ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 OF 1998

BETWEEN:

[1] THE HONOURABLE MINISTER OF INFORMATION AND BROADCASTING
[2] THE HONOURABLE ATTORNEY-GENERAL OF ANGUILLA

Appellants/Respondents

and

[1] JOHN BENJAMIN
[2] MILDRED VANTERPOOL
[3] SIDNEY GUMBS

Respondents/Applicants

Before:

The Hon. Mr. Satrohan Singh — Justice of Appeal
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Albert Matthew — Justice of Appeal [Ag.]

Appearances:

Mr. Rex McKay S.C. for the Appellant
Mr. Ronald Scipio, Attorney-General, and Mr. Stanley Reid with him
Miss Bernice V. Lake Q.C. for the first-named Respondent
Miss Joyce Kentish and Mr. Elson Gaskin with her
Mr. Hugh Rawlins for Nos. 2 and 3 Respondents

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1998: May 21, 22;
June 15.

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JUDGMENT

ALBERT REDHEAD J.A.

The first named Appellant is the political head of broadcasting in the Anguilla administration. Radio Anguilla is owned by the Government of Anguilla. There are no regulations or guidelines which govern its operation. There is no policy making board. It is administered on a day to day basis as any other government department with Mr. Nathaniel Hodge,

at the material time, as Director of Information and Broadcasting as the administrative head.

Mr. John Benjamin, the first named Respondent is a legal practitioner qualified to practice in 1981. He is also by his training a Community Worker having obtained a certificate in Youth and Community Work issued by Birmingham University in 1990.

The learned trial judge said of him that Mr. John Benjamin was very active in the Social, cultural and Sporting life of Anguilla Community. In 1988, he had produced a radio programme called “Legal Briefs” which was aired on Radio Anguilla for three and a half years.

Sometime in 1994 Mr. Hodge thought of the idea of establishing a radio “call-in” programme and he was of the view that Mr. John Benjamin would be a suitable host for such a programme. As a consequence, Mr. Hodge approached Mr. Benjamin who readily agreed to host the programme free of charge. Both men discussed the programme. They both agreed that it should be enlightening and educational. Mr. Hodge would take responsibility for the timing and duration of the programme. Mr. Benjamin would secure Sponsorship and undertake the production of the programme. Mr. Benjamin would select the topics to be discussed and guests who would appear on the programme. In order to have explicit government endorsement for the programme he was about to launch, he arranged a meeting with the ministers of government. Mr. Benjamin discussed with the ministers his idea of the programme which was to be called “Talk your mind”. It would also fulfil an electoral promise of open government made by Anguilla Democratic Party [ADM] of which Mr. Benjamin was the election campaign manager and its chairman. This party the ADM together with the Anguilla United Party [AUP] forms the present administration.

The programme would provide an opportunity for people to raise topical issues and to express their views openly. It was intended to stimulate creative ideas.

The minister of government had also told Mr. John Benjamin that at Executive Council they had collectively made a commitment to uphold the freedom of the press and of expression.

Mr. Benjamin secured sponsorship for the programme from a company owned by the Leader of the Opposition, the inaugural programme, "Talk Your Mind" was first aired on 19th October, l994.

The programme was aired on Wednesday evenings for one hour, between the hours of 9.00 pm and 10.00 pm, with a discretion by the Director of Broadcasting to extend the duration of any programme depending on the interest shown in that programme.

Anyone could call into the programme and was not required to identify himself. Callers were able to express their views on the topic of day with openness and frankness. Slanderous remarks, personal abuses or personal attacks were not tolerated by the host.

The learned trial judge at page 4 of his Judgment wrote:

> "The value of this radio programme cannot be appreciated unless one understands the context in which it operated. One newspaper is published in Anguilla. It is called The Light. There are two privately owned radio stations on the island. One of them is a religious station. Radio Anguilla is the only publicly owned electronic medium. At the time that it commenced, Talk Your Mind was the only inter active radio programme in Anguilla".

Sidney Gumbs, one of the Respondents, stated on Oath that Talk Your Mind enjoyed a wide listening audience in his community. On Wednesdays the villagers of his neighbourhood would remind each other of the forthcoming programme. They would often congregate to listen together and to discuss the programme as it unfolded. Mr. Gumbs called in regularly and was able to make his own contribution to the issues at hand.

For Mildred Vanterpool, the other Respondent, Talk Your Mind became a necessary part of life in Anguilla. It knitted together the community. She too was a regular listener and caller. As she went about her daily chores she would note topics and issues raised by her neighbours and undertake personally to inform Mr. Benjamin of these

subjects so that he could deal with them on air. As a result of calls made to the programme by her, corrective action was taken by the responsible authorities regarding such matters as garbage being deposited at the beaches; young men loitering at the comprehensive school; disaster preparedness; and the condition of some of the roads in the island.

It seems that as a result of continued criticism of the government by callers to the programme, in about July l996, the minister of Information suggested to Mr. Benjamin that the programme should be changed from a call-in programme to a panel discussion only. The minister also expressed the view that since the radio station was government station the programme should be slanted to promote the government of the day. Mr. Benjamin disagreed with the views expressed by the minister and pointed out to the minister these views were not in keeping with good journalism and his pre administration expression of opinion that the radio station should "be freed" up for open access and discussion.

