

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CONSTITUTIONAL COURT**

**COR: THE HONOURABLE MR. JUSTICE REID
THE HONOURABLE MR. JUSTICE HARRISON
THE HONOURABLE MRS. JUSTICE N. E. McINTOSH**

SUIT NO. M. 135 OF 2001

IN THE MATTER of The Constitution of Jamaica.

A N D

IN THE MATTER of Sections 13, 18, 22 & 25 of the
Constitution of Jamaica.

A N D

IN THE MATTER of Sections 2, 5, & 7 of the
Fundamental Rights (Additional Provisions) (Interim) Act.

A N D

IN THE MATTER of the TELECOMMUNICATIONS
ACT 2000.

BETWEEN	INFOCHANNEL LTD.	APPLICANT
A N D	THE MINISTER OF INDUSTRY COMMERCE & TECHNOLOGY	1ST RESPONDENT
A N D	THE OFFICE OF UTILITIES REGULATION	2ND RESPONDENT
	CABLE & WIRELESS JAMAICA LTD.	3RD PARTY INTERVENOR

Dr. L.G. Barnett and H. Brady for Applicant

B. St. J. Hylton Q.C. Solicitor General and Miss Katherine Francis for 1st Respondent

Maurice Manning instructed by Nunes, Scholefield, Deleon & Co. for 2nd Respondent

Miss Hilary Phillips Q.C. Mrs. Denise Kitson and Wayne McGregor for 3rd Party Intervenor.

Consolidated with **SUIT NO. M. 167 OF 2002**

IN THE MATTER of an Application by
STANLEY DOUGLAS BECKFORD for
redress of breach of right of freedom of
expression pursuant to the Constitution of
Jamaica and right to fair treatment and
protection against deprivation of property.

BETWEEN	STANLEY DOUGLAS BECKFORD	APPLICANT
A N D	THE MINISTER OF INDUSTRY COMMERCE & TECHNOLOGY	1ST RESPONDENT
A N D	THE OFFICE OF UTILITIES REGULATION	2ND RESPONDENT

Mrs. P. Benka-Coker Q.C. and Frank Williams for Applicant

Other Appearances as above.

Heard: 1st, 2nd, 3rd, 4th, July, 9th, 10th, 11th, 12th, September, 2002,
20th, December 2002.

REID, J

The Applicant Infochannel seeks redress under Sections 13, 18, 20 22 & 25 of the
Constitution of Jamaica also under Sections 2, 5 & 7 of the Fundamental Rights (Additional
Provisions) (Interim) Act, as follows;

- (a) A Declaration that the failure and/or refusal of the Minister of Industry Commerce &
Technology and/or the Office of Utilities Regulation to grant to the Applicant a licence to
continue to provide the telecommunications services including Voice Over Internet
(VOIP) service which it provided to its subscribers and users of the service and the public
at large before the passage of the Telecommunications Act 2000 and which now require
licence under the said Act is unconstitutional and is in breach of the Applicant's

constitutional rights of freedom of expression guaranteed by Section 22 of the Constitution.

- (b) A Declaration that the Applicant has been deprived of the protection of the law and the enjoyment of its rights of property enshrined in Sections 13 and 20 of the Constitution and the right to fair treatment protected by Section 5 of the Fundamental Rights (Additional Provisions) (Interim) Act in that (i) the services which it had been providing, including Voice Over Internet, before the enactment of the Telecommunications Act without the need for a licence has been curtailed or prohibited by the Telecommunications Act 2000. and/or (ii) it has been treated unfairly by the grant to Cable & Wireless of a monopoly in the provisions of the services to the exclusion and detriment of the Applicant.
- (c) A Declaration that the telecommunications services carried by the Applicant prior to the passage of the Telecommunications Act 2000 are protected by section 22 of the Constitution of Jamaica.
- (d) The exclusive licence granted to the existing telecommunications carrier by the provisions of the Telecommunications Act 2000 which make unlawful the provision of Voice Over Internet Service by the Applicant contravened/or is likely to contravene the Applicant's fundamental right to freedom of expression granted by section 22 of the Constitution and the protection of law and the enjoyment of the Applicants rights of property enshrined in Sections 13 and 20 of the Constitution.
- (e) Damages for contravention of the Applicant's constitutional rights aforesaid in the amount of US\$100,000 per month.
- (f) Costs.

The Grounds on which the Applicant relies are as follows:-

- (a) The Applicant is entitled to the protection of Sections 13, 18, 20, 22 and 25 of the Constitution of Jamaica and Section 5 of the Fundamental Rights (Additional Provisions) (Interim) Act to constitutional redress pursuant to Section 25 of the Constitution of Jamaica and Section 7 of the Fundamental Rights (Additional Provisions) (Interim) Act.
- (b) The Applicant's right to freedom of expression is guaranteed by Section 22 of the Constitution and its right to protection of law guaranteed by Section 20 and its right to property guaranteed by Section 18 and its right to fair treatment guaranteed by Section 5 of the Fundamental Rights (Additional Provision) (Interim) Act have been contravened by the provisions of the Telecommunications Act 2000 which prohibits the Applicant to continue providing services including VOIP which it had provided to its customers prior to the enactment of the said Act.

The second Applicant Stanley Douglas Beckford seeks redress as follows:

- (a) A declaration that the failure and/or refusal of the Ministry of Industry Commerce and Technology and/or the Office of Utilities Regulation to grant to Infochannel Ltd. a telecommunications licence to continue to provide the telecommunications services, including Voice Over Internet (VOIP) service, which it provided to its subscribers including that applicant and other users of the service and the public at large before the passage of the Telecommunications Act, 2000 and which now require licence under the said Act is unconstitutional and is in breach of the applicant's constitutional rights of freedom of expression guaranteed by Section 22 of the Constitution.
- (b) A declaration that the applicant has been deprived of the protection of the law and the enjoyment of its rights of property enshrined in Sections 18 and 20 of the Constitution and

the right to fair treatment protected by Section 5 of the Fundamental Rights (Additional Provisions) (Interim) Act in that (i) the Services which he enjoyed and were provided to him by Infochannel Ltd., including Voice Over Internet, before the enactment of the Telecommunications Act, 2000, without the need for a licence, has been curtailed or prohibited by the Telecommunications Act, 2000 and/or (ii) Infochannel Ltd. has been treated unfairly by the grant to Cable & Wireless (Jamaica) Ltd. of a Monopoly in the provisions of the said services to the exclusion and detriment of the applicant.

- (c) A declaration that the telecommunications services carried on by Infochannel Ltd. and provided to the applicant prior to the passage of the Telecommunications Act, 2000 are protected by Section 22 of the Constitution of Jamaica.
- (d) The exclusive licence granted to the existing telecommunications carrier pursuant to the provisions of the Telecommunications Act, 2000 which make unlawful the provision of the Voice Over Internet Service to the applicant by Infochannel Ltd. Contravenes/or is likely to contravene the applicant's fundamental right to freedom of expression granted by Section 22 of the Constitution and the protection of law and the enjoyment of the applicants rights of property enshrined in Sections 13 and 18 and 20 of the Constitution;
- (e) Damages for contravention of Applicant's Constitutional rights aforesaid.

The Factual Background

The Applicant, Infochannel Ltd. (Infochannel) in 1995 commenced to offer to subscribers a range of telecommunications service and by means of access to the Internet a further extensive range of value added services including, Voice Over Internet Protocol. In July 1996 application was made to the Minister for licence under the Radio and Telegraph Control Act (RTC) for licence 'to establish maintain and use telecommunications equipment for access to Internet in

order to dispense with a leased international circuit supplied by Cable & Wireless Jamaica Ltd. (CWJ). The grant of a spectrum licence from the Postmaster General in 1998 permitted access to full Internet services including VOIP to Infochannel and its subscribers. When In January 1999 CWJ refused to supply leased lines connecting the World Bank and the Bank of Jamaica to Infochannel's Internet facilities, the bi-directional lines were converted into uni-directional. CWJ contended that Infochannel through its VSAT facilities was routing international calls in breach of CWJ's purported exclusive licence. Infochannel filed an Action against CWJ and obtained a mandatory interlocutory injunction pending the result of the trial and the lines were re-instated. CWJ claimed that it held the exclusive status of carrier for international calls

In August 1999 CWJ sought to move into the Full Court and quash by order of Certiorari the order of the Minister, which granted to Infochannel a special licence under the RTC Act to maintain a VSAT station. Infochannel was joined as a respondent by Order of the Court. Following submissions before that Court, CWJ secured an adjournment to present its reply to submissions but at the resumed hearings a settlement was announced. The agreement dated August 19, 1999 on which the settlement between the Minister, Infochannel and CWJ was reached provided inter alia for;

- (1) Discontinuation of the Actions filed against CWJ and for same to be referred to arbitration should a negotiated settlement fail
- (2) The continuation of Infochannel Internet services including Voice Over Internet
- (3) That the agreement should continue in force until September 30, 1999 or until such time that the legal and regulatory framework is implemented
- (4) Preservation of the parties' rights.

