COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 5 OF 1999

BETWEEN:

CABLE AND WIRELESS DOMINICA LIMITED

Appellant

and

MARPIN TELECOMS AND BROADCASTING COMPANY

Respondent

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. R. Mahfood Q.C. for the Appellant, Mr. A. Lawrence with him
Mr. A. Astaphan S.C., Mr. J. Armour, S.C. Mr. J. Harris S.C and
Mr. R. Armour for the Respondent

1999: September 15,16,17;
November 8.

JUDGMENT

[1] REDHEAD J.A: The Constitution of the Commonwealth of Dominica, Section 10[1] of which mandates that:-

> "1. Except with his own consent a person shall not be hindered in enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information, freedom to communicate ideas and information without interference [whether the communication be to the public

generally or to any person or class of persons] and freedom from interference with his correspondence.

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 question makes provision-

[a] That it is reasonably required in the interest of public safety, public order,
public morality or public health;

[b] That is reasonably required for the purpose of protecting the reputations rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing disclosures of information received in confidence, maintaining the authority and independence of the courts or regulating the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or

[c] That imposes restrictions upon public officers that are reasonably required for the proper performance of their functions;

And except so far as that provision or as the case may be the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

[2] The constitutional provision as outlined in section 10[1] above is to my mind giving legislative effect to that which every human being any where in the world is as of right, not as a privilege, as of right entitled to.

[3] The right to freedom of speech is to my mind most sacrosanct. It is of the most fundamental importance in any democracy, particularly in any emerging democracy in that it nurtures and fertilizes the growth of democracy. Therefore, nothing should be done [if democracy is to flourish] to interfere with, to tamper with, except in exceptional circumstances, the right of free speech, the right to receive information and ideas freedom to communicate ideas and information and freedom from interference with one's correspondence.

[4] The right to freedom of speech in particular and all the other rights attendant to that right should be viewed from the same stand point as the fresh air which we breathe. Every human being where-ever he is, is entitled to and has a right to breathe that fresh air unpolluted which is essentially vital for the sustenance and the growth of a healthy body, so too, freedom of speech is essentially vital for the sustenance and growth of a healthy democracy.

[5] The appellant become involved in providing telephone services in Dominica since about April, 1929.

[6] On 1st December, l968 The Public Telephone Act was enacted. This was to provide for the establishment of a telephone system by the appellant. In that same year the appellant was granted exclusive right by licence to provide for 20 years national Telephone Services for Dominica.

[7] In or about the late 1980's the appellant and the Government of the Commonwealth of Dominica commenced negotiations with a view to establishing a local company with government participation in the equity of the new company, the grant of a new licence and the enactment of new legislation.

[8] The result was the Telecommunications Act No. 18 of l995 [The Act], which came into operation on the 1st April, 1995. On or about the same date the company Telecommunications of Dominica Ltd. [the appellant] was incorporated. On or about the 29th day of April, 1995 the appellant and the government of the Commonwealth of Dominica executed an agreement conferring and granting an exclusive operating licence to Telecommunications of Dominica Limited. On or about the 1st day of March, 1996 the minister acting under and by virtue of the Act granted the respondent a licence to install, maintain and operate a television station in

the Commonwealth of Dominica. The respondent had, in the meantime, in January 1996 obtained a platform in Switzerland for access to the Internet.

[9] Between the 1st and 22nd day of March 1996 the respondent requested a 1-800 line from the appellant.

[10] On or about the 13th day of January, 1997 the respondent and the appellant executed an agreement for the provision of Internet services.

[11] By notice given on the 25th day of March, l998 the respondent terminated the agreement for the provision of Internet services. It however continued to advertise its e-mail and Internet services. The appellant discovered that the respondent had not been using the leased circuits that it had acquired under the agreement but was instead using a VSAT [i.e. a very small aperture terminal earth station which enables traffic to be sent to orbiting satellites which can then be relayed to receiving earth stations in foreign countries for onward transmission to its destination via local public switched network] to bypass the appellant's network in order to secure access to an internet platform abroad.

[12] On 21st May and 25th June a meeting took place between the appellant and the respondent consequent upon a letter written to the respondent by the appellant on 11th day of February, 1998 expressing a willingness to open discussions with the respondent in relation to the agreement.

[13] By letter dated 6th August, 1998 the appellant confirmed the termination of the agreement by the respondent and threatened discontinuation of the 1-800 line unless "the Internet Service is supervised via our facilities as conceived in the agreement"

[14] On 29th September, 1998 without further communication from the appellant it withdrew the 1-880 number service from the respondent on the basis that the respondent was continuing to operate its VSAT without a licence and was therefore using the 1-800 number service to facilitate a breach of both the Act and of the respondent's exclusive rights under its licence bypassing the appellant's network. The appellant however made it clear to the respondent that the service would be restored on condition of an understanding by the respondent that it would desist from providing any telecommunication that by-passed the appellant's network by VSAT or by any other means.

[15] As a result the respondent brought a motion in the High Court seeking declaratory and injunctive, relief under section 16 of the constitution of the Commonwealth of Dominica.

[16] In the High Court the respondent alleged that its constitutional right to freedom of expression is/was infringed by the enactment of the "Telecommunications Act No. 18 of 1995 by the Government of the Commonwealth of Dominica which Act gives the appellant the exclusive right to operate international and national telecommunications in Dominica.

[17] The motion came before Cenac J. who granted part of the respondent 's application by declaring:-

1. The exclusivity conferred by the licence dated 29th April, 1995 and granted to CWD [the appellant] pursuant to section 7[1] of the Act and permitted by Section 9 thereof is declared to be in contravention of section 10[1] of the constitution and accordingly invalid.

2. Section 7[1] of the Act to the extent that the minister is prohibited from issuing a licence to any person other than the exclusive licence issued to CWD under the agreement [and to any person in succession to the licencees named in the agreement] is declared to be in contravention of section 10[1] of the constitution and accordingly invalid.

3. The Attorney-General must bear the applicant's costs certified fit for two counsel to be taxed if not agreed.

[18] The appellant is dissatisfied with the judgment and has appealed to this court.

[19] By its amended notice of appeal filed on the 26th August, 1999 the appellant alleges as follows:

"1. The learned trial judge erred in law and misdirected himself by holding that the relevant provisions of the Telecommunications Act and Licence hindered the appellant/Respondent in the enjoyment of its freedom of expression guaranteed by section 10[1] of the Constitution

2. The learned trial judge erred in law and misdirected himself by holding that the burden of establishing whether or not the relevant provisions of the Act and Licence were "reasonably required" under Section 10[2][a] and [b] of the constitution rested on the appellant.

4(a) further, and in the alternative had the learned trial judge properly directed himself in relation to the matters referred to in [2] and [3] above, he could only reasonably have found that the relevant provisions of the Act and Licence were "reasonably required" and were reasonably necessary in a democratic society within the meaning of section 10[2] of the constitution having regard to the uncontradicted evidence produced by the first Respondent/Appellant

5. The learned trial judge erred in law and misdirected himself by making the first, second and third orders contained in the judgment.
6. The learned trial judge erred in law and misdirected himself by failing, having found that the constitutional claim was not sustained against the first respondent/appellant to make an order for costs of the first respondent/appellant".

[20] I now set out some of the provisions of the impugned Act, the Telecommunications Act No. 18 of 1995:-

"6(1) No person shall without first obtaining a licence under this Act-
(a) install, establish, maintain or operate a telecommunication system or telecommunication service;
(b) import, establish, maintain, operate or use any telecommunication apparatus including any earth station for satellite communications;
(c) install, establish, maintain or operate a mobile service;
(d) lay down or maintain any cable for telecommunication purposes upon the foreshore and bed of the sea;
(e) by way of his trade or business, hire, sell, exchange or deal in any telecommunication apparatus; or
(f) work any telecommunication apparatus installed on –
[i] any ship whilst that ship is in the territorial waters of Dominica; or
[ii] any aircraft whilst that aircraft is in or over Dominica;
except for normal ship to shore communication or aircraft to air traffic control communication or in connection with public safety.

7.[1] The Minister may in accordance with section 3 grant an exclusive licence to an application [including the exclusive powers or licences which are granted by the Agreement to any person in succession to the Licencees named in the Agreement].

9. All of the licences, privileges, powers and authorities expressed to be granted to the Licencee in the Agreement are confirmed and conferred under this Act".

[21] I now refer to the relevant parts of the Licence:

[a] On its face it confers exclusivity in national and international telecommunications services on CWD. In this regard, the Licence [by the recital] gives CWD:-

> "…the exclusive licence power and authority to own, provide, install, maintain, operate, promote and augment the Relevant Telecommunication Services [as hereinafter defined] within the Commonwealth of Dominica and between the Commonwealth of Dominica and places or mobile stations within or outside the Commonwealth of Dominica and its territorial waters and airspace and passing in transit through the Commonwealth of Dominica; and for the period and on the terms and conditions hereinafter expressed and contained."

[22] AND for such purposes the Company is authorised as necessary:

[i] to establish, maintain and operate Telecommunications station[s] of any type in the Commonwealth of Dominica including but not limited to satellite research stations, terrestrial radio stations [including cellular radio stations] and cable landings stations."

"Relevant telecommunication services" are defined in clause [1] of the Licence, and thereby include:

[a] "those national and international services provided by CWWI at the date of the Licence; and
[b] to the extent not already included under [a], the services set out at Schedule 1 to the Licence".

[23] The services set out at Schedule 1 include:-

> "….
> 4. International and national data, telex and facsimile services.
> 5. International and national electronic mailboxing
> ….
> 6. International and national packet-switched data services.
> …"4

[b] The only exception to CWD's exclusivity is contained in clause 22 of the Licence which provides that::-

> "…the Government agrees not to undertake itself nor issue to any person, company organization any licence, permission or authority directly or indirectly to:
> (a) provide, operate augment or promote any Relevant Telecommunication Service unless the Company at any time notifies the Government in writing that it is unwilling or unable within a reasonable period of time to provide or continue to provide any such Relevant Telecommunication Service and upon receipt of such notice from the Company the Government shall be entitled to find and licence some other person, company or organization so to do if the Company is then unwilling or unable to match such said other person, company or organization's offer to provide such Relevant Telecommunication Service; or
> [b] establish a private international two-way telecommunications with any other person or body."

[24] Learned Queen's Counsel, Mr. Mahfood argued that under S.10[1] of the Constitution the right protected is freedom of expression including freedom to hold opinions freedom to receive ideas, freedom to communicate ideas and information without interference and freedom, from interference and freedom from interference with ones correspondence . He stressed that the applicable word is freedom.

[25] Mr. Mahfood argued that the respondent must prove that there was a hindrance to that freedom and this it has failed to do. He submitted, if I understand his submission, and I hope I am not doing any violence it, that

the respondent by the agreement which the appellant entered into with the respondent, the respondent was provided with the freedom to communicate by the use of the appellant's system. Learned Queen's Counsel further argued that by its action the respondent is claiming a right to compete with the appellant. He argued that right is not given to it by the constitution neither is that right recognized by the constitution. That argument is very attractive but when one analyses the provisions of the Act, the question to my mind that must be asked is whether the Act in effect constitutes a denial of a right to freedom of expression which the respondent would have had but for the enactment of the legislation, that to my mind is fundamental issue which must be determined and to which I shall return. I should add of course, if after, an examination of the legislation, it is found that it constitutes a denial of the appellant's freedom of expression then "it must be shown, that it is a law reasonably required for one of the purposes specified in section10[2][a][b] or [c] then its provisions could otherwise have been regarded as a hindrance to the enjoyment of freedom of expression, it is not to be treated, nor is anything done under it, to be treated as contravening the section."

[Per Lord Fraser in Attorney-General and Minister of Home Affairs v. Antigua Times Ltd 1975 21 W.I.R. 560 AT 573]

[26] In the Court below the appellant argued subsection 10[2][a] i.e the law was reasonably required on the ground of public order, Mr. Mahfood stated before us that although not conceding that ground that he was not arguing that ground before us. He therefore relied on subsection 10[2][b].

[27] Learned Queen's Counsel, argued on behalf of the appellant that the learned trial judge erred when he found that the appellant exclusivity as conferred by the Act and the Licence infringed section 10[1] of the constitution. He further erred when he concluded that the measure was

not saved by subsection 10[2] because it was not reasonably required for any of the purposes identified in subsection [2].

[28] Mr. Mahfood argued that the learned judge fell into error by not properly construing the purpose of "protecting the rights and freedom of others" under subsection 10[2].

[29] Mr. Mahfood submitted that the appellant's case is that the Act and Licence are justified under subsection 10[2][b] in that any interference is reasonably required in order to protect and advance the freedom of expression of the Dominican people as a whole.

[30] He contended that the interest of advancing universal service, for example and the interest in technological development are both directed to ensuring that as wide a range of people in Dominica as possible share in the freedom to communicate over an efficient and modern telecommunications network. This is, learned Queen's Counsel submitted, plainly an objective which falls within subsection 10[2][b].

[31] The appellant is fully entitled to rely upon the constitutional justification in subsection 10[2][b] relying upon an unrestricted interpretation of the rights of other persons so argued Mr. Manfood. He also contended that the learned trial judge did not give proper weight to section 1 of the constitution:-

> "Subject to respect for the rights and freedoms of others and for the public interest and the recital thereto – respect for the principles of social justice and distribution of material resources through the economic system to subserve the common good……."

[32] Mr. Astaphan, learned S.C argued on behalf of the respondent that the consequence of the Act and Licence in creating a monopoly in favour of

the appellant is to abridge or extinguish the respondent's fundamental right and freedom of expression guaranteed by section 10 of the constitution.

[33] Mr. Astaphan contended that the respondent is not asking to be provided or supplied with any government owned media of expression and communication.

[34] Learned Senior Counsel argued it is not claiming that it has an absolute right to establish, install or operate its own media or means of communication.

[35] He conceded that its right may be limited but argued that, that its right can only be limited by a law falling within the permissible limitations and purposes prescribed by the provisions of subsection [2] of section 10.

[36] Mr. Astaphan contended that if no such permissible law exist, it is entitled and free to exercise its fundamental right and freedom of expression and communication by means of its media without hindrance.

[37] Mr. Astaphan argued that the respondent asserts that it is guaranteed at least the establishment of a legislative system of regulation that is reasonably required for the purpose of regulating the technical administration and technical operation of telephony and which gives it an opportunity to apply and or compete for a licence in accordance with the law.

[38] Mr. Mahfood argued that the government of the Commonwealth of Dominica had to make choices and it opted for exclusivity. He argued that having regard to the evidence of the experts, Professor Hausman and Mr. Earl Estrado. Professor Hausman testified as to the nature, extent and

standard of Dominica's telecommunication infrastructure and services, measured against international comparisons and as to the Social economic choices faced by a legislative and executive in determining the mode of telecommunications regulation. Mr. Mahfood argued that the executive is in a better position than the court in determining what choices to make.

[39] Learned Queen's Counsel argued that the court should only intervene and find that the measure is not reasonably justified if "no reasonable member of Parliament who understood correctly the meaning of the relevant provisions of the constitution could have supposed" that the interference with free expression was reasonably and justifiable.
[Hinds v Director of Public Prosecutions [1975]24 W.I.R. 326].
Alternatively if the legislature's judgment as to what was in the public interest in balancing the competing interest of free expression was "manifestly without foundation".

[40] In Ming Pao News paper v. Attorney-General of Hong Kong 1996 4 2 LRC.144 at 151:
Lord Jauncey quoting with approval Lord Woolf the approach in dealing with an alleged contravention of a section of the constitution dealing with fundamental rights and freedoms of the individual when he said:

> "This approach involves looking at the totality of what is relied on as an interference with interests, is relevant in determining whether there has been a contravention of S. 3[c] . In Mauritus it is the task of the Supreme Court to carry out that exercise unless the Supreme Court in doing this misdirects itself in law or otherwise fails to have proper regard to the relevant considerations. It is not for their Lordships to interfere with their decision. Their Lordships on an issue of this nature, like the European Court, will extend to the national court a substantial margin of appreciation. Similarly their Lordships are in accord with the European Court in respecting the national legislatures judgment as to what is in the public interest when implementing

> social and economic policies unless that judgment is manifestly without foundation……."

[41] I accept that respect must be paid to and great emphasis must be placed on the national legislature's judgment as to what is in the public interest when implementing social and economic policies unless that judgment is manifestly without foundation. Because social and economic policies are the responsibility of the national government, for a government is elected among other things to implement such policies.

