REVISED APPELLANT'S SUBMISSIONS AND LIST OF AUTHORITIES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 77 OF 2014

CLAIM NO. **2012 HCV 05676**

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

AND

IN THE MATTER of an Application by **MAURICE ARNOLD TOMLINSON,** alleging a breach of his rights under 13 (3) (c) & (d) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011

AND

IN THE MATTER of an Application by **MAURICE ARNOLD TOMLINSON** for constitutional redress pursuant to section 19 of the said Charter

BETWEEN **MAURICE ARNOLD TOMLINSON** **APPELLANT**

AND

TELEVISION JAMAICA LTD **1st RESPONDENT**

AND

CVM TELEVISION LTD **2nd RESPONDENT**

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A. INTRODUCTION AND FACTS

1. This is an appeal against the judgement of the Full Court, consisting of the Honourable Ms. Justice Paulette Williams, the Honourable Mr. Justice Leighton Pusey and the Honourable Mr. Justice Bryan Sykes, delivered on November 12, 2013, in which the learned Justices dismissed the Appellant's claim for constitutional redress brought against the 1st and 2nd Respondents.

2. This is the first case concerning the "horizontal" application of the provisions of the 2011 Charter of Fundamental Rights and Freedoms.

3. The Appellant is a gay man and advocate for the human rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) people. The 1st and 2nd Respondents are holders of commercial television broadcasting licences granted to them by, the Jamaican government. Presently, the 1st and 2nd Respondents are Jamaica's principal free-to-air television stations.

4. The Appellant takes the position, based on his experience and research, and an extensive body of evidence, some of which was drawn to the attention of the court below, that prejudice against people with a homosexual sexual orientation (i.e., homophobia) has led to grave human rights abuses against LGBTI people (and individuals perceived, whether rightly or wrongly, to be LGBTI) in Jamaica. Such prejudice, and the discrimination and violence that flow from it, are also identified by UNAIDS and the national Ministry of Health as a significant factor in the high prevalence rate of HIV in the gay community in Jamaica. As part of ongoing efforts to address this prejudice, and related human rights abuses, the Appellant produced and appeared in a "Love and Respect" video, which was created as part of an educational and advocacy campaign to encourage Jamaicans to respect the human rights of LGBTI people.

5. In this 30-second video, a man (played by the Appellant) is seen visiting his aunt (played by well-known Jamaican human rights advocate Yvonne McCalla-Sobers). The aunt asks the man how he is doing and he replies that he is "still trying to get Jamaicans to respect his human rights as a gay man." The aunt then tells the man that she does not know why he is gay, but as a Jamaican she respects and loves him, and love is enough for all of us. They both hug, sit down, and the video fades.

6. The video was submitted to the 1st Respondent in March 2012 and the 2nd Respondent in February 2012 to be aired as a paid advertisement on their stations. For several months, the Appellant attempted repeatedly to get a response from the 1st and 2nd Respondents as to whether they would air the video and at what price. However, no responses were forthcoming and the Appellant finally concluded, after several months of waiting and having repeatedly sought an answer from them, that the 1st and 2nd Respondents had refused to air his ad.

7. In their affidavits filed in the court below the 1st and 2nd Respondents admitted that they had indeed refused to air the ad but this decision not to air the ad and the reasons for the refusal were never communicated to the Appellant.

8. In early May 2012, as the Appellant was engaged in efforts to obtain a response from the Respondents to his request to air the paid advertisement, the Appellant's attorney-at-law sent a letter to the Executive Director of the Broadcasting Commission of Jamaica (the Commission), asking him to identify any concerns or impediments to airing the ad under Jamaican broadcasting regulations, including the provisions of the Broadcasting and Radio Re-Diffusion Act of 1949, the Television and Sound Broadcasting (Amendment) Regulations, 2007 and/or the Television and Sound Broadcasting Regulations, 1996. One week later, the Commission advised that the ad did not breach any of Jamaica's broadcasting rules or regulations.

B. GROUNDS OF APPEAL AND ISSUES

(a) Appellant's Claim and Ruling in the Court Below

9. The Appellant brought a claim at first instance alleging that the refusal by the two respondent television stations to air his paid advertisement advocating tolerance towards LGBT people amounted to an unjustifiable restriction of his right to freedom of expression and his right to disseminate and distribute ideas through any media – rights guaranteed by ss. 13(3)(c) and (d) of the Charter, respectively.

10. The broad issues which the Full Court had to resolve were as follows:

    a. Are the rights guaranteed in sections 13(3)(c) and (d) of the Charter, having regard to their nature and the duty they impose, capable of binding private media owners?

    b. If so, did the refusal by the Respondents to air the Appellant's advertisement amount to an unjustifiable restriction of the Appellant's rights as guaranteed by ss. 13(3)(c) and (d)?

11. In the court below, all three Justices found that section 13(5) of the Charter made it possible for private individuals to be found liable for breaches of Charter rights, including sections 13(3)(c) and (d) – the so-called *horizontal* application of Charter rights. However, the Justices did not find that such horizontal application would give rise to the remedy sought by the Applicant in the circumstances of the case. Justice Williams held that to grant the Appellant's application would be to infringe the rights of the 1st and 2nd Respondents, which in her view was not the intended result of section 13(5). Justice Sykes found that, having regard to their scope, the rights identified in sections 13(3) (c) and (d) were not capable of binding the 1st and 2nd Respondents in the present circumstances

12. Despite ultimately not finding for the Appellant on the horizontal application of the Charter in the specific circumstances at bar, the Court denied the Respondents' requests for an order of costs against the Appellant. The Court reasoned that parts 56 and 64 of the Civil Procedure Rules (CPR) generally denied an award of costs for administrative matters, unless the matter was, among other things, frivolous and vexatious. The Court found that these proceedings were well-managed and raised important issues of law, which gave the court a landmark opportunity to consider how the constitutional law relates to private individuals, the rights of homosexuals under the new Charter[1], and the critical importance of freedom of expression to the effective functioning of a democratic state[2]. As such, there was no basis for ordering costs against the Appellant.

(b) <u>Summary of Appellant's grounds of appeal</u>

13. The Appellant submits that the Full Court was correct in concluding (unanimously) that the Charter rights in question could bind private actors, but erred in its subsequent finding that their horizontal application was not applicable in the present circumstances. Before this Honourable Court, he seeks to:

    a. affirm the decision of the Full Court with regard to (i) the Appellant's standing to bring this matter, (ii) the general principle of horizontal application of Charter rights, and (iii) its determination that no costs are to be ordered against the Appellant; and
    b. overturn the decision of the Full Court denying the Appellant's claim for horizontal application of Charter rights to the Respondents in this matter, and secure the following remedy from the Court of Appeal:
        i. a declaration to the effect that the 1st and 2nd Respondents' refusal to air a paid advertisement advocating tolerance towards LGBTI people in Jamaica, which was not in violation of any of Jamaica's broadcasting acts or regulations, amounted to an unjustifiable restriction of the rights to

[1] Per Williams, J at para. 28 of *Tomlinson*

[2] Per Sykes, J at paras. 272-280 of *Tomlinson*

freedom of expression and the right to disseminate and distribute ideas through any media - guaranteed by ss. 13(3)(c) and (d) of the Charter, respectively;

ii. an Order for the 1st and 2nd Respondents to air the "Love and Respect" ad in exchange for the standard fees.

14. The Appellant filed a Notice of Appeal citing 14 grounds of appeal. The separate grounds are argued below, but in essence the underlying questions raised by this appeal can be summarized as follows:

a. Was the Full Court correct in finding that, although section 13(5) of the Charter introduces direct horizontal application of Charter rights, the Respondents did not breach the Appellant's rights to freedom of expression and to disseminate or distribute information and ideas through any media, guaranteed by ss. 13 (3)(c) and (d) of the Charter respectively, because:
   i. to grant the relief sought by the Appellant would incorrectly prioritize his Charter rights over those claimed by the Respondents (per Williams J); and
   ii. allowing the Appellant's request – which claims a right not to be denied access to public media on discriminatory, arbitrary or otherwise unreasonable grounds – would infringe the property rights of the Respondents (per Sykes J)?

b. What test should be used in balancing competing claims to Charter rights between private parties?

(c) <u>Summary of Respondents' Counter-Notices of Appeal</u>

15. The 1st Respondent filed a Counter-Notice of Appeal citing five grounds of appeal. In summary, the 1st Respondent challenged the Full Court's ruling that: (a) the Appellant

had standing to bring this claim, (b) there is direct horizontal application of Charter rights, and (c) there should be no award of costs against the Appellant.

16. On October 7, 2014, the 2nd Respondent filed a Counter-Notice of Appeal citing five grounds of appeal. In summary, the 2nd Respondent challenged the Full Court's finding that: (a) prior to the Charter there were no remedies for infringement of constitutional rights by private parties, (b) the Charter created direct horizontal application of constitutional rights, (c) there should be no award of costs.

C. Legal framework: Appellant's overview

(a) the Constitution

1. The Rights in Qesution

17. Section 13(3) of the Charter provides for the following rights that are relevant to this Appeal:
    (c) the right to freedom of expression; and
    (d) the right to seek, receive, distribute or disseminate information, opinions and ideas through any media.

18. Both the existence of subsection 13(3)(d), in addition to the general guarantee of freedom of expression in subsection 13(3)(c), as well as the use of the phrases "distribute or disseminate" and "through any media," clearly indicate that the Charter guarantees more than just a right to speak: distribution or dissemination of ideas or opinions is severely undermined without access to media. For the individual, effective public communication through some forms of media (e.g., broadcast media such as television), will require the individual to make use of the services of others (i.e., owners/operators of such media).

19. It should also be noted that in the Final Report of the Constitutional Commission in Jamaica, the Commission stated that one of its reasons for rejecting the term 'freedom of the press' in favour of the current phrasing in section 13(3)(d) was that '*the express*

mention of one institution may imply that other institutions ...which are not similarly mentioned or the individual who wishes to employ his freedom spasmodically…has less protection (at paragraph 27). It is evident from the wording finally adopted in the Constitution that it is intended that the right in question should be understood as of equal importance for all those wishing to disseminate information, opinion and ideas, and not simply a right to be enjoyed by (or better protected for) the press.

2. Freedom from Discrimination

20. Section 13(1) (b) of the Charter states that "all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society…". Section 13(2)(i) (ii) further provides that the grounds for freedom from discrimination include race, place of origin, social class, colour, religion or political opinions.

21. In the Full Court below, Williams J pointed out that although the Charter does not specifically mention sexual orientation as a ground for non-discrimination, "[I]t is to be noted that the first paragraph of the Charter [s. 13(1)] is comprehensive enough to point to a view that it be interpreted to embrace all the rights and responsibilities of all Jamaicans."[3]

22. This view is bolstered by the fact that Jamaica is a party to several international agreements that provide for a very liberal interpretation of non-discrimination, including the Universal Declaration of Human Rights (UDHR)[4], the International Covenant on

[3] *Tomlinson* at para. 28

[4] Art. 2 "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Civil and Political Rights (ICCPR)[5], and the American Convention on Human Rights (ACHR)[6].

3. Horizontal Application of Charter Rights in Jamaica

23. Sections 13(1)(c) of the Charter states that "all persons are under a responsibility to respect and uphold the rights of others recognized" in the Charter, while section 13(5) of the Charter provides that any right or freedom guaranteed by the Charter "binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right."

24. It should be noted that, in discussing this provision and the question of the horizontal application of Charter rights, the Report of the Joint Select Committee of Parliament on the proposed Charter had this to say: "*The Committee is, therefore, of the view that the constitutional protection of fundamental rights and freedoms afforded in the proposed new Chapter III should be extended to cases of infringement by private persons*."

4. Limitation of rights

25. Based on section 13(2), restrictions on the rights and freedoms guaranteed in the Charter must be "demonstrably justified in a free and democratic society."

5. Standing

26. *Locus standi* for bringing a constitutional action is established by section 19 (1) of the Charter, which states: "If any person alleges that any of the provisions of this Chapter

[5] Art. 2(1). "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[6] Article 1()1. "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

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."

(b) Broadcast Licenses of the Respondents

27. Section 6 in the Licence to Operate a Commercial Television Broadcast Service, issued by the Government of Jamaica to the 1st and 2nd Respondents, states that :

    i. The licensee shall operate the station at all times in the **public interest**, convenience or necessity, recognising **the sovereign right of the Government of Jamaica to its air waves** and waives all rights expressed or implied except those conveyed by the Licence [emphasis added].

28. Therefore, the Respondents have an obligation to hold and use the public air waves in trust for the government and people of Jamaica. Their right to use this trust property is limited by the public interest. This essential consideration must be factored into any balancing that may be required between the rights of private broadcasters and the Charter rights of other private persons, such as the Appellant, who wish to gain access to this public property as a necessary means for exercising their Charter rights to freedom of expression and "to seek, receive, distribute or disseminate information, opinions and ideas through any media."

(c) Relevant Case Law

1. International jurisprudence on horizontal application of rights

29. The full extent of horizontal application of constitutional rights remains largely underdeveloped. There is little literature on any experiences other than those in Canada, the US, Germany, Ireland and South Africa.[7]

Ireland

30. Requirements for when the court will allow a *direct* constitutional action against a private actor can be gleaned from the Irish authorities. Unlike Jamaica, Ireland does not have an explicit recognition in its Constitution of the horizontal application of the rights it protects. Nonetheless, the Irish courts have said that: "if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right."[8]

31. However, the courts will intervene on the basis of horizontality only where there has been "failure to implement" constitutional rights through either the common law or statute, or where the execution of constitutional rights through the common law was "plainly inadequate."[9]

South Africa

32. In contrast, the Bill of Rights in Chapter Two of the Constitution of the Republic of South Africa[10] is explicit in making constitutional rights horizontally applicable.[11]

33. Specifically, section 8(2) of the South African Constitution, which is an exact replica of section 13(5) of our Charter, states: "A provision of the Bill of Rights binds a natural or a

[7] Mark Tushnet, "The Issue of State Action/Horizontal Effect in Comparative Constitutional Law" (2003) 1 Int'l J Const L 79 at 89 (note 37).

[8] *Meskell v. Coras Iompair Eireann* [1973] IR 121 at 132-133 (per Walsh J).

[9] *Hanrahan and Philip Hosford v John Murphy and Sons Ltd (Philip Hosford)* [1988] ILRM 300 (HC) (per Henchy J).

[10] Act 108 of 1996 [hereinafter referred to as the 'Constitution' or the 'final Constitution'].

[11] As per ss. 8 and 39(2) of the Constitution.

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."

34. Section 8(3) of the South African Constitution provides explicit guidance as to *how* the law must give effect to a constitutional right which, pursuant to s. 8(2), binds a private person. Section 8(3) states [with emphasis added]:

> 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).

35. When it comes to possibly limiting constitutional rights, section 36(1) of the South African Constitution provides the following further guidance:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
>
> a. the nature of the right;
> b. the importance of the purpose of the limitation;
> c. the nature and extent of the limitation;
> d. the relation between the limitation and its purpose; and
> e. less restrictive means to achieve the purpose.

36. It is certainly the case that the Jamaican Charter has no identical or as detailed guidance regarding limitation of rights as in the South African Constitution (section 8(3) supplemented by s. 36(1)). Nonetheless, it still falls to our courts to define how we should give effect to constitutional rights, including the obligations of private duty-bearers in this regard.[12] The Appellant suggests that, given the identical nature of the sections in

[12] It should also be noted that the foundational concept expressed in the South Africa Constitution is echoed in the parallel provision in our Charter (s. 13(2)) – namely, the core reference to limiting rights only insofar as they can be "demonstrably justified in a free and democratic society."

both constitutions that explicitly give rise to the horizontal applicable of constitutional rights, the experience of the South African courts in applying such a provision is helpful. Two decisions of the South African Constitutional Court in particular are most relevant.

37. *Khumalo and Others v Holomisa*[13] involved a claim of freedom of expression in the context of a private defamation action, as a defence against liability that would otherwise restrict its constitutional right. The Constitutional Court of South Africa began by noting that, in terms of s. 8(2), the scope of horizontal applicability of any provision of the Bill of Rights has to be determined principally in terms of the nature of the relevant substantive right and the nature of any corresponding duty. So, while it is clear under s. 8(2) that the obligation to respect freedom of expression binds *private* persons the judiciary is required to conduct a contextual determination of whether the relevant constitutional provision (and the right/duty embodied therein), is "capable, fit and suitable"[14] for application to private persons. To begin with, courts will have to look at the wording of the relevant provision(s), in the proper context of the case at hand, for any express or implicit indicators that the right(s) finds horizontal application. Furthermore, they will have to take cognisance of the underlying spirit, purport and objects of the substantive right (and any corresponding duty) as enshrined in the relevant provision.[15] Finally, the courts must always be mindful of the broader constitutional values of freedom, dignity and equality and the underlying vision of transforming South Africa from a society previously riven by discrimination (and in particular, *apartheid*).

