

**THE EASTERN CARIBBEAN SUPREME COURT  
COMMONWEALTH OF DOMINICA**

**IN THE HIGH COURT OF JUSTICE  
(CIVIL)**

Claim No. DOMHCV2019/0149

**IN THE MATTER OF the Constitution of the Commonwealth of Dominica**

**AND**

**IN THE MATTER OF an Application by B.G. alleging a breach of his rights under sections 1(a), 1(b), 1(c), 3, 5, 7(1, )10(1), 11(1) and 13 of the Commonwealth of Dominica Constitution Order 1978**

**AND**

**IN THE MATTER of an Application by B.G. for constitutional redress pursuant to section 16(1) of the Constitution.**

**BETWEEN:**

**B.G.**

Claimant

and

**THE ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA**

Defendant

and

**THE BISHOP OF ROSEAU  
THE METHODIST CHURCH  
THE ANGLICAN CHURCH**

**(represented herein by Bishop Gabriel Malzaire, The Bishop of Roseau)**

and

**DOMINICA ASSOCIATION OF EVANGELICAL CHURCHES**

Interested Parties

## APPEARANCES:

Mrs. Cara Shillingford-Marsh with Mr. Wayne Benjamin Marsh for the Claimant  
Mr. David Dorsett and Ms. Vanica Sobers-Joseph for the Defendant  
Ms. Joelle Harris for the Interested Party, (The Bishop of Roseau, The Methodist Church and The Anglican Church)  
Mr. Joshua Francis for the Interested Party, the Dominica Association of Evangelical Churches

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2022: September 28;  
2024: April 22.

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## JUDGMENT

### Introduction

[1] **CENAC-PHULGENCE J:** The claimant who is a citizen of the Commonwealth of Dominica ("Dominica") seeks a declaration that sections of the **Sexual Offences Act** (the "SOA"),<sup>1</sup> being section 14 prohibiting 'gross indecency' and section 16 prohibiting 'buggery', are void and of no effect to the extent that they contravene the Constitution of the Commonwealth of Dominica (the "Constitution"). The defendant, the Attorney General of Dominica, opposes the motion in his affidavit in response. The Attorney General's position in relation to the claim evolved by the time submissions were filed and his position in relation to the various constitutional provisions is reflected in the discussion which follows.

[2] I think it is important to say at the outset that this case is not about whether the actions, choices, lifestyle or otherwise of the claimant are right or otherwise but is solely to determine whether certain rights guaranteed to every citizen of Dominica, by the Constitution of Dominica have been infringed by sections 14 and 16 of the SOA. With this in mind, I now examine the case as presented by the claimant.

### The Parties' Pleaded Cases

[3] The claimant avers that section 14 of the SOA prohibits consensual sexual acts other than sexual intercourse as 'gross indecency', except such acts committed in private between an adult male and adult female. This has the effect of criminalising every consensual sexual

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<sup>1</sup> Chap. 10:36 of the Revised Laws of the Commonwealth of Dominica, 2017.

act between two men or between two women for which it imposes a maximum sentence of 12 years imprisonment.

- [4] Section 16 forbids any person from engaging in consensual anal sex with any other person, regardless of consent, punishable by 10 years imprisonment and/or committal to a psychiatric hospital for treatment. Thus, he asserts that the laws of Dominica criminalise and penalise consensual sexual activity between men and between women and the only consensual sexual activity permitted in Dominica is that between a man and a woman, with the law even prohibiting heterosexual consensual anal sex. Therefore, the claimant states that the law targets gay men and is an impermissible violation of the constitutional rights of lesbian, gay, bisexual, and trans-gender ("LGBT") Dominicans.
- [5] The claimant states that these provisions breach the constitutionally guaranteed (i) right to liberty (s. 1(a) and 3); (ii) right to freedom of expression (s. 1(b) and 10(1)); (iii) right to freedom of assembly and association (s. 1(b) and s. 11(1)); (iv) right to privacy of home (s. 1c), including protection from entry of others on one's premises without consent (s. 7(1)); (v) right to security of the person (s. 1(a)); (vi) right to protection from inhuman or degrading punishment or other treatment (s. 5); and (vii) right to protection from discrimination (s. 13). The claimant also seeks orders prohibiting the Commonwealth of Dominica Police Force from laying charges under sections 14 and 16 of the SOA in relation to consensual activities between adults of the same sex, and the Director of Public Prosecutions or its agents from prosecuting persons in respect of such offences.
- [6] The claimant states that he is a gay man and citizen of the Commonwealth of Dominica. He describes aspects of his childhood, coming of age, and adulthood that have been profoundly impacted by his identity as such and the disdain with which he has been treated as a result. Without purporting to capture his personal experience in a few sentences, he avers that as an openly gay man in Dominica, he lives with great condemnation and fear, not only for himself but others who are part of the LGBT community in Dominica. The impugned provisions cause him to live in constant fear of criminal sanction for engaging in

consensual sexual activity, which by his sexual orientation, he is naturally inclined to engage in, or to deny his identity and consensual relationships.

[7] Further, these laws incite hateful and violent conduct towards him and other LGBT persons, including discrimination, threats, harassment, and violence, which prevent him from living and expressing himself freely and in dignity. Perpetrators find justification in and are emboldened by the laws that criminalise buggery and gross indecency, which laws tend to condone discrimination and inaction by law enforcement in response. This state of affairs has not only resulted in LGBT persons feeling silenced but acts as a barrier to LGBT persons seeking and receiving effective healthcare, particularly HIV prevention and treatment, and has exacerbated the public health challenge of eliminating the spread of HIV.

[8] In the circumstances, the claimant maintains that the criminalisation of consensual sexual conduct amounts to a direct and blatant denial by the State of human rights to which he is entitled under the Constitution. He says the scope of sections 14 and 16 of the SOA far exceed any legitimate purpose and is disproportionate in their application to consenting adults. The violations of fundamental rights and freedoms they represent cannot be justified by any of the stipulated limitations on rights set out in particular constitutional provisions, nor the overarching limitation in section 1 as being necessary to ensure respect for the rights and freedoms of others and the public interest.

[9] On behalf of the defendant, it is asserted that, between 2000 and 2019, there were sixty-nine reports of alleged buggery made to the Commonwealth of Dominica Police Force, none of which related to consensual sexual activities between adults. Of the sixty-nine reports, only ten (10) persons were arrested and charged for the offence of buggery. All such arrests and charges followed complaints by virtual complainants alleging non-consensual sexual activity or assaults and none originated from police activity, detection, observation, or investigation. Further, there were no reports of gross indecency in this period. The Police Force and/or agents of the State have all acted in good faith in

enforcing the Laws of Dominica and in particular sections 14 and 16 of the Sexual Offences Act.

[10] The defendant's position at first was that sections 14 and 16 of the SOA do not, of themselves, contravene the provisions of Chapter 1 of the Constitution and members of the Police Force have not by their actions breached the constitutional rights of the claimant. The defendant initially prayed that the relief sought by the claimant be denied.

[11] The claimant replies that it is of no moment that sections 14 and 16 of the SOA have not been enforced over past 20 years. As long as they remain enforceable, there will always be a risk of enforcement. Further, the fact that the laws criminalizing consensual same sex activities between adults have not been enforced within the past twenty years shows that these laws are not necessary or reasonably justifiable in a democratic society.

### **The Issues**

[12] The issues to be determined are as follows:

- i. Whether sections 14 and 16 of the SOA contravene the following rights guaranteed under the Constitution of Dominica, namely: (i) right to liberty (s. 1(a) and 3); (ii) right to freedom of expression (s. 1(b) and 10(1)); (iii) right to freedom of assembly and association (s. 1(b) and s. 11(1)); (iv) right to privacy of home (s. 1c), including protection from entry of others on one's premises without consent (s. 7(1)); (v) right to security of the person (s. 1(a)); (vi) right to protection from inhuman or degrading punishment or other treatment (s. 5); and (vii) right to protection from discrimination (s. 13)?
- ii. If so, whether the claimant is entitled to the relief sought pursuant to section 16(2) of the Constitution?

### **Discussion**

#### **Sections 14 and 16 of the Sexual Offences Act**

[13] Section 14, so far as relevant, provides that any person who commits an act of gross indecency with another person is guilty of an offence and, where the complainant is sixteen years or older, the person who commits the offence is liable on conviction to imprisonment for twelve years. An act of gross indecency means an act other than sexual intercourse (whether natural or unnatural) involving the use of the genital organs, breasts, or anus for the purpose of arousing or gratifying sexual desire. Section 2(2) of the SOA defines sexual intercourse as penetration of the vagina, to any extent, by the penis. Section 14(2) further provides that, where an act amounting to gross indecency is committed in private between an adult male and adult female, both of whom consent, it is not an offence.

[14] Section 16, so far as relevant, provides that any person who commits buggery is guilty of an offence and, if committed by an adult on another adult, is liable on conviction to imprisonment for ten years. The Court may also order the convicted person to be admitted to a psychiatric hospital for evaluation, treatment, or counselling. The section defines buggery as sexual intercourse per anum with a male person or by a male person with a female person. Any person who attempts to commit the offence of buggery is also guilty of an offence; and liable to imprisonment for four years and may be ordered to be admitted to a psychiatric hospital for treatment.

