[2013] JMFC Full 5

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012 HCV 05676

THE HONOURABLE MISS PAULETTE WILLIAMS

THE HONOURABLE MR JUSTICE SYKES

THE HONOURABLE MR JUSTICE PUSEY

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

AND

IN THE MATTER OF AN APPICATION BY MAURICE ARNOLD TOMLINSON ALLEGING A BREACH OF HIS RIGHTS UNDER SECTION 13 (3) (C) AND (D) OF THE CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS (CONSTITUTIONAL AMENDMENT) ACT, 2011

AND

IN THE MATTER OF AN APPICATION BY MAURICE ARNOLD TOMLINSON FOR CONSTITUTIONAL REDRESS PURSUANT TO SECTION 19 OF THE SAID CHARTER

BETWEEN	**MAURICE ARNOLD TOMLINSON**	**CLAIMANT**
AND	**TELEVISION JAMAICA LTD**	**FIRST DEFENDANT**
AND	**CVM TELEVISION LTD**	**SECOND DEFENDANT**
AND	**THE PUBLIC BROADCASTING CORPORATION OF JAMAICA**	**THIRD DEFENDANT**

IN OPEN COURT

Lord Anthony Gifford QC and Anika Gray instructed by Anika Gray for the claimant

Georgia Gibson-Henlin and Taniesha Rowe instructed by Henlin Gibson Henlin for the first defendant

Hugh Small QC, Jerome Spencer and Hadrian Christie instructed by Patterson Mair Hamilton for the second defendant

Donald Scharschmidt QC, Saverna Chambers and Jebby Campbell instructed by Saverna Chambers and Co for the third defendant

Nicole Foster Pusey QC, Solicitor General, Simone Pearson, Assistant Attorney General and Carole Barnaby, Crown Counsel for the Attorney General as amici curiae

May 27, 28, 29, 29, 30, 2013 and November 15, 2013

CONSTITUTIONAL LAW – CHARTER OF RIGHTS - SECTION 13 (3) (c), (c) AND (5) – FREEDOM OF SPEECH – FREEDOM OF EXPRESSION – WHETHER FREEDOM OF EXPRESSION INCLUDES RIGHT TO USE PRIVATE PROPERTY TO EXERCISE RIGHT – WHETHER FUNDAMENTAL RIGHTS APPLIES HORIZONTALLY

PAULETTE WILLIAMS J

[1] The Jamaican Constitution was drafted in 1962 to meet the needs of the newly independent nation with the expectation that requisite adjustments would be made in tandem with the needs of the developing democracy. It was not until 1991 that the first recognized official steps were taken to deal with perceived deficiencies concerning the issue of a human rights charter. It took twenty (20) years before the Governor General on April 8, 2011 was able to sign into law the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 which replaced the previous bill of rights. Within two (2) years of its passing, this matter has commenced and thus takes on historic significance as being the first to raise issues requiring the interpretation of certain provisions of this amended Chapter III of the Constitution.

[2] The Claimant, Maurice Arnold Tomlinson, is a man with a message he seeks to have aired at a time and in a manner of his choosing. His inability to achieve this, thus far, has led him to allege that there has been a breach of his rights under section 13(3) (c) and (d) of the Charter and to seek Constitutional redress. He alleges that Television Jamaica Ltd. and CVM Television Ltd, the 1st and 2nd

defendants, as owners and operators of Jamaica's two major television stations and the Public Broadcasting Corporation of Jamaica, the 3rd defendant as a public authority, refused to air his paid advertisement and in so doing committed the breach of his Constitutional rights complained of.

[3] He is therefore seeking the following Orders, inter alia:

(1) A declaration that the 1st, 2nd and 3rd Defendants' refusal to air a paid advertisement promoting tolerance for homosexuals in Jamaica and which was not in violation of any of Jamaica's broadcasting acts and regulations, amounted to a breach of the Claimant's constitutional right to freedom of speech as guaranteed by section 13(3) (c) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 (hereinafter 'the Charter').

(2) A Declaration that the 1st, 2nd and 3rd Defendants' refusal to air a paid advertisement promoting tolerance for homosexuals in Jamaica and which was not in violation of any of Jamaica's broadcasting acts and regulations amounted to a breach of the Claimant's constitutional right to distribute, or disseminate information, opinion and ideas through any media, as guaranteed by section 13 (3) (d) of the Charter.

(3) An order that the 1st, 2nd and 3rd Defendants air the 'Love and Respect' paid advertisement in exchange of the standard fee.

[4] When the matter commenced there was an abandonment of his claim for damages. As it progressed there was an amendment proposed to the claim to delete references to the advertisement being paid for airing and for there to be an exchange of the standard fee so far as it concerned the 3rd defendant.

Factual Background

[5] The claimant asserts that he is an attorney-at-law and a homosexual man. He is a citizen of Jamaica but became a landed immigrant of Canada in 2012. He was, at the time of commencing the quest to have his message aired, employed as Legal Advisor for the international NGO Aids-Free World (A.F.W.). He describes himself as an activist and as such he has organized several public events in an attempt to bring about changes in the attitudes towards men having sex with men (MSM) and homosexuals in Jamaica, and further to draw attention to the need for tolerance of minority groups as an effective tool to counter the spread of HIV and AIDS.

[6] The message he is seeking to have aired is presented in what he describes as the "Love and Respect PA" video. This is a 30 second video which was produced as part of his advocacy campaign. He acts in it, portraying a homosexual man whose aunt reassures him when he complains of trying to get Jamaicans to respect his human rights as a gay man, that she respects and loves him and "love is enough for all of us".

[7] The intention initially was for the video to be aired by the local television stations, the 1st and 2nd defendants, and after this matter commenced, to have it aired by the 3rd defendant who were joined when they failed to do so. It was intended that the video be aired during prime time of these stations – for the 1st defendant during Early Prime, Primetime News, Smile Jamaica and Morning Time, for the 2nd defendant it would be during Live at 7, News Watch and CVM at Sunrise and for the 3rd defendant it was whatever time deemed their prime time.

[8] The effort to have his message aired by the 1st defendant commenced on February 21, 2012 when the claimant e-mailed a sales executive with the company. He sent the script of what he called a Public Service Announcement ('PSA') indicating that he wished it to be aired during Prime Time News but desired to have verification as to whether the station would be willing to air it

before it was produced. He was told he could have to send it first. He replied indicating they just wanted to verify if the script was ok with the station before they paid to produce it.

[9] On March 5, 2012 the claimant sent an e-mail with a link to Youtube.com which he said was the finished advertisement which he would wish to pay to have aired during Early Prime, Prime Time News and Smile Jamaica Its Morning Time. On March 7, a follow-up e-mail was sent to which the 1st defendant responded that the commercial had been passed on to the directors and a response would be forthcoming as soon as one was had from the directors. There followed what can be described as multiple telephone conversations/contacts with no apparent decision forthcoming by April 2, 2012.

[10] The 1st defendant indicated that they became aware of threats of legal action through other media if the 'advertisement/PSA' was not carried. On April 2, 2012 an attorney-at-law acting on the claimant's instructions, sent a letter and an e-mail to the 1st defendant requesting that it provide notification, within seven (7) days of the receipt of the said letter, of whether or not it intended to air the PSA. This was responded to on the 30th of April 2012 by the company secretary/attorney-at-law who viewed the request for notification as the issuing of a demand but explained that the request would be reviewed and processed according to their established procedure.

[11] Having received no response, the claimant's attorney-at-law wrote again on September 10th, 2012 requesting notification of the intention of the 1st defendant within seven (7) days failing which he 'will presume' that the station had no intention to air the PSA.

[12] On September 18th, 2012 the attorney responded to the company secretary/attorney-at-law re-enforcing the request for a decision. There was no response by October and the claimant took the lack of response as the

unwillingness of the station to air the PSA. By the 19th of October, 2012 the Fixed Date Claim Form to commence this matter, dated the 9th of October, 2012 had been filed.

[13] The effort to have his message aired by the 2nd defendant was launched on the 22nd of February, 2012 when what is described as a revised version of a PSA script was sent with a request for a feedback by the following day as to whether the station would be willing to air it. An account executive for the 2nd defendant responded on the 23rd of February, 2012 indicating a need for more clarity and information. By the next day, the 24th the claimant e-mailed requesting an update on whether the station would be willing to air the PSA.

[14] On March 6th, 2012 the claimant sent a YouTube-link to the PSA now requesting that it be aired during Live at 7, News Watch and CVM at Sunrise, if they would be willing to air it. The next day the claimant e-mailed the 2nd defendant again asking if they would be willing to air the PSA and the response was sent that they were awaiting the answer from the management team. By March 30th, 2012 the claimant was again e-mailing requesting whether the manager would be able to let him know whether the station would air the attached PSA and sent a link to YouTube.com again.

[15] The claimant having not received a final decision by the 2nd April, 2012 instructed his attorney-at-law to send a letter by both mail and e-mail requesting that the 2nd defendant provide the notification within seven (7) days of the receipt of the said letter, as to its intention whether it would air the PSA failing which it would be presumed that the station had no intention of airing it. In similar manner to the approach taken with the 1st defendant, another letter was sent to the 2nd defendant dated September 10, 2012 repeating the request for notification. By September 18th, 2012 the attorney wrote advising that the claimant had been forced to take the lack of response as an intention not to air the PSA.

[16] It is to be noted that while waiting on the response from the defendants as to whether the PSA would be aired, the claimant instructed his attorney to write to the Broadcasting Commission, through its Executive Director, seeking advice on whether the PSA was in violation of any of the provisions of the Broadcasting and Radio Re-Diffusion Act 1949, the Television and Sound Broadcasting Amendment Regulations 2007 and/or the Television and Sound Broadcasting Regulations 1996. A copy of the PSA video was enclosed with a request for a timely response. This letter was dated May 7, 2012.

[17] The Commission replied by letter dated May 16, 2012. They explained that the 'Commission does not, in practice review and/or prejudge broadcast content nor do we constrain stations in their selection of programming save in cases where the Television and Sound Broadcasting Regulations, Children's Code for Programming and other directives which the Commission issues from time to time are breached.' They indicated however that the recording supplied did not 'readily reveal a basis on which to conclude a likely breach of any rules that are administered' by them. They concluded that this did not appear to be a matter for them and advised that clarity be sought with the broadcasting stations as to the 'precise nature of any concerns they might have.'

[18] After the Fixed Date Claim Form had been filed on October 19, 2012 a date for first hearing was set for December 12, 2012. It was on October 22, 2012 that a letter was written by the attorney acting on behalf of the claimant to the Chief Executive Officer for the 3rd defendant. He was advised of the claimant's request as to whether the station would be willing to air the video during the station's prime time and the cost for doing so. The video was enclosed with the same demand which was made of the other defendants concluding the letter i.e. notification within seven (7) days of receipt of the letter as to the intention to air or not to air the video. There was a letter in response dated November 6, 2012 from the Chief Executive Officer acknowledging receipt of the letter and advising that the matter was being referred to the Board of Directors that would next be

meeting on Tuesday November 20, 2012. The claimant's response through his attorney was in a letter dated November 21, 2012 where there was an indication that since no response had been received as to whether the PSA would be aired, the 3rd defendants were now given until Friday November 30, 2012 to give notification of their intention failing which the claimant would presume there was no intention to air the PSA. A notice of application dated 13th December, 2012 was filed by the 18th December seeking to have the station joined as the 3rd defendant.

[19] It needs to be noted that the 1st defendant operates a commercial television broadcasting service under a licence which came into effect on August 11th, 1997 – this licence may be cited as the Commercial Television Broadcasting (Television Jamaica Limited) Licence 2010. It is a limited liability company. The 2nd defendant is also a limited liability company which was incorporated on July 30, 1990. It is the holder of a commercial broadcasting licence granted in March 1991. The 3rd defendant is a public body established by the Public Broadcasting Corporation Act and as such it is established by statute, governed by regulation and is not a commercial entity with a commercial licence to broadcast.

The issue of standing

[20] The 1st Defendant has raised the question as to whether the claimant has standing or is entitled to seek the declaration at paragraph 1 of the Charter. Mrs. Gibson-Henlin on their behalf has submitted that this is a starting point in relation to fundamental rights cases as the applicant for redress must allege infringement 'in relation to himself.' She notes that this is not a new position but the clause which previously was at section 25 (1) of the constitution is now to be found at section 19 (1). She describes it as a threshold question.

[21] She cannot be faulted with this approach. The support found in the reasoning of the Full Court of the Supreme Court of Jamaica in the case of

Banton and others v Alcoa Minerals of Jamaica and others (1971) 17 WIR 207 as stated by Parnell J, at page 305 is well founded. It remains instructive as expressed therein:

> *…..the mere allegation that a fundamental right of freedom has been or is likely to be contravened is not enough. There must be facts to support it. The framers of the Constitution appear to have had a careful and long look on several systems operating in other countries before they finally agreed to Chapter III as it now stands.*
>
> *It seems to me that the position may be summarized as follows:*
>
> *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 Chap. 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 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.*

(3) that his complaint is substantial and adequate and has not been waived or otherwise weakened by consent, comprise or lapse of time.

(4) 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.

(5) that the controversy or dispute which has prompted the proceedings is real and that which 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.

[22] The Claimant, in the instant case must bring himself within the provisions of Section 19 (1) of the Charter which states:

If any person alleges that any of the provisions of this Charter has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action

with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

[23] It is Mrs. Gibson-Henlin's submission that the claimant has suffered no harm and is no more than a 'poser' or 'a tool.' He is at the forefront of a campaign on behalf of homosexuals – a tolerance campaign on their behalf. This campaign is admitted to be part of a regional campaign to change allegedly homophobic laws across the region and Mrs. Gibson-Henlin has noted the Charter is only applicable to Jamaicans in relation to breaches in Jamaica. Further, she noted he is the tool or agent of his employer – an international NGO that has no standing as it is not Jamaican and has suffered no harm in Jamaica.

[24] For the claimant, Lord Gifford QC. has noted that the PSA was:

a. produced in Jamaica;

b. by a Jamaican;

c. submitted to television stations in Jamaica;

d. to be broadcast on television in Jamaica;

e. the refusal to air the PA occurred in Jamaica;

[25] He argues that the courts have interpreted 'to be contravened in relation to him' to mean that the individual bringing the action has to be one who is personally affected. He referred to the Privy Council decision **Mirbel v Mauritius** [2010] UKPC 16 where a similar section in the Mauritius Constitution was described as providing "a personal remedy for a personal prejudice".

[26] Further he notes that when the television stations refused to air the PSA their actions impacted on the claimant's rights under Sections 13(3) and (d) of the Charter. The claimant he urged has no other redress in statute or common

law to adequately remedy the prejudice suffered as a result of the three (3) defendants' refusal to air his PSA.

[27] It is true that in his initial contacts with the 1st and 2nd defendants he referred to not himself in the singular but spoke to the PSA that 'we' wanted to have aired and asked to let 'us' know if it would be aired. One can readily discern that he was acting on behalf of the group of persons of which he is a member – homosexuals MSM. He speaks of being the organizer of several public events in his advocacy campaign to encourage tolerance of this group. He also speaks to the abuse and threats of violence that he had experienced as a result of the perceived intolerance towards persons with his sexual orientation. So although it is beyond dispute that the efforts of the claimant is not only on his own behalf this does not take away from the fact that he is to be a` beneficiary as well and this takes him out of the realm of being a 'poser.'

[28] It is perhaps to be recognized that the claimant cannot seek redress for any allegations of discrimination on the grounds of his sexual orientation as the Charter does not afford that protection specifically. This may be viewed as a significant deficiency in this Charter but it is to be noted that the first paragraph of the Charter is comprehensive enough to point to a view that it be interpreted to embrace all the rights and responsibilities of all Jamaicans.

[29] Section 13 (1) reads:

> *Whereas-*
>
> *(1) the state has an obligation to promote universal respect for, and observance of, human rights and freedoms;*
>
> *(2) all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of*

their inherent dignity as persons and as citizens of a free and democratic society; and

(3) all persons are under a responsibility to respect and uphold the rights of others in this Chapter

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 right and freedom do not prejudice the rights and freedom of others.

[30] It cannot be denied that in these circumstances, the matter sought to be addressed by the claimant in the PSA affected him personally. He would therefore have an interest in its airing, and that interest would be sufficient and legitimate enough for him to be affected by his inability to freely share his message. The refusal to air can be viewed, prima facie, as an infringement of his rights hence he has sufficient interest in this matter and locus standi to bring this application.

The rights alleged to have been infringed

[31] In the Final Report of the joint select committee of the House of Parliament on Constitutional and Electoral reform dated 31st May 1999 it was expressed as follows inter alia:

The New Chapter III better reflects modern thinking by adopting the Modern Bill of Rights form in which the rights are positively and simply stated without specific exception. It also ensures much greater protection to the individual against abuse by the State or other persons or organizations

and provides easier access to more persons and organizations to the court to facilitate the protection and preservation of the protected rights and freedoms.

[32] It is considered useful to begin a consideration of the rights allegedly infringed by recognition of the intent and purpose of the amendment to the Constitution as it existed. The sections the claimant is now seeking to enforce are section 13 (3) (c):

… the right to freedom of expression

and section 13 (3) (d)

…the right to seek, receive, distribute or disseminate information, opinions and ideas through any media.

[33] These sections were previously contained in section 22(1) – which stated inter alia –

Except with his own consent, no person shall be hindered in the employment of his freedom of expression and for the purposes of this section, the said freedom included the freedom to hold opinions and to receive and impart ideas and information without interference and freedom from interference with his correspondence and other means of communication.

[34] The Charter therefore recognizes the right to one being able to freely express himself. As simply stated as this may appear, the interpretation of this right has been the subject of many judicial pronouncements. In **Irwin Ltd., v. Quebec (Attorney General** (1989) 58 DLR (4^{th}) 577 the judgment of Dickson CJ and Lamer and Wilson JJ expressed it in a manner found most useful at page 606:

"Expression" has both content and form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is it contents. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all the expression of the heart and mind, however, unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions of their inherent value both to the community and the individual. Free expression was for Cardozo J of the United States Supreme Court "the matrix, the indispensable condition of nearly every other form of freedom" (Polko v. Connecticut, 320 US 319 (1937) at p 327); for Rand J of the Supreme Court of Canada, it was "little less vital to man's mind and spirit than breathing is to his physical existence (Switzman v. Elbling 1957 Can L11 2 (SCC), [1957] SCR 285 at page 306). And as the European Court stated in the Handyside case, Eur. Court H.R. decision of 29 April 1976, Series A No. 24 at p. 23, freedom of expression:

> *…is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.*

[35] Although in the declaration sought in relation to this section the claimant refers to his constitutional right to freedom of speech, the right actually provided encompasses more that speech. Certainly the message he seeks to convey in the PSA of a homosexual seeking to have his human rights as a gay man respected is one that cannot be viewed as objectionable. Whether the PSA would secure the objective of 'encouraging tolerance to homosexuals and MSM as an effective tool to counter the spread of HIV and AIDS' leads to questions not to be addressed here.

[36] The second right being sought to be enforced is one the Solicitor General Mrs. Foster-Pusey QC has submitted 'is in essence a development of the more familiar articulation of the right which is "freedom of the press.' She urges the Court to seek guidance in understanding the nature of this right by looking at the Final Report of the Constitutional Commission of Jamaica dated February 1994 at page 13 paragraph 23 which states:

> *While recognizing the critical role played by the Press in the preservation of democracy, by a majority decision we did not accept that the only or even the most effective way of providing the appropriate constitutional guarantee is by the use of the term "freedom of the press." In the first place, press literally means a printing house or newspaper establishment. Modern technology has demonstrated that there is unlimited scope for the development of new methods of expression and communication. It therefore requires a particularly liberal extension of the word press to cover all these new developments. Accordingly, we have preferred the use of the word media.*

[37] Certainly at that time, the committee would hardly have envisioned the type of development which has since taken place such that media today now includes what is referred to as social media where citizens divorced from any traditional

'media house' are able to express their views and spread news to millions in a matter of seconds.

[38] The formulation of the section remains sufficiently wide to address the usage of the media by other than those specifically trained or employed to do so.

[39] However, in its present context it is appreciated that the claimant is seeking to use the media in its traditional sense to disseminate his information, opinions and ideas and he is entitled to claim that right.