[42] However, it is not uncommon that government when implementing social and economic policies breaches of the citizen's fundamental rights occur or allegations of breaches are made. If the court's jurisdiction is invoked in those circumstances, then the court has no option but to act .

[43] As the Indian Supreme Court has observed:-

> "Though the court starts with the assumption that the Legislature is the best judge of what is good for the community by whose suffrage it comes into existence, the ultimate responsibility of determining the reasonableness of the restriction, from the point of view of the general interest of the general public rest with the court and the court cannot shrink this solemn duty cast on it by the constitution."
>
> [Harif Quareshi v. State of Bihar 1958 S.C 731]

[44] Mr. Mahfood in making his contribution on behalf of the appellant argued that although the court has an important constitutional role, no court is a commission of inquiry. I perceive the role of the court as far more important than a commission of inquiry.

[45] As Basu in his commentary on the Constitution of India 5th Edition at page 226 wrote:-

> "……It is the duty of the court to determine the constitutional validity of an impugned law, because the constitution is the organic or fundamental law, [a] contravention of which no law can be allowed to stand, and the final authority to determine whether the legislature acted within the powers conferred upon it by the Constitution rests with the judiciary."

[46] The nature of this duty was thus explained by Marshall C.J:-

> "The Judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass by it because it is doubtful. With whatever doubts, with whatever difficulties a case may be attended we must decide it, if it [is], brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which not given. The one or the other would be treason to the constitution.
>
> Judges are bound by their oath to support the provisions of the constitution and to give effect to its commands irrespective of their views of the wisdom of such provision. Hence, where the constitutionality of a statute is properly raised before the court and it is clear that it transgresses the authority vested in the legislature by the constitution, the judges cannot shrink from their duty to declare the statute unconstitutional. The court should not be deterred from this duty by such considerations such as:-
>
> (I) That the Executive might take political action in disregard of the court's judgment;
> (ii) That serious consequences in the economic or social sphere will result from the declaration of unconstitutionality;
> (iii) That the violation of the constitution is small in its degree or extent. The duty of the court in this behalf is higher where fundamental rights are involved.
> "It is the constitutional duty of the courts to be vigilant and to resist even petty encroachment upon the fundamental rights, privileges and immunities of the people.
> (iv) That, in the opinion of the court, the impugned statue or other act is highly beneficial;
> (v) That the statute has been in operation for a long time."

[47] The learned author went on to observe that under the Indian constitution, this principle is reinforced by the express provision of Art 13 which declares that a law in contravention of a fundamental Right included in part 11 of the Constitution shall be 'void'.

> "As the Supreme Court has observed this provision assigns to the court the role of a "sentinel on the qui vive", so that the court cannot refuse to entertain an application for an appropriate constitutional remedy where a constitutional right has been infringed."

[48] I do not know of any express provisions in the constitutions of the Eastern Caribbean States which declare that a law in contravention of a Fundamental Right shall be void. However, I do know that a declaration by a court that a law is in contravention of a Fundamental Right renders that law void. So in my view the result is the same. For that reason, with respect, I adopt the above.

[49] I now turn to the impugned provision section 10[1] which is set out above. The appellant did not and cannot rely on subsection10[2][a] neither can it rely on subsection 10[2][c]. He is relying on the provisions of subsection 10[2][b]. I now set out and analyze that provision hereunder:

[a] Subsection [2] of section 10 states nothing contained in or done under the authority of any law shall be held to be inconsistent or in contravention of this section to the extent that the law in question makes provisions-

[b] That is reasonably required for the purpose of protecting.....the rights and freedoms of other persons.

[50] This to my mind is the part of section 10[2][b] to which Mr. Mahfood nails his mask. As most of his arguments deal with the freedom of expression of the Dominica people as a whole e.g. he makes this submission:-

> "This is of great significance in the case, [referring to competing rights] because the essence of the appellant's case [is] that the Act and Licence are justified under subsection 10[2][b] is and has always been that any interference is reasonably required in order to protect and advance the freedom of expression of the Dominican people as a whole……. The interest of advancing universal service, for example, and the interest in technological development, are both directed to ensuring that as wide a range of people of Dominica as possible share in the freedom to communicate over an efficient and modern telecommunications network. This is, it is submitted, plainly an objective which falls within subsection 10[2][b]. the appellant is fully entitled to rely on the constitutional justification set forth in subsection 10[2][b] relying upon an unrestricted interpretation of rights and freedoms of other persons."

[51] In interpreting that provision I remind myself that I must give it a "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" [See Minister of Home Affairs v Fisher 1980 A.C. 319 at 328 per Lord Wilberforce]

[52] This I am required to do but I have no authority to rewrite sections of the constitution under the veiled guise of interpretation. In my view therefore, where the constitutional provision is written in plain and simple words I must give those words their ordinary meaning.

[53] It is my considered view that the fundamental rights – a person shall not be hindered in the enjoyment of his freedom of expression, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and

information without interference and freedom from interference with his correspondence – all are contained in section 10[1].

[54] Subsection 10[2][a],[b] and [c] in my view could impose limitation, restriction, on or derogate from what is granted under section 10[1] . That is to say a law can curtail any of the rights under section 10[1], that law however, must deal with matters referred under subsection[2][a],[b] and/or [c] and that law must be shown to be justifiable in a democratic society.

[55] I think that it defies logic and common sense to say that a subsection, which limits the rights of a person in one section would give those very rights limited by that subsection to a third person. I entertain great doubts about that and therefore I reject that notion.

[56] The other part of subsection 10[2][b] – or regulating the technical operation of telephony, telegraph, posts, wireless broadcasting or television – Mr. Mahfood did not place great emphasis in his argument on this part of the subsection.