### **The Constitutional Rights Infringed**

[15] Before proceeding to consider the rights alleged to be infringed, I acknowledge that the Constitution is the supreme law of the State of Dominica and affirms, by its preamble, that the Commonwealth of Dominica is founded upon principles that acknowledge the supremacy of God, faith in fundamental human rights and freedoms, the dignity of the human person, and the equal and inalienable rights with which all members of the human family are endowed by their Creator among other values. Further, it is indeed a well-established principle that constitutional interpretation must be undertaken in a broad and purposive manner that seeks to give effect to its spirit and the protection of human rights.<sup>2</sup>

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<sup>2</sup> AG v Henry and another SLUHCVP2020/0004; Reyes v R, [2002] UKPC 11 at para 26; Jason Jones v Attorney General (2018) T 2018 CH 137 (Trinidad and Tobago, High Court) at paras 54-57; Minister of Home Affairs v Fisher [1980] AC 319 at 329; Orden David v. Attorney General of Antigua and Barbuda, ANUHCVP2021/0042 (delivered 5<sup>th</sup> July 2022, unreported).

[16] Section 16 of the Constitution provides that where a person alleges that any of his/her rights contained in sections 2-15 of the Constitution is being or is likely to be infringed the person may apply to the High Court for redress. Section 117 of the Constitution declares that the Constitution is the supreme law of Dominica, and that if any other law is inconsistent with the Constitution, the provisions of the Constitution "shall prevail and the other law shall, to the extent of the inconsistency, be void". With these principles in mind, I proceed to consider the claimant's case.

[17] I have dealt with the constitutional rights in issue, not in the order in which they were pleaded, but in the order most convenient for disposing of this case. I have found that the claimant has succeeded in his claim impugning sections 14 and 16 of the SOA, on the basis of their infringement of three of his constitutionally guaranteed rights. Accordingly, I have dealt with these first, followed by the relief to which he is entitled. Thereafter, for completeness and the avoidance of doubt, I have summarily addressed the remaining constitutional violations that were pleaded, albeit they do not affect the outcome of this case.

### **The Right to Liberty**

#### **Analysis**

[18] The claimant states that sections 1(a) and 3 of the Constitution guarantee him the right to not be deprived of his personal liberty unless authorised by law. These provisions ensure his freedom and autonomy without unreasonable physical restraint, especially from the State. Whilst the right to personal liberty may be limited upon a reasonable suspicion of his having committed, or being about to commit a criminal offence under the laws of Dominica, the mere fact that a deprivation of liberty is authorised by law is insufficient to render it constitutionally valid. Limitations on the right to liberty must be justified as necessary to protect the rights and freedoms of others or the public interest. However, consensual sexual acts between participants of the same sex do not prejudice the rights and freedoms of others and criminalising such acts is not necessary to protect the rights and freedoms of others or the public interest.

[19] It was submitted on behalf of the claimant that the right to liberty includes not only freedom from physical constraint and detention, but also the protection of inherently private choices and sexual autonomy. Counsel for the claimant relied upon the Botswana case of **Motshidiemang v Attorney General**<sup>3</sup> where the Court of Appeal held that sexual orientation is innate to a human being. It is an important attribute of one's personality and identity and, therefore, persons are entitled to autonomy over intimate decisions relating to personal life, including choice of a partner and encompasses the right to sexual autonomy. Similarly, the US case of **Lawrence v Texas**<sup>4</sup> upheld the right to liberty as allowing homosexual persons the right to make the choice to enter intimate sexual relationships in the confines of their homes with sexual partners of their choosing. The Indian Supreme Court in a line of cases recognised that respect for individual choice is the essence of liberty under law, such that criminalising carnal intercourse is irrational, indefensible, and arbitrary.<sup>5</sup> The High Court of Antigua and Barbuda has recently adopted this reasoning, holding that "the sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an inseparable facet of individual liberty."<sup>6</sup> In all of the above-mentioned cases, laws criminalising homosexual sexual activities were held invalid as violating the fundamental right to liberty and, therefore, unconstitutional.

[20] Counsel for the claimant states that sections 14 and 16 of the SOA infringe inherently private choices and individual autonomy such as the choice of sexual partner, contributing to a climate where it is dangerous for the claimant to pursue romantic and sexual relationships. The claimant's evidence was that he was routinely subjected to harassment, threats, and invasions of privacy in respect of at least one of his romantic relationships, which ultimately caused him and his partner to separate because they feared for their lives as a couple. Thus, the provisions have prevented the claimant and other LGBT people from enjoying relationships on their own terms without fear of persecution.

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<sup>3</sup> [2022] 1 LRC 665 at para 72 52 BHRC 571 (Botswana, Court of Appeal).

<sup>4</sup> (2003) 593 U.S. 558 (United States, Supreme Court).

<sup>5</sup> Navtej Singh Johar v Union of India, (2018) Writ Petition No. 76 of 2016 at para 240; National Legal Services Authority v Union of India and others (2014) 5SCC 438; KS. Putaswamy and another v Union of India and others (2017) 10 SC 1.

<sup>6</sup> Orden David v Attorney General of Antigua and Barbuda, ANUHCV2021/0042 (delivered 5<sup>th</sup> July 2022, unreported) at para 72.



- [21] Counsel for the defendant accepts that section 1(a) of the Constitution provides the right to liberty, which is not limited to bodily restraint and extends to the full range of conduct which the individual is free to pursue, including sexual conduct, relying on the cases of **Bolling v Sharpe** and **Lawrence v Texas**. Further, Counsel acknowledged that the case of **Dudgeon v United Kingdom**<sup>7</sup> militates against any argument that there is a proper governmental objective in criminalising homosexual activity between consenting adults. Thus, the defendant accepts that the liberty protected by the Constitution allows all persons, regardless of sexual orientation, the right to choose to enter into relationships in the confines of their homes and their private lives and still retain their dignity as free persons.

### **Conclusion**

- [22] In the circumstances, I accept that the legal position is as stated by Counsel for both parties and that sections 14 and 16 of the SOA violate the right to liberty guaranteed by section 1(a) of the Constitution. However, I also accept the position of Counsel for the defendant that sections 14 and 16 of the SOA do not infringe the right to liberty articulated by section 3 of the Constitution, which appears to go further and specifically guarantees the right to liberty in the sense of freedom from bodily or physical restraint. It is clear, on a reading of the provision, that it relates to matters such as arrest and detention or even a limitation on a person's movement.
- [23] The conclusion is that sections 14 and 16 of the SOA contravene section 1(a) of the Constitution-the right to liberty.

### **The Right to Freedom of Expression**

#### **Analysis**

- [24] The claimant states that section 1(b) of the Constitution affirms that every person in Dominica is entitled to freedom of expression, subject to respect for the rights and freedoms of others and for the public interest. Section 10(1) of the Constitution further

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<sup>7</sup> [1981] ECHR 5; (1981) 4 EHRR 149.

mandates that except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression.

[25] The claimant asserts that 'expression' encompasses not only written or oral communication but any conduct that conveys or attempts to convey meaning, including presentation of oneself to the world and expression of intimacy and pleasure through sexual connection with another consenting partner. Freedom of expression is further not limited to ideas, words or conduct that are popular amongst, or acceptable to, the majority of society. Restrictions on free expression can disrupt personal development and deprive a person of their self-fulfilment. It is also a cornerstone of a democratic and plural society.

[26] According to the claimant, sections 14 and 16 of the SOA unreasonably and unjustifiably curtail the expression of identity of LGBT persons and the private expression of intimacy between two men or women who consent to engage in the activities criminalised. Such infringements are not defensible as falling within the limitations set out in section 10 of the Constitution, nor section 1 as necessary to protect the rights and freedoms of others or the public interest.

[27] Counsel for the claimant submits that the Court of Appeal of Belize and the High Courts of Antigua and Barbuda and Saint Christopher of Nevis have held that the choice of whom a consenting adult is romantically or sexually intimate with is a form of protected expression. Particularly, the Court of Appeal of Belize in **Orozco v Attorney General and others**,<sup>8</sup> held that the criminalisation of homosexual conduct breached the right to freedom of expression enjoyed by LGBT citizens and encouraged public prejudice against members of the LGBT community with the effect of limiting their right to express their sexuality.

[28] Similarly, the High Courts of Antigua and Barbuda and Saint Christopher and Nevis in **Orden David v Attorney General of Antigua and Barbuda**,<sup>9</sup> and **Jamal Jeffers and**

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<sup>8</sup> [2020] 2 LRC 501 at paras 157, 160, [2019] CA Civil Appeal No. 32 of 2016 (Belize, Court of Appeal).

<sup>9</sup> ANUHCV2021/0042 (delivered 5<sup>th</sup> July 2022, unreported).

**others v The Attorney General of St. Christopher and Nevis**<sup>10</sup> found that provisions similar to sections 14 and 16 of the SOA infringed the claimants' rights to free expression of their sexual orientation. Similar positions were taken by the Caribbean Court of Justice in **McEwan v. Attorney General of Guyana**,<sup>11</sup> the Botswana High Court<sup>12</sup> and the Indian Supreme Court,<sup>13</sup> where it was expressed by the latter:

"LGBT persons express their sexual orientation in myriad ways. One such way is engagement in intimate sexual acts like those proscribed under Section 377. Owing to the fear of harassment from law enforcement agencies and prosecution, LGBT persons tend to stay 'in the closet'. They are forced not to disclose a central aspect of their personal identity i.e. their sexual orientation, both in their personal and professional spheres to avoid persecution in society and the opprobrium attached to homosexuality. Unlike heterosexual persons, they are inhibited from openly forming and nurturing fulfilling relationships, thereby restricting rights of full personhood and a dignified existence."