[40] Before moving on from this consideration it must be recognized that neither of these rights can be regarded as absolute. In **Trieger v Canadian Broadcasting Corp** (1989) 54 DLR (4^{th}) 143 the comments of Campbell J at page 151 are instructive:.

> *As to free speech, the right to speak does not necessarily carry with it the right to make someone listen or the right to make someone else carry one's own message to the public. That point was made by Thurlow C.J. of the Federal Court in* ***Re New Brunswick Broadcasting Co. Ltd., v. Canadian Radio Television and Telecommunications Commission*** *(1985) 13 DLR (4^{th}) 77 at page 89:*
>
> > *The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It gives no right to anyone to use someone's land or platform to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter or*

> *use a public building for such purposes. And it gives no right to anyone to use the radio frequencies which, before the enactment of the Charter, had been declared by Parliament to be and had become public property and subject to the licensing and other provisions of the Broadcasting Act.*

[41] As recognized from the outset, the claimant is a man with a message and is entitled by virtue of his inherent dignity as a person and as a citizen of this free democratic society to express himself as he chooses and to use the media to have his message heard.

Whether these rights are protected not only against state action but also from actions of private individual and entities.

[42] It was formerly the position that constitutional remedies are available for infringement of the fundamental rights and freedoms provisions by the State. This had been aptly described as the vertical application. The Charter has introduced sections which have given rise to the debate as to whether these remedies are now available for infringements by a natural or juristic persons – the horizontal approach. Section 13 (1), as already outlined above, along with Section 13 (5) are the sections which Lord Gifford QC opines that their inclusion 'undoubtedly expresses Parliament's intention for constitutional remedies to be available against private entities who infringe the fundamental rights and freedoms of others.'

[43] Section 13 (5) provides

> *A provision of this Charter binds natural or juristic persons, if, and to the extent that, it is applicable taking account of the*

nature of the right and the nature of any duty imposed by the right.

[44] It is acknowledged that section 13 (4) makes it clear that the vertical application remains. It states:

This Chapter applies to all law and binds the legislature, the executive and all public authorities.

[45] Hence the new provision of Section 13 (5) opens the debate with the 1st defendant maintaining that this provision does not create any new right allowing for the horizontal application. The 2nd defendant submits that it does not establish any obligation on non-state individuals that enable constitutional redress of the kind claimed by the claimant nor does it enable the horizontal application of constitutional redress in the private sphere of legal rights as enacted in the constitution of other countries such as South Africa.

[46] It is again useful to consider the intention of the drafters of the Charter for including this section. In the report of the joint Select Committee of Parliament on its deliberations on the Bill at page 16 is stated:

The Committee is committed to the principle of ensuring that the constitution encompasses the widest possible deposit of rights with the most open and liberal form of justiciability for those rights.

The Committee agrees that in order to have respect for human rights, a culture of respect for human rights has to be created, and that can only take place when all persons are treated as being obliged to respect the constitutional provisions. The Committee does not agree that an individual's right to question an action against his interest whether by another individual or by the state, should be

> *curtailed on the ground that it would result in too much litigation or uncertainty. The Committee feels that it would be difficult to justify a distinction as to a constitutional remedy arising on the same set of facts, one which would be available against the State and one not against the State. The Committee is, therefore, of the view that the constitutional protection of fundamental rights and freedoms afforded in the proposed new Chapter III should be extended to case of infringement by private persons.*

[47] It is also significant to note that consideration was given as to whether the rights that would bind private persons should be listed but the Committee decided against enumerating those rights that would apply horizontally.

[48] The objective of the Committee, to my mind, was achieved. Section 13 (5) is clear that it is to be applied between persons natural or juristic. This flows from 13 (4) which provides for the other categories that it binds.

[49] Section 13 (1) (c) which provides for persons to be under a responsibility to respect and uphold the rights of others is elevated to enforceable rights, breach of which may lead to constitutional redress.

[50] It is recognized that the South African Constitution contains provisions which guided the drafters in including similar provisions in the new Charter. As such the case of **Khumalo and Others [**2002] ZACC 12, from that jurisdiction is useful. In that case the Constitutional Court of South Africa interpreted section 8 (2) of that country's Constitution which is worded in an identical manner as section 13 (5) of the Charter. It should however be noted that the South Africa Constitution goes on to include an important provision that is absent from the Jamaican Charter.

[51] Section 8 (3) states:

When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2) a court

(a) in order to give effect to a right in the Bill, must apply or if necessary develop the common law to the extent that legislation does not give effect to that right and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 30 (1).

[52] In the case of **Khumalo**, O' Regan J said at paragraph 31-

It is clear from sections 8 (1) and (2) of the Constitution that the Constitution distinguishes between two categories of persons and institutions bound by the Bill of Rights. Section 8 (1) binds the legislature, executive, judiciary and all organs of state without qualifications to the terms of Bill of Rights. Section (8) (2) however provides that natural and juristic persons shall be bound by the provisions of the Bill of Rights to the extent, that is applicable, taking into account the nature of the rights and the nature of any duty imposed by the rights.

[53] Of note she goes on at paragraph 33 to state something that may ultimately prove useful –

In this case, the applicants are members of the media who are expressly identified as bearers of constitutional rights to freedom of expression. There can be no doubt that the law of defamation does affect the right to freedom of expression. Given the intensity of the constitutional right in question coupled with the potential invasion of that right which could be occasioned by persons other that the state or organs of the state, it is clear that the right of freedom of

expression is of direct horizontal application in this case as contemplated by section 8 (2) of the constitution.

[54] The 1st defendant argues that the underlying dispute which causes a party to seek constitutional redress must be grounded in the common law and state action and there can be no right of action or cause of action against an individual. Applying the same reasoning to the section in our Charter, as was done in South Africa, and interpreting it literally and also bearing in mind the purpose for its inclusion, the formulation put by the 1st defendant as to the applicability of the section cannot be correct. The 1st and 2nd defendants as private entities are juristic persons who are bound to uphold the rights and freedom of other individuals such as the claimant. The 3rd defendant's position can be distinguished however as it is not a private entity and different considerations will apply. As far as the 1st and 2nd defendants are concerned, the matter of what, if any, rights and freedom they may be deemed to have and how it may affect the horizontal approach needs be considered.

The Positions/Submissions

Re: The 1st defendant

[55] In his affidavit on behalf of the 1st defendant, its company secretary, and attorney-at-law Mr. Stephen Greig outlined that there was a procedure existing for dealing with advertisements which included reviewing them to ensure conformity with the 1st defendants regulatory obligations and determining the 'advertising spend.'

[56] It is his opinion that the 1st defendant was not given a fair opportunity to follow its established procedure in considering whether to air the PSA. The PSA, as the message was initially described by the claimant, held a particular meaning for the 1st defendant and was not viewed as an advertisement by them. For a

PSA payment may not be requested but what is required is the endorsement or agreement of the broadcaster. In the circumstances it is urged that the broadcaster therefore has the option to determine whether a PSA is something that it will endorse to transmit.

[57] Mr. Greig opined that the 1st defendant's property rights, editorial, press freedom and control are material considerations. He spoke of a previous occasion where a guest had declared on air that he was gay and this had resulted in a group of angry and militant members of the public descending on the 1st defendant's station threatening to do harm to the guest and to damage the property.

[58] It was submitted that the Charter protection does not extend to breaches of law 'threats of violence or destruction of property and further that the claimant has offered no safe guard as to how it proposes to balance the interests of the private commercial interests or property.' In any event, it was urged that a declaration to air the PSA would amount to an imposition on the 1st defendant which is not sanctioned by the Charter. The case of **Trieger v Canadian Broadcasting Corp.** (supra) was relied on in support of this proposition.

[59] The case of **New Brunswick Broadcasting Co Ltd v CRTC** (supra) was relied on for the position that the right guaranteed by section 13 (3) (d) of the Charter is not a right to use private property to disseminate one's message. Thurlow C.J. in considering a section in the Canadian Charter which is equivalent to section 13 (3) (c) of the Jamaican Charter said:

> *The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint whether orally or in print or by other means of communication. It is not a freedom to use someone else's land or platform to make a speech or someone else's printing press to publish his ideas.*

[60] It was concluded that the case of **Trieger** (supra) also confirms that it's not the responsibility of the Courts to dictate what the broadcaster or editor should publish or report; their decision as to whether to cover a matter or not is within the area of 'journalistic discretion.' The 1st defendant is therefore obliged to be careful about what it publishes and it is submitted that the claimant has no basis for challenging the exercise of this right.

Re: The 2nd Defendant

[61] The Vice President Sales Marketing and Programmes of the 2nd defendant Mr. Ronnie Sutherland gave an affidavit of their behalf. He too spoke to the procedure to be followed when the matter of placing advertisement on the station is in issue. He noted that the advertising contract expressly provides that the 2nd defendant reserves the right to decline to accept for transmission any advertisement or any part thereof. He explained that to arrive at a decision on a prospective advertisement their stance as broadcasters has been to avoid advertisements which seek to promote illegal activities and advertisements which are likely to invite adverse public attention and commentary as this will and has attracted unfavourable reaction and sometimes outright hostility from members of the public.

[62] After the review of the contents of the proposed advertisement, the decision was taken not to broadcast it from the following reasons:

(i) the Board of the 2nd defendant was concerned it could be construed as being a covert attempt by the station to encourage homosexuality;

(ii) there was an apprehension of the negative public response that the advertisement could have on revenue stream;

(iii) it was thought ill-advised to air any advertisement that would reasonably be construed as encouraging the criminal offence of buggery;

(iv) it was felt that they had a common law and constitutional right to determine with whom it contracts.

[63] Mr. Sutherland also thought it prudent to note that the station had broadcast current affair programmes that relate to some of the issues of concern to the claimant, who had been interviewed on several occasions and thus afforded the opportunity to express his views for longer air time. He also took issue with the claimant's interpretation of public interest as based on advice he had received, he asserted 'the proper interpretation of the licence's obligation is to operate the station in the interest of the listening and viewing public which includes ensuring that the material the 2nd defendant broadcasts is not to be inimical to the interest of the public because for example it could provoke wide scale public agitation or discontent.'

[64] The submissions on behalf of the 2nd defendant made by Mr. Hugh Small QC, emphasizes the fact that the 2nd defendant had the constitutional right to freedom of expression as well which includes a right of editorial control and judgment over what it broadcasts. Further they too enjoy the right to choose what views and opinions it disseminates. They have a right to freedom of association coupled with a common law right to freedom of contract and thus cannot be compelled to associate with others.

[65] It was noted that the section 13 (4) of the Charter which is similar to section 8 (1) of the South African Constitution does not bind the judiciary as it does in South Africa. This Mr. Small QC urges should not mean that the judiciary should not consider itself bound and in refining and developing the principles to be followed from the constitution the judiciary cannot grant rights to one which abrogates the rights of others.

[66] It was argued that freedom of expression and dissemination does not include a right of access to the mass media. The House of Lords decision in **R (on the application of Prolife Alliance) v. British Broadcasting Corporation** [2004] 1 AC 185 was relied on as their Lordships there had examined these freedoms and had stated that no one has a right to broadcast on television. Several other decisions largely from the United States of America and Canada were cited as reiterating and affirming 'the fact that freedom of expression does not afford every citizen a right of access to the media and the media is not bound to facilitate a person's right to freedom of expression.'

[67] Ultimately, Mr. Small QC suggests that the dilemma which faces the court is that both sides concede the other has constitutional rights which are common to both. However, he urges that no right can limit the other and the court should not grant a right to one without infringing on the right of the other. It was submitted also that to grant the redress of the order sought to compel the 2nd defendant to air the claimant's message would be disproportionate interference with the common law and constitutional rights of the 2nd defendant.

Re the 3rd Defendant

[68] The structure and establishment of the 3rd defendant gives rise to the question as to whether it is a public authority and thus is clearly bound pursuant to section 13 (4) of the Charter. Mr. Scharschmidt QC on its behalf starts his submission with a recognition that it is a creature of statute. There is no disputing that the 3rd defendant was established by the Public Broadcasting Corporation of Jamaica Act ('The Act'). As a body corporate it had a right to regulate its own procedure and business. Under the Act however it is the minister with portfolio responsibility who must make regulations for the following –

(a) prescribing the constitution and functions of the corporation;

(b) prescribing such other provisions as appear to the Minister to be consequential supplemental or ancillary to the matters specified in paragraphs (a) and (b).

[69] It is noted that the funds and resources of the 3rd defendant are outlined in the Act to be such funds as may be provided from time to time by Parliament and all grants, sums and other property which may in any manner become payable or vested in the Corporation in respect of any matter incidental to its functions (see Section 5 of the Act). Hence it is urged that the 3rd defendant can accept no funding from other sources to air any advertisement.

[70] It is useful to note here that in seeking to support its contention that the 3rd defendant is a public authority the claimant had referred to **Rambachan v. Trinidad and Tobago Television Co Ltd et al** T.T. 1985 HC 8 where the court had stated:

> *As I indicated earlier, Lord Diplock in my view used the phrase "public authority" in a very broad sense to mean any entity however constituted in which the government as a matter of deliberate policy decided in the public interest to participate in a substantial way, whether financially or otherwise. Using this meaning as a guideline and considering the Trinidad and Tobago Television operates in an area where several fundamental rights and freedoms are involved, rights and freedoms which the government are in duty bound to uphold, I am of the view that T.T.T. on all the evidence is a "public authority" for the purposes of Lord Diplock "test" and I so hold.*

[71] Further in **Aston Cantlow and Wilmcote with Billesly Parochial Church Council v Wallbank** [2004] 1 AC 546 at 554 **[7]** (Lord Nicholls) the House of Lords explained the meaning of public authority as follows:

> *… phrase a public authority in section 6 (1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression. Behind the instinctive classification of organizations as bodies whose nature is governmental lie factors such as the possession of specific powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest and a statutory constitution.*

[72] The Chief Executive Officer for the 3rd Defendant, Mr. Keith Campbell, responding to the request for the paid advertisement outlined:

(i) the PBCJ is not a commercial entity and does not have a commercial licence to broadcast. It is not allowed to accept payment to air any content nor to air paid advertisement;

(ii) its function includes providing public broadcasting services designed to promote the development of education and training, dissemination of news information and ideas on matters of general public interest, development of literary and artistic expression, development of culture, human resources and sports.

[73] The overriding thrust of the submissions made by Miss Chambers for the 3rd defendant is that they do not have any greater power than the Act creating it allows and they have no power to air and broadcast advertisements. While conceding that the claimant has a right to freedom of expression under the

Charter, this freedom cannot be construed as obliging the 3rd defendant to air and broadcast advertisements.

[74] Further, it is submitted, the fact that the 3rd defendant does not offer commercial services means that it was not able to enter into any contractual obligation/arrangement with the claimant. The question then becomes how then could the 3rd defendant air the claimants message? The 3rd defendant maintains that although the claimant's rights may be sacrosanct, these rights do not place an obligation on them to provide a vehicle for him to exercise his rights. They acted in a manner consistent with its functions under the law.

[75] In any event, it is the position expressed by Miss Chambers that the message conveyed in the claimant's video is not of public interest. The 3rd defendant's functions as laid down in the Act include at section 4 in addition to those already mentioned by Mr. Campbell, the provision of public broadcasting services designed to promote –

(a) respect for fundamental rights and freedoms and the responsibilities of the individual to society;

(b) integrity in public and private life.

[76] Hence questions may arise as to whether the 3rd defendant is obliged to consider if publication of the video would contravene any existing statutes, one such being the Offence Against the Persons Act; whether in admitting that he is gay the claimant will be viewed as having committed a crime under that Act thus rendering the 3rd defendants liable to be prosecuted for airing what amount to the contravention of the law.

[77] In resolving this matter, the position expressed in the Solicitor General's submission is to my mind the correct starting point. If any reliance is to be placed by the 1st and 2nd defendants on a constitutional right, it can be done only in relation to the rights as listed in section 13 of the Charter. It is also considered a

proper statement that the right of the 1st and 2nd defendants to decide whether or not to broadcast a particular advertisement is a matter of their exercise of their freedom of expression. The comment of the Court on the Canadian case **Slaight Communications Inc v Davidson** (1989) 59 DLR (4th) 416 at page 446 is instructive:

> *There is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things.*

[78] It has been recognized that the former right of freedom of the press had been replaced by section 13 (3) (d). Indeed in the Final Report of the Constitutional Commission dated February 1994, the change was viewed as being to allow for the explicit incorporation of the functional aspects of the media in the terms:

> *The right to seek, distribute or disseminate to other persons and members of the public, information, opinions and ideas through any media.*

[79] It is noted that the words "to other persons and members of the public" were omitted from the final draft. However, this right can be viewed as complementing and supplementing the right to freedom of expression where certain form of media is concerned. Certainly where broadcast media is considered and private entities especially, they must enjoy these rights.

How then must the competing rights of the claimant vis-à-vis the 1st and 2nd defendant be dealt with?

[80] It must be noted and acknowledged that the claimant did recognize the rights of the defendants. Indeed Lord Gifford QC did recognize that as broadcast licensees, the 1st and 2nd defendants 'are allowed editorial and journalistic freedom to broadcast ideas and opinions of their choice subject of course to

restrictions in their broadcast licenses and regulations.' However, their rights, he submits have to be balanced against the right of the public to receive information ideas or opinions on a wide range of subject matters and especially those of public interest. It is also to be balanced against the right of the claimant to access broadcast media and to express himself on issues of importance to himself and the public in general. It is his contention that the court must impose on broadcasters such as the defendants an obligation to broadcast under reasonable circumstance what private citizens wish to disseminate, particularly given the dominance of the media. Further it is argued that if the rights of the claimant are perceived as being infringed, the matter then for consideration would be if the infringement falls within the permissible limit as expressed in Section 13 (2) of the Charter which states:

> *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 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.

[81] It is submitted that the principle articulated by Lord Hoffman in **Prolife Alliance v. British Broadcasting Corporation** (supra) is most applicable to this matter. In that case the claimants were challenging the BBC's refusal to air their video containing graphic footage of aborted fetuses on the grounds of taste and

decency. The judge at first instance refused their application for permission to apply for judicial review. The Court of Appeal allowed an appeal by the claimant. On appeal by the BBC, the appeal was allowed. Lord Hoffman at paragraph 58 had this to say:

> *The fact that no one has a right to broadcast on television does not mean that article10 has no application to such broadcasters. But the nature of the right in such cases is different. Instead of being a right not to be prevented from expressing one's opinions, it becomes a right to fair consideration for being afforded the opportunity to do so; a right not to have one's access to public media denied on discriminatory, arbitrary or unreasonable ground.*

[82] The case of **R v Oakes** (1986) 26 DLR (4th) 200 is also referred to for the usefulness of the test laid down by the Canadian Court which is to be applied when determining whether a measure can be construed as demonstrably justified in a free and democratic society.

[83] Dickson CJ said in giving the court's decision said at page 227:

> *To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the object which the measures responsible for a limit on a Charter right of freedom are designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.*

> *Second, once a sufficiently significant objective is recognized then the party invoking s.1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test.*

[84] Section 1 of the Canadian Charter of rights and freedoms guarantees the right and freedom set out in it subject only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. It is important to bear in mind that the Canadian Charter does not have a provision similar to our Charter which I have interpreted as allowing for the horizontal application.

[85] In its duty to balance the rights of the claimant vis-à-vis the 1st and 2nd defendant, Lord Gifford QC has suggested seven (7) things the Court should take into account:

1. the language of the Constitution;
2. nature of the outlet/media;
3. whether the degree of intrusion is minimal;
4. whether the "ad" offends any law;
5. the importance of the issue;
6. manner in which the entity dealt with the request;
7. the adequacy of the reasons given.

[86] In any event it is the claimant's ultimate submission that the 1st and 2nd defendants' refusal was arbitrary and/or unreasonable and thus not demonstrably justifiable in a free and democratic society. This is the case because –

(a) they failed to give timely consideration to the request;

(b) they failed to communicate their reasons for refusal;

(c) the grounds for refusal were not relevant and sufficient.

[87] Where the 3rd defendant is concerned it is opined that their refusal to air the claimant's PSA, in which he advocated on an issue of public importance and was in accordance with their type of programming for which they were mandated to broadcast under section 4 (2) (c) and (h) of their Act, amounts to an arbitrary and/or unreasonable restriction. It is canvassed that the claimant's right to access broadcast media so as to advocate an issue of importance to him and the public in general is even more pronounced with 3rd defendant as it is a publicly funded station and a statutory creature.