Infochannel contends that it had not been consulted or invited to participate in the discussions leading up to the settlement agreement.

The Applicant Beckford a subscriber to the services offered by Infochannel and had regarded the international communications as an important component of his business and professional life. He had been able to communicate with his suppliers of equipment, goods and services overseas and with the termination of Infochannel's VOIP service had been deprived of that means of communication.

The Legislative Framework prior to the Telecommunications Act 2000

Prior to the passing of this Act telecommunications in Jamaica were governed by

- (1) The Telephone Act of 1893.
- (2) The Radio and Telegraph Control Act (RTC) of 1973.

The Telephone Act regulated wired network communications whereas the RTC governed wireless systems communication. The Licensing regime for private persons created by the RTC treated wireless communication under two heads: In one situation the Postmaster General retained jurisdiction and by virtue of Section 6 the Minister exercised jurisdiction. Section 5 (1) prohibited unlicensed radio or telegraph apparatus "within the Island or its territorial waters..... without first obtaining a licence..... issued pursuant to regulations made under Section 8."

By Section 6 (1) of the RTC Act the Minister could grant special licence whether exclusive or non-exclusive to "maintain radio telegraph station or apparatus" on such terms and conditions to which the holder of the special licence might be required to conform.

Section 8 (1) (k) of the RTC Act expressly provides for regulations requiring "users of radio and telegraph stations or apparatus" to comply with international regulations with sanctions (including revocation) for non-compliance.

I accept, as Dr. Barnett submits that exclusivity would relate to the establishment, maintenance or use by the licensee and has no relevance to another person obtaining a licence to operate and use his own station

Value-added Services

The learned Solicitor General identified as a major issue to be determined was whether or not Infochannel had a right to provide Voice Over Internet Protocol since the terms of its licence permitted transmission of data only over its VSAT. While the Respondents contend that VOIP is a voice service they concede that at some stage in transmission there is a data component and that notwithstanding, voice was transformed into data packets and afterwards re-assembled into voice and so remains a voice service. Having had the benefit of reading in draft the Judgment of my brother Harrison J, I would hold that VOIP is a standard part of data communication that takes place over the Internet Protocol and that what is transmitted over the VSAT are digital data packets generated by computer processing application.

Was Infochannel's full Internet Services including VOIP protected under Section 85 of the Telecommunications Act?

Section 85 of the telecommunications Act subtitled "Transitional" reads:

Where -

(a) Immediately before the appointed day, any person

(i) was engaged in providing specified service to the public or in the selling, trading in or importation of prescribed equipment; or

(ii) Owned or operated a facility,

for which no licence was required under the Radio and Telegraph Control Act or the Telephone Act; and

(b) Within ninety days after the appointed day, that person has applied for a licence under

Section 11 of this Act.

that person shall be entitled to be so engaged or to own or operate a facility for a period not exceeding ninety days beginning with the appointed day or until the licence has been granted or the application has been withdrawn, whichever is the later.

Infochannel's Attorneys on the 22nd February, 2000 wrote to the Office of Utilities Regulation (OUR) applying for licences pursuant to Section 11 of the Act and on the 14th March were issued with both carrier and spectrum licences but not with Internet Service Provider licence. On the 24th March The OUR wrote to Infochannel's Attorneys citing CWJ'S complaint of the bypass of internationally routed calls. The disconnection on 31st March 2000 of the lines supplied to Infochannel effectively prohibited VOIP services to Infochannel subscribers. When on 16th July 2001 Infochannel was granted International Voice Provider licence only the re-sale to the public of internationally switched minutes was authorized.

Inexorable is the finding that Infochannel was hindered in the offer of VOIP in its telecommunications services.

The Constitutional Issues

The contention by the Applicants of deprivation of right to property invokes Section 18 (1) of the Constitution –

“No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired.”

This provision Dr. Barnett submitted was breached by the actions of the Minister and the OUR together with the Telecommunications Act resulting in the compulsory acquisition of Infochannel's rights qua contracts with its subscribers.

Mrs. Benka-Coker Q.C. would extend the application of the Section to property deprived of by an act of Government. However as the Solicitor General pointed out, proof would be required the property had been taken by the Minister. Inasmuch as the Minister could not be shown to be enjoying the property allegedly taken in each instance, the submission must be rejected.

The right to protection of the law

Section 20 of the Constitution on which the Applicants rely will address specific sections prayed in aid. Section 20 – (2) reads;

Any Court or other authority prescribed by law for the determination of the existence of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a Court or authority, the case shall be given a fair hearing within a reasonable time.

- (3) *All proceedings of every Court and proceedings related to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or other authority, shall be held in public.*

Dr. Barnett Submitted that the Minister, by the agreement made with CWJ, ceased to be an impartial arbiter on issues germane to Infochannel's civil rights and obligations. Inasmuch as neither the Act nor the Minister sought to deprive the Applicant of the full protection of law, and as the present proceeding show, the submission is untenable.

Mrs. Benka-Coker Q.C. submitted that Beckford's rights were affected by the actions of the Minister and the OUR in not affording him a forum to demonstrate how adversely he might be affected. However as the Solicitor General pointed out, neither Applicant could show an entitlement over the rest of the public to be consulted before the Minister and Parliament might have considered to be in the public interest.

The Freedom of Expression

Section 22 of the Constitution provides:

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

22 (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in any contravention of this section to the extent that the law in question makes provision –

- (a) which is reasonably required –*
 - i. In the interest of defence, public safety, public order, public morality or public health or*
 - ii. for the purpose of protecting reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or*
- (b) which imposes restrictions upon public offenders, police officers or upon members of a defence force.*

For the 1st and 3rd respondents it was submitted that the Applicants must establish that the restrictions are not reasonably required for the purposes of this Section. The court ought to allow a wide “margin of appreciation” to Parliament who in enacting the legislation presumably considered that it was reasonably required. The advantages provided by the settlement in Suit No. M. 89 of 1998 by the surrender by CWJ of the five licenses granted 1988 and an abandonment of a claim to a monopoly of all telecommunications services until 2013 was reasonable in exchange for a phased introduction to full competition and the provision of a number of telephone lines within the projected period. The surrender of their licenses did not involve the payment of compensation to CWJ. Moreover the uncertainty of the outcome of what could be protracted

litigation and the realization of a projected telecommunications policy. Should the court find that there was some interference in the Applicants' right of free expression, the issue in this case would be whether the restrictions during the process of phased liberalization were reasonably required to:

- (a) Protect the rights and freedoms of others, or
- (b) regulate telephony or other means of communication.

The proper approach is for the court to start with the presumption that the circumstances existing in Jamaica are such that a delay in permitting the applicants and others to utilize the VOIP is reasonably required for protecting the rights and freedom of other persons and/or the regulation of means of communication.

The agreement together with the Act were designed to pave the way to regulated competition and the enhancement of the right to freedom of expression to the public at large. The phased introduction fell squarely within the aim of protecting the rights and freedom of others and this included the rights of CWJ to use their property without exploitation or abuse by others.

