JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 1 & 6 /2003

BEFORE: THE HON MR JUSTICE P. HARRISON, J.A.
THE HON MR JUSTICE PANTON, J.A.
THE HON MR JUSTICE SