[2020] JMCA Civ 52

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 77/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**MAURICE ARNOLD TOMLINSON**	**APPELLANT**
AND	**TELEVISION JAMAICA LIMITED**	**1st RESPONDENT**
AND	**CVM TELEVISION LIMITED**	**2nd RESPONDENT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**INTERESTED PARTY**

Lord Anthony Gifford QC and Miss Anika Gray instructed by Gifford, Thompson and Shields for the appellant

Mrs M Georgia Gibson Henlin QC and Miss Stephanie Williams instructed by Henlin Gibson Henlin for the 1st respondent

No appearance for the 2nd respondent

Mrs Nicole Foster Pusey QC, Ms Simone Pearson and Ms Ceila Middleton instructed by the Director of State Proceedings for the interested party

1, 2, 3, 4, 5, 16 February 2016 and 30 October 2020

PHILLIPS JA

[1] On 15 November 2013, the Supreme Court sitting as a Full Court to hear a constitutional matter ("the Full Court"), comprising P Williams and Sykes JJ (as they

then were) and Pusey J, delivered its judgment in the claim filed by the appellant, Mr Maurice Tomlinson. By this claim, Mr Tomlinson sought orders and declarations for the alleged breach of his constitutional rights as guaranteed by section 13(3)(c) and (d) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ("the Charter"). These are the right to freedom of expression (section 13(3)(c)) and the right to seek, receive, distribute or disseminate information, opinions and ideas through any media (section 13(3)(d)). Having heard arguments from the respective parties, the Full Court dismissed the claim and, as a consequence, refused to grant the reliefs which had been sought.

[2] Subsequent to the dismissal of his claim, Mr Tomlinson, on 29 August 2014, filed a notice of appeal (later amended and re-filed on 21 July 2015) seeking, among other things, an order to set aside the judgment of that court.

[3] Before considering the appeal, I must first extend my apologies to the parties for the delay in the delivery of the judgment. Several factors contributed to its delay, most of which are well-known, but are by no means acceptable excuses. The delay, nonetheless, is deeply regretted.

Background

[4] On 19 October 2012, Mr Tomlinson filed a fixed date claim form against Television Jamaica Limited and CVM Television Limited, being the 1st and 2nd respondents respectively (hereafter referred to as "TVJ" and "CVM" respectively). In Mr Tomlinson's affidavit in support of his claim dated 13 December 2012, he describes

himself as being employed as a legal advisor for an international non-governmental organisation, AIDS-Free World. In that capacity, he liaised with other organisations to advocate for changes to homophobic laws and policies across the region. He also stated that he is a homosexual man and an activist who personally experienced abuse and threats of violence.

[5] TVJ and CVM are limited liability companies incorporated under the Companies Act, 2004. Both are holders of commercial television broadcasting licences and are the owners and operators of Jamaica's two major television stations.

[6] Subsequent to the initiation of the claim, the Public Broadcasting Corporation of Jamaica ("the PBCJ") was added as a 3rd defendant to the proceedings, by an order of the court of 16 January 2013. The PBCJ, however, does not appear as a party in this appeal.

[7] The Attorney General, as in the proceedings below, continued to appear in these proceedings *amicus curiae,* to assist the court, in the light of the constitutional issues raised by the appeal.

[8] The events culminating in the filing of the fixed date claim form can be gleaned from several affidavits that were admitted into evidence before the Full Court and the documents exhibited thereto. These affidavits set out the positions of the respective parties, and include: (i) for the appellant, the re-filed affidavit of Maurice Tomlinson dated 13 December 2012 as well as his affidavit dated 16 January 2013; (ii) for TVJ, the

affidavit of Mr Stephen Greig filed on 10 December 2012; and (iii) for CVM, that of Mr Ronald Sutherland dated 5 December 2012.

[9] At the centre of the claim is a 30-second video Mr Tomlinson desired to have aired on TVJ and CVM. In his affidavit in support of the claim, he described this video as a "Love and Respect PA", which had been produced as part of an advocacy campaign to encourage tolerance for "men who have sex with men and homosexuals in Jamaica". He is portrayed as an actor in the video. In it, he converses with a woman who is featured portraying the role of his aunt. The woman asks him how he is doing. Mr Tomlinson replies that he is "still trying to get Jamaicans to respect my human rights as a gay man". The woman then responds by saying, "I love you as my son. I don't know why you are gay. But, as a Jamaican, I respect you and I love you and love is enough for all of us". They then hug and the video ends shortly thereafter.

[10] The essence of Mr Tomlinson's claim is that the refusal by TVJ and CVM to air this video violated his right to freedom of speech and his right to distribute or disseminate information, opinions and ideas through any media, as guaranteed by section 13(3)(c) and (d) of the Charter. For completeness, the details leading up to TVJ and CVM, ultimately not airing the video on their respective television stations and their reasons for not doing so will be outlined below.

a. TVJ

[11] TVJ relied on the affidavit evidence of Mr Stephen Greig who averred that, on 21 February 2012, several emails passed between Mr Tomlinson and TVJ through its agent, Ms Diana Buchanan. The first email, was captioned, "Possible PSA". In that email, Mr Tomlinson requested that TVJ provide verification of the acceptability of a script prior to him paying to have it produced. Ms Buchanan responded to the effect that the script would first have to be sent to TVJ. Consequently, Mr Tomlinson responded by sending an email in which he referred to a "Public Service Announcement", which he abbreviated as a "PSA". He further expressed the desire to have the PSA aired during Prime Time News. He also included in the email a copy of the script.

[12] Subsequent to the above emails, a further email was sent by Mr Tomlinson to TVJ on 5 March 2012. This email contained the caption "PSA" and included a link to youtube.com, which he said, was the finished advertisement. He indicated that "we would pay to have the advertisement aired during Early Prime, Prime Time News and Smile Jamaica its Morning Time".

[13] Mr Tomlinson sent a follow-up email on 7 March 2012, bearing the caption, "Airing the PSA?". In that email, he repeated his query as to whether TVJ would air "the PSA". TVJ responded on 8 March 2012, stating that "the commercial" had been passed on to the directors and that a response would be forthcoming. Thereafter, a series of telephone conversations transpired between Mr Tomlinson and representatives of TVJ. However, no definitive answer was given by TVJ on the issue.

[14] On 2 April 2012, Miss Anika Gray, an attorney-at-law acting on Mr Tomlinson's instructions, sent a letter to TVJ by both mail and email. This correspondence bore the caption, "Airing of Public Service Announcement On Respect for the Human Rights of Homosexuals", and requested that notification be provided within seven days of its receipt whether TVJ intended to air the PSA. It was stated that failure to respond would be interpreted as a refusal to air the PSA.

[15] TVJ, through Mr Greig, responded by letter on 30 April 2012. In it, TVJ questioned Mr Tomlinson's basis for issuing a demand for notification, where there was no contractual obligation to compel such an action, and especially since the stipulated time frame for a response had been unilaterally imposed by Mr Tomlinson. TVJ indicated that the request would be reviewed and processed in accordance with its established procedures.

[16] Having not received a response, on 10 September 2012, Mr Tomlinson, through Miss Gray, sent a further letter to TVJ. This letter, in contrast to the previous correspondence, was captioned, "Airing of Paid Advertisement (PA) On Respect for the Human Rights of Homosexuals". It stated that a failure by TVJ to respond within seven days of the receipt of the letter would be construed to mean that it did not intend to air "the PA". On 18 September 2012, Mr Tomlinson made a further request with regard to the "Airing of Paid Advertisement (PA) On Respect for the Human Rights of Homosexuals". There was still no response, and thereafter, Mr Tomlinson filed suit.

[17] At paragraph 12 of his affidavit, Mr Greig deposed that TVJ had in place certain established procedures for dealing with advertisements, which included reviewing, so as to ensure conformity with its regulatory obligations. He further averred that TVJ had been considering the PSA, which carried certain implications, and had, therefore, been denied a fair opportunity of conducting its assessment. Additionally, it was contended that TVJ's property rights, editorial, press freedom and control would have been significant factors for consideration.

[18] Mr Greig asserted that the use of the term "PSA" connotes a particular meaning within the broadcasting industry. He stated that, in this case, the use of that term meant that Mr Tomlinson had not sought to air an advertisement. According to him, a PSA did not require payment, as in the case of an advertisement. A critical difference was also that a PSA necessitated the endorsement or agreement of the broadcaster. As a consequence, a broadcaster is at liberty to determine whether it would broadcast or transmit a PSA.

b. CVM

[19] Mr Tomlinson deposed that, on 22 February 2012, he sent an email to Ms Andrea Wilson of CVM, captioned "Revised PSA Script". The email was said to contain a revised version of the PSA script and enquired whether CVM was willing to air it. CVM acknowledged receipt of the email on the same day.

[20] On 23 February 2012, Ms Annmarie Brightly, an employee of CVM again emailed Mr Tomlinson, indicating that his email had been forwarded to her, and that she

required some clarity and further information. She also invited Mr Tomlinson to contact her by telephone.

[21] Mr Tomlinson deposed that he subsequently telephoned Ms Brightly on 23 February 2012, and also sent her an email on 24 February 2012. The email was captioned "Revised PSA Script", and in it, Mr Tomlinson enquired whether CVM was willing to air "the PSA". Ms Brightly responded enquiring whether he had received the example of a draft for the commercial that she had sent, and if so, his response.

[22] Mr Tomlinson responded by email on 6 March 2012, with the caption "Revised". He attached to this email a link to youtube.com which was said by him to be the link to "the PSA", which he would like to have aired during Live at 7, News Watch and CVM at Sunrise. He concluded this email with an inquiry as to whether CVM would be willing to air it.

[23] A follow-up email was sent by Mr Tomlinson on 7 March 2012, again enquiring whether "the PSA" would be aired. Ms Brightly responded on the same day, indicating that she was awaiting a response from the management team. Several telephone conversations were exchanged thereafter which did not result in a conclusive response. A further email dated 30 March 2012, was sent by Mr Tomlinson captioned, "Update about PSA", enquiring whether the attached PSA would be aired.

[24] On 2 April 2012, Miss Gray sent correspondence by letter and email both bearing the subject title, "Airing of Public Service Announcement On Respect for the Human Rights of Homosexuals" to CVM. A request was made for notification within seven days

of receipt, whether "the PSA" would be aired. Additionally, she stated that a failure to respond would be construed as an intention not to air the advertisement.

[25] No response having been received, Miss Gray again wrote to CVM by registered post on 10 September 2012. The letter was captioned, "Airing of Paid Advertisement (PA) On Respect for the Human Rights of Homosexuals". It repeated the request for a notification of a decision of whether the station would air the video. The letter, however, referred to the video for the first time as a paid advertisement ("PA"). Another registered letter was sent by Mr Tomlinson on 18 September 2012, to CVM, bearing the same caption as the previous letter. It indicated that the lack of response by CVM had been interpreted to mean an intention on its part not to air the PSA.

[26] Mr Ronnie Sutherland, the Vice President of Sales, Marketing and Programmes of CVM, in his affidavit, averred that an individual interested in broadcasting an advertisement with the company would have been required to complete a standard form advertising contract. This contract, he stated, expressly provided that CVM reserved the right to decline to accept for transmission any advertisement or any part thereof. As such, prior to entering into contractual relations with a prospective customer, a general procedure of revision would have been followed. He posited that in arriving at a decision on prospective advertisements, CVM's stance as a broadcaster has been to avoid advertisements which sought to promote illegal activities or which were likely to invite adverse public attention and commentary. This, he said, was in order to avoid unfavourable public reaction and sometimes outright hostility from members of

the public to the station. He further stated that these factors were important considerations, as CVM's revenue is derived primarily through advertisements.

[27] Mr Sutherland also deposed that CVM's board of directors, after reviewing the content of the proposed advertisement, took the decision not to accept it for broadcast for several reasons. These were stated by him as follows:

i. The advertisement could be construed as a covert attempt by the station to encourage homosexuality. Further, there was apprehension with regard to the negative public response that the advertisement could attract, and the impact that such a response could have on its revenue stream.

ii. There was a common assumption that men who engaged in sexual relationships with men are participants in the act of buggery. The advertisement could therefore be perceived as the encouragement of the commission of buggery, which is a criminal offence.

iii. A corporate body had a common law and constitutional right to determine with whom it entered into contracts.

[28] Mr Sutherland further deposed that the broadcast could not properly be categorised as a PSA. This is because a PSA is a broadcast message in the public interest disseminated by the media free of cost to the person or institution requesting

the announcement, with the principal objective being to raise awareness, change public attitudes and behaviour towards a particular social issue. Mr Sutherland, therefore, challenged Mr Tomlinson's interpretation of its obligation to operate in the interest of the public and contended that there had been no breach of his human rights as guaranteed by the Charter. It was in the light of these reasons, Mr Sutherland averred, that the decision was taken not to broadcast the video. CVM's position, he said, had been previously communicated to the Jamaica Forum for Lesbians, All-Sexuals and Gays at a meeting of the Heads of Media held on 2 September 2011.

[29] Additionally, Mr Sutherland deposed that CVM had broadcast current affair programmes which referred to issues that concern homosexuals and men who had sex with men in Jamaica, even featuring Mr Tomlinson himself.

c. The BCJ

[30] Subsequent to what was perceived by Mr Tomlinson as reluctance on the part of TVJ and CVM to air the PSA, he instructed his attorney-at-law to write to the Broadcasting Commission of Jamaica ("the BCJ"). By this letter of 7 May 2012, Mr Tomlinson sought clarification from the BCJ as to whether the airing of the PSA would have been in violation 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.

[31] The BCJ replied by letter dated 16 May 2012, expressing that it was not within its remit to review broadcasting content save in certain limited exceptions. However, it

stated that the recording supplied did not "readily reveal a basis on which to conclude a likely breach of any rules that [were] administered by the Broadcasting Commission". Mr Tomlinson was, therefore, directed to seek clarification from the broadcasting stations with respect to his concerns, as they were not matters for the BCJ's consideration.

Proceedings before the Full Court

The claim

[32] By virtue of the events recounted above, Mr Tomlinson commenced a claim in which he contended that both TVJ and CVM had violated, and continued to violate, his rights to freedom of expression and to distribute or disseminate information, opinions and ideas through any media, as guaranteed by section 13(3)(c) and (d) of the Charter. Consequently, he sought from the court the following orders and declarations:

> "1. A Declaration that [TVJ and CVM's] 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 [Mr Tomlinson's] constitutional right to freedom of speech as guaranteed by sections 13(3)(c) of [the Charter]
>
> 2. A Declaration that [TVJ and CVM's] 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 [Mr Tomlinson's] constitutional right to distribute or disseminate information, opinion and ideas through any media, as guaranteed by sections 13(3)(d) of the Charter

3. An order for [TVJ and CVM] to air the "Love and Respect paid advertisement in exchange for the standard fees.

4. Damages

5. Such further and/or other relief as this Honourable Court may deem just

6. An order as to costs of this claim."

The addition of the PBCJ

[33] Subsequent to the filing of the claim, on 22 October 2012, Mr Tomlinson through his attorney-at-law, wrote to the Chief Executive Officer of the PBCJ, requesting confirmation as to whether the station was willing to air the video during its prime time and the cost for doing so. The video was enclosed with the letter and the same demand which had been made of TVJ and CVM, that, he required notification within seven days of receipt of the letter, as to whether they intended to air the video was again made. The Chief Executive Officer responded by letter dated 6 November 2012, acknowledging receipt of the previous letter and advised that the matter had been referred to the board of directors for consideration. He explained that the next meeting of the board was scheduled for 20 November 2012. Mr Tomlinson responded by letter dated 21 November 2012, giving the PBCJ until 30 November 2012 to indicate its intention, failing which it would be presumed, by him, that the PBCJ did not intend to air the video.