[88] It had not communicated with the claimant prior to the time they were added as a party to the claim. Its refusal ultimately was not shown to be necessary in order to achieve some pressing and substantial objective and moreover they had no reasonable grounds for refusing to air the PSA. It is urged that the test as laid out in **R v. Oakes** (supra) is even more relevant to the 3rd defendant as it is a public authority.

[89] The Solicitor General, in assisting the court in deciding how to balance competing rights which prima facie enjoy constitutional protection, suggests that the court may be aided by looking at the approach in the **Khumalo** case (supra). In that case the Constitutional Court acknowledged that it would have to involve a balancing of the media's right to freedom of expression in one hand, and the respondent's right to human dignity on the other. She pointed to the comments of O' Regan J at paragraph 41:

> *In deciding whether the common law rule complained of by the applicants does indeed constitute an unjustifiable limitation of section 16 of the constitution, sight must not be lost of other constitutional values and in particular the value of human dignity. To succeed, the applicants need to show*

> *that the balance struck by the common law, in excluding from the elements of the delict a requirement that the defamatory statement published be false, an appropriate balance has been struck between the freedom of expression on the one hand, and the value of human dignity on the other.*

[90] Section 16 of their Charter refers to the freedom of expression which includes specifically freedom of the press and other media.

[91] In that case it is indeed useful to note that the Court in carrying out this important balancing exercise did not seem to be suggesting that one right must be seen as yielding to the other. In any event the Court was able to resolve the matter by recognizing that the common law as it related to defamation had already arrived at an appropriate balance of the applicant's right to freedom of expression and the respondent's right to human dignity. It is also useful to note that in South Africa the fact is that their Bill of Rights allows the Court, in order to give effect to a right in the Bill, to develop the common law to the extent that the legislation does not give effect to that right and also may develop the rules of common law to limit the right in accordance with the limitation set by the Bill itself. To my mind the absence of any such provision in our Charter means that our adherence to the rights as stated is stricter and more rigid in its applicability between private individuals.

[92] Another illustrative comment of O'Regan J touches the important consideration of the role of the media in this balancing act at paragraph 22:

> *The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information*

are respected. … The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.

[93] And at paragraph 24:

In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goal will be imperiled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16."

[94] One however has to be mindful of the fact that the 1st and 2nd defendants are in the position of being independent of governmental control and of being accountable to their shareholders and/or owners in their private capacity. Whereas their obligation to the public remains, they also have other obligations which must dictate the manner in which they operate. In balancing their rights therefore and those of the claimant, the question that I must attempt to answer, is whether these opposing but equal rights means that one must trump the other under our Charter, where the horizontal approach is applicable.

[95] In appreciating their right as private licensees I find the decision of the Supreme Court of the United States, in **Columbia Broadcasting System v. Democratic National Committee et al v Business Executives & Business Executives More for Vietnam et al** 421 US 94, 93 S Ct 2080 useful. In this case petitions had been filed for review of orders of the Federal Communications Commission ruling that broadcasters who meet public obligation to provide full and fair coverage of public issues are not required to accept editorial advertisements. The United States Court of Appeal for the District of Columbia Circuit had held that a flat ban on paid public issue announcements by broadcast licensees violated First Amendment, at least when other sorts of paid announcements were accepted but it would be up to licensees and Federal Communication Commission to develop and administer reasonable procedures and regulations for determining which and how many editorial advertisements would be put on the air. The Supreme Court reversed this decision holding that the public interest standard of the Communications Act of 1934 which invites reference to First Amendment principles does not require broadcasters to accept editorial advertisements.

[96] Chief Justice Burger at page 110 – 111 stated:

> *From these provisions [of the Communications Act, 1934] it seems clear that Congress intended to permit private broadcasting to develop the widest journalistic freedom consistent with its public obligations. Only when the interest of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act.*
>
> *…*
>
> *Since it is physically impossible to time for all viewpoints, however, the right to exercise editorial judgment was granted to the broadcaster.*

At later at pages 120 – 121:

> *More profoundly, it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on Government. Application of such standards to broadcast licensees would be antithetical to the very ideal of vigorous, challenging debate on issues of public interest. Every licensee is already held accountable for the totality of its performance of public interest obligations.*

[97] In that case it was accepted that the private broadcaster could not be held to have infringed the First Amendment right of the citizen in refusing to accept 'editorial ad' when exercising their journalistic discretion. In the instant case this journalistic discretion is to be viewed as their rights as at Section 13 (c) and (d) of the Charter. It would seem to me that their rights now are to be respected and upheld just as the rights of the claimant are to be. The proposition as put forward for the claimant suggests that in this balancing act the scale must be tipped in favour of one over the other. I am not satisfied that this is what must have been intended by the inclusion of section 13 (5) in the charter. If this was the intention it would be suggested that one person's right should be considered greater/lesser than the other although all are equal.

[98] To make the declarations against the 1st and 2nd defendants as asked for by the claimant could only be accomplished by prejudicing their rights and freedoms. As is stated in Section13 (5) a provision of the chapter binds the

natural or juristic person taking account of the right and the nature of the duty imposed by the right. In the circumstances of the case the horizontal application to my mind is not applicable as the claimant has the duty to uphold the corresponding rights of the 1st and 2nd defendants.

[99] As it concerns the 3rd defendant as a public authority the question as to whether their refusal to air the advertisement is demonstrably justified in a free and democratic society would arise. Then the considerations raised by the claimant would have to be paramount. The 3rd defendant, it cannot be but noted, was given even less time to consider whether or not to air the advertisement than was given the other defendants. It is apparent that the 3rd defendant was to be brought into the matter after it had commenced and thus had to fall into the timeline already in place. In any event their refusal to air stemmed largely from the fact that the statute creating them does not entitle them to air advertisements whether paid for or not. It is true that it was not until after they had begun before this Court that the claimant had to acknowledge the 3rd defendant's statutory inability to air paid advertisement and was invited to amend their claim against them. However, the 3rd defendant maintains that as they are structured, their functions cannot accommodate the claimant's advertisement at all.

[100] The case of **Committee for the Commonwealth of Canada v Canada** (1991) 77 DLR (4th) 385 discussed some factors which though different from the matter at bar does offer, what I regard as a useful way to approach this matter. In that case members of an interest group were disseminating their political objectives to the public at an airport. They were informed that political propaganda activities were prohibited by section 7 (a) and (b) of the Regulations. They successfully applied for a declaration that their right to freedom of expression was violated. The Crown's appeal was dismissed and they brought a second appeal which was again dismissed. The provision of the regulations concerned the activities that were permissible at the airport which was the

property of the government. The sections of the Charter in question were sections 1 and 2. They read as follows:

> *1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

And

> *2. Everyone has the following fundamental freedoms:*
>
> *(a) …*
>
> *(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;*

[101] The majority of the court concluded that the provisions of the regulation were inconsistent with section 2 (b) of the Charter. Further it was held that the provisions in question could not be regarded as reasonable limits within section (1) of the Charter.

[102] It is the comment of Lamer CJ at page 394 that I find notable.

> *In my opinion the 'freedom' which an individual may have to communicate in a place owned by the government must necessarily be circumscribed by the interest of the latter and of the citizen as a whole: the individual will only be free to communicate in a place owned by the state if the form of expression he uses is compatible with the principal function or intended purpose of that place.*

and at page 395:

> *The fact that one's freedom of expression is intrinsically limited by the function of a public place is an application of the general rule that one's right is always circumscribed by the right of others. In the context of expressing oneself in places owned by the state, it can be said that, under section 2 (b), the freedom of expression is circumscribed at least by the very function of the place."*

[103] I feel compelled to find parallels in these comments when I consider the way in which the 3rd defendant was added to this matter. Extending the view of the government's property to the broadcaster represented by the 3rd defendant, it is arguable that the claimant is seeking to use its airways in a manner that they were not created for. The 3rd defendant came to court prepared to explain their reason for not airing the advertisement based on what they had been asked to do. They do not provide a platform for paid advertisements. True it is that it was at the invitation of the court that the claimant attempted to adjust their claim to, as it were, meet the explanation they were now getting from the 3rd defendant having chosen not to wait to afford their Board an opportunity to consider their request and respond.

[104] The issue of whether the law and regulations on which the 3rd defendant rely actually infringes on the right of the claimant to express himself and to disseminate his views as provided for in the Charter raises other constitutional issues which are not properly addressed in the claim as it was presented to the 3rd defendant initially. In the circumstances, I would decline from making the declaration as requested.

[105] In conclusion therefore as regards the 1st and 2nd defendants the declarations sought by the claimant conflicts with the rights of these defendants.

In the circumstances, I recognize that the rights cannot be viewed as absolute for either side. I cannot see the justification in holding that either right must yield to the other. As regards the 3rd defendant they ought not to be forced to air an advertisement which their functions do not permit them to do. I therefore decline from making the declarations and orders sought by the claimant.

SYKES J

[106] Mr Maurice Tomlinson, a Jamaican citizen and an attorney-at-law, asked the defendants to broadcast a thirty-second video (in which he is a participant) which advocates tolerance for homosexuals or, as he puts it, tolerance for men who have sexual relations with men. He says that he is part of local, regional and extra regional groups which have as their objective, among other things, the repeal of laws he and the groups consider to be against homosexuals. He and the groups wish to see increasing public acceptance of homosexuality. Part of this effort includes public education, holding public fora, speaking through electronic and printed media of communication. The video was part of these endeavours.

[107] In the final analysis none of the defendants broadcast the video. The non-broadcast was interpreted by Mr Tomlinson as a breach of his right to freedom of expression and right to seek, receive, distribute or disseminate information, opinions and ideas through any media. He is asking this court to declare that the defendants breached these rights and also to order the defendants to broadcast his video.

[108] The defendants have rejected Mr Tomlinson's view. They say that no right has been infringed because they did not prevent him from exercising any of his fundamental rights. They add that he has exercised his rights because the video has been produced without any attempt or effort by them to obstruct his effort. To use an expression from one of the cited cases, the defendants say that the right to freedom of expression does not mean that they are under an obligation to provide Mr Tomlinson with a microphone to air his views.

[109] Mr Tomlinson is alleging that the defendants infringed rights guaranteed to him under section 13 (3) (c) and (d) of the Charter of Fundamental Rights of Freedoms of the Jamaican Constitution.

[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) 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.

[111] What has just been stated was taken from Stu Woolman and Henk Botha, 'Limitations' in Stuart Woolman, Michael Bishop, Jason Brickhill (eds), *Constitutional Law of South Africa*, (2nd edn, JutaLaw 2008) Part 2, Ch 34, p 2.

[112] This judgment will be of some length and so a road map should prove helpful. Part A will set out the facts in relation to each defendant. Part B will state remedies claimed. Part C will set out the relevant parts of the Charter. Other sections of the Charter will be referred to where necessary to make the narrative, submissions or reasoning more understandable. Part D will seek to establish an appropriate analytical framework for interpreting the Charter rights. Part E will analyse the law and facts relevant to deciding whether Mr Tomlinson has established any of the matters set out in paragraph 6.

Part A – The facts

[113] The facts will be dealt with in a manner so that the relevant facts between Mr Tomlinson and each defendant are clearly delineated.

TVJ

[114] The pertinent affidavits are those of Mr Tomlinson and Mr Stephen Grieg, attorney-at-law and company secretary for Television Jamaica Ltd ('TVJ'). On

March 5, 2012, Mr Tomlinson sent an email to Ms Diana Buchanan, a sales representative of TVJ, requesting information regarding airing of a public service announcement and the cost. Actually, the email had these words, 'Here is a link to the finished advertisement which we would like to pay to have aired during Early Prime Time News and Smile Jamaica Its Morning Time. Please let us know if TVJ would be willing to air it.' There was a link to YouTube.com where the video could be viewed. Other than the Youtube link, TVJ did not receive a copy of the video until it was served as part of the disclosure requirement of this claim. Until the video was served TVJ had no way of knowing whether what was at the Youtube website was the same video that Mr Tomlinson wished it to air (para 9 of Mr Stephen Grieg's affidavit).

[115] A second email was sent asking, 'Can you say if TVJ will air the PSA?' On March 8, 2012, Ms Buchanan responded by saying that 'the commercial has been passed to our directors who have not responded as yet. As soon as u (email speak in original) have a response, I will inform you.' Obviously, the 'u' should be 'we' or 'I.' Thereafter, several telephone calls took place between Ms Buchanan and Mr Tomlinson but the issue was not resolved.

[116] By April 2, 2012, a letter from Miss Anika Gray, Mr Tomlinson's attorney-at-law, began the second round of communication. This letter refers to a public service announcement and not an advertisement. This letter enquired whether TVJ would air the video and closed with the declaration that if there was no response 'within 7 days of your receipt of this letter' it will be taken that TVJ will not air the video.

[117] Another email followed addressed to Mr Allen, a senior executive at TVJ, asking that he respond to the letter of April 2.

[118] By letter dated September 10, 2012, Miss Gray wrote to TVJ asking whether the video would be shown and notification should be given within 7 days failing which it will be taken that a decision was made not to show the video.

[119] Another letter dated September 18, 2012 from Miss Gray was sent to Mr Grieg. She pressed for an answer on the issue of the airing the video. An answer never came. It was the non-response to these last two letters (September 10 and 18) that prompted Mr Tomlinson to conclude that TVJ had decided not broadcast the video.

[120] From TVJ's standpoint the issue is not as cut and dry as presented by Mr Tomlinson. He added TVJ has a process used to decide whether it would air any advertisement it received. According to him, the procedure is used to determine:

(1) whether the advertisement meets TVJ's regulatory obligations;

(2) whether the standard advertising contract and copyright indemnity will be sufficient;

(3) whether there are any risks and penalties that may flow from airing the advertisement;

(4) whether in light of TVJ's property rights, editorial and press freedom the advertisement should be aired.

[121] Mr Grieg also explained that a public service announcement (which is how the advertisement was styled by Miss Gray) has a particular meaning in the broadcasting industry. It is not treated as an advertisement. An advertisement is done on a purely commercial basis. However, a public service announcement is not done for payment and requires the endorsement or the agreement of the

broadcaster. A public service announcement is essentially a message or campaign. This explanation regarding a public service announcement and how it is understood and treated in the industry was not challenged by Mr Tomlinson.

[122] Mr Grieg also stated that the station met with one of the local groups sympathetic to homosexual men in September 2011 and explained in some detail the nature of public service announcements. At that meeting it was explained that some of the considerations for public service announcements include:

(1) the time of day;

(2) the nature and content of the advertisement;

(3) the sensibilities of viewers.

[123] The reasons given in Mr Grieg's affidavit for not airing the broadcast are first, TVJ's property rights, editorial press freedom and control gives it the right to determine what material it will broadcast. Second, TVJ must consider and carefully scrutinise the content of all advertisements and programmes to be transmitted to see if it might face penalties for breach of its broadcasting regulations and licence.

[124] Mr Grieg indicated that in the absence of any contractual relationship with Mr Tomlinson or Miss Gray it is difficult to see the basis of issuing a demand for a response within a time frame set unilaterally.

[125] The case against TVJ is that it failed to consider Mr Tomlinson's request and failed to communicate its reasons for refusal. These failures it is said amount to a breach of section 13 (3) (c) and (d).

CVM

[126] On February 22, 2012 Mr Tomlinson sent a script to Miss Andrea Wilson of CVM and requested confirmation whether CVM would accept payment and broadcast the public service announcement. One Ms Ann-Marie Brightly contacted Mr Tomlinson by email and informed him that the email making the request was forwarded to her. Mr Tomlinson called Ms Brightly on February 23 and passed on further relevant information to her. There were follow-up emails from Mr Tomlinson to Ms Brightly between February 24, 2012 and March 7, 2012. On March 7, 2012, CVM informed Mr Tomlinson that the management was considering the matter. CVM never got back to Mr Tomlinson. Several telephone conversations took place between Mr Tomlinson and Ms Brightly. Mr Tomlinson sent another email on March 30, 2012 seeking a final decision.

[127] By letter dated April 2, 2012, Miss Gray wrote to CVM requesting a decision within seven days failing which it would be interpreted as a decision not to air the advertisement.

[128] As was the case with TVJ, there was a five-month hiatus before the letter writing resumed through letters dated September 10 and 18, 2012 from Mr Tomlinson's counsel to CVM. The letters pressed for a response and indicated that failure to respond within the stated deadline would be interpreted as a decision not to air the video. CVM did not respond to any of them.

[129] CVM responded to this claim through the affidavit of Mr Ronnie Sutherland, Vice President of Sales, Marketing and Programmes. Mr Sutherland explained that CVM was a private limited liability company which generates revenue from advertising. CVM provides a 24-hour format of scheduled programming comprising a variety of programmes and also caters to the needs of its advertisers.

[130] Anyone desirous of placing an advertisement with CVM is required to complete the standard advertising contract which expressly states that CVM

‘reserves the right to decline to accept for transmission any advertisement or any part thereof.’

[131] When the advertiser completes the standard form contract and before CVM signs, a script or storyboard of the proposed or actual advertisement is required. Mr Sutherland said that when making a decision on advertisements the following matters are taken into account:

(1) whether the advertisement promotes illegal activities;

(2) whether the advertisement is likely to invite adverse public attention;

(3) whether the advertisement will attract unfavourable reaction and at times hostile reactions from the public.

[132] CVM insists that it ‘operates its business in order to make a profit for the shareholders’ who have invested in the enterprise and consequently, CVM has to take into account the possibility that a advertisement may have content that may offend viewers and advertisers. Were this to happen then it would have negative impact on revenues. This point was being made in order to contrast CVM with the British Broadcasting Corporation which gets its revenue from a licence fee imposed on British householders. Therefore, says CVM, it ‘gives careful consideration to the images and messages contained in advertisements presented by potential clients for broadcast on the station.’

[133] In this particular case, the board viewed the video and decided not to accept it for broadcast. The decision was not communicated to Mr Tomlinson. Four reasons were advanced. First, the board thought that broadcasting the advertisement might convey the impression that the station is a covert supporter of homosexuality. Second, based on past experience, CVM was concerned that

the public may have a negative reaction which could in turn decrease revenue flows. Third, Jamaicans commonly assume that men who engage in sexual relations with other men frequently engage in buggery which is still a criminal offence in Jamaica. Fourth, based on legal advice, CVM had a common law and constitutional right to decide whom it contracts with, or in this case, not to contract with.

[134] CVM took the view that this advertisement did not qualify as a public service advertisement which is usually broadcast free of cost. In CVM's view, public service advertisements are for non-controversial things like increasing literacy in schools or the closing of schools when the weather is poor.

[135] As in the case of TVJ, the non-response was taken as a decision not to broadcast and therefore a breach of Mr Tomlinson's constitutional right to freedom of expression.

The Public Broadcasting Corporation of Jamaica

[136] The Public Broadcasting Corporation of Jamaica (PBCJ) is a statutory body established by the Public Broadcasting Corporation of Jamaica Act (PBCJA). Miss Gray by both letter dated October 22, 2012 and email contacted Mr Keith Campbell, the Chief Executive Officer of PBCJ. He was asked whether the entity would broadcast the advertisement during its prime time spot in exchange for payment. Mr Campbell, by letter dated November 6, 2012, responded by saying that the matter was referred to the board which would be meeting on Tuesday, November 20, 2012.

[137] It turned out that the board did not meet in November but this was not communicated to either Mr Tomlinson or his attorney. The board met in December and the matter was considered and a decision made not to air the advertisement. The date of the decision was not stated. This decision was not told to Mr Tomlinson or his attorney.

[138] In response to these allegations, Mr Keith Campbell, the Chief Executive Officer of PBCJ, filed an affidavit. He said that PBCJ is not a commercial entity and does not have a broadcasting licence. It is not allowed to accept paid advertisement. The PBCJ broadcasts programmes promoting education and training, dissemination of news, information and ideas on matters of general public interest, development of literary and artistic expression and the development of culture, human resources and sports. In keeping with its understanding of its role PBCJ broadcasts programmes such as local plays, Parliamentary debates and similar functions.