[29] Likewise, the High Court of Justice of Trinidad and Tobago in **Jason Jones v the Attorney General of Trinidad and Tobago**,<sup>14</sup> declared similar sections of the Trinidad Sexual Offences Act unconstitutional because they violated an individual's right to freedom of expression, noting:

"The court is in no doubt that the sanction imposed on him by the State under these provisions affects his ability to freely express himself and his thoughts in public. Those criminal sanctions have the potential to be used oppressively by differently minded citizens as a foundation for hate as condoned by the State."

[30] Counsel for the defendant agrees that section 1(b) of the Constitution guarantees the right to freedom of expression, which is not limited to the freedoms specified in section 10(1) but may include words or conduct; and further that persons engaged in sexual conduct (whether consenting heterosexuals or homosexuals) are engaged in a form of expression. Relying on **Jones v Attorney-General of Trinidad and Tobago**<sup>15</sup>, Counsel accepted that

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<sup>10</sup> SKBHCV2021/0013 (delivered 29<sup>th</sup> August 2022, unreported), at paragraphs 72-80.

<sup>11</sup> *McEwan and others v Attorney General of Guyana* [2018] CCJ 30 at paras 75-76 and 79.

<sup>12</sup> *Motshidiemang v Attorney General*, (2019)4 LRC 507 at paras 151, 169, 74 BHR 3 (Botswana, High Court).

<sup>13</sup> *Navtej Singh Johar v Union of India*, (2018) Writ Petition No. 76 of 2016 at s 17.1 (per Malhotra J.).

<sup>14</sup> *Jason Jones v Attorney General* (2018) TT 2018 HC 137 (Trinidad and Tobago, High Court) at para 95.

<sup>15</sup> [2018] 3 LRC 651, per Rampersad J.

sexual relations, including same sex relations, is the “ultimate expression of love and affection” and the means by which a person may “express their sexual orientation”.

- [31] Further, Counsel for the defendant accepted that as the conduct prohibited by sections 14 and 16 of the SOA is almost always done in private, the issue of public morality does not arise as a relevant limitation<sup>16</sup> and as many leading democracies have for decades decriminalised offences covered by sections 14 and 16 of the SOA, it cannot be argued that the continued criminalisation of these offences is reasonably justified in a democratic society. Thus, sections 14 and 16 of the SOA, to the extent that it criminalises gross indecency and buggery between persons capable in law of consenting amounts to a contravention of the right to freedom of expression.

### **Conclusion**

- [32] The law, as agreed by both parties, is clear that criminalising sexual relations between consenting adults, as effected by sections 14 and 16 of the SOA, is an unjustifiable restriction of the constitutionally guaranteed right to freedom of expression in a free and democratic society. Therefore, the infringing sections are void to this extent.
- [33] Sections 14 and 16 of the SOA therefore infringe the right to freedom of expression guaranteed by sections 1(b) and 10(1) of the Constitution.

### **Right to Privacy of the Home and Protection from entry by others on his premises without his consent**

- [34] The claimant asserts that section 1(c) of the Constitution declares as a fundamental right protection for the privacy of home, while section 7(1) declares that except with his own consent, a person shall not be subjected to the entry by others on his premises. These provisions recognise the right to occupy a private space free from intrusion by others, including the State, which necessarily incorporates a right to make fundamental personal decisions about intimate relationships in such a space. However, sections 14 and 16 of the SOA violate that right, as all sexual acts between two men or between two women, even in

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<sup>16</sup> Johar v Union of India [2020] 1LRC 1.

the privacy of the home, are criminal offences for which participants can be deprived of their liberty.

[35] The claimant argues that the criminalisation of consensual same-sex sexual activity under sections 14 and 16 of the SOA further encourages others to violate, sometimes violently, the privacy of those suspected of being LGBT. Such violations include physical invasion of an individual's home and harassing and threatening those within the home. It also contributes to inadequate action in the face of such trespass, harassment, and violence, as perpetrators often act with impunity.

[36] Counsel for the claimant stated that the right to privacy includes the concept of dignity of the individual, and aspects of physical and social identity including gender identity and sexual orientation, and the right to develop and establish relationships with others, including through one's sexual life. For this submission, Counsel relied on the cases of **Orden David v Attorney General of Antigua and Barbuda**,<sup>17</sup> **Jamal Jeffers et al v Attorney General of Saint Christopher and Nevis**,<sup>18</sup> **Caleb Orozco v Attorney General of Belize**,<sup>19</sup> **Jason Jones v the Attorney General of Trinidad and Tobago**,<sup>20</sup> and **Motshidiemang v Attorney General of Botswana**.<sup>21</sup> In these cases, the respective Courts held that provisions that criminalised same sex relations violated the right to privacy to which the respective claimants were entitled.

[37] Counsel highlighted dicta of Justice Ward in **Jamal Jeffers et al v Attorney General of Saint Christopher and Nevis**:

“I harbour no doubt that Section 56 and 57 of the Act intrude into the personal and private sphere of consenting adults who engage in intimate sexual activity of their choice. They impinge upon the claimant's right to determine the way they, as individuals, choose to express their sexuality in private with another consenting adult. This is encompassed within the right to privacy guaranteed under section

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<sup>17</sup> ANUHCV2021/0042 (delivered 5<sup>th</sup> July 2022, unreported) at para 66 and 70.

<sup>18</sup> SKBHCV2021/0013 (delivered 29<sup>th</sup> August 2022, unreported) at paragraphs 72-80.

<sup>19</sup> [2016] 4LRC 705 at para 86: (uncontested on appeal), 41 BHRC 135.

<sup>20</sup> Jason Jones v Attorney General (2018) TT 2018 HC 137 (Trinidad and Tobago, High Court) at paras 91-92.

<sup>21</sup> (2019)4 LRC 507 at para 126, 47 BHRC 3 (Botswana, High Court) (holding affirmed in Court of Appeal decision (2022) I LRC 665).

3(c) of the Constitution. To the extent that sections 56 and 57 criminalise sexual acts engaged in between consenting adults they are unconstitutional, null and void and of no effect."<sup>22</sup>

[38] Further, Counsel for the claimant noted that regional and international human rights bodies have similarly concluded that laws criminalizing same-sex intimacy violate the right to privacy, construed as extending beyond spatial bounds and encompassing personal autonomy. This has been determined to breach international human rights instruments that Dominica has ratified, namely: the **International Covenant on Civil and Political Rights** ("ICCPR") and the **American Convention on Human Rights** ("American Convention").

[39] Counsel for the claimant, however, further argues that section 7(1) of the Constitution, enshrining the right to protection from arbitrary entry is also breached by sections 14 and 16 of the SOA, as they contribute to a climate where break-ins, home invasions and police inaction to violence against LGBT people is normalized and justified. The State's failure to protect the claimant from such invasions and to investigate and take action against home invasions constitutes an infringement of the claimant's section 7(1) right to protection from arbitrary entry.

[40] Counsel for the defendant acknowledges that section 1(c) of the Constitution gives every person in Dominica the right to "protection for the privacy of his home" modelled after article 8(1) of the **European Convention on Human Rights** which provides that "everyone has the right to respect for his private and family life, his home and his correspondence." It was held in **Dudgeon v United Kingdom**<sup>23</sup> that the article 8(1) right to respect for private life includes sexual life. Similarly in **ADT v United Kingdom**<sup>24</sup> the ECHR held that laws which criminalise homosexual acts in private constitute a violation of article 8 of the European Convention on Human Rights. Counsel for the defendant indicated that the defendant did not seek to challenge these rulings and accepted that sections 14 and 16 of the SOA contravened the constitutional right to privacy guaranteed by section 1(c) of the Constitution.

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<sup>22</sup> SKBHCV2021/0013 (delivered 29<sup>th</sup> August 2022, unreported) at paragraph 66.

<sup>23</sup> [1981] ECHR 5, (1981) 4 EHRR 149

<sup>24</sup> [2000] 2 FLR 697

## **Conclusion**

[41] In light of the persuasive authorities placed before the Court, I accept that the right to protection for privacy of the home encompasses private and family life and the personal sphere, which includes one's sexual identity and orientation as well as intimate activity with a partner of a person's choice. Therefore, sections 14 and 16 of the SOA contravene the Constitution insofar as they intrude on the private home life of an individual by proscribing the choice of consenting adults as to whom to engage in intimate sexual activity with, and are, therefore, void. However, I do not agree with the claimant that, without more, sections 14 and 16 breach section 7(1) of the Constitution which guarantees freedom from arbitrary entry, in light of section 1(c).