Shortly, thereafter the minister directed that Talk Your Mind be discontinued. This direction was complied with and another programmes, On Line ostensibly a substitute was put in its place.

There was widespread disapproval and condemnation by the discontinuance of the programme. Ms. Vanterpool, the second-named Respondent approached the first-named appellant as well as the Minister of Finance. She explained to them the hardship which the community was experiencing. The first-named appellant promised the second-named appellant that he would have the programme resumed without further interference.

The Minister of Information also gave Mr. Benjamin a verbal assurance that he would not seek to interfere with the programme further and that it would be maintained in its original format.

The Minister also apologised in writing for remarks made by him about Mr. Benjamin in a radio interview on August 9, l996. In the letter of apology the Chief Minister referred to Mr. Benjamin as "my government foremost legal adviser" and that they would continue to rely heavily on his legal expertise.

In October the programme was reinstated with the format remained unchanged. The first guest on the programme was the Chief Minister who is also Minister of Information. The Minister commented that Talk Your Mind should have been on the air a long time ago and that it was not supposed to be off the air for such a long time.

Talk Your Mind of 16th July, l997 centered on a lottery that had been recently introduced in Anguilla, the operation of which had become very controversial. The church and the community were opposed to the lottery. On the programme of 16th July, l997 the operation of the lottery was criticized by callers to the programme, Talk Your Mind. Mr. Benjamin made comments in response to a caller's question about whether the lottery was legal or illegal. Mr. Benjamin gave as his view that the lottery was illegal.

Immediately thereafter a person called into the programme identifying himself as Todd Washington, Vice President of the Anguilla Lottery and Gaming Company. He refuted the view that the Lottery was being operated illegally. Lengthy discourse ensued between Mr. Washington and Mr. Benjamin who held his personal view that the Lottery was being operated illegally.

The following day Mr. Washington telephoned Mr. Hodge and complained that he had not had equal time to respond to the allegations made on the radio.

Shortly thereafter an American law firm sent by telefax a "formal notice" of the intention of the Anguilla Lottery Gaming Company Limited to sue Radio Anguilla and Mr. Benjamin, for defamation, malicious intent to injure and destroy the economic interests of the Company in Anguilla and for other serious tortious actions".

This letter was brought to the attention of the Minister of Information. Mr. Hodge was then instructed that as a result of the threat to sue Radio Anguilla the Ministers of Government had collectively agreed that Talk Your Mind should be suspended until further notice.

On 21st July, l997 after the announcement was made of the decision to suspend Talk your Mind Mr. Washington telephoned Mr. Hodge

informing him that in light of the decision taken by Government in suspending the programme he would no longer be instituting legal action against the radio station. This was confirmed by letter of even date.

Since the suspension of the programme, Mr. Benjamin spoke with Mr. Hodge on several occasions about the programme. Mr. Hodge was unable to give any indication that airing of the programme would be resumed.

As a result Mr. Benjamin, through his Solicitors, filed a motion on 17th September, l997 in which he sought the following declaratory reliefs and orders:

1. A Declaration that in the circumstances the suspension of the Radio Programme "Talk Your Mind" by the first-named Respondent on 19th July, l997, constitutes a contravention, active suppression and abridgement of the first-named Applicant's rights to freedom, of thought and expression as guaranteed by Sections 1, 10, 11 and enshrined by Sections 10, 11, and 16 of the Constitution of Anguilla in that:

   [a] It constitutes a refusal by the Respondent to allow further debate of the issue of the Lottery through the medium which has the widest and most effective broadcast dimension in Anguilla.

   [b] It constitutes in relation to the Applicants' access to the medium, which has the widest and most effective broadcast dimension for the debate on matters of community by concern.

2. A Declaration that under the prevailing circumstances in Anguilla, the continuation of the programme "Talk Your Mind" is a necessity and essential vehicle for the exercise of the Applicants' rights to freedom of thought and expression, and as a consequence the suspension of the same, by the first-named Respondent constitutes and infringement of the Applicants' respective rights to freedom of thought and

expression guaranteed and enshrined in the Constitution of Anguilla.

3. A Declaration that the first-named Applicant had a legitimate expectation that the programme which he conceptualized at his own costs and expense, together with the costs of the relevant Sponsors, would endure for the benefit of the Applicants and the community for so long as the social need required it.

4. A Declaration that as a consequence of the assurances given by the first-named Respondent by radio broadcast in September, l996 the Applicants have had a legitimate expectation that the said programme would continue to be used as a vehicle for the exercise of their rights to freedom of thought and expression and consequently the suspension of the programme is in the circumstances a wrongful breach and disappointment of that legitimate expectation.

5. A Declaration that the state so operates and controls public media radio station, Radio Anguilla, that the Applicants' access to the public broadcasts is governed by arbitrary decisions of the first-named Respondent, and the Applicants' rights to freedom of the press are being and are likely to be contravened.

6.[a] A Declaration that the decision of the Minister with respect to the Applicant's access to the relief and the freedom of expression of views on the Lottery as was stated in the newscast of 19th July, l997, constitutes a contravention of the rights of the Applicants to freedom of thought, freedom of expression to express political views and the freedom of expression in general.

7. An Order that the Respondents be required to formulate, publish,promolgate and make such rules and/or procedures as to this Honourable Court shall be appropriate for the purpose of ensuring and securing to the Applicants the

unfettered lawful exercise of the aforesaid rights and freedoms limited only by such provisions and may be reasonably required in a Democratic Society.

8. A Declaration that under the circumstances as aforesaid the proper administration of the radio station warrants that it be administered under and by a Broadcasting Board.

9. An Order that damages in respect of the infringements of the aforesaid rights be assessed and paid to the Applicants.

10. An Order that damages in respect of the damage and loss suffered by the first-named Applicant as a result of the aforesaid contravention and infringement of the rights of the said Applicant guaranteed under the Constitution of Anguilla and breach of the legitimate expectation held out to be assessed and paid by the Respondents.

11. Costs.

12. Such further or Other relief as the Court may deem just".

This notice of Motion was supported by an affidavit of the first-named Applicant containing 56 paragraphs.

The other Applicants, both Mildred Vanterpool and Sidney Gumbs, filed affidavits in support of the Notice of Motion.

The matter came on for hearing before Saunders J. beginning on 16th October, l997 and after a hearing which lasted for about six [6] days, he gave judgment on 7th January, l998 and declared and ordered as follows:

1. The decision by the First-named Respondent to suspend and the Suspension of the Radio Programme "Talk Your Mind" on 19th July, l997 constituted a contravention of the Applicants' rights to freedom of expression guaranteed and enshrined in the Constitution of Anguilla and protected by S.11 thereof. The said decision is therefore void and invalid and is hereby quashed.

2. The said Suspension constitutes in relation to the Applicants a denial of their access to the medium which has the widest

and most effective broadcast dimension for debate on matters of community concern.

3. He ordered that in relation to the First-named Applicant damages in respect of the infringement of his aforesaid right to be assessed by a Judge in Chambers and be paid to the First-named Applicant.
4. He ordered that costs to be taxed if not agreed, be paid to the Applicants. Such costs and hereby certified fit for two Counsel in respect of the First and Second named Applicants respectively.

The Appellants have appealed to this court from these declarations and orders principally on the ground that the learned judge was wrong in law in making the various declarations and orders.

1. The learned trial judge was wrong in law in holding freedom of expression was at the heart of the case. By so holding the learned judge wrongly concluded that constitutionally law issues were the focal points of the case.

The learned judge ought to have held:

[a] That the First-named Respondent\Applicant being in effect a volunteer at most the holder of a mere privilege had no rights of his that could have been infringed;

[b] Alternatively the case only raised issues pertaining to administrative law at the centre of which was the decision by the First-named Appellant\Responent to suspend the radio programme "Talk Your Mind" and the manner in which he exercised his discretion;

2. The learned trial judge by holding that the decision of the First-named Appellant/Respondent to suspend the programme was an interference with the fundamental rights of the Respondents\Applicants in effect held that:

[a] the first-named Respondent\Applicant had a fundamental right to host the said programme;

[b] the second and third-named Respondents had a fundamental right to listen and express their views on the said programme.

It is beyond doubt, if I may encapsulate the claim of the three Respondents, is that their fundamental rights to freedom of expression by Sections 1, 10 and 11 [more particularly 1[b] and 11] of the Constitution of Anguilla have been contravened by the Administrative action of the Minister of Information and Broadcasting in ordering the Suspension of the programme.

The Respondents also claim to have a legitimate expectation that the programme would continue. Learned Counsel Mr. Mckay S.C invited this court to consider the case of the First-named Appellant, Mr. Benjamin separately from that of the other two Respondents.

I think it is prudent to accept that invitation because in my view the legitimate expectation which operated on the mind of the First-named Respondent is different from those that operated on the minds of the second and third-named Respondents. Whereas the first-named Respondent claims that he had a legitimate expectation that the programme which he conceptualized at his own costs and expense with the support of relevant Sponsors as a result of verbal assurance given to him by the first-named Appellant that the programme would endure for his benefit and that of the Community for as long as the social need required it, if not indefinitely.

The second and third-named Respondents claimed to have a legitimate expectation as a result of the assurances given by the First-named Appellant, the Minister of Information and Broadcasting, that the programme "Talk Your Mind" would continue to be used as a vehicle for the exercise of their rights to freedom of thought and expression.

Mr. Mckay S.C. argued that Mr. Benjamin has no fundamental right to be a moderator for the programme "Talk Your Mind" nor does he have a legitimate expectation to do so.

Learned senior Counsel argued that in agreeing to permit Mr. Benjamin to moderate the programme "Talk Your Mind" the Minister was

acting administratively, likewise when "Talk Your Mind" was suspended on each occasion the Minister was acting administratively.

Mr. Rawlins, Learned Counsel, agreed that the Minister was acting administratively but not legally. Mr. Rawlins argued that it was not a change of policy in relation to the programme.

I cannot comprehend that argument, not that it matters much, but to say that the Minister was acting administratively but that it was not a change of policy is beyond my comprehension when the stark reality of the situation is that four Ministers got together after there was a threat to sue the station and there was the directive from the first-named Appellant that the programme should be discontinued and to say that the Minister was acting administratively but it was not a change of policy, I cannot comprehend.

Mr. Mckay further argued that if his submission is accepted that Mr. Benjamin has no fundamental right to moderate the programme, "Talk Your Mind" and the Executive has not contravened his freedom of expression then it would have been open to him to seek redress by prerogative writs.

In my view I would, rather than say, "open to him" say the proper redress would be by prerogative writs. That is, if Mr. Mckay's submission is accepted.

In support of his submission, Mr. Mckay referred to Khemrajh Harrikission v. Attorney-General 1979 31 W.I.R.346 at 349.

Lord Diplock said:

> "In Originating Application to the High court under Section 6[1] , the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom" .

[See also Attorney-General v. McLeod 1984 32 W.I.R. 450 AT 458 Nankisoon Boodram (Dole Chesdee) v Attorney-General And Another 1994 47 W.I.R.]

Mr. Rawlins, Learned Counsel, argued that the Respondents are seeking redress under the Constitution because the constitutional remedies are more flexible that the old prerogative orders under which we operate and the fact that a litigant may be entitled to a prerogative relief, does not preclude constitutional redress if his or her constitutional right has been infringed.

The latter part of the argument I agree with but I do not agree that one can bring a constitutional motion simply because the constitution remedies are more flexible, unless there is a genuine infringement of a fundamental right guaranteed by the Constitution, the constitutional remedies are not available.

Miss Lake, Learned Queen's Counsel on the other hand argued that the First-named Respondent was not asserting a fundamental right to be moderator of the programme indefinitely as was argued by Mr. Mckay.

According to Miss Lake the rights which the Respondents assert are:

[1] The Fundamental Right to freedom of expression, to express and receive ideas for their human flourishings.

[2] A right of access to such Government-owned property as is [a] either by tradition or [b] by dedication amenable as a forum for the exercise of the fundamental right to freedom subject to such time place and manner restriction.

[3] That the Government on the facts had so dedicated the programme subject to time, place and manner restrictions. Upon that dedication the Respondents had the right of access and were entitled to exercise the right of access for the purpose of exercising their fundamental rights of freedom of expression.

[4] The Government having itself dedicated the Government-owned property in the circumstances of "Talk Your Mind"

> which circumstances are unchallenged, the right of access could only be curtailed in circumstances which are reasonably justifiable in a democratic society.

What is the case of the First-named Respondent? As I understand it, he is saying that his fundamental rights to freedom of expression and freedom of thought have been contravened and infringed by the action of the Minister of Information and Broadcasting when he gave instructions which were carried out to suspend the programme. In addition, the First-named Respondent is saying that he had a legitimate expectation in continuing the programme as long as he could find funding or sponsors for the programme and there was a social need for the programme. The first-named Respondent's case is that legitimate expectation was a consequence of the assurance given to him by the First-named Appellant, he is, seeking among other things that an order be made directing the Director of Broadcasting to restore the "Talk Your Mind" programme to the airways with the First-named Respondent as host.

Analytically the First-named Respondent is not making a claim in vacuouo that his fundamental rights have been infringed. He is saying specifically his freedom of expression and of thought has been infringed in relation to the programme that is he is not allowed to monitor the programme. Was there an infringement of the First-named Respondent's rights to freedom of expression and freedom of thought?

I turn now to Sections 1, 10 and 11 of the Anguilla Constitution which were allegedly abrogated by the first-named Appellant's action.

> Section 1 "whereas every person in Anguilla is entitled to the fundamental rights and freedoms of the individual, that is to say, the right "
> "Whatever his race, place of origin, political opinions, colour, creed or sex, but subject to the respect, therefor the rights and freedoms of others and for the public interest to each of the following:
> [a] –
> [b] freedom of conscience, of expression and of peaceful assembly and association – "
> Section 10 "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, including freedom of thought and religion, freedom to change his religion or belief and freedom, either alone or in community with others, and

> both in public and in private, to manifest and proprogate his religion or belief in worship, teaching, practice and observance".
>
> Section 11 "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 interferences and freedom from interference with his correspondence and other means of communication".

Mr. Mckay's argument, in a nutshell, is that Mr. John Benjamin's fundamental rights of freedom of thought and expression were not abrogated by the action of the Minister because the provisions of the Constitution [referred to above] do not mandate the government to take any positive action to ensure the enjoyment of those rights by Mr. Benjamin or to put it another way the government is under no obligation to provide a specific platform of expression to Mr. Benjamin for the enjoyment of those rights, as he put it the government does not have to provide megaphones for him to express his views.

Miss Lake, on the other hand, argued that the government may not be obligated to take positive action in providing the citizen with a platform to express his opinion but where, as in this case, the government does provide one it cannot arbitarily or discriminately withdraw that means.

Miss Lake, Learned Queen's Counsel, placed a great deal of emphasis on:

Committee for Commonwealth v Canada 77 DLR [4th] 385

The Plaintiffs wanted to disseminate their political ideas by distributing pamphlets in the public terminal at Montreal International Airport at Douval. The airport management prohibited such activity. The Plaintiffs brought an action against the crown seeking declarations that the airport management had not observed the fundamental freedoms of the plaintiffs and that the areas of the airport open to the public constituted a public forum where fundamental freedoms could be exercised. The trial judge gave judgment for the plaintiffs granting them the declarations they sought. The Federal Court of Appeal dismissed an appeal, holding that

the judgment should be varied by declaring only that the defendant did not observe the Plaintiffs' fundamental freedoms.

On appeal to the Supreme Court of Canada, held, that the appeal should be dismissed.

In my view most of the seven judges who heard this appeal in the Supreme Court gave, varying reasons for dismissing the appeal. For instance Larmer C.J.C. began his judgment at p. 389 by saying:

> "Essentially, my position differs from that of my Colleague [Madame Justice L'Heureut-Dube] in two regards: first, with respect, I do not share her position that the concept of "public forum" should be considered exclusively in the context of S.I of the Canadian Charter of Rights and Freedoms. Second, like Dube J at trial……. And the majority on appeal, I have come to the conclusion that S7 of The Government Airport Concession Operations Regulations SOR/79-373……is not applicable to the activities of the Respondents in the case at bar".
>
> He went on at page 390:
> "As developed by the American Courts in a series of decisions, the concept of "public forum" refers first and foremost to a social reality, namely, that certain places owned by the government constitute a favourable platform for the dissemination of ideas…….
> The "public forums" concept thus appears as a "label" used by the American Courts to describe certain places which are by their very nature suited to free expression".

The Chief Justice then went on to a classification of "public forums" as adumbrated in:

Perry Education Assn. V Perry Local Educators Assn. 460 U.S. 37 [1983] at P.45:

> "The first, traditional public forum, comprises streets and Parks. Restrictions on access to these properties comes under strict judicial scrutiny. If the restrictions are not narrowly tailored to serve compelling state interest, they are unconstitutional. The second, public forum by designation encompasses those public properties that the state has dedicated primarily as sites for communicative activity. These include auditoriums, meeting facilities and theatres. Second category properties enjoy the same strict scrutiny protection as properties in the first category.
> The third category is defined as "property" which is not by tradition or designation a forum for public communication".
> S.7 of Government Airport Concessions Operations Regulations – the impugned Regulation reads as follow:

"Subject to S.8 except as authorized in writing by the Minister no person shall:

[a] Conduct any business or undertaking commercial or otherwise at any airport;

[b] advertise or solicit at any airport on his own behalf or on behalf of any person; or

[c] fix, install or place anything at any airport for the purpose of any business or undertaking".

Madame Dube J concluded her judgment by saying at pages 445-446:

"The impugned regulation on its face and as applied to the activity of the Respondents, as well as government policy and action in prohibiting distribution of pamphlets by the Respondent at Douval Airport did have the effect of restricting freedom of expression and therefore constituted a breach of S.2[b] of the Canadian Charter of Rights and Freedoms. In assessing its potential justification under S.1 on account of its vagueness S.7 of the regulations does not constitute a limit prescribed by law. Similarly because of its over breath S.7 does not pass the means analysis of Oakes [R v Oakes 1986 26 D.L.R 4th 200].

In addition to vagueness and over breath, the guidelines as to scope of content – neutral time, place and manner regulations put this particular attempt outside the boundaries of constitutional permissibility.

While I do not entirely endorse the "public forum" doctrine which has found favour in the American jurisprudence , the qualified definition of "public arenas" is helpful to appraise the reasonableness of any "place" restrictions within contested time, place and manner regulations. While clearly not dispositive, those areas traditionally associated with, or resembling, sites where all persons have a right to express their views by any means at their disposal, should be vigilantly protected from legislative restrictions on speech. That is not to say that no encumbrances of any kind can be imposed, but simply that any prospective conditions will have to be reasonable having regard to the circumstances.

The particular provision does not even come close to meeting that standard. As a result of its vagueness and overbreath, there is no foreseeability as to what activity is in fact prescribed. Furthermore, the unfettered discretion vested in the Minister itself undermines the reasonableness and predictability of the provision application. Those affected by the regulation cannot be left to speculate or summarise how or in what circumstances it will be implemented. Such conjecture is incompatible with the spirit, purposes and goals of our charter and will not pass constitutional muster. It has not been demonstrably justified in a free and democratic society.

I would therefore dismiss the appeal with costs…."

I make the observation that the above case was decided on the basis that S.7 of the regulations when pitted against S.2[b] of the Charter and was found to be inconsistent with the Charter i.e. the limit imposed by regulation 7 was not reasonably justified in a democratic society.

In the instant case, governing the operation of Radio Anguilla, there are no rules statues or statutory orders which constitutional validity could be called into question. All we have in this case is an administrative order from the Minister directing that the programme be suspended.

While I understand the reasoning in the "public forum" doctrine which is not part of our jurisprudence, even if I were to be guided by such a doctrine, from the categorization [listed above] surely a radio station in my view must fall within the third category i.e. property which is not by tradition or designation a forum for public communication. Nor can a radio station be referred to as a place "traditionally associated with or resembling sites where all persons have a right to express their views by any means at their disposal".

The Canadian Charter of Rights and Freedoms

S.2 Everyone has the following fundamental freedom

[b] freedom of thought, belief, opinion and expression, including freedom of the press and other media communication.

S.15[1] Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion sex, age or mental or physical disability.

In Native Women's Assn. Of Canada v. Canada 1994 35 S.C.R 627

On September 24, l991 the Government of Canada set out proposals for constitutional reforms. During this time it was decided that a parallel process of consultation should take place within the Aboriginal community.

The Government of Canada provided funding to four national Aboriginal organizations. The Government entered into contribution agreements with each of the four Aboriginal Organisation in order to provide $10 million to fund participation through the Aboriginal Constitutional Review Program of the Department of the Secretary of State. National Women's Association of Canada [NWAC] was not specifically included in the Government of Canada funding. NWAC made a request to the Minister responsible for Constitutional Affairs for funding and participation equal to the other four national Aboriginal Organisation. This was refused.

NWAC commenced proceedings against the Government of Canada. The substance of the complaint was that by financing the four recipients Aboriginal groups the Government of Canada assisted the propagation of the view that the Charter should not apply to Aboriginal self-government. The allegation was that by funding male dominated groups and failing to provide equal funding for the NWAC the Government of Canada violated their freedom of expression and right to equality.

The application was dismissed by Federal Court . The Federal Court of Appeal also refused to issue an order of prohibition. However, the Court made a declaration that the Government of Canada restricted the freedom of expression of Aboriginal women in a manner that violated S.S.2[b] and 28 of the Charter.

On appeal from the Federal Court of Appeal it was held inter alia that the Federal Government's decision not to provide equal funding and participation in the Constitutional discussions to NWAC did not violate their rights under S.S.2[b] and 28 of the Charter since S.2[b] does not guarantee any particular means of expression or place a positive obligation on the Government to fund or consult anyone.

S.28 of the Charter is in the following terms:

> "Notwithstanding anything in this Charter the rights and freedoms referred to in it are guaranteed equally to male and female persons".

Sopinka J. writing for majority said at page 653:
"It has not yet been decided that in the circumstances such as the present ones, a government has a constitutional obligation under S.2[b] of the Charter to provide a particular platform to facilitate the exercise of freedom of expression. The traditional view, in colloquial terms, is that the freedom of expression contained in S.2[b] prohibits gags, but does not compel the distribution of megaphones".

At page 665 he said:
"The following caveat is, however, in order here while S.2[b] of the Charter does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. The traditional rules of Charter Scrutiny continue to apply. Thus, while the government may extend such a benefit to a limited number of persons, it may not do so in a discriminatory fashion and particularly not on a ground prohibited under S.15…….

Therefore, Haig established the principle that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or a group"
He concluded by saying at page 665:
"I respectfully disagree with the conclusion of the Federal Court of Appeal that the failure to provide funding to the Respondents and invite them as equal participants in the constitutional discussions violated their rights under S.S.2 [b] and 28 of the Charter".

Although Madame Dube J. agreed with the reasoning of Sopinka J. as well as with the result, she was in disagreement with the interpretation he placed on Haig v. Canada [1993] 2 S.C.R.995.

Miss Lake Q.C. placed a lot of emphasis on the judgment of Dube J. in support of her submissions.

Madame Dube J. said at page 666:

Although I am in general agreement with my colleague Sopinka J's reasons as well as with the result he reaches I feel that since he relies in great part on Haig v Canada [1993] 2 S.C.R.995 his interpretation of this case mandates some comments on my part.

Haig stands for the following preposition… while S.2[b] of the Charter does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the constitution. The traditional rules of Charter Scrutiny continue to apply. Thus while the government may extend such a benefit to a limited number of persons it may not do so in a discriminatory fashion, and particularly not on a ground prohibited under S.15 of the Charter.

> Consequently, I cannot agree with my colleague when he states that Haig establishes the principles that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or group. In my view, Haig rather stands for the preposition that the government **in that particular case** was under no constitutional obligation to provide for the right to a referendum under S.2[b] of the Charter but then if and when the government does decide to provide a specific platform of expression it must do so in a manner consistent with the Charter.
>
> This court has always fostered a broad approach to the interpretation of S.2[b] of the Charter, freedom of expression being an important aspect of the functioning of the democratic process…… Haig is consistent with this approach in that it underlines the possible consequence of disparate financing of viewpoints and the importance of promoting a variety of views.
>
> It is also recognised in Haig……. "that a philosophy of non-interference may not in the circumstances guarantee the optimum functioning of the market place of ideas"

**Haig v Canada [**1993] 2 S.C.R. 995:

In that case the issue arose in the context of a referendum held by the Federal Government of Canada in all the provinces and territories, except, Quebec, concerning proposed amendments to the Canadian Constitution. At the same time Quebec held its own referendum. Due to a change in residence, Mr. Haig did not meet the requirements to be eligible to vote in either referendum Mr. Haig contended that the Order-in-Council establishing the referendum, made pursuance to the federal Referendum Act, infringed his rights under S.2[b] of the Charter. It was not disputed that the casting of a ballot in the referendum was a form of expression. However, Mr. Haig argued that S.2[b] not only guaranteed protection from interference, but an affirmative role on the part of the State in providing the specific means of expression.

Madame L. Heureux-Dube J. writing for the majority noted that the "case law and doctrinal writings have generally conceptualized freedom of expression in terms of negative rather than positive entitlement".

It was concluded that no positive governmental action was required in order to provide Mr. Haig with a right to vote in the referendum. The Charter does not guarantee Canadians a right to vote in a referendum. Furthermore the referendum actually presented a forum for and

encouraged expression. Thus, it could not be said that Mr. Haig's S.2[b] Charter rights were violated.

Miss Lake, Queen's Counsel, urged this court to distinguish between Committee for Commonwealth Canada [supra] from Native Woman [Supra] and Haig Cases [Supra] and to give a purposive interpretation to the constitutional provisions.

I shall give a purposive interpretation to the Constitution, as I ought to give to any interpretation of any constitutional provisions.

As Lord Wilbertforce said in:

Minister of Home Affairs v Fisher 1979 3 ALL ER. 21 at page 25:

> "So far the discussion has been related to Acts of Parliament concerned with specific subjects. Here, however, we are concerned with a Constitution
> …….The Bermuda Constitution Act 1967. …….. It can be seen that this instrument has certain characteristics [1] It is particularly in chapter 1 drafted in a broad and ample style which lays down principles of width and generality [2] Chapter 1 is headed 'Protection of Fundamental Rights and Freedoms of the individual'. It is known that this chapter has similar provisions of other constitutional instruments drafted in post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean Territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms. That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations Universal Declaration of the Human Rights 1948. These antecedents and the form of Chapter 1 itself call for generous interpretation avoiding what has been called the austerity of tabulated legalism, suitable to give to individuals the full measure of the fundamental rights and freedoms referred to".

Miss Lake also urged, in effect, if I understand her argument, that the court should be particularly vigilant to formulate a "made in Anguilla Standard" that is sensitive to the legal Sociological and political characteristics that inspired the Constitution [See Committee for Commonwealth v Canada p.4.12]. I shall attempt to do so as well, but can only do so within the perimeters of the Anguilla Constitution. As Mr. Mckay, Learned Senior Counsel rightly argued that this court cannot re-write the Constitution. The Court's function is only to interpret the

Constitution and when I do so I shall put a liberal interpretation on the provisions of the Constitution that fall for interpretation.

It is beyond doubt that Section 11 of the Anguilla Constitution is the most relevant provision that is called into question. This Section says in part:

> "……No person shall be hindered in the enjoyment of his freedom of expression and for the purposes of this section the said freedom includes 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 my view that this Section is couched in negative terms. "No person shall be hindered in the enjoyment of his freedom". It can, in my Judgment, be interpreted thus, nothing shall be done to hinder any person in the enjoyment of his freedom of expression. When this provision is compared with Section 2[b] of the Canadian Charter of Rights and Freedoms; it is my view that there is at least a linguistic difference.

The Canadian Charter

> "2[b] Everyone has the following fundamental freedoms.
> Freedom of thought, belief opinion and express, including freedom of the press and other media of comunication"

It is my view that the above provision is couched in positive, imperative terms almost in the form of a Command Notwithstanding the positivity in the language of 2[b] of the Canadian Charter Madam Dube J. in Haig wrote:

> "Case Law and doctrinal writings have generally conceptualized freedom of expression in terms of negative rather than positive entitlements"

I agree and I hold that freedom of expression and thought are fundamental rights. In fact I would say that they are sacrosanct. They must not be interfered with and must be protected and jealously guarded. However, under the Anguilla Constitution, in my judgment, the right to freedom of expression does not place a positive obligation on the government to provide a means for exercising that fundamental right. Even if I were to distinguish Committee for Commonwealth Canada,

[Supra] from Native Women's Association [Supra] and Haig [Supra], having regard to the classification of "Public Forum" referred to above I am perforce to come to the same conclusion, because in my view a radio station must be regarded as "…….property which is not by tradition or designation a forum for public communication".

[Per Larmer C.J. Committee for Commonwealth v Canada at p.391]

Miss Lake Q.C. in her argument referred to:

Spencer v. The Minister of Information [unreported]

This was a case in which I held that the opposition Leader in Antigua because he occupied a constitutional position had a right of access to the public media .

I also wrote:

> "……..that every Antiguan and Barbudian cannot have a right of free access to the media……."

Miss Lake submitted that this was obiter dictum. It was indeed. She also submitted:

> "That obiter is not sustainable in light of the International Covenant for protection of Civil and Political rights"

I agree that in construing the Constitution regard must be had to International Covenant for Protection of Civil and Political rights

[See observation of Lord Wilberforce in Minister of Home Affairs v. Fisher] [supra] but that, notwithstanding, and giving a purposive interpretation to the Anguilla Constitution and the formulation of a "made in Anguilla Standard", I cannot interpret the Constitution to mean that freedom of expression to the Anguillan gives every Anguillan a free right of access to the public medium the radio. If I were to so hold, in my view it would be a recipe for chaos. By extension of logic, therefore, Mr. John Benjamin has no right to free access to media to express his views, opinion or thoughts. He was therefore granted a licence by the Minister of Information "a forum for and encouraged expression". This licence in my view was revoked by Administrative decision.

I agree with the submission of Learned Senior Counsel, Mr. Mckay that official action of public officials carry with them the presumption of

regularity and having regard to the fact that the Learned Judge found that there was no mala fides on the part of the Minister, I hold that there is no room for questioning the regularity of the Minister's action.

[See Attorney-General v Lipinot Limestone Ltd 1984 34 W.I.R. 325 at 328 J].

I therefore reject Miss Lake's submission that the Minister of Information had provided a platform for the expression of the Respondent's views and therefore could not capriciously withdraw that "platform".

In rejecting this submission I take into consideration, having regard to what the learned trial judge had found that this was indeed a very popular programme with the majority of Anguillans. In my view Anguillans must have felt anger, incensed, may have felt cheated, that a foreign voice or rather a pen wielded by a foreign hand could be the cause of silencing such a popular programme, enjoyed by most Anguillans. But even a made in Anguilla standard I cannot find that the first named Respondent's fundamental rights were abrogated.

I now turn to analyse the question of legitimate expectation. As I understand the first-named Respondent is saying that he had a legitimate expectation that the programme "would continue for months to come if not indefinitely".

[See paragraph 39 Respondents' affidavit].

Mr. Mckay submitted that::

"the learned trial judge cannot fetter the executive power to change a policy".

Although the learned trial judge said in his judgment at page 152:

"Relevance of legitimate expectation in view of my finding above, it is not necessary for me to consider this issue……"

From the submission of Counsel I understand him to be saying that issue influenced his decision.

I therefore address the issue.

Mr. Mckay, Learned Senior Counsel, argued that a legitimate expectation cannot endure eternally. It may be cancelled at anytime. Learned Counsel referred to many authorities including the following.

R v. Ministry of Agriculture Fisheries and Food ex parte Hamble [offshore] Fisheries Ltd 1995 2 ALL ER. 714 at 721 J.

Wade and Forsyth Administrative Law 7 Ed. 1994 P 419-420.

In the latter it is there stated:

> "It is obvious that this principle of substantive as opposed to procedural fairness may undermine some of the established rules about estoppel and misleading advice which tend to operate unfairly. Claims based on legitimate expectation have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on estoppel. The argument under the label "estoppel" and "legitimate expectation" argument are substantially the same. In the conflict of doctrines the demands of fairness are proving the stronger. But those demands cannot be pressed to the point where they obstruct changes of policy which a government should be at liberty to make within its discretionary powers or legitimate practices…."

In R v. Ministry of Agriculture and Food ex parte Hamble [offshore] Fisheries 1995 2 ALL ER. 714

Sedley J. said at page 723 :

Quoting from Taylor J. with approval in:

R v. Secretary of State for Home Department ex parte Ruddock l987 2 AER 518 AT 531 where he said:

> "On those authorities I conclude that the doctrine of legitimate expectation in essence imposes a duty to act fairly. Whilst most of the cases are concerned……..with a right to be heard. I do not think the doctrine is so confined. Indeed, in a case where ex hypothesi there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept. Of course such promise or undertaking must not conflict with his statutory duty or his duty, as here, in the exercise of a prerogative power. I accept the submission of Counsel for the Secretary of State that the Respondent cannot fetter his discretion. By declaring a policy does not preclude any possible need to change it".

Learned Senior Counsel, Mr. Mckay also submitted that there could be no legitimate expectation based on the affidavit evidence which merely

says that the first-named Respondent was given a verbal assurance by the first-named Appellant that he would not seek to interfere with the programme. Learned Senior Counsel argued that the first-named Respondent did not say what was said to him by the first-named Appellant and therefore it must have been a conclusion that he came to. Mr. Mckay argued that the first-named Respondent did not allege and could not allege to any express promise given by the Minister because none was given. He referred to:

Council of Civil Service Unions and others v Minister for the Civil Service 1984 3 All ER. 935

At page 944 Lord Fraser said:

> "This subject has been fully explained by Lord Diplock in O'Reiley v. Mackman [1982] 3 ALL ER. ,,24 and I need not repeat what he had recently said. Legitimate, or reasonable expectation may arise from express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue".

It is quite obvious that the first-named Respondent is not claiming a legitimate expectation as a result of the existence of a regular practice but rather, as what was held out to him by the first-named Appellant.

After the programme was recommenced after the first suspension the Minister of Information went on the programme and said inter alia:-

> "……..The Talk Your Mind Programme should never have been off the air for such a long time. I know a lot of people enjoy it and I hope we will make it a very constructive, responsible programme I hope we all understand that Anguilla is ours and we need to promote it, protect it, and safeguard it for ourselves……..
> I have nothing to hide and I hope that we would be able to dialogue together in the best interest of our little island every month".

In my view there is no evidence that the first-named Appellant made any express promise to the first-named Respondent that he would be kept on the programme as host. In my view there is no issue of legitimate expectation which the appellant can claim.

The evidence so far as the second-named Respondent is that she went to the office of the first-named appellant and he assured her that the

programme would return to the airways. In fact the programme did return to the airways. Could she claim to have a legitimate expectation that the programme would continue indefinitely? I think not.

The third-named Respondent is claiming a legitimate expectation by virtue of the fact that he was a regular listener to the programme and that he heard the broadcast of the Minister of Information on the resumption of the programme. This certainly in my view cannot give the second –named Respondent a legitimate expection.

Even if the Respondents had a legitimate expectation that the programme would continue that by itself cannot provide them with a fundamental right, because, in my view, one either has a fundamental right or does not have a fundamental right. If one does not have a fundamental right a legitimate expectation cannot give one a fundamental right.

Having regard to the foregoing the appeal is allowed. The order for damages and declarations of the learned trial judge are hereby set aside.

The Respondents cross appeal is dismissed.

Costs to the Appellants to be taxed if not agreed.

A.J. REDHEAD
Justice of Appeal

I concur

SATROHAN SINGH
Justice of Appeal

I concur

ALBERT MATTHEW
Justice of Appeal [Ag.]