[139] The allegation against PBCJ is that it refused to broadcast the advertisement without giving reasons. It was also said that it had no justification for the refusal and as a public body it failed to give homosexuals the opportunity to receive and distribute information about themselves so that there can be greater understanding of homosexuality.

[140] In seeking to bolster his claim, Mr Tomlinson by letter dated May 7, 2012 sought the view of the Broadcasting Commission on whether the advertisement broke any relevant rules or regulations of the Commission. The Commission responded by saying that no breaches of any kind were identified.

Part B – The remedies claimed

[141] The remedies claimed are:

(1) A declaration that the defendants' refusal to air a paid advertisement promoting tolerance for homosexuals in Jamaica amounted to a breach of the claimant's right to freedom of speech as guaranteed by section 13 (3) (c) of the Charter.

(2) A declaration that the defendants' refusal to air a paid advertisement promoting tolerance for homosexuals in Jamaica amounted to a breach of the claimant's constitutional right to seek, receive, distribute or disseminate information, opinion and ideas through any media, guaranteed by section 13 (3) (d) of the Charter'

(3) An order for the defendants to air the paid advertisement submitted by the claimant in exchange for the standard fees.

(4) Damages.

(5) Such further and/or other relief as the Honourable Court may deem just.

(6) An order as to costs of this claim

[142] At the commencement of the hearing Lord Gifford QC who appeared for Mr Tomlinson amended the two declarations by removing the words 'paid advertisement' and substituting 'video.'

Part C – The constitutional provisions

[143] Section 13 (2), the relevant parts of section 13 (3) (c) and (d) and section 13 (4) and (5) read:

> *(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; 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

…

(c) the right to freedom of expression;

(d) the right to seek, receive, distribute or disseminate information, opinions and ideas through any media;

(4) This Chapter applies to all law and binds the legislature, the executive and all public authorities.

(5) A provision of this Chapter binds natural or juristic persons, if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right.

Part D – How should the Charter be interpreted?

[144] In **Minister of Home Affairs v Fisher** (1979) 44 WIR 107, Lord Wilberforce held that a constitution is to be given 'a generous interpretation' because a constitutional instrument is 'sui generis, calling for principles of interpretation of its own, suitable to its character … without necessary acceptance of all the presumptions that are relevant to legislation of private law' (pp 112 – 113).

[145] His Lordship added bills of rights 'call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' in order that individuals receive the full measure of the fundamental rights and freedoms referred to' (p 112).

[146] His Lordship went on to say that '[r]espect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language' (p 112 – 113). No doubt these words were added in anticipation of the argument that may be made that on this view, namely, '[t]his is in no way to say that there are no rules of law which should apply to the interpretation of a constitution' (pp 112 – 113).

[147] As recently as 2002, it was held in **Reyes (Patrick) v R** (2002) 60 WIR 42 **[26]** (Lord Bingham):

> *As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society*.

[148] This passage reflects what is called the living document theory of constitutional interpretation as distinct from the originalism or textualist school of thought (Justice Antonin Scalia of the United States Supreme Court being a contemporary proponent of the latter). It is vital to observe that Lord Bingham

was insistent that despite the generous interpretation no judge has the licence to read his own personal views into the text. It would seem to me that the prophylactic against that happening is paying attention to the language actually used in its context (immediate and the surrounding context).

[149] In 2004, on appeal from Jamaica, the Judicial Committee of the Privy Council in **Watson v R** (2004) 64 WIR 241,259 (**[42]**) (Lord Hope) held, in relation to the interpretation of human rights provisions, that:

> *Guidance as to how this issue should be approached is not to be found in any presumption as to whether the law which was in force immediately before the appointed day secured the fundamental rights of the people of Jamaica. It is to be found in the principle of interpretation, which is now universally recognised and needs no citation of authority, that full recognition and effect must be given to the fundamental rights and freedoms which a Constitution sets out. The rights and freedoms which are declared in s 13 must receive a generous interpretation. This is needed if every person in Jamaica is to receive the full measure of the rights and freedoms that are referred to.*

[150] All three cases from the Judicial Committee of the Privy Council stress the importance of giving the words in bills of rights, a generous interpretation. Lord Wilberforce states that constitutions are sui generis and thus call for principles of interpretation suitable for its own character without necessary acceptance of all presumptions applicable to statutes or private law. Lord Bingham indicated that the words are not treated like those found in a will or charterparty. This cannot mean that ordinary rules of grammar and syntax do not apply. The draftsman responsible for producing the bill of rights would be guided by the grammar and syntax of the language in which he is writing the bill. Also whatever meaning the judge comes up with it is hoped that it would be within the linguistic range of

meanings the word has at the time it is being used unless there is something to show that it is being used in a very unusual sense.

[151] As Justice Scalia and Bryan Garner in their book, *Reading Law: The Interpretation of Legal Texts* (2012), no one (legislator or the creator of private documents) pursues any [or all] purpose[s] at any costs. They limit their choices by the words they use. Indeed, there is no other way to indicate what is meant than by choice of words. They rely on what they believe the ordinary reader in existence at the time they wrote would understand the words to mean. Where they wish to have a fairly unrestricted meaning they use general words and the higher the level of generality of the language, the less likely that they intended to give the words a very restrictive meaning; and even then, general words do indeed have boundaries of meaning. Indeed this was the very technique used by Lord Wilberforce in **Fisher**. His Lordship, in the passages leading up to the resolution of the constitutional issue noted that Chapter 1 was drafted in 'in a broad and ample style which lays down principles of width and generality' (p 112) and having regard to the bill of rights its historical antecedents suggested a wide and generous interpretation (p 112).

[152] Thus when Lord Bingham in **Reyes** says that the language of the constitution is considered carefully what does his Lordship mean when, almost in the next breadth, there is mentioned giving the words a generous interpretation? It is my view that his Lordship means that the language is capable of carrying the meaning being ascribed to it having regard to its immediate context and the rest of the bill of rights which itself is read in context of the whole document.

[153] The problem under consideration was examined by the Constitutional Court of South Africa ('CCSA'). In the passage about to be cited Kentridge AJ is torn between fidelity to the actual text and what is described as the generous interpretation. In **S v Zuma** [1995] ZACC 1 **[17] – [18]**, Kentridge AJ stated:

While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

[18] We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination. If I may again quote S v Moagi, supra, at 184, I would say that a constitution

> *"embodying fundamental rights should as far as its language permits be given a broad construction"*

[154] Judge Kentridge appreciated that a broad construction is only permissible where the language permits. The learned judge, in agreement with Lord Bingham in **Reyes**, was urging that words cannot mean whatever judges want them to mean. Thus even with a broad construction the language of the constitution must be capable of bearing the meaning sought to be given to them. It would seem to me that the learned judge was indicating that the generous interpretation must take place within the boundaries of acceptable meanings that may reasonably be given to the words actually used. But how then does the judge choose between possible meanings? Judge Kentridge did not resolve that issue.

[155] Judge Kentridge did make an effort by suggesting a possible solution. Earlier at **[15]**, Kentridge AJ stated

> *…that regard must be paid to the legal history, traditions and usages of the country concerned, if the purposes of its constitution are be fully understood. This must be right.*

[156] Having established the principles by which the Charter is to be interpreted it is now appropriate to address the issues raised by Mr Tomlinson.

Whether Mr Maurice Tomlinson has sufficient standing to bring this claim

[157] One of the threshold issues raised by Mrs Gibson Henlin on behalf of TVJ was whether Mr Tomlinson had sufficient locus standi, that is, whether he is the proper person to bring the claim. None of the other defendants took the point in their written or oral submissions. Mrs Gibson Henlin referred to section 19 (1) and (2) of the Charter which is as follows:

> *(1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*
>
> *(2) Any person authorised by law, or, with the leave of the Court, a public or civic organisation, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter.*

[158] The submission was that Mr Tomlinson is not alleging that he personally suffered any harm, or that his right has been infringed or is likely to be infringed. What he has stated is that he represents a number of groups advocating for rights to be conferred on homosexuals. For this submission, Mrs Gibson Henlin relied on Mr Tomlinson's affidavits. It is therefore necessary to see what they actually state.

[159] Mr Tomlinson stated that he is the legal advisor for AIDS-Free World an international non-governmental organisation and in that capacity he advocates for changes to what he describes as 'homophobic laws and policies across the region.' The video that precipitated this claim was produced as part of the advocacy campaign. It was designed to encourage tolerance for men-having-sex-with-men groups and homosexuals in Jamaica. He stated that he was one of the actors in the video. It is common ground that he is a Jamaican national.

[160] From this, he is a Jamaican national who is seeking to exercise his constitutional right to freedom of expression and freedom to disseminate ideas and opinions in Jamaica. It would seem that, prima facie, he would be entitled to claim that his constitutional rights are infringed and thus able to bring this claim in his own right. Mrs Gibson Henlin submitted that Mr Tomlinson is not a genuine claimant. Her submission was that he was going from entity to entity seeking to precipitate or generate facts which would allow him to file this claim with the assistance of financiers from overseas. She added that Mr Tomlinson was not a bona fide person honestly seeking to exercise his rights under the Constitution but rather trying to 'trap' the defendants in circumstances which would allow him to argue that his rights were infringed.

[161] Mrs Gibson Henlin cites a decision of this court, **Banton and others v Alcoa Minerals of Jamaica Incorporated and others** (1971) 17 WIR 275 in support of her proposition. This was a matter heard in the Supreme Court sitting as the Constitutional Court. This was a matter involving trade union

representation for workers who were engaged by Alcoa Minerals to construct a bauxite and alumina plant in Clarendon. The company recognised one trade union as the exclusive bargaining agent for the workers. The claimants in that case were members of a rival union. They brought a claim under the constitution alleging that their right to freedom of association was being infringed because Alcoa refused to recognise the union of their choice. Parnell J had this to say about locus standi to bring a claim under the Constitution at pages 304 – 305:

> *But the mere allegation that a fundamental right or freedom has been or is likely to be contravened is not enough. There must be facts to support it. The framers of the Constitution appear to have had a careful and long look on several systems operating in other countries before they finally agreed to Chapter III as it now stands.*
>
> *It seems to me that the position may be summarised as follows:*
>
> *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 "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;*

(3) that his complaint is substantial and adequate and has not been waived or otherwise weakened by consent, compromise or lapse of time;

(4) 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;

(5) 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.

[162] Mrs Gibson Henlin relied heavily on the first two paragraphs of this extract. She submitted that for all practical purposes, Mr Tomlinson does not reside in Jamaica and is only here at the behest of his financial backers. These claims, she submitted, were manufactured and did not flow out of a real attempt to exercise the right to free speech; the claim is the product of a sting operation designed to generate facts so that Mr Tomlinson can find a stage to spout his views. She relied on the series of letters to make the point that the tone and tenor of the letters to TVJ reveal that a hidden agenda was at work. This explains the unilateral imposition of deadlines and constant calls and email. These acts were directed at one thing only: to get some facts which would enable him, with the support of overseas entities, to launch this claim.

[163] Lord Gifford QC submitted that Parnell J's dictum was not supported by the other two judges and it is out of step with the recent approaches to standing in constitutional matters. This is not entirely correct. Robotham J expressly agreed with the judgment of Parnell J (pp 305 – 306). Graham-Perkins J expressed no view on the issue. Second, regardless of how liberal the interpretation of standing, the litigant must have sufficient interest to bring the claim.

[164] From the narrative of facts, it is fair to say that Mr Tomlinson has made allegations that his right to freedom of expression and right to disseminate and receive ideas have been infringed. He is alleging breaches in relation to him and not in relation to the group that may be providing financial support for his claim. He is one of the actors in the video. It is he who contacted the defendants either directly or indirectly through his attorney in order to have the video broadcast but without success. The fact that he may have support from a group outside of Jamaica does not necessarily mean that he is the 'tool' of that group. Mr Tomlinson is asking this court to declare what his legal rights are in relation to the defendants in light of the new Charter of Fundamental Rights and Freedoms of the Constitution of Jamaica ('the Charter'). It is my view that Mr Tomlinson has sufficient standing to bring the claim.

Whether the Charter of Fundamental Rights and Freedoms permits horizontal application

[165] Lord Gifford QC submits that by virtue of section 13 (5) of the Charter, one private citizen can enforce the fundamental rights provisions directly against another private citizen. According to learned Queen's Counsel, section 13 (5) introduced explicitly what is called horizontal application of bill of rights. My understanding of this is that in the world of constitutional theory there are two applications of bill of rights. The first is vertical, that is between state and person. The second is horizontal that is between private citizen and private citizen. The argument of Queen's Counsel is that the bridge over which Mr Tomlinson can walk to enforce section 13 (3) (c) and (d) against the defendants is section 13 (5).

[166] Over against this submission is Mrs Gibson Henlin's strident submission that horizontal application of bill of rights is not part of Jamaican constitutional law. It seems to me that a logical starting point is a determination of this sub-issue because if there is no such thing as horizontal application of bill of rights then that is the end of the claim against the first two defendants. When this issue is resolved then attention can be directed at the content of the rights conferred by section 13 (3) (c) and (d).

[167] Lord Gifford QC relied heavily on the developments in South Africa and a decision of the CCCSA in support of his case that under the Jamaican Charter one private citizen can enforce the fundamental rights against another private citizen. I will look at the developments of which learned Queen's Counsel speaks to see if the thesis is supported. I am acutely aware that I am not aware of the various nuances of this area in South Africa and so I approach this task with circumspection and humility.

The developments in South Africa

[168] South Africa has been emerging from the long night of apartheid with all its associated ills. As part of the process of reconstructing the society into a more equitable and just one, two constitutions were enacted. The first was the Interim Constitution ('IC') of 1994 and the Final Constitution ('FC') of 1996. Both constitutions have provisions that are relevant to this analysis. I will deal with the relevant provision of the IC as it was understood by the CCSA in **Du Plessis and others v De Klerk** [1997] 1 LRC 637. This was a defamation case filed in court before the IC came into force. The case arose out of a series of articles in a newspaper where it was alleged that a number of South African citizens were engaged in the supply of arms to UNITA, an armed group locked in combat with the government of Angola. The defendants pleaded that the articles were not defamatory. After the IC came into operation, the defendants sought an amendment to their pleadings to the effect that they had a defence under section 15 of the IC. Section 15 dealt with the right to freedom of expression. The

defendants sought to amend their defence to add that the articles in question were not unlawful because section 15 of the IC guaranteed the right of freedom of expression which included freedom of the press. It was further argued that the articles were on matters of public interest and were published in order to keep members of the public informed. It was also contended that the publication of the articles were not unlawful and the publication of them was protected by section 15. The defendants were saying, to use the language of this area, that section 15 was directly applicable to the law of defamation. The private citizens (newspapers) were seeking to apply the bill of rights directly to the claim of another private citizen (the claimant). There was no allegation of governmental involvement. No statute, regulation, ordinance or bylaw enacted by organ of state was involved in the case.

[169] The claimants objected to the amendment on a number of grounds. The most relevant one for present purposes was that the IC did not apply horizontally to disputes between private citizens.

[170] The CCSA held that the bill of rights, generally, did not apply to the relationship between citizen and citizen (horizontally) but only between citizen and the State (vertically). The two significant provisions in this case were sections 15 and 35 of the IC.

[171] Section 15 read:

> *(1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.*

(2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.

[172] Section 35 provided

(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign law.

(2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used prima facie exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.

[173] A majority upheld the submissions of the claimant. Kentridge AJ (Chaskalson P, Langa and O'Regan JJ concurring) held at **[49]**:

> *[49] To recapitulate, by reason of the sections to which I have referred:*
>
> *(a) constitutional rights under Ch 3 may be invoked against an organ of government but not by one private litigant against another.*
>
> *(b) In private litigation any litigant may none the less contend that a statute (or executive act) relied on by the other party is invalid as being inconsistent with the limitations placed on the legislature and executive under Ch 3. ….*
>
> *(c) As Ch 3 applies to common law, governmental acts or omissions in reliance on the common law may be attacked by.*

[174] A crucial point was made in this passage which apparently gave strength to Mrs Gibson Henlin. Judge Kentridge stated that the bill of rights could be invoked in private litigation if one of the parties challenged relied on some governmental act such as statute, regulation, ordinance, bylaw or actual conduct. Conceivably, the foundation of the private citizens action could be eroded if it could be shown that he relied on a governmental act that was contrary to the bill of rights. This was as far as the majority were prepared to go in the absence of clear wording permitting direct horizontal application. The possibility conceived of by the majority is called indirect horizontal application of bill of rights.

[175] The majority buttressed their reasoning further. Kentridge AJ stated at **[45]**:

> *Had the intention been to give it a more extended application that could have been readily expressed. One model which would have been available is art 5 of the Constitution of Namibia 1990, which provides:*

> *'The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.'*
>
> *It would be surprising if as important a matter as direct horizontal application were to be left to be implied.*

[176] The court held that the bill of rights was not applicable in the particular case because there were no words in the constitution capable of making this possible. Had it been intended that direct application was possible between private citizens then one would expect to find words to that effect. The majority reasoned further that if direct horizontal application was intended it would indeed be remarkable if such a far-reaching principle was arrived at by implication when there were in existence constitutions that made direct horizontal application possible.

[177] The CCSA also conceived of another route to indirect horizontal application of the bill of rights. This is how it was expressed. At **[60]**, Kentridge AJ stated:

> *[60] Fortunately, the Constitution allows for the development of the common law and customary law by the Supreme Court in accordance with the objects of Ch 3. This is provided for in s 35(3):*
>
> > *'In the interpretation of any law and the application and development of the common law and customary law, a court shall have due*

> *regard to the spirit, purport and objects of this Chapter.'*

I have no doubt that this subsection introduces the indirect application of the fundamental rights provisions to private law. I draw attention to the words 'have due regard to' in s 35(3). That choice of language is significant. The law-giver did not say that courts should invalidate rules of common law inconsistent with Ch 3 or declare them unconstitutional. The fact that courts are to do no more than have regard to the spirit, purport and objects of the Chapter indicates that the requisite development of the common law and customary law is not to be pursued through the exercise of the powers of this court under s 98 of the Constitution. The presence of this subsection ensures that the values embodied in Ch 3 will permeate the common law in all its aspects, including private litigation. I incline to agree with the view of Cameron J in the judgment already referred to above (paras [21] and [59]) that s 35(3) makes much of the vertical/horizontal debate irrelevant. The model of indirect application or, if you will, indirect horizontality, seems peculiarly appropriate to a judicial system which, as in Germany, separates constitutional jurisdiction from ordinary jurisdiction. This does not mean that the principles evolved by the German Constitutional Court must be slavishly followed. They do, however, afford an example of how the process of influencing the common law may work in practice. Article 1(3) of the German Basic Law provides:

> *'The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.'*

> *It has no equivalent to s 35(3). Yet, as I pointed out earlier in this judgment, the German courts none the less apply a model of indirect and not direct application of the basic rights provisions in private litigation.*

[178] This passage envisages indirect horizontal application of the bill of rights by developing common law principles, incrementally to reflect the values of the constitution. In this conception there is no wholesale rejection of the common law but rather a gradual development of the common law. In other words, the bill of rights, on an indirect application, does not permit any declarations or findings of unconstitutionality thereby creating the risk of a void in the law. The courts were to 'have regard to the spirit, purport and objects' of the bill of rights. This, according to Judge Kentridge, permitted the values of the bill of rights to permeate the common law 'in all its aspects, including private litigation.' Judge Kentridge also observed that while Germany did not have the equivalent of section 35 (3), nonetheless the German legal system found it possible to integrate into the general law through indirect application the fundamental rights provisions. As I understand it, Judge Kentridge is saying that if the German courts managed to integrate the basic rights into general law indirectly, then the courts in South Africa could do so all the more because of the presence of section 35 of the IC.

[179] Another member of the majority, Mohamed DP, while initially was more inclined to direct horizontal application, eventually found that the text of the IC did not permit direct horizontal application. He agreed with Kentridge AJ. Of interest should be the fact that Mohamed DP found himself limited by the text of the constitution despite his own moral view about the matter. A clear indication that unbridled purposive interpretation was not acceptable. The liberal and purposive approach did not permit him to give the actual words used a meaning they could not legitimately bear. Mohamed DP held this position despite his concerns about what he called 'the privatisation of apartheid.'