38. In the subsequent decision in *Barkhuizen v. Napier*[16] (where the issue was whether a limitation clause in an insurance contract violated the constitutional right to approach the court for redress) the Constitutional Court held that as between private parties to such a contract, the Bill of Rights applied indirectly.[17]

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[13] *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC).

[14] *Khumalo* paras 35-45.

[15] *Khumalo* para 33 refers to the 'intensity' of the relevant right

[16] *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) paras 28-30.

[17] *Barkhuizen* paras 23; 28-30.

39. It is submitted that the apparently conflicting Constitutional Court judgments can be explained and reconciled in terms of the nuance of the two distinct (albeit related) legs of the horizontal application enquiry viz. the *scope* (content) leg of the enquiry and the *form* (method) leg of the enquiry. So, whereas the direct application contemplated by *Khumalo* is situated within the *scope* (content) leg of the horizontal application inquiry as presented by ss 8(1) and 8(2) respectively, the indirect application contemplated by *Barkhuizen* is situated within the ensuing *form* (method) leg of such horizontal application inquiry. Therefore, the constitutional right that is at stake is crucial in determining the extent of the corresponding duty on the private individual.

Latin America

40. Fourteen countries in Latin America have come to adopt some form of horizontal application of constitutional rights: Argentina, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Paraguay, Peru, Puerto Rico, Uruguay and Venezuela.[18] These countries exercise this application through the writs known variously *amparo, protección* or *tutela*. These proceedings are Latin American extraordinary judicial remedies specifically conceived for the protection of constitutional rights from public authorities or private individuals.[19] Below is a brief overview of the instances of *direct* horizontal application – which has been adopted in three countries: Argentina, Colombia and Puerto Rico.

41. **Argentina** saw the first instance of horizontal application in the Americas. The *Samuel Kot* case[20] found that constitutional protections were not just applicable against the state, but equally enforceable in the face of a private party's actions or omissions.[21] In 1994, Argentinian constitutional reform recognized the right of any person to file the writ of *amparo* when "any act

[18] William Rivera-Perez, "2012 LATCRIT South-North Exchange on Theory, Culture and Law: What's The Constitution Got to do With it? Expanding the Scope of Constitutional Rights into the Private Sphere" (2012) 3 Creighton Int'l & Comp LJ 174 at 182 [Rivera-Perez].

[19] Allan R Brewer-Carias, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (London: Cambridge University Press, 2009) at pg 1.

[20] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/9/1958, "*S.R.L. Samuel Kot*," 241 Fallos de la Corte Suprema de Justicia de la Nación [Fallos] 291 (1958) (Arg.).

[21] William Rivera-Perez, *International Human Rights Law and the Horizontal Effect of Constitutional Rights in Latin America: A Look at the Direct Application of Constitutional Rights in Argentina, Colombia and Puerto Rico* (2010) Unpublished SJD Dissertation, UCLA.

or omission of public authorities or *private* individuals… injures, restricts, alters, or threatens… the rights or guarantees recognized by [the] Constitution."[22] [emphasis added]

42. **Colombia**'s 1991 Constitution adopted the writ of *tutela*. This was a mechanism designed to provide immediate protection of fundamental constitutional rights. Article 42 of Decree 2.591 enumerates 9 instances in which the writ can be brought against private entities and individuals.[23] Included are those instances where the private person is in charge of rendering public services, where the private party stands to damage collective interests, or the plaintiff is in a position of subordination or otherwise defenseless.[24] The Constitutional Court has broadly interpreted the writ and it has been used to protect the rights of minorities and women, including against domestic abusers.[25]

43. **Puerto Rico** has a broad Bill of Rights. Half of the Bill's provisions do not specify whether they apply exclusively to the state.[26] There is some uncertainty about which sections have horizontal application because Puerto Rico follows U.S. jurisprudence, which most recognize as limited to the exclusively vertical application of constitutional rights. However, the Supreme Court of Puerto Rico has stated that the rights recognized by the Bill of Rights can be claimed in actions between private parties. In *Gonzalez v Cuerda,* the court reasoned that the plaintiff could bring an action against a private person to vindicate her constitutional right to dignity.[27]

44. The approach varies in other countries in Latin America. The laws of Venezuela, Uruguay and Chile provide for the use of *amparo* to protect constitutional rights without distinction as to whether those obligations bind just the state or private individuals as well.[28] Meanwhile, Guatemala, Ecuador and Honduras provide for *amparo* actions similar to those found in Colombia – they are restricted in the sense that they can only be filed against individuals or

[22] Article 43 of the Constitution of Argentina.

[23] *Ibid* at 188.

[24] Brewer-Carias, *supra* note 19 at at 302.

[25] Rivera-Perez, *supra* note 18 at 191.

[26] Puerto Rico's Bill of Rights does not contain a provision specifying its applicability. The language of Sections 1 (human dignity and equality), 5 (education), 6 (freedom of association), 7 (life, liberty and property), 8 (honor, reputation and privacy), 10 (search and seizure, wiretapping), 12 (prohibition of slavery or servitude), 15 (employment of minors), 16 (worker's rights) and 20 (social and economic rights) are not directed towards the state but framed in a general language. P.R. LAWS ANN. TIT. II, Ss 1, 5-8, 10, 12, 15-16, 20 (2012).

[27] 88 DPR 125, 130 (1963).

[28] Brewer-Carias, *supra* note 19 at 301.

corporations that are in a position of superiority regarding citizens or in some way exercise public functions and activities or are rendering public services or utilities.[29]

United States of America

45. The United States has come to embody the vertical application of constitutional rights protection – applying either directly and fully because of some state action, or not at all.[30] However, in various circumstances, the courts have had some difficulty with drawing a line between state and private action and this that has led some commentators to conclude the US is not as exclusively vertical as often suggested.

46. Most notably, for purposes of the present case, in the landmark case of *New York Times v. Sullivan*[31] the US Supreme Court ruled that the constitutional guarantees of freedom of speech and freedom of the press applied to the common law of defamation. Therefore, the Court modified the existing common law to bring it into conformity with these constitutional guarantees. This shows indirect horizontal application of constitutional rights as between private parties without state involvement such as a court order to trigger the application of the constitution, as is described in the paragraphs above.

Canada

47. Similar to the US, the Canadian *Charter of Rights and Freedoms* only explicitly provides solely for vertical application – i.e., the application of constitutional rights provisions in the context of the interaction between the private individual rights-claimant and the state. Section 32(1) of the Charter states explicitly that it applies to the "Parliament and government of Canada" and to the "legislature and government of each province." Consequently, the Supreme Court of Canada has determined that in order to trigger the direct applicability of Charter rights against a private entity, there must be a sufficiently substantial degree of *governmental control* over the entity[32] or the entity is implementing a specific government policy or program.[33]

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[29] *Ibid* at 303.

[30] Stephen Gardbaum, "The 'Horizontal Effect' of Constitutional Rights" (2003) 102:3 Mich L Rev 387 at 412 [Gardbaum].

[31] (1963) 376 US 254.

[32] E.g., *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 SCR 570.

48. However, Canadian courts have evolved a system of "indirect horizontal effect" of constitutional rights. Constitutional protections will not directly bind private parties, but the constitutional values of the *Charter* do influence the development and application of common law through the decisions of the courts.

49. In the landmark case of *RWDSU v Dolphin Delivery Ltd.*, delivered early in the development of jurisprudence under Canada's new *Charter of Rights and Freedoms*, the Supreme Court of Canada found that absent any governmental action, the Charter could not be invoked.[34] The decision was based on Section 32(1) of the Charter, which, as noted above, provides that it applies to the "Parliament and government of Canada" and to the "legislature and government of each province." However, the Court also found that if private litigation involved the application of a private law statute, that statute could be subjected to constitutional scrutiny, as it introduces the requisite element of state action. Furthermore, notwithstanding that the Canadian Charter expressly limits its rights guarantees to direct enforcement only against the state, McIntyre J. did explicitly recognize that "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution," and also proceeded to say that "in this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided under the common law."[35]

50. This conclusion has been subsequently further clarified in a number of decisions affirming that the common law should be interpreted and applied consistently with "Charter values." This includes several cases specifically involving questions about the scope of freedom of expression, including the exercise of that freedom by the press, and the necessity of balancing that private constitutional right against the constitutional rights and interests of other private actors. For example, in *Dagenais v. CBC*,[36] the Court considered whether the common law regarding publication bans – issued in this case to prevent a TV broadcast from influencing juries in an ongoing criminal proceeding, and hence potentially affecting the constitutional right of a defendant to a fair trial – was constitutionally sound. The Court determined that it was not, and therefore reformulated the common law. In *Hill v Church of Scientology*,[37] and more recently in

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[33] *Eldridge v. B.C.*, [1997] 3 SCR 624.

[34] *RWDSU v Dolphin Delivery Ltd.,* [1986] 2 SCR 573.

[35] Ibid., at 603.

[36] *Dagenais v. CBC*, [1994] 3 SCR 835.

[37] *Hill v. Church of Scientology*, [1995] 2 SCR 1130.

Grant v. Torstar Corporation,[38] in the context of private actions for defamation, the Court reaffirmed that in private litigation, a litigant can challenge the common law for being inconsistent with Charter values.[39] Those cases involved a balancing of rights and interests between litigants, including the constitutionally protected right of freedom of expression. So, too, did the case of *Pepsi-Cola Canada Beverages v. RWDSU*, in which the Supreme Court affirmed that adequately protecting freedom of expression of picketing employees required a reformulation of existing common law governing the relationship between employees and the employer whose private property interests were affected by said picketing.[40]

51. The application of Charter values to reformulating the common law governing relations between private parties has been seen in other contexts as well, requiring the court to balance other constitutionally protected rights. For example, in the case of *M(A) v Ryan*, the Supreme Court held that the common law rules of psychiatrist-patient privilege must be modified in light of Charter values, balancing constitutional privacy rights of a patient and the accused's right to a fair trial.[41]

Summary of international jurisprudence on horizontal application

52. Some countries explicitly provide for horizontal application of Charter rights (for example Argentina, Colombia, Puerto Rico, and South Africa), as Jamaica's constitution now does. But even in the case of countries where the constitution is either silent on the matter (e.g. Ireland), or actually explicitly directs that constitutional rights are only directly enforceable vertically against the state (for example the United States and Canada), the Courts have nonetheless determined that the rights that are supposed to be protected by the Constitution are capable of at least some degree of horizontal application in disputes between private parties, either by making them directly applicable where there is some sort of nexus to the state (for example, there is an applicable statute being invoked/applied, which must be constitutional; or the private actor is in some way acting akin to a state entity), or alternatively, providing for indirect horizontal application as

[38] *Grant v. Torstar Corporation*, [2009] 3 SCR 640.

[39] For some further discussion of some of these cases, see: Mattias Kumm & Victor Ferreres Comella, "What is So Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect" in Andras Sajo & Renata Uitz, eds, *The Constitution in Private Relations* (Utrecht, The Netherlands: Eleven International Publishing, 2005) 241 at 259.

[40] *Pepsi-Cola Beverages Canada v. RWDSU*, [2002] 1 SCR 156.

[41] *M(A) v. Ryan*, [1997] 1 SCR 157.

described above (i.e., the approach of ensuring the common law, even in disputes between private parties, is reflective of values embodied in the rights guaranteed in the Charter).

53. This extensive jurisprudential history shows that (i) there is precedent that can assist Jamaican courts in approaching the horizontal application of Charter rights, and (ii) this will necessarily involve a weighing of competing constitutional rights invoked by private parties (which Williams J claimed to be unwilling to undertake in this case, although as submitted further below, she did do so *de facto* by prioritizing the Respondents' rights over those of the Appellant).

2. General Principles Relevant to the Interpretation of Charter Rights

54. In the interpretation of the Charter rights invoked by the Appellant, certain well established principles apply:

    a. "Parts of the Constitution, and in particular the fundamental rights provisions of Chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions … [T]he terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights. The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning. The text is a "living instrument" when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life." (*Boyce & Joseph* v. *The Queen*[42])

[42] [2004] UKPC 32 at paragraph 28

b. "…the principle of interpretation, which is now universally recognised and needs no citation of authority, [is] that full recognition and effect must be given to the fundamental rights and freedoms which a Constitution sets out. The rights and freedoms which are declared in section 13 [of Jamaica's Charter] must receive a generous interpretation. This is needed if every person …is to receive the full measure of the rights and freedoms that are referred to." (*Lambert Watson v. The Queen*[43])

c. A generous interpretation also means that where the Constitution *explicitly* guarantees a right, the Courts cannot—using the common law or any other device—deny the existence of that right. (see *Thornhill v Attorney General of Trinidad and Tobago*[44])

d. "With respect to decisions from other jurisdictions, the constitutional principles from which the actual decision flows are of assistance where the constitutional values are the same or similar; for it is in the area of the constitution and constitutional law that the heart of a country is opened and its sense of right and justice breaks forth. Thus we can look to foreign countries with constitutions, which entrench the fundamental rights and freedoms since we can be sure that (originally at least) they recognise the underlying spiritual and moral tenets, which enlighten our constitution."(*Rambachan v Trinidad and Tobago Television Co. Ltd et al*[45] quoting a passage from the Trinidadian High Court case of *K.C. Confectionary v. A.G.*[46])

[43] [2004] UKPC 34 at paragraph 42

[44] (1981) 31 WIR 498, [1981] AC 61, [1980] 2 WLR 510, PC; *Gairy v Attorney General of Grenada* (No 2) [2001] UKPC 30, (2001) 59 WIR 174, [2002] 1 AC 167, PC.

[45] 1985 H.C. 8 (unreported)

[46] [1985] 34 WIR 387

e. Finally, restrictions on fundamental rights and freedoms must be given a strict and narrow, rather than broad, construction. (*The Queen v. Hughes*[47])

3. Freedom of Expression as a Constitutional Right

55. The Universal Declaration of Human Rights (UDHR)[48], the International Covenant on Civil and Political Rights (ICCPR)[49], and the American Convention on Human Rights (ACHR)[50] all recognize a liberal right to freedom of expression, which includes media access. This is very similar to the new formulation of the right as found in Jamaica's 2011 Charter. Jamaica became a full state-party to the ICCPR and the ACHR in 1976 and 1978 respectively and is therefore bound by these conventions.

Rationale underlying the right

56. In *Benjamin and Others v Minister of Information and Broadcasting and Another*,[51] the Privy Council, in extolling the importance of the right to freedom of expression in the Constitution of Antigua and Barbuda, cited the European Court of Human Rights (ECtHR) declaration that:

> freedom of expression, as secured in para 1 of art 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. [52]

[47] [2002] 2 App. Cas. 259 at paragraph 35

[48] Article 19. "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

[49] Article 19: "2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

[50] Article 13: "1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

[51] [2001] UKPC 8 at para.38

[52] *Lingens v. Austria*, (1986) 8 EHRR 407 at 418, para. 41

57. The South African Constitutional Court in *South African National Defence Union v Minister of Defence and Another*[53] explained that freedom of expression

> …lies at the heart of a democracy. It is valuable for many reasons, including its instrumental functions as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters…

58. Similarly, in *Irwin Troy Ltd. v. Quebec (Attorney General),* the Supreme Court of Canada made it clear that:

> Freedom of expression was entrenched in our [Canadian] Constitution and is guaranteed in the [provincial] 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.[54]

59. In addition, the Canadian Supreme Court, in both *R. v. Keegstra*[55] and *Irwin Toy*[56], has held that the values underlying the protection of freedom of expressions are truth-seeking, freedom in political activity, and self-fulfilment. In *Irwin Toy*,[57] the court found that the precise and complete articulation of what kinds of activity promote these principles is of course a matter of judicial interpretation to be developed on a case by case basis, but the plaintiff must at a minimum be able to show that his activity promotes at least one of these underlying values before he is able to allege that his freedom of

[53] 1999 (6) BCLR 615 (CC); 1999 (4) SA 469 (CC), para 8

[54] [1989] 1 S.C.R. 927 at 968

[55] [1990] 3 S.C.R. 697 at 732

[56] *supra* note 54 at 976

[57] *supra* note 54 at 976

expression has been infringed. Finally, in *R v Keegstra*[58], the court declared that the values promoted by freedom of expression help to not only define the ambit of the right but also play an important role in analyzing how competing interest(s) might co-exist with, and need to be reconciled with, freedom of expression.