[57] Learned Queen's Counsel, Mr. Mahfood however argued that the learned trial judge erred when he held that the rights and freedom of others cannot apply to the regulation of telephony or telecommunications.

[58] Mr. Mahfood submitted that there is no warrant for construing the different objectives set out in subsection 10[2] as other than alternatives. Thus more than one of the various objectives may be relied upon cumulatively in defense of a measure which infringes a constitutional right. I agree.

[59] He added in particular, even though "the technical administration or…operation of telephony is specially referred to in subsection 2[b] a

telecommunications measure may be justified not only by reference to the aim but by reference to any of the other aims contained in subsection [2].

[60] For this approach Mr. Mahfood referred to:

Groppera Radio AG v. Switzerland 1990 12EH ER 321 where the European Court rejected the submission that the existence of the "technical administration of broadcasting" provision contained in third sentence of Article 10[3] of the convention meant that a respondent defending an interference with free expression was not entitled to rely on other justifications contained in Article 10[3] . The Court noted that the corresponding Article 19 of the International Covenant on Civil and Political Rights did not include a corresponding "technical administration" provision, and observed at page 339:-

> "The negotiating history of Article 19 shows that the inclusion of such a provision in that Article had been proposed with a view to the licencing not of the information imparted but rather of the technical means of broadcasting in order to prevent chaos in the use of frequencies. However, its inclusion was opposed on the ground that it might be utilized to hamper free expression, and it was decided that such a provision was not necessary because licencing intended was deemed to be covered by the reference to public order in paragraph 3 of the Article. This supports the conclusion that the purpose of the third sentence of Article 10[3] of the Convention is to make it clear that states are permitted to control by a licencing system the way in which broadcasting is organized in their territories particularly in its technical aspects. Its does not, however, provide that licencing measures shall not otherwise be subject to the requirements of paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole." [my emphasis].

[61] Mr. Astaphan S.C. submitted that:-

> "It is precisely because a person is entitled to use his own medium or means of communication that the constitution enacts and prescribes specific limitations in subsection [2] which may be lawfully imposed on that right and in particular the limitation

> regulating the technical administration and the technical operation of telephony, telegraphy posts, wireless, broadcasting or television."

[62] I agree with Mr. Astaphan and as I have said above all the matters mentioned in subsection [2] including, "regulating the technical administration and technical operation of telephony" etc. are matters which can lawfully impose restriction on the rights contained in section 10[1]."

[63] The vital question to be decided on this aspect of the matter must therefore be, is the creation of a monopoly in favour of the appellant for twenty [20] years to operate telecommunications services in Dominica to be regarded as regulating the technical administration of telephony, telegraphy, wireless broadcasting in accordance with subsection 10[2][b] of the constitution.

[64] To put it another way do the Telecommunications Act and the Licence which give the appellant the exclusive right to provide telecommunications services in Dominica regulate the technical operation of telephony, telegraphy wireless broadcasting in Dominica. If either of these answers is in the negative, is the appellant hindered in the enjoyment of his freedom of expression etc. thereby? It is interesting to note that in the Groppera case supra in referring to the history of Article 19 and the non inclusion of a technical administration provision. The European Court said:-

> "Its inclusion was opposed on the ground that it might be utilized to hamper free expression…."

[65] It is beyond doubt that legislation, the Telecommunications Act was enacted by the government of Dominica. That Act together with the licence granted to the appellant the exclusive right to operate national and

international telecommunications services in Dominica for a period of twenty [20] years. What is more the minister is precluded by the Act from considering and granting any licence to the respondent or anyone else for that matter. The respondent is also precluded from establishing, maintaining or operating any telecommunications without a licence.

[66] If, as the Act and the Licence do the exclusive right to operate and maintain national and international telecommunications is given to one person and the minister is precluded from entertaining any application for the period, in my opinion the characterization of regulating the technical administration or the technical operation of telephony, telegraphy is totally lost. One is therefore impelled to come to the irresistible conclusion that the decision by the government of Dominica to give the appellant 20 years exclusive right to operate the telecommunication services in Dominica was motivated by business consideration.

[67] As Professor Hausman confirmed in cross examination when he said:

> "I will say what I just said. I have nothing else to say, that when you make a long life capital investment and you are a business person you don't make that investment unless you have the opportunity to earn back your investment."

[68] He then later said:

> "It is a business decision."

[69] Assuming that I am wrong and that the Act can be regarded as regulating the technical operation of telephony, telegraphy, wireless broadcasting etc. and it was passed for protecting the rights and freedoms of other persons.

[70] And it is recognised that the respondent has a fundamental right of freedom of expression including freedom to receive ideas and information.

It is further recognised for the enjoyment of that freedom the respondent may make use of its own equipment and that in preventing it the use of its own equipment is a hindrance in its enjoyment of freedom of expression, then a law which prevents it from making an application to the minister for the consideration of its right to exercise its free speech that law must in my view be regarded as not to be reasonably justifiably in a democratic society.

[71] In R v Oakes 1987 L.R.C. [Const.] 477 where SI of the Canadian Charter of Rights and Freedoms was considered. This states:-

> "1 The Canadian Charter of Rights and Freedoms guarantee the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"

[72] This to my mind closely parallels or approximates the provision under S.10 of the Dominica Constitution:-

> "and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

[73] In Oakes, supra at page 500 Dickson C.J. said:-

> "To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied first the objective which the measures responsible for a limit on a chartered rights or freedom are designed to serve must be of sufficient importance to warrant overriding a constitutionality protected right or freedom."……..
> Secondly, once a sufficient significant objective is recognised, then the party invoking section 1 must show that the means chosen, are reasonably and demonstrably justified. This involves "a form of proportionality test."…….to balance the interests of society with those of individual groups. There are, in my view, three important components of a proportionality test.