[180] Thus far, in South Africa, under the IC, the CCSA envisioned that horizontal application of the bill of rights to private litigation was to be by indirect application through (a) gradual development of the common law and (b) allowing a challenge to any governmental act on which one private citizen relied on as legal authority for his action. Mrs Gibson Henlin relied on principle (b) which has been stated in the immediately preceding sentence to make the submission that Mr Tomlinson' case against TVJ could not possibly succeed because no government action in the form of statute, regulation, bylaw or conduct was involved in this case. This was a matter controlled exclusively by private law and so the concept of horizontal application of the Charter to private law disputes could not apply in the absence of government action.

[181] The FC came into force in 1996. That Constitution has sections 8, 36 and 39. Section 8 of the FC reads:

> *(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state.*
>
> *(2) A provision of the Bill of Rights binds natural or a juristic person, if and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.*
>
> *(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—*
>
> > *(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the*

common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

[182] Section 36 of the FC reads:

(1) Limitation of rights.-(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[183] Section 39 (1) of the FC reads:

(1) When interpreting the Bill of Rights, a court, tribunal or forum

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

[184] Sections 8 and 36 are new. Section 39 retained some aspects of section 35 of the IC. Section 8 (1) states that the bill of rights binds the State, organs of

state all persons and the judiciary. Section 8 (2) provides that the bill of rights binds natural and juristic persons if and to the extent applicable having regard to the nature and duty imposed by the right. Section 8 (3) is directing the courts to apply or, where necessary, develop the common law to the extent that legislation does not give effect to the fundamental right when applying the bill of rights to natural or juristic persons. In addition, the South African courts have the express authority, when developing the common law rules to do so in a manner which limits the right in question so long as the limitation complies with section 36 (1) of the FC. Section 36 permits the court to limit the effect of bill of rights only to the extent necessary in a free and democratic society. Section 39 (2) of the FC is urging all court and tribunals in South Africa to promote and encourage the objects and ethos of the bill of rights. The stage was now set for a second attempt at direct horizontal application of the bill of rights to private law disputes between citizens.

[185] In **Khumalo v Holomisa** [2003] LRC 382 the CCSA returned to this question of direct horizontal application. It was a defamation case. There was no governmental action involved and no government institution or organ was a party to the claim. Mr Holomisa was a well-known South African politician and leader of a political party. Mr Khumalo and others were involved in the publication of a newspaper called The Sunday World. Mr Holomisa was accused of many execrable things including involvement with a band of brigands who robbed banks. Needless to say he sued. His particulars of claim did not specifically say that the allegations made by the newspaper were false. The newspaper applied to have the particulars struck out on the ground that the defamation law as it presently stood which did not require a claimant to allege specifically that the defamatory material was false infringed the newspaper's constitutional right to freedom of expression (section 16) and therefore was inconsistent with the FC because the defamation law was an unjustifiable limitation of the freedom of expression. The newspaper also submitted that 'the right of freedom of

expression in s 16 is directly applicable in this case despite the fact that the litigation does not involve the state nor any organ of state.'

[186] In light of section 8 (2), the CCSA was being asked to depart from **Du Plessis** on the basis that the direct horizontal application was now part of South African constitutional law. It will be recalled that CCSA did not go the route of direct horizontal application because there was no provision in the constitution that made that possible. Section 8 (2) was now there and so that limitation had been overcome.

[187] The CCSA did not accept all the arguments made by the newspapers. The court held that section 16 was of direct application as contemplated by section 8 (2) even though there was no governmental action or law involved. However, the common law as it presently stood in South Africa struck the correct balance between freedom of speech and protection of reputation. The court also noted that section 8 (2) binds private persons to the extent that the right in question was applicable. The court then linked section 8 (2) to section 8 (3) and noted that under section 8 (3) the courts were to develop the common law to give effect to the fundamental rights to the extent that legislation did not do so.

[188] The reasoning is important. Although section 16 was of direct application it did not produce the result of striking down the common law. This was not because the common law had already struck the correct balance, which it in fact did, but because section 8 (2) and (3) required the courts to mould the common law to meet the constitutional standard. In other words, even if the defamation law had been held to be incompatible with the constitution then the courts would then undertake the job of moulding the law to meet the constitutional requirement. This is why the court held that it could not apply section 8 in the manner contemplated by the newspapers which was simply to declare the defamation law incompatible with the constitution. Had this approach been taken then section 8 (3) would have no meaning. Since section 8 (3) would come into play if there was any incompatibility between the constitution and the common

law, it means that the bill of rights would be applied indirectly in fact although it was declared that section 16 directly applied.

[189] The point then is that a finding that the bill of rights directly applies to a dispute between private citizens based on pure private law without any governmental involvement whether through conduct or statute, regulation or bylaw, does not invalidate the private law principle under scrutiny. The practical result is that the courts then take up the job of indirect application by developing the common law.

[190] The case shows that even if the right is of direct horizontal application between citizen and citizen that is not the end of the matter. There has to be further examination to see whether the content of the law under scrutiny is compatible with the bill of rights.

[191] To return to the question being answered. If section 8 (2) of the FC had the effect of making the bill of rights applicable horizontally in South Africa and those exact words were introduced into Jamaica, then there is a good prima facie basis for saying that horizontal application of fundamental rights is part of our Charter. Section 13 (5) is completely new to Jamaica. It was deliberately copied from a country with significant inequality between different social groups and that section along with others was, perhaps, seen as a way of addressing that inequality through judicial decision on the scope and meaning of the Bill of Rights.

[192] Mr Hugh Small QC and Mrs Foster Pusey QC, Solicitor General, made use of various reports that were prepared when the new bill of rights was being considered. Both Houses of Parliament produced a report of the Joint Select Committee of Houses of Parliament. One of the things that the Select Committee did was to refer to the old Chapter 3 of the Jamaican Constitution and noted that the ‘new Chapter 3 will go a far way in answering the persistent complaints from persons and organisations that the existing Chapter 3 is inadequate and unduly

qualified the stated rights and freedoms in an over-zealous attempt to protect the interest of the State' (*Final Report of the Joint Select Committee of The House of Parliament on Constitutional and Electoral Reform* (tabled in Gordon House May 31, 1995, p 8 para. 35). I shall call this Joint Select Committee, the first Joint Select Committee because a second one was appointed some years later to continue the deliberations on constitutional reform. The same report noted that the 'new Chapter 3 better reflects modern thinking' and it was noted 'that in the new Chapter 3 individual rights are protected not only from the State but from '*any other persons or body*' (p 9 para. 38).

[193] Even before this report there was the *Final Report of The Constitutional Commission of Jamaica* (February 1994). That report attached a recommended draft bill of rights as an appendix. This report did not mention section 8 of the FC. It did not perhaps because the FC was not in place until 1996. The IC did not include horizontal application. The Joint Select Committee by the time of its report in 1995 would have had the Constitutional Commission's Final Report of 1994. It was the Parliamentarians and not the Commission who specifically spoke to protecting the rights not only from the State but also from any other person or body.

[194] After the report of the first Joint Select Committee, things did not move apace and another Joint Select Committee (the second Joint Select Committee) was appointed 2000/2002. By this time the FC had become law in South Africa. The second Joint Select Committee produced its own report. In the introduction to this report there is this paragraph (the report before the court was not paginated and neither did it have numbered paragraphs):

> *Two issues must be mentioned in this introduction. First, it should be noted that there are significant implications of the approach recommended in this Report, concerning "who should be bound". (sic) Those implications have been*

indicated. In the end, your Committee is strongly of the view that constitutional rights and freedoms should bind not only the State, as in the traditional approach taken in the existing Constitution and other older Constitutions, but, in addition, as in some of the modern Constitutions such as the Constitution of South Africa, natural and juristic persons to the extent that those rights and freedoms are applicable, taking into account the nature of the right and of any duty imposed by that right.

[195] In the body of the report there is this paragraph:

The Committee discussed, extensively, the question whether the constitutional protection of the fundamental rights and freedoms afforded by the proposed new Chapter 111 of the Constitution should be extended to cases of infringement by private persons.

[196] The second Joint Select Committee's report refers to an Advisory Group which recommended extension of protection to deal with infringements by private citizens. Among the reasons given by the Advisory Group was that in 'the modern state private persons and entities command great resources and exercise far-reaching powers which are capable of having an adverse impact on the rights and freedoms of other persons and entities' and [m]odern development has largely involved the privatization of traditional Government activity.'

[197] The report then referred expressly to the Constitutions of South Africa, Namibia and Malawi. Reference was also made to the New Zealand Bill of Rights Act, 1990 and the United Kingdom's Human Rights Act, 1998 as well as the Canadian Charter of Rights and Freedoms.

[198] The second Joint Select Committee's report referred expressly to section 8 of the FC and concluded that 'the constitutional protection of fundamental rights and freedoms afforded in the proposed new Chapter 3 should be extended to cases of infringement by private persons.' The second Joint Select Committee recommended a provision which became, with immaterial modifications, section 13 (4) and (5).

[199] I must confess that I have always had and still have grave doubts about the propriety of using these materials in aid of deciding what the Charter or any Act of Parliament means. My reservations are grounded in the following considerations. First, it is not beyond possibility that legislators may form the view that the judicial branch is consulting their deliberations they may start to make all sorts of pronouncements concerning the meaning of legislation which they hope the court will adopt. Second, the very process of legislative enactment (and a Charter does not differ in this regard) is subject to dialogue, debate, alteration and modification. The finished product is often times not the result of agreement by all sitting in the legislative chamber but the result of a majority vote. The prompted on legal commentator to say that the statute that emerges looks like more like the one that should have gone in and the Bill that goes in looks more like the statute that should have emerged. In other words, the Bill introduced is usually the product of a well-trained draftsman skilled in the technical art and he is usually trying to produce a coherent and interlocking enactment. During the process, interest groups and influential parties have their say. Some legislators alter their opinions as the debate ensues. In light of this the Government Minister who introduced the Bill may be forced to make all types of concessions here, do a bit of horse trading there and compromise elsewhere so that the statute which is passed is no longer the product of a careful draftsman but has been 'victimised' by the democratic process. Third, it means that any stated purpose of the Bill at the time of the introduction must now be read with caution since the finished product does not necessarily reflect in toto what was said at the outset. Even Stefan Vogenauer, in his *A Retreat from Pepper v Hart? A reply to Lord*

Steyn, OJLS, 2005, 25 (4), 629 – 674, in which he mounts a valiant attack on Lord Steyn's extrajudicial questioning of **Pepper v Hart** [1993] AC 593 (HL), had accepted that the there was a step back from that decision. It is my view that Mr Vogenauer has not effectively answered Lord Steyn's concerns and neither has he dealt effectively with Dr Aileen Kavanagh's critique in *Pepper v Hart and Matter of Constitutional Principle,* LQR 2005, 121 (Jan), 98 – 122.

[200] The concern for me then is not what the various Select Committees intended but rather what words were used in the Charter. I have no desire to find out the intention of the majority, a difficult task enough, to say nothing of finding out the intention of the entire legislature. The starting and ending points must be the words used having due regard to the fact that a Charter of Rights has been enacted. The Select Committees as helpful as they are do not make law. They have no authority to enact any statute or bill of rights. They make a report to the legislature which may be accepted by the majority.

[201] By any analysis the legislators have used words that make it plain that one private citizen can seek to enforce any right being infringed by another private citizen. For the first time in Jamaica's constitutional history we now have explicit horizontal application of fundamental human rights. It may be argued that under the old bill of rights horizontal application was possible. That would have been an argument from implication. Now, it is explicit and there is no need for an argument from implication.

[202] From all this I can now say definitively, in answer Mrs Gibson Henlin's submission, that horizontal application is now part of Jamaican constitutional law. The position was arrived at by the legislature after full and careful consideration. There is no doubt that this Charter, in time, will prove to be the most fundamental change to our legal system since 1655. The horizontal approach with all its implications will change private law in ways not yet appreciated and will have to be worked out as the circumstances require.

[203] It is vital to notice what section 13 (5) says. It states that a provision of the Charter is binding on natural and juristic persons if and to the extent that it is applicable having regard to the nature of the right and the extent of the duty imposed by the right. The wording suggests that a Charter right may not apply to a private citizen at all or it if does then it may not apply to the same extent as it would to the State.

[204] Lord Gifford QC sought to say that section 13 (5) gives one private citizen against another private citizen the full extent of the rights he would against the State and the only limitation would be whether the citizen accused of breaching another's rights could say that it was demonstrably justified in a free and democratic society. I don't agree. One cannot get this interpretation even on a generous interpretation. Lord Gifford QC is rewriting the provision. The wording is that the Charter right is applicable to natural and juristic persons to the extent that the particular right is applicable having regard to the nature of the right and the extent of the any duty imposed by the right.

[205] Mrs Foster Pusey QC suggested that the new standard of 'demonstrably justified in a free and democratic society' may apply only to the State and a different standard applies to private citizens. The learned Solicitor General suggested that the court may engage in a balancing of various considerations in the instant case in deciding whether Mr Tomlinson's rights prevail in this case. These are undoubtedly helpful suggestions but in light of my conclusion regarding the content of the rights relied on by Mr Thompson I do not have to engage in such a delicate exercise. The balancing with have to await another day. I note that Paulette Williams J has addressed the issue of balancing but I reserve judgment on this.

[206] The premise of Lord Gifford's QC's submissions seems to be the absence of Jamaican equivalent of section 8 (3) of the FC. This is false comfort because once the court decides that the right applies to private citizens, then it must necessarily be the courts, in accordance with the words of section 13 (5), to say

to that extent the right applies. The extent to which the right applies to private citizens necessarily affects their private law obligations. The courts cannot leave the parties in limbo. Merely to say that it applies without going to say what it means in practice would be an inappropriate. The courts are the only institutions that can give a legally binding interpretation of the law. Others are entitled to their interpretation until the courts decide the matter. It is my view that direct application of the Charter to private law cannot mean that whole swathes of the law are erased thus creating a great legal vacuum. If there is incompatibility between the common law and Charter then there are only two remedies: legislation or judicial moulding of the common law to reflect the constitutional values. Until legislation is passed to deal with the situation then it must be for the courts to say what the new principle is. In effect we are at the same position as if section 8 (3) of the FC had been enacted in Jamaica. This is consistent with the separations of powers. The legislature enacts the law, the executive enforces the law and the courts interpret the law. On this premise, it is my view that an equivalent of section 8 (3) of the FC is not required for the courts to undertake the task of re-examining the common law in light of the Charter. After all if the Charter is the supreme law then that must mean supreme over every other law including the common law. The courts are the only institutions established by law to say what the law is. It is not because judges are inherently wiser than others but rather it is the result of the Westminster model based on the rule of law and the separation of powers.

[207] Some may say that this role should not be undertaken by the courts but I would suggest that the other position (which is the only one left) would be worse because it would mean that following a finding of incompatibility there would be a great hole in the law. Private arrangements would be in doubt. It would be chaos. The lesser evil is retaining the common law as adjusted by the courts and that operates until the legislature acts, if it chooses to act. There is no other practical solution. It may well be that the risk of a legal hole prompted the legislators in South Africa to address the matter by putting in section 8 (3). It may well be that

the section is a removal-of-doubt provision. It avoids the arguments suggested by Mr Small QC that the courts do not have the power to adjust private law rights in light of the Charter. However, as should be clear, I do not accept Mr Small's QC's submission on this point.

[208] Could it be seriously contemplated that in Jamaica, in light of the Charter's reference to non-discrimination (section 13 (3) (i), that a court in this country would enforce a private law arrangement based on explicitly racist considerations? Would a court, influenced by the Charter, not say that any such provision is contrary to public policy? If so, would this not be indirect horizontal enforcement of the Charter?

Whether section 13 (3) (c) and (d) of the Charter has the meaning contended for by Mr Tomlinson

[209] The next stage of the enquiry is to determine whether the content of section 13(3) (c) and (d) enables Mr Tomlinson to sustain his claim. If this is not the case, then the question of horizontal application becomes academic.

[210] Lord Gifford QC submitted that both of these defendants are subject to the Charter and must provide air time to the claimant. Unless this is done then Mr Tomlinson will not be able to enjoy his Charter rights. Respectfully, this is putting the matter the wrong way round. The correct view is to determine the content and then decide whether the content of the right applies to the defendants. Lord Gifford's QC's submissions assumes that Mr Tomlinson has a prima facie right to be granted access to the defendants' property in order to use the frequencies allocated to them. It is this assumption which must be scrutinised.

[211] The factual premise of Lord Gifford QC rested on market share. The argument goes something like this. TVJ and CVM together control the major share of the market of television viewers. This means that they have significant control over what viewers watch and by extension what views they are exposed

to. The significance of television and its influence is well documented. Under their licence there is a term which requires them to operate in the public interest. This means that they have an obligation to air unpopular views because it is in the public interest that all views, unless they are urging unlawful or criminal conduct, be allowed to compete in the market place of ideas. Persons like Mr Tomlinson do not have the means to establish their own broadcasting facilities and so if they are to enjoy the right of freedom of expression and freedom to receive and disseminate ideas in the context where there are dominant broadcasters then the editorial right of the broadcasters must be restricted. That restriction means in practice that they must make available to persons like Mr Tomlinson their time and facilities to that their view can be broadcast. Section 13 (5) has the effect of limiting the private law rights and editorial control of media owners. If the Jamaican Constitution of which the Charter is a part is the supreme law then the court must give effect to Charter in the manner proposed by learned Queen's Counsel. Supreme means standing above all others. In this context, the Charter stands above private law rights and any common law right. That the Charter stands above common law rights should not be in doubt in light of the Board's decision in **Lambert Watson v R** (2004) 64 WIR 241, Lord Hope **[16]**, Lord Bingham, Lord Nicholls, Lord Steyn and Lord Walker **[56]**.

[212] Lord Gifford QC went on to say that this leads to the conclusion that section 13 (5) has the effect of cutting down the scope of editorial control in favour of the exercise of the freedom of expression and freedom to receive and disseminate information. This is so even if it is not accepted that as between private citizens the Charter rights operate to the full extent as between State and citizen. These Charter rights are high-priority rights in the scheme of things. They are essential to human dignity and so must be given the fullest protection even, if necessary, at the expense of private law rights.

[213] The argument ends by saying that any denial of airtime is necessarily a restriction on Mr Tomlinson's rights and such restriction can only stand if it can

be shown by TVJ and CVM that the restriction is demonstrably justifiable in a free and democratic society. The very way in which Lord Gifford QC puts the case reveals the vice in his submission. The submission assumes, rather than establishes, that Mr Tomlinson has a right to use the defendants' equipment, broadcasting facility and allocated frequencies to propagate his view. If he has no such right then clearly any refusal by the defendants cannot make liable for any breach of these Charter rights.

[214] In seeking to indicate, if not define, the extent of the rights granted under section 13 (3) (c) and (d) Mrs Gibson Henlin made these submissions. Learned counsel submitted that freedom of expression and freedom to seek and disseminate ideas are not new rights. They existed at common law and existed before the Jamaican Constitution. She is not saying that the Charter has simply codified the understanding that existed before. What she is saying is that placing them in the Charter in and of itself does not change the content of the rights. What has happened is that these rights now have special protection but special protection does not add to the content of the right.

[215] Mrs Gibson Henlin's point is that if the understanding of the duty imposed by the right has never extended to imposing a duty on a private citizen to make his property available to another so that another can express himself and disseminate information, by what process of analysis or reasoning can section 13 (5) suddenly change that position? How does an understanding of the meaning of a right which imposes no duty on a private citizen to allow another to use his front lawn to reach his target audience now become a duty to be imposed on the lawn owner? The right to speak cannot mean that private citizen A has the obligation to put a microphone in the hand of private citizen B as well as provide him with speakers.

[216] Mrs Gibson Henlin submitted that no one anywhere - not in the United States of America under the First Amendment, not the European Court of Human

Rights, not the Supreme Court of England (formerly the House of Lords) and yes, not even the CCSA - has ever asserted that these rights extend to using other person's property to express yourself without that person's permission.

[217] Counsel relied on a number of authorities - case law and academic, in support of her point, most of which were drawn from Canada. Mr Hugh Small QC made common cause with Mrs Gibson Henlin on this point. He cited decisions from the United States of America and from Europe. Cases from the Commonwealth Caribbean, Sri Lanka and the Solomon Islands were cited. It is appropriate to examine these cases to see if they shed any light on the content of the Charter rights in view in this case.