60. It also serves to preclude the majority's perception of `truth' or `public interest' from smothering the minority's perception.(*R. v. Zundel,*[59])

61. In the US, the Supreme Court has held that :

> Indeed, the First Amendment itself testifies to our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open,' and the Amendment 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . ..' *Associated Press v. United States*,[60]

62. In *On the Application of Animal Defenders International v Secretary of State for Culture, Media and Sport*, Lord Bingham (at para 28) had this to say about the duty of broadcasters in public discussion of important issues:

> The fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out the bad and the truth prevail over the false… It is the duty of broadcasters to achieve this object in an impartial way by presenting balanced programmes in which all lawful views may be ventilated.[61]

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[58] *supra* note 55 at 730

[59] [1992] 10 CRR (2nd) 193 (Can SC) 206 at 209

[60] 326 U.S. 1, 20 65 S.Ct. 1416, 1425, 89 L.Ed. 2013 (1945)

[61] [2008] UKHL 15

Scope of the Right to Freedom of Expression

63. In *Irwin Toy*[62] the Canadian Supreme Court in defining the meaning of the word 'expression' in section of 2(b) of the Canadian Charter held that:

> "Expression" has both content and a form, and the two can be inextricably connected. *Activity is expressive if it attempts to convey meaning.* That meaning is its content.
>
> …
>
> We cannot… exclude human activity from the scope of guaranteed free expression on the *basis of the content or meaning being conveyed*. Indeed, *if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee.* [emphasis added]

The court in *Irwin Toy* re-affirmed the decision of *Ford v Quebec (Attorney General)*[63] by finding that advertisement was a form of expressive activity protected by the right to freedom of expression.

64. Additionally, in *Handyside v the United Kingdom*, the ECtHR in defining the scope of protected expression stated that

> [Freedom of expression] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[64]

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[62] supra at 968,

[63] [*1988*] 2 S.C.R. 712

[64] (1976) 1 EHRR 737 at 754

65. Greater protection is accorded to political speech and debate on questions of public interest than to other forms of expression (*Vgt Verein gegen Tierfabriken v Switzerland*[65] ; *Wingrove v United Kingdom*[66]). Political expression has also been broadened to include social advocacy on issues of public importance. (*Vgt Verein gegen Tierfabriken v Switzerland*[67], *Animal Defenders, Regina (ProLife Alliance) v British Broadcasting Corporation*[68])

66. For example, an advertisement that was political in nature -- it reflected controversial opinions pertaining to modern society in general and affected the applicant's participation in a debate affecting the general interest -- was afforded greater protection than an advertisement which was commercial in the sense of inciting the public to purchase a particular product (*Vgt Verein gegen Tierfabriken v Switzerland*)

67. The proposition of course has particular resonance not only for the freedom of the press to broadcast views or information, but also for the right an individual to have access to said media for this purpose. Finally, Justice Brennan in *Colombia Broadcasting System v. Democratic National Committee*.,[69] had this to say:

> …the right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency. For in the absence of an effective means of communication, the right to speak would ring hollow indeed. And, in recognition of these principles, we have consistently held that the First Amendment embodies, not only the abstract right to be free from censorship, but also the right of an individual to utilize an appropriate and effective medium for the expression of his views… Here, of course, there can be no doubt that the broadcast frequencies allotted to the

[65] (2002) 34 E.H.R.R. 4

[66] (1996) 24 EHRR 1

[67] (2002) 34 E.H.R.R. 4

[68] [2003] UKHL 23

[69] 412 U.S. 94, 93 S.Ct 2080 (1973) at pg. 2132 (per Brennan J in dissent).

various radio and television licensees constitute appropriate 'forums' for the discussion of controversial issues of public importance. Indeed, unlike the streets, parks, public libraries, and other 'forums' that we have held to be appropriate for the exercise of First Amendment rights, the broadcast media are dedicated specifically to communication. [emphasis added]

Horizontal application of the right to freedom of expression

68. In *Khumalo and Others v Holomisa*,[70] the South African Constitutional Court found that, by virtue of section 8(2) of the South African Constitution – identical in wording to section 13(5) of Jamaica's Charter – freedom of expression is one of the rights in its Constitution which is of direct horizontal application – i.e., it creates obligations not only for the state and its organs, but also for private entities (which would include private media owners). Thus, a private entity is allowed the right to bring an action against another private citizen for breach of his right to freedom of expression. The courts finding was based on two grounds:
    a. the intensity or importance of the constitutional right in question; and
    b. the potential invasion of that right which could be occasioned by persons other than the state or organs of state.

4. Judicial interpretation of broadcast media's role and obligations vis-à-vis the public.

69. In *Khumalo* (at para. 24), which passage was favorably cited by Justice Sykes in the court below (at para. 276), the South African Constitutional Court laid out the critically important role (and hence responsibility) which the media has in securing freedom of expression in a democracy:

> In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information

[70] (CCT53/01) [2002] ZACC 12 at para.33

and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperiled. [emphasis added]

70. In *United Church of Christ v. FCC*,[71] the US D.C. Circuit Court stated thus:

> "... a broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts the franchise it is burdened by enforceable public obligations."

71. It has also been accepted by both the UK House of Lords and the European Court of Human Rights that the broadcast media is more pervasive and potent than any other form of media and the use of such media is an enormously effective way of getting across evidence of social problems and giving the public the chance to participate in change.[72]

72. Justice Brennan in *Colombia Broadcasting System v. Democratic National Committee*[73], at pg 2135 (agreeing with the conclusion of *Business Executives' Move For Vietnam Peace v Federal Communications and United States of America*[74] made these important points about the rights and duties of broadcasters vis-à-vis the public:

> Although the broadcaster has a clear First Amendment right to be free from Government censorship in the expression of his own views and, indeed, has a

[71] 123 U.S. App. D.C. 328, 359 F.2d 994, 1003 (1966)

[72] *(On the Application of Animal Defenders International) v Secretary of State for Culture, Media and Sport ; VgT Verein gegen Tierfabriken v Switzerland.*

[73] Supra at note 69

[74] 412 U.S. 94 (93 S.Ct. 2080, 36 L.Ed.2d 772)

significant interest in exercising reasonable journalistic control over the use of his facilities, "(t)he right of free speech of a broadcaster . . . does not embrace a right to snuff out the free speech of others." Indeed, after careful consideration of the nature of broadcast regulation in this country, we have specifically declared that "as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to . . . monopolize a radio frequency to the exclusion of his fellow citizens."

Thus, we have explicitly recognized that, in light of the unique nature of the electronic media, the public have strong First Amendment interests in the reception of a full spectrum of views—presented in a vigorous and uninhibited manner—on controversial issues of public importance. And, as we have seen, it has traditionally been thought that the most effective way to insure this 'uninhibited, robust, and wide-open' debate is by fostering a 'free trade in ideas' by making our forums of communication readily available to all persons wishing to express their views.[emphasis added]

Although the overriding need to avoid overcrowding of the airwaves clearly justifies the imposition of a ceiling on the number of individuals who will be permitted to operate broadcast stations and, indeed, renders it 'idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish,' it does not in any sense dictate that the continuing First Amendment rights of all non-licensees be brushed aside entirely.

73. In *Rambachan*, a Trinidadian case concerning the right of a citizen to access broadcast media in order to promote his political views, the High Court held that:

> … with television being the most powerful medium of communication in the modern world, it is in my view idle to postulate that freedom to express political views means what the constitution intends it to mean without the correlative adjunct express such views on television (pg 58)

74. Although somewhat different on the facts from the present case, *Benjamin* also involved the right of citizens to receive information via broadcast media on matters of public importance. In that case, a call-in programme in Anguilla was shut down because of the consistently critical positions it took against the government. The right to freedom of expression was invoked not only by its host but also by two regular listeners and contributors. The Privy Council held that there was a violation of the rights of the two listeners since they were denied access to the programme to which they had been regular callers and to which they had frequently listened.

75. In the case at bar, Justice Sykes in the court below favourably commented as follows on the critical importance of the broadcast media in supporting a healthy democracy:

> [274] Editorial discretion, in the context of licensed broadcaster, does not mean the editor can exclude views he does not like or he does [not] agree with. The grant of licences is not about the privatization of censorship but rather about regulating a public resource (airwaves) so that the citizens derive the greatest benefit in order for them to play an effective role in the democracy. In the current age, access to reliable and effective information is vital to the functioning of a democratic state. Contending views are put forward, debated, discussed, improved, discarded or ignored. In agreement with the Supreme Court of the United States [*Columbia Broadcasting System v Democratic National Committee*], it is my view that **freedom of expression is not for the sole benefit of a private broadcaster but rather it is in the interest of viewers and listeners that is paramount.** If private censorship, under the guise of editorial discretion, were to become the order of the day, then the democracy is undermined and much weaker for that [emphasis added].
>
> …
>
> [276] As noted by O'Regan J. in *Khumalo,* the fact of the matter is that media

have become the "primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility." ([24]) Judge O'Reagan was using media to refer to newspapers and broadcasters**. It must be appreciated and recognized that in our age, broadcasting has become the primary means of disseminating information and in fact has become the fastest means of communication and can reach the largest number of persons in the shortest time.** Newspapers would necessarily take a longer time to achieve the same impact and result.[75] [emphasis added]

Refusal To Air Must be Demonstrably Justifiable in a Free and Democratic Society

76. In light of (i) the rationale for, and scope of, the constitutional protection of freedom of expression and the right to disseminate information, opinion and ideas through any media, and (ii) the role and responsibility of the media (including private broadcasters) in facilitating the public interest served by such free expression and dissemination, the Appellant submits these inform any understanding of the rights and the corresponding duties. In this regard, the Appellant calls the Court's attention to the judgment in *Regina ProLife Alliance v British Broadcasting Corporation*.[76] Lord Hoffman explains how Article 10 of the European Convention of Human Rights (ECHR), which guarantees freedom of expression, ought to be interpreted in the context of broadcasting on television, especially as it relates to the citizen's right of access to the media:

> 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.**

[75] *Tomlinson*

[76] [2003] UKHL 23 at para. 58

77. Lord Hoffman's principle gives effect to the proposition that a restriction on Charter rights must be demonstrably justifiable in a free and democratic society, which is the only limitation on the right to freedom of expression countenanced in section 13(2) of the Charter.

78. Discriminatory, arbitrary or otherwise unreasonable grounds for refusal will hardly ever be deemed proportionate, notwithstanding the pressing and substantial objective. As noted above at para. 55, the ICCPR presentation of the rights to freedom of expression and the right to access the media is very similar to that found in the Charter. Therefore, the analytical framework used by the ICCPR in weighing limitations of rights would be instructive. The United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,[77] provides the following:

> ….
>
> 2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.
>
> 3. All limitation clauses shall be interpreted strictly and in favor of the rights at issue.
>
> 4. All limitations shall be interpreted in the light and context of the particular right concerned.
>
> ….
>
> 9. No limitation on a right recognized by the Covenant shall discriminate contrary to Article 2, paragraph 1.
>
> 10. Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:
>
> (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
>
> (b) responds to a pressing public or social need,

[77] U.N. Doc. E/CN.4/1985/4, Annex (1985)

(c) pursues a legitimate aim, and

(d) is proportionate to that aim.

Any assessment as to the necessity of a limitation shall be made on objective considerations.

11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.

12. The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.

….

79. Thus the reason given or the purpose for restricting the individual's access to the media is extremely important in determining whether an individual's right to access the media to advocate on issues of public importance was infringed. The 5 cases below highlight this point.

European Court of Human Rights

80. In ***Vgt Verein gegen Tierfabriken v. Switzerland***,[78] the Swiss broadcasting authority refused to air a paid advertisement from [describe group] encouraging people to eat less meat, on the basis that it was political in nature and therefore prohibited by section 18 of the Federal Radio and Television Act. The applicant association eventually took the matter before the European Court of Human Rights (ECtHR), alleging a breach of the guarantee of freedom of expression in Article 10 of the European Convention on Human Rights. ruled that this refusal amounted to an "interference by public authority" in the exercise of the right to freedom of expression. Specifically, the Court based its ruling on the following three observations:

a. The grounds generally advanced in support of the statutory prohibition of political advertising could not be used to justify the interference with freedom of expression in the particular circumstances because:

[78] (2002) 34 E.H.R.R. 4

1. The applicant's association did not itself constitute a powerful financial group seeking, with its proposed commercial, to endanger the independence of the broadcaster, unduly influence public opinion or endanger the equality of opportunity between different social groups.

2. Indeed, rather than abusing a competitive advantage, all the applicant association intended to do with its advertisement was to participate in an ongoing general debate on animal protection and the rearing of animals.

b. In response to the Government's argument that the applicant association could use other means to disseminate the information, the Court observed that the applicant association, which sought to reach the entire Swiss public, had no other means than the national television programmes of the Swiss Radio and Television Company at its disposal, since these programmes were the only ones that broadcast throughout Switzerland.

c. The Court also made it clear that while it cannot exclude that a prohibition of 'political advertising' *may* be compatible with the requirements of Article 10 of the Convention in certain situations, nevertheless, the reasons must be 'relevant' and 'sufficient' in respect of the particular interference with the rights under Article 10.

81. Like the Appellant in the matter at bar, the ECtHR does not assert that private individuals have an unlimited right to access the media, but rather that any refusal of such access must be subject to some objective measure of reasonableness considering the critical importance of the right to freedom of expression in a functioning democracy.

Commonwealth Caribbean

82. In *Rambachan*[79] the state owned television station, TTT, refused to broadcast the applicant's pre-recorded political speech on the ground that it contained statements which were critical of the government's budget. The High Court held that the reasons given by TTT and its refusal to air paid political advertisement (pgs. 62 to 63 of the judgment) were not good enough to justify infringing the applicant's freedom to express his political opinion.

United Kingdom

83. In *An Application for Judicial Review by the Kirk Session of Sandown Free Presbyterian Church*[80] the Northern Ireland High Court found that the authorities had no justification to refuse the printing of an advertisement simply because it might be offensive to the majority of the population. The ECtHR reached a similar decision in *Handyside v the United Kingdom.*[81]

Canada

84. In *Greater Vancouver Transportation Authority v. Canadian Federation of Students*[82] 2009 SCC 31 the Supreme Court of Canada considered a public transport authority's refusal to place a paid political advertisement on the side of a bus, on the basis that it was not the policy of the Authority to accept political advertisement since doing so would interfere with its efforts to provide a safe, welcoming public transit system. The Court found such an infringement of freedom of expressions was not justifiable in a free and democratic society because:
    a. it is difficult to see how an advertisement on the side of a bus that constitutes political speech might create a safety risk or an unwelcoming environment for transit users; and

[79] TT 1985 HC 8

[80] [2011] NIQB 26

[81] (1976) 1 EHRR 737

[82] 2009 SCC 31

b. having chosen to make the sides of buses available for expression on such a wide variety of matters, the transit authorities cannot, without infringing s. 2(b) of the Charter, arbitrarily exclude a particular kind or category of expression that is otherwise permitted by law.

Summary of principles applicable to constitutional rights of access to the media to express and disseminate views and information

85. Freedom of expression, and the associated right to disseminate or distribute ideas or opinion through any media, as guaranteed in the Jamaican Charter, includes the right of an individual to require a broadcaster (or other media owner) to publish one's views through the use of a paid advertisement (*Rambachan, Benjamin, TV Vest, Vgt*, etc), or similarly to require another provider of a platform for advertising, that it generally makes available to the public, to not exclude individuals from availing themselves of said platform (*Greater Vancouver Transportation Authority*).

86. At the same time the broadcaster, in exercise of its editorial and journalistic freedom, may refuse to air the ad – however, at the bare minimum, the constitutional obligation to respect and give effect to others' rights to freedom of expression, and to disseminate views and information through any media, means that any such refusal can only be demonstrably justifiable in a free and democratic society **if** it is not based on discriminatory, arbitrary or unreasonable grounds (*ProLife Alliance*).