[34] Thereafter, on 13 December 2012, Mr Tomlinson filed an application and was subsequently granted an order adding the PBCJ as a 3rd defendant to the proceedings.

[35] The PBCJ responded through the affidavit of Keith Campbell, its Chief Executive Officer. Mr Campbell stated that the board had not met as scheduled, but had convened in December 2012 when a decision was taken not to air the advertisement. He indicated that Mr Tomlinson had not been informed of that decision.

[36] Mr Campbell also averred that the PBCJ is not a commercial entity and does not have a broadcasting licence. As such, it is not permitted to accept paid advertisements. The programmes broadcast by the PBCJ promote 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.

Submissions before the Full Court

(i) Mr Tomlinson

[37] Mr Tomlinson expressed his recognition of the fact that, as broadcast licensees, TVJ, CVM and the PBCJ were allowed editorial and journalistic freedom to broadcast subject matters of their choosing, having regard to the restrictions of their licence. Mr Tomlinson argued, however, that this right had to be balanced with (i) the right of the public to receive information, ideas or opinions on a variety of subject matters, especially those of public interest, in addition to (ii) his right to access broadcast media to express himself on issues of personal and public importance. Bearing those considerations in mind, it was asserted that the court ought to impose an obligation on broadcasters to broadcast what reasonable private citizens desire to disseminate, in light of the dominance of the media.

(ii) TVJ

[38] TVJ's primary contention was that it had not been given a fair opportunity to follow its established procedures in considering whether to air the PSA. It also submitted that, whereas a PSA required the endorsement or agreement of the broadcaster, its property rights, editorial press freedom and control were also material considerations.

[39] It was also submitted that the declarations sought by Mr Tomlinson, if granted, would amount to an imposition that was not sanctioned or contemplated by the Charter. This is because, according to TVJ, section 13(3)(d) did not create a right to use a person's private property to disseminate one's message and it was not the duty of the court to dictate what a broadcaster or editor could publish or report. In making these arguments, counsel for TVJ placed reliance on **New Brunswick Broadcasting Company Limited v Canadian Radio Television and Telecommunications Commission** [1984] 2 FC 410 (hereafter referred to as "**New Brunswick Broadcasting Company Limited**") and **Trieger v Canadian Broadcasting Corporation** (1988) 54 DLR (4th) 143 (hereafter referred to as " **Trieger"**).

(iii) CVM

[40] Relying on what it described as a right to freedom of contract, CVM submitted that by virtue of its standard contractual provisions, it had a right to decline or accept any advertisement or part thereof. It further posited that it had refused to air the PSA/PA in the light of its policies to uphold the law and to protect its revenue stream.

[41] It further asserted that, in light of its right to freedom of expression and its editorial control and judgment over what ought to be broadcast, it ought not to be compelled by the court to associate with others. Reliance was placed on the authority of **Regina (ProLife Alliance) v British Broadcasting Corporation** [2004] 1 AC 185 (hereafter referred to as "**ProLife**"), to submit that no one has a right to broadcast on the television.

(iv) The PBCJ

[42] The PBCJ's position was different from that of TVJ and CVM. It submitted that, by virtue of its statutory mandate, it did not offer commercial services, and as such, would have been prohibited from entering into contractual relations with Mr Tomlinson. It was further submitted that Mr Tomlinson's rights could not be properly interpreted to place an obligation on it to provide a mechanism for the exercise of that right. Additionally, the message Mr Tomlinson desired to convey, it submitted, was not of public interest. Concern was also raised that the advertisement could be construed to be in contravention of the Offences against the Person Act, which, it argued, would have its own possible repercussions.

Findings of the Full Court

[43] All three judges that heard the matter provided written reasons for their decision.

[44] Both P Williams and Sykes JJ concluded that the salient issues for the Full Court's consideration were:

i. whether Mr Tomlinson had sufficient standing to have brought the claim;

ii. whether the Charter permits horizontal application; and

iii. how the competing rights of Mr Tomlinson, vis-à-vis TVJ and CVM as provided for by section 13(3)(c) and (d) of the Charter, were to be dealt with.

[45] Pusey J, while highlighting certain features in the development of the constitutional protection of human rights, expressed the position that he concurred with his learned brother and sister.

[46] I will now set out below a summary of the learned judges' respective reasons for judgment.

(i) P Williams J

[47] Having had regard to the circumstances of the case, the reasoning in **Banton and others v Alcoa Minerals of Jamaica Incorporated and others** (1971) 17 WIR 275 as well as section 19(1) of the Charter, P Williams J found that Mr Tomlinson had demonstrated sufficient standing to have brought the claim. She reasoned that, whilst it could not be disputed that he acted not only on his own behalf, this did not take away from the fact that he was also a beneficiary of the claim, as the matters that were being addressed in the advertisement also affected him personally.

[48] It was clear, the learned judge concluded, that he had an interest in the airing of the PSA and that interest was sufficient and legitimate enough for him to be affected by the inability to share his message freely. Her decision on this issue can be seen at paragraph [30] of the judgment, which reads as follows:

> "[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."

[49] In coming to this decision, the learned judge reasoned, among other things, that "…although it is beyond dispute that the efforts of the claimant is [sic] 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'" (see paragraph [27] of the judgment).

[50] In the light of the above, the next question which arose for the learned judge's consideration, she said, was whether the provision in section 13(5) of the Charter was such that it allowed for constitutional redress to be available for infringements by a natural or juristic person vis-à-vis each other - the horizontal approach. With this in mind, the learned judge concluded that both TVJ and CVM as private entities are juristic persons who are bound to uphold the rights and freedom of other individuals, to include Mr Tomlinson. The position with respect to the PBCJ, was found by the learned judge to

be slightly different. This was based on her reasoning that it was not a private entity, and so, different considerations would apply.

[51] In seeking to balance the rights of the respective parties, the learned judge accepted the recognition by Lord Anthony Gifford QC, that the respondents "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". These rights, she found, had to be balanced against Mr Tomlinson's right to access broadcast media and to express himself on issues of importance to himself and the public in general.

[52] At paragraph [94] of her judgment, the learned judge reasoned that in order to balance the rights between the parties, the question for her to answer was "whether these opposing but equal rights [meant] that one must trump the other under our Charter, where the horizontal approach is applicable".

[53] In resolving this question, reliance was placed by her on the decision in **Columbia Broadcasting System, Inc v Democratic National Committee** (1973) 412 US 94. This led to her ultimate conclusion that the horizontal application was not applicable to the case in question as Mr Tomlinson had a duty to uphold the corresponding rights of TVJ and CVM.

[54] The learned judge further reasoned that journalistic discretion was a part of the rights of TVJ and CVM under section 13 (3)(c) and (d) of the Charter. These rights, she concluded, were to be respected and upheld just as the rights of Mr Tomlinson. To make a declaration against TVJ and CVM in favour of Mr Tomlinson could have only

been accomplished by prejudicing their rights and freedoms. Such a proposition, she concluded, could not have been the intention of the framers of section 13(5) of the Charter.

[55] With regard to the PBCJ, the learned judge accepted that it was a State agent. She held that the PBCJ had been afforded little time to respond to Mr Tomlinson's request. Further, its refusal having stemmed from its statutory mandate that did not entitle it to air paid or unpaid advertisements, the court could not, therefore, make an order compelling it to do so.

(ii) Sykes J

[56] Sykes J, like P Williams J, found that Mr Tomlinson had sufficient standing to have brought the claim. He accepted that Mr Tomlinson was an actor in the video and had, whether directly or indirectly, sought to have the video broadcast, albeit without success. These factors, the learned judge found, demonstrated that Mr Tomlinson would have been entitled to make the allegation that his right to freedom of expression and right to disseminate and receive ideas were being infringed, notwithstanding the fact that he may have been in receipt of financial support from third parties in bringing his claim. The fact that Mr Tomlinson was in receipt of financial support from a group outside Jamaica, the learned judge reasoned, was not indicative of him being the group's "tool". Having considered all the arguments, he concluded at paragraph [164]:

> "[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."

[57] In relation to the horizontal application of the rights of the Charter, the learned judge assessed dicta from a number of authorities emanating from several jurisdictions and concluded that the wording of the Charter is clear; horizontal application of Charter rights is now part of Jamaica's constitutional law. Accordingly, the learned judge stated at paragraph [203] of the judgment that section 13(5) 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 if it does then it may not apply to the same extent as it would to the state".

[58] The learned judge concluded that, once the court decided that a right applied to private citizens, it would be incumbent on it, in accordance with the wording of section 13(5), to indicate the extent to which the right applied. He stated further that the extent to which the right applied to private citizens necessarily affected their private law obligations.

[59] Having conducted a jurisdictional analysis, the learned judge stated that he found no basis in concluding that the Government was required to provide a forum to everyone who wanted to speak on an issue. He therefore reasoned that by comparison, it would be extremely unlikely that by some process of reasoning, a private citizen would be subject to greater obligation than the Government simply because of the horizontal application of the Charter rights.

[60] Turning to section 13(3)(c), the learned judge found that Mr Tomlinson did have the right of freedom of expression. This right empowered him to express himself in any manner that was capable of transferring an idea from his mind to another, even if those views were shocking or disturbing. The learned judge, however, found that notwithstanding the seemingly generous interpretation to be given to section 13 (3)(c), it would be impossible to glean that a demand could be placed on anyone to provide a forum for the person wishing to exercise the right.

[61] It was the learned judge's view, therefore, that the right to freedom of expression, though closely related, was not synonymous with the right to seek, receive distribute or disseminate information, opinions and ideas. The right, he concluded, meant that persons could use modern communication systems to fund, collect, disperse and deliver opinions and ideas and the State could not prevent this unless the restriction was demonstrably justified in a free and democratic society.

[62] The right to seek and distribute ideas, therefore, did not in the learned judge's view, accommodate the notion that one private citizen could compel another to use his

property to do the reception and dissemination of one's ideas. Section 13(5), he concluded, did not have anything to do with expanding or contracting the content of a right. What the provision did, he reasoned, is to create the possibility of horizontal enforcement, whilst adding nothing to the content of the right.

[63] In view of this, the learned judge reasoned that the respondents had not, in fact, breached the rights of Mr Tomlinson as section 13(3)(c) and (d) did not give a private citizen the right to use another private person's property to disseminate a message. What section 13 (3)(d) did, the learned judge held, was to give the person the right to disseminate his message by any technological means available. No private citizen was under an obligation to make specific provision to enable Mr Tomlinson to express himself.

[64] In rejecting Mr Tomlinson's claim, the learned judge concluded that his proposition with respect to freedom of expression, sought to use the court to compel someone to speak against their will. Such a stance, he concluded, failed to recognise that freedom of expression and freedom to receive and disseminate information or ideas included the right not to speak and not to receive or disseminate information. As such, Mr Tomlinson's wish to exercise his right was no more important than that of TVJ and CVM.

[65] In relation to the PBCJ, the learned judge held that the factual challenge against it had not been established. He opined that, while its position was different from TVJ and CVM, Mr Tomlinson had not been arbitrarily deprived of an avenue which had

previously been made available to him. The learned judge further concluded that there was no evidence that the PBCJ had solicited content from the public or had permitted the public to influence its content.

[66] The learned judge also noted that Mr Tomlinson had failed to demonstrate that judicial review was not an appropriate alternative remedy.

[67] It was for the reasons set out above, among others, that the Full Court dismissed the claim.

The appeal

[68] Dissatisfied with the Full Court's decision, Mr Tomlinson filed his notice and grounds of appeal. These were the grounds advanced by him, in support of the appeal:

> "1. The learned trial judge Sykes J erred in law when he recognized that the underlying rationale for the adoption of section 13(5) in South Africa was to address the significant social equality between different groups (para 191) but failed to:
>
> a. adequately consider the significance of this rationale in the Jamaican context where private bodies that are akin to the State in both power and influence can use their position to restrict the rights and freedoms of individual members of the society; and
>
> b. thereafter, apply that analysis to the facts of the case and in particular the unequal power relations between [Mr Tomlinson] and CVM and TVJ and the applicability of s 13(5) in those circumstances.
>
> 2. The learned trial judge Williams J erred in law when she found that ss 13(3)(c) & (d) could not be applied horizontally in the circumstances since to do so would be to trump TVJ and CVM's rights in favour of [Mr

Tomlinson] and that this result was never the intention of s 13(5) (para 97 and 98).

3. The learned trial judge Williams J erred in law when she failed to utilize section 13(2) of the Charter to balance the rights of [Mr Tomlinson] and [TVJ and CVM]. Section 13(2) of the Charter, which states that the rights are guaranteed. 'save only as may be demonstrably justified in a free and democratic society' provide a mechanism, which can be used to balance competing rights irrespective of whether the claim challenges an act of the state or an act of a private party.

4. The learned trial judge Sykes J erred in law when he concluded that [Mr Tomlinson] was arguing that he had a right to use a private person's property to disseminate his message and that [TVJ and CVM] had an obligation to air all advertisements.

5. On the contrary, it was [Mr Tomlinson's] contention that the right to freedom of expression included a right to not have his access to broadcast media refused on discriminatory, unreasonable or arbitrary grounds.

6. The learned trial judge Sykes J erred in law when he found that the content of the right to freedom of expression was the same under the 2011 Charter as it was under the old Chapter 3 of the Constitution of Jamaica and in particular that s 13(5) did not change the content of the right to freedom of expression.

7. The learned trial judge Sykes J erred in law when he found that the word 'media' in section 13 (3)(d) did not include entities such as [TVJ and CVM].

8. The learned trial judges Sykes J and Williams J erred in law when they failed to recognized [sic] that the primary reason the majority in ***Columbia Broadcasting System v National Democratic Committee*** 412 US 94 found as they did, was because they were unable to locate any indicia of state involvement, which would make the 1st Amendment applicable to the private broadcasters.

9. The learned trial judge Sykes J erred in law when he found that the decision in ***Benjamin v Minister of Information*** (2001) 58 WIR 171 turned on the distinction between withdrawing a forum for freedom of expression on the one hand and not providing such a forum and therefore could not be used to extrapolate the general principle articulated by Lord Hoffman in ***Prolife Alliance v British Broadcasting Corporation*** [2004] 1 AC 185.

10. The learned trial judge Sykes J erred in law when he found that Lord Hoffman's observations at para 58 of ***Prolife Alliance*** – broadcasters had a duty not to deny access to the airwaves in an arbitrary, unreasonable or discriminatory manner – was not applicable to [TVJ and CVM] as they are neither public bodies under a duty to act fairly nor subjects of judicial review (para 248).

11. The learned trial judge Sykes J erred in law when he failed to appreciate that even though the ***Prolife Alliance*** principle was developed in relation to a public broadcaster it is also applicable to [TVJ and CVM], where the position of the private entity is akin in power and influence to a state-owned broadcast station.

12. The learned trial judge Williams J erred in law when she found that the principle in ***Prolife Alliance*** was applicable to [TVJ and CVM] but failed to apply it in her analysis of whether they had breached [Mr Tomlinson's] rights under sections 13(3)(c) & (d) of the Charter.

13. The learned trial judge Sykes J erred in law when he failed to recognize that [TVJ and CVM's] obligation to act in the public interest by informing the public on important issues also included a duty to not deny access to the airwaves in an arbitrary, unreasonable or discriminatory manner (para 282).

14. The learned trial judges, Sykes J, Williams J and Pusey J, erred in law when they failed to sufficiently consider and subsequently find that the reasons given for the refusal by TVJ and CVM amounted to an unreasonable and discriminatory denial of access to the airwaves."

[69] Mr Tomlinson sought to have this court, on a successful hearing of his appeal, set aside the Full Court's decision in respect of TVJ and CVM and grant the declarations that had been sought in the court below. At the hearing of the appeal, Mr Tomlinson made it clear that no positive orders were being sought from this court, in that, he was not seeking an order that the advertisement be aired neither was he seeking an order with respect to costs.

The counter-notices of appeal

a. TVJ's counter-notice of appeal

[70] TVJ filed a counter-notice of appeal on 29 September 2014, which was subsequently amended on 4 June 2015 and again on 21 July 2015. Its grounds of appeal centred primarily on the question of whether Mr Tomlinson possessed the requisite standing to have brought the claim. The grounds as filed are outlined below:

> "a. The learned judges erred as a matter of fact and/or law in finding that the [Mr Tomlinson] has standing to bring the Claim having regard to the facts *including* the undisputed admission that the video in question was a part of a campaign on behalf of a group of persons.
>
> b. The learned judges erred as a matter of fact and/or law in finding that the [Mr Tomlinson] has standing to bring the Claim having regard to the true construction of sections 19(1) and 19(2) of the Charter.
>
> c. The learned judges erred as a matter of law in finding that the Charter provisions are capable of direct horizontal application thereby giving a private person a cause of action founded on a breach of the Charter.
>
> d. The learned judges erred as a matter of law in their interpretation of section 13(5) by failing to make the distinction between direct and indirect horizontal application

> in Charter jurisprudence as a consequence whereof they concluded that the section introduces a cause of action or litigation between private citizens for constitutional breaches.
>
> e. The learned judges erred as a matter of fact and law and/or wrongly exercised their discretion in not awarding costs to [TVJ] on these facts."

[71] At the hearing of the appeal, grounds (c) and (d), which focused primarily on the question of whether the provisions of the Charter are capable of horizontal application, were abandoned. TVJ, therefore, only argued grounds (a), (b) and (e) above.

b. CVM's counter-notice of appeal

[72] On 7 October 2014, CVM also filed a counter-notice of appeal, in which it sought to have the judgment affirmed in spite of what it stated were errors in the Full Court's interpretation of the law, and its failure to make rulings with respect to CVM's submissions. However, at the hearing of the appeal, Mr Hugh Small QC, appearing on CVM's behalf, notified the court that it would not participate or be represented in the appeal. No written submissions were filed on behalf of CVM. In the circumstances, the grounds of appeal which were filed by it will not be examined by the court.

[73] That notwithstanding, some of the issues raised by CVM in its counter-notice and grounds of appeal may be answered, without more, when dealing with the issues relating to TVJ's submissions on appeal and its grounds in the counter-notice of appeal.

The issues on the appeal and TVJ's counter-notice of appeal

[74] Having reviewed Mr Tomlinson's grounds of appeal and TVJ's counter-notice and grounds of appeal, I am of the view that, for the sake of convenience, they may be considered and disposed of by this court under the following broad headings:

i. Whether the rights guaranteed by section 13(3)(c) and (d) of the Charter are capable of horizontal application by virtue of section 13(5) of the Charter (grounds 1, 2, 6, 10 and 11 of the grounds of appeal).

ii. Whether the Full Court erred in its conclusion that the respondents' failure to air Mr Tomlinson's advertisement did not amount to an infringement of his constitutional right as guaranteed by section 13(3)(c) and (d) of the Charter (grounds 4, 5, 7, 8 and 9 of the grounds of appeal).

iii. Whether the failure or refusal to broadcast Mr Tomlinson's advertisement is justifiable in the light of the respondents' own constitutional rights (grounds 3, 12, 13 and 14 of the grounds of appeal)

iv. Whether the Full Court erred in its finding that Mr Tomlinson possessed the requisite standing to have brought the claim having regard to the facts, and also based on the true and

proper interpretation of section 19(1) and (2) of the Charter (TVJ's counter-notice of appeal grounds (a) and (b)).

v. Whether the Full Court erred in the exercise of its discretion to not award costs to TVJ (TVJ's counter-notice of appeal ground (e)).

The appeal

Issue (i)

Whether the rights guaranteed by section 13(3)(c) and (d) of the Charter are capable of horizontal application by virtue of section 13(5) of the Charter (grounds 1, 2, 6, 10 and 11 of the grounds of appeal)

Submissions

[75] The horizontal application of Charter rights, according to Mr Tomlinson, marks a new day in Jamaica's constitutional jurisprudence. The scope of the rights under the Charter, he said, is different from the old Charter, in that, private individuals are now capable of being bound by the Charter. In the light of this, Lord Gifford, on his behalf, contended that, while the original rationale for the recognition of human rights was to guard against State power unduly interfering with the autonomy of an individual, section 13(5) of the Charter is an express recognition of the power private entities might have to infringe the human rights of private citizens.

[76] The remedy provided by section 13(5) of the Charter is all the more powerful, Lord Gifford submitted, in cases where there exists no remedial legislation or common law remedy to govern cases in which a private entity's action has the potential to, or

does in fact, infringe another individual's Charter rights. Pointing to the facts of the case that were before the Full Court for consideration, learned Queen's Counsel argued that the influence, power and position of the respondents were such that they had the ability to unduly interfere with the free speech of a wide cross-section of the Jamaican population.

[77] Lord Gifford submitted further that P Williams J, in treating with the issue of the horizontal application of Charter rights, appeared to have accepted that, where one person's rights conflict with another's, as they did in this case, a balancing exercise would have to be undertaken. He, however, criticised the learned judge's conclusion that where the conflict exists, it was not intended that the scale must be tipped in favour of one individual over the other.

[78] TVJ had initially submitted that section 13(5) of the Charter only permitted indirect horizontal application, but later, in oral submissions, abandoned this approach, and argued, instead, that section 13(5) only dealt with the question of who could apply or benefit from a Charter right. Whether a right had horizontal application, depended, it said, on the nature of the right and the duty imposed in each case. This, TVJ submitted, was the question the Full Court was duty bound to ask and answer, in resolving this issue.

[79] Mrs M Georgia Gibson Henlin QC, on behalf of TVJ, submitted that the Full Court's reliance on the decision of **Fred Khumalo and others v Bantubonke Harrington Holomisa** (CCT53/01) [2002] ZACC 12 ("**Khumalo**"), led to its conclusion

that in the case in question, "section 13(3)(c) and (d) were not capable of direct horizontal application". This conclusion, she said, was the correct course for the Full Court to have adopted because the subject matter of the dispute between the parties related to a PSA, which, according to various authorities, amounted to editorial advertisements. These types of advertisements usually related to public issues which may at times be controversial. There is, according to Mrs Gibson Henlin, substantial journalistic discretion in relation to these types of advertisement. This, she submitted, was of significance, as it meant that the right being contended for by Mr Tomlinson was either not capable of horizontal application as found by the Full Court or, alternatively, was not infringed. The premise of this argument, according to her, was based on the fact that editorial discretion did not fall within the ambit of Charter protection accorded to individuals in their right to freedom of expression. This is in light of the fact that editorial discretion was incorporated within the rights accorded to the press as part of their freedom of the press or expression. To find otherwise, Mrs Gibson Henlin submitted, would undermine the rights accorded to the press, particularly as it relates to journalistic discretion.

[80] In sum, Mrs Gibson Henlin maintained that journalistic discretion was protected by section 13(3)(c) of the Charter and would be lost if direct horizontal application was allowed in relation to it. Further, section 13(3)(d) of the Charter was not engaged in relation to the issues that were before the Full Court, as there was no evidence confirming that TVJ had, in any way, prevented Mr Tomlinson seeking, receiving, distributing or disseminating information, opinions and ideas through the media.

[81] The position adopted by Mrs Nicole Foster-Pusey QC (hereafter referred to as "the Solicitor-General") was dissimilar to that of TVJ. The Solicitor-General submitted that the interpretation to be given to section 13(5) of the Charter was clear and unambiguous, that is, a person may enforce rights against other private individuals or companies.

[82] In the light of this, the learned Solicitor-General submitted that she shared the view expressed in **Khumalo** that the right to freedom of expression and the right to seek, receive, distribute or disseminate information, opinions and ideas through any media are rights which should be considered applicable to private persons as they are capable of being both upheld and violated by private persons. She further contended that the respondents would, *prima facie*, have been bound by virtue of section 13(5) of the Charter to uphold Mr Tomlinson's rights to freedom of expression and to seek, receive, distribute or disseminate information, opinions and ideas through any media.

[83] The learned Solicitor-General submitted, however, that section 13(5) did not have the effect of automatically applying Charter rights to private persons. The court would be required to engage in a deliberation so as to determine whether, in a particular case, based on the nature of the right itself, and the duty imposed by the right, it would be appropriate for a private person to be bound to uphold the right.

Discussion and analysis

[84] In the light of the chronology of events leading to Mr Tomlinson's 30-second video not being aired, he filed his claim and placed before the Full Court for its

deliberation and determination several provisions of the Charter, the first being the interpretation of section 13(5), which reads:

> "(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."

[85] Prior to the promulgation of the Charter, the rights and freedoms guaranteed under the Constitution were protected against infringement and abuses of the State to the extent that those rights and freedoms did not prejudice the rights and freedoms of others. That was described as the vertical application of Charter rights. One of the issues in this case, before the Full Court, was whether the Charter is enforceable against individuals or juristic persons, that is to say, whether it applies horizontally, and if so, how does it make provision for the horizontal application of Charter rights.

[86] It is important, in this discourse, to start with the general approach to the interpretation of any instrument or statute, namely, that one is to ask, what is the natural and ordinary meaning of words or phrases in its context in the statute. With regard to the interpretation of the rights guaranteed by the Charter, one can refer to and take guidance from the dictum of Lord Bingham of Cornhill in **Patrick Reyes v The Queen** [2002] UKPC 11 where, having referred to several authorities, his Lordship stated that the principles on this topic are well-known. Expressing in very clear language how one ought to proceed, he said:

> "26. ...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..."

[87] It has also been stated in several authorities and by many learned scholars that the interpretation of any limitation or reduction in any guaranteed right in the Charter is to be construed strictly.

[88] I agree with the Solicitor-General that, on a literal grammatical reading of section 13(5) of the Charter, the meaning is clear and unambiguous, and the court "need look no further than the literal rule of statutory interpretation". It was clearly the intent of Parliament that the rights in the Charter were to be upheld, and that provisions in the Charter would now bind not only the State but also, "natural and juristic" persons.

[89] Section 13(4) of the Charter states quite clearly that:

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

And so, there is no doubt that the Charter applies to all law (including the common law) and, as it says, binds the legislature, the executive and all public authorities.

[90] Section 13(5) is a major change in the new Charter. The original constitutional provision only bound the State and its organs as set out in section 13(4). So, previously, the rights were only of vertical application. Citizens could only seek to

enforce these rights against the Government and organs of the State. Now, with the promulgation of section 13(5) of the Charter, a citizen may enforce rights guaranteed under the Charter against other private individuals and juristic persons, which includes companies. This is what is referred to as the horizontal application of Charter rights: citizens are now permitted to sue each other, alleging a breach of their human rights. What is of grave importance now is how those rights are to be interpreted in relation to each citizen, in respect of each other. I shall deal with that aspect later on in this judgment. Several authorities were referred to by counsel in an effort to assist with the interpretation of the horizontal application of Charter rights. I will treat with a few of those authorities under this issue.

[91] In **Khumalo**, the Constitutional Court of South Africa had to grapple with the horizontal application of section 8 of the Constitution of the Republic of South Africa ("the South African Constitution"), which is in many respects similar to section 13(4) and (5) of the Charter. In that case, the competing rights were, the freedom of expression, on the one hand, and the value of human dignity, on the other.

[92] Section 8 of the South African Constitution reads as follows:

> "**Application**
>
> 8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
>
> (2) A provision of the Bill of Rights binds a 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 any 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."

[93] As can be seen, section 8(1) and (2) are similar to section 13(4) and (5) of the Charter, save that section 13(4) does not specifically include the judiciary. However, section 13(1)(2)(b) of the Charter does state that Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights, which in my view, would include the judiciary. Additionally, the Charter does not include section 8(3) of the South African Constitution which requires when applying any provision to a "natural or juristic" person, to apply, or if necessary, to develop the common law to the extent that the legislation does not give effect to the right, and permit the development of rules of the common law to limit the right, provided the limitation is in accordance with section 36(1). Section 36(1) deals with the circumstances and the extent to which the rights guaranteed by the Bill of Rights may be limited. More specifically, it states that the 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 certain relevant factors.

[94] The **Khumalo** case involved an application for leave to appeal (which was also treated as the appeal) against the dismissal of an exception by the Transvaal High Court. The respondent was a well-known South African politician, and leader of a political party. He sued Khumalo and others ("the applicants"), who were cumulatively responsible for the publication of the newspaper, the "Sunday World", for defamation in relation to an article published in the newspaper, which stated, *inter alia*, that the respondent was involved in a gang of bank robbers, and that he was under police investigation in relation thereto.

[95] The applicants' first challenge to the claim was that it disclosed no cause of action, as the respondent had made no plea that the statements were false. The challenge was made on the direct application of section 16 of the South African Constitution, which protects the right to freedom of expression, and alternatively, on the common law, that it should be developed to protect the spirit and purpose of the Bill of Rights. The applicants claimed that it was inconsistent with section 16 of the South African Constitution for the respondent to make a claim relating to matters in the public interest, and/or of political importance, dealing with the fitness of a public official for public office in circumstances where he had not alleged, and, therefore, did not intend to prove, the falsity of the statements allegedly made. The issue raised, therefore, was whether the common law of defamation, as developed in the courts, was

inconsistent with the South African Constitution, in that, it would limit the rights of freedom of expression enshrined in section 16 of the Constitution. The application for leave to appeal was granted; the issue of whether the order was appealable was raised and decided in the affirmative. The appeal proceeded with the constitutional issues as stated, which had been raised therein.

[96] The issue of the horizontal application of section 16 was examined. It was submitted that, as the Bill of Right applies to all law and binds the judiciary, section 16 must be interpreted to have direct application to the common law of defamation. That argument did not succeed. The court held that the common law does not, in all circumstances, fall into the direct horizontal application of the Constitution. It is only when subsections 8(1) and (2) are read together, and a court determines that a natural person is bound by a particular provision of the Bill of Rights, that section 8(3) of the Constitution becomes applicable, and if necessary, the common law must then be developed to the extent that the legislation does not give effect to that right.

[97] It was clear, and the court held that the right to freedom of expression was of direct horizontal application. If the common law of defamation unjustifiably limited that right, then it would have to be developed, pursuant to section 8(3) of the South African Constitution. The question was, as the common law did not require proof that the defamatory statement was false, and therefore, had not been raised and or pursued by the defence, was that inconsistent with the Bill of Rights, as "directly applicable?" Not having to prove that a defamatory statement was false would not directly affect the

powerful constitutionally protected freedom of expression interest, for, as O'Regan J stated, "there is no powerful interest in falsehood". But the court also stated that it remained a burden for the defendant to prove the truth of the statement, which often is a difficult task and risk, but that is the situation for the defendant at common law.

[98] In determining the issue, the court indicated that there were other constitutional values that had to be considered, namely the value of human dignity. The court stated that, for the applicant to succeed in showing that an unjustifiable limitation on the freedom of expression had occurred, the constitutional value of human dignity must be considered, and the applicants must show that the balance struck by excluding the need to prove falsity in the defamatory statement in the common law, resonated with the balance struck between freedom of expression and human dignity.

[99] In assessing this balance, the court examined the horizontal application of section 16 of the South African Constitution which protects the right to freedom of expression. In doing so, it made the following incisive statement at paragraphs [31]-[33] of the judgment:

> "[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 qualification to the terms of the Bill of Rights. Section 8(2) however provides that natural and juristic persons shall be bound by provisions of the Bill of Rights "to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right". Once it has been determined that a natural person is bound by a particular provision of the Bill of Rights, section 8(3) then provides that

> a court must apply and if necessary develop the common law to the extent that legislation does not give effect to the right. Moreover, it provides that the rules of the common law may be developed so as to limit a right, as long as that limitation would be consistent with the provisions of section 8(3)(b).
>
> [32] Were the applicants' argument to be correct, it would be hard to give a purpose to section 8(3) of the Constitution. For if the effect of sections 8(1) and (2) read together were to be that the common law in all circumstances would fall within the direct application of the Constitution, section 8(3) would have no apparent purpose. We cannot adopt an interpretation which would render a provision of the Constitution to be without any apparent purpose.
>
> [33] 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 than the state or organs of state, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2) of the Constitution... ."

[100] As a consequence, the court found that, in the circumstances, the applicants had not shown that the common law, as currently developed, was inconsistent with the provisions of the South African Constitution, and the appeal failed.

[101] Although **Khumalo** focused on section 8(3) of the South African Constitution, a provision that is not in the Charter, what emerged from the case was the clear acknowledgment that section 8(2) recognised that natural and juristic persons were bound by the provisions of the Bill of Rights, "to the extent that, it is applicable, taking into account the nature of the right, and the nature of any duty imposed by the right".

[102] It is evident to me that those words as set out in section 13(5) of the Charter also embrace a determination of whether the right alleged to be infringed is applicable, and if it is, the extent to which it is applicable, having regard to the nature of it, and the duty imposed by it. It is not the same as the protection of the fundamental rights of a person which are guaranteed against infringement by the State and which binds the State, as expressed in section 13(4) of the Charter.

[103] **Du Plessis and Others v De Klerk and Another** ("**Du Plessis**") [1997] 1 LRC 637 was another case before the South African Constitution Court. This case was, however, before the amendment to the South African Constitution, which, as indicated, contained section 8(1), (2) and (3) referred to earlier. The contention in this matter also concerned a defamation action brought by the plaintiff (respondent) for damages against the defendants' (appellants') newspaper. The appellants (editor/owner/publisher/journalist and distributor of the newspaper) had published a series of articles, alleging that certain "illegal" and "private flights", "were 'fuelling the war in Angola', and were doing so for personal gain, notwithstanding the disastrous effect of the Angolan civil war on the inhabitants of the country". The respondent was named as one of the private air operators.

[104] There were several issues in the case, for instance, whether the provisions of the South African Constitution were applicable, bearing in mind that the actions of the appellants and the publication of the offending articles in the newspaper had occurred before the Constitution had come into operation. The court held that they were not

applicable. Another challenge related to whether the provisions of Chapter 3, dealing with the protection of human rights, including section 15 (freedom of expression), were not generally applicable to any relationship other than between persons and the legislature, and the executive organs of government, at all levels of government, (the later section 8(1) provision). The court held that, perhaps in some other case, one may be able to argue that "some particular provision of Chapter 3 must by necessary implication have direct horizontal application". But ultimately, the court further held that horizontal application ought not to be done by implication. The court referred to the approach of developing the common law to be in keeping with the South African Constitution, and to have due regard to the "spirit", "purpose" and "object" of the Constitution in the interpretation of law, including the common law.

[105] In fact, Ackermann J cautioned against the use of the horizontal application as he said it would:

> "[112] ...[C]ast onto the Constitutional Court the formidable ultimate task of reforming the private common law of this country, a consequence which could not have been intended by the drafters. It turns the Constitution, contrary to the historical evolution of constitutional individual rights protection, also into a code of obligations for private individuals, with no indication in the Constitution as to how clashes between rights and duties are to be resolved, or how clashing rights are to be "balanced"; section 33(1) was clearly not designed and is quite inappropriate for this purpose. It would also be undesirable in a broader constitutional sense, pre-empting in many cases Parliament's role of reforming the common law by ordinary legislation."

[106] Kentridge AJ (with Chaskalson P, Langa and O'Regan JJ concurring) had, however, earlier in the judgment explained the difference between vertical and

horizontal application on fundamental rights in the Bill of Rights. So that the caution given by Ackermann J merely foreshadowed what was to be implemented later in the South African Constitution. This is what Kentridge AJ had to say in paragraph [8] of the judgment:

> "The term 'vertical application' is used to indicate that the rights conferred on persons by a Bill of Rights are intended only as a protection against the legislative and executive power of the state in its various manifestations. The term 'horizontal application' on the other hand indicates that those rights also govern the relationships between individuals, and may be invoked by them in their private law disputes. Although the terms 'vertical' and 'horizontal' are convenient they do not do full justice to the nuances of the jurisprudential debate on the scope of [Chapter] 3."

[107] In the context of the Constitution as it stood then, after an analysis of the South African Constitutional provisions, the court found that Chapter 3 only had vertical and not horizontal application, and as a consequence, the appellant could not invoke section 15, which guaranteed the right to freedom of expression, as a defence to a civil action for damages for defamation.

[108] Having acknowledged the dicta from **Khumalo** and **Du Plessis**, reviewing the provisions of the South African Constitution, particularly the provisions which currently embrace the horizontal application, I accept the reasoning of the courts, and can only conclude that the Charter does so also.

[109] There is no evidence before the court that section 13(5) of the Charter was promulgated to address, as existed in South Africa, great social inequality between groups, which were allegedly akin to private bodies in Jamaica capable of exercising

influence by virtue of their size and affluence, as argued by Lord Gifford (see ground 1(a)). As literally interpreted, the provision is really to address natural and juristic persons, and the issue before the Full Court was to examine the applicability of the horizontal application of Charter rights to the facts of the instant case. What is clear, as recognised by Sykes J at paragraph [201] of the judgment, is that the horizontal application of Charter rights established by virtue of section 13(5) of the Charter is now part of the Jamaican constitutional landscape.

[110] That, however, is not an end to the discourse, as the issue arises as to whether the horizontal application is applicable to the competing rights of the parties before the court. The question is, what is the extent and nature of the right claimed, the duty imposed by that right, in order to ascertain whether the natural or juristic person is bound by the said specific right.

Issue (ii)

Whether the Full Court erred in its conclusion that the respondents' failure to air Mr Tomlinson's advertisement did not amount to an infringement of his constitutional right as guaranteed by section 13(3)(c) and (d) of the Charter (grounds 4, 5, 7, 8 and 9 of the grounds of appeal)

Submissions

[111] The resolution of this issue, Mr Tomlinson submitted, rests on the distilling of two key factors. They were stated by him to be:

i. an understanding of the meaning of the term media; and

ii. a review of why the constitution was not worded so as to limit section 13(3)(d) of the Charter to the term, "freedom of the press".

[112] Lord Gifford submitted that the term "media" as defined by the Oxford Online dictionary, encompasses, "the main means of mass communication (especially television, radio, newspapers, and the internet)". Accordingly, the respondents would be included in the term, as described by section 13(3)(d) of the Charter.

[113] With respect to the concept freedom of press, Lord Gifford argued that it was of note that the final report of the Constitutional Commission in Jamaica shows that the use of the term, "freedom of press", had been rejected in favour of the current formulation of section 13(3)(c) and (d) which speaks to a person having an entitlement to freedom of expression and having the right to seek, receive, distribute or disseminate information, opinions and ideas through any media. This was of importance, he submitted, as the use of the phrase, "distribute or disseminate" indicates that the section envisaged a person having more than a right to speak. Distribution or dissemination of ideas or opinions, he contended, would not be possible without access to the media. It is clear that for an individual to have effective public communication this must be through some form of media, for example, the television. To do this, Lord Gifford argued, would necessarily involve the use of the services of others. For an individual, therefore, to effectively access these avenues for expression and to disseminate information, the person who controls the access must be required to not deny access arbitrarily, discriminatorily or unreasonably.

[114] It is in the light of this reasoning that Lord Gifford levied much criticism at the Full Court's findings and in particular the reasoning of Sykes J at paragraph [311] of the judgment. He contended that the learned judge had concluded that the Charter did not give any private citizen the right to use another private person's property to disseminate any message, and that a television station was, therefore, not obliged to air all advertisements from the public. He contended that this finding would have been wrong, as it was neither Mr Tomlinson's contention that he had a right to use a private person's property to disseminate his message, nor was it his view that the respondents had an obligation to air all advertisements. Instead, the crux of his arguments before the Full Court were that the right to freedom of expression or to disseminate information included a right to not have his access to broadcast media refused on discriminatory, unreasonable or arbitrary grounds. This reasoning, he concluded, was based on the principles outlined in such decisions as **ProLife**, **Benjamin and others v Minister of Information and Broadcasting and another** [2001] UKPC 8 and **VgT Verein gegen Tierfabriken v Switzerland** (2002) 34 EHRR 4 ("**VgT v Switzerland**").

[115] In contrast to the position adopted above, Mrs Gibson Henlin, on behalf of TVJ, posited that the question of whether Mr Tomlinson had the right to use someone else's property to disseminate his message properly arose within the context of the rights created by section 13(3)(d) of the Charter. She, therefore, submitted that, based on the facts that were before the Full Court, the learned judges could not be faulted in their conclusion.

[116] Queen's Counsel argued that Mr Tomlinson had misrepresented the facts in contending that TVJ had been requested to carry a paid advertisement. What had been requested, she submitted, was for TVJ to review a PSA before Mr Tomlinson would have been asked to pay for the production of it. This is of significance, she submitted, as it demonstrated that the case before the Full Court was not one where there could have been a finding that TVJ's actions were done on terms which were discriminatory, unreasonable or arbitrary. In the light of this, Mrs Gibson Henlin submitted that Sykes J would have been correct in his conclusion that the content of the right under the Charter was not extended by the fact that private individuals could now enforce a Charter right.

[117] The learned Solicitor-General submitted that the right to freedom of expression through the use of any media is a right which extends not only to the specific class of persons, commonly known as the "media", but extends to everyone (see **Moysa v Alberta (Labour Relations Board**) [1989] 1 SCR 1572). This meant, therefore, that all persons, inclusive of Mr Tomlinson, would have the right to use the press and other media of communication to express their thoughts, beliefs and opinions. Consequently, the learned Solicitor-General was of the view that the question that stands to be resolved by this court, in disposing of this issue, is whether, having regard to the scope of the rights, they could be extended to the use of another person's property or media platform in order to convey a message. This question could be answered, she said, based on the ratio which could be distilled from such authorities as **Greater Vancouver Transportation Authority v Canadian Federation of Students -**

British Columbia Component and British Columbia Teachers' Federation [2009] 2 SCR 295 ("**Greater Vancouver Transportation Authority**"), which highlighted that the right to freedom of expression does not allow a person to express themselves in any format or at any place they desired. A distinction was, however, made with respect to property, which was being used as a platform for public expression, and where a manner of expression is refused by the authorities. In those circumstances, the authorities would have impeded the right to freedom of expression and would be put in a position of having to justify that impediment.

[118] The learned Solicitor-General was, therefore, of the view that the right to freedom of expression could include within its scope the use of someone else's property to broadcast a message. In the circumstances, she advanced the position that it would not be correct to conclude that the fact that the media platform sought for use by Mr Tomlinson happened to be the property of another, was sufficient to entirely dismiss the question of whether an infringement had been occasioned. TVJ's failure to broadcast the advertisement did impact on Mr Tomlinson's freedom of expression as he had been clearly hampered in his efforts to convey his message through a particular medium of communication to the television viewing public in Jamaica.

Discussion and analysis

[119] The Charter, in its preamble, recognises the obligation of the State to promote universal respect for, and observance of, human rights and freedoms (section 13(1)(a)); that all persons in Jamaica are entitled to preserve for themselves these rights by virtue of their inherent dignity (section 13(1)(b)); and that persons have a

responsibility to uphold the rights of others (section 13(1)(c)). The protection of the rights and freedoms guaranteed by the Charter is to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.

[120] These rights and freedoms are several. But subsections 13(3)(c) and (d) are relevant for the purposes of this appeal. They read as follows:

> "13. (3) The rights and freedoms referred to in subsection (2) are as follows -
>
> (a) ...
>
> (b) ...
>
> (c) the right to freedom of expression;
>
> (d) the right to seek, receive, distribute or disseminate information, opinions and ideas through any media; ..."

[121] There is no question that these are very important fundamental rights. Indeed, the right to "freedom of expression" is a right set out in other jurisdictions with similar human rights provisions as the Charter. For example, article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (now the European Convention on Human Rights, hereafter referred to as "the Convention") and section 12 of the Human Rights Act, 1998 (of the United Kingdom), both make specific provision for an individual's right to freedom of expression to be upheld. In **Handyside v The United Kingdom** ("**Handyside**")[1976] ECHR 5493/72, the European Court of Human Rights ("the ECtHR") declared that:

> "Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to para 2 of Article 10, it 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."

[122] The Charter, however, provides that subject to certain provisions (sections 18 and 49, and to subsections 13(9) and (12)), and save only as may be demonstrably justified in a free and democratic society, the rights as set out therein, are guaranteed (section 13(2)). Parliament is obliged not to pass any law which infringes those rights (section 13(2) (b)).

[123] In spite of the breadth and importance of the right to freedom of expression, and the right to disseminate information, opinions and ideas, one must be mindful, therefore, that these rights are not absolute. The Charter constrains persons to uphold the rights and freedoms of others, and states that the protection of the rights and freedoms are to the extent that they do not prejudice the rights and freedoms of others. It also provides that the rights and freedoms may be limited if it is demonstrably justified to do so, in a free and democratic society.

[124] This requires us, therefore, to carefully examine the Charter rights that Mr Tomlinson alleges have been infringed, in order to ascertain whether they are enforceable against the respondents. This must be considered bearing in mind the circumstances of the nature and extent of the respondents' guaranteed rights to

freedom of expression and the duties attendant therewith, as well as their common law right of freedom to contract. The question is, are the respondents in those circumstances bound to uphold the rights alleged by Mr Tomlinson to have been infringed by virtue of section 13(5) of the Charter?

[125] In **New Brunswick Broadcasting Company Limited**, the Federal Court of Canada reviewed the challenge to paragraph 2(b) of the Canadian Charter of Rights and Freedoms ("the Canadian Charter"), which reads:

> "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; ..."

[126] The summary of the facts are that the appellant, a newspaper publisher and a television broadcasting station, applied for a renewal of its broadcasting licence. The Canadian Radio-television and Telecommunications Commission ("CRTC") limited the renewal of its licence to less than the five-year term expected. In coming to its decision, the CRTC took into account an Order in Council which restricted its authority to issue or renew broadcasting licences to persons who owned or controlled newspapers circulated in the broadcasting area. The appellant appealed on the basis that, *inter alia*, the steps which had been taken by the CRTC deprived it and members of the public of the right

to freedom of expression, including freedom of the press and other media communication. The Federal Court of Appeal dismissed the appeal and the application.