Commonwealth Caribbean

[218] In Benjamin v Minister of Information (2001) 58 WIR 171, an appeal from Anguilla, the issue was whether removing a radio programme from a government-run station for unsatisfactory reasons amounted to a breach of the constitutional right to freedom of expression. The background was that the radio station had introduced a call-in programme permitting citizens to voice their views. The issue of the introduction of a national lottery arose. The talk show host expressed the view that the lottery was not appropriate. He even added that he believed that it was illegal. The Government, without speaking with the host, suspended the programme. The host fought back by launching a claim alleging that his constitutional right to freedom of thought and expression was breached. A second claimant, a regular listener and contributor alleged that her right to freedom of thought and expression was infringed. The trial judge agreed. The Court of Appeal reversed the trial judge and the Privy Council restored the trial judge's ruling. The Board held that the Government was bound by the Constitution. The removal of the programme was not justified under any of the exceptions stated in section 11 (2) of the Anguillan Constitution. The Board agreed with the trial judge's assessment that 'there was an arbitrary or capricious withdrawal of a platform which had been made available by the Government'

(**[51]**). At paragraph **[49]**, the Board noted that the decision was not made on the basis that the programme had lost audience participation or public appeal or that it was intended from the outset to be for a limited period. Thus the claimants succeeded on the basis that the Government's withdrawal of a platform for the public to exercise its right to freedom of expression for arbitrary reasons was a constitutional infringement. Their Lordships were saying that the host and listeners had lost the right, arbitrarily, to receive ideas and impart information; the callers lost the right to impart ideas and information without interference.

[219] It is important to observe that the Board was prepared to accept the jurisprudence from the European Human Rights Commission that freedom of expression does not 'include a general and unfettered right for any private citizen or organisation to have access to broadcasting time on radio and television in order to forward its opinion' (**[31]** quoting **X and the Association of Z v United Kingdom** (1971) 38 CD 86 at 88). The Board citing the same case accepted that in some instances the denial of broadcasting time to one or more specific groups or persons may raise an issue under article 10 of the European Convention on Human Rights.

[220] How the Board expressed itself is important. Their Lordships did not say that a denial of broadcast time was necessarily an automatic breach of article 10. Their Lordships said that the denial *may* raise an issue under article 10.

[221] The Board also held that 'no-one has a right in all circumstances to insist on holding a meeting in another individual's house' (**[32]** Lord Slynn). Implicit in this expression is the idea that the right to freedom of expression does not automatically translate into a right to use another's property to express one's self.

[222] The outcome of the case turned, it appears, on the distinction between withdrawing a forum for freedom of expression on the one hand and not providing such a forum. In the **Benjamin** case, the Government had provided the means to exercise that right and had withdrawn it arbitrarily and in those

circumstances the denial of access to the station amounted to a breach of the right to freedom of expression. The case is not authority for the proposition that the Government was under an obligation to provide a forum for the exercise of the right of freedom of expression where none exists. This was a case of vertical application.

Canada

[223] In the case of **New Brunswick Broadcasting Co Ltd v Canadian Radio-Television and Telecommunications Commission** (1984) 13 DLR (4th) 77, 79 Thurlow CJ held:

> *The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter and use a public building for such purposes. And it gives no right to anyone to use the radio frequencies which, before the enactment of the Charter, had been declared by Parliament to be and had become public property and subject to licensing and other provisions of the Broadcasting Act …*

[224] The Canadian Supreme Court in **Haig v The Chief Electoral Officer and The Attorney General of Canada** [1993] 2 SCR 995 held - in the context of whether the deprivation of an opportunity to vote in a referendum amounted to a breach of section 2 (b) of the Canadian Charter, that is, the right to freedom of expression - that the content of the right to freedom of expression consists of not placing impediments in the exercise of the right rather than affirmative obligations on anyone to provide the means to exercise the right. The only difference between the justices was on the role of the Chief Electoral Officer but no justice

dissented from L'Heureux-Dubé J's assessment that (after referring to thirteen cases in which the Supreme Court had exhaustively discussed the values underlying the right to freedom of expression) 'case law and doctrinal writings have generally conceptualized freedom of expression in terms of negative rather than positive entitlements' and while it had not yet been decided whether the government should provide a particular platform to facilitate the exercise of the right '[t]he traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(*b*) prohibits gags, but does not compel the distribution of megaphones.'

[225] No case from Canada was cited that has cast doubt on the essential proposition that freedom of expression is conceptualised more in terms of prohibition than a positive duty. The closest one comes to finding a case suggesting otherwise is that of **Native Women's Assn. of Canada v Canada** [1994] 3 SCR 627 where Sopinka J held that:

> *Therefore, Haig establishes the principle that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or a group. However, the decision in Haig leaves open the possibility that, in certain circumstances, positive governmental action may be required in order to make the freedom of expression meaningful. Furthermore, in some circumstances where the government does provide such a platform, it must not do so in a discriminatory fashion contrary to the Charter.*

[226] It is to be noted that Sopinka J was prepared to accept that in some circumstances governmental action may be necessary to give effect to the right of freedom of expression. I understand this to mean a possible obligation on the government to provide the means to exercise the right.

[227] What the cases from Canada have shown is that even where the courts have accepted, conceptually, that freedom of expression in some instances may impose a positive duty on the government to take action to give substance and meaning to the right of freedom of expression, it is not a decision easily reached. If this is the case in relation to a government then the position is even more difficult to reach when deciding whether private citizens are under a similar obligation. Thus far, no case has been found where such a positive duty was in fact imposed on any government to provide megaphones or microphones to private citizen to air his point of view. If this is so in the case of a government in relation to its citizens under a Charter of Fundamental Rights, then it is even more difficult to impose a positive duty on a private citizen the obligation to make his property available to another private citizen in order for that latter citizen to exercise his right to freedom of expression.

[228] It may be that in Canada the reason for the absence of a discussion of freedom of expression taking place in the context of private broadcasters is that the Canadian position is that the Charter does not apply horizontally but only vertically.

United States of America

[229] The case of **CBS Inc v Federal Communications Commission** 101 S Ct 2813; 453 US 367, a decision of the United States Supreme Court, does not avail Mr Tomlinson. In that case a statute was passed which imposed directly on the broadcasting networks the obligation to make time available in their programming for legally qualified federal election candidates for federal office. The statute provided that their licences may be revoked for wilful or repeated failure to act within the statute. The law was challenged by the broadcasters on the basis that it infringed their right to freedom of expression by eroding their editorial discretion. Despite the Constitution of the United States and its well known emphasis on freedom of expression, that court reiterated that the Supreme Court of the United States has never ‘approved a general right of access to media’ (p

2830; p 396). This was said even after the majority referred to the fact that there were limits to a broadcasting licence. One of these limits was that a licensee had no constitutional right to monopolise a frequency to the exclusion of his fellow citizens. There was even reference to authority that stated that there was nothing in the First Amendment which prevented the government from requiring a licensee to share his frequency with others. One case referred to by the court even spoke to 'the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experience' and that 'it is the right of viewers and listeners, not the right of broadcasters which is paramount.' Even with these words the court did not recognise any general right of access to the media.

[230] From **CBS** there are important lessons and this ties in with the horizontal application principle which I have already said applies to Jamaica. First, it was legislation that set out in clear terms and conditions under which the broadcasting networks were to make available air time for legally qualified candidate for federal office. Second, even with legislation, as a reading of the **CBS** case will show (majority and minority judgments), the question of a private citizen being granted access to another's broadcasting equipment, material and personnel is a difficult matter. The case revealed in some instances, haggling over the date and time of day of the broadcast, the length of time of the broadcast, costs and a host of other issues.

[231] If I may be permitted to remain in the United State a while longer. The issue of allocation of frequencies to broadcasters has been discussed by the United States Supreme Court for the better part of seventy years ever since the establishment of the Federal Communications Commission 1934 ('FCC'). The FCC replaced the Federal Radio Commission ('FRC') which was established in the 1920s. Before the FRC, radio transmission was left to private industry without any government regulation. The outcome was described as a 'cacophony of competing voices, none of which could be clearly and predictably heard' (**Red Lion Broadcasting Company v FCC** 395 US 367, 376). It was in this context

that the Federal Government stepped in to regulate the allocation of broadcast frequencies. In so doing the idea that licensees were actually granted permission to use a public resource was more clearly articulated. The consequence was a greater and forcefully stated proposition that the licensees had no right to exclude from the air waves views that they did not like. Hence the insistence by the Supreme Court that the licensees right to free speech did not grant them unbridled censorship over what views were articulated. In addition, there has been an insistence that the regulation of the frequencies was not for the benefit of broadcasters but for the listening and viewing public who should be able to receive a clear crisp broadcast rather than the cacophony of competing voices. This may well explain why the concept of freedom of expression is not applied in the same way to newspapers because, historically, newspapers never required a licence and it was not clear that they were utilising a public resource in the same way as broadcasters.

[232] In **Red Lion Broadcasting Company v FCC** the broadcasters challenged the provision in the relevant statute that enabled the regulator, when granting licences, to impose conditions on the broadcasters such as requiring them to (a) provide a tape of any personal attack on a person and grant that person equal time to reply; and (b) to give both sides of an issue fair coverage when the broadcasters are covering a matter of public interest. The broadcasters challenged these restrictions on the ground that they infringed their right to freedom of expression. The challenge failed but Justice White who delivered the opinion of the court discussed the relationship between the regulator's power and the broadcasters' right to freedom of expression. The broadcasters had argued that they had the right to exclude anyone from the use of the frequencies allocated to them. This view was robustly rejected. White J noted at page 387 that:

The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.

And at page 390:

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

[233] The rationale for this was stated by White J at page 389:

… as far as the First Amendment is concerned those who are licensed stand in no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

[234] The restriction imposed on the licensee was directed at enhancing free speech and the broadcasters had to act in accordance with the regulations which were found to be reasonable. If they were not imposed then persons who might proffer views contrary to the broadcasters' views would be shut out. Thus regulation of the airwaves was not intended to confer a monopoly but rather to have a controlled environment not because the government wished to control what was said or by whom it was said but because there were limited frequencies which had to be allocated properly so that the public would receive maximum benefit from the right to freedom of expression which includes the notion of receiving ideas. The crucial point I wish to make is that there is nothing in **Red Lion,** in spite of the strongly expressed view that the licensing of broadcasters was for the public and not the licensee, that supports the view that the public had a right of access to the microphones of the broadcaster.

[235] In **Columbia Broadcasting System v National Democratic Committee** 412 US 94. Here, the FCC had issued two guidelines that permitted broadcasters who met their 'obligation to provide full and fair coverage of public issues' to decline to accept editorial advertisements. The problem arose when the Democratic Party approached some broadcasters to purchase air time. Relying on the FCC's guidelines, the broadcasters refused. Ultimately the matter got to court and the Court of Appeal reversed the Commission's decision on the basis that it breached the First Amendment. The Court of Appeal was reversed by the Supreme Court.

[236] The majority opinion in the Supreme Court reviewed the history and philosophy behind regulation of broadcasters and made important observations which are of value in this case. The legislature has never enacted a law which gave a right of access to the general public who may wish to speak on an issue of public importance. It was also noted that the FCC's view seems to have been that the public interest is served by imposing on broadcasters two positive duties. First, the broadcaster must provide adequate coverage of issues of public

importance. Second, the broadcaster must fairly reflect differing viewpoints. The court noted that because it was impossible to provide air time for all viewpoints then of necessity there must be editorial discretion residing in the broadcaster. Thus the broadcaster is permitted to exercise journalistic discretion in deciding how best to meet the two obligations referred to above.

[237] The underpinning idea of this approach by the FCC and the courts is that it was appreciated that broadcasters are not quite like newspapers. The broadcasters utilised a valuable and limited public resource. Broadcasting is subject to an inherent limitation, namely, a limited number of frequencies and so these frequencies are apportioned to applicants. In light of this it was recognised that broadcasters have an important responsibility. It was therefore recognised that the licensee cannot decide that important issues or views will not be broadcast because he does not like them.

[238] Lord Gifford QC has relied on the dissenting judgment of Brennan J in the **National Democratic Committee** case. Brennan J took the view that the broadcasting spectrum is public property and the private broadcaster is really granted a privilege (licence) to use an important public resource. This public resource is so greatly regulated by the Federal Government that it can be said that there is significant government involvement. This involvement of government through regulation was so pervasive, so extensive and so elaborate that despite the fact that the industry was privately run and despite the fact that the Bill of Rights applied vertically, the First Amendment should be applied horizontally to the broadcasting industry. The First Amendment states that, Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. According to Brennan J this right was not to protect broadcasters but the public. The public had a right to gain appropriate access to ideas and information. The reasoning continued that ‘absolute editorial control in

the hands of a few Government licensees is inimical to the First Amendment, for vigorous, free debate can be attained only when members of the public have at least some opportunity to take the initiative and editorial control in their own hands' (p 189).

[239] Brennan J held that freedom of speech does not exist in a vacuum. There must be an effective forum – 'public park, a school room, a town meeting hall, a soapbox, or a radio and television frequency' – to exercise the right. His Honour concluded that 'in light of the current dominance of the electronic media as the most effective means of reaching the public, any policy that absolutely denies citizens access to the airwaves necessarily renders the concept of 'full and free discussion' practically meaningless. Note that even Brennan J did not recognize a right to give a microphone to anyone who wishes to speak on any subject at any time.

[240] Despite Brennan J's eloquence the stubborn fact is that the United States has steadfastly held to the proposition that freedom of expression (inclusive of speech) does not include the right to use someone else's medium as your platform to disseminate your views. This is so despite the recognition that radio and television by their nature are unique. They are unique in two respects. First, there are not enough frequencies for all who wish to broadcast because the number of frequencies is in fact limited. Second, the granting of a licence to a broadcaster does not mean that everyone can have access to a microphone. The solution to the first problem adopted in the United States and in Jamaica is that the frequencies will be allocated by a regulator. The solution to the second problem is to leave broadcasters to decide who has access to the airwaves. The regulator may impose restrictions on broadcasters, as was done in the United States, such as requiring them to cover a variety of views on matters of public importance but the regulations must be compatible with the fundamental rights. More will be said about this when I am dealing with editorial control.

[241] The last case I will refer to from the United States is **Avins v Rutgers** 385 F. 2d 151, United States Court of Appeals Third Circuit, Judge Maris stated 'the right to freedom of speech does not open every avenue to one who desires to use a particular outlet of expression' and neither 'does freedom of speech comprehend the right to speak on any subject at any time' (page 153). Further appeal to the Supreme Court was denied.

[242] The cases cited from the United States of America disclose that the Federal Government used the FCC to regulate broadcasting. The FCC was given the power to make rules for broadcasting. The FCC under what is called the Fairness Doctrine developed the two positive duties referred to above. Consistent with this approach the FCC 'on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities' (**CBS v National Democratic Committee** Burger CJ, p 113). This last point is vital because it is impossible to believe that these rulings by the FCC would have stood to today had it been the case that the United States' constitutional guarantee of free speech gave everyone a right of access to use another's broadcasting facilities.

[243] A legitimate question to ask is why is there insistence in the United States that free speech does not encompass the right to use another's private property? The reason appears to be that the First Amendment was intended primarily as a limitation on the actions of Congress and the federal government (**McIntire v Penn** 151 F 2d 597, 601 (Biggs, Circuit Judge)). The same underlying principle can be applied to all bills or rights: they are intended to guarantee rights to citizens against their governments. This explains why section 13 (5) of the Charter is written in the way that it is: the provisions bind private citizens 'if, and to the extent that it is applicable.' These words recognise, implicitly, that it would be reckless to say that the Charter binds private individuals to the same extent and in the same manner as it binds the government. Thus section 13 (5)

appreciates that some provisions of the Charter may not bind private citizens at all and if they do then not the same extents as it binds the government.

Europe

[244] Under Article 10 of the European Convention on Human Rights the freedom of expression guarantee does not confer an unfettered right on any citizen to have access to radio or television to air his views except under exceptional circumstances (**Haider v Austria** (1983) 83 DR 66).

[245] In **Handyside v The United Kingdom** (1979 - 80) 1 EHRR 737 the European Court of Human Rights indicated that freedom of expression is one of the important components of a democratic society and it is not only for disseminating ideas that are well regarded or inoffensive but also for ideas that 'offend, shock or disturb.' I accept this as a general proposition but that is a far cry from saying that one has the right to use another's property to propagate one's views.

England and Wales

[246] In the case of **R (On the application of Animal Defenders International) v Secretary of State for Culture** [2008] 1 AC 1312, the applicant sought to say that the refusal to accept their advertisement for broadcast by the Broadcast Advertising Clearing Centre (BACC) was in breach of its right to freedom of speech under article 10 of the European Convention on Human Rights. The BACC was an informal body established and funded by commercial broadcasters to monitor proposed advertisements to see if they complied with relevant laws and regulations. If they did not then they were not accepted. The BACC declined to accept the applicant's advertisement on the basis that it would breach the relevant statute as it was thought to be a political advertisement. The applicant lost in the Divisional Court but was given a leap frog appeal to the House of Lords which dismissed the appeal. The House held, among other things, that the restrictions did not amount to an infringement of any of the applicant's free

speech rights. Lord Bingham whose support of human rights cannot be questioned observed at paragraph 26:

> *While the right to freedom of expression is not absolute, and no one has a right of access to the airways, the importance of free expression is such that standard of justification required of member states is high and their margin of appreciation correspondingly small …*

[247] Even though this was a general statement its importance lies in the fact there is no recognition of any general right of access to airways by anyone who wishes to exercise the right to freedom of expression.

[248] Not even the case of **Regina (Prolife Alliance) v British Broadcasting Corporation** [2004] 1 AC 185 despite its strong statements regarding free speech was prepared to override editorial decision making of the BBC and other broadcasters in refusing to air a particular broadcast. This case has to be read carefully because it was a case of judicial review and the matter at hand was a political broadcast which attracted special considerations. The BBC raises its money from the public under a licensing system where member of the British public have to pay a licensing fee. TVJ and CVM are commercial broadcasters who are beholden to shareholders and any other investor. Lord Hoffman's observation at **[58]** in my respectful view is not applicable to the first two defendants. They are not public bodies under any duty to act fairly. They are not susceptible to judicial review. Lord Hoffman's observations, without closer scrutiny, cannot be applied to the first two defendants.

[249] Lord Gifford QC has placed emphasis on certain passages, particularly from the judgment of Lord Hoffman. His Lordship, in speaking of article 10 of the European Convention on Human Rights, stated that '[t]here is no human right to use a television channel' (**[57]**). His Lordship stated that even though there was

no right to a television channel there was nonetheless a ‘right to fair consideration for being afforded the opportunity to do; a right not to have one’s access to public media denied on discriminatory, arbitrary or unreasonable grounds’ (**[58]**). Lord Hoffman then refers to the **Benjamin** case as an application of this principle. It is not clear whether Lord Hoffman distinguished sufficiently, denying access to public media on discriminatory, arbitrary or unreasonable grounds where access was already provided and not providing the means to exercise the right. **Benjamin** It will be recalled was a case in which the government had provided the means to express the freedom of expression and then withdrew it on arbitrary grounds. This is very different from an obligation to provide the means for exercising the right where the means do not exist or has not been made available to those who wish to speak. No such obligation has been found to exist under the right to freedom of expression; not even by Lord Hoffman.

[250] Lord Scott (dissenting) while accepting that the right to impart information and ideas does not necessarily mean that the wherewithal to do so must be provided, sought to say that radio and television were quite different from newspapers because the former depended on a licence granted by the State. The ability to reject an advertisement should therefore be restricted accordingly.

[251] It is my view that the proposal of Lord Hoffman and that of Lord Scott fail to take account sufficiently of the freedom of expression also enjoyed by the broadcaster and neither did any of their Lordships give proper recognition to the role of editorial control in deciding how the broadcaster gives effect to rights and obligations in the licence granted to it. The broadcaster must have the discretion to decide how to fulfill its mandate under the relevant statute or licence. What the broadcaster needs to do is to decide how to cover a particular issue. Hopefully, the method chosen to cover the issue will be effective in exposing the public to the various view points on the subject. This cannot mean granting access to all who wish to speak on an issue; it is simply impractical. In this very case, Mr Tomlinson obviously wanted to secure facts to launch his claim. What if many

like minded persons band together to engage in a similar campaign? It is not hard to see the resources and time of the broadcasters being consumed in charting an appropriate response to each request. For Lord Hoffman, it appears it would not be enough for the broadcasters to say, 'We have provided extensive coverage to the issue.' They would have to consider whether each person who wishes to speak should be permitted his time.