### **Reasonably justifiable in a democratic society?**

[42] Having found that sections 14 and 16 of the SOA contravene the rights to liberty (section 1(a)), freedom of expression (sections 1(b) and 10(1)) and privacy and home life (section 1(c)), the next question to be considered is whether the impugned provisions are reasonably justifiable in a democratic society. The Constitution provides that the State may legitimately limit the enjoyment of the rights to ensure that the enjoyment of these rights by any person does not impair the enjoyment of rights and freedoms by others or injure the public interest. Public interest considerations include defence, public safety, public order, public morality, and public health. Thus, the limitation of rights imposed by the impugned provisions must not only be shown to pursue one of these objectives, but the measures designed to meet the objective must be rationally connected to the objective, and must be proportional in that they go no further than are necessary to achieve the objective.<sup>25</sup>

[43] The defendant concedes that section 14 and 16 of the SOA breach the claimant's right to liberty, freedom of expression and privacy and home life and that the impugned provisions cannot be said to be reasonably justifiable in a democratic society as they do not pursue any of the legitimate objectives. Counsel for the defendant, accepted that the argument that the criminalisation of buggery and gross indecency between consenting adults in

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<sup>25</sup> See *Jamal Jeffers St. Kitts and Nevis; DeFreitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

private should be immune from constitutional challenge on the ground of public morality is not an argument that can be made with much conviction when most other consensual sexual behaviours between adults, which may be rightly condemned as immoral, do not attract criminal sanctions.

- [44] Counsel for the defendant also stated that the defendant does not, in the absence of empirical evidence, make the argument that the criminalisation of buggery and gross indecency between consenting adults in private should be immune from constitutional challenge on the ground of public health. Further, the claimant has presented evidence at great length to show that the provisions cannot be justified on the grounds of public health to which they are contrary or public morality; and that the impugned provisions are not proportional given their harmful effects on the physical and mental health and wellbeing of LGBT persons and their enjoyment of their fundamental rights. This, the defendant accepts citing, **Lawrence v Texas**<sup>26</sup> in which it was held that:

“Although the laws involved in [sections 14 and 16 of the Sexual Offences Act] purport to do no more than prohibit a particular sexual act, their penalties and purposes have more far-reaching consequences, touching upon the most private human conduct, sexual behaviour, and in the most private of places, the home. They seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons.”

### **Conclusion**

- [45] Thus, I find that the impugned provisions, which violate the claimant's constitutional rights, are not reasonably justified in a democratic society. Consequently, I now proceed to consider the relief to be granted.

### **Relief to which the Claimant is entitled**

- [46] I agree with and adopt the wording of the appropriate declarations to be made, proposed by Counsel for the defendant, as follows:

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<sup>26</sup> 539 U.S. 558 (2003).



(1) It is declared that section 14 of the Sexual Offences Act contravenes sections 1(a), 1(b), 1(c) and 10 of the Constitution of the Commonwealth of Dominica, namely, the right to liberty, freedom of expression, and protection of personal privacy, in so far as section 14 of the Sexual Offences Act is inconsistent with the rights of persons sixteen (16) years and older to engage consensually and in private in the sexual acts described in section 14(4), and to the extent of that inconsistency section 14 of the Sexual Offences Act is void.

(2) It is declared that section 16 of the Sexual Offences Act contravenes sections 1(a), 1(b), 1(c) and 10 of the Constitution of the Commonwealth of Dominica, namely, the right to liberty, freedom of expression, and protection of personal privacy, in so far as section 16 of the Sexual Offences Act is inconsistent with the rights of persons sixteen (16) years and older to engage in consensual sexual intercourse per anum in private, and to the extent of that inconsistency section 16 of the Sexual Offences Act is void.

[47] The legal position is as stated by Saunders J in the CCJ case of **Zuniga v Attorney General of Belize**.<sup>27</sup>

“... the Constitution itself makes it clear that inconsistent laws are to be invalidated by the court 'to the extent of the inconsistency'. This means that, provided it is possible and feasible to save a law that may contain one or more inconsistent provisions, a scalpel, rather than a machete, is to be used by the court to sever that which is inconsistent.”

[48] With this the claimant agrees, as he has indicated that he does not challenge the provisions relating to non-consensual activities or the provisions relating to persons under the age of 16 years – the age of valid legal consent.

[49] Thus, for the purpose of giving effect to declaration 1 above, section 14(2) of the **Sexual Offences Act** shall be read as “Subsection (1) does not apply to an act of gross indecency committed in private between adult persons both of whom consent.”

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<sup>27</sup> [2014] CCJ 2 (AJ), 84 WIR 101 at [32].

[50] For the purpose of giving effect to declaration 2 above, section 16(1)(b) of the **Sexual Offences Act** shall be read as "ten years, if committed by an adult on another adult, save and except where the acts which would otherwise constitute the offence are done in private between consenting adults."

[51] I agree with the defendant that it is unnecessary to consider the further orders sought by the claimant, that is – prohibiting the Police Force from laying charges under sections 14 and 16 of the SOA in relation to consensual activities between adults of the same sex, and the Director of Public Prosecutions or its agents from prosecuting persons in respect of such offences, as a natural consequence of the orders already granted.

#### **The other Constitutional Rights Pleaded**

[52] As I have found that the claimant's aforementioned constitutional rights – the rights to liberty, freedom of expression and privacy and home life – are being infringed by sections 14 and 16 of the SOA, it is not strictly necessary to deal with the other rights pleaded to dispose of the case. However, I address them briefly:

#### **Right to Security of the Person and Protection from Inhuman or Degrading Punishment or other Treatment**

##### **(a) Right to Security of the Person**

[53] The claimant states that section 1(c) of the Constitution declares that every person in Dominica is entitled to the right to "security of the person." Section 5 further declares that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment. This is confirmed in international law, binding on Dominica, as absolute, non-derogable, and admitting of no limitation. The claimant states that sections 14 and 16 of the SOA violate the security of person of LGBT Dominicans in ways that amount to punishment and treatment that are inhuman and degrading.

[54] Firstly, the State directly inflicts harm to the physical and mental integrity of the individual by criminalising consensual sexual activity and penalising it with the potential of years of imprisonment and involuntary psychiatric intervention. Every LGBT Dominican, therefore, lives each day with the knowledge that their identity and consensual activity with sexual

partners is criminalised and the fear of possible prosecution. Furthermore, the punishment prescribed is grossly disproportionate to the conduct that causes no harm, rendering it both inhuman and degrading.

[55] Secondly, the State has an obligation to take steps, including legislative measures, to protect vulnerable groups from violations of security of their person, and from inhuman or degrading treatment, at the hands of state and non-state actors. Attacks on the physical or mental integrity of a person, or threats thereof, by state and non-state actors, violate the right to security of the person and further amount to inhuman and degrading treatment. Failure by the State to take steps to protect LGBT Dominicans from such attacks and indeed encouraging such attacks through the continued criminalisation of LGBT people therefore amount to a breach of their right to security of the person and freedom from inhuman or degrading treatment. Furthermore, the harms to the security of the person of LGBT people – the encouragement of harassment and violence; the failure to adequately protect against such attacks; and the direct imposition of inhuman and degrading punishment as the penalty for consensual same-sex sexual activity under the SOA cannot be justified as necessary to respect the rights and freedoms of others or in the public interest.

[56] Counsel for the claimant submits that section 1 (a) of the Constitution outlines that every person in Dominica has the right to security of the person and protection of the law, which includes protection from inhuman or degrading punishment or other treatment. Unlike other provisions of Dominica's Constitution, there are no limitations on the right to freedom from inhuman or degrading treatment. This right, ought to be interpreted to protect against State interference with the psychological or physical integrity of the person.

[57] Counsel for the claimant states that the ECHR and the UNHRC have consistently held that inhuman or degrading treatment arises where an individual is subjected to mental and/or physical suffering that reaches a level of severity that is established where: (1) treatment, ranging from torture to humiliation or cruel, inhumane and degrading treatment, with various degrees of physical and psychological effects constitutes a serious attack on

human dignity; or (2) an atmosphere of terror causes persons to live in constant anguish and fear of being subjected to physical abuse and/or immense psychological pressure/suffering. This is affirmed by the Eastern Caribbean Court of Appeal in **Harding v. Superintendent of Prisons et al.**<sup>28</sup>

[58] Counsel for the claimant further argues that the ICCPR and the American Convention, which Dominica has ratified, require Dominica to protect citizens from inhuman or degrading treatment from both public officials and private individuals, and that the State can be liable for the actions of private individuals because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.<sup>29</sup> Similar decisions have been taken by the ECHR<sup>30</sup> and the UN Human Rights Committee.

[59] Similarly, the claimant's Counsel states that the Constitutional Court of South Africa<sup>31</sup> held that laws that criminalize consensual sexual relations between adults of the same sex creates a culture of hostility, discrimination and serious violations against LGBT persons by providing a social sanction for abuse, contributing to homophobic and transphobic crimes. The IACHR has ruled that criminalization of sexual intercourse between men also has a symbolic effect treating all gay men as criminals with the result that it sanctions inhuman treatment against LGBT people as they are already thought to be engaged in illegal activity.<sup>32</sup>

[60] Counsel for the claimant also refers to the Special Rapporteur on Torture, who has declared that a "clear link exists between the criminalization of lesbian, gay, bisexual and transgender persons and homophobic and transphobic hate crimes, police abuse,

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<sup>28</sup> Unreported Judgment, Civil Appeal No 13 of 2000.