D. APPELLANT'S SUBMISSIONS ON APPEAL

Ground I: ***Court below (per Sykes J) erred in failing to correctly apply the underlying rationale of s. 13(5) (addressing significant social inequality) to the competing claims of the parties in this case in the Jamaican context***

87. Sections 13(1)(c) of the Charter states that "all persons are under a responsibility to respect and uphold the rights of others recognized" in the Charter, while section 13(5) of the Charter provides that each of the rights and freedoms guaranteed by the Charter "binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right." Section 13(2) of the Charter provides that the rights it recognizes are guaranteed save only for limitations that "may be demonstrably justified in a free and democratic society."

88. While the original rationale for recognizing and constitutionally embedding human rights was to guard against state power unduly interfering with the autonomy of the individual, section 13(5) of Jamaica's Charter is an express recognition of the power private entities often have to infringe the human rights of other private parties. In the Report of the Joint Select Committee of Parliament on its Deliberations on the Bill Entitled an Act to Amend the Jamaica Constitution, the members expressly stated that this was the main reason the Committee saw it fit to include section 13(5) in the new Charter: *"The Committee is, therefore, of the view that the constitutional protection of fundamental rights and freedoms afforded in the proposed new Chapter III should be extended to cases of infringement by private persons."*

89. As has been noted above, and as discussed in the court below (particularly per Sykes J), this provision of Jamaica's constitution is modelled on – indeed, identical to – such a provision in South Africa's Constitution that also explicitly makes Charter rights (and hence corresponding obligations) horizontally applicable. Sykes J. noted (at para. 191 of the judgment of the court below), that the provision in Jamaica's Charter was "deliberately copied from a country with significant inequality between different social groups and that section [i.e., section 13(5)] along with others was, perhaps, seen as a way of addressing that inequality through judicial decision on the scope and meaning of the

Bill of Rights." In *Khumalo and Others v Holomisa*, the South African Constitutional Court explained that these power inequalities between private entities, plus the importance of the right to freedom of expression (including in overcoming inequalities in a democratic society), meant that media owners could be found liable for breaching an individual's right to freedom of expression.[83]

90. Pursuant to the clear wording of sections 13(1) and 13(5) of the Charter, in adjudicating the horizontal application of Charter rights, the court must consider the nature of the Appellant's constitutional rights to freedom of expression and to disseminate ideas through the media, and the nature of any corresponding duty on the part of the Respondents to respect and uphold that right. The Appellant submits that in so doing, the court must have regard to the special role and hence obligations of the media in a free and democratic society as means of giving effect to such Charter rights (as described above in paras. 71-78). The significant power of the Respondent broadcasters to determine whether individuals are able to exercise their Charter rights via the media comes with a heightened responsibility to respect and uphold that right. In addition, the Appellant submits that, as noted in *Khumalo* and as recognized (but then not correctly applied) by Sykes J. in the court below, the rationale of addressing social inequalities in making constitutional rights horizontally applicable must mean that, in the case at bar, in assessing the nature and scope of the Appellant's constitutional rights, and the Respondent's corresponding duty, the law must also be informed by both (1) the inequality of power between the Appellant and the Respondents as private actors, and (2) the pervasive structural and social inequalities which the Appellant sought to use constitutional rights to address through the airing of an ad to be broadcast by the Respondents. However, the court below erred in failing to adequately consider these two factors.

91. In the case at bar, the Appellant submits that the influence, power and position of the respondent television broadcasters give them the ability to unduly interfere with the free

[83] (CCT53/01) [2002] ZACC 12 at para.33

speech of a wide cross section of the Jamaican population. In the court below, Justice Sykes correctly noted the fundamental role of broadcasters in fostering democracy and hence the limits that should be placed on their editorial control as gatekeepers of access to the airwaves.[84] Notwithstanding this, the Appellant submits that court below did not sufficiently and correctly address the special position of CVM and TVJ as the two major television stations in Jamaica, commanding the vast majority of the market share in televised media, and their resulting dominant position in determining what is televised in Jamaica. The Court also failed, in its assessment of whether constitutional rights of the Appellant had been infringed by the Respondents' refusal to air the ad, to address the context of societal and structural inequalities that confront Jamaican LGBT people, including gay men such as the Appellant – inequalities that the Appellant's advertisement was meant to address.

92. The Appellant further submits that the need to ensure the horizontal availability of a constitutional remedy pursuant to section 13(5) is all the more important in cases where there is no existing remedy under statute or at common law to govern circumstances in which a private entity's action has the potential to, or does in fact, infringe another individual's Charter rights – as was the case at bar.

Grounds II and III (jointly): ***Court below (per Williams J) erred in failing to correctly balance the rights of the Appellant against those of the Respondents***

93. The Appellant respectfully submits that in the court below, Williams J made two related errors when it came to the weighing of the competing constitutional rights claimed by the Appellant and the Respondents. The first error was to conclude that it is not possible or necessary to make a determination as to whether one right "must trump the other." The second error was nonetheless to then engage *de facto* in an incorrect balancing by allowing the Respondents' claims to unjustifiably trump those of the Appellant. As Dr. Lloyd Barnett pointed out: "The Court did not pronounce any view on this question [of

[84] *Tomlinson* para. 274, 275, 276.

how to balance rights] having treated the commercial stations' rights as presumptively overriding the [Appellant's] rights.[85]

The necessity of resolving competing rights

94. In this case, freedom of expression, and the related, more specific right to disseminate ideas or opinions through the use of the media, embodies protection for three groups (as articulated by Brennan J in *Columbia Broadcasting v. Democratic National Committee* at pg 2121):

    a. *Broadcasters*, such as the 1st and 2nd Respondents, are allowed editorial and journalistic freedom to broadcast ideas and opinions of their choice subject of course to restrictions in their broadcast licences and broadcast regulations, and any other applicable legal requirements – including those under the Charter.

    b. The Jamaican *public*, including television viewers, have a right to receive information, ideas or opinions on a wide range of subjects and especially those that are of public interest. It is in the public interest that LGBT Jamaicans such as the Appellant are free to distribute information aimed at promoting tolerance and defending their human rights. First and foremost, this is because of the inherent value and dignity of all persons and the universal applicability of fundamental human rights, as repeatedly recognized by Jamaica. However, dissemination of such views is also important to address the deleterious impact of homophobia on health, including on the national HIV response.

    c. The *Appellant* has a right to access broadcast media so as to advocate on issues of importance to himself and to the public in general – which public, it must be remembered, includes the Jamaican LGBT community, their families, friends, and all those who interact with LGBT people (from employers to landlords, shop-

[85] "Horizontal Application under the Charter of Fundamental Rights and Freedoms" Unpublished paper delivered at Continuing Professional Legal Development seminar on Nov. 15, 2014 at para. 3.19

keepers to bus drivers, legislators to judges, and indeed all in Jamaica). This is so even if the Appellant does not have a proprietary interest in the broadcast facility. Thus, US and other courts (see overview in paragraph 67 above) have explicitly recognized that editorial advertisements constitute "an important outlet for the promulgation of information and ideas by persons who do not themselves own media facilities" (i.e., the vast majority of people who have a constitutional right to freedom of expression and to disseminate information via the media), and have further recognized that the arbitrary, discriminatory or otherwise unreasonable denial of access to the means of disseminating such editorial advertising can serve only to undermine freedom of expression – or, as Brennan J. put it in *Columbia Broadcasting*, to "shackle the First Amendment in its attempt to secure the widest possible dissemination of information from diverse and antagonistic sources."

95. Consequently, the decision of the 1st and 2nd Respondents to not air the Appellant's advertisement inevitably amounted to a *prima facie* restriction on the Appellant's rights as guaranteed by ss. 13(3) (c) and (d) of the Charter. The Appellant submits that some balancing of the rights at stake, to determine whether such an infringement is constitutionally sound, is necessarily required.

96. In the court below, Sykes J was incorrect to conclude that there was no such infringement, by impermissibly and narrowly interpreting the Appellant's rights *ab initio* so as to avoid giving rise to a conflict requiring a balancing. Meanwhile, Williams J in appeared initially to accept that where horizontal application led to one person's Charter right conflicting with that of another, a balancing exercise was necessary [para 94]. But she went on to contradict this: she asked whether "one must trump the other," and concluded that it was not intended that "the scale must be tipped in favour of one over the other" [para 97]. She declared that she could not see the justification for holding that "either right must yield to the other" [105]. As noted above, this was the first error by Williams J.

97. This conclusion cannot be correct, since it would mean the court would never be able to decide in favour of one party over another. Horizontal application of rights will, by necessity, often involve some balancing of rights. In *Khumalo*, balancing was inherent in the libel laws of South Africa, just as it was in the US and Canadian cases noted above, in which, notwithstanding no explicit horizontal application of Charter rights between private parties, nonetheless those countries' Supreme Courts have refashioned the common law (including the law of defamation) to reflect constitutional rights such as freedom of expression. Similarly, to think of other potential examples in the Jamaican context, an individual's right to free movement (s. 13(3)(f) of the Charter) may have to give way to another person's right to lead a procession on the highway. Or, a person's right to "enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage" (under s. 13(2)(l) of the Charter) may require that their neighbour not store flammable rubbish on their premises in the exercise of their right to property (s. 13(3)(q) and s. 15). In all cases concerning the obligations of private persons to respect the rights of others, the Charter says that an obligation arises 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 (s. 13 (5)).

How to balance the rights of private litigants

98. In this case, the Appellant's Charter rights were inevitably engaged by the action of the Respondents in refusing his paid ad, thereby impeding his dissemination of information and views. However, a balancing of rights was necessary since the media companies also asserted their rights to freedom of expression and property. The Charter provides some guidance as to how to resolve such a conflict: section 13(2) of the Charter states that the rights therein are guaranteed, "save only as may be demonstrably justified in a free and democratic society."

99. Neither the 1st and 2nd Respondents' licences, nor the broadcast regulations, provides a standard for how these competing interests ought to be balanced in circumstances such as

those in the case at bar, where the Appellant desires access to the media to exercise his constitutional rights, but is refused by the Respondents claiming editorial freedom rooted in their claims to freedom of expression and to private property rights.

100. However, the Court, in keeping with its role as the guardian of the Constitution, has the power and the obligation to interpret the rights guaranteed in the Charter. This is not surprising; hitherto, the focus of freedom of expression in the context of media actors has been on protecting press freedom from government intrusion and balancing press freedom with the state's sovereign ownership of public airwaves. A part of its interpretative power is to determine how competing interests ought to be balanced when dealing with alleged infringement of Charter rights by private entities/individuals.

101. These competing rights must be balanced appropriately. This Honourable Court can be guided by the jurisprudence that does exist, and can contribute to that body of jurisprudence. As noted by Justice Sykes, if the broadcaster's right to journalistic and editorial discretion is left unbridled, this will inevitably trample on the rights of the viewing and listening public, as well as those citizens who wish to have access to the media to exercise their constitutional right to disseminate ideas via the media.[86] On the flipside, it would be equally impractical to guarantee every and any private individual or organization unrestricted access to use the airwaves via the Respondent television broadcasters.

102. Determining how the interests ought to be balanced in this case requires a two-pronged approach.

1. First, the court must determine if there has been an infringement. If we accept the *ProLife Alliance* principle, then the right to freedom of expression includes the individual's right to fair consideration when he

[86] *Tomlinson* para. 274, 275.

desires to access the broadcast media, i.e. the right not to be denied access to broadcast media on arbitrary, discriminatory or otherwise unreasonable grounds.

In making the assessment of whether the refusal was arbitrary, discriminatory or unreasonable the court ought to look at whether:

a. fair and timely consideration was given to the request,
b. reasons for the refusal were communicated to the individual and
c. the grounds for the refusal were relevant and sufficient

2. Second, 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," provides a mechanism which can be used to balance competing rights, whether the claim challenges an act of the state or an act of a private party. The Appellant submits the following factors ought to be used in determining whether the infringement is demonstrably justifiable in a free and democratic society:
    a. The language of the Constitution;
    b. Nature of the outlet/media;
    c. Whether the degree of intrusion is minimal;
    d. Whether the ad offends any broadcasting laws or regulations;
    e. The importance of the issue;
    f. Manner in which the entity dealt with the request; and
    g. Whether requiring the private broadcaster to respect and uphold the right(s) in question by airing the advertisement would impose an undue hardship.

100. Since section 13(2) makes it clear that all restrictions on Charter rights must be demonstrably justifiable in a free and democratic society, it is only if these conditions are met that a refusal, which amounts to a restriction on the Appellant's rights, could be constitutionally acceptable.

Solicitor-General on Balancing Rights

101. In the Full Court, the Solicitor-General suggested that in cases of horizontal application of Charter rights there may be different tests for justifying the limitation of rights than that of demonstrable justifiability in a free and democratic society. However, the Solicitor-General did not suggest any alternative test or framework. As noted by Dr. Lloyd Barnett, Jamaica's pre-eminent constitutional scholar:

> It is obscure as to what would the source of such an alternative and still less its justification. There seems to be no rational or moral basis for allowing a private person or entity exercising physical or economic power in their own self-interests to be more advantageously placed than the democratically elected Parliament or public officers or bodies carrying out public functions. The Court [in its ruling below in the instant case] did not pronounce any view on this question having treated the commercial stations' rights as presumptively overriding the Claimant's rights.[87]

102. In *Gardener v. Whittaker*,[88] the South African Constitutional Court considered the task of the trial judge in balancing one fundamental right (dignity, including reputation) against another (freedom of speech), and in doing so was developing (or altering) a common law rule in a manner which in the trial judge's opinion struck the correct balance. The Court held that there was nothing in the Constitution to suggest that the onus of establishing the basis for the precedence of one fundamental right over another, (as the trial Judge had held), rested upon the plaintiff who sought to rely on such precedence, as such an arbitrary and mechanical test in the interpretation of the Constitution was alien to the objects of the fundamental rights provisions and therefore in balancing competing rights it was of no moment whether the person asserting one of the rights was a plaintiff or defendant. (In this respect, it is fair to say that the approach to assessing legal limits on constitutional

[87] "Horizontal Application under the Charter of Fundamental Rights and Freedoms" Unpublished paper delivered at Continuing Professional Legal Development seminar on Nov. 15 2014. Para. 3.19

[88] [1997] 2 L.R.C.436

rights differs somewhat in the case of horizontal application between private parties from the case of vertical application; in the latter case, the state always bears the burden of justifying a restriction on private constitutional rights.)

103. It is important to appreciate that in the South African constitutional scheme the tension between the Bill of Rights and common law principles is resolved by a prescribed mechanism of what has been called "constructive gradualism." In addition to providing explicitly for horizontal application of constitutional rights, Section 8 of the South African Constitution also states:

> ... (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)."

104. Therefore, in the South African Constitution, there is the explicit provision in section 8(3) that makes it clear that the courts are to apply the constitution to the common law, so as to render it constitutional. This includes both the circumstance where the court needs to fill a lacuna left by the absence of a statutory provision to ensure constitutional rights are adequately applied horizontally as between private parties, and the case where the court may need to craft constitutionally sound limits on a right (e.g. if needing to balance constitutional rights as between private parties).

105. While there is not an equivalent explicit constitutional guidance in Jamaica, nonetheless the Appellant submits that the Court has the obligation to apply Charter principles to the common law rules of contract so as to ensure that there is no discriminatory, arbitrary, or otherwise unreasonable denial of the Appellant's right to freedom of expression and to have access to the media to disseminate information and ideas.

Grounds IV and V (jointly): ***Sykes J erred when he misinterpreted the Appellant's arguments and then went on to find that horizontal application was not applicable in the circumstances***

"No right to use another's property to broadcast message" & "No obligation to air all ads"

106. In the court below, Sykes J held that the Charter did not give any private citizen the right to use another private person's property to disseminate any message [para 311] and the Respondent TV stations had no obligation to air all advertisements from the public [para 278]. Therefore, he concluded, the Appellant's rights under ss.13 (3)(c) and (d) of the Charter were not affected by the 1st and 2nd Respondents' refusal to air the ad, and therefore it followed, in his view, that horizontal application of the Appellant's Charter rights did not arise in the first place in these circumstances.

107. The Appellant respectfully submits that the learned trial judge erred in this approach, which interpreted away *ab initio* the basis for the Appellant's Charter claim. Sykes J's reasoning is incorrect for the following reasons:

a. It was never the Appellant's contention that he had an unbridled right to use a private person's property to disseminate his message and he certainly never argued that the Respondents had an obligation to air all advertisements submitted to them.

b. The Appellant's contention is that the rights to freedom of expression and to disseminate information and views through any media include a right to not have his access to broadcast media refused on discriminatory, arbitrary, or otherwise unreasonable grounds. This proposition is amply

supported by the jurisprudence reviewed above (paras 69-84).[89]

b. Here, the Respondent TV stations have made a particular forum open for members of the public to submit paid advertisements. While it is perhaps unreasonable to expect every advertisement submitted to be aired (as there are only so many hours reasonably available in the broadcast schedule to dedicate to advertising), it is certainly reasonable – especially given the influence of both TVJ and CVM, and the special, fundamental role the media (particularly broadcast media with their reach and dominant position) in facilitatin the free expression and exchange of ideas in a democratic society – to expect that the TV stations should not refuse paid ads on arbitrary, discriminatory or otherwise unreasonable grounds, particularly when such an ad addresses issues of public importance such as public health and fundamental human rights, which was the case here.

c. In his judgment, Sykes J. repeatedly says that *Charter* rights are to be given a "broad and generous" interpretation" while also noting that the language of the constitution is tremendously important and *Charter* rights cannot be interpreted to have meanings that the words do not allow. However, the Appellant respectfully submits that, looking at the judgment as a whole, the learned justice failed to put these principles into practice. His failure to afford generous interpretation to the constitutional provisions in question was most visible with regards to his dismissal of the ***ProLife*** principle as being inapplicable to private broadcasters. He effectively narrowed the scope of freedom of expression guaranteed to a private citizen vis-à-vis a broadcast licensee - even though the broadcast licensees

[89] *ProLife Alliance v British Broadcasting Corporation* [2004] 1 AC 185 at para.58,; *Benjamin v Minister of Information* (2001) 58 WIR 171; *Haider v Austria* (1995) 83 DR 66 ; *Huggett v United Kingdom* (1995) 82A DR ; *VgT Verein gegen Tierfabriken v Switzerland (2002)* 34 E.H.R.R. 4; 10 B.H.R.C. 473 ; *An Application for Judicial Review by the Kirk Session of Sandown Free Presbyterian Church* [2011] NIQB 26 ; *Greater Vancouver Transportation Authority v. Canadian Federation of Students* 2009 SCC 31

in question held similar power and influence as a public broadcaster. In the instant case, the Respondents have power akin to that of a public broadcaster and there is no principled public/private distinction between the two types of broadcasters. Therefore, the analysis from *ProLife* is entirely on point.

108. It is clear that the commercial broadcasting entities have been granted a license to use the airwaves which form part of the national patrimony. Without a license from the public authority, the broadcasting equipment which is their private property is useless. In any event, property rights found in s. 15 of the Charter are the least protected under our Constitution in that the protection is limited to protection against compulsory acquisition and taking of private possessions in the absence of a statutory provision for prompt and adequate compensation. The regulation of the use of property is not in itself protected. See *Grape Bay Ltd. V A.G.*[90]

109. In the instant case, the Appellant offered to pay the Respondents the usual market rate for airing the ad. Therefore, contrary to what the Respondents alleged, there would have been no infringement of their property rights to begin with by their acceding to the Appellant's request to air the ad, and the Respondents would have faced no detriment. The Respondents would have been properly compensated based on rates they themselves set for airing the Appellant's ad. There was therefore no need to balance the Respondents' property rights with the Appellant's right to access the media. The Appellant submits that the property rights claim by the Respondents was without any foundation; therefore, to the extent that Sykes J. based any of his ruling on this claim – which he did heavily – his analysis proceeded on a faulty premise and should be set aside.

[90] (1999) 57 WIR 62

110. However, in the alternative, even if there was some foundation for the Respondents' property rights claim, and therefore a requirement to balance it against the Appellant's Charter rights to freedom of expression and to disseminate views and information via any media, it is clear that the balance should have been struck in favour of the Appellant because of his very minimal request that the Respondents air a short 30-second ad in return for the Respondents' standard market price.

111. In those circumstances, there is no *a priori* principle that editorial discretion or choice trumps the guarantee of freedom of expression, particularly where the editor is using a facility which a public license grants a special privilege to use. Accordingly, it is submitted, that the nature of the rights involved and the obligation not to impede freedom of expression should not lead to a mechanical assessment but requires an analysis of the competing rights and the nature of any burden that might arise under a corresponding duty to give effect to and uphold those rights. No single one of the factors listed below is determinative, but it is suggested that the factors relevant for this assessment include:

a. The language of the Constitution;
b. The nature of the outlet/media;
c. Whether the degree of intrusion is minimal;
d. Whether the ad offends any law;
e. Whether the ad addresses a matter of public importance; and
f. The manner in which the media entity dealt with the request.

Ground VI: ***The scope of the right to freedom of expression in the new Charter must reflect its expansion to take into account its enforceability against private actors***

112. The constitutional text, and in particular the section dealing with fundamental rights and freedom, is to be treated as a "living instrument" and therefore should be interpreted in a manner that takes into account the changing standards of the society. ***Boyce & Joseph* v. *The Queen***,[91]

113. As such, the content of the rights in section 13(3)(c) and (d) will reflect the evolving standards of the society. Therefore, what might have been true under the old Chapter 3, which was enacted in 1962, will certainly not hold in interpreting a Charter passed in 2011.

114. Moreover, horizontal application marks a new day in our constitutional jurisprudence. The scope of the rights under the Charter will necessarily be different from that to be found in the old Chapter 3 –where only the state could be bound- in order to accommodate private individuals being bound by Charter rights.

115. A refusal to air an ad would be discriminatory under the Charter if, as in the instant case, it does not recognize "the equal enjoyment of rights…for all Jamaicans" (per Williams, J in the Full Court[92]). Therefore, when Ronnie Sutherland on behalf of the 2nd Respondent stated that the Appellant was not granted equal access to the media because his ad would offend "significant numbers of [the 2nd Respondent's] viewers"[93] that refusal was patently discriminatory.

[91] [2004] UKPC 32 at paragraph 28

[92] *Tomlinson* para. 28

[93] Para 7 Affidavit of Ronnie Sutherland dated 5, December 2012

116. The General Comment of the UN Human Rights on Article 19 of the International Covenant on Civil and Political Rights is useful for understanding the right of LGBTI people like the Appellant to access the media in conservative religious societies such as Jamaica. General Comment 34 at para 32: reads: "The Committee observed in general comment No. 22, that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination."

117. Further, in *Fedotova v Russian Federation*[94], a law which restricted freedom of expression for LGBTI people based on the prohibition of "public actions aimed at propaganda of homosexuality among minors" was struck down. This is because the law violated the freedom of expression rights contained in the ICCPR (art 19) and must be interpreted within the principles of non-discrimination (general comment 34 on Article 19 para 32)

118. The refusal to air an ad would also be arbitrary if, as in the instant case, the media owner cannot even rationally justify its own objections, (*Free Presbyterian Church, TV Vest* and *Vgt).* As both Respondents admit, they have aired much longer pro-LGBTI material on their stations with no undue hardship.[95] Therefore it would be an arbitrary refusal if the individual prejudices and biases of the media owner were the only means of effectively

[94] IHRL 2053 (UNHRC 2012)

[95] Para, 22 of the Affidavit of Stephen Greig on behalf of the 1st Respondent dated Dec. 10, 2012; Para. 13 of the Affidavit of Ronnie Sutherland on behalf of the 2nd Respondent dated Dec. 5, 2012.

determining others' access to the medium to exercise their Charter right to freedom of expression.

119. Also, the refusal would be otherwise unreasonable if, as in the instant case, the ad is not in breach of any regulatory provision and is otherwise permitted by law (*Greater Vancouver Transportation Authority*). It would also unreasonable if the broadcaster cannot prove any undue hardship. The undue hardship defense is not available where it is based on discriminatory customer preferences. In *Giguere v Popeye*, the Human Rights Tribunal of Ontario states that Canadian law clearly doesn't allow for discrimination based on business interests that are based upon customer preferences that are themselves discriminatory.[96] Only well-grounded concerns about rights will be considered, while "attitudes inconsistent with human rights" are irrelevant to the determination of undue hardship.

120. For an undue hardship defense to apply the cliamant must prove evidence of actual cost or health and safety concerns. In *Thwaites v Canadian Armed Forces,*[97] which concerned the constructive dismissal of an HIV positive gay man from the Canadian military, the Canadian Human Rights Tribunal stated that:

> "The nature of the evidence required to prove undue hardship must be objective, real, direct, and in the case of cost, quantifiable. The employer must provide facts, figures and scientific data or opinion to support a claim that the proposed accommodation in fact causes undue hardship. A mere statement to the employee or the Human Rights Commission without

[96] 2007 HRTO 26 at para. 74

[97] 19 CHRR 259

supporting evidence, that the cost or risk is "too high" based on impressionistic views or stereotypes will not be sufficient".

121. The tribunal ruled that concerns based on health and safety were not based on evidence and so could not be relied upon. This case further states that the onus of proof of undue hardship on the employer:

> Whenever an employer relies on health and safety considerations to justify its exclusion of the employee, it must show that the risk is based on the most authoritative and up to date medical, scientific and statistical information available and not on hasty assumptions, speculative apprehensions or unfounded generalizations.[98]

122. The tribunal also concluded that health and safety concerns must be "substantial" and claims of undue hardship cannot rely on assumptions or generalizations. Undue hardships related to economic costs must be substantial if they are to possibly be considered as justification for infringing the right to non-discrimination in employment.

123. In the instant case where the Respondents allege that fears of potential negative repercussions from advertisers and the general public were the basis for the refusal of the Appellant's ad, the Court should require strict proof, especially because of the fundamental right to freedom of expression which is at stake, as well as the very grave issues (human rights for LGBTI people and the fight against HIV among MSM) that the Appellant's ad addresses.

124. Furthermore, the Appellant recalls that freedom of expression on matters of public importance and debate is even more robustly protected than

[98] Ibid

commercial expression,[99] meaning that if the ad addresses matters of public importance and debate (e.g., *Vgt* regarding animal cruelty, or *Free Presbyterian Church* regarding homosexuality), then correspondingly, there is an even greater scrutiny warranted of the media owner's refusal, to air and a greater onus for justifying such a refusal given the importance of giving effect to freedom of expression on such matters.

Ground VII: ***The word "media" in s. 13(3)(d) of the Charter does in fact include entities such as the Respondents***

125. 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 the 1st and 2nd Respondents.

126. The Oxford Online Dictionary defines media as "the main means of mass communication (especially television, radio, newspapers, and the Internet) regarded collectively." From this definition it follows that the 1st and 2nd Respondents would be included in the term 'media' as described in section 13(3)(d) of the Charter.

127. In the Final Report of the Constitutional Commission in Jamaica, the Commission stated that one of its reasons for rejecting the term 'freedom of press' in favour of the current phrasing in section 13(3)(d) was that '***the express mention of one institution may imply that other institutions …which are not similarly mentioned or the individual who wishes to employ his freedom spasmodically…has less protection*** (at paragraph 27). It is clear therefore that individuals, and not simply media owners/operators, were meant to enjoy the rights guaranteed in section 13(3)(d).

[99] *Vgt Verein gegen Tierfabriken v Switzerland* (2002) 34 EHRR 4*; Wingrove v United Kingdom* (1996) 24 EHRR 1

128. The use of the phrase "distribute or disseminate" clearly indicates that section 13(3)(d) is more than just a right to speak: distribution or dissemination of ideas or opinions is not possible without access to media. For the individual, effective public communication through some forms of media, for example television, will require him/her to make use of the services of others. In order for the individual to effectively access these avenues, the gatekeepers of said access must be required to not deny it on grounds that are arbitrary, discriminatory or otherwise unreasonable.

Ground VIII: ***The majority opinion in Columbia Broadcasting System is grounded in the fact that the Court was unable to find any indicia of state involvement so as to hold the private broadcaster liable for infringement of the 1st Amendment***

129. The learned trial judges Sykes J and Williams J erred in law when they failed to recognize that the primary reason the majority in *Columbia Broadcasting System v. Democratic National Committee*[100] 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.

130. It is important to understand that, at the heart of the majority opinion in *Columbia Broadcasting System v Democratic National Committee* et al[101] lies the fact that the court was unable to establish "that a broadcast licensee's refusal to accept a paid editorial advertisement constituted "governmental action" for First Amendment purposes. (Pp. 114 -121). The US only recognizes vertical application of human rights and therefore the Courts could not find a private individual liable for infringement in the absence of some degree of state involvement. Had the majority been of the view that the constitutional protection of freedom of expression could be applied this dispute between private parties, it seems that result would almost certainly

[100] 412 US 94

[101] 412 US 94

have been different, given the majority's views about the critical importance of freedom of expression and access to the media.

131. On the other hand, the minority opinion of Justices Brennan and Marshall (pp 170 and onwards) concluded that there was state involvement and from there they were able to find that ***Columbia Broadcasting System***'s refusal to accept paid editorial advertisement was a breach of the Petitioner's First Amendment right to freedom of expression – and as noted above, their decision specifically elaborated on how the exercise of this freedom necessarily entailed access to the airwaves via private broadcast media

132. The Appellant therefore submits that Sykes J. erred in relying on *Columbia Broadcasting System* in ruling against the Appellant's claim for horizontal application of Charter rights in the circumstances of the case at bar.

Ground IX: ***The decision in Benjamin stands for the broader proposition that access to broadcast media should not be denied on discriminatory grounds.***

133. In *Benjamin v Minister of Information*[102] the government of Anguilla revoked the appellant's broadcast license because he was critical of a government lottery. The government claimed that the appellant had no general right to access the media, however, the UK Privy Council ruled that the government violated the appellant's constitutionally guaranteed right to freedom of expression, which was essential to a functioning democracy.

134. In the Full Court, Justice Sykes contended that the decision in *Benjamin*[103] turned on the distinction between withdrawing a forum for freedom of expression on the one hand, and not providing such a forum on the other.

[102] (2001) 58 WIR 171

[103] (2001) 58 WIR 171

135. However, more recently, Lord Hoffman in *ProLifeAlliance v British Broadcasting Corporation*[104] did not put such a narrow and restrictive interpretation on the decision in *Benjamin*. He found that the crux of decision in *Benjamin* is to be found in the fact that the right to freedom of expression included a right not to have ones access to radio denied on politically discriminatory grounds. He also pointed to other authorities where the emphasis was on the right not to be denied access to media on discriminatory grounds.[105]

Grounds X, XI and XII (jointly): *The ProLife Alliance principle was developed in relation to public broadcaster but it is also applicable to the 1st and 2nd Respondents, particularly where the position of the private entity is akin in power and influence to a state-owned broadcast station*

136. 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 the Respondents as they are neither public bodies under a duty to act fairly nor subjects of judicial review (para.248)

137. The learned trial judge Sykes, J. also 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 the 1st and 2nd Respondents, where the position of the private entity is akin in power and influence to a state-owned broadcast station.

138. The learned trial judge Williams, J. erred in law when she found that the principle in *Prolife* Alliance was applicable to the Respondents but failed to

[104] [2004] 1 AC 185

[105] See also *Haider v Austria* (1995) 83 DR 66; Huggett v United *Kingdom* (1995) 82A DR

apply it in her analysis of whether they had breached the Appellant's rights under sections 13(3)(c) & (d) of the Charter.

139. The particular obligation not to deny access to television on discriminatory, arbitrary, or otherwise unreasonable grounds was developed in relation to public television broadcasters in the *ProLife* decision of the Privy Council. Nonetheless, contrary to the approach Sykes J in the court below, this principle is equally applicable in cases involving private broadcasters, and particularly in the Jamaican constitutional context, for the following reasons:

a. The right to access the media found in s. 13(3) (d) of the Charter imposes an obligation on all media not to refuse access to private citizens on arbitrary, discriminatory, or otherwise unreasonable grounds. The Jamaican Constitution makes it explicit that constitutional rights apply horizontally to private actors; there is no indication anywhere that a broadcaster is exempt from the legal obligation to respect and uphold constitutional rights simply because it is privately owned.

b. This obligation is heightened in the case of broadcasters because of their license to use the (limited) public resource of the airwaves. Indeed, the law specifically imposes heightened public obligations on a broadcast licensee: its broadcasting licence explicitly says that it must at all times operate in the public interest.

c. It is in the public interest that broadcasters are not allowed to deny access to the airwaves, without good reasons. They should not be permitted to use their licences to completely and unjustifiably snuff out an individual's constitutional rights as guaranteed by ss. 13(3)(c) and (d) of the Charter.

d. This is especially the case where the material sought to be disseminated addresses an issue of public importance, such as the fundamental human rights

issue raised by the Appellant's ad and its additional underlying public health objective.

e. Ownership does not endow upon a private entity absolute dominion. Even in a context where there is only vertical application of horizontal rights (e.g., the US), the more a private entity opens up, for its own advantage, its property to the public, the more its proprietary interests become circumscribed by the constitutional rights of others.[106] As such, TV stations are not allowed to refuse access without adequate justification. If this were to be allowed they could deny access on the basis of racial discrimination and a citizen would have no redress since the stations could simply rely on their proprietary rights to do as they like.

f. In the Jamaican context, where there is horizontal application of Charter rights, such an obligation attaches to any broadcaster. That said, where the position of the private entity is akin in power and influence to a state-owned broadcast station, the obligations that courts have seen fit in other jurisdictions (of exclusively vertical application of constitutional rights) to place on the state-owned broadcaster can be applied to the similarly situated private broadcaster. Broadcast licensees, like TVJ and CVM that controls access to the airwaves for millions of Jamaican and by virtue of their power, influence and position, have a heightened obligation to respect the free speech of others

140. Unlike Justice Sykes, Justice Williams in the court below found that the *ProLife* principle was applicable, but then erred by failing to utilize it in her analysis of whether the refusal by the Respondents to air the Appellant's ad had breached his rights under ss. 13(3)(c) and (d).