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short they must be rationally connected to the objective. Secondly, the means, if even if connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question……
> Thirdly, there must be a proportionality between the effect of the measures which are responsible for limiting the charter right or freedom and the objective which has been identified as 'sufficient importance…….
> Even, if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve….."

[74] What is the objective of the Telecommunications Act and the licence? So far as I glean from the arguments of Mr. Mahfood it is to provide an efficient system of Telecommunications nationally and internationally to all Dominicans. Even if this can be regarded as a sufficient important objective. However, denying the respondent an opportunity to exercise its fundamental right must in my view in the circumstances be unfair and arbitrary. In other words it cannot be reasonably justifiable in a democratic society and more over the appellant has not shown it to be so.

[75] The learned trial judge said at page 15 of his judgment:-

> "In determining whether the Act hinders Marpin's [the respondent's] right to freedom of expression regard is to be had to its effect upon the fundamental freedom and not its object or subject matter. If the effect of the impugned law is to abridge a fundamental freedom its object or subject matter is irrelevant. [Re Munhumeso and others [1994] L.R.C. 282 at 293."

[76] He concluded at page 18 saying:-

> "Clearly there is no evidence that the enactment was for the purpose [of] regulating the technical administration or technical

> operation of telephony {section 10[2][b]} and the Act itself does not so disclose."

[77] I agree with Cenac J. Even the long title of the Act just simply states:-

> "An Act to provide for the licencing and operation of the national and international Telecommunication Systems and Services and as respect of the Commonwealth of Dominica."

[78] Learned Senior Counsel, Mr. Astaphan, argued that a monopoly is irreconcilable with the fundamental right and freedom of expression and communication guaranteed by the provisions of subsection [1] which also guarantees individual and personal rights and personal choices.

[79] He further argued that monopoly abolishes or limits individual and personal rights and choices under a framework of compulsion and the obligation to pay arbitrary fees and charges for the use of a third party's System and services.

[80] In my view the most damning aspect of the telecommunications Act is that it prevents the minister from even considering an application for a licence to operate telecommunications service. This is tantamount in my view to an absolute denial to the respondent, irrespective of the circumstance or condition which may arise, of it exercising its freedom of expression etc. in the manner it desires.

[81] In that regard the reasoning of Lord Fraser is instructive.

[82] In Attorney-General and Minister of Home Affairs v Antigua Times 21 WIR 560 at page 571:-

> "If the grant of a licence signed by the secretary to the Cabinet to any one who wished to publish a newspaper or to cause one to

be published was automatic then it could no more be contended that the requirement of a licence was a hindrance to the enjoyment of the right to freedom of expression than that the requirements to register imposed by the Newspaper Registration Act of 1883 was such a hindrance. The secretary to the Cabinet when signing or refusing to sign a licence no doubt he acts in accordance with instructions he receives from the Cabinet and SIB leaves the Cabinet free to discriminate between applicants for a licence as the Cabinet thinks fit, granting a licence, to one and refusing it to another without having to give any reasons.

Section 12[1] of the constitution provides that, save as provided in that section, "no law shall make any provision which is discriminatory either of itself or in its effect."

This subsection does not apply to any law so far as that law makes provision with respect to persons who do not belong to Antigua SIB though not discriminatory of itself, is so widely drawn that it permits the cabinet to discriminate not only between persons who belong and person who do not belong to Antigua but also between persons who belong to Antigua.

The respondent cannot complain that it was discriminated against as it did not have to apply for a licence, having published its paper fifteen days before the Act came into force. It cannot establish that the imposition of the obligation to obtain a licence before publishing a newspaper constitutes a contravention of the constitution which either has taken place or is taking place in relation to it. The only part of section 1B which affected it was the requirement to pay $600 as the annual fee for the licence deemed on payment of that sum to have been granted to it.

Their Lordships, while they recognize that the answer to the questions whether the requirement to obtain a licence from the secretary to the cabinet contravenes the constitution, is not free from difficulty, involving consideration not only of section 10[1] but also of section 10[2] and other sections of the constitution, consider that on the facts of this case, the question is hypothetical and does not arise for decision. They therefore express no opinion on it.

In relation to S1B it remains to consider whether the requirement of the payment of $600, both by those who are granted licences and those who are deemed to have been granted licences, amounts to a contravention of the constitution…….

Section 10[2] of the constitution of Antigua, however, expressly provides that nothing contained in or done under the authority of certain laws is to be held to be inconsistent with or in contravention of the section. If therefore, section IB is a law reasonably required for one of the purposes specified in section 10[2][a], then, though its provisions could otherwise have been

> regarded as a hindrance to the enjoyment of freedom of expression, it is not to be treated, nor is anything done under it to be treated, as contravening the section.
>
> Their Lordships…….in their opinion the imposition of the licence fee to be paid annually by all publishers of newspapers was correctly regarded by Louisy J as a Tax…….
>
> Revenue requires to be raised in the interest of defence and for securing public safety, public order, public morality and public health and if this tax was reasonably required to raise revenue for these purposes or for any of them then SIB is not to be treated as contravening the constitution."

[83] Although the question of whether the requirement to obtain a licence from the Secretary to the Cabinet before one can publish one's newspaper contravenes the constitution was not decided; Lord Fraser delivering the opinion of the Board left that question open because on the facts of the case it was hypothetical. Yet in my view the issues in that case and the instant case are not unrelated i.e. whether the requirement to obtain a licence from the secretary to the cabinet in order to publish a newspaper, was a hindrance to the freedom of expression guaranteed under the constitution.