[127] The court, in rejecting the appellant's submission that the direction of the Commission was in breach of the Canadian Charter, gave clarity to what the right guaranteed in paragraph 2(b) envisaged. It stated that the right to freedom of expression and the right to the use of property should not be confused. The court reasoned:

> "25 ...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 else'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 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 the licensing and other provisions of the *Broadcasting Act*. The appellant's freedom to broadcast what it wishes to communicate would not be denied by the refusal of a licence to operate a broadcasting undertaking. It would have the same freedom as anyone else to air its information by purchasing time on a licensed station. Nor does the Charter confer on the rest of the public a right to a broadcasting service to be provided by the appellant. Moreover, since the freedom guaranteed by paragraph 2(b) does not include a right for anyone to use the property of another or public property, the use of which was subject to and governed by the provisions of a statute, there is, in my opinion, no occasion or need to resort to section 1 of the Charter to justify the licensing system established by the *Broadcasting Act*."

[128] The court, indeed, found that what was affected by the failure to renew the licence was nothing but "...an expectation. It was not something recognised as a property right". The appellant had no right to a specific renewed term of the licence. The limiting of the period of extension of the licence was, therefore, upheld.

[129] In the examination of **New Brunswick Broadcasting Company Limited**, and its applicability to the instant case, it must be remembered that the important point of relevance and the issue herein is the content of the right alleged to have been infringed, and the approach to ascertain whether there had been a violation of it. In Canada, there is no provision for the horizontal application of Charter rights, so the court used the vertical application, and the conclusions reached must be viewed against that backcloth.

[130] In his submissions before this court, Lord Gifford advanced that, in contrast to the findings of the Full Court, Mr Tomlinson was not of the view that he had a right to use a private person's property to disseminate his message or that the respondents were obligated to air his advertisement. Learned Queen's Counsel postulated that Mr Tomlinson's position was that, in order for an individual to effectively communicate publicly, this necessitated the use of some form of media, which would include the television, and that this, by its very nature, would require the use of services of others.

[131] It is accepted, as argued by Lord Gifford, that the reference to "media" in section 13(3)(d) of the Charter would include the respondents. The literal definition of "media" is the "main means of mass communication (especially television, radio and

newspapers) regarded collectively" (see the Concise Oxford Dictionary, 11th edition revised, page 886).

[132] In my view, Lord Gifford's position cannot be examined without consideration of whether, in exercising the rights set out in section 13(3)(c) and (d), an individual would be empowered to use someone else's media as a platform for mass communication. Freedom of expression, as guaranteed by the Charter, undoubtedly gives a person the right to disseminate his message by any technological means available, as was observed by Sykes J at paragraph [311] of the judgment. The question, therefore, must be asked, whether in exercising the rights set out in section 13(3)(c) and (d) of the Charter, this would also include a right to use someone else's property, as in this case, the respondents' television station, as a platform to do so.

[133] It is clear, in my view, that Mr Tomlinson's right to freedom of expression and the right to distribute or disseminate information, opinions and ideas does not give him the right to use someone else's property to publish his advertisement. A similar approach was adopted in the Canadian case of **Irwin Toy Limited v Quebec (Attorney General)** [1989] 1 RCS 927, which was an appeal to the Supreme Court of Canada from the Court of Appeal for Quebec. The case concerned the regulation of advertising aimed at children. Included in the issues for determination was whether commercial expression, as a category of expression, was protected by section 2(b) of the Canadian Charter. The case, therefore, raised questions as to whether sections 248 and 249 of Canada's Consumer Protection Act, dealing with control of advertisements

directed at persons under the age of 13 years, were in breach of sections 2(b) and 7 of the Canadian Charter. The court concluded that, when faced with an alleged violation of the guarantee of the right to freedom of expression, there were two steps to be taken in its deliberation.

[134] What was important for the first step consideration, was stated by the court as follows:

> "Activity is expressive if it attempts to convey meaning. That meaning is its content. 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 expressions 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 for their inherent value both to the community and to the individual."

[135] So, the court concluded that, "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie,* falls within the scope of the guarantee". The court further made it clear that the "guarantee of free expression protects all content of expression". However, the court underscored that "violence as a form of expression receives no such protection". So, the first question for the court was, "did the advertisement aimed at the children fall within the scope of freedom of expression?" That answer was in the affirmative as the advertisement aimed to convey a meaning. One could not say that it had no expressive content.

[136] The second step in the enquiry was whether the purpose or effect of the alleged violation or action in question was to restrict freedom of expression. That is, whether the purpose or effect of the impugned Governmental action was to control attempts to convey meaning through that activity? The court made it clear that the purpose of the activity must be measured and assessed from the standpoint and against the ambit of, the relevant guaranteed right. If, as in that case, the court was concerned as to whether it was the Government's purpose to restrict the content of the expression by singling out particular meanings so that they were not conveyed, then it would necessarily limit the guarantee of freedom of expression. Equally, if the government's purpose was to restrict a form of expression, in order to control access by others to the meaning to be conveyed, or to control the ability of the person conveying the meaning, all would limit the guaranteed right. Ultimately, the court held that the provisions were in breach of section 2(b) of the Canadian Charter, but found that the limitations and the provisions were justified.

[137] In the instant case, there is no question about the clear fundamental right to freedom of expression. Mr Tomlinson wanted to air an advertisement geared at bringing about a more favourable outlook by members of the public of gay men. The first question would have to be what was the scope and content of the activity/advertisement? Did it fall within the protection of the right? It clearly wished to convey a meaning, and so, it did fall within the description of the guaranteed right to freedom of expression. There was no element of violence depicted therein.

[138] With regard to the second step, was the purpose of the activity limited? This question may be answered in the affirmative, as the advertisement was not aired. However, as indicated previously, in **Irwin Toy**, there was no horizontal application. It is my view, therefore, in the particular circumstances of this case, that where horizontal application of Charter rights arises for consideration, unlike in **Irwin Toy**, the real question which has to be asked, is, whether given the equal nature of the rights as between the parties, the respondents in not airing the advertisement, in effect, limited or restricted Mr Tomlinson's rights? In other words, whether there was, in fact and in law, an attempt by the respondents to control the message or the meaning Mr Tomlinson wished to have conveyed. My immediate response would be in the negative. There are also two points that need to be made here, in this regard.

[139] First, TVJ has said that it did not have the opportunity to provide a response to Mr Tomlinson. It contended that it was in the process of considering his request and contemplating what action should be taken when he instituted proceedings against it. The matters being considered by TVJ were disclosed. There was an added difficulty, which was that it was not clear from Mr Tomlinson’s initial correspondence, whether the video was a PSA or a PA. With regard to a PSA, TVJ intimated that serious considerations had to be given to publication of the same, for as stated, the station may appear to have endorsed homosexuality as a preference, which could have its own consequences for the institution, which is a private organisation, with obligations to directors and shareholders. TVJ, therefore, considered it necessary to act prudently.

With regard to the PA, there was the concern relating to content, and also the comparative issue of the advertising spend.

[140] In relation to CVM, before the claim was filed, the company adopted a similar position to that of TVJ. Subsequent to the action having commenced, it indicated, however, that a decision had been taken not to publish the video, and the company indicated its reasons for not doing so, namely, that the advertisement may be considered a covert attempt by the station to encourage homosexuality. Also, there may be an assumption of the commission of buggery, which is a criminal offence. It was CVM's opinion that those perceived activities could have a consequent adverse effect on its revenue stream. CVM also relied on what it stated was its common law and constitutional right to freedom of contract.

[141] Lord Gifford, in his submissions before us in support of the grounds of appeal, argued that one of Mr Tomlinson's main planks of complaint was that he was entitled to, and the respondents had failed to give, due consideration to the airing of the video. They were not entitled, he submitted, to refuse to do so on arbitrary, discriminatory and unreasonable grounds, contrary to their duty to uphold Mr Tomlinson's guaranteed constitutional right.

[142] It is, therefore, necessary as a consequence, to discuss the distinct difference between the vertical and horizontal application of the Charter. In **Irwin Toy**, the question was whether the legislation was interfering with the Canadian Charter provisions. Whereas, in the instant case, the issue is not whether legislation is

interfering or limiting Mr Tomlinson's rights to freedom of expression and the dissemination, information of opinions and ideas, but whether the respondents, who are not organs of the State, but juristic persons, are doing so. One important thing to note in this distinction is that the respondents also have the same rights as Mr Tomlinson - the right to freedom of expression as well as the right to disseminate information, opinions and ideas. These rights are equal in content and in nature. And so, in the instant case, the respondents could not be said to have adversely or negatively affected the message Mr Tomlinson intended to convey. This is because, on the one hand, the appellant was desirous of airing a PSA/PA and the respondents were concerned about the content of the said PSA/PA being conveyed or broadcast on their network for several reasons already indicated. It is to be noted also, that the right of the freedom of expression includes a right not to say anything at all (see **Slaight Communications Inc v Davidson** [1989] 1 SCR 1038).

[143] The thrust of the respondents' reasons for refusing to air the advertisement, as stated by them, was the concern, *inter alia*, that: (i) their actions could be viewed as endorsing breaches of the law, and (ii) could incite violence or breach of the peace, both of which would constitute breaches of the Television and Sound Broadcasting Regulations, 1996. So, on any analysis of the facts of this case, I do not see how Mr Tomlinson could succeed with a submission of an allegation of arbitrary, unreasonable and discriminatory conduct on the part of the respondents, in the circumstances set out above and previously, or that the respondents had been abusing their position of large commercial institutional strength.

[144] This reasoning is in line with the House of Lords case of **ProLife**. In that case, the claimant was a political party opposed to abortion. It submitted a video for broadcast showing graphic footage of an actual abortion, including images of aborted foetuses. The British Broadcasting Corporation ("the BBC") refused transmission of the video on the grounds of taste and decency, concluding that it would be offensive to public feeling, contrary to its agreement with the Secretary of State for Natural Heritage, and section 6(1)(a) of the United Kingdom's Broadcasting Act 1990. The claimant applied for permission to apply for judicial review of the decision to refuse transmission, which was refused by the judge. The Court of Appeal allowed the appeal by the claimant.

[145] On appeal by the BBC, the House of Lords (Lord Scott of Foscote dissenting), allowed the appeal on the basis that party political broadcasts were subject to the same restriction on transmission with regard to offensive material as other programmes, and so, there was no basis for interfering with the BBC's decision. Applying the standards laid down by Parliament, the court found that the video should not be transmitted. The decision also was found not to have been a discriminatory, arbitrary, or unreasonable denial of the right to freedom of expression represented in article 10(2) of the Convention.

[146] As Laws LJ said in the Court of Appeal, "this case was about the censorship of political speech". The claimant's campaign policy was one of "absolute respect for innocent human life from fertilisation until natural death," and as a consequence they

"oppose abortion, euthanasia, destructive embryo research and human cloning". The video, the subject of the case, was created as part of the political campaign for general elections. The process for reviewing the video for publication was set out, commencing with a review of all representatives of all territorial broadcasters, namely BBC, ITV, Channels 4 and 5. They all refused to broadcast it. The video was revised, edited and two subsequent versions were produced. They were all graphic depictions of various kinds of abortions, at different stages with limbs of the foetuses dismembered in a number of the images. The court noted that the images in the video were of real footage. There had not been any fictional display for sensationalisation. Laws LJ said that the images were certainly, "disturbing to any person of ordinary sensibilities". In fact, Lord Nicholls of Birkenhead in the House of Lords said, "[u]nquestionably the pictures are deeply disturbing. Unquestionably many people would find them distressing, even harrowing". Although edited, the subsequent videos showed some of the same pictures but the images appeared fuzzy with no sharp focus. It was obvious, subsequently, that the broadcasters had no objection to the soundtrack of the video. So, ProLife was not prevented from saying what they wanted to say about abortion. The objection was to the disturbing images of the damaged foetuses.

[147] The House of Lords held that the ProLife advertisement was subject to the programmes standard. The independent broadcasters were governed by section 6 (1)(a) of the Broadcasting Act 1990, which imposed a duty on licensees to do nothing in their programmes against good taste or decency or which would be likely to encourage or incite crime or to lead to disorder, or to be offensive to members of the public. The

BBC was subject to the agreement with the Secretary of State, which contained similar terms relating to publishing any broadcast against good taste and decency.

[148] Lord Hoffmann set out the nature of the right under article 10 of the Convention. He said, *inter alia*, that the "primary right protected by article 10 is the right of every citizen not to be prevented from expressing his opinions". He has the right to "receive and impart information and ideas without *interference* by public authority". He stated that in this case, the primary right had not been engaged, and ProLife had not been prevented from doing anything. Indeed, he said that ProLife had enjoyed the same free speech as every other person. He made it clear that, "there is no human right to use a television channel". He stated also clearly that broadcasters were required to allow political parties to broadcast, but they are permitted to do so subject to certain conditions.

[149] Lord Hoffmann cautioned, however, with the following incisive remarks in paragraph 58 of his reasons for judgment:

> "The fact that no one has a right to broadcast on television does not mean that article 10 has no application to such broadcasts. 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 grounds."

[150] Lord Hoffmann stated further that the Court of Appeal erred in that it had asked itself the wrong question. He said the Court of Appeal:

> "...[T]reated the case as if it concerned the primary right not to be prevented from expressing one's political views and concluded that questions of taste and decency were not an adequate ground for censorship. The real issue in the case is whether the requirements of taste and decency are a discriminatory, arbitrary or unreasonable condition for allowing a political party free access at election time to a particular public medium, namely television."

[151] The court found that the conditions were not discriminatory. There was no basis, public interest or otherwise, to exclude or exempt ProLife from the taste and decency requirements. The conditions imposed on the broadcasters, and their refusal to broadcast the video, did not invoke any arbitrary or unreasonable restriction on the right of freedom of speech.

[152] Lord Gifford relied heavily on this case to submit that Mr Tomlinson has recognised that his right to freedom of expression must be subject to the rights of freedom of expression of the respondents, with all its attendant rights and duties. He posited, however, that Mr Tomlinson's right included the right for his activity to be considered fairly, reasonably, and not discriminately, and for the respondents to act as such. The question would then be, was there any evidence in this case, that the respondents had not given fair, reasonable and indiscriminate consideration to Mr Tomlinson's request? The facts of this case do not seem to support that claim. I will deal further with this later on in this judgment.

[153] In **Trieger v Canadian Broadcasting Corporation** (1988) 66 OR (2d) 273, a case from the Supreme Court of Ontario, Campbell J dealt with an application for an injunction or a mandatory order to force the participation of the leader of the Green

Party in the national political leaders' debates, which had been scheduled for broadcast by the respondent television networks. The persons scheduled to participate in the debate were the leaders of the three national political parties. The applicants' contention was that they should have been permitted to participate in the national debate, and if that was not permitted, it was a violation of their constitutional right and the debates ought to be stopped. Alternatively, they sought an order requiring some similar debate or similar opportunity in order to be able to get their ideas across to the public on an equal basis with the other leaders.

[154] The legal basis of the application was, *inter alia*: (i) the Television Broadcasting Regulations, 1987, which require equitable treatment by "the broadcast media of partisan political issues and parties"; (ii) the fundamental freedom of expression guaranteed by section 2(b) and of freedom of association, guaranteed by section 2(d) of the Canadian Charter; and (iii) the right to equal protection and benefit of the law without discrimination, guaranteed by section 15 of the said Charter.

[155] It is important to reiterate that the Canadian Charter does not have any provision for the horizontal application of Charter rights, so predictably, Campbell J noted that the Canadian Charter "...applies to government action. It represents a curb on the power of government, not a fetter on the rights of organisations or individuals independent of government which do not exercise the functions of government". Indeed, he asserted strongly:

> "16 It is not the function of government or indeed the courts to dictate to the news media what they should report. The

> broadcasters are exercising a function that is very central to the democratic process. But it is a function they perform quite independently of government."