Dr. Barnett submitted that the justification for the hindrance had to be shown to be reasonably required for one of the constitutionally prescribed objectives. The position currently taken by the Minister was inconsistent with the enunciated policy of free competition. The exclusivity claimed by CWJ had the effect of violating the protection of fundamental rights. The balancing exercise of the rights of citizens did not indicate any justification for the accommodation of CWJ's position nor was the hiatus to full implementation the least obtrusive method of the hindrance to the rights of the applicants. Moreover infringement of the fundamental rights was inconsistent with the Minister's policy statements. In the course of the proceedings for Judicial Review he had emphasized the revolution in telecommunications and the need for the

introduction of a policy consistent with global trends and which would enhance economic growth in Jamaica. Value-added services including VSAT would become the vehicle for either voice, high-grade data communication or both. Then he had expressed concern about the slow pace of telecommunications services pursued by CWJ and the long waiting list of citizens requiring telephones. The need was seen for wireless and cellular telephony to be available in the shortest time possible to wide cross-section of the population.

In my view it has clearly not been shown that the increases in multiple licences justifies extension of the monopoly of CWJ nor that the period of three years phased liberalization was reasonably required allowing even the "wide margin of appreciation" to be accorded to Parliament.

I would therefore hold that the applicants are each entitled to the reliefs sought as set out in the order below.

HARRISON J.

The Motions

The Applicants have filed these Motions in the Constitutional Court and are seeking a number of declarations and relief under Sections 13, 18, 20, 22 and 25 respectively of the Constitution of Jamaica and Sections 2, 5 & 7 respectively of the Fundamental Rights (Additional Provisions) (Interim) Act. They contend inter alia, that their constitutional rights of freedom of expression have been breached and that they have been deprived of the protection of law and enjoyment of their rights of property and the right to fair treatment protected by section 5 of the Fundamental Rights (Additional Provisions) (Interim) Act. The Motions were consolidated by order of the Court.

The factual background

InfoChannel was established to offer telecommunications services to members of the public and in the ordinary course of its business it offered these services to its subscribers from and since 1995. Up to the date of filing the Notice of Motion, it had upwards of twenty-four thousand (24,000) subscribers to its Internet services known as INFOCHAN.COM.

On or about July 1, 1996 InfoChannel made an application to the relevant Minister, under the Radio and Telegraph Control Act (RTC), for a licence to establish, maintain and use telecommunication equipment and facility for the purpose of gaining access to the Internet directly via satellite which would thereby render unnecessary the leased international circuit supplied by Cable & Wireless.

In April 1998 the Postmaster General (under whose jurisdiction the subject of spectrum and rates fall) authorized the spectrum to be utilized by Infochannel and the rates payable for such use, subject to the grant of the licence. The Minister then issued the VSAT licence to InfoChannel on the 14th June 1998. The equipment was put in service by InfoChannel and this allowed it to provide full Internet service including Voice Over Internet Protocol (VOIP).

In January 1999, difficulties developed between Cable & Wireless and InfoChannel. Cable & Wireless without notice or the consent of InfoChannel, converted its dial-up lines from bi-directional to uni-directional. The reason given by Cable & Wireless was that InfoChannel was using its VSAT for routing international voice calls in breach of its (Cable & Wireless) licence.

As the actions of Cable & Wireless adversely affected the company's operations, InfoChannel filed an action in the Supreme Court. By an Interlocutory Mandatory Order the lines were reinstated by Cable & Wireless pending the outcome of the trial of the issues.

In March of 1999, Cable & Wireless applied to the Full Court of the Supreme Court of Jamaica for an Order of Certiorari to remove into the Full Court and quash the decision of the Minister of Commerce and Technology made the 16th day of June 1998, whereby the Minister granted to InfoChannel Limited a special licence pursuant to the RTC, to establish and maintain a VSAT station and apparatus for the purposes of providing Internet Services.

The application to the Full Court by Cable & Wireless was founded on the allegation by the company that under its existing licences the Minister had granted it exclusivity in the provision of the international telecommunications services and therefore the Minister had no further power or authority to issue or was obliged to consult with Cable & Wireless prior to issuing the licence to InfoChannel. Cable & Wireless contended that the issue of the licence to InfoChannel was in breach of its exclusivity for the provision of international telecommunications services enjoyed by it. It contended that the licence to InfoChannel was therefore void. By order of this court InfoChannel was joined as a respondent in these proceedings.

Cable & Wireless further contended that the Minister was prevented from issuing any further licence under section 6 of the RTC until Cable & Wireless was given the opportunity to provide the service. This included licences to persons who wished to establish telecommunications services for their own use as well as persons who did not wish to use Cable & Wireless' services.

By a settlement agreement dated August 19, 1999 between InfoChannel, Cable & Wireless and the Minister of Industry, Commerce & Technology all the suits between InfoChannel and Cable & Wireless were submitted to arbitration. The agreement also provided for (a) the continuation of InfoChannel's Internet services including VOIP to its customers (b) the remaining in force of the agreement until September 30, 1999 or until such time that the legal and regulatory framework was implemented (c) preservation of the parties' rights.

The Full Court matter was settled on the 30th September 1999 and this resulted in a discontinuation of the Motion in October 1999. The terms of the settlement included inter alia:

"3.1 Subject to the coming into effect of the New Telecommunications Legislation, the Minister agrees that all licences issued under the New Telecommunications Legislation other than the New CWJ Licences (The Competitor Licences) will be issued in accordance with, and as contemplated by the Drafting Instructions governing the grant and issuance of those licences and in the form set out....Further during the Transition period, the Competitor Licences will authorize the holders of those licences to own and operate only those facilities, or to provide only those services, that are permitted from time to time in accordance with and as contemplated by the Drafting Instructions.

3.2 The Minister will procure that all existing holders of VSAT Licences (other than CWJ) will surrender those licences in exchange for new VSAT licences in the form provided for in Annexure C (The New VSAT Licences) so as to ensure that during the Transition Period the existing holders of VSAT Licences will only be authorized to own and operate those facilities, or provide those services, as contemplated by the Drafting Instructions and permitted under the New VSAT Licences.

3.3 For the avoidance of doubt, the Minister acknowledges that the Drafting Instructions contemplate that during the Transition Period the New Telecommunications Legislation will restrict the Government from issuing any international facilities (including VSAT licences) other than to existing holders of VSAT licences as provided for in clause 3.2 above and to persons eligible to hold Free Trade Zone licences consistent with, and as contemplated by, the Drafting Instructions."

InfoChannel contends however, that although it was a party in the Judicial review proceedings it was not consulted and did not participate in the discussions leading up to this settlement agreement. The Telecommunications Act was eventually enacted on the 1st day of March 2000.

The second applicant contends that he had been a subscriber of VOIP since this service was offered by InfoChannel in 1999. He deposed that international communications is an integral and important component of his business and professional life and that his business associates are located in the United States of America, Canada and the United Kingdom. VOIP was his preferred choice in communicating with his family and his business associates since it only cost him 60% of what it cost to use the regular telephone service. He further contends that since the termination of InfoChannel's VOIP service he has been deprived of this means of communication.

The legislative background

Prior to the enactment of the Telecommunications Act there were two (2) basic pieces of legislation that governed telecommunications in Jamaica. They were: The Telephone Act of 1893 and The 1973 Radio & Telegraph Control Act (RTC). The former governed telecommunications over a wired network whereas the latter governed telecommunications over a wireless system. Under the Telephone Act it was illegal for any person to provide telephone service by means of a wired system without first obtaining a licence from the responsible Minister. The Minister also had the power to impose terms, conditions and regulations. The RTC created a licensing regime for private persons and treats wireless telecommunications under two heads: wireless telecommunications over which the Postmaster General retained jurisdiction and wireless telecommunications over which the Minister is granted jurisdiction by section 6 of the RTC.

Within the scheme of the RTC Act an applicant may seek:

- (a) A General Licence under section 5; or
- (b) A Special Licence under section 6

Section 5 of the RTC provides as follows:

"5(1) No person shall within the Island or its territorial waters establish, maintain or use any radio or telegraph station or apparatus without first obtaining a licence for the purpose, issued pursuant to regulations made under section 8."

Section 6 provides as follows:

"6(1) Notwithstanding the provisions of section 5, the Minister may grant to any applicant a special licence whether exclusive or non-exclusive, maintain or use any radio or telegraph station or apparatus for such period and on such terms and conditions as the Minister may determine, so however, that the holder of a special licence granted under this section shall conform to any regulations for the time being in force in relation thereto".

The common feature of both sections 5 and 6 of the RTC is that they provide for the licensing of "the establishment, maintenance or use of any radio or telegraph station or apparatus". Dr. Barnett submitted therefore, that what is required to be licensed is the actual radio or telegraph station or apparatus and its use by the applicant. He further submitted that it was within this context that reference to the power under section 6 of the Act to the grant of a Special Licence "*whether exclusive or non-exclusive*" must be interpreted. The power he said, under section 6 of the Act to grant a Special Licence "*whether exclusive or non-exclusive*" is confined within the language of the section:

"to grant to the applicant a special licence whether exclusive or non-exclusive to establish, maintain or use any radio or telegraph station or apparatus."

It was therefore Dr. Barnett's view that sections 5 and 6 of the RTC did not make provision for telegraph or telecommunication services. This he said was in sharp contrast to the provisions in legislation such as in the United Kingdom (Telecommunications Act 1984) in which clear and express provisions are made in respect of telecommunications service. He said that it was also in sharp contrast to the provisions of the Telephone Act, which expressly provides for a licence for telephone communication (section 5 of the Telephone Act), the regulation of the service (section 6) and the rights of persons to the use of a telephone (section 11) and the terms of supply of telephonic communications (section 19).

Having regards to the arguments advanced, I agree with Dr. Barnett when he submitted that the RTC contains no provisions which relate to:

- (a) the conditions on which telecommunication services would be provided;
- (b) the securing of regular and efficient telecommunications services;
- (c) the rights of the public to access to telecommunication services.

The importance of this submission will be appreciated when I come to deal with section 85 of the Telecommunications Act.

Value-added services

In the field of wireless telecommunications, VSAT technology offers value-added satellite-based services which include Voice over Internet (I.P. Telephony), electronic mail transmissions (e-mail); electronic mail to facsimile machines (fax), USENET news services, World Wide Web (WWW), search engines , File Transfer Protocol (FTP), video over Internet, streaming broadcasting and fax over Internet (fax over I.P.).

A major issue for determination in these motions is whether or not the first applicant had the right to provide Voice Over Internet Protocol to its subscribers. To answer this question the status of VOIP must be determined since InfoChannel was only permitted to transmit data with its VSAT.

According to the experts, VOIP is classified as a wireless telecommunications service that allows someone to send voice from one point in the world to another via the VSAT. The call is sent to orbiting satellites and is relayed to receiving earth stations for onward transmission, and vice versa. During the transmission voice is transformed into packets of digital data and is sent over an Internet Protocol (IP) network such as the public Internet. At the receiving end the packets are reassembled into one voice stream thereby completing the call.

The Applicants contend that VOIP is a standard part of data communications that takes place over the Internet Protocol and accordingly, it ought to be classified as data. David Greenblatt who has deposed on behalf of the first applicant stated that in order to provide this service the Internet Service Provider must of necessity utilize the local telecommunications infrastructure thus adding value to it in the provision of a wide range of telecommunications services including VOIP. He also states that this range of service is referred to as enhanced or value-added telecommunications services and further that enhanced services usually involve some computer related feature such as formatting data or restructuring the information. He further states: "In other words, an enhanced service is a computer processing application that interferes in some way with the information transmitted over the telephone lines".

The Respondents contend on the other hand, that VOIP is a voice service. They seem however, to acknowledge that at some point there is a data component. The Solicitor General argued nevertheless, that it would remain a voice service regardless of the fact that voice was transformed into data packets and then later reassembled into voice. He submitted that the nature of a service must be determined by what the customer receives and that it ought not to be determined by the methods used by the provider.

I disagree with the submissions made on behalf of the Respondents. I accept the evidence given by Greenblatt and find that VOIP is a standard part of data communications that takes place over the Internet Protocol. What in fact that is transmitted over the VSAT, are digital data packets generated by a computer processing application.

The transitional provision

The next issue I come to consider is whether InfoChannel's full internet services including VOIP would have been protected under section 85 of the Act.

Section 85 of the Act states:

"85. Where –

(a) immediately before the appointed day, any person –

i. was engaged in providing specified services to the public or in the selling, trading in or importation of prescribed equipment; or

ii. owned or operated a facility,

for which no licence was required under the Radio and Telegraph Control Act or the Telephone Act; and

(b) within ninety days after the appointed day, that person has applied for a licence under section 11 of this Act,

that person shall be entitled to be so engaged or to own or operate a facility for a period not exceeding ninety days beginning with the appointed day or until a licence has been granted or the application has been withdrawn, whichever is the later."

Two situations arise upon a perusal of section 85. Firstly, where someone is engaged in providing specified services and secondly, or where that person owned or operated a facility, and for which no licence was required that person shall be entitled to be so engaged

or to own or operate a facility for a period not exceeding ninety days beginning with the appointed day or until a licence has been granted or the application has been withdrawn, whichever is the later.

Dr. Barnett submitted therefore that pursuant to section 85 of the Act, the first Applicant was entitled to carry on operating its VSAT equipment and to continue providing its VOIP services for a period of 90 days or until a licence had been granted, whichever is later.

In order to comply with section 85 InfoChannel's Attorneys wrote to the Office of Utilities Regulation (OUR) on the 22nd February 2000 applying for licences pursuant to section 11 of the Act. These licences included a carrier and spectrum as well as an Internet service provider. It was expected that the licences would cover InfoChannel's existing licence that was granted under the Radio and Telegraph Control Act in order to continue providing internet services including VOIP.

Both carrier and spectrum licences were issued on the 14th March 2000 by the Minister but there was no response in respect of the internet service provider licence.

In its letter of the 28th September 2000 the OUR stated inter alia:

"...the Office recognized that, if InfoChannel and the other companies which provided Internet services prior to the effective date of the Telecommunications Act, 2000 were to continue providing those services, they would need to obtain service provider licences. Earlier this month we communicated this view to the Minister...."

It is evident to me after reading the above paragraph, that the OUR recognized the need for InfoChannel's ISP licence to be granted since it was providing internet services prior to the effective date.

By letter dated March 24, 2000 the OUR wrote to InfoChannel's Attorneys advising the company that it had received a complaint from Cable and Wireless which suggested that it had been conducting telephone bypass operations contrary to the Telecommunications Act and was making an application pursuant to section 51 of the Act for disconnection or discontinuance of the services supplied to InfoChannel. These services were disconnected on the 31st March 2000. The effect was to prevent InfoChannel providing VOIP services to its

subscribers. As a result of the action taken by Cable and Wireless InfoChannel filed a suit against it for breach of its contractual obligations to supply service to InfoChannel.

The Minister subsequently advised InfoChannel by letter dated June 25, 2001 that an Internet Service Provider Licence had been granted to the Company. Under this licence InfoChannel was authorized to provide telecommunications services (excluding voice service) only in relation to Internet services. Voice service has been defined in the Act to mean:

- (a) the provision to or from any customer of a specified service comprising wholly or partly of real time or near real time audio communications, and for the purpose of this paragraph, the reference to real time communications is not limited to a circuit switched service;
- (b) a service determined by the Office to be a voice service within the provisions of section 52,

and includes services referred to as voice over the internet and voice over IP."

An International Voice Provider licence was also granted to InfoChannel on the 16th July, 2001. Pursuant to this licence InfoChannel was only authorized to resell to the public, international switched minutes obtained from Cable & Wireless.

The facts indicate therefore, that InfoChannel's VSAT licence issued under the RTC and its VOIP operations which it operated immediately before the appointed day and for which no licence was required, were directly affected by the September Agreement and section 13 of the Act which makes provision for the grant of an internet service provider licence.

It was obvious that in order for InfoChannel to provide VOIP services it would have to use the services provided by Cable and Wireless. To compound the problem, Cable & Wireless refused to provide this service to InfoChannel on the ground that it had applied to and was granted by the OUR an Order whereby it can refuse to provide the service.

On the basis of the facts presented, I find therefore that InfoChannel was hindered from carrying on its telecommunications services including the offer of VOIP.

The burden of proof

On the question of the burden of proof and on whom it lies both Dr. Barnett and Mrs. Benka-Coker Q.C submitted that once an infringement was established the onus falls on those who seek to justify it to show that it is reasonably required for a legitimate purpose. Dr. Barnett had relied upon the cases of **Cable and Wireless (Dominica) Ltd v Marpin Telecoms and Broadcasting Co. Ltd** 57 WIR 141 and **Benjamin and Others v Minister of Information and Broadcasting and Another** 58 WIR 171.

The Solicitor General submitted on the other hand, that because of the presumption of constitutionality, the burden of proof remained on the Applicants (who are the parties attacking the statutory provision). He referred to **A-G of Antigua and Minister of Home Affairs v Antigua Times** [1976] AC 16 (a decision of the Privy Council) where Lord Fraser, observed that in considering whether a measure was reasonably required:

"...the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required."

He also relied on the case of **Hinds v R** (1975) 24 WIR 326.

It is my considered view, that once it is shown that the restriction is reasonably required the burden will shift on the challenger to establish that the restriction is not reasonably required. (See Marpin's case)

I now turn to the constitutional issues.

The right to Property

The applicants contend that they have been deprived of the enjoyment of their rights of property enshrined in section 18 of the Constitution which provides as follows:

"18(1) - No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired..."

Accordingly, Dr. Barnett submitted that the combined effects of the Telecommunications Act and the actions of the OUR and the Minister have resulted in the compulsory acquisition of the proprietary rights of the first Applicant in respect of its contracts with its subscribers without satisfying the requirements of paragraphs (a) and (b) of Section 18 (1) of the Constitution. Additionally it had affected the first Applicant's enjoyment of those contractual rights which are choses-in-action and therefore proprietary rights of economic value. He referred to and relied upon the case of **GRAPE BAY v A. G. OF BERMUDA**[2000] 1 W.L.R. 574)

Ms. Benka Coker Q.C submitted that the Applicant Beckford was deprived of his enjoyment to property when his contractual obligations with InfoChannel were abrogated by the Telecommunications Act in so far as he enjoyed the services of VOIP. She further submitted that the proper interpretation of section 18 of the Constitution is that it was not limited to compulsory acquisition but extended to property deprived by an act of Government. She referred to the case of **Societe United Docks** [1985] 1 AC 585 and argued that the provisions of the Telecommunications Act prevented InfoChannel from continuing to provide VOIP services and thus prevented Beckford (a subscriber) from using those services thereby depriving InfoChannel of the goodwill of business and Beckford being deprived of his contractual chose-in-action to be able to enjoy those services. In the circumstances she submitted that the Applicants were deprived of property within the meaning of section 18 of the Constitution. She further submitted that owing to the contract between Cable and Wireless and the Minister, the benefits of InfoChannel's contractual rights have been taken control of and InfoChannel's rights to enjoyment of these rights have been arbitrarily suspended for three years leaving only Cable and Wireless with the capacity to exercise those rights.

In response to the Applicants' submissions the Solicitor General submitted that it was for the Applicants to prove that the right which they allege exists was compulsorily taken or acquired by the government through the use of legislative provisions. He argued that it was curious that the Applicants sought to rely on the Grape Bay decision since the Applicant in that case did not rely on the provision relating to compulsory acquisition. He said this was obvious because there was no taking of possession or acquisition of property. Instead the Applicant relied on the provision which dealt with deprivation of property without compensation. Notably, there was no equivalent provision in the Jamaican Constitution.

He submitted that acquisition and deprivation were two separate and distinct concepts and in examining the case law this difference must be borne in mind. This distinction was recognised in the decision of the South African Constitutional Court in **Harksen v Lane NO and Others** where Mr. Justice Goldstone stated that:

"[33] The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law,"

The Government of Malaysia v Selangor Pilot Association, [1978] AC 337 was also relied upon by the Solicitor General. In that case Viscount Dilhorne noted that great care is usually taken in drafting constitutions, and went further to juxtapose deprivation and compulsory acquisition in this way:

"...a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision which leads to deprivation also leads to compulsory acquisition or use."

In concluding his arguments on this issue the Solicitor General submitted that there was clear authority that deprivation and compulsory acquisition were two different concepts. With this in mind, he argued that the correct approach must be to ignore cases which relate to deprivation since this concept forms no part of our Constitution. In the instant case the Applicants had alleged a deprivation, and not an acquisition. They were not contending that the Minister now has any property which they had. However, if the Court was of the view that the concepts of acquisition and deprivation may be used synonymously in the Jamaican context, it was his submission that this would not assist the Applicants since section 18(3) of our Constitution provides that -

"(3) Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for ...the reasonable restriction of the use of any property in the interests of safeguarding the interests of others or the protection of tenants, licensees or others having rights in or over such property. "

He further argued that the case law confirmed that restrictions on property use by regulatory laws did not necessitate the payment of compensation. In the Grape Bay case itself Lord Hoffmann had observed:

"It is well settled that restrictions on the use of property imposed in the public interest by regulatory laws do not constitute a deprivation of that property for which compensation should be paid... The give-and-take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest. The principles which underlie the right of the individual not to be deprived of his property without compensation are, first, that some public interest is necessary to justify the taking of private property for the benefit of the State and, secondly, that when the public interest does so require, the loss should not fall upon the individual whose property has been taken but should be borne by the public as a whole. But these principles do not require the payment of compensation to anyone whose private rights are restricted by legislation of general application which is enacted for the public benefit. This is so even if, as will inevitably be the case, the legislation in general terms affects some people more than others."

Accordingly, the Solicitor General submitted that the Applicants must prove that some property has been taken by the Minister. The property which Infochannel alleges was taken was its goodwill. He said that Stanley Beckford had alleged that the property lost was his contractual right to use VOIP as part of services provided to him by Infochannel but on no view of the Applicants' case could it be said that the Minister was now enjoying that property. In the circumstances he submitted that the claim on this ground was clearly without merit.

Having considered the submissions I do believe that there is merit in the submissions of the learned Solicitor General on this issue. I hold that the applicants must prove that some property has been taken by the Minister in order to satisfy the provisions of section 18(1) of the Constitution.

The right to protection of the law

Section 20 of the Constitution makes provision for the right to "protection of law". The Applicants base their claim specifically on sections 20(2) and (3) which state:

"(2) Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.

(3) All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or other authority, shall be held in public."

Dr. Barnett submitted in the circumstances that the Minister could not adjudicate as an impartial person in the grant of licences. He further submitted that InfoChannel has been deprived of its right to protection of law or due process in that both the OUR and the Minister have approached its application for a service provider licence on the basis that it has no right to contend that Cable & Wireless has no exclusivity or legitimate claim to prevent the Applicant's Voice Over Internet Services and have therefore failed to give to the Applicant an independent and impartial hearing. Further, the Minister has by the Agreement made with Cable & Wireless ceased to be an impartial arbiter in the determination of the relevant issues affecting the Applicant's civil rights and obligations.

With regards to this issue, the Solicitor General submitted that reliance on section 20 was entirely misconceived since neither the Act nor the Minister had attempted in any way to deprive the Applicants of their rights under this provision. Indeed, he argued that the present proceedings showed that the Applicants continue to enjoy the full "protection of law" guaranteed by the Constitution.

I agree with the submissions of the Solicitor General and hold that there was no breach under the Constitution with respect to the above provisions.

The right to fair treatment

Dr. Barnett submitted that the Minister and the OUR being both public authorities have contravened the first Applicant's right to fair treatment in the exercise of their functions in contravention of section 5 of the Fundamental Rights (Additional Provisions) (Interim) Act.

Mrs. Benka Coker Q.C submitted that Beckford's rights were essentially affected by the actions of the Minister and the OUR since he was not afforded a forum by either party in which he could have demonstrated to the authorities the adverse way in which he could be affected by their actions and to alert them to the possibility of a contravention of his fundamental rights.

The Solicitor General submitted however, that this ground was even weaker than the others because, unless the Applicants had some pre-existing right that the rest of the public did not have, they would have had no unique entitlement to be consulted or for their approval to be obtained before the Minister and Parliament did what they considered to be in the public interest.

I also find that there is merit in the submissions of the Solicitor General.

The freedom of expression

Section 22(1) of the Constitution provides:

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

It is readily seen that the major elements of the right are (a) no person shall be hindered (b) in the enjoyment (c) of his freedom of expression which includes (i) the freedom to hold opinions, (ii) freedom to receive and impart ideas and information without interference and (iii) freedom from interference with his correspondence and other means of communication. Subsection (2) however allows this right to be restricted and it provides as follows:

22(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in questions makes provision -

(a) which is reasonably required -

- i. *in the interest of defence, public safety, public order, public morality or public health; or*
 - ii. *for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or*
- (b) *which imposes restrictions upon public offenders, police officers or upon members of a defence force.*

The Respondents have relied upon section 22(2) (c) (ii) so the issue for consideration is whether in all the circumstances of the case, the restrictions during the phased liberalization are reasonably required to:

- (a) Regulate telephony or other means of communication or
- (b) Protect the rights and freedoms of others.

The importance of freedom of expression

It was stated in **Re Munhumeso** [1994] 1 LRC 282 at 288 that:

“[t]he importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be underestimated. They lie at the foundation of a democratic society and are “one of the basic conditions for its progress and for the development of every man”....”

In **Retrofit v Posts & Telecommunications Corp** [1996] 4. L.R.C.498 Gubbay C.J explained that the decision in Munhumeso has four broad special purposes to service. They are: (a) it helps an individual to obtain self-fulfilment; (b) it assists in the discovery of truth; (c) it strengthens the capacity of an individual to participate in decision making and (d) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

It was also stated in **Woods v Minister of Justice, Legal and Parliamentary Affairs** [1994] 1 LRC 282 that:

'freedom of expression is 'one always to be jealously guarded by the courts'.

Interference with the means of expression

Now, section 22(1) of the Constitution enjoins not only that persons be free to express themselves, but also that they are not hindered in the means of their expression. As Gubbay C.J said in Retrofit (supra):

"This is manifest in the freedom to receive and impart ideas and information without interference.."

What were the facts of that case? Retrofit was a company (the Applicant), which desired to provide a cellular telephone service in Zimbabwe. The Respondent was the Posts and Telecommunications Corporation, a body established by statute to provide telecommunication services, regulate radio stations and establish radio stations in Zimbabwe. Section 26(1) of the Postal and Telecommunication Services Act conferred on the Respondent the exclusive right to establish, maintain and operate telephone systems within Zimbabwe. The Applicant had requested the Respondent to issue it with a licence to establish and operate a cellular telephone service. The Respondent declined such request on the ground that section 26 gave it a monopoly to provide such a service, and that accordingly the Respondent was unable in law to grant the Applicant such a licence. The Applicant sought an order declaring that section 26(1) of the Postal and Telecommunication Services Act was inconsistent with section 20(1) of the Constitution of Zimbabwe. The Applicant also sought an order directing the Respondent to issue it with a licence to operate such a telephone service in Zimbabwe.

The Court held inter alia:

- 1) That Section 20(1) of the Constitution enjoined not only that persons be free to express themselves but that they be not hindered in their means of doing so.
- 2) That the protection of freedom of expression applies not only to the content of information but also to the means of transmission and reception of such information.
- 3) That a restriction imposed on the means of transmission or reception necessarily interferes with the right to receive and impart information.

The case is therefore authority for the proposition that any provision in law which has the effect, whatever its purpose, of hindering the right to receive and impart ideas and information, therefore violates the protection of this paramount right.

In **Autronic AG v Switzerland** (1990) 12 EHRR 485 at 499 (para 47) the European Court on Human Rights decided that a similarly worded protection of freedom of expression in article 10(1) of the European Convention applies:

"... not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information."

Indeed, it was stated by Lord Cooke of Thorndon who delivered the advice of the Board in **Cable and Wireless (Dominica) Ltd v Marpin Telecoms and Broadcasting Co Ltd** 57 WIR 141 that:

"...some significant hindrance to a would-be competitor's freedom is normally inherent in any requirement that he provides to his customers certain services only if permitted and on terms laid down by a monopolist".

His Lordship referred to the Retrofit case (supra) and stated:

"...their lordships would adopt the following proposition in his judgment (1995 (2) ZLR (S) at 216):

'These cases, and there are others, underline the principle that restriction upon or interference with the means of communication, whatever form it may take, abridges the guarantee of freedom of expression. A fortiori, any monopoly which has the effect, whatever its purpose, of hindering the right to receive and impart ideas and information, violates the protection of this paramount right.'

In Retrofit Gubbay C.J also stated at page 306:

"It was mentioned recently in **Nyambirai v National Social Security** [1996] 1 LRC 64...that the court will look to three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right, (ii) the measures designed to meet the legislative objective are rationally connected to it and are not arbitrary, unfair or based on unreasonable considerations, (iii) the means used impair the right or freedom no more than is necessary to accomplish the objective."

The submissions

The Solicitor General submitted that the Telecommunications Act 2000 is reasonably required to regulate telecommunications and that it allows Parliament to choose the most appropriate regulatory framework for Jamaica, having regard to the public interest. He further submitted that the phased introduction of competition, provided for by the Act falls squarely within the aim of protecting the *"rights and freedoms of other persons"* and that the rights and persons fell into several categories, namely:

"(a) First, the rights of other internet service providers (more than 40 have so far benefited) to provide internet services using their own VSAT. Without the legislation and Agreement and while the litigation with Cable & Wireless was proceeding, only Cable and Wireless and Infochannel would have been able to do so.

(b) Second, Cable and Wireless' property rights which included their ability to use their property without exploitation or abuse by other persons, namely InfoChannel, were protected. Otherwise, InfoChannel could continue to provide services which they had no right to provide.

(c) Thirdly and most importantly, the rights of thousands of persons across Jamaica to access telecommunications in the exercise of their rights to freedom of expression. This right was protected through the Agreement between Cable & Wireless and the Minister which brought an end to a 25-year licence, provided for the installation of over 300,000 new lines within a 3 year period and Internet terminals at post offices for public internet access and allowed the grant of multiple cellular licences".

He therefore submitted that the proper approach was for this Court to start with the presumption that the circumstances existing in Jamaica are such that a delay in permitting the Applicants and others to utilize VOIP is reasonably required for the purpose of protecting the rights and freedoms of other persons and/or the regulation of means of communication. He also submitted that the Applicants had not rebutted this presumption. They had failed he said, to show that no reasonable Member of Parliament who understood correctly the meaning of the Constitution could have supposed that a delay in the sanction to utilize VOIP is reasonably required for the purpose of protecting the rights and freedoms of other persons and/or the regulation of means of communication. Accordingly, the failure to establish this was fatal to the Applicants' claim under section 22 of the Constitution.

The Solicitor General had also submitted that what Infochannel and Beckford were claiming was in fact a right to express themselves in a cheaper or more profitable way, by using Cable & Wireless' facilities. He referred to and relied upon the case of **Re New Brunswick Broadcasting Co. Ltd. and Canadian Radio - Television & Telecommunications Commission** (1985) 13 DLR 77 a decision of the Federal Court of Appeal of Canada. Thurlow CJ observed at page 88:

"In my opinion, the argument confuses the freedom guaranteed by the Charter with a right to the use of property and is not sustainable. The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It gives no right to anyone to use someone else's land or platform to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter and use a public building for such purposes. And it gives no right to anyone to use the radio frequencies which, before the enactment of the Charter, had been declared by Parliament to be and had become public property and subject to the licensing and other provisions of the Broadcasting Act. The appellant's freedom to broadcast what it wishes to communicate would not be denied by the refusal of a licence to operate a broadcasting undertaking. It would have the same freedom as anyone else to air its information by purchasing time on a licensed station. Nor does the Charter confer on the rest of the public a right to a broadcasting service to be provided by the appellant."

Mr. Manning submitted that it was Parliament's right to set policy and to determine the direction legislation would go. Accordingly, he submitted that the purpose and aims expressed by section 3 of the Telecommunications Act showed that Parliament considered that the provisions of the Act were required to regulate the industry and protect the interest of the public.

Dr. Barnett submitted on the other hand, that interference or hindrance has to be justified on the basis that it was reasonably required in the interest of one of the constitutionally prescribed objectives. He submitted that there was no basis for the Minister implementing section 22(2) of the Constitution. He argued that the real defect of the Act was that it had postponed the rights of the first applicant for three (3) years and it was necessary for the Court to declare that it was not acceptable for the Minister to declare that a deprivation of the applicant's constitutional rights for a period of three years is reasonably required to regulate telephony. Furthermore, he argued that the current position taken by the Minister in his affidavit was inconsistent with the policy he extolled of free competition. It was his view that freedom could not be legitimately postponed and that the least obtrusive method ought to be adopted so as to limit any infringement of the applicant's fundamental rights.

It was also clear he said, that the exclusivity claimed by Cable & Wireless, conceded by the Minister and enforced by the OUR had the effect of whatever the objective, of violating the protection of this fundamental right. There were two factors which he said ought to be taken into consideration. Firstly, the Government could not say that it has a common interest with Cable and Wireless having regards to the Minister's statement of policy as to fair competition. Secondly, there was no question of the protection and rights of other persons being the dominant purpose of the Minister's promotion of the Act or his exclusion of the first applicant from VOIP.

He also submitted that when the tests that are clearly stated in Nyambrai are applied, the legitimate objective was clearly to liberalize telecommunication, and to introduce free competition for the benefit of the Jamaican people. He argued that there was nothing in the cases which support a proposition that you can barter the rights of citizens generally to settle the claim of one person or to avoid litigation.

He further submitted that when one comes to the second test (the rationality of the measures) the two reasons given for the exclusion of the applicants from their enjoyment of their fundamental rights for a period of three years was that this would be orderly but the Minister had not shown that by one year or six months or no period of delay would not serve effectively the legislative objective of introducing liberalization. Furthermore, he argued that under the interim agreement the first applicant was granted and was using VOIP service, and there was nothing to show why it could not carry on the service. He also said that the Minister was advised that he had a fair chance of success so why did he settle? He submitted that in the balancing exercise of the constitutional freedoms of the citizen as against the claim of the litigant, the Minister had no reasonable justification for sacrificing the constitutional rights to placate the claims of Cable and Wireless. He submitted that the argument that litigation would have prevented implementation of liberalization is unsound because there would be nothing to prevent the introduction by legislation without the questionable provision. Furthermore, there was no application for an injunction against the Minister.

Finally, he submitted that the evidence did not measure up to the standard required. It was not shown that the deprivation of the right for three years or interference with rights for that period was the least obtrusive method of interfering with the rights of the applicants. It had not been shown that the measures adopted were reasonably required to attain the legitimate objective of the policy of liberalization and competition and what was done was inconsistent with that policy when at the same time infringing the fundamental rights of Jamaican citizens.

With respect to the New Brunswick case (*supra*) Dr. Barnett submitted that it was no authority for the interpretation of the Jamaica Constitution. On the facts the objective of the restriction was liberalization and competition rather than a restriction on monopoly. He said, what the applicant wanted in that case was the unrestricted right to use the radio frequencies which were always subjected to regulation. In the instant case, the Minister had taken the position that the legislative provision should restrict the right of all persons other than Cable & Wireless to use a particular medium of communication.

Mrs. Benka Coker Q.C submitted that Beckford's evidence amply demonstrated to the Court his need for access to the knowledge and information provided by the Internet owing to his business activities and his personal use. She also argued that Beckford was now forced to

use the services provided by Cable and Wireless and since Cable and Wireless did not provide VOIP services, the applicant has been deprived of its use. She submitted that the substance of Beckford's case is that his fundamental rights were breached when the expressed provisions of the Telecommunications Act effectively prevented InfoChannel, his ISP, to use the VSAT technology to provide a more efficient form of telecommunications service and to provide service of VOIP that is no longer provided by any ISP. She also submitted that the burden was on the Minister to show that there was a pressing need to utilize one of the permissive circumstances under section 22 of the Constitution of Jamaica.

The margin of appreciation

It is recognized that due regard should be given to parliament's power to make laws for the peace order and good government of the country. I also bear in mind what Gubbay C.J has stated in **Nyambirai v National Social Security Authority** [1996] 1 LRC 64:

"...In implementing social and economic policies a government's assessment as to whether a particular service or programme it intends to establish will promote the interest of the public, is to be respected by the courts. They will not intrude but will allow a wide margin of appreciation unless convinced that the assessment is manifestly without reasonable foundation" (emphasis supplied)

It was also observed in **Buckley v UK** ((1996) 23 EHRR 101 at 129 (para 75)):

"... the national authorities in principle enjoy a wide margin of appreciation", although it remains open to the court to conclude that there has been a manifest error of appreciation by the national authorities. In these circumstances, the procedural safeguards available to the individual applicant will be especially material in determining whether the respondent state has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, it must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual ..."

What is meant by the term a "margin of appreciation"? This means the degree of discretion allowed to the Court when interpreting the laws passed by Parliament having regards to local needs and conditions. This concept is aimed to serve as a balance between individual

and public interests. However, the exercise of a margin of appreciation remains under the supervision of the Courts and further stays deeply interconnected with the requirement of proportionality. The measures taken should at all times only be to the extent required by the exigencies of the situation.

The role of the court

It must be accepted that in democratic societies the court has a constitutional role and duty to ensure that the fundamental rights of the individual are protected

It seems to me after considering the submissions that the objective of Government was to liberalize telecommunication by introducing free competition for the benefit of the Jamaican people. The issue for determination then is whether it was reasonably justified for a postponement of three (3) years before full liberalization becomes effective.

How does the affidavit evidence deal with the stated objectives?

In an affidavit sworn to on the 18th day of June 2002, the Minister stated that in considering the development of Government's policy he was of the view that in order to attain the stated objectives it would be best accomplished through the introduction of regulated competition into the telecommunications sector, while at the same time having due regard to the rights of currently-licensed telecommunications providers in the Country. He figured that the implementation of this new policy of regulated competition would be through a phased transition plan, whereby competition would be introduced into the telecommunications sector in three phases commencing with the issuing of certain types of licences, with full competition beginning three years after the commencement of the first phase. He further stated that on examining the legislation which was in existence until early 2000, he formed the view that they did not provide the legislative framework by which he could have achieved these objectives. The laws in place were the Radio and Telegraph Control Act and the Telephone Act. The former regulated the establishment, maintenance and use of any radio or telegraph station or apparatus. The latter was confined to wire communications for voice transmission and according to him it did not extend to wireless or satellite communications, such as VSAT, data or images.

These statements should be compared however, with the earlier policy statements he made on behalf of Government in 1999. The statements he made in 1999 came about at a time

when the Judicial Review proceedings were instituted. At that time the Minister said he was quite aware of the revolution that was taking place in telecommunications and as a result of this trend the Government of Jamaica had introduced and laid in Parliament its telecommunications policy. He stated that the theme of that document was that Government was bent on introducing competition in the telecommunications arena consistent with global trends and to enhance the economic development and growth in Jamaica. The Government he said, felt that particularly in areas such as wireless and value added services which included VSAT's, the development of technology and the extensive opportunities for communication and the transmission, receipt and access to information would be of tremendous benefit to the Jamaican economy and the economic, social and cultural development of the people. He was positive that the technology would enable the populace to participate in a meaningful way in the telecommunications revolution that was taking place globally.

He had also recognized that the VSAT could be used as the vehicle for either voice or high grade data communications or both since he had been advised by his Consultants of its capabilities in transmitting voice. Furthermore, he had stated that it was consistent with Government's objective of promoting competition in the telecommunications arena why he had decided to issue the VSAT licences. In addition, he deposed that the range of telecommunications services could be made available at a reasonable cost.

In March of 1999 he had admitted that the telecommunication services in Jamaica were provided solely by Cable & Wireless and notwithstanding their efforts he was very concerned at the pace at which it was going. There was a waiting list for telephones which had grown rapidly and he was of the view that access of all sectors of the population and the country to the global network should be made available in the shortest possible time. For this reason he felt that cellular and wireless telephony would reach to a wide cross section of the population within the shortest possible time (emphasis supplied).

The Solicitor General had expressed the view that there was consistency on the part of the Minister regarding the achievement of the desired objectives. I do not share that view. I agree with Dr. Barnett that there has been inconsistency on the part of the Minister in stating Government's policy with regards to the liberalization of the telecommunications industry.

The Solicitor General had also argued that the rights of thousands of persons across Jamaica to access telecommunications in the exercise of their rights to freedom of expression was protected through the Agreement between Cable & Wireless and the Minister which: (a) brought an end to a 25-year licence, (b) provided for the installation of over 300,000 new lines within a 3 year period, (c) provided for the installation of Internet terminals at post offices for public internet access and (d) allowed the grant of multiple cellular licences.

I do believe however, despite the reduction in the number of years of Cable & Wireless' licence, that a continued monopoly for even three years is not justifiable having regards to the Minister's policy statements. The dicta of Kaufman C.J in **Berkey Photo Inc v Eastman Kodak Co.** (1979) 603 is quite apt where he had condemned the use of monopoly and stated:

"Because, like all power, it is laden with the possibility of abuse; because it encourages sloth rather than the active quest for excellence; and because it tends to damage the very fabric of our economy and our society, monopoly power is inherently evil".

It is beyond any question also that the grant of multiple cellular licences is a worthy objective but this does not mean that the increase of cellular service justifies the continuation of the monopoly. It is my considered view that without the monopoly Cable & Wireless would remain free to implement the increase in the number of telephone lines and other services to the public. In fact, the existence of competitors may be a strong inducement for it to do so with increased expedition.

I do agree with Dr. Barnett that the Minister had no reasonable justification for sacrificing the rights of the Applicants and many other Jamaicans to placate the claims of Cable and Wireless. He really should have allowed the Judicial Review proceedings to be finalized in order to see whether or not Cable and Wireless had an exclusive licence under the provisions of the RTC. The principles enunciated in the Marpin case are worthwhile repeating here. They are as follows:

1. Where the general effect of the legislation and the licence confers on one person a monopoly in telephonic and/or other telecommunication services that monopoly is an

infringement of the freedom of expression and the right to communicate information guaranteed by the Constitution.

2. Where such monopoly is granted so that a "would be competitor's" freedom is hindered by a requirement that he can only provide such services to his customers through the monopoly's this constitute a significant hindrance with the enjoyment of the freedom.
3. Since freedom of expression includes freedom of communication and freedom of communication is not limited to the information or ideas which a person wishes to convey, the hindrance of that freedom by the prohibition of an element of the means of communication interferes with the freedom of expression of the service provider as well as the persons wishing to use his service.

For the reasons stated above, I am satisfied that a postponement of the rights of the Applicants for a period of three years before full liberalization of the telecommunications industry takes place was not the least drastic means available to the first Respondent for the achievement of the stated objectives. In my view, the argument is quite sound that you cannot barter the rights of citizens generally in order to settle the claim of one person or to avoid litigation. It is my considered view therefore, that the Applicants have succeeded in showing that it should not be accepted that the restriction placed upon the first applicant's Internet service provider licence pursuant to the Telecommunications Act 2000 is reasonably required to regulate telephony or other means of communication and/or to protect the rights and freedoms of others.

Accordingly, I find that:

There has been a breach of the Applicants' enjoyment of their freedom of expression and the constitutional guarantee of their freedom from interference with their means of communication.

Conclusion

I conclude therefore that the first Applicant is entitled to the following declarations and relief:

- (a) The failure and/or refusal of the Minister of Industry Commerce & Technology and/or the Office of Utilities Regulation to grant to the first Applicant a licence to continue to provide the telecommunications services including Voice Over Internet

(VOIP) service which it provided to its subscribers and users of the service and the public at large before the passage of the Telecommunications Act 2000 and which now require licence under the said Act is unconstitutional and is in breach of the Applicant's constitutional rights of freedom of expression guaranteed by Section 22 of the Constitution.

(b) The telecommunications services carried on by the first Applicant prior to the passage of the Telecommunications Act 2000 are protected by Section 22 of the Constitution of Jamaica.

(c) The exclusive licence granted to the existing telecommunications carrier by the provisions of the Telecommunications Act 2000 which make unlawful the provision of Voice Over Internet Service by the Applicant contravenes the first Applicant's fundamental right to freedom of expression granted by Section 22 of the Constitution.

(d) Damages to be assessed for contravention of the first Applicant's constitutional rights aforesaid.

(e) Costs.

The second Applicant is also entitled to the following declarations and relief:

(a) The failure and/or refusal of the Minister of Industry Commerce and Technology and/or the Office of Utilities Regulations to grant to InfoChannel Limited a telecommunications licence to continue to provide the telecommunications services, including Voice Over Internet (VOIP) service, which it provided to its subscribers including the second Applicant and other users of the service and the public at large before the passage of the Telecommunications Act, 2000 and which now require licence under the said Act is unconstitutional and is in breach of the Applicant's constitutional rights of freedom of expression guaranteed by section 22 of the Constitution.

(b) The telecommunications services carried on by InfoChannel Limited and provided to the second Applicant prior to the passage of the Telecommunications Act, 2000 are protected by section 22 of the Constitution of Jamaica;

(c) The exclusive licence granted to the existing telecommunications carrier pursuant to the provisions of the Telecommunications Act, 2000 which makes unlawful the provision of Voice Over Internet Service to the second Applicant by InfoChannel Limited contravenes the second Applicant's fundamental right to freedom of expression granted by section 22 of the Constitution.

(d) Damages for contravention of the Applicant's constitutional rights aforesaid.

(e) Costs.

N.E. MCINTOSH, J.

I have had the benefit of reading the judgment of my brother Harrison, J, in draft and am in agreement with his reasons and have nothing else to add.

REID, J.

ORDER

The first Applicant is entitled to the following declarations and relief:

- (a) The failure and/or refusal of the Minister of Industry Commerce and Technology and/or the Office of Utilities Regulation to grant to the first Applicant a licence to continue to provide the telecommunications services including Voice Over Internet (VOIF) service which it provided to its subscribers and users of the service and the public at large before the passage of the Telecommunications Act 2000 and which now require licence under the said Act is unconstitutional and is in breach of the Applicant's constitutional rights of freedom of expression guaranteed by Section 22 of the Constitution.
- (b) The telecommunications services carried on by the first Applicant prior to the passage of the Telecommunications Act 2000 are protected by Section 22 of the Constitution of Jamaica.
- (c) The exclusive licence granted to the existing telecommunications carrier by the provisions of the Telecommunications Act 2000 which make unlaw-

ful the provision of Voice Over Internet Service by the Applicant contravenes the first Applicant's fundamental right to freedom of expression granted by Section 22 of the Constitution.

(d) Damages to be assessed for contravention of the first Applicant's constitutional rights aforesaid.

(e) Costs.

The second Applicant is also entitled to the following declarations and relief:

(a) The failure and/or refusal of the Minister of Industry Commerce and Technology and/or the Office of Utilities Regulations to grant to InfoChannel Limited a telecommunications licence to continue to provide the telecommunications services, including Voice Over Internet (VOIP) service, which it provided to its subscribers including the second Applicant and other users of the service and the public at large before the passage of the Telecommunications Act, 2000 and which now require licence under the said Act is unconstitutional and is in breach of the Applicant's constitutional rights of freedom of expression guaranteed by Section 22 of the Constitution.

(b) The telecommunications services carried on by InfoChannel Limited and provided to the second Applicant prior to the passage of the Telecommunications Act, 2000 are protected by Section 22 of the

Constitution of Jamaica;

(c) The exclusive licence granted to the existing telecommunications carrier pursuant to the provisions of the Telecommunications Act, 2000 which makes unlawful the provision of Voice Over Internet Service to the second Applicant by InfoChannel Limited contravenes the second Applicant's fundamental right to freedom of expression granted by section 22 of the Constitution.

(d) Damages for contravention of the Applicant's Constitutional rights aforesaid.

(e) Costs.