[84] In the instant case under and by virtue of the Telecommunications Act the appellant was granted a licence which gave it exclusive right to operate national and international telecommunications in Dominica for twenty [20 years. The minister is debarred from considering any application from the respondent to exercise his right in the enjoyment of his freedom of expression.

[85] In the Antigua Times case the legislation provided at least for an application to be made in order to obtain a licence. Even though as Lord Fraser opined it permitted the Cabinet to discriminate without giving any reason because it was drafted so wide. That, notwithstanding, discrimination in granting the licence may of itself be a constitutional violation.

[86] The effect of the granting of exclusivity in the telecommunications operation in Dominica and without even been able to consider an application from the respondent is to force the respondent to use the appellant's facilities. The only lawful way this can be achieved is if the Act and Licence fell within the permissible limitations or purpose prescribed by section 10[2] of the constitution.

[87] They do not so fall. As neither the Act nor the licence can be regarded as being passed for the purpose of protecting the rights and freedoms of other persons nor for regulating the technical operation of telephony, telegraphy…, wireless broadcasting etc. It compels the conclusion that the law and the licence were passed solely to accommodate the business venture of the appellant, it having invested substantial sums of money in Dominica telecommunications system. That in my opinion "constitutes in substance and effect, the direction of execution a different and forbidden power." [Per Louisy J. in Attorney-General & Minister of Home Affairs v Antigua, Times Ltd at p. 573]

[88] Was the respondent's constitutional right to freedom of speech infringed? Section 10[b]. Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of his expression, including freedom to receive ideas and information without interference…….etc. That is the right which is guaranteed by the constitution.

[89] Except with his own consent a person shall not be hindered in the enjoyment of his freedom of expression etc. These are in my view, very important words. Every word in that sentence has a meaning. The first question that, springs to my mind is, can one enjoy one's freedom of expression if he is forced to use another person's means of communication particularly, having regard to the facts of this case, if that

person is unwilling to make use of that other person's means of communication. The enjoyment of a freedom must include, but not limited to, the right to say what wants, when one wants to say it, how one wants to say it, by what means one wishes to say it, all of these things of course within the confines of the law.

[90] In Hope and A.G. of Guyana v New Guyana Ltd and Vincent Teekar 26 W.I.R 233 at page 254 Crane J.A. said:-

> "To be free is to have the use of one's power of action [i] without restraint from outside and [ii] with whatsoever means or equipment the action requires 'the primary suggestion of the term 'freedom" is the negative one. The absence of external interference whether to suppress or, to constrain. To be free is essentially to be free from something- some arbitrary impediment to action, some domination, power or authority.
> And so long as it can be taken for granted that the unhindered person has all the means to act within which is usually the case – the negative meaning remains the chief element of the conception."

[91] Perforce I have no alternative but to reject Mr. Mahfood's submission when he said:-

> "……it is inescapable [that] since the court [below] declined to accept any of the respondent's evidence that CWD's service was in any way inferior, costlier etc., Marpin can in no way be hindered from communicating, receiving and imparting information and ideas, whether to the public generally or to any person by the fact that it is obliged to do so over lines and other equipment owned by CWD [upon payment of a fee or charge] rather than over its own equipment."

[92] The question of comparative costs or comparative quality of service could never be the issue. The real issue is that the respondent is guaranteed freedom of expressions, freedom to communicate ideas etc. The vital question is, was it hindered in anyway by the exclusivity in Telecommunications granted to the appellant.

[93] If the respondent wishes to enjoy his freedom of communication in a manner which results in great costs to itself or if it wants to use equipment inferior to anyone else. These matters are of no concern to anyone.

[94] Mr. Mahfood contended that the respondent at trial sought to rely upon authorities which establish that an interference with the means of free expression can constitute an interference with the right or expression. He gives as an example a ban on the sale of radios or telephones would be an "indirect" interference with freedom of expression.

[95] Mr. Mahfood argued that the crucial point in such cases, a violation exists because, on the facts, the interference with the means causes an interference with the constitutionality protected right.

[96] However Mr. Mahfood sought to draw a distinction between broadcasting cases and Telecommunications.

[97] In broadcasting cases, he argued that the refusal of a licence to transmit or retransmit will be a hindrance to free expression, because the interference with the means in each case will have the effect of hindering the applicant from broadcasting or otherwise transmitting its message i.e from communicating ideas and information without interference.

[98] He contended that the cases referred to by the respondent below support that proposition. He referred to the following cases as relied on by the respondent:-

Autronic v. Switzerland [1990] 12 E4RR. 327 Retrofit [1995] 22 LR.199 at 214

Groppera Radio AG v Switzerland [1990] 12 ER 214

[99] Mr. Mahfood on behalf of the appellant accepts the above and also accepts that an interference with the means of free speech, in broadcasting cases, can constitute an interference with the right of free speech. However, he argued, the position is very different in the context of telecommunications, where restrictions upon using one's own means does not normally translate into any hindrance in transmitting one's message.

[100] He then referred to the Retrofit case supra and argued that the ground of challenge was not that the state monopoly over telecommunications automatically necessarily restricted the freedom of Retrofit to impart or receive information rather the court found on the facts, the state monopoly was so inefficient that in substance it was not providing a service at all to a great number of people, that was therefore clearly an interference with the freedom of expression of those persons.

[101] I am not persuaded by the distinction, which Mr. Mahfood sought to draw between broadcasting cases and telecommunications.

[102] Referring to the example which Mr. Mahfood gave, the banning of the sale of radios and telephones in support of his argument that in broadcasting cases that would be an indirect interference with freedom of expression because the interference with the means would prevent persons from receiving or expressing ideas or information over those media.