Summary of comparative analysis

[252] From the survey of jurisdictions undertaken, even taking into account the dissenting voices, it is safe to say that there is simply no suggestion that the government must provide a forum or a microphone to everyone who wishes to speak on an issue. If there is no such obligation on the government surely it is extremely unlikely that by some process of reasoning a private citizen would be subject to greater obligations than the government simply because some provisions of the many bills of rights apply horizontally.

The meaning of section 13 (3) (c), (d) and (5)

[253] Looking now at section 13 (3) (c) of the Charter which provides that all persons enjoy the right to freedom of expression it is important to note that the legislature chose the word 'expression' and not 'speech.' This is so because it was clearly appreciated that not all expression can be called speech, as in the spoken or written word. Without being exhaustive, speech includes different forms of expression such as speech, sign language, dance, drama, cartoons, poetry, and depending on the context, silence. It seems to cover just about any form of expression by which meaning can be conveyed from the mind of the communicator to the person intended to be communicated with. The word used permits of a wide meaning – expression is not limited to speech or word and there is nothing in the context which excludes gestures, miming and such like. The word '*expression*' can legitimately bear the meanings indicated.

[254] There is no doubt that Mr Tomlinson has the right of freedom of expression. There is no doubt that he can express himself in any manner that is

capable of transferring an idea from his mind to another. Under section 13 (3) (c) Mr Tomlinson has the right to express his views that some may find offensive, shocking or disturbing. However, based on the comparative analysis done as well as examining the actual words of the provision in their immediate context and having due regard to the fact that this is constitutional provision, it is impossible to glean, regardless of how generous one's interpretation to erect a right from section 13 (3) (c) which demands that anyone provides forum, a microphone and an audience for the person who wishes to exercise the right. The language and full context, history as well as the usual understanding of the right simply do not give rise to this possibility. Neither does this provision in combination with section 13 (3) (d) suggest such a possibility.

[255] In my view the right of freedom of expression is so closely related, but not necessarily synonymous with the right to seek, receive, distribute or disseminate information, opinions and ideas that one perhaps cannot speaking meaningfully of one without the other. In some instances, a person may wish to express himself privately and does not want to disseminate and distribute his expression. The fact that these rights are closely associated with each other and the fact that one may be impaired without the other, does not mean that Mr Tomlinson has a right to use another person's property to disseminate his views.

[256] It is important to consider the meaning of the noun *media* in section 13 (3) (d). Lord Gifford QC suggested that it meant specific entities such as TVJ, CVM and PBCJ. Lord Gifford QC embarked on the very difficult task of trying to extract a right to use other person's property to disseminate one's ideas, by relying on the power and influence of the media. When it was pointed out to him (in submissions made by Mr Small QC) that media in section 13 (5) may well mean the many ways or methods of communication as opposed to actual newspapers and broadcasters, learned Queen's Counsel suggested that both meanings may well be intended by the provision. I do not agree with Lord Gifford QC.

[257] A close look at section 13 (3) (d) shows that *seek*, *receive*, *distribute* and *disseminate* are verbs functioning as nouns or verb-nouns. The whole sentence (beginning at section 13 (3)) is, *The rights and freedoms referred to in subsection (2) are as follows … the right to seek, receive, distribute or disseminate information, opinions and ideas through any media…* right up to subsection 3 (s). Each paragraph and sub-paragraphs are separated by semi-colons and the full stop, signifying the end of the sentence only appears at the end of paragraph (s). Paragraphs (a) to (s) of section 13 (3) are listing or naming the rights that are guaranteed by section 13 (2). Section 13 (2) did not name the rights and until this was done by section 13 (3) no one would know which rights were protected and which rights were not. Hence the naming of the rights in section 13 (3) in some instance are properly nouns in their own right (abstract nouns such as the right to life) but in other instances there are verbs functioning as nouns (such as seek, receive, distribute and disseminate). The opening words of section 13 (3), namely, *The rights and freedoms referred to in subsection (2) are*, are part of the larger sentence comprising paragraphs (a) to (s).

[258] This means that although the rights in section 13 (3) (d), namely, *the right to seek, receive, distribute or disseminate*, had they stood alone would be verbs, the context in which they appear makes it clear they are functioning primarily as nouns. Had this part of the sentence stopped at disseminate, the meaning would be unclear because one would be asking, 'What is it that a person has the right to seek, receive, distribute and disseminate?' Other words needed to be added.

[259] Indeed, the preposition '*to'* could properly be placed before each of the verb-nouns but this was not necessary because the structure of the sentence makes it obvious that the infinitive form (the most basic form of a verb) of each verb-noun was what was intended even though '*to*' only appears before '*seek*'. The particular sentence construction using the infinitive form or the verbs used as verb-nouns demanded that other words be added to complete the meaning. Thus the nouns, '*information, opinions and ideas*' were added to complete the thought and declare with greater clarity what the person could do. In all this the verb-

nouns are still verbs (in this case transitive verbs and therefore can take a direct object) and it is permissible for them, by virtue of the grammar and syntax of the English language, to take a direct object even though they are functioning primarily as nouns. Thus the direct objects of the verb-nouns are '*information, opinions and ideas.*' In effect section 13 (3) (d) has noun phrases which function as the noun naming the activity or right guaranteed.

[260] On this reading the named rights guaranteed by section 13 (3) (d) in full extended form are the:

(i) right to seek, to receive, to distribute or to disseminate information;

(ii) right to seek, to receive, to distribute or to disseminate opinions; and

(iii) right to seek, to receive, to distribute or to disseminate ideas

[261] These rights could be even further expanded. Thus the right '*to seek*' could have read:

(i) the right to seek information;

(ii) the right to seek opinions;

(iii) the right to seek ideas.

The right to receive could have read:

(i) the right to receive information;

(ii) the right to receive opinions;
(iii) the right to receive ideas.

The right to distribute could have read:

(i) the right to distribute information;

(ii) the right to distribute opinions;

(iii) the right to distribute ideas.

The right to disseminate could have read:

(i) the right to disseminate information;

(ii) the right to disseminate opinions;

(iii) the right to disseminate ideas.

[262] As this expansion shows, it would be redundant and repetitive to set out the rights in this way thus the shortened form was used but that should not prevent us from using grammar and syntax to understand what is being said.

[263] The verb '*are*' used in the opening words '*The rights and freedoms referred to in subsection (2) are as follows*' is a state-of-being verb which has as its subject the words '*rights and freedoms.*' However, the expression '*rights and freedoms'* do not state what those rights are and thus they had to be enumerated in sub-paragraphs. State-of-being verbs do not denote action that moves from the subject to the object and therefore are intransitive verbs. There is no action being transferred from the subject through the verb to an object. The verb '*are*' cannot form a predicate on its own and therefore needs other words. The

additional words to complete the predicate are those found in paragraphs (a) to (s). The additional words, by virtue of English grammar rules, must refer to the same things or ideas named in the subject, namely, '*rights and freedoms*.' In this case the things named are found in paragraphs (a) to (s) and these paragraphs name the rights and freedoms enjoyed because the compound subject '*rights and freedom*' did not name the rights. The paragraphs (a) to (s) must necessarily be referring back to the compound-subject '*rights and freedoms*.' If it were otherwise then one would not know that *'rights and freedoms*' are protected. Since in paragraph (d) the verb-nouns are naming the rights, English syntax permits the verb-nouns to functions as nouns. Because they are verbs syntax and grammar permits them to take a direct object. This explains the nouns following the infinitive form of the verbs.

[264] The final words of section 13 (3) (d), *through any media* comprise a prepositional phrase showing the relationship between *media* and the rights in the same provision. The preposition *through* is showing the relationship or connection between the noun phrases and the noun *media*. The word *any* in this context is qualifying or adding more information to the noun *media* and is therefore functioning like an adjective. Media is a wide term which may refer to means of communication or to specific new dissemination entities. However, the context of the Charter strongly suggests means of communication and not specified news dissemination entities. News entities benefit to the extent that it relies or uses different modes of communication and so enjoy the same right as any other citizen. News entities established, rightly, cannot enjoy greater protection that ordinary citizens. What if the news entities have particular prejudices which cause them to skew the news in particular direction? Surely, citizens who may not have the financial ability to compete by establishing a rival news entity should be able to use any medium at his disposal to get his message out without relying on the established news disseminators.

[265] In this age of multiple means of communication including the internet, it is extremely unlikely that the framers would limit the word to specific entities. What if they disappeared? Could it be said that the right would cease to exist? The means of disseminating information would still exist. The purpose then is to give to Jamaicans the right to use any means of communication. For these reasons I do not accept Lord Gifford's QC's submission that *media* has the double meaning he suggests.

[266] In other words, the right does not depend on the existence of broadcasters; it is a right independent of them. The right is saying that persons can use modern communication systems to find, collect, disperse and deliver opinions and ideas and the State cannot prevent this unless the restriction is demonstrably justified in a free and democratic society.

[267] What this means is that on the face of it, the right to seek and distribute ideas does not readily accommodate the notion that one private citizen can compel another private citizen to use his property to do the reception and dissemination of one's ideas. I do not see how the right to seek, receive and disseminate opinions and ideas promoting respect for the human rights of homosexuals translates into a right, enforceable by court order, to use another private citizen's radio or television broadcasting equipment to propagate those views.

[268] I agree with Mrs Gibson Henlin when she says the content of rights of freedom of expression has not changed much over time, if at all. Section 13 (5) does not have anything to do with expanding or contracting the content of a right. What section 13 (5) does is to create the possibility of horizontal enforcement but it adds nothing to the content of the right.

[269] It is to be observed that section 13 (5) is actually predicated on the distinction between vertical and horizontal application of constitutional rights. This is reflected by the fact that section 13 (5) says that the rights are binding on

private citizens to the extent that they are applicable. This stands in sharp contrast to the way the Charter deals with the State and its agencies. The Charter does not say that the rights apply to the State and its agencies to the extent that they are applicable. The Charter says that it binds State and its agencies. The Charter says, 'You cannot breach any of these rights unless you can show that your conduct or proposed law is demonstrably justified in a free and democratic society.'

[270] In other words, section 13 (5) assumes that the content of the right has been determined and when that is done then there is a further enquiry to see whether the right is capable of binding the private citizen and if so, then the extent to which it binds the private citizen is to be decided having regard to the nature of the right and the nature of any duty imposed by the right.

[271] My comments are limited to the factual circumstances of this case. I have not addressed the possibility of whether an internet service provider has the right to deny access to that media without any good reason. Neither have I addressed the possibility of whether a claim could be made if one private citizen uses his power (from whatever source) to block another to use any media in the exercise of the rights conferred by section 13 (3) (c) and (d).

Editorial control

[272] It is important to address a submission made by Mr Small QC to the effect that CVM has absolute editorial control. This is not correct. Both TVJ and CVM are required by the terms of their licence to operate in the public interest. However, this expression is defined, it is a clear limitation on the licence granted to these two entities. This obligation is imposed in the context of a constitutional democracy where the role of broadcasters is recognised as very important in fostering and promoting democracy. Broadcasters, in Jamaica, are regulated under the Broadcasting and Radio Re-diffusion Act, 1949. One of the reasons for this, as noted in the United States of America, is that there is a limited number of frequencies available and thus some regulation is necessary.

[273] This regulation, in the context of the Charter, does not give the government a right of censorship unless such action can be demonstrably justifiable in a democratic society. The role of government regulation is to enhance freedom of expression and not to extend governmental power. The power to grant licences is to prevent (to borrow the expression from the United States) the 'cacophony of competing voices, none of which could be clearly and predictably heard' (**Red Lion** p 376). If the government is restrained from censorship unless it can justify it under section 13 (2) of the Charter, then it is unlikely that the licensee who is granted exclusive right to use a public domain would also be granted the right to private censorship.

[274] Editorial discretion, in the context of licenced broadcasters, does not mean the editor can exclude views he does not like or he does agree with. The grant of licences is not about the privatisation of censorship but rather about regulating a public resource (airwaves) so that the citizens derive the greatest benefit in order for them to play an effective role in the democracy. In the current age, access to reliable and accurate information is vital to the functioning of a democratic state. Contending views are put forward, debated, discussed, improved, discarded or ignored. The citizens make their choices based on the discussion that takes place. In agreement with the Supreme Court of the United States, it is my view that freedom of expression is not for the sole benefit of a private broadcaster but rather it is the interest of viewers and listeners that is paramount. If private censorship, under the guise of editorial discretion, were to become the order of the day, then the democracy is undermined and much weaker for that.

[275] Licensed broadcasters are under an obligation to use the public domain in the public interest as stated in their licence. In this regard the editorial control does not mean that a broadcaster can refuse to cover matters of public interest (recognising all the difficult with defining this expression in this context). The duty of the broadcaster is to provide information on important public issues so that the public at large can have accurate, reliable information about the matter. An

informed public is vital to the functioning of a democracy. A broadcaster who consistently fails to provide accurate and reliable information on matters of public interest is not operating in the public interest. The ability of the citizen to participate effectively in this democracy is dependent on the freedom of broadcasters to exercise their right to freedom of expression.

[276] As noted by O'Regan J in **Khumalo**, the fact of the matter is that media have become the 'primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility' (**[24]**). Judge O'Regan was using media to refer to newspapers and broadcasters. It must be appreciated and recognised that in our age, broadcasting has become the primary means of disseminating information and in fact has become the fastest means of communication and can reach the largest number of persons in the shortest time. Broadcasters can shape public opinion in a relatively short time. Newspapers would necessarily take a longer time to achieve the same impact and result.

[277] It seems to me, building on what I had said earlier that regulation of the airwaves is not for the purpose of giving the government censorship powers, that the main objective of regulating the airwaves has to be to keep the public informed. This cannot mean, as Mr Small QC suggested, that a broadcaster can substitute private censorship for public censorship. A private broadcaster cannot use the public domain to promote only views that are consistent with his own. When the private broadcaster receives a licence it is granted exclusive use of a limited and valuable part of the public domain and in return it accepts the obligation to operate in the public interest (I have modified the holding of Burger CJ in **Federal Communication Commission** case p 395).

[278] Of course it can promote its own position but not at the expense of ignoring other positions on the issue. The editorial control is to decide how best to provide reliable and accurate information about public issues. Editorial control,

necessarily involves judgment of which events are of sufficient public interest to require coverage. There are simply so many hours in a day and prime time is limited. Thus editorial discretion will have to be used to decide not only which events are covered but how extensive it should be and what form it should take. The reason for this kind of editorial control is that recognised by Burger CJ in the **National Democratic Committee** case. The learned Chief Justice observed 'it is physically impossible to provide time for all viewpoints, however, the right to exercise editorial judgment was granted to the broadcaster' (p 111). This was said in relation to the Fairness Doctrine developed by the FCC. Despite this, it is my view, that the position taken by Chief Justice that a private broadcaster operating under a licence cannot refuse to cover 'important issues or views because of his private ends or beliefs' (p 111, quoting from the FCC's decisions which led to the challenge in the case before the court) applies to Jamaica as well.

[279] In the same case the Chief Justice accepted the FCC's Fairness Doctrine policy and its justification as correct in principle. Under that Doctrine, 'broadcasters are responsible for providing the listening and viewing public with access to a balanced presentation of information on issues of public importance' (p 112). The justification for this principle is 'the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter. …' *Report of Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949)' (p 112).

[280] In my respectful view, this approach of the FCC to the regulation of broadcasters in the United States can assist in giving content to the meaning of public interest in the licences of TVJ and CVM. Once the fundamental premise that TVJ and CVM is that they are granted a privilege to use the airwaves to disseminate and receive information is understood and once the role of broadcasters in a democracy is understood, then it should be clear that the kind

of complete and absolute editorial control contemplated by Mr Small QC simply does not and cannot exist. No licensee has a constitutional right to a licence. The right that it has is to have its application considered fairly and properly and if granted, the further right that the licence will not be revoked except in accordance with lawful procedures.

[281] Having said this, it does not mean that everyone who wishes to speak must have access to the airwaves. Neither does it mean that every single existing view point on an issue must be aired. This is so because the private broadcasters must have the right to determine how they will cover and issue. Will there be errors of judgment made in carrying out this balance? Yes. Is it open to abuse by private broadcasters? Yes. Is it possible that there will be disagreement on what is a matter of significant public interest that requires coverage? Yes. Like the majority in the **National Democratic Committee** case, I accept that this approach is open to criticism and will not suit everyone but in my view, this is the best way of achieving harmony between a private for-profit broadcaster's right to freedom of expression and his role which includes providing accurate and reliable information so that the citizen in a constitutional democracy can be kept informed and make informed decisions (O'Regan in **Khumalo [22]**).

[282] It follows from this that I accept the approach of majority in **National Democratic Committee** that on this view, no person can dictate to a private broadcaster that he should accept a particular advertisement advocating any particular position. The issue is not whether or not to accept the advertisement but rather whether the private broadcaster has carried out his obligation, in the public interest, to inform the public on the particular issue. To impose on a private broadcaster the obligation to accept any advertisement sent to it would be infringing its right to freedom of expression since that freedom carries with it the right to decide, when, where and how that right will be exercised.

[283] For those who fear that this will be giving the private broadcaster the ability to skew information in one direction or another, they must remember that the

regulator is there to monitor the licensees. The regulator's role, as part of the executive branch of government, is not to control content but to ensure that the licensee operates within the terms of its licence.

[284] Who will determine what matters are of public concern sufficient to warrant coverage? That is a matter for the editors of the broadcasters. Is this solution imperfect? Of course. However, it is better than government censorship but it is not intended to mean private censorship is to be substituted for government censorship.

[285] Mr Tomlinson is not alleging that TVJ and CVM have generally failed to fulfill their mandate under their licence and so undermine his ability to participate in the democracy. What he is saying is that TVJ and CVM have failed to air an advertisement that he wishes to be aired. Were I to accept Mr Tomlinson's proposition, it would mean that that court would now be getting into the business of telling editors what advertisements or events to broadcast. The regulation of broadcasters has not been given to the courts and it is not a job any court should even contemplate accepting. That job, in Jamaica, has been given to the Broadcasting Commission. There is no complaint that the Broadcasting Commission is dissatisfied with how TVJ and CVM have operated under their licence. There is no complaint that they have failed to deliver under the public interest clause of their licence.

[286] Before it can be said that TVJ and CVM have breached the constitutional rights of Mr Tomlinson, in the context of this case, it is my view that he would have had to gone on to show that the 'public interest' clause of the licence under which both broadcasters operate was being breached. He would need to show that TVJ and CVM having been granted a right to use the public resource of a particular frequency have not been covering the matter (assuming it's a public issue) at all or covering in a manner that did not fully and fairly reflect the various view points. If the two broadcasters did this then they would not be fulfilling their

duty to inform the public so that they can make informed decisions about important public issues.

[287] If this is shown and in attempting to redress that omission the stations refused to air his video then Mr Tomlinson has the beginnings of case because what he would be showing is that the broadcasters were not operating in the public interest by covering properly a matter of public interest and he is trying to fill the gap and he is being refused access to the media. He may be able to show (in accordance with the dicta from the United States cases) that the broadcasters were using their position to suppress views contrary to their own and this the act of not airing the add would be the latest manifestation of that position.

[288] It has not been suggested that either TVJ or CVM has failed to give full, fair and adequate coverage to the issue of homosexuality. Under their licence, the public interest clause requires them to cover public issues. Even if there were no public interest clause the fact that they were granted the privilege to use public property meant that they have an obligation to act in the public interest by providing full and fair coverage to public issues. Fair and full coverage of a public issue does not require them to place a microphone in the hand of all who wish to speak or air advertisements of all who wish to speak to an issue. How the coverage is done is for the editors to decide. The reason for this was explained by Burger CJ in **National Democratic Committee** at page 111:

> *Since it is physically impossible to provide time for all viewpoints, however, the right to exercise editorial judgment was granted to the broadcaster. The broadcaster, therefore, is allowed significant journalistic discretion in deciding how best to fulfill its … obligations…*

[289] This was said in the context of the FCC administering regulations designed to ensure that the public interest was served in the regulatory environment in the United States. Nonetheless the underlying premise of limited broadcast time and

many viewpoints compels the conclusion that the best means of managing the situation where demand for media coverage may be greater than the supply of time is allowing editors to make the decisions. Thus editorial control is necessarily inherent in any news organisation whether or not it is organised for profit.

Application to case

[290] Indeed the more I have considered this case, the more I am convinced that Mr Tomlinson's challenge must fail. There is no allegation that TVJ or CVM has prevented him from making his video or to advocate his position. What he is saying is that TVJ and CVM have failed to air an advertisement that he wished to be aired. TVJ and CVM have the editorial right to decide how an issue – in this case, the treatment of homosexuals – is to be covered. That does not mean that all who wish to speak on the issue must be allowed to do so by TVJ or CVM.

[291] The affidavits of both stations have shown that they have covered the issue of homosexuality. That is a decision for the editors. Mr Tomlinson has been permitted to participate in programmes hosted by the both stations. Mr Tomlinson has no Charter right to the microphone of TVJ or CVM. They may choose to give him access to one if they wish but that is their editorial decision to make and not for the courts to tell them who to speak, when, how, at what time and on what issue. What they can do, and this is their Charter right, is to decide how best to cover the issue bearing in mind the cultural, political, social and economic context in which they operate. It is for the editors to decide whether one form of coverage is better than another. The decision not to air the specific advertisement cannot be used to say that they have failed to respond to a matter of public importance. If that were the case, then what you would have is tyranny of broadcasters by anyone who feels that he must have a microphone to speak or an advertisement to broadcast.

[292] There is no evidence that either TVJ or CVM has used its position to block Mr Tomlinson and persons like him from disseminating their views. Mr

Tomlinson's real complaint is that neither broadcaster has permitted him to air his message at a time and manner of his choosing - a different matter entirely. Mr Tomlinson wants this court to strip TVJ and CVM of their editorial control to satisfy his personal opinion of how they should operate. I agree with Paulette Williams J when her Ladyship stated that as part of their right to free speech TVJ and CVM have the editorial power to decide how they will deal with an issue.

[293] From what has been said, it is clear that Mr Tomlinson is hard pressed to say that any right of his guaranteed by section 13 (3) (c) and (d) has been, is being or likely to be infringed by TVJ or CVM. It follows that I do not see the need to engage in the balancing of rights as suggested by the learned Solicitor General.

[294] In respect of the PBCJ the analysis is done differently. It is a government-run organisation. No issue was taken in this case over whether it fell within the expression 'organ of State' in section 13 (2) or 'public authority' in section 13 (4). I will proceed on the basis that it falls squarely within the Charter.

[295] No case was cited in which even a government-run or funded or supported broadcaster did not have editorial discretion over what it broadcast. No case was cited showing that any person has an automatic right to have anything he wished to disseminate broadcast by a government-run or owned broadcaster. That a government-run or funded broadcaster must have editorial control is self-evident; there are only so many hours in a day and there are many issues to cover. How they are covered is an editorial decision.

[296] There was no evidence presented that PBCJ operated in a manner such as that which was present in **Fernando v Sri Lanka Broadcasting Corporation** (1996) 1 BHRC 104. In that case, similar to **Benjamin**, the government had provided a forum for open discussion and then arbitrarily withdrew that medium of communication. The Supreme Court of Sri Lanka found that the sudden removal of the programme infringed the constitutional right of Mr Fernando who

was a listener to the programme. In those cases, the government of the day had in fact provided a forum for persons to call in and participate actively in the broadcast. There is no evidence that PBCJ operated in that way. It cannot therefore be said that Mr Tomlinson is being deprived of an avenue which was previously made available and was withdrawn for arbitrary reasons as was expressly found to be the case in **Fernando** and **Benjamin**.

[297] In the absence of clear evidence that PBCJ had a format or programmes similar to those that precipitated the challenge in **Fernando** and **Benjamin**, I have to proceed on the basis that the staff, in their undoubted editorial discretion, and the board in its undoubted policy making role, did not have participatory programmes similar to talk shows and discussions of matters of public nature. There is no evidence that PBCJ had a policy of broadcasting anything sent to it and therefore had a similar policy to that which would govern an open talk show. It cannot therefore be argued that the public had an opportunity to express themselves freely, as in a talk show, by sending content to PBCJ to be broadcast and this opportunity of free expression was being withdrawn arbitrarily. The evidence suggests that PBCJ had editorial discretion while acting within its statutory mandate to decide what programmes it broadcasts. There is no evidence that PBCJ solicited content from the public or permitted the public to influence content in the way that an open call-in programme does.

[298] In addition to what has been said about PBCJ, the claim as framed before the amendment accused PBCJ of breaching the constitutional right of Mr Tomlinson because it refused to air the advertisement. The claim as originally framed did not challenge the constitutionality of PBCJA or the regulations and policy of PBCJ. Indeed this was not possible because the claim was filed without hearing what PBCJ's explanation was. It has now happened that PBCJ has given an explanation and it says that its statute, regulations and policy do not allow it to take paid advertisement, which was what the request to PBCJ was. Based on this response any breach of constitutional rights against PBCJ was always going to be a Sissyphean task unless it was argued either (a) PBCJ's explanation was

based on a misunderstanding of its statute, regulations and policy; or (b) assuming that the PBCJ properly understood the statute, regulations and policy and assuming that the decision was justified in light of them, then the statute, regulations and policy that permitted such a decision were unconstitutional. Unfortunately, for Mr Tomlinson no such argument was made and so it has to be assumed until successfully challenged that the statute, regulations and policy are constitutional and do indeed enable PBCJ to make the decision it did. The issue in respect of PBCJ is not a constitutional one but rather the exercise of discretion by a statutory body.

[299] Based on the submissions of Mr Scharschmidt QC, Mrs Foster-Pusey QC and Miss Saverna Chambers it cannot be doubted that (a) under section 3 of the Broadcasting and Radio Re-Diffusions Act any person who wishes to establish commercial broadcasting must have a licence; (b) under section 4 of the PBCJA, the PBCJ cannot behave as a commercial broadcaster which involves taking paid advertisement. Lord Gifford QC has not suggested that PBCJ could take paid advertisement. As Mrs Foster Pusey QC reminded the court, ‘a decision maker must understand correctly the law that regulates his decision making power and must give effect to it’ (**CCSU v Minister of the Civil Service** [1984] 3 All ER 935, 950 (Lord Diplock)). On the face of it, the PBCJ has met Lord Diplock’s prescription.

[300] In light of what has been said, one of my concerns about the case against PBCJ is whether there are alternative means of redress available. Lord Gifford QC submitted that the only means of redress against PBCJ was this constitutional action. I am not so sure about that on the facts alleged against PBCJ. It is a statutory body and therefore must act within the legislation unless the legislation or the applicable parts have been declared to be in breach of the Charter and therefore of no effect. It has not been demonstrated to me why judicial review was not an appropriate remedy in the circumstances of this case.

[301] The evidence from PBCJ is that it told Mr Tomlinson that the meeting of the board would have been held on November 20, 2012. The November 2012 meeting was not held. The board of PBCJ eventually met in December 2012. However before the decision was communicated to Mr Tomlinson he filed this claim. PBCJ did not inform Mr Tomlinson that the November meeting was not held and that his video would be considered at the December meeting.

[302] This is not similar to the situation in **Observer Publications Ltd v Matthew** (2001) 58 WIR 188 where the appellant's application for a broadcasting licence met all the stated criteria but no response was given for over one year. In this state of affairs, the Judicial Committee of the Privy Council agreed with the trial judge's assessment that the lack of response for over one year was a refusal of the application.

[303] The fact that section 25 of the old Chapter 3 has been repealed and more discretionary powers introduced in section 19 of the new Charter are available does not mean that just about every dispute should be 'constitutionalised' in order to escape the leave requirement for judicial review.

[304] It seems that there has been total disregard for Lord Diplock's important words in **Kemrajn Harrikissoon v Attorney General** (1979) 31 WIR 348, a case involving a public officer who had bypassed other available remedies and arrived in the Constitutional Court of the Republic of Trinidad and Tobago alleging that his rights under the 1962 Constitution were infringed. He was firmly but politely shown the door because other means of providing adequate redress were available. Lord Diplock held at page 349:

> *The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The*

> *right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.*

[305] There is no evidence that PBCJ failed to comply with the law. PBCJ is not a commercial broadcaster and does not take advertisements in exchange for a fee. When it was first contacted, it was asked specifically whether it would air the broadcast for a fee. Eventually it decided not to air the broadcast because its terms and conditions of operating did not permit it to do that.

[306] It appears that this was conceded by the applicant who, at the commencement of this matter, amended the claim form by deleting all references to paid advertisement so far as it applied to the third defendant. The impact of this is that the case against PBCJ was altered significantly in that it came to meet a case where it was being accused of failing to accept a paid advertisement for broadcast.

[307] Even with the amendment it is not clear to me why judicial review was not appropriate. It has not been argued that the statute governing PBCJ is unconstitutional. Surely, it cannot be said that the decision not to air the advertisement is outside of the margin of appreciation that editors have. The argument would have to be that the decision was only apparently legitimate but fell outside the power given to the statutory body on the ground of irrationality, illegality or unreasonableness (not just Wednesbury unreasonableness in the narrow because it is my view that no statutory functionary has a right to be as irrational as he wishes and is only subject to challenge if his irrationality amounts stupidity of the highest order). Lord Gifford QC sought to say that affidavits of PBCJ somehow were not sufficient to rebuff the challenge. However, it must be remembered that the affidavits were crafted to meet the case alleged right up until the amendment. It would not be fair to shift the goal post during the game to enable the defendant to score thus leaving the defenders in a hapless position. One cannot shift the stumps while the bowler is running in and the batsman has assumed his batting stance in order to give the bowler a greater opportunity at dismissing the batsman.

[308] If the decision not to air the advertisement was taken because it was presented to PBCJ as a paid advertisement what wrong has been committed if it is indeed the case that it did cannot accept paid advertisement? The interesting thing is that it was never Mr Tomlinson's case that PBCJ could take paid advertisement and that PBCJ's understanding of the Government's policy on PBCJ not to accept paid advertisements was wrong. The argument was that it should have taken the advertisement for payment in keeping with its statute and the Charter. It seems that the factual foundation for the challenge to PBCJ simply does not exist.

[309] Mr Scharschmidt QC took the point on behalf of PBCJ, after Lord Gifford QC amended the declarations being sought to remove any reference to paid advertisement that this necessarily meant that Mr Tomlinson is conceding that

what he asked PBCJ to air was a paid advertisement which it is not allowed to do. This would mean that PBCJ was acting in accordance with its statute, regulation and policy. The constitutionality of the statute was not raised and neither was it being said that any policy PBCJ had was contrary to the Charter. The sole basis of the claim against PBCJ was its refusal (or more accurately, its non-response to the November 26 letter from Mr Tomlinson's attorney before January 18, 2013 when the amended claim was filed, which was interpreted as a refusal to broadcast the advertisement) to transmit an advertisement in exchange for payment. I accept that a faster response indicating that it did not accept paid advertisement would have been helpful but the failure to do so in eight weeks, in the absence of any compelling time pressure, cannot transform administrative tardiness into a constitutional claim. The claim against PBCJ then must necessarily fail because of the absence of a factual foundation sufficient to raise a breach of the Charter.

A final matter

[310] Mr Tomlinson has suggested that the fact that the Broadcasting Commission viewed the video and found no breach of any of its rules or regulations had to be taken into account. In a general sense this is true but it cannot be overlooked that the Broadcasting Commission is a regulator and not the operator of any of the defendants. The Commission would be looking at the matter as a regulator and not as a commercial broadcaster as in TVJ and CVM or a public body such as PBCJ. The fact that the Broadcasting Commission found nothing wrong with the advertisement is not a basis for saying that the defendants were in error not to broadcast it. There is the question of editorial control which gives the defendants the right to determine how they will deal with the issues of public concern. Each of the defendants must have the right to determine what it broadcasts, the time at which any broadcast is made and the manner in which it is done. Each defendant must have the right to decide on its programming having due regard to its audience and its objectives.

Conclusion

[311] From what has been said it is my view that TVJ and CVM have not breached any Charter right of Mr Tomlinson. Section 13 (3) (c) and (d) does not give any private citizen (natural or juristic) the right to use another private person's property to disseminate any message. What section 13 (3) (d) does is to give the person the right to disseminate his message by any technological means available. No private citizen is under an obligation to make specific provision to enable Mr Tomlinson to express himself.

[312] The necessary implications were I to hold otherwise would mean that CVM or TVJ could be compelled by this court to prevent another private citizen from having his message broadcast. This is so because both broadcasters, if compelled to accommodate Mr Tomlinson, would have to decline to accommodate another person who may wish to use the same time slot as Mr Tomlinson. This would be an interference with the general right broadcasters have to determine the content of their programmes. In short it would undermine editorial control and cut down journalistic discretion. This has the potential to drag the courts into telling broadcasters whose message to broadcast, when and at what time – a task I do not wish to have.

[313] Mr Tomlinson was asking for a prime time spot. Surely the owners must be allowed to determine for themselves who gets which spot at any point in time and for what fee. What if TVJ and CVM raise the price to Mr Tomlinson, could it not be argued that he is being discriminated against?

[314] Mr Tomlinson's proposition on freedom of expression is that he can use the courts to compel someone to speak against their will. This does not recognise that freedom of expression and freedom to receive and disseminate information or ideas includes the right not to speak and not to receive or disseminate information. Why should Mr Tomlinson's wish to exercise his right be more important than TVJ's or CVM's desire to exercise their right not to broadcast? The claim against TVJ and CVM is dismissed in its entirety.

[315] The case against PBCJ was that under its mandate it cannot accept paid advertisements. This position has not been challenged. The amendment, late in the day, is a concession to PBCJ's position. In light of the pleaded case of both parties up to the commencement of the hearing, where is the breach? The assessment of whether there is a breach of the Charter rights of Mr Tomlinson has to be assessed at the time when the request was made and the decision made and in light of the amendment. It would have been good form if PBCJ communicated in a more timely way but non-communication of an apparent lawful decision made based on its mandate cannot, amount to a breach of Mr Tomlinson's Charter rights. The claim is dismissed in its entirety.

[316] Let me end by commending Miss Anika Gray for the outstanding work done on behalf of Mr Tomlinson. It was indeed a very difficult case to put together and she did so admirably. All counsel who addressed the court on behalf of the parties provided invaluable assistance. If I did not agree with the arguments advanced it was not for want of advocacy or lack of clarity in their submissions. Mrs Foster-Pusey QC, while not appearing for any of the parties, was her usual insightful, technical and precise self. Her submissions clarified my own thoughts on many of the issues. All told, our job was made easier by all.

PUSEY J

[317] This case attempts to explore a new development in the law relating to the enforcement of fundamental rights and freedoms. Traditionally, fundamental rights were enshrined in constitutions to protect the individual from the excesses of the state. The facts of this case have already been well rehearsed in the judgments of P. Williams J. and Sykes J. I have read those judgments in draft and agree with the reasoning and conclusions and wish to add a few comments.

[318]]This case seeks to develop and extend the law relating to fundamental rights and freedoms. It signifies the movement of the law of fundamental rights and freedoms from being primarily a means of regulating the balance between the state and the individual to the proposed position where these freedoms are made into guidelines for the society at large.

[319] The earliest example of these rights enshrined in a modern constitution comes in the United States of America's constitution. American colonists had experienced the oppression of British colonial government and consequently sought to balance the power of the state with the freedom of the individual. This also came at a time when Western thought had started to emphasise the rights and status of the individual rather than of the nobility or the institutionalized church.

[320] At the same time, the Americans saw the need for a strong nation state which could protect its borders and its population. Their founding fathers therefore constructed a constitutional framework which guaranteed individual rights while enabling the government to enforce the rule of law and enable commercial activities to thrive.

[321] The United States Courts became the guardians of these personal rights against the real and imagined excesses of the state. The importance of fundamental rights was emphasized in the early Twentieth Century. World War II

and the Holocaust made society aware of the need to ensure that fundamental rights and freedoms are of general application to all states. This induced the drafting and adoption of the Universal Declaration of Human Rights, by the newly-formed United Nations, which became a template for regional declarations and the fundamental rights charter in newly independent states.

[322] The necessity to ensure that individuals were protected against the state and guaranteed these freedoms became part of the legal framework worldwide. When the European powers began to grant independence to their colonies these fundamental rights and freedoms were guaranteed in the constitutions of these territories.

[323]] In former British colonies such as Jamaica the insertion of the Charter on Fundamental Rights and Freedoms was considered to be a codification of the rights and freedoms granted to citizens under the Common Law. This view lead to a perception of the Fundamental Rights section of the Jamaican constitution as being not sufficiently protective of the rights of individuals.

[324] The position taken in **Minister of Home Affairs v Fisher** [1980] AC 319 where the Privy Council indicated that Constitutions ought to be interpreted with greater generosity was symptomatic of the view that Constitutions are living documents rather than static legislation bound by precedent or antiquated interpretations. In **Fisher** the Board was asked to restrict the meaning of the word “child” in a constitutional provision that related to family to exclude illegitimate children. The restricted meaning was in line with the rules of statutory interpretation applied.

[325] After South Africa emerged from apartheid the framers of their constitution attempted to use the Constitution to help to redress the imbalances created by the years of a legal system that perpetuated these injustices. This was displayed in Sections 8 (1) and 8 (2) of 1996 Constitution of South Africa. By Section 8 (1)

the Bill of Rights binds the legislature, executive, judiciary and all organs of the state. Section 8 (2) binds

> *… a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right*

[326] Section 8 (3) expressly grants the court the right to develop and interpret the common law to the extent that legislation does not give effect to the law. In **Khumalo and other v Holomisa** [2002] ZACC 12 the court contemplated the use of this provision to modify the law of defamation to accord with protected rights. This indicates the widest power given to the enforcement of constitutional remedies for the violation of fundamental rights.

[327] When the Jamaican parliament enacted the New Charter of Rights in 2011 it attempted to modernize Jamaica‘s access to Constitutional protection. In section 13 the Jamaican Charter of Rights opened new ground. It not only bound the state in section 13 (1) (a) but 13 (1) (c) placed a duty on all persons to respect and uphold the rights of others recognized in the Charter. Section 13 (5) then explicitly indicates that the Charter binds natural and juristic persons. It says:

> *A provision of this chapter binds natural and juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right.*

[328] These provisions brought the concept of horizontal application of the Charter of Rights but are of a more limited application than the South African foray into horizontal application. There is no express power to amend the common law to conform to the Charter of Rights. Parliament took this more cautious and qualified application of the principle as Jamaica has had more than half a century of Fundamental Rights guaranteed by an independent Judiciary.

South Africa in contrast had its previous half century coloured by the system of apartheid which created a legal system that denied fundamental rights to many and developed the common law to justify that denial.

[329] The Jamaican Constitutional provision first asks the Court to consider whether the right is applicable between individuals. Then it requires that the Court determine to what extent this right should be applied. These determinations will vary based on the nature of the right and the duty.

[330] However in common law jurisdictions, the courts have always had the power to develop the Common Law. That power is still part of the toolkit that the courts may use when enforcing constitutional rights. It could be argued that this is what the Privy Council did in **Pratt & Morgan v The Attorney General of Jamaica** [1994] 2 AC 1 in constraining the circumstances in which the death penalty could be exercised. In my view, that power to develop the common law should be used sparingly as the courts should not readily resort to what may seem to be judicial legislation. Based on the decision we have come to this discussion may be entirely academic.

[331] It now comes to the Jamaican courts to begin to create a new and appropriate jurisprudence to balance the rights between individuals. The reasoning and conclusions of P. Williams J and Sykes J begin to articulate this new dispensation in the law.

[332] For the avoidance of doubt I expressly agree with the view of the applicability of **Regina (Prolife Alliance) v British Broadcasting Corporation** [2004] AC 185 taken by P. Williams J.

[333] I expressly agree with the definition of media in the Charter as set out by Sykes J.

[334] For the reasons expressed by my brother and sister I would refuse the Claimants application. I agree that the issue of Costs fall to be determined in the circumstances of this matter.