[106] *Marsh v. Alabama*, 326 U.S. 501, 506, 66 S.Ct. 276, 278, 90 L.Ed. 265 ; *Rudolph Lombard et al., Petitioners, v. State of Louisiana* 373 U.S. 267.

Grounds XIII: ***The obligation to act in the public interest, as found in the Respondents' broadcast licenses, also includes an obligation not to deny access to the public unjustifiably***

141. Sykes J considered that the issue was not whether the broadcaster should accept a particular advertisement but whether it has carried out its obligation, in the public interest, to inform the public on the particular issue [para 282]. He supported his conclusion by reference to the various authorities where it was said that there was no general right of access to the media [para 236], and no right to compel a broadcaster to use its facilities to propagate his views [para 267]. He said that it should be left to editorial discretion and judgment to determine what particular message should be carried [para 278].

142. The Appellant respectfully submits that this position fails to consider the following as stated by Justice Brennan in *Columbia Broadcasting*:

a. There is considerable possibility the broadcaster will exercise a large amount of self-censorship and try to avoid as much controversy as he safely can.

b. Indeed, in light of the strong interest of broadcasters in maximizing their audience, and therefore their profits, it seems almost naive to expect the majority of broadcasters to produce the variety and controversial material necessary to reflect a full spectrum of viewpoints.

c. Stated simply, angry customers are not good customers and, in the commercial world of mass communications, it is simply 'bad business' to espouse—or even to allow others to espouse—the heterodox or the controversial. (Justice Brennan in *Columbia Broadcasting* at pg. 2129)

d. But what of those whose ideas are too unacceptable to secure access to the broadcast media? To them, the broadcast media, buttressed by Sykes's judgment, can now legitimately reply: Our freedom of expression guarantees our freedom to

do as we choose with our media.[107] The right to freedom of expression is somewhat hollow if the law only protects the sanctity of what is said and fails to recognize the difficulty minority views might encounter when trying to access broadcast media –which by its nature is concentrated in the hands of a few individuals concerned solely with profit-making.

e. The *ProLife* principle, at least, ensures that the perhaps unpopular but important views on human rights promoted in the Appellant's ad are given fair consideration to secure expression in media with the largest impact.

Ground XIV: ***The reasons given by the Respondents amounted to a discriminatory, arbitrary and otherwise unreasonable denial of access to the airwaves.***

143. Having dismissed the applicability of the *ProLife* principle in deciding if the stations had indeed infringed the Appellant's rights under s.13 (3)(c) and (d), the court below failed to assess the conduct of TVJ and CVM and to consider whether the reasons given for refusal were relevant and sufficient.

144. The Appellant submits that the Respondents' refusal to air his ad was discriminatory, arbitrary and/or otherwise unreasonable and thus not demonstrably justifiable in a free and democratic society. This is the case because:

a. The Respondents failed to give timely consideration to the Appellant's request;
b. The Respondents failed to communicate their reasons for refusal to the Appellant; and
c. The grounds for refusal were not relevant and sufficient.

The Respondents failed to give timely consideration to the Appellant's request

[107] Jerome Barron, *Access to the Press- A New First Amendment Right* Harvard Law Review, Vol 80, 1967

145. The 1st Respondent takes the position that it did not refuse to air the ad, but rather was not given a fair opportunity to consider the matter.[108] However, the ad was submitted to the 1st Respondent in March 2012 and almost seven months later, the Appellant still had not been given a decision despite numerous follow-up letters, emails and telephone calls. Almost seven months is more than a fair opportunity to consider the request to air the ad. Similarly, the 2nd Respondent received the ad in February 2012, but up to the filing of the Appellant's claim in November of that year, it had failed to respond to follow up letters regarding the request to air the ad, and had also failed to communicate either orally or in writing a decision as to whether it intended to air it. In the circumstances, the Appellant submits that neither Respondent gave timely consideration to the Appellant's request.

The Respondents failed to communicate the reasons for refusal to the appellant

146. In his letters of April 2nd, September 10th and September 18th, 2012 to both the 1st and 2nd Respondents, the Appellant gave the Respondents the opportunity to communicate a decision on whether they would air the ad. The Appellant also made it clear that failure to respond on the part of the Respondents would be taken as refusal to air the ad.

147. The 2nd Respondent did not respond to any of the letters and its refusal was therefore inferred. Once the Appellant eventually filed his claim, the 2nd Respondent admitted to refusing to air the ad,[109] but this refusal and the reasons for it were never communicated to the Appellant prior to the filing of the claim.

148. The 1st Respondent responded to the Appellant's April 2nd letter but at no time did it communicate a decision as to whether it would air the ad.

[108] Affidavit of Stephen Greig on behalf of the 1st Respondent, dated December 10, 2012.

[109] Affidavit of Ronnie Sutherland on behalf of the 2nd Respondent, dated December 5, 2012.

Furthermore, the 1st Respondent did not respond to the September 10th and September 18th letters from the Appellant, still seeking a response months later. The 1st Respondent has never denied receiving any of the Appellant's letters and as such its non-response can only be taken as a refusal. The 1st Respondent has never communicated to the Appellant any reason for its refusal.

149. Both the 1st and 2nd Respondent showed utter disregard for the Appellant's constitutional right to access media to broadcast his message on a matter of great public importance. They refused to air the ad and did not think it was important to communicate either this refusal or the reasons for such a refusal to the Appellant. In both cases the Respondents illustrate how the editorial freedom endowed to broadcast media can be abused at the expense of the individual, who without the means to get a broadcast license, must necessarily depend on broadcast media to reach a wide audience.

The grounds for refusal were not relevant and/or sufficient

The 1st Respondent's Grounds for Refusing

150. As noted, no reasons for refusing to air the ad were ever provided by the Respondents before they were compelled to respond to the Appellant's claim. It is therefore reasonable to suggest that the Respondents should, in the circumstances, be estopped from now being afforded an opportunity to try to justify the denial of the Appellant's constitutional rights for which they previously showed utter disregard.

151. In the alternative, should this Court entertain such belated justifications, the Appellant notes that, in the affidavit of Stephen Greig, the 1st Respondent offers a number of purported ground for justifying its refusal to air the Appellant's ad, but none of these offer relevant or sufficient grounds justifying

the infringement of the Appellant's constitutionally guaranteed rights. The Appellant addresses the grounds put forward by the 1st Respondent as follows:

f. At paragraph 14 of the Greig affidavit, he states that the 1st Respondent's property rights, editorial, press freedom and control are material considerations in deciding the material it will broadcast.

Appellant's counter-argument:

1. The Appellant has submitted above (para 109), that the Respondent's property rights are not engaged, or in the alternative that any such intrusion was minimal and would not outweigh his rights to freedom of expression and to disseminate views and information through any media. Therefore this aspect of the Respondent's argument should be dismissed.

2. Section 13(5) of the Charter now demands that 1st Respondent's property rights, editorial, press freedom and control be balanced against the Appellant's right to access broadcast media so as to advocate on issues of importance to himself and the public. It does not appear that the 1st Respondent gave any weight to the latter consideration in its deliberations.

3. The 1st Respondent has not presented any evidence to demonstrate that their rights should trump those of the Appellants. In particular, the 1st Respondent has presented no credible evidence that it would suffer harm from airing pro-gay material, such as the advertisement. Therefore, there would be no harm done to its rights in giving effect to the Appellant's rights. So there would be no basis on which to conclude that 1st Respondent's rights should trump the Appellant's.

4. It is to be remembered that the 1st Respondent is given a licence to broadcast over public airwaves and as a condition of their licence they should do so in the public interest. The public interest demands, and the position of influence occupied by the 1st Respondent obliges them to present a wide gamut of views on issues of public importance. The treatment of LGBT in Jamaica, which the ad addresses, is one such issue.

g. Additionally, in paragraph 13 of his affidavit, Greig states that the 1st Respondent is obliged to carefully scrutinize the content of all advertisements and programmes it transmits based on the penalties it might face – penalties pursuant to broadcasting regulations and its broadcast licence.

Appellant's counter-argument:

1. Based on the content of the May 16, 2012 letter from the Broadcasting Commission, the ad did not appear to breach any of Jamaica's broadcasting laws or regulations.

2. The 1st Respondent through careful scrutiny would have recognized this and would have had no need to fear any resulting punishment from broadcasting the ad.

The 2nd Respondent's Grounds for Refusing

152. In the affidavit of Ronnie Sutherland on behalf of the 2nd Respondent, he stated three (3) main reasons for the 2nd Respondent's refusal to air the ad:

h. It did not want to be seen as promoting homosexuality given the potential negative public response and the impact on revenue stream:

Appellant's counter-arguments:

1. At paragraph 13 of the said affidavit, the Respondent noted it had broadcast three programmes dealing with "topical matters affecting homosexuals in Jamaica." It has also noted that it has given the Appellant air time on other occasions to express his views on issues affecting homosexuals. It has, however, not been able to show how those recent programmes have led to either a decrease in its profits or public outrage against it. Furthermore, the Appellant notes that the 'Our Voices' episode, referred to in paragraph 6 of the affidavit, was aired several years ago without any payment to the Respondent. In contrast, the Appellant had always asserted his intention to pay for air time to air his "Love and Tolerance" advertisement.

2. In any event, the Appellant's rights under sections 13(3)(c) and (d) cannot be legitimately breached simply because the message conveyed by the video might be offensive or shocking to the majority opinion. These rights exist especially to protect the views of the minority and to give them a space where they can flourish. The video did not seek to incite any type of violence; indeed, to the contrary it was concerned with promoting the human rights of a much vilified and marginalized group. Indeed, the 2nd Respondent's logic would mean any private actor – e.g., a shop-keeper – could "justify" discrimination by saying it was fearful of the reactions of its discriminatory, bigoted customers.

i. The 2nd Respondent also stated that it felt that airing the advertisement would be construed by viewers as promoting the commission of the offence of buggery:

Appellant's Counter-argument

1. In *Gay Student Services v Texas A&M University (TAMU)*[110] , the Fifth US Circuit Court of Appeals stated: "*As to TAMU's asserted interest in preventing expression likely to 'incite, promote and result ' in then-illegal homosexual activity, we emphasize that while Texas law may prohibit certain homosexual practices, no law makes it a crime to be a homosexual.*" [emphasis added]

2. While it is true that in Jamaica certain homosexual acts between men are illegal, homosexuality, or being a homosexual, is not unlawful. A 30 second video showing the Appellant advocating for the human rights of homosexuals is not a criminal activity and cannot be confused with promoting buggery.
3. Even if certain homosexual activities are illegal, this does not negate the Appellant's freedom of expression to educate the public as to the discrimination, vilification and violence faced by LGBT people and agitate for better treatment, including calling for reform of the law (although in fact the "Love and Tolerance" ad in question made no reference to the law or any call for its reform).

4. If this was a legitimate concern on the part of the 2nd Respondent, why did it air the other programmes on homosexuality? And when the 2nd Respondent broadcast the 'Our Voices' episode did the Broadcasting Commission ever reprimand them for promoting illegal activities? The finding of the May 16, 2012 letter from the Broadcasting Commission, which stated that the ad was not in breach of any of Jamaica's broadcasting regulations, clearly demonstrates how spurious this concern was.

[110] 737 F.2d at 1328

j. The 2nd Respondent asserts that it was advised by its attorneys that it had a common law and constitutional right to determine with whom it decides to enter into a contract.

Appellant's Counter-argument:

1. No doubt the 2nd Respondent has such freedom of contract under the common law. However, such a right – even if elevated to the status of a constitutional right (which dubious) – if not unfettered, and is subject to legitimate constitutional limitations, including those arising out of the horizontal application of the constitutional rights of other private actors, such as the Appellant.
2. Furthermore, given their position of power to affect the constitutional rights of others, and the special position and responsibility of the media in a democratic society, members of the broadcast media are to be judged by a higher standard than the ordinary private citizen. Section 13(5) now demands that their freedom to contract must be balanced with the rights of individuals requiring access to broadcast media to exercise their freedom of expression and right to disseminate views and information, particularly on matters of public importance. The 2nd Respondent cannot simply say "We can decide to contract with whom we choose and that is the end of the matter."

153. **In conclusion**, both the 1st and 2nd Respondents exercised the power they have over granting access to free to air television, discriminatorily, arbitrarily and/or unreasonably because:

ii. The ad was not in breach of any regulatory provision and was otherwise permitted by law (*Greater Vancouver Transportation Authority*). The May 16 letter from the Commission proves this point.

iii. The 1st and 2nd Respondent did not give timely consideration to the PA.

iv. 1st and 2nd Respondent failed to communicate their reasons for refusal to the Appellant. Both Respondents are given a licence to use a very limited and valuable public resource – the airwaves. They have a constitutional obligation to ensure that they use it responsibly by taking into consideration the constitutional rights of those who seek to access the airwaves. A part of that obligation is to give reasons when access to this valuable public resource is denied

v. The subject matter of the ad was of public importance and contributed to public debate (*Vgt* –animal cruelty *Free Presbyterian Church* – homosexuality*)* Homophobia in the Caribbean and in this case Jamaica, cannot be successfully challenged if LGBT advocates, like the Appellant, are not allowed access to television - currently the most pervasive and powerful communication tool in our part of the world.

vi. Free to air television provided a wide audience for the Appellant's message and it did not matter that there were other means to broadcast the message (*Vgt*). The 1st and 2nd Respondents have a duopoly over the free to air television market and together they have the greatest influence of any media owner in the island. There is no just reason to deny the Appellant, a member of a marginalized group, the opportunity to use this tool to bring his message of tolerance to the Jamaican public.

vii. Justice Sykes correctly noted the fundamental nature of broadcasters in fostering democracy and the limits that should be placed on editorial control.

viii. The ad was done in a manner that was fairly innocuous and could not be

seen as condoning or likely to provoke violence (*Free Presbyterian Church)*

ix. The PA is not objectionable on the grounds put forward by the media owner. (*Free Presbyterian Church* and *Vgt)*

x. The media, often considered the fourth estate, is extremely powerful but with power comes the responsibility to use that influence in a manner that promotes a just society. In failing to place sufficient weight on the Appellant's rights under ss. 13(3) (c) and (d), the 1st and 2nd Respondent did not exercise their enormous power responsibly and in the public interest.

154. As a result their refusal was not demonstrably justified in a free and democratic society.

155. Both Respondents are given a licence to use a very limited and valuable public resource – the airwaves. They have a constitutional obligation to ensure that they use it responsibly by taking into consideration the constitutional rights of those who seek to access the airwaves.

Conclusion

156. The Appellant contends that the Full Court judgment was incorrectly decided because:

k. It did not give sufficient weight to the rationale for the adoption of section 13(5) of the Charter and its significance in the Jamaican context where private bodies, such as the Respondents, that can use their position of considerable power and influence to restrict the rights and freedoms of individual members of the society.

l. The new Charter has broadened the scope of the rights to freedom of expression, and to disseminate views and information through any media, through the introduction of horizontal application. Consequently, the court below was required to weigh the competing rights claims of the Appellant and the Respondents.

m. The majority opinion of the US Supreme Court in *Columbia Broadcasting*, followed incorrectly by Sykes J in the court below, is properly distinguished from the case at bar, in that in *Columbia Broadcasting System* the Court was unable to find any indicia of state involvement so as to hold the private broadcaster liable for infringement of freedom of expression contrary to the 1st Amendment of the US Constitution, which instrument only provides for vertical application of constitutional rights. In the Jamaican context, the Charter explicitly creates horizontal application; the dissent by Brennan and Marshall JJ in *Columbia Broadcasting System* is therefore more appropriately applicable here.

n. The word "media" in s. 13(3) (d) does in fact include entities such as the 1st and 2nd Respondents, making them subject to constitutional obligations to respect and uphold the Appellant's Charter rights.

o. In attempting to justify the refusal to air the Appellant's ad, at least the 1st Respondent claimed that being compelled to air the ad would infringe its property rights. However, no such infringement ever arose, because the Appellant was prepared to pay the standard fees for the short use of the Respondent's privately-owned equipment necessary for the broadcasting of the ad (over publicly-owned airwaves licenced to the Respondent subject to the public interest). No loss or harm would have been occasioned to the Respondent in giving effect to the Appellant's Charter rights to freedom of expression and to disseminate information and views through any media. The Respondent's claim that its

property rights would be infringed rests on the demonstrably false premise that its right is completely unfettered in any way by any other consideration, which is not correct as a matter of fact or law.

p. The 'save only' provision in section 13(2) of the Charter provides for the possibility of balancing the competing rights of the Appellant and 1st and 2nd Respondents and ought to have been used.

q. The ***ProLife*** principle strikes the correct balance between the Appellant's rights and those of the 1st and 2nd Respondents by appropriately limiting the editorial discretion of the media companies and at the same time not giving the Appellant an unrestricted right of access to broadcast media.

r. The obligation to act in the public interest, as found in the 1st and 2nd Respondents' broadcast licenses, also includes an obligation not to deny access to the public unjustifiably. Moreover, for individuals to effectively exercise their rights as guaranteed by this provision, access to the media owned by the 1st and 2nd Respondents must not be denied on arbitrary, discriminatory or unreasonable grounds.

s. The decision in ***Benjamin*** stands for the broader proposition that access to broadcast media should not be denied on discriminatory grounds.

t. The reasons given by the 1st and 2nd Respondents amounted to an arbitrary, discriminatory and/or otherwise unreasonable denial of access to the airwaves.

E. APPELLANT'S RESPONSE TO RESPONDENTS' COUNTER-NOTICES OF APPEAL

a) *1st Respondent*

157. The 1st Respondent advances 5 arguments in its Counter-Notice of Appeal. The Appellant addresses each in turn below

Respondent's Argument 1

158. The 1st Respondent asserts the learned judges below erred as a matter of fact and/or law in finding that the Appellant 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.

Appellant's Counter-Argument

159. The Appellant agrees with and relies upon the finding of the Court below that the Appellant's desire to have the Advertisement air would affect him personally, and the refusal by the Respondents to air the Advertisement "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".[111] The Appellant further submits that there is nothing unusual or objectionable about a concerned individual seeking to advance a claim that would also be of benefit to the rights and interest of others whose rights are similarly affected. Indeed, accepting the 1st Respondent's logic would effectively preclude any public interest case in which an individual claimant petitions the courts regarding a matter of human rights affecting a larger group of which the claimant is a person. Seeking such judicial protection is an entirely legitimate

[111] *Tomlinson*, at para 30 (per Williams J).

aspect of broader efforts to secure human rights or address other important matters of law and public policy.

Respondent's Argument 2:

160. The 1st Respondent asserts the learned judges erred as a matter of fact and/or law in finding that the Appellant has standing to bring the Claim having regard to the true construction of sections l9(1) and l9(2) of the Charter.

Appellant's Counter-argument

161. Section 19(1) of the Charter sets out gives the criteria for establishing standing in a constitutional claim:

a. Any person
b. who alleges that any of the rights and freedoms protected under the Charter
c. has been, is being or is likely to be contravened in relation to him
d. then without prejudice to any other legal remedy available to him
e. he may apply to the Supreme Court for redress (paraphrased)

'Any person'

162. The word person refers to both a natural and juridical person. The Appellant is a Jamaican citizen and is currently not a citizen of any other country. He maintains a residence on the island, is a licensed attorney in Jamaica and has very strong familial ties here. He travels back and forth between Jamaica and Canada, where he also has a home.

'to be contravened in relation to him'

163. The courts have interpreted this to mean that the individual bringing the action has to be one who is personally affected. More recently, the Privy

Council describes a similar section in the Mauritius Constitution as providing "a personal remedy for personal prejudice" (*Mirbel v Mauritus*[112]).

164. The Appellant is both one of the producers of the ad and one of two persons featured in the ad. He was also the person who submitted the ad to the Respondents. He therefore suffered personal prejudice when the television stations refused to air the ad. The Appellant should not be taken as suggesting that all of such factors should need to be present in order to qualify for standing to challenge the Respondents' refusal to air the ad. The Appellant simply wishes to underline the multiple ways in which he was centrally engaged in the effort to air the message in the advertisement, thereby illustrating the depth of his connection to the matter before the court and illustrating plainly that the Respondent's attempt to deny him standing is without foundation.

'has been , is being or is likely to be contravened'

165. The complainant must show that one or more of the rights in the Charter has been or is being infringed. When the television stations refused to air the ad, their actions infringed the Appellant's rights under section 13(3)(c) and (d) of the Charter.

'without prejudice to any other legal remedy available to him'

166. According to the UK Privy Council in *Attorney General of Trinidad and Tobago v Ramanoop*[113] and *Angela Inniss v the Attorney General of St. Christopher and Nevis*[114] , if the Appellant has a parallel remedy for the breach of constitutional right, constitutional relief should not be sought unless

[112] [2010] UKPC 16 [26]

[113] [2005] UKPC 15

[114] [2008] UKPC 42

the circumstances of the breach indicate that the parallel remedy would not be an adequate means of redress. In this instance, the Appellant has no other redress under either statute or common law to adequately remedy the prejudice suffered as a result of the 2 Respondents' refusal to his ad.

'apply to the Supreme Court for redress'

167. The Supreme Court refers to the Supreme Court of Jamaica which has jurisdiction to interpret the Charter. The Charter is only binding in Jamaica. As such any alleged infringement must have occurred within the jurisdiction. The ad was:

a. produced in Jamaica,

b. by a Jamaican,

c. submitted to television stations in Jamaica,

d. for broadcast on television in Jamaica,

e. via the airwaves publicly owned by the Jamaican people and licenced to private Jamaican broadcasters, and

f. the refusal to air the ad occurred in Jamaica by Jamaican broadcasters.

Respondent's Argument 3:

168. The Respondent argues 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.

Appellant's Counter-Argument

Charter Rights Apply Horizontally and not Just Vertically (against the State)

169. The Appellant submits that the Respondent's contention is patently incorrect. The learned judges were correct as a matter of law in concluding (unanimously) that the Charter provisions are capable of direct horizontal application, thereby providing a private person a cause of action against another private party for a breach of the Constitution.

170. The inclusion of sections 13(1)(c) and 13(5) in the Charter undoubtedly expresses Parliament's intention for constitutional remedies to be available against private entities who infringe the fundamental rights and freedoms of others. In other words, constitutional rights apply horizontally and not just vertically (against the state).

171. The question the court has to answer is whether the right to freedom of expression and the right to distribute or disseminate ideas or opinions through any media, are rights - which by their nature and the duty they impose - suitable for horizontal application. The Appellant submits that the answer to that question must be in the affirmative for the reasons given by the South African Court in *Khumalo*, namely:

a. The importance of freedom of expression – which many courts have referred to freedom of expression as the cornerstone of democracy and "the matrix, the indispensable condition of nearly every other form of freedom[115]" - means that it must be respected by all citizens.

b. The potential infringement of the rights in ss. 13(3)(c) and (d), which could be occasioned by persons other than the state or organs of state, is both a palpable and present danger. In this case, as the owners and operators of Jamaica's only free to air television stations, the 1st and 2nd Respondents have immense power over the information, opinion and ideas that are disseminated and distributed to the public. They are therefore in a position to dictate both who gets access to the media and what is broadcast through the media. With such immense power must come corresponding responsibilities so as to guard against the abuse of said power.

[115] *Palko v. Connecticut,* 302 U.S. 319 (1937), at p. 327 (per Cordoza J in the US Supreme Court)

172. Further, the duty imposed by the rights in ss. 13(3) (c) and (d) will depend on the private entity or person involved and the standard by which the entity/person ought to be judged is one that can be judicially determined. Naturally, private entities, such as media owners like the 1st and 2nd Respondent, who "command great resources and exercise far-reaching powers which are capable of having an adverse impact on the rights and freedoms of other persons and entities", must be judged at a higher standard than the ordinary citizen. Indeed, the more the power of the Respondents to affect others' constitutional rights, the more compelling the case for a robust application horizontally of constitutional rights and corresponding obligations to give effect to those rights.

173. Additionally the court should also consider that the constitutional remedy provided by section 13(5) is all the more compelling in cases where there is no existing 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. At present, there is no existing remedial legislation or common law remedy governing the manner in which media owners ought to deal with requests by individuals to have aired paid advertisements, a lacuna of particular concern when such expression relates to matters of public importance. Paragraphs 2 and 4 of the May 16, 2012 letter from the Broadcasting Commission suggest that there is no legislative framework for such matters and paragraph 1 of Mr. Greig's April 30th letter rightly indicates that there is no private law remedy available to the Appellant seeking to have his ad aired. If it is accepted that the actions of the 1st and 2nd Respondents did amount to restriction on the Appellant's right to freedom of expression and the right to distribute or disseminate ideas or opinions through any media, then section 13(5) provides the only means by which the Appellant's rights can be vindicated.

Respondent's Argument 4:

174. The Respondent argues the learned trial 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, and as a consequence thereof they incorrectly concluded that the section introduces a cause of action between private citizens for constitutional breaches.

Appellant's Counter-Argument

175. The Appellant relies on his submissions in relation to horizontal application above (see paras 20-52). Although there may be scope for direct and indirect horizontal application of Charter rights, on the facts of this case, there is direct application.

Respondent's Argument 5 (regarding costs)

176. The Respondent asserts the learned trial judges erred as a matter of fact and law and/or wrongly exercised their discretion in not awarding costs to the 1st Respondent on the facts of the case at bar.

Appellant's Counter-Argument

177. The Appellant submits that for this matter, in which the Appellant applied for relief under the Constitution, the Court must follow the specific rules found in CPR 56.15(5) and may award costs only if the Appellant acted "unreasonably." The rule is clear and unambiguous.

Relevant Legislation on Costs in Constitutional Matters

178. In Jamaica, the Court's jurisdiction to award costs is found in Part 64 of the CPR. However, for "administrative orders", defined in CPR 56.1(b) as an application "by way of originating motion or otherwise for relief under the Constitution," CPR 56.15(5) prescribes the rules for costs:

> *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.*

179. In determining whether a party acted unreasonably under CPR 56.15(5), Rule 64 provides that the Court should "have regard to all the circumstances"[116] and in particular, according to CPR 64.6(4), must have regard to, among other issues, "the conduct of the party both before and during the proceedings"; "whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings"; "whether it was reasonable for a party to pursue a particular allegation and/or raise a particular issue"; and "the manner in which a party has pursued that party's case".[117]

The Appellant Acted Reasonably

180. An examination of the matters presented to the Court, and a review of the conduct of the Appellant throughout demonstrate that: (a) the Appellant brought a serious constitutional claim to the Court which was neither frivolous nor vexatious; (b) the case was handled professionally and efficiently by Appellant's counsel (c) the matter raised important new issues of law for the Court which it was reasonable for the Appellant to bring before it; and (d) the Appellant was successful in the court below on several foundational issues.

Claim was neither frivolous nor vexatious

181. In the judgment by the Court below, it was recognized by Williams J. that the refusal by the Respondents to air the advertisement "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".[118] Contrary to the assertions

[116] Rule 64.6(3), Civil Procedure Rules 2002.

[117] Rules 64.6(4)(a), (b), (d)(i) and (ii), (e)(i), respectively, Civil Procedure Rules 2002.

[118] *Tomlinson*, at para 30.

made by some of the Respondents,[119] the Court confirmed that the Appellant had a legitimate claim to argue that his constitutional rights had been affected.

182. The Appellant also made numerous attempts to avoid litigation by repeatedly requesting a response from each of the Respondents as to whether the Advertisement would be aired. From as early as February 2012, the Appellant wrote to TVJ and CVM inquiring if they would air the advertisement and at what cost. Yet the Respondents generally failed (with one exceptional instance) to even respond to the Appellant, let alone provide reasons for refusing to air the advertisement. As Sykes J noted: "It was the non-response [to the Appellant's last two letters] that prompted Mr. Tomlinson to conclude that TVJ had decided not to broadcast the video."[120] Notice of delays in decision-making were never communicated to the Appellant,[121] and even once decisions were made to reject the advertisement for broadcast, "the decision was not communicated."[122] The Appellant was left with no recourse, no confirmation of any decision, and no ability to judge the merits of a response without bringing this matter before the Court. It was only after the Appellant brought his claim that the Respondents bothered to eventually put forward ostensible justifications for the refusal to air the ad. For the Respondents to suggest that the Appellant's claims were frivolous after failing to even reply to the Appellant's numerous requests is disingenuous. It is entirely possible that a reasoned reply from any of the Respondents could have narrowed the scope of the claim before the Court or averted litigation,

[119] *Tomlinson*, at para 23. ("It is Mrs. Gibson-Henlin's submission that the Appellant has suffered no harm and is no more than a 'poser' or a 'tool.'")

[120] *Tomlinson*, at para 119.

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

[122] *Tomlinson*, at para 133.

thereby mitigating or completely avoiding the costs of taking this claim to trial, yet no such reply was provided by either of the Respondents.

183. Further evidence of the reasonable conduct of the Appellant with regard to this application can be seen from the fact that, while waiting for a response from the Respondents, he sought confirmation from the Broadcasting Commission of Jamaica as to the suitability of the advertisement for public broadcast.[123]

The case was properly managed

184. At every stage of the preparation and execution of the trial, the Appellant and his counsel conducted the case properly and efficiently, respecting the Court's time and making every effort to keep costs low. Most notably, at the case management conference on December 12, 2013, the trial period was fixed at five days based on the submission of CVM, yet due to the professional handling of the trial documents by Appellant's counsel the matter was concluded in four days.

185. Finally, the Court itself commended Appellant's counsel for their conduct of the case. Sykes J cited the "outstanding work" of Ms. Anika Gray, and the "invaluable assistance" of all counsel. [124] While it was a "difficult case", Sykes J indicated that "if I did not agree with the arguments advanced it was not for want of advocacy or lack of clarity in the submission".[125] These comments would not be made by a Court to ineffective or frivolous counsel. Instead, the Appellant submits that the compliments of the Court were offered in acknowledgment of the serious and thoughtful efforts made by Appellant's counsel in bringing an important matter effectively and efficiently before the court. To suggest that such behaviour and such a claim were unreasonable or

[123] *Tomlinson*, at para 16.

[124] *Tomlinson*, at para 316.

[125] *Ibid*.

frivolous ignores the sober and lengthy attention the Court paid to the issues raised by the Appellant at trial.

The matter raised important legal issues, and the Appellant succeeded on several key points

186. While the Appellant was ultimately unsuccessful in proving to the Court that his constitutional rights had been breached, the Court found, contrary to the claims of the Respondents, that a party may seek constitutional redress against another private individual. Williams J. wrote that the Respondents "as private entities are private persons who are bound to uphold the rights and freedom[s] of other individuals, such as the Appellant."[126] Based as it was on the amended 2011 Charter, this was a new matter before the Court that resulted in a significant legal determination with widespread consequences for future cases. The 1st Respondent itself acknowledged, in paragraph 13 of its submissions on costs, that "[t]his matter was a complex matter. It involved novel and new points of law, in uncharted waters." And Pusey J opined: "It now comes to the Jamaican courts to begin to create a new and appropriate jurisprudence to balance the rights between individuals."[127]

187. To award costs against the Appellant on this matter would require, under CPR 56.15(5) that the Court finds the Appellant acted unreasonably. The Appellant respectfully submits that there is no evidence to suggest that the Appellant or his counsel acted unreasonably in any manner. This matter involved a sincere effort by the Appellant to assert his constitutional rights to secure air time on national television in order to promote tolerance towards a persecuted group of Jamaican citizens of which he is a part. The case was handled professionally and expeditiously by Appellant's counsel. It was brought forward based on the absence of binding jurisprudence on this issue, and in the face of stonewalling and indifference on the part of the

[126] *Tomlinson*, at para 54.