<sup>29</sup> Velásquez Rodríguez, Inter-Am. Ct. H.R. (Ser. C) No. 4 Judgment of July 29, 1988 at paragraphs 172-176

<sup>30</sup> H.L.R v France, (1997) Application no. 24573/94 at para 40; Mahmut Kaya v Turkey, (2000) Application no. 22535/93, at paragraph 15.

<sup>31</sup> National Coalition for Gay and Lesbian Equality and Anor v Minister of Justice

<sup>32</sup> IACHR, Violence against LGBTI persons in the Americas, Oas/Ser.L./V/II.rev.I, Doc. 36, 12 November 2015, at para 74; IACHR, Report on the Situation of Human Rights in Jamaica. OEA/Serr.L/v/II.144, Doc. 12, 10 August 2012, para 264 and 271.

community and family violence and stigmatization.”<sup>33</sup> Additionally, Counsel notes that the Kenyan High Court recently ruled that rape by third parties constitutes a violation of the right to protection from inhuman and degrading treatment where the State refuses to investigate a report made by a victim and fails to arrest the accused perpetrators,<sup>34</sup> which has been the experience of the claimant in Dominica.

[61] Counsel for the claimant further submits that the IACHR has established that the mere existence of sodomy laws can impact mental health by creating anxiety, guilt, and depression among LGBT persons.<sup>35</sup> The claimant's expert witness similarly explains that there is a strong association between discrimination and harms to the mental and physical health of gender and sexual minorities.<sup>36</sup> The latter also explains that counselling and treatment aimed at 'correcting' same-sex attraction is considered cruel, inhumane, and degrading treatment, especially when the patient has not consented to such treatment, but rather is required under a court order, often resulting in abuse and varied harms, including symptoms of post-traumatic stress disorder, depression, guilt, intimacy avoidance, sexual dysfunction and religious and spiritual conflict long after therapy has ended.<sup>37</sup> Similarly, the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity has concluded that practices of 'conversion therapy' comprise treatment that is degrading, inhumane and cruel in its very essence and on the risks that it creates for the perpetration of torture, which may engage the international responsibility of the State.<sup>38</sup>

[62] Counsel for the defendant submits that section 1(a) of the Constitution gives every person in Dominica the right to "liberty [and] security of the person" fashioned after article 5 of the

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<sup>33</sup> Inter-American Commission on Human Rights (IACHR), Report No. 250/20. Case 13.095. Merits (Final). BT. and S.H. Jamaica, (September 14, 2020) at para 79.

<sup>34</sup> Coalition on Violence Against Women and others v Attorney General of the Republic of Kenya and others (Kenya Human Rights Commission, interested party), (2021) 5 LRC 61 at paras 114, 121, 127.

<sup>35</sup> Inter-American Commission on Human Rights (IACHR), Report No.250/20. Case 13.095. Merits (Final). TB. and S.H. Jamaica, (September 14, 2020) at para 97.

<sup>36</sup> Expert Report, Pierre Waldemar Brouard (March 29, 2022) at 5.

<sup>37</sup> Expert Report, Pierre Waldemar Brouard (March 29, 2022) at 17-19.

<sup>38</sup> Victor Madrigal-Borloz, Practices of so-called conversion therapy: report of the Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity, 44<sup>th</sup> Session General Assembly, UN Human Rights Council, A/HRC/44/53 at para 65; Expert Report, Pierre Waldemar Brouard (March 29, 2022) at para 20.

European Convention on Human Rights. Article 5 provides that "everyone has the right to liberty and security of person" of which a person may only be deprived "in accordance with a procedure prescribed by law." The **Guide on Article 5 of the European Convention on Human Rights: Right to Liberty and Security**<sup>39</sup> states that the key purpose of article 5 is to prevent arbitrary or unjustified deprivations of liberty. Counsel argues that sections 14 and 16 of the SOA do not facilitate "arbitrary or unjustified deprivations of liberty" and therefore do not contravene the constitutional right to "liberty [and] security of the person."

[63] In respect of the alleged contravention of the right to protection from inhuman or degrading punishment or other treatment, Counsel for the defendant submits that section 5 of the Constitution provides that "no person shall be subjected to torture or to inhuman or degrading punishment or other treatment" and there are no limitations to this right. Section 5 of the Constitution of Dominica is equivalent to section 7 of the Constitution of Antigua and Barbuda and in considering section 7 of the Antigua and Barbuda Constitution, the Privy Council in **Williams v Supervisory Authority**<sup>40</sup> declared that "that provision is concerned with the imposition of punishment and is primarily concerned with the physical conditions to which an individual is subjected by the state." Counsel for the defendant therefore submitted that section 5 of the Constitution of Dominica has no bearing on the present case.

[64] In respect of the alleged breach of the right to security of the person, in the case of **Duncan and another v Attorney General of Trinidad and Tobago**,<sup>41</sup> whilst the Board reiterated the importance of the right, it defined the right as "securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities." Thus, the right speaks properly to the deprivation of liberty, such as detention for an indefinite period of time, whether pending judicial investigation or trial or simply without charge. In **Duncan**, the Board held: "The legal system, as it operated at that stage, made it possible for the law to be applied properly and with due respect for the right to liberty and security of the person, which due process of law was supposed to provide."

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<sup>39</sup> At [23] under the rubric "Purpose of Article 5".

<sup>40</sup> [2020] UKPC 15, [2020] 5 LRC at [98].

<sup>41</sup> [2021] UKPC 17.

## Conclusion

[65] In light of this, it cannot be said that sections 14 and 16 of the SOA permits or encourages arbitrary detention, or indefinite detention pending investigation or without charge. Sections 14 and 16 of the SOA contemplate that the due process of law will be followed for a fair and proper trial and sentencing. Additionally, a person convicted would be entitled to a right of appeal as well as a right to seek constitutional relief as is here being sought, such that the judicial process is not being subverted and such person would be entitled to the full protection of the law. This is in keeping with learning in The Guide on Article 5 of the European Convention on Human Rights: Right to Liberty and Security cited by the defendant. Therefore, I find that sections 14 and 16 of the SOA, do not ipso facto violate the right to security of the person.

### (b) Protection from Inhuman or Degrading Punishment or other Treatment

[66] I now turn to the matter of the alleged breach of the right to protection from inhuman and degrading punishment or other treatment. I am of the view that the case of **National Coalition for Gay and Lesbian Equality and Anor v Minister of Justice** does not support the claimant's contention that laws that criminalize consensual sexual relations between adults of the same sex amount to or sanction inhuman or degrading treatment, even as the case acknowledges that as a result of the criminal offence imposed, gay men are at risk of arrest, prosecution and conviction. The paragraphs referred to in this case were considering the right to dignity and privacy and not to the right of protection from inhuman or degrading punishment or treatment. I have already found, in keeping with the **National Coalition for Gay and Lesbian Equality case**, that such laws violate the right to privacy and the defendant has conceded this.

[67] Similarly, the cases of **Velásquez-Rodríguez v. Honduras**<sup>42</sup> and **H.L.R v France**,<sup>43</sup> relied on by the claimant, are of little assistance. The facts of **Velásquez** were that the claimant

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<sup>42</sup> Inter-American Court of Human Rights, Judgment of July 29, 1988.

"was violently detained without a warrant for his arrest." The Court was considering the recent phenomenon of the systemic and repeated use of 'forced disappearances' of individuals, either briefly or permanently, as a means of creating a general state of anguish, insecurity, and fear. Article 5 of the Convention guaranteed the right to physical, mental, and moral integrity; not to be subjected to torture or to cruel, inhuman, or degrading punishment or treatment; and to be treated with respect for the inherent dignity of the human person even where one is deprived of liberty. In the circumstances, the Court found that the circumstances of forced disappearances – invariably involving kidnapping and physical torture, prolonged isolation (without due process) and deprivation of communication violated article 5. Indeed, the Court held that the failure of the State to investigate, punish and take reasonable steps to prevent such a violation of the Convention i.e., forced disappearances could itself amount to a violation of article 5.

- [68] In **H.L.R. v France**, the applicant, convicted in France, on drug trafficking charges argued that if he were deported to Colombia, he would certainly be subjected there to treatment proscribed by Article 3 of the Convention, which provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The applicant alleged that in Colombia, he would be exposed to vengeance by the drug traffickers who had recruited him as a smuggler, the endemic violence perpetuated by Colombian criminal organisations, as well as the general prevalence of violence in the country, which the court noted that the Commission had agreed with in substance. The court accepted that by virtue of the positive obligations incumbent on States and the absolute character of Article 3, it could apply to inhuman and degrading treatment resulting from the actions of private individuals where a Contracting State had, through its acts or passivity, failed to comply with its duties under the Convention. Nevertheless, the court held that the appropriate test was whether, if deported, there was a real and serious risk of being subjected to treatment proscribed by Article 3. Further, in determining whether there was a risk of treatment proscribed by Article 3, strict criteria had to be applied and only the existence of an objective danger could be taken into account.

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<sup>43</sup> European Court of Human Rights, 29<sup>th</sup> April 1997.



[69] The European Court of Human Rights held:

“the Court can but note the general situation of violence existing in the country of destination. It considers, however, that this circumstance would not in itself entail, in the event of deportation, a violation of Article 3. Although drug traffickers sometimes take revenge on informers, there is no relevant evidence to show in H.L.R.’s case that the alleged risk is real.”<sup>44</sup>

[70] I do not accept that the issue of forced disappearances as described by the Court in **Velásquez** is analogous to the harassment or violence that might be experienced by LGBT persons in Dominica. The evidence does not establish that this violence and harassment will necessarily be the case. Indeed, one of the articles forming part of the claimant’s evidence, demonstrate that public opinion about treatment of LGBT persons is varied.<sup>45</sup> Applying the strict test suggested in **H.L.R v France**, with which the present case is more akin, the possibility of an attack is not sufficient. A real and serious objective risk of danger must be shown to result from sections 14 and 16 of the SOA. Like in that case, I am not so satisfied.

[71] The claimant has, further, not provided any authority that establishes that the mere fact that a ‘long’ term of imprisonment may be imposed, of itself amounts to inhuman and degrading punishment or treatment, or indeed what constitutes ‘long’ for this purpose. I would refer to the law relating to security of the person, in concluding that once due process is adhered to, this argument fails. While, in substance, it is possible for conversion therapy or other treatment of the nature described by the claimant’s expert and referred to in some of his exhibits to amount to inhuman or degrading treatment, this is not mandated by section 14 and 16 of the SOA, which merely permits the court to order counselling or treatment; nor has treatment of the kind described been shown to have ever taken place or to be likely to take place at the psychiatric facility referred to or any other facility in Dominica, on the evidence.

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<sup>44</sup> H.L. R. at para 41.

<sup>45</sup> See Exhibit KBG 1, Certificate of Exhibits, Part 1 of 2, pages 3-15 (electronic bundle).

[72] The case of **Williams v Supervisory Authority**<sup>46</sup> cited by Counsel for the defendant also does not assist. That case stated that the making of a freeze order and civil forfeiture order under the Money Laundering (Prevention) Act had not been by way of punishment and was not a criminal offence. Rather, it was described as an effective preventative measure to ensure that those who engaged in money laundering activity did not profit. Thus, this case is not comparable to the present case on its facts. Section 14 and 16 of the SOA clearly create criminal offences for which the prescribed term of imprisonment is clearly a punishment. The court in **Williams**, however, noted that the appellant's dignity as an individual was fully respected in the MLPA procedures to which he was subject, in which he had a fair opportunity to participate and present his case. This point is instructive as it confirms that adherence to due process is relevant in determining whether there has been a violation of this right.

### **Conclusion**

[73] I am therefore not satisfied that sections 14 and 16 of the SOA infringe the claimant's right to security of the person or protection from inhuman or degrading punishment or other treatment.

### **Right to Protection from Discrimination**

[74] The claimant states that section 13(1) of the Constitution establishes that no law shall make any provision that is discriminatory either of itself or in its effect. Section 13(3) defines 'discriminatory' as affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex (among others), whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

[75] According to the claimant, criminal prohibitions on consensual sexual activity with a partner of the same sex breach the constitutional protection against discrimination based on "sex." Section 14 of the SOA criminalises any consensual sexual activity other than penile-

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<sup>46</sup> [2020] UKPC 15, [2020] 5 LRC at [98].

vaginal penetration, and explicitly declares that this prohibition does not apply to an act of gross indecency committed in private between an adult male and adult female. Therefore, a man who engages in an act of gross indecency with a female partner commits no crime whereas a woman who engages in the same act with a female partner faces criminal prosecution and imprisonment. A woman who engages in an act of gross indecency with a male partner commits no crime whereas a man who engages in the same act with a male partner faces criminal prosecution and imprisonment. Thus, section 14 of the SOA explicitly discriminates on the basis of sex, contrary to section 13 of the Constitution.

[76] With respect to section 16 of the SOA, the claimant says the wording of the offence appears neutral, in that it prohibits anal sexual intercourse by a man with a male or female. Although section 16 violates the rights of all persons in Dominica who engage in consensual anal sex, including heterosexual couples, it would be specious to conclude that the provision is therefore not discriminatory. This would ignore the history of this provision as rooted in colonial-era laws primarily aimed at criminalising consensual anal sex between men and the current reality that the "buggery" provision is commonly and predominantly understood as a law against male-male sexual activity. Furthermore, as consensual sexual intercourse between two male partners consists of anal sex, the prohibition in section 16 of the SOA inherently discriminates against gay men and other men who have sex with men ('MSM'). In practice, this seemingly neutral criminal prohibition discriminates against gay men, on the basis of the sex of their partner. The discrimination against LGBT people, under sections 14 and 16 of the SOA cannot be justified as necessary to respect the rights and freedoms of others nor in the public interest.

[77] Counsel for the claimant further submits that numerous courts have affirmed that sex-based discrimination includes discrimination based on sexual orientation and the impugned provisions of the SOA discriminate against LGBT people on the basis of sex by criminalizing same-sex intimacy; therefore, they are unconstitutional. Counsel states that Caribbean Courts have ruled that sex-based discrimination encompasses discrimination on the basis of sexual orientation and argues that recognizing that sexual orientation falls

under the protected ground of sex gives effect to the broad and purposive interpretation required in the exercise of human rights interpretation, citing **Orden David v Attorney General of Antigua and Barbuda**;<sup>47</sup> **AG of St Kitts et al v Kaleel Jones**;<sup>48</sup> **Baldwin Spencer v Attorney General et al**;<sup>49</sup> and **Orozco v Attorney General and others**.<sup>50</sup>

[78] Counsel for the claimant noted that the High Court of Antigua and Barbuda in **Orden David**, for example, held:

"In giving a liberal and purposive interpretation to section 14(3) of the Constitution the reference to "sex" ought not to merely reference a physical gender. Such an approach would be too linear and restrictive. The reference to "sex" would necessarily encompass concepts such as gender identity, sexual character, and sexual orientation. It would be self-defeating to the constitutional provision if the notion of sex were to be separated from matters of sexual orientation and sexual identification since the concept of sex as a physical gender carries with it a perception of how people identify and are oriented even in those instances when the identification and orientation are stereotypical or traditional in nature."<sup>51</sup>

[79] The High Court of Belize, adopting the reasoning of the UNHCR in **Toonen v Australia Communication**,<sup>52</sup> has also held that discrimination on the basis of sex should be interpreted as including sexual orientation. Further, as Belize acceded to the ICCPR after **Toonen**, it tacitly embraced this interpretation. Counsel notes that the prohibitions against discrimination in the Constitutions of Belize and Dominica are identical and Dominica ratified the ICCPR after **Toonen**.<sup>53</sup> As the High Court of Belize noted (upheld by the Court of Appeal in 2019):

"In our view sexual intercourse is the primary element in carnal intercourse, whether it be between heterosexuals or homosexuals. Sexual intercourse orientation fits in with "sexual act;" or "sexual activity", the dictionary meaning of the word "sex", so, sexual orientation is included in the word "sex" in ss. 3 and 16 of the Constitution. For the reason that sexual intercourse is the primary element in carnal intercourse alone, we accept that, the word sex in ss. 3 and 16 of the Constitution includes sexual intercourse and sexual intercourse orientation.

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<sup>47</sup> Claim No ANUHCv2021/0042 (delivered 5<sup>th</sup> July 2022, unreported) at para 75.

<sup>48</sup> [2008] ECSC J0602-3.

<sup>49</sup> [1998] ECarSC 72 (8 April 1998) at 12.

<sup>50</sup> [2020] 2 CRL 501 at paras 258-9.

<sup>51</sup> *Orden David v Attorney General of Antigua and Barbuda*, ANUHCv2021/0042 (delivered 5<sup>th</sup> July 2022, unreported) at para 75.

<sup>52</sup> *Toonen v Australia Communication No. 488/1992*, U.N. Doc CCPR/C/50/D/488/1992 (1994) at para 87.

<sup>53</sup> *Orozco v Attorney General and others*, (2016) Claim No. 688 of 2010 at para 94 (Supreme Court of Belize);

Moreover, including sexual orientation gives the word sex in ss. 3 and 16 of the Constitution a purposive and generous meaning for protecting human rights. Accordingly, we hold that s. 53 of the Criminal Code is a law which discriminates on the basis of sex, which includes sexual orientation and discriminates against the respondent Orozco, a homosexual. The section is inconsistent with s. 3 and 16 of the Constitution, and is void to that extent."<sup>54</sup>

[80] Counsel for the claimant also cited the U.S. Supreme Court case **Bostock v Clayton County, Georgia** where it was held that discrimination against an employee because of sexual orientation constitutes prohibited sex-based discrimination. Justice Gorsuch explained:

"It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

"Homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."<sup>55</sup>

[81] In **Navtej Singh Johar and others v. Union of India, the Supreme Court of India** found that the law criminalizing consensual same sex intimacy violated the right to equality. The court outlined how the provisions disproportionately impact LGBT persons:

"Section 377 operates in a vastly different manner for two classes of persons based on their "sexual orientation" i.e. the LGBT persons and heterosexual persons. Section 377 penalises all forms of non penile-vaginal intercourse. In effect, voluntary consensual relationships between LGBT persons are criminalised in totality. The import and effect of Section 377 is that while a consensual heterosexual relationship is permissible, a consensual relationship between LGBT persons is considered to be 'carnal', and against the order of nature. Section 377 creates an artificial dichotomy. The natural or innate sexual orientation of a person cannot be a ground for discrimination. Where a legislation discriminates on the

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<sup>54</sup> Orozco v Attorney General and others, [2020] 2LRC 501 at paras 108-110, [2019] CA Civil Appeal No. 32 of 2016 (Belize, Court of Appeal).

<sup>55</sup> Bostock v Clayton County, (2020) 140 S. Ct. 173 at 9-10 (United States Supreme Court).

basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia.”<sup>56</sup>

[82] Consequently, Counsel for the claimant submits that sections 14 and 16 create discriminatory distinctions between LGBT people and heterosexual people. Explicitly in section 14, and while section 16 appears facially neutral, prohibiting any act of anal sex between two people captures an activity that homosexual and bisexual men are more likely to engage in and has a discriminatory and disproportionate effect on gay men.<sup>57</sup>

[83] Counsel for the defendant on the other hand submitted that the Constitution of Dominica must be compared with other instruments guaranteeing protection against discrimination. Counsel highlighted Article 14 of the European Convention on Human Rights which provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[84] Counsel notes that with respect to the European Convention on Human Rights, the prohibition on the ground of "other status" has been held to include, among other things, that of age, gender identity, and sexual orientation.<sup>58</sup>

[85] Similarly, section 9 of the Constitution of the Republic of South Africa 1996 stipulates as follows:

"(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."<sup>59</sup>

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<sup>56</sup> Navtej Singh Johar v Union of India, (2018) Writ Petition No. 76 of 2016 at para 14.3 [Malhotra opinion].

<sup>57</sup> Orden David v Attorney General of Antigua and Barbuda, ANUHCv2021/0042 (delivered 5<sup>th</sup> July 2022, unreported) at paras 83- 84.

<sup>58</sup> (see Guide on Article 14 of the European Convention on Human Rights and Article 1 of Protocol No. 12 to the Convention: Prohibition of discrimination at [150]-[198]).

<sup>59</sup> National Coalition for Gay and Lesbian Equality v Minister of Justice and Others [1998] ZACC 15, [1998] 3 LRC 648 at [10] (a case emanating from the Constitutional Court of South Africa).

[86] Thus, Counsel for the defendant argues that it is pellucid that whereas some constitutional instruments provide that "sexual orientation" or "other status" are prohibited grounds of discrimination separate and apart from sex, this is not the case with respect to Dominica's Constitution. The Constitution of Dominica, in enumerating the prohibited grounds of discrimination, is clear in its language, which needs no gloss and it is not permissible for the Court to ignore clear statutory language and the plain meaning of words used by the framers of the Constitution, citing Lord Neuberger in **Williams v Central Bank of Nigeria**:

"When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material, and treating the wording of the statute as merely one item. **Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used.**" As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613, "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used".<sup>60</sup> (emphasis mine)

[87] Counsel for the defendant submits that the rule has always been that "express enactment shuts the door to further implication;" "expressio unius est exclusio alterius."<sup>61</sup> Counsel also notes dicta of the European Court of Human Rights in **Austin v The United Kingdom**:

"53. Firstly, as the Court has underlined on many occasions, the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today (see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26; *Kress v. France* [GC], no. 39594/98, § 70, ECHR 2001-VI; *Christine Goodwin v. the United Kingdom* [GC], no. 28957 /95, § 75, ECHR 2002-VI; and, most recently, *Bayatyan v. Armenia* [GC], no 23459/03, § 102, ECHR 2011). **This does not, however, mean that to respond to present-day needs, conditions, views or standards the Court can create a new right apart from those recognised by the Convention** (see *Johnston and Others v. Ireland*, 18 December 1986, §§ 51-54, Series A no. 112) **or that it can whittle down an existing right or create a new "exception" or "justification" which is not expressly recognised in the**

<sup>60</sup> [2014] UKSC 10, [2014] AC 1189 at [72].

<sup>61</sup> (*Whiteman u Sadler* [1910] AC 514 at 527, per Lord Dunedin).

**Convention** (see, for example, Engel and Others, cited above, §57, and Ciulla v. Italy, 2 February 1989, § 41, Series Ano. 148)."<sup>62</sup> (emphasis mine)

[88] Counsel for the defendant accepts that the prohibited grounds of discrimination enumerated in section 13 of the Constitution "must be given a generous interpretation of which it is linguistically and textually fully capable of bearing."<sup>63</sup> However, section 13(3) of the Constitution expressly states the prohibited grounds of discrimination. It is not to be implied that there are other grounds. For this reason, "sex" cannot be made to be "sexual orientation" so as to create a new prohibited ground of discrimination giving rise to a new constitutional right. The expansion of constitutional rights by amendment of the Constitution is a matter for the people of the Commonwealth of Dominica through their elected representatives. The claimant's complaint is that sections 14 and 16 of the SOA discriminate against (or have a discriminatory effect on) gay men and persons of the LGBT community. This is a complaint about discrimination on the basis of sexual orientation, not discrimination on the basis of sex. The fact that the offence of gross indecency does not arise in circumstances where the act is committed "in private between an adult male person and an adult female person, both of whom consent" does not have a discriminatory effect on either males or females. The offence, and exceptions to the offence, cut both ways.

[89] As to the offence of buggery, Counsel for the defendant had regard to the finding of the Supreme Court of Zimbabwe in **Banana v State**, where it fell to be decided whether, inter alia, the common law crime of buggery was in conformity with s. 23 of the Constitution of Zimbabwe which guaranteed protection against discrimination on the ground of gender. The Supreme Court of Zimbabwe held:

"Section 23 of the Constitution, which gave protection against discrimination on the ground of gender, did not include an express prohibition against discrimination on the ground of "sexual orientation". That provision forbade discrimination between men and women, not between heterosexual men and homosexual men. The latter discrimination was prohibited only by a Constitution, which proscribed discrimination on the grounds of sexual orientation. **The real complaint by**

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<sup>62</sup> [GC], nos. 39692/09, 40713/09 ECHR 2012-II at [53].

<sup>63</sup> (see National Coalition at [21]).



homosexual men was that they were not allowed to give expression to their sexual desires, whereas heterosexual men were. In so far as that was discrimination, it was not the sort of discrimination which was struck down by s. 23. The argument that the discrimination arose from the fact that men who performed that act with women were not penalised, although technically correct, lacked common sense and real substance. The law had properly decided that it was unrealistic to try to penalise such conduct between a man and a woman. That did not lead to the conclusion that the law was discriminating when such conduct took place between two men. The real discrimination was against homosexual men in favour of heterosexual men, which was not discrimination on the ground of gender. That being so, the criminalisation of consensual buggery was not discrimination under the Constitution."<sup>64</sup> (emphasis mine)

[90] Similarly, Ward J in **Jeffers v The Attorney General of St. Christopher and Nevis** held:

"In my view, the offence of buggery under section 56 does not discriminate as between males and females or even between homosexual males and heterosexual males, as in Zimbabwe. It is gender and sexual orientation neutral. The offence is prohibited whether it occurs between two gay males or between a heterosexual male and a female. Mutual consent of the parties is immaterial. The fact that sex per anum may be the way gay men commonly express their sexuality and sexual desires, or that among the general community gay males are the ones predominantly engaged in this type of activity, does not make section 56 a gender discriminatory provision even if it may be said to be discriminatory in its effect. The complaint by gay men that they are not allowed to give expression to their sexual desires, is not caught within the type of discrimination proscribed by sections 3 and 15."<sup>65</sup>

[91] Both parties agree that section 13(1) of Dominica's Constitution provides that no law shall make any provision that is discriminatory either of itself or in its effect. Section 13(3) provides that "'discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made

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<sup>64</sup> [2000] 4 LRC 621 (as reported in the head note).

<sup>65</sup> SKBHCV2021 / 0013 relied on *Banana* and at [103].

subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

[92] However, they disagree on how this provision should properly be interpreted, particularly whether sex includes sexual orientation. Both have identified a line of cases which support their respective positions. I prefer and adopt the interpretation advocated by Counsel for the defendant. I agree with Counsel for the defendant that the words of the Constitution are unambiguous, as is the definition of sex. To accept that sex includes sexual orientation is to apply a meaning that is not supported by the clear wording of the Constitution, which despite the principle that the Constitution is a living document that ought to be interpreted broadly, purposively, and generously to give effect to fundamental rights and freedoms, does not extend to creating new rights.

[93] Additionally, I note, as Counsel for the defendant points out, that in some of the cases cited by Counsel for the claimant, the Constitutional provisions differ from the Dominica Constitution. These differences permit, on the words of the texts, the more generous interpretation of sexual orientation as a prohibited ground of discrimination. Such differences include expressly prescribing ‘sexual orientation’ as a prohibited ground (the South Africa Constitution)<sup>66</sup> and a catch-all phrase of “or any other status”, as seen in the European Convention of Human Rights and the ICCPR.

[94] Therefore, I adopt the ruling of the Court in **Banana v The State of Zimbabwe** followed by Ward J, in **Jeffers v The Attorney General of St. Christopher and Nevis**. I do not agree with the reasoning on this point in **Orden v AG of Antigua and Barbuda** and **Orozco**, in which the respective Constitutions are identical in wording to the Constitution of Dominica and the Constitution of St Kitts and Nevis considered by Ward J. The cases of **Johar** and **Toonen** can be distinguished as in **Johar**, the Court was considering the constitutionality of a law criminalising ‘carnal intercourse against the order of nature’, which term was undefined, on the basis of infringement of the right to privacy and freedom of expression and not the right to protection from discrimination. In **Toonen**, the ICCPR’s article 26

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<sup>66</sup> National Coalition for Gay and Lesbian Equality and Anor v Minister of Justice.

protection from discrimination provision includes 'other status' as a prohibited ground and this is the provision the Committee was asked to consider; merely, in passing, expressing the view that sex includes sexual orientation. This statement must be considered in light of the presence of 'other status' ground. Thus, I find **Orozco**, which relies on **Toonen**, of little persuasion in this regard as well.

### **Conclusion**

- [95] As the Dominica Constitution does not include a prohibition on the ground of sexual orientation, which cannot properly be considered to be encompassed within sex; and as there is no prohibition on the basis of 'other status', I am constrained to find that sections 14 and 16 of the SOA do not discriminate against the claimant and members of the LGBT community on the prohibited ground of 'sex', and consequently that the sections do not violate the constitutional right to freedom from discrimination.

### **Right to Freedom of Assembly and Association**

- [96] The claimant states that section 1(b) of the Constitution protects the right to freedom of assembly and association of all persons in Dominica. Section 11(1) further guarantees that except with his own consent, a person shall not be hindered in the enjoyment of his right to assemble freely and associate with other persons. This must necessarily include the freedom to enter into and maintain intimate relationships without undue intrusion by the State, including consensual sexual relationships between persons of an age to give legally valid consent. It similarly guarantees the right to gather together and associate peaceably with others without fear of physical assault. Yet sections 14 and 16 of the SOA engender widespread hostility towards persons perceived to be LGBT both in public and private settings and inadequate action in response. Furthermore, sections 14 and 16 of the SOA cannot be justified as necessary to respect the rights and freedoms of others or the public interest and are not defensible as falling within any limitation on freedom of association set out in section 11 of the Constitution.

[97] Counsel for the claimant submits that the right to freedom of association in sections 1(b) and 11(1) protect each person's right to assemble and associate with other persons for the protection of their interests. In **MA, Applicant v Minister of Justice, Equality and Law Reform**,<sup>67</sup> the Irish High Court outlined that freedom of association protects the right of homosexual people to freely associate with others of the same sexual orientation. Counsel argues that freedom of association recognises the profoundly social nature of human endeavours and aims to protect the individual from state-enforced isolation in the pursuit of their ends;<sup>68</sup> enable the achievement of individual potential through interpersonal relationships; and protect the collective action of individuals in pursuit of their common goals.<sup>69</sup> It also functions to protect individuals against more powerful entities, thus empowering vulnerable groups and enabling them to right imbalances in society.<sup>70</sup>

[98] Accordingly, Counsel for the claimant contends that freedom of association protects the claimant's right to enter into and develop intimate relationships for his individual fulfilment without undue intrusion by the State, including consensual sexual relationships between persons of an age to give legally valid consent to sexual activity. Similarly, the freedom of assembly must guarantee to every person the right to gather together and associate peaceably with others without fear of physical assault. The impugned provisions prevent the claimant from openly being in a relationship with a man and from being able to associate with LGBT events to avoid harassment, threats, and potentially deadly violence.

[99] Counsel for the defendant states that the claimant's argument that freedom of association must necessarily include – the freedom to enter into and maintain intimate consensual same-sex adult sexual relationships without undue intrusion by the State – is misguided and fails to have any regard to the words of section 11(1) of the Constitution, which clearly defines freedom of association as the right to "associate with other persons and in particular to form or belong to . . . associations for the protection of his interests."

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<sup>67</sup> [2010] IEHC 519.

<sup>68</sup> *Mounted Police Association of Ontario v Canada*, 2015 SCC1 at para 54.

<sup>69</sup> *Lavigne v Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 at 253.

<sup>70</sup> *Mounted Police Association of Ontario v Canada*, 2015 SCC1 at para 58.

[100] Counsel refers to **The Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly and Association** at [122]:

“122. The concept of freedom of association is concerned with the right to form or be affiliated with a group or organisation pursuing particular aims. It does not concern the right to share the company of others or to mix socially with other individuals (*McFeeley v. the United Kingdom*, Commission decision, 1980, § 114; *Bollan v. the United Kingdom (Dec.)*, 2000).”

[101] The claimant in advocating for "freedom to enter into and maintain intimate relationships" is advocating for freedom of "expressive conduct and not conduct of an associational nature" according to **R v Skinner**.<sup>71</sup> The legislative provisions against gross indecency and buggery are not prohibitions against conduct of an associational nature, but rather are prohibitions against certain expressive conduct.

[102] Counsel for the defendant submits that the right to freedom of association protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.<sup>72</sup> The right to freedom of association does not apply to intimate sexual relationships<sup>73</sup>, or family relationships or generally where the association is for the purpose of loving or being loved, of comforting and protecting, or being comforted and protected.<sup>74</sup>

[103] I agree with Counsel for the defendant's submissions. **Catholic Children's Aid Society of Metropolitan Toronto v S(T)**,<sup>75</sup> makes it clear that the right to freedom of association does not protect private, intimate family relationships. The Court in that case held:

“The provisions in the legislation which require a termination of access by birth parents upon placement for adoption do not violate the Canadian Charter of Rights and Freedoms. **The freedom of association guaranteed by s. 2(d) of the Charter does not protect family relationships. The fundamental freedoms are public in nature and the Constitution is concerned with those assemblies**

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<sup>71</sup> [1990] 1 SCR 1235.

<sup>72</sup> *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (CanLII), [2015] 1 SCR 3.

<sup>73</sup> *R v Skinner* [1990] 1SCR 1235.

<sup>74</sup> *Catholic Children's Aid Society of Metropolitan Toronto v S(T)* (1989), 69 OR (2d) 189 (CA).

<sup>75</sup> See above.

**and associations outside the intimate circle of the family.** The desire of a parent to be with a child has no goal or purpose like that of associations for economic, political, religious, social, charitable or even entertainment purposes. The provisions do not violate s. 7 of the Charter.<sup>76</sup> (emphasis mine)

[104] The case of **Mounted Police Association of Ontario v. Canada (Attorney General)** also cited by the claimant does not support his position. In **Mounted Police**, the court held that the section 2(d) guarantee of freedom of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests. Section 2(d) protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities. Viewed purposively, section 2(d) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals.

[105] **R v Skinner**<sup>77</sup> concerned the offence of communicating in a public place for the purpose of obtaining the sexual services of a prostitute contrary to section 195 of the Criminal Code. The respondent claimed that this provision infringes section 2(d) of the Charter which guaranteed freedom of association. The court ruled against the respondent concluding that the section did not infringe the rights of freedom of association because it attacks expressive conduct and not conduct of an associational nature. The court held that the section does not directly proscribe an agreement between two individuals for the exchange of sex for money nor sexual relations between consenting individuals. The mere fact that an impugned legislative provision limits the possibility of commercial activities or agreements is not sufficient to show a prima facie interference with freedom of association protected by section 2(d) of the Charter.

## Conclusion

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<sup>76</sup> (1989), 69 OR (2d) 189 (CA) (See Headnote).

<sup>77</sup> [1990] 1 SCR 1235.

[106] Thus, none of these cases support the claimant's contention. I find that sections 14 and 16 of the SOA do not violate the right to freedom of association. They rather proscribe certain expressive intimate conduct.

### Orders

[107] Based on the foregoing discussion, I make the following orders:

- (1) It is declared that section 14 of the **Sexual Offences Act** contravenes sections 1 and 10 of the **Constitution of the Commonwealth of Dominica**, namely, the right to liberty, freedom of expression, and protection of personal privacy, in so far as section 14 of the **Sexual Offences Act** is inconsistent with the rights of persons sixteen (16) years and older to engage consensually and in private in the sexual acts described in section 14(4), and to the extent of that inconsistency section 14 of the **Sexual Offences Act** is void.
- (2) It is declared that section 16 of the **Sexual Offences Act** contravenes sections 1 and 10 of the **Constitution of the Commonwealth of Dominica**, namely, the right to liberty, freedom of expression, and protection of personal privacy, in so far as section 16 of the **Sexual Offences Act** is inconsistent with the rights of persons sixteen (16) years and older to engage in consensual sexual intercourse per anum in private, and to the extent of that inconsistency section 16 of the **Sexual Offences Act** is void.
- (3) For the purpose of giving effect to declaration 1 above, section 14(2) of the **Sexual Offences Act** shall be read as "Subsection (1) does not apply to an act of gross indecency committed in private between adult persons both of whom consent."
- (4) For the purpose of giving effect to declaration 2 above, section 16(1)(b) of the **Sexual Offences Act** shall be read as "ten years, if committed by an adult on another adult, save and except where the act which would otherwise constitute the offence is done in private between consenting adults."
- (5) There shall be no order as to costs.

[108] I wish to thank Counsel for their very helpful submissions. I also thank Counsel and the parties for their patience and understanding as they awaited the delivery of this judgment which was delayed due to my inability to write or type extensively for an extended period during the course of last year. The delay is deeply regretted.

**Kimberly Cenac-Phulgence  
High Court Judge**



By The Court  
  
Registrar (Ag)