[156] Campbell J, therefore, held readily that the respondent was not "...exercising powers akin to government action so as to become subject to the Charter". It was not for the court to say who should be part of the debate and on what terms it should occur. It was also not for the court, "...to dictate the agenda of political debates… [or] to interfere with the freedom of speech and expression of the various party leaders by dictating the debate format, content or participant ". Campbell J also noted that, "...it [was] up to broadcasters and editors to decide what they wish to publish". It was, he stated, really a matter, "...within the area of journalistic discretion".

[157] Campbell J remarked that, "there [was] a significant constitutional value at stake" with regard to freedom of the press and other media communication. However, of even more significance was his statement that, " it [was] by no means clear on this record that [the applicants'] freedom of expression requires a court to force the media to carry their views to the public". Indeed, he said that, in pursuance of their own constitutional rights, the applicants were desirous of interfering with the rights of the public to hear the debate, and the rights of the leaders to participate in the debate. It would, he said, ultimately result in an interference with the constitutional right of the media, "...to decide what they think is newsworthy without having newsworthiness dictated to them by any court". He then stated categorically, with regard to the right of freedom of speech, that, "...[it] does not necessarily carry with it the right to make someone else listen or the right to make someone else carry one's own message to the

public". He endorsed the speech referred to at paragraph [128] herein, where Thurlow CJ of the Federal Court in **New Brunswick Broadcasting Company Limited** stated, *inter alia*, that the freedom to express and communicate ideas is not a freedom to use somebody else's property to do so. For these reasons, *inter alia*, the injunction was refused.

[158] The dictum in **Trieger** is of some significance to the deliberation on the issues in the instant case because, although there is no horizontal application of Charter rights in Canada, Campbell J exercised restraint and did not permit the applicants, who claimed that their constitutional right to freedom of expression was being infringed, to interfere with the interest of the CRTC, a federal board, subject to government regulations, to decide what was newsworthy, and to force the use of its platform. He also refused to permit the applicants to interfere with the national debaters' interest or to interfere with the interest of members of the public. In the instant case, one must query why Mr Tomlinson should be permitted to force the respondents, who have no government association, to permit him to use their television stations to carry his message to the public, or to encourage members of the public to listen to his ideas.

[159] In the case of **Columbia Broadcasting System, Inc**, the Supreme Court of the United States examined, *inter alia*, whether the First Amendment principles relating to freedom of speech, expression and the press, required broadcasters to accept paid editorial advertisements. For these purposes, those equate to PSAs. In this case, the Democratic National Committee requested a declaratory ruling from the Federal

Communications Commission ("FCC") as to whether a policy, refusing to sell time to "responsible entities" to present their views on public issues, was in breach of the United States' Communications Act and the First Amendment. There was a challenge to a restriction on permitting announcements on the Vietnam conflict, claiming that restricting those views in relation thereto failed to meet the FCC's Fairness Doctrine. The FCC rejected the challenge, and ruled that a broadcaster was not prohibited from having a policy of refusing to accept paid editorial advertisements. The Court of Appeal reversed that ruling as being in violation of the First Amendment. The court directed the FCC to develop regulations indicating which, and how many editorial announcements would be aired. The Supreme Court reversed that ruling, indicating that neither the United States Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements.

[160] The court stated that it was the right of viewers and listeners and not the right of broadcasters, which was paramount, and that was particularly so, when dealing with the sale of commercial time and persons wishing to discuss controversial issues. It was also held that, "...no private individual or group has a right to command the use of broadcast facilities".

[161] The court recognised the "great delicacy and difficulty" in balancing various First Amendment interests, namely, what best served the public's interest as against rights of the broadcast media. The broadcaster, however, had to be regulated by the issuance of licences, which was necessary due to the scarce resources, and as stated in **Red**

Lion 395 US 377, "without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard".

[162] With the development of legislative reform, the United States congress chose to leave broad journalistic discretion to the licensee. The broadcaster, therefore, was allowed significant editorial judgment in deciding how to exercise a fair approach to access the broadcast platform. This editorial judgment was, however, constrained by rules and regulations, and within those restrictions, the broadcaster endeavoured to grapple with different viewpoints wishing to be aired, and the amount of time which ought to be accorded to any particular point, individual, or groups of individuals making any specific request. It was expected that this in-depth consideration would be undertaken fairly, and not pursuant to one's own private ends and beliefs.

[163] The court referred to the case of **New York Times Co v Sullivan** (1964) 376 US 254, in which it was recognised that the FCC's Fairness Doctrine required that the broadcaster licensee must not only permit partisan voices in a bland, inoffensive manner, as that would run counter to the "profound national commitment that debate on public issues should be uninhibited, robust, and wide-open". The court stated that the viewing public should, therefore, be provided with a "balanced presentation of information on issues of public importance".

[164] To arrive at its ultimate determination, the court examined whether the action of the broadcaster to refuse to accept editorial advertisements was 'governmental

action', violative of the First Amendment. It is significant to note that there is only vertical, and no horizontal application to constitutional rights in the United States. The court recognised that the broadcaster, by way of electronic media, had become a major factor in the dissemination of ideas and information. The court found that, with that responsibility, the broadcaster became a "public trustee" charged with the duty to act fairly in informing members of the public. Indeed, the licensee was expected to operate with "balance and objectivity". So, the decision to accept or reject editorial advertising was to be examined against the backcloth of its journalistic role. The court, therefore, found that the regulated industry, with private independent broadcasters with journalistic input could not be described as 'government action' violative of the First Amendment.

[165] The court next considered whether, pursuant to the Communications Act, the "public interest" required broadcasters to accept editorial advertisements. Having canvassed several authorities and detailed submissions, the court found that the First Amendment did not require the FCC to mandate a private right of access to the broadcast media. As indicated previously, the Supreme Court differed from the Court of Appeal which was of the view that the terms of the FCC's Fairness Doctrine, permitting the broadcasters to exercise journalistic judgment over the discussion on public issues, was inadequate to meet the public interest and for them to be properly informed and fell victim to a "paternalistic structure", allowing the broadcaster to decide what issues were important and how to cover them. The Court of Appeal was of the view that the forced sale of advertising time for editorial spot announcements would "remedy that

deficiency". That view was rejected by the Supreme Court. It also rejected the Court of Appeal's view that the FCC's Fairness Doctrine was "paternalistic."

[166] In the hearing of the appeal in the instant case, Lord Gifford relied heavily on the dissenting judgment of Mr Justice Brennan, with whom Mr Justice Marshall concurred. Justice Brennan indicated that he endorsed the dictum from **New York Times Co v Sullivan**, which adhered to the principle that "debate on public issues should be uninhibited, robust, and wide-open". Justice Brennan was concerned that the judgment of the majority would, to the contrary, serve to inhibit, "...competing interests of broadcasters, the listening and viewing public and individuals seeking to express their views over the electronic media", representing an exclusionary policy.

[167] The dissenting judgment was very forceful that it was imperative to preserve the "vital First Amendment interest in assuring "self-fulfilment" (of expression) for each individual". It was the view of the minority that it was crucial, and the need even greater than in previous times, for citizens to "express their own views directly to the public, rather than through a governmentally appointed surrogate, if they are to feel that they can achieve at least some measure of control over their own destinies". Justice Brenann reasoned further that freedom of speech was not an abstract concept, and the "...right to speak can flourish, only if it is allowed to operate in an effective forum - whether it be a public park, a school room, a town meeting hall, a soapbox or a radio and television frequency".

[168] The minority stated that, without effective means of communication, the "right to speak would ring hollow". The First Amendment, the court therefore stated, embodied the right to be free from censorship, and also the right of an individual, "to utilize an appropriate and effective medium for the expression of his view". The minority further found and stated clearly that, "...[t]he suggestion that constitutionally protected speech may be banned because some persons may find the ideas expressed offensive is, in itself, offensive to the very meaning of the First Amendment".

[169] These are very powerful words and assertions. How then do they impact the facts of the instant case, bearing in mind that this too is not a case of governmental action, but one involving competing interests of equal scope? There is the individual (Mr Tomlinson) on the one hand, with the sole purpose of expressing his views to members of the public, pursuant to his constitutional right to freedom of expression and the right, *inter alia*, to disseminate information, and the broadcasters on the other hand, who are exercising their freedom of expression, utilising their editorial and journalistic discretion and control, to decide what in their view should be aired, broadcast and disseminated to the listening, viewing, and discerning members of the public. There is no doubt that the parties have equal and competing interests. So, the questions arise: should the Charter be applied horizontally in the circumstances to bind the respondents, bearing in mind the nature and extent of the rights and the duties imposed by the rights? Could the respondents be bound to air an advertisement in circumstances where they have editorial and journalistic freedom not to do so in exercising their own constitutional right to freedom of expression, particularly in

circumstances where Mr Tomlinson wishes to utilise the respondents' property? In my view, the answer must be in the negative.

[170] I agree with the position taken by Sykes J in the Full Court that it would be extremely unlikely that it was the intention of the framers of the Charter that a private citizen would be subject to greater obligation than the Government because of the horizontal application of Charter rights. Section 13(5) did not expand or contract the content of the right. The section affords horizontal enforcement without adjusting the content of the right. I do not see how the respondents could be bound. The horizontal application of the Charter would, therefore, not be applicable to render the respondents liable for infringing the Charter rights of Mr Tomlinson to freedom of expression and to, *inter alia*, distribute or disseminate information as alleged.

[171] P Williams J found that Mr Tomlinson and the respondents had equal competing rights and that one could not trump the other. In my view, P Williams J must have meant that the rights of Mr Tomlinson could not prejudice the rights of the respondents, as indicated by her at paragraph [98] of the judgment. The Charter is clear that the rights are protected to the extent that they do not prejudice the rights of others. I would, therefore, say differently from P Williams J that, based on the nature and extent of the respective rights between the parties and the duties imposed by those rights, the respondents are not bound by section 13(3)(c) and (d) of the Charter by virtue of section 13(5), as claimed by Mr Tomlinson.

[172] Because only the Constitutions of South Africa and Jamaica have specific provisions for horizontal application of Charter rights, many of the authorities cited by counsel in this appeal dealing with the right of freedom of expression, relate to the vertical application. I have examined the dicta of these cases mainly for the extrapolation of how the courts have dealt with the content and context of the right, to assist with the interpretation of the applicability of competing equal rights. It is for these reasons that it is necessary to further examine the dicta from **VgT v Switzerland** and **Greater Vancouver Transportation Authority**.

[173] In **VgT v Switzerland**, an association registered in Switzerland, VgT Verein gegen Tierfabriken ("the applicant association"), had as its aim the protection of animals. The commercial it wished aired showed a sow caring for her piglets in the forest, and thereafter pigs constrained in pens. The voice over said, *inter alia*, that the rearing of animals in the latter circumstances resembled concentration camps. The Commercial Television Company ("CTC") refused to air the commercial in light of its "clear political character". The applicant association subsequently complained to the Independent Radio and Television Appeal Board, as well as the Federal Department of Transport, Communications and Energy. Both complaints were dismissed. Consequently, the applicant association lodged an administrative law appeal to the Federal Court, stating that, *inter alia,* the CTC had acted, in breach of article 10 of the Convention (the right to freedom of expression), and also, that it had been subjected to unlawful discrimination, in contravention of article 14. The Federal Court found, *inter alia*, that there had been no violation of article 10 of the Convention as the applicant

association had, among other things, other means of disseminating its political ideas. The claim with respect to discrimination was also rejected by the Federal Court.

[174] The applicant association appealed this decision to the ECtHR, which found, *inter alia,* that there had been a breach of article 10 of the Convention with respect to the right to freedom of expression, but no such violation was found with respect to article 14. This was so, in circumstances where the parties did not dispute that the CTC had been established under private law, and so, the issue arose whether in refusing to air the advertisement, the CTC acted as a private party enjoying contractual freedom. The CTC submitted that it could "not be obliged to broadcast commercials which damaged its business interests and involved its editors' rights".

[175] The court referred to article 1 of the Convention, which secured to everyone within its jurisdiction the rights and freedoms of the Convention. The court did not think that it was prudent to develop a theory whereby the guarantees of the Convention should be extended to relations between private individuals *per se*. So, bearing in mind section 18 of the Swiss Federal Radio and Television Act prohibiting "political advertising", the court held that articles 1 and 10 of the Convention were engaged, and the responsibility of the State was established. The interference by a public authority would also have infringed article 10. The court noted that there was a law which prohibited political advertisements, and examined whether the legislation had a legitimate aim, and found so affirmatively. This was pursuant to article 10(2) of the Convention. The court further examined whether the interference was necessary in a

democratic society and found that it was not. In arriving at that conclusion, the court set out its clear understanding of what "freedom of expression" constitutes. At paragraph 66 of the judgment, the court endorsed the definition outlined in **Handyside** and set out earlier herein in paragraph [125].

[176] The court held that article 10 was subject to exceptions and those must be construed strictly. The court addressed whether section 18 of the Act was proportionate to the legitimate aim pursued, was it "relevant and sufficient" and was there a "pressing social need" for the section in the Act? The court found that there was no pressing need for the section.

[177] The court balanced the applicant association's freedom of expression, on the one hand, with the reasons adduced by the Swiss authorities, on the other hand, for the prohibition of political advertising. These reasons were, namely, to protect public opinion from the pressures of powerful financial groups and from undue commercial influence; to provide for a certain equality of opportunity between the different forces of society; to ensure the independence of the broadcasters in editorial matters from powerful sponsors; and, to support the press. The court found that the applicant association was not part of a "powerful financial group" and there was no relevant or sufficient reason for the prohibition. The fact that the depiction of the pigs and words employed may have appeared provocative, and disagreeable, was of no moment. Of importance, there were no other means for the applicant association to reach members

of the public throughout Switzerland. The court also did not accept that its declaratory order, in the circumstances, was a "right to an antenna" of the CTC.

[178] The court, therefore, although recognising that the CTC, when deciding not to acquire advertising, was acting as a private party enjoying contractual freedom, nonetheless, decided not to focus on extending Convention guarantees to relations between private individuals *per se*. The court found that the legislation was applicable, and that the articles of the Convention had been infringed, but with no sufficient basis for intervention. The court, therefore, found that the violation was not necessary in a democratic society.

[179] In the instant case, with there being competing Charter rights of the respondents as well as their entitlement at common law to contractual freedom, the issue of them being bound through horizontal application of the Charter rights would appear unsustainable, once both parties exercised their equal right to freedom of expression as well as the right to receive and disseminate information, opinions and ideas.

[180] In **Greater Vancouver Transportation Authority**, the facts were somewhat similar. The appellant transit authorities (the Greater Vancouver Transportation Authority "TransLink") and British Colombia Transit ("BC Transit"), which operated public transportation systems in British Colombia, refused to post the respondents' political advertisements on the sides of their buses, on the basis that the advertising policies permitted only commercial advertising, not political advertising on public transit

vehicles. The respondents commenced a claim alleging that several articles of the transit authorities' policies violated their right to freedom of expression as guaranteed by section 2(b) of the Canadian Charter. The trial judge dismissed the respondents' claim, stating that the constitutional right to freedom of expression had not been infringed. The Court of Appeal reversed the decision, declaring some of the advertising policies to be of no effect, being in breach of section 52(1) of the Constitution Act, and based on section 24(1) of the Charter. No ruling however, was made in relation to any infringement of the right of freedom of expression. The Supreme Court upheld the decision of the Court of Appeal, but also declared that the constitutional provision, namely, the right of freedom of expression had been infringed.