[127] *Tomlinson*, at para 331.

Respondents, who refused to respond to the Appellant's numerous requests. Ultimately, the Court recognized the Appellant's standing to bring the claim forward and seriously considered the issues set out by all parties; the Court made important favourable pronouncements on key legal arguments raised by the Appellant, and most significantly on critically important constitutional issues, including the horizontal application of constitutional rights, all of which will have a lasting impact on Jamaican jurisprudence.

CPR 56.15(5) Should Apply in Constitutional Cases Between Private Litigants

188. There is no reason CPR Rule 56.15(5) should not apply to constitutional cases involving private litigants. There is certainly nowhere in the CPR that provides for such a deviation. Furthermore, the Appellant submits that, had the Jamaican legislature intended different rules to apply in such cases, the CPR would have been so amended at the time the Charter was amended in 2011 to allow private litigants to bring constitutional changes. Without such amendment, the rule is clear and must be followed. As Panton J confirmed in *Golding v Simpson-Miller*:

> *[W]here it is intended that these special rules are to be affected by other rules, it is so stated…It cannot be that without there being a statement to that effect, the special rules are to be watered down by any and every provision in the body of Rules. That would make a mockery of the entire Rules, and provide countless loopholes…The whole point of providing for orderly conduct of litigation would be defeated."*[128]

189. The Appellant submits that the absence of an exception to CPR 56.15(5) is the *sine qua non* that should guide the Court's decision on costs. The case law in South Africa (which has a similar horizontal application of constitutional rights) reveals a strong and definitive trend to <u>not</u> assign costs to a losing litigant in constitutional cases involving a public interest, even when between private litigants, based on a strong policy rationale articulated by the courts.

[128] *Golding v Simpson-Miller*. SCCA 3/08 (unreported) (decided April 11, 2008) at para. 10.

190. Before reviewing the South African precedent, it is important to recognize that CPR 56.15(5) was introduced as an exception to the general costs rule in Part 64. This exception was created in order that costs awards would not have a chilling effect on constitutional claims made against a state party. As was noted by Sykes J in *Walker v Contractor General* at para. 14: "Costs orders may have a crippling effect on the ability of persons, particularly the paupers, to challenge the decisions of public authorities."[129] He recognized that in order to have a vibrant and healthy democracy, constitutional claims cannot be restricted to only the wealthiest citizens who can afford to pay costs should they lose. The Charter was created to protect all citizens, regardless of wealth; ensuring such equal access to justice must always be a paramount consideration for the Jamaican courts.

191. Whether the claim was brought against a state party or against a private entity, a costs award against a losing litigant would have the same chilling effect on the ability of Jamaicans to protect their constitutional rights. South Africa articulated this in *Barkhuizen v. Napier*, where the court rejected a constitutional challenge by a private person who was barred from suing an insurance company because of a provision in a contract between two private parties:

> *This is not a case where an order for costs should be made. The applicant has raised important constitutional issues relating to the proper approach to constitutional challenges to contractual terms. The determination of these issues is beneficial not only to the parties in this case but to all those who are involved in contractual relationships. In these circumstances, justice and fairness require that the applicant should not be burdened with an order for costs. To order costs in the circumstances of this case may have a chilling effect on litigants who might wish to raise constitutional issues. I consider therefore that the parties should bear their own costs, both in this Court and in the courts below.*[130]

[129] [2013] JMFC Full 1(A).

[130] CCT 72/05 [2007] ZACC 5 at para 90.

192. The South African justices viewed the public interest component of a claim, and the reasonableness of the litigant's actions, to be the paramount considerations when determining costs awards. The holding in *Barkhuizen* was followed in *Bothma v. Els*, where the justices reiterated the importance of considering the public interest dimension:

> *The first two factors could also have relevance to the determination of costs awards in private litigation involving constitutional issues. They are the chilling effect an adverse costs order might have and the broader implications of most constitutional litigation. Taken together, they highlight the importance of considering the public interest dimension, and could influence a decision as to whether there should be an exception to the general rule set out above.*[131]

193. It is important to note that South Africa does not have a rule similar to CPR 56.15(5), and therefore the justices were relying purely on policy considerations to create an exception to the general rule that costs follow the judgment, rather than relying on specific rules as in Jamaica. This judicial insistence further underscores the importance of ensuring litigants' ability to bring forward constitutional concerns. In *Biowatch v Registrar Genetic Resources*,[132] Sachs J recognized the importance of distinguishing constitutional cases between private litigants based on whether or not the matter was in the public interest. He referred to the case of *Barkhuizen* to explain the policy rationale for not awarding costs against a litigant when the case is in the public interest; and also cited *Campus Law Clinic v Standard Bank of South Africa,*[133] where a public interest group sought unsuccessfully to intervene in a dispute between a bank and a mortgagor. In that case the court did not award costs against the group as requested by the bank because,

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[131] *Bothma v Els and Others* (CCT 21/09) [2009] ZACC 27; 2010 (2) SA 622 (CC) ; 2010 (1) SACR 184 (CC) ; 2010 (1) BCLR 1 (CC) (8 October 2009) para. 95

[132] CCT 80/08) [2009] ZACC 14

[133] CCT 21/09 [2009] ZACC 27 at para 95

although unsuccessful in its claim, the Campus Law Clinic had raised important constitutional issues in the public interest.

194. In fact, all of the South African cases mentioned by Sachs J in *Biowatch* where costs were awarded, including *Khumalo v. Holomisa,*[134] *Laugh it Off Promotions v South African Breweries International (Finance (BV) t/a Sabmark International,*[135] and *NM v Smith,*[136] can be distinguished from the *Barkhuizen* reasoning because no public interest argument was raised in relation to costs, which would have justified an exception to the general costs rule in South Africa.

195. While the direct horizontal application of constitutional rights is not allowed under Canadian law (although the courts have engaged in indirect application of "Charter values" to common law applying between private parties), Canadian courts have also consistently held that claims involving matters in the public interest should be given special treatment in relation to costs.

196. In *Incredible Electronics Inc. v. Canada (Attorney General)*, Perell J defined public interest cases as "litigation that involves the resolution of a legal question of importance to the public as opposed to private-interest litigation, which I will define as litigation that involves the resolution of a legal question of importance mainly only to the parties."[137] He went on to hold that the applicant, described as a public interest litigant, would not be liable to pay costs.

[134] (2003) 2 LRC 382

[135] (2005) 5 LRC 475

[136] (2007) 4 LRC 638

[137] (2006), 80 O.R. (3d) 723 (Sup. Ct. J.) at para 59.

197. Similarly, LeBel J. of the Supreme Court of Canada outlined the rationale for affording certain cases special treatment in relation to costs in *British Columbia (Minister of Forests) v. Okanagan Indian Band*:

> *[T]he more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues."*[138]

198. South African and Canadian legal precedents demonstrate that the public interest qualification is a significant factor for their courts when determining costs awards in constitutional cases. The Appellant submits that in this matter, it is clear that the issues raised are of significance to the broader community, both as matters of policy and as matters of law, and the claim was not brought forward for the Appellant's own pecuniary interests.

199. As a human rights and HIV advocate, the Appellant's primary purpose in bringing this claim forward was to address a grave public health concern. This concern is based on the fact that UNAIDS and Jamaica's Ministry of Health have declared that intolerance for homosexuals drives men who have sex with men ("MSM") underground, away from effective HIV prevention, treatment, care and support interventions, and contributes significantly to Jamaica's vastly disproportionate HIV prevalence rate for MSM.[139] The Advertisement was created to make use of a powerful communication medium

[138] 2003 SCC 71 at para. 38.

[139] Ministry of Health of Jamaica, *Culture Shift Needed to Help in the Fight Against HIV/AIDS* (19 Oct 2010), http://www.moh.gov.jm/general/latestnews/1-latest-news/346-culture-shift-needed-to-help-in-the-fight-against-hivaids.

in order to encourage greater tolerance of homosexuality and thus improve access to health care for MSM. While the Appellant asserts that his own constitutional rights were violated, his attempts to exercise those rights were made in the interest of encouraging respect for the human rights of a significant portion of Jamaican society and promoting the public health more generally.

200. The question of whether the advertisement would be an effective way to bring about the societal changes hoped for by the Appellant is not relevant to the issue of costs, or even to the case itself. Williams J wrote: "[w]hether the PSA [the advertisement] would secure the objective of encouraging tolerance to homosexuals and MSM as an effective tool to counter the spread of HIV and AIDS leads to questions not to be addressed here."[140] Thus while the Court did not judge the efficacy of the Appellant's efforts, it accepted that it was the intention of the Appellant to have a broader societal effect by asserting his constitutional rights in this matter, thus recognizing the public interest motivating the Appellant's efforts.

201. Beyond the subject matter of the advertisement, which was to serve a broad public interest, the claim itself raised important legal issues of concern to the Jamaican public: the horizontal application of the new Charter, the obligations of the media in a constitutional democracy, and the balancing of competing rights of freedom of expression and the freedom of the press. As quoted above, as the first to raise issues regarding the new Charter, this matter took on "historical significance," [141] making the public interest in this matter abundantly clear.

[140] *Tomlinson*, at para 35.

[141] *Tomlinson*, at para 1.

202. The length and detail of the judgment handed down by the Court also makes it clear that the Court was aware the judgment would provide a foundation for future claims that will inevitably arise under the new 2011 Charter. The centrality of the constitutional rights debated by this Court and their importance for a functioning state cannot be diminished. Sykes, J wrote that "an informed public is vital to the functioning of a democracy,"[142] and further:

> *The obligation for television stations to act in the public interest*] *is imposed in the context of constitutional democracy where the role of broadcasters is recognized as very important in fostering and promoting democracy.*[143]

203. This case, which dealt with constitutional issues that were both untested and fundamental to the functioning of democracy, was clearly in the public interest. While Jamaican law, for important policy considerations, unequivocally establishes that costs should not be awarded against unsuccessful litigants in constitutional cases, the South African precedents also demonstrate that even when such constitutional cases are between private litigants, the same rule should be followed if the case is in the public interest.

b) 2nd Respondent

204. The 2nd Respondent also advances 5 arguments in its Counter-Notice of Appeal. The Appellant deals with each of them in turn below.

[142] *Tomlinson*, at para 275.

[143] *Tomlinson*, at para 272.

Respondent's Argument 1:

205. The Respondent asserts that Justice Williams incorrectly concluded that constitutional remedies for infringement of fundamental rights and freedoms provisions were not available prior to the amendment of the Chapter III of the Constitution of Jamaica.

Appellant's Counter-Argument

206. The Appellant cannot identify where in the judgment this alleged conclusion was made by William J. This arugment is without foundation and should be dismissed. In the alternative, even if this conclusion had been drawn by William J, it is of no consequence given that it is indeed the provisions of the new Charter that apply in this case.

Respondent's Argument 2:

207. The Respondent asserts that Justice Williams failed to correctly interpret the provisions of section 13(5) which explicitly delineated the circumstances in which a juristic person could be bound by the provisions of the recent amendment of the Chapter III of the Constitution of Jamaica – in other words, the horizontal application of Charter rights.

Appellant's Counter-Argument

208. The Appellant notes the 3 justices of the court below were unanimous in their view that private juristic persons could be bound by Charter obligations. The Appellant agrees with the judgment of the learned judges on this point and relies on their reasoning and his submissions above (see paras. 20-21).

Respondent's Argument 3:

209. The 2nd Respondent asserts that Justice Sykes misinterpreted its submission on editorial control by attributing to it the position that it has absolute and unbridled editorial control over the material it chooses to broadcast akin to private censorship of the airwaves.

Appellant's Counter-Argument

210. The Appellant submits that the 2nd Respondent has not demonstrated that Justice Sykes misinterpreted its submissions. In fact, at para. 29 of the 2nd Respondent's submissions in the court below they assert the unbridled right to freedom of the press.

Respondent's Argument 4:

211. The 2nd Respondent submits the Full Court erred in not ruling on the following aspects of the 2nd Respondent's submissions:

a. The Respondent submitted that to compel it to air the Appellant's advertisement would contravene the 2nd Respondent's (i) common law right to freedom of contract, (ii) constitutional right to freedom of association, and (iii) constitutional right to the enjoyment of its property.

b. The Respondent also submitted that the relief sought by the Appellant would disproportionately infringe the constitutional rights of the 2nd Respondent.

Appellant's Counter-Argument

212. The Appellant submits that the 2nd Respondent has not proved any error on the part of the court as alleged. Further, the private TV station's common-law right to contract must now yield to the Charter obligation to respect the rights

of others. Additionally, the Respondent's right to associate would not be affected by airing the paid ad as this could not reasonably be construed as an endorsement of the Appellant's message. Indeed, TV stations regularly air paid commercial and political campaign ads without any concern that the reasonable viewer will consider such airing to be an endorsement by the broadcaster of the content or the entity placing the ad. Indeed, it is inherent in the very nature of advertisements that they are not expressing the view of the broadcaster; they are content clearly distinguished from the programming aired by the broadcaster. Finally, the right to property is the right least protected in the constitution (which is hardly surprising for a former slaveholding and plantation society), and certainly vis-à-vis other personal rights guaranteed by the Charter. In any event this right would not have been infringed as the Appellant offered to pay the Respondents the usual market rate.

Respondent's Argument 5:

213. The Respondent claims the Full Court erred in not awarding costs of the trial proceedings to the 2nd Respondent.

Respondent's Counter-Argument

214. The court was correct and the Appellant relies on his submissions on costs above (see paras 164-191).

F. COSTS ON THIS APPEAL

215. The Appellant further relies on his submissions on costs above in submitting that because of CPR 56, as well as the significant public interest nature of this matter, there should also be no order as to costs in this appeal.

216. In the alternative, the Appellant relies on this Court's judgment in the decision of *Holness (Andrew) v Williams (Arthur)*[144] in submitting that costs should be apportioned based on the complexity of the matters addressed in the appeal and the counter-notices of appeal.

217. In *Holness* this court said:

[128] In considering the costs of the litigation in this case, it may be said that whereas the Full Court was entitled to hold, because of Mr. Williams' participation in the scheme that created the letters, that there should be no orders as to costs, different considerations apply here. Mr. Holness, having received judgment of the Full Court, decided to appeal from it. That is his right. He should not be denied it. He cannot, however, say that there is any basis to depart from the usual rule that costs must follow the event. **Were it not for the counter notice of appeal**, his appeal having failed, costs would have been awarded to Mr. Williams to be taxed if not agreed [emphasis added].

[129] There was, however, the counter-notice. Mr. Williams [who brought the counter-notice] failed in respect of that. The issues raised in respect of the counter-notice were far less demanding that those raised on appeal. Mr. Williams would have been put to greater expense in respect of the appeal than Mr. Holness would have been in respect of the counter-notice. Mr. Wiliams should be paid a portion of his costs. Two-thirds would be reflective of the difference in demand between the appeal and the counter-notice.

218. The 1st and 2nd Respondents in this matter filed counter-notices of appeal dated September 26, 2014 and October 7, 2014, respectively. Therefore, by this court's reasoning, each party should bear their own costs in the matter raised in their appeal.

[144] [2015] JMCA Civ 21

219. In addition to the foregoing, the complexity of the issues in both the appeal and counter-appeal warrant a departure from the general rule.

220. The complexity of this claim is reflected in the fact that the learned Justices of the Full Court were not agreed on several key elements of the case.

221. Further, in the interest of the administration of justice in Jamaica, and to support the development of the constitutional law, and to prevent a chilling effect on the exercise of constitutional rights by Jamaicans, this court should order that all parties bear their own costs in this appeal.

G. REMEDIES SOUGHT

222. The Appellant prays that in light of the foregoing the Court will grant his appeal by:

c. Affirming the decision of the Full Court with regard to the ability of the Appellant to bring this matter, the horizontal application of Charter rights, and its determination that costs are not to be ordered against the Appellant;

b. Overturning the decision of the Full Court denying horizontal application of Charter rights to the Respondents in this matter, and granting the following remedy:

i. A declaration to the effect that the 1st and 2nd Respondents' refusal to air a paid advertisement advocating tolerance towards LGBT people amounted to an unjustifiable restriction of the rights to freedom of expression and the right to disseminate and distribute ideas through any media - guaranteed by ss. 13(3) (c) and (d) of the Charter, respectively.

ii. an Order for the 1st and 2nd Respondents to air the "Love and Respect" advertisement in exchange for the standard fees.

c. Ordering that there be no costs on this appeal.

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Dated the day of , 2015

SETTLED BY:

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