[103] That example however is self-defeating so far as Mr. Mahfood's case is concerned. Because in my view it is inconceivable that there exists today any state or country without a national radio and telephone network. A ban on the sale of these things may indeed create a monopolistic situation. There is nothing then in that case preventing them from expressing their opinion and receiving information on the government

owned media and telephone, to take Mr. Mahfood's argument to its logical conclusion.

[104] A special feature, if I may call it that, of this case, is the denial to even consider an application by or on behalf of the respondent to exercise a fundamental right given him by the constitution. In that regard I cannot see any difference between the instant case and the broadcasting cases.

[105] Having regard to what I have said above the respondent was undoubtedly hindered in the enjoyment of its freedom of expression. The authorities show that even if the respondent was not prevented but was hindered in the enjoyment of his fundamental rights then a breach of its constitutional right would have occurred.

See : Hope & A.G. v New Guyana Co. & Teekah 26 W.I.R. at 225

Oliver v Buttigieg 1967 A.C. 115 – ER 135-137

Francis v Chief of Police 30 W.I.R. and 550

[106] There was much argument before us on whom the burden lay to establish that the law was reasonably required.

[107] Mr. Mahfood contended that the respondent relied upon A.G of Antigua and Minister of Home Affairs Antigua Times supra in which Cecil Lewis C.J. held in the court of Appeal that once a prime facie interference is shown, the burden shifts to the respondent to show that the enactment follows a legitimate aim and is reasonably required.

[108] Mr. Mahfood argued that this decision is "fatally" undetermined by the judgment of the Privy Council in the same case. He referred to Lord Fraser's advice:

> "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. This presumption will be rebutted if the statutory provisions in question are…….. arbitrary as to compel the conclusion that it was not in reality a revenue raising – matter."

[109] What did Lewis C.J. say ?

> "Once it has been established that the Act 8/1971 is prime facie a violation of S. 10 of the constitution [and in my view this is apparent on the face of this enactment itself] then the burden shifts to the appellant [a] to show that this Act comes within the permissible limits imposed by S.10[2] of the constitution, and [b] to place before the court all relevant facts and materials to show that the enactment was reasonably required"

[110] In my judgment the judgment of Cecil Lewis C.J on this point remains unassailable – as in my opinion Lord Fraser was dealing with a different point which Lewis C.J dealt with.

[111] The learned chief justice said:

> "Once it has been established that Act 8/1971 was prime facie a violation of S. 10 of the Constitution… then the burden shifts to the appellant."

[112] Of course a fact can only be established by evidence. But what is more the chief justice also said that in his view it is the apparent from the face of the enactment that it was in violation of S. 10 of the Constitution.

[113] On the other hand Lord Fraser said in some cases it may be possible for a court to decide from a mere perusal of the Act whether it was or was not reasonably required. That is the situation with which Lewis C.J. was dealing.

[114] But Lord Fraser went on:

> "In other cases the Act will not provide the answer……."

[115] It was the "other cases" scenario that Lord Fraser was dealing with and made his pronouncement in relation to that matter and not in relation to the aspect of the matter dealt with by Lewis C.J. I therefore disagree with Mr. Mahfood that that aspect of the judgment was overruled by the Privy Council.

[116] The burden is therefore on the appellant to show that the Act was reasonably required. This it has not done. But for all practical purposes is it necessary for me to decide that? I think not.

[117] Having already decided that the Act was not for the purpose of protecting the rights and freedoms of other persons. If on the other hand I had decided that the purpose of the Act was for the protection of the rights and freedoms of other persons then the debate whether it is reasonably required becomes relevant.

[118] There is a cross appeal by the respondent, against the award of costs by the judge.

[119] This action was brought by the respondent against Cable and Wireless [Dominica] Limited and the Attorney-General of the Commonwealth of Dominica. The Attorney-General took no part in the proceedings. The respondent was successful against the appellant. The learned trial judge however ordered that costs be paid by the Attorney-General.

[120] Mr. Mahfood submitted that the learned judge did not err when he held that the respondent was not entitled to any relief which it sought against

the appellant because the appellant was "not a public body nor in the nature of a public body" as is necessary precondition for relief on a constitutional motion [See Maharaj v Attorney-General of Trinidad and Tobago [1978] ALL ER. 670].

[121] Mr. Astaphan on the other hand submitted as follows:

1. That the respondent succeeded in its application which was vigorously contested by the appellant on the merits

2. That costs should follow the event unless there are good grounds for ordering otherwise. No such ground exists in this case.

4. There was no application for costs made by the first appellant against the second respondent.

5. No order as such could therefore have been made against the respondent.

[122] Finally because the appellant performed essentially public functions and/or for the purposes of this action, is an agent, instrumentality or emanation of the State and as a result the respondent is entitled to relief and costs.

[123] I am persuaded by the argument that the appellant took part in and contested the proceedings on the merits and that the case went against it. Costs should therefore have followed the event. The learned trial judge in not awarding costs against the appellant gave no reasons for departing from the norm.

[124] In my judgment therefore I am of the view that the judge erred.

[125] Having regard to the foregoing the appeal is hereby dismissed.

[126] The appeal is therefore dismissed . The judgment of the learned trial judge is affirmed except as to the order for costs.

[127] The respondent, Marpin Telecoms and Broadcasting Company to have its costs in this court and the court below against the appellant Cable & Wireless Dominica Limited, fit for two Counsel to be taxed if not agreed.

ALBERT J. REDHEAD
Justice of Appeal

I Concur

SATROHAN SINGH
Justice of Appeal

I Concur

ALBERT MATTHEW
Justice of Appeal [Ag.]