[181] Article 2 restricted advertisements to those which communicated information concerning goods, services, public service announcements, and public events. They specifically prohibited any ideology or political philosophy or information relating to political events (article 9) and prohibited advertisements likely to cause offence to any group or persons or create controversy (article 7). The issue before the Supreme Court was whether the articles of the policy lacked constitutional validity.

[182] There were four issues before the court: (i) were the public transit systems subject to the Charter; (ii) if so, did the impugned policies impinge the respondents' right to freedom of expression; (iii) if so, whether the limits imposed were reasonable limits prescribed by law, within the meaning of section 1 of the Canadian Charter; and

(iv) could a declaration be made under section 52 of the Canadian Constitution Act with regard to the policies?

[183] In its deliberations, the court made it clear that in order to determine whether the Canadian Charter applies to an entity's activities, one must enquire into the nature of the entity or into the nature of its activities. Because, if the entity was found to be "government", it would be subject to the Charter. If not, then only the entity's performance, which could be said to be governmental in nature, would be subject to the Charter. In conclusion, the court found that the appellant transit authorities were "government" in nature within the meaning of the Charter, and so, it was unnecessary to inquire into the nature of the individual activities as they would, therefore, be subject to the Charter, "regardless of whether a given activity can correctly be described as 'private'".

[184] There was extensive discussion as to whether the publication of the advertisements on the side of the buses effectively represented advertisements in a "public place". The court ultimately concluded that the space on the buses allows for a wide range of public expression, which was protected by section 2(b) of the Charter. The court found that the respondents' rights under section 2(b) of the Charter, freedom of expression, were violated by the articles 2, 7, and 9 in the policy. In addressing the violation of section 2(b) of the Charter, the court found that the limit on the right was not demonstrably justified. Interestingly, Fish J, concurring with the leading judgment

of McLachlin CJ, Binnie, LeBel, Deschamps, Abella, Charron and Rothstein JJ, made this statement at paragraph [122] of the judgment:

> "... [T]he purpose or function of the "space", "place" or "platform" where freedom of expression has been restricted is for the courts to ascertain, and not for government entities to unilaterally and finally determine. Depending on the circumstances, the relevant purpose or function will be established by reference to its current or ordinary use, to historical and traditional practice, to reasonable public expectations, to clear government intent, and to other like considerations. In this case, the acknowledged purpose of the scheme for advertising on the sides of buses is to raise revenue. And the function of the buses themselves is safe, clean, and orderly transportation. But in neither respect is there an obvious incompatibility with political advertisements."

[185] In paragraph [123], he continued:

> "On the contrary, permitting political advertising would serve *the very purpose for which the sides of buses were made generally and publicly accessible for a price* — to raise revenue. And there is no inherent conflict between political advertisements on the sides of buses and orderly transportation."

Fish J examined the justification and agreed with the lead judgment that there was none.

[186] This case obviously decided that as a governmental entity, a "public place", namely the side of buses offering public transportation, should permit political advertisements protected by the Canadian Charter right of freedom of expression, and any articles prohibiting that would be violative of the Charter and not justified. In the

instant case, the conclusion would be different, as there was no government entity involved, and so, no vertical application of the constitutionally guaranteed rights.

[187] The Privy Council case from the Court of Appeal of Anguilla, **Benjamin and others v Minister of Information and Broadcasting and another** [2001] UKPC 8 was referred to extensively in the judgments in the court below and also by counsel before us. The facts of the case are slightly different, and so too is the conclusive reasoning of the court. The case related to a radio station owned by the Government, and run as a department of government. There was a discussion programme, run by the 1st applicant ("Mr Benjamin") on the station, to which the 2nd and 3rd applicants were regular listeners and contributors. Mr Benjamin responded to a caller who questioned the propriety of the recently established national lottery, and he expressed the view that the lottery was not appropriate for Anguilla and was illegal.

[188] The Minister responsible for the department suspended the programme without reference to Mr Benjamin. The applicants applied to the High Court of Anguilla for redress on the basis of, *inter alia,* an infringement of their rights to freedom of thought and of expression. The first instance judge declared that the decision to suspend, and the suspension of the programme, constituted a contravention of the said rights enshrined in section 11 of the Constitution, and ordered damages to the 1st applicant. The Court of Appeal reversed the decision, indicating that the "right of freedom of expression did not place a positive obligation on the government to provide a means for

expressing that right, and [Mr Benjamin] had no right to free access to the media to express his views".

[189] The Judicial Committee allowed the appeal. The Law Lords accepted and recognised that, "...a constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction, (see Lord Diplock in **Attorney General of the Gambia v Momodou Jobe** [1984] AC 689). However, the court stated that circumstances may exist where freedom of speech may be hindered, where there is no contractual and no absolute generalised right to speak in the way in which the individual wishes to speak or express his views. Indeed, Lord Slynn of Hadley, who delivered the judgment on behalf of the Board, stated that "… no one has a right in all circumstances to insist on holding a meeting in another individual's house or in the middle of a highway in a way which impedes traffic or to use language intended to stir up violence or in breach of the peace. <u>But the circumstances of each case have to be looked at"</u> (emphasis supplied).

[190] The Board examined the particular circumstances of the case and found that the judge was correct. There had been a contravention of Mr Benjamin's freedom of speech and expression protected by section 11 of the Constitution. The Board stated that, on the facts of this case, the motive by the Government in closing the programme was an important factor. They agreed with the first instance judge, that there was an arbitrary or capricious withdrawal of the platform which had previously been made

available to Mr Benjamin by the Government. Damages were awarded to Mr Benjamin, but not to the listeners to the programme, the other appellants, on the basis outlined by the first instance judge.

[191] Mr Tomlinson relied on this case to support his submission that he was entitled to have the consideration of the publication of his video not dealt with in an arbitrary or capricious manner. I had dealt with that particular challenge previously. But, additionally, one must be reminded that the respondents have no governmental description or obligation. And in the case before the Board, Mr Benjamin had already been enjoying the right to freely express his opinions and ideas on the programme and that opportunity was arbitrarily withdrawn. That was substantially the basis of the ruling of the Privy Council, which facts are absent in the instant case. One could say that Mr Tomlinson's position vis-à-vis the respondents, was merely a "hope" not even an "expectation", given their competing constitutional rights. There certainly was no previous relationship, contractual or otherwise, with regard to the publication of the specific video, the subject of the claim/appeal.

Issue (iii)

Whether the failure or refusal to broadcast Mr Tomlinson's advertisement is justifiable in the light of the respondents' own constitutional rights (grounds 3, 12, 13 and 14 of the grounds of appeal)

Submissions

[192] Lord Gifford contended that in resolving the issue of the parties' competing rights, the court is required to consider whether the respondents' refusal to broadcast the advertisement can be justified in a free and democratic society as provided for by

section 13(2) of the Charter. According to him, section 13(2) provides a mechanism which can be used to balance competing rights irrespective of whether a claim seeks to challenge an act of the State or that of a private individual. Queen's Counsel contended that the balancing exercise undertaken by Sykes J was intrinsically flawed, particularly, as it relates to his finding that the issue to be considered was not whether the broadcaster should accept a particular advertisement but whether he had carried out his obligation, in the public interest, to inform the public on the particular issue. In adopting this position, Queen's Counsel argued that, the learned judge would have failed to take into account the following salient factors:

i. The possibility that a broadcaster would exercise a large amount of self-censorship and try to avoid as much controversy as it safely can;

ii. It would be naive to expect the majority of broadcasters to produce the variety and controversial material necessary to reflect a full spectrum of viewpoints. This is in light of the broadcasters' strong interest in maximizing their audience and as a consequence profit;

iii. Angry customers are not good customers. This fact would have impacted the broadcaster's decision whether to allow others to "espouse the heterodox or the controversial"; and

iv. The views expressed in the case of **ProLife** ensure that the unpopular but important views promoted by Mr Tomlinson's advertisement are given fair consideration to secure expression in the media with the largest impact.

[193] TVJ, for its part, rested its argument on the fact that there was no democratic interest engaged in the instant case. It highlighted that it did not have the opportunity to reject to air the advertisement. Rather, Mr Tomlinson had proceeded with the claim while the content of the advertisement was still under review.

[194] Mrs Gibson Henlin submitted that Mr Tomlinson had failed to appreciate that TVJ was, in fact, bound by the overarching regulatory regime in its licence, the Television and Sound Broadcasting Regulations, 1996. This licence, according to Mrs Gibson Henlin, required TVJ to maintain a balance between viewers, listeners and other private interests in the interest of the public. In this respect, it would be expected to exercise its editorial judgment and discretion responsibly. In so doing, it could not sacrifice the public's interest in favour of those who could pay.

[195] The learned Solicitor-General noted that the respondents, not being a public authority or agent of the State, would have been guaranteed the same rights as Mr Tomlinson under the Charter. As such, the respondents' refusal to air the advertisement amounted to an exercise of their own freedom of expression, which included the right to say nothing or not to say certain things (see **Slaight Communications Inc v Davidson**).

[196] However, the learned Solicitor-General expressed the view that section 13(2) of the Charter, as well as the tests laid down in **R v Oakes** [1986] 1 SCR 103 ("the **Oakes** test"), would not be applicable in cases such as these where the competing rights are between two private persons. This is because such an approach contemplates the infringement of Charter rights as between the State and a private person and not in determining competing rights of two individuals. According to her, the most appropriate approach to be undertaken by the court in resolving this issue is that adopted by the South African Constitutional Court in the case of **Khumalo**.

[197] As previously discussed, the South African Constitutional Court resolved a similar issue of competing constitutional rights by finding that the common law as it relates to defamation made an appropriate balance of the appellants' right to freedom of expression and the respondent's right to human dignity (see also, the article, Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law, German Law Journal, Vol 7, 2006, by Mattias Kumm). These authorities, she contended, would require the court to balance the rights of both parties and consider the justification for interfering with each right separately.

Discussion and analysis

[198] It was Lord Gifford's submission that, in the situation of competing rights, section 13(2) of the Charter provided a mechanism which could be used to balance those competing rights. Section 13(2) of the Charter reads:

> "(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) ... "

[199] He relied on certain factors, referred to in paragraph [192] herein, which ought to be considered when that mechanism was triggered. I would agree that those factors would be relevant and ought to be considered if the guaranteed rights have been limited, abrogated or infringed, which is usually in a claim against the State, invoking the vertical application of the protection of Charter rights. It is also widely accepted that the interpretation of any limitation of guaranteed rights under the Charter is to be strictly construed, and the burden is on the State to prove that any such limitation is demonstrably justified in a free and democratic society. There is no doubt that section 13(2) of the Charter was promulgated to ensure that protection.

[200] In **R v Oakes**, Dickson CJ, in treating with the meaning and effect of section 1 of the Canadian Charter, which is in similar terms to section 13(2) of the Charter, stated at page 105:

> "Section 1 of the Charter has two functions: First, it guarantees the rights and freedoms set out in the provisions which follow it; and second, it states explicitly the exclusive justificatory criteria (outside of s 33 of the *Constitutional Act*, 1982) against which limitations on those rights and freedoms may be measured.
>
> **The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a**

> **free and democratic society rests upon the party seeking to uphold the limitation. Limits on constitutionally guaranteed rights are clearly exceptions to the general guarantee. The presumption is that Charter rights are guaranteed unless the party invoking s 1 can bring itself within the exceptional criteria justifying their being limited**." (Emphasis added)

[201] It would seem to me that section 13(2) of the Charter would also be relevant, when considering the horizontal application of Charter rights. I am not in agreement with the submissions of the Solicitor-General. To the contrary, as worded, the Charter does provide that all rights and freedoms are guaranteed, save only as may be justified in a free and democratic society. It would mean that any violation of the Charter, be it by the State or a private citizen, must be demonstrably justified in a free and democratic society, in order to be upheld as constitutional. It is clear that there is no exemption from justification, within the sense and letter of section 13(2), where a right has been limited, abrogated or infringed.

[202] Therefore, the only issue that would arise for discussion concerning the applicability of section 13(2), within the horizontal application of the Charter, is whether the **Oakes** test that has been applied in cases involving the vertical application of the Charter, should be applied, and if so, to what extent. According to the **Oakes** test, there are two central criteria to be satisfied in order to establish that a limit is demonstrably justified in a free and democratic society. The first is that the objective which the measures responsible for a limit on a Charter right or freedom are designed to serve must be of sufficient importance to warrant overriding a constitutionally

protected right or freedom. The second criterion is that, once a sufficiently significant objective is recognised, then the party invoking the exception must show that the means chosen are reasonable and demonstrably justified. This second criterion, it is said, involves a form of proportionality test.

[203] There is strong authority to suggest that the **Oakes** test would be applicable but would have to be modified. This modification primarily relates to the form of proportionality test that should be applied in establishing that the limit on the right is demonstrably justified (see Professor Hugh Collins' article, "**On the (In)compatibility of Human Rights Discourse and Private Law**" LSE Law Society Economy Working papers, 7/2012).

[204] In **Campbell v MGN Ltd** [2004] 2 AC 457, the House of Lords examined the proportionality test, which should be applicable to cases involving the horizontal application of Convention rights. The facts of that case could prove useful.

[205] The case involved the supermodel, Naomi Campbell, who was struggling with drug addiction. The defendant newspaper, the Mirror, published articles which, among other things, disclosed her drug addiction, gave details of therapy group meetings she attended and showed photographs of her in a street as she was leaving a group meeting. Naomi Campbell sought damages against the Mirror for the tort of breach of confidentiality. Although it was a private law case, the House of Lords, by a three-two majority, treated the case as one concerning a contest between Naomi Campbell's right

to privacy, protected under article 8 of the Convention, and the freedom of expression enjoyed by the press, guaranteed under article 10 of the Convention.

[206] The House of Lords opined that the competition between these two Convention rights could only be resolved by conducting a balancing exercise. Lord Hope of Craighead, one of the members of the majority, opined:

> "The effect of these provisions [articles 8 and 10] is that the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life."

[207] Baroness Hale of Richmond, for her part, also speaking as a member of the majority, made the important observation at paragraph 140 of the judgment that the application of the proportionality test was more straightforward when only one Convention right was involved, but that it was less straightforward when two Convention rights were in play, and the proportionality of interfering with one had to be balanced against the proportionality of restricting the other. She continued at paragraph 141 of the judgment:

> "Both parties accepted the basic approach of the Court of Appeal in *In re S* [2004] Fam 43, 72-73, paras 54-60. This involves looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each."

[208] After conducting a balancing exercise of the two Convention rights that were engaged, the majority found in favour of Naomi Campbell, while the minority was in favour of the press.

[209] This proportionality test enunciated in **Campbell v MGN Ltd** was, shortly thereafter, applied by the House of Lords in **Re S (a child)** [2005] 1 AC 593. Delivering the leading judgment, Lord Steyn observed that the case involved a contest between two conflicting rights, which were the rights to privacy guaranteed by article 8 of the Convention, and the right to freedom of the press guaranteed by article 10. Lord Steyn, at paragraph 17 of the judgment, distilled four relevant principles for the resolution of this conflict of rights as follows:

> "First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case."

[210] Professor Hugh Collins, in his helpful article, at pages 30-31 opined:

> "The balancing exercise in private law often assumes a rather different character. This change results from the problem that in many cases both parties can claim that their fundamental rights are at stake. It is not a matter of assessing whether the government's case for the need to override a right in the pursuit of a compelling public interest is established, but rather how to measure competing rights against each other. There are likely to be both rights policy considerations on both sides of the argument. This structure prevents the application of the familiar test of

> proportionality, because this transplant will not function to provide a procedure by which all the different relevant considerations are measured against each other...
>
> Admittedly, private law reasoning must also resort to indeterminate open-textured tests such as good faith and reasonableness to provide the mechanism for this necessary balancing process between the private parties' rights and the policies underlying the legal rules. The point is not that some kind of process of accommodation like a test of proportionality is not needed, but rather that the normal test of proportionality in public law provides the wrong formula in this context owing to its assumption that only one party to the dispute has rights.
>
> If the test of proportionality developed in public law is inappropriate in those cases where both parties to a private law dispute are protesting about an interference with their rights, what is the correct formulation of the test? The simple answer is that the rights need to be balanced against each other. But this answer is not as informative as one might hope. Given that there are competing interests, rights, and policies on both sides of the argument in a private law dispute, the correct approach appears to be a double proportionality test. In other words, the case for interference with the separate rights of each party needs to be assessed separately according to a test of proportionality. The legitimate aim that may justify such an interference with a fundamental right is likely in a private law context to include the protection of the fundamental right of the other party."

[211] Professor Collins made the further point that the "ultimate balancing test" referred to by Lord Steyn in **Re S** "involves in fact a double application of the test of proportionality, in which the rights of each party are qualified according to the weight of the rights in a particular context" (page 32).

[212] It is clear from an examination of the foregoing authorities that section 13(2) is applicable to cases involving horizontal application of the Charter because the rights guaranteed can, generally, be limited if such limitation is demonstrably justified in a

free and democratic society. It is within that context that the appropriate proportionailty test would have to be applied in balancing the competing and conflicting rights of the parties.

[213] In this case, however, there is no need for the court to engage in a balancing exercise within the context of section 13(2), as submitted by Lord Gifford, and the Full Court did not err in not doing so. There was no breach by the respondents that calls for justification from them within the ambit of that section. As I have indicated, the respondents are not bound by the horizontal application of the Charter rights in issue as there was no infringement, abrogation or limitation of Mr Tomlinson's rights by them, having regard to the nature and the extent of the rights, and the duty imposed by those rights.

[214] Furthermore, as also stated previously, the Charter is clear that the guaranteed rights are protected to the extent that they do not prejudice the rights of others. Mr Tomlinson is free to express his ideas and disseminate his information, opinions and ideas but he does not have the right to use the respondents' platform (private property) to do so, and they have an equal right to use their platform to receive, disseminate or distribute information, opinions and ideas that they wish to reach the members of the public. Mr Tomlinson cannot rely on his own guaranteed rights to the exclusion or prejudice of the respondents' equally enforceable guaranteed rights. In addition, the respondents also have the right of journalistic and contractual freedom within the context of their broadcasting licence and legislative restrictions.

[215] For these reasons, the enforcement of Mr Tomlinson's rights would, without a doubt, significantly prejudice the same rights of the respondents, which are guaranteed to them by the Charter. This could not be in harmony with the values of a free and democratic society. As Professor Collins stated in dealing with the "double" proportionality test, "the legitimate aim that may justify such an interference with a fundamental right is likely in a private law context to include the protection of the fundamental right of the other party". I am of the view that, if justification were called for, the respondents could appropriately and successfully rely on the substantial prejudice to them, if Mr Tomlinson were allowed to enforce his rights against them in all the circumstances of this case.

[216] In my view, it cannot reasonably be held that the failure or refusal to broadcast Mr Tomlinson's advertisement was unjustifiable in the light of the respondents' own constitutional rights and all the circumstances surrounding their failure or refusal to air the video.

[217] For all the foregoing reasons, the Full Court cannot be faulted in its decision that the respondents did not breach Mr Tomlinson's constitutional rights as alleged.

Disposal of the appeal

[218] Mr Tomlinson has not succeeded on the grounds advanced by him in the appeal. In my view, the Full Court would not have erred having rejected Mr Tomlinson's assertion that his rights as provided for in section 13(3)(c) and (d) had been infringed. Whilst it is clear that the rights guaranteed by the Charter are capable of horizontal

application, in this case, bearing in mind the extent and nature of the rights of both parties, and the duties imposed by those rights, the horizontal application of the Charter was not warranted in the circumstances to render the respondents bound by the provisions of the Charter relied on by Mr Tomlinson. Accordingly, the appeal must be dismissed.

TVJ's counter-appeal

Issue (iv)

Whether the Full Court erred in its finding that Mr Tomlinson possessed the requisite standing to have brought the claim having regard to the facts, and also based on the true and proper interpretation of section 19(1) and (2) of the Charter (TVJ's counter-notice of appeal grounds (a) and (b))

Submissions

[219] It is TVJ's contention that Mr Tomlinson is no more than a "poser" or "a tool" with respect to the claim which was brought in the court below, no harm having been suffered by him. According to TVJ, at the core of Mr Tomlinson's claim is a campaign on behalf of homosexuals. The claim, it contended, is divorced from any harm in relation to Mr Tomlinson himself, as is contemplated by section 19(1) of the Charter, which requires an individual to demonstrate that a provision of the Charter has been, is being or is likely to be contravened in relation to him. This, Mrs Gibson Henlin submitted, on behalf of TVJ, is a stringent test designed to weed out frivolous and vexatious litigants. Having referred to the evidence that was presented in the court below, Mrs Gibson Henlin submitted that, on a close review, there was nothing to show that any State action or public authority had encouraged intolerance towards Mr Tomlinson or had threatened him. In the circumstance, he would not have had any standing to have

brought the claim. This reasoning, Mrs Gibson Henlin submitted, is confirmed in the Full Court's reasoning in the case of **Banton and others v Alcoa Minerals of Jamaica Incorporated and others**.

[220] Relying on the decision in **ProLife**, Mrs Gibson Henlin further argued that Mr Tomlinson had no legitimate interest in the claim. Alternatively, if he was found to have a legitimate interest, he was a self appointed editor with no interest in the democratic process, which was contemplated by the Charter, he having failed to articulate any identifiable democratic process or interest.

[221] In response to this contention, Lord Gifford argued (in summary) as follows: (i) the court below was correct in finding that he had the requisite standing to have brought the claim; and (ii) that he satisfied all the constituent parts and requirements of section 19(1) and (2) of the Charter, he being a Jamaican citizen who had been directly affected by the actions of the respondents that he had complained of.

[222] The learned Solicitor-General has given much assistance to the court in relation to this issue. She accepted, as contended on behalf of TVJ, that section 19(1) of the Charter requires a person to show that a provision of the Charter has been, is being or is likely to be contravened in relation to him, in order to seek redress through the constitutional court. Unlike TVJ, however, the learned Solicitor-General contended that Mr Tomlinson does possess the requisite standing to bring the case he being, a Jamaican national; one of the actors in the advertisement that was to have been aired; the person who made the request of the respondents for the advertisement to be

broadcast; and it was his contention that both breaches of his constitutional rights were as a direct result of the respondents' refusal to broadcast the advertisement in question. In the circumstances, it would have been incorrect to say that the breaches by the respondents, as alleged by Mr Tomlinson, were not in relation to him.

Discussion and analysis

[223] The best starting point to commence the discussion is that all-important section governing the bringing of constitutional claims: that is, section 19(1) and (2) of the Charter. The relevant parts of the section read as follows:

> "19.-(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 authorized by law, or, with the leave of the Court, a public or civic organization, 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."

[224] Section 19(1) in particular sets out the requirements that anyone who wishes to apply for redress for an alleged breach of a Charter right must satisfy. The focus of this provision is on the words, "…has been, is being or is likely to be contravened in relation to him…". When one closely examines the circumstances of the claim as outlined in Mr Tomlinson's affidavit evidence in the court below, it is clear that it would have been difficult, if at all possible, for the court below to have avoided coming to the conclusion that the alleged breaches were being said to have been committed in relation to him.

Apart from being employed to the international non-governmental group on whose behalf he is seeking to increase tolerance for the lifestyles of men who have sex with men, Mr Tomlinson himself is, on his evidence, a homosexual man and a gay-rights activist. If there was any doubt as to this, we need only look at paragraphs 11 and 12 of Mr Tomlinson's affidavit in the court below, which read as follows:

> "11. It is also universally acknowledged that homophobia has led to serious abuses of the rights of Jamaican [men who have sex with men] and homosexuals.
>
> 12. As a homosexual man and activist, I have personally experienced such abuse and threats of violence. For example, in February 2011, I wrote a letter to a local newspaper describing police raids on two gays clubs in Jamaica. In response to the letter, I received a death threat via e-mail. The writer said that if I did not stop writing I would 'fucking die!' When I reported the threat to the police, the recording officer proceeded to hurl homophobic slurs at me. I then reported the matter to Assistant Police Commissioner Green who said that attitudes to homosexuality in Jamaica were set and they would not change until changes were made to the law... ." (Emphasis added)

[225] The affidavit evidence also disclosed that he produced and appeared in the video advocating tolerance for homosexuals and also either in person or through his attorney-at-law was in communication with the respondents relating to the airing of the video.

[226] Against this background, it is not surprising that Mr Tomlinson alleged that the respondents' refusal (as he saw it) to broadcast the video, led to a breach of his Charter rights. This, *prima facie*, satisfied the requirements of section 19(1). Mr Tomlinson having thus satisfied the requirements under section 19(1) of the Charter in respect of

standing, it is unnecessary to explore section 19(2). The court below was, therefore, correct in its finding that Mr Tomlinson had standing to bring the claim.

[227] It is also clear that, in relation to the requirements for bringing a valid claim for constitutional redress that were outlined in **Banton and others v Alcoa Minerals of Jamaica Incorporated and others**, referred to by both P Williams and Sykes JJ, the following may be said in relation to the question of standing: Mr Tomlinson, with the facts he averred in his affidavit, satisfied the criteria and offended against none of the principles outlined therein.

[228] In light of these considerations, TVJ's ground, relating to standing, in its counter-notice of appeal must be dismissed.

Issue (v)

Whether the Full Court erred in the exercise of its discretion to not award costs to TVJ (TVJ's counter-notice of appeal ground (e))

Submissions

[229] Mrs Gibson Henlin noted that, notwithstanding the claim having been rejected, TVJ was denied its costs. This approach by the Full Court, she submitted, was wrong both in fact and law, for the following reasons:

i. The case was peculiar in nature, in that, the dispute was not between the State and a private individual as was accustomed in Charter cases, but rather, between two private individuals;

ii. In litigation between private individuals with competing constitutional rights, the general principles in relation to costs should apply. That is, (a) costs is in the discretion of the court and should be exercised judicially, and (b) costs is usually awarded to the successful party. (see **Khumalo**; **Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International and another** [2005] 5 LRC 475; and **NM and others v Smith and others** [2007] 4 LRC 638); and

iii. Rule 64.6(3) of the Civil Procedure Rules, 2002 ("the CPR") provides that in deciding who should be liable to pay costs the court must have regard to all the circumstances of the case.

Discussion and analysis

[230] I accept that Parts 64 and 65 of the CPR deal with the question of costs and indicate, generally, who should bear the costs of an action, the factors to be taken into consideration, and the quantification of costs. However, it is also a general rule that the award of costs is entirely within the discretion of the judge or panel of judges, a discretion, of course, which the court will exercise judicially. I also accept that this is an unusual case. It is the first of its kind, where a claimant is asking the court to exercise the horizontal application of Charter rights. The Full Court made no order as to costs. I think, in all the circumstances of the case, that was a reasonable order to have been made and I would not interfere with it. I am sure that the Full Court was influenced by the provisions of rule 56.15 (5), which states that:

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

[231] On the facts of this case, I am of the view that Mr Tomlinson has not acted unreasonably in bringing the claim and there can be no complaint about his conduct of the proceedings throughout.

[232] As a consequence, the Full Court would not have erred in the exercise of its discretion in not awarding costs. Therefore, TVJ would also not succeed on this ground. The order of the Full Court that there shall be no order for costs should be affirmed.

Conclusion

[233] In this appeal, dealing with novel issues relating to the interpretation and application of certain provisions of the Charter, it is clear that in the particular circumstances of this case, Mr Tomlinson had the standing to bring the claim. On any literal interpretation of section 13(5) of the Charter, horizontal application of Charter rights is now a part of the constitutional landscape of the country. However, bearing in mind the nature, extent of the right and the duty imposed on the right of the fundamentally guaranteed provisions of the Charter, namely the freedom of expression, and the freedom to disseminate opinions, information and ideas, in the particular circumstances of this case, the horizontal application of Charter rights, pursuant to section 13(5), was inapplicable, and the respondents were not bound by sections 13(3)(c) and (d) of the Charter in relation to Mr Tomlinson.

[234] In my view therefore, the appeal, CVM and TVJ's counter-notice of appeal should be dismissed and the judgment of the Full Court affirmed.

Costs on the appeal

[235] With regard to the costs on appeal, I have noted that Mr Tomlinson is not asking for any order in relation thereto. Perhaps, this is in keeping with the approach taken by the Full Court below. I must say that I am not as sanguine with that approach in this court. Bearing in mind, that pursuant to rule 1.1(10) of the Court of Appeal Rules, 2002, rule 56.15(5) of the CPR is not included in the rules applicable to this court. However, that having been said, the parties had engaged in a matter through the courts involving unchartered waters, and that is noteworthy as it aids in the development of the jurisprudence of the country, and in respect of which they should be commended. There has been no allegation of delay or tardiness in the prosecution of the case, and there has been intense and comprehensive submissions from counsel on both sides. Also, whereas Mr Tomlinson has lost the appeal, TVJ has also not succeeded on the counter-notice of appeal and CVM has not particpated in the appeal, although named as a respondent.

[236] However, there is no doubt that the six days of hearing of this appeal was in the main, substantially consumed by arguments in relation to the grounds filed by Mr Tomlinson. It is of significance also, that the counter-notice of appeal filed by TVJ originally had included grounds relating to whether the Charter provisions were capable of direct horizontal application, and the interpretation of section 13(5) of the Charter. These grounds were abandoned and TVJ only pursued the grounds relating to whether

Mr Tomlinson had standing to bring the claim pursuant to section 19(1) of the Charter, as well as whether, it was entitled to its costs before the Full Court. These issues were disposed of readily in this court. So, although the discussion related to new and interesting arguments on appeal, in all the circumstances, for a fair result, I am of the view, that Mr Tomlinson should pay 60% of the costs of the appeal. I would order that there be no costs on TVJ's counter-notice of appeal, the costs having been reduced on the appeal to make allowance for its failure on the counter-notice of appeal.

[237] I would therefore order that Mr Tomlinson should pay 60% of TVJ's costs of the appeal, and that there should be no order on TVJ's counter-notice of appeal.

[238] The Full Court's order of no costs should not be disturbed.

MCDONALD-BISHOP JA

[239] I have read, in draft, the comprehensive and thoroughly reasoned judgment of my learned sister Phillips JA. I agree with her reasoning, conclusions and the orders proposed and there is nothing that I could usefully add.

F WILLIAMS JA (AG)

[240] I too have also read, in draft, the judgment of my learned sister Phillips JA and agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

i. The appeal is dismissed.

ii. The counter-notices of appeal of TVJ and CVM are dismissed with no orders as to costs.

iii. The decision and orders of the Full Court including the ruling made of no order as to costs is affirmed.

iv. Mr Tomlinson shall pay 60% of TVJ's costs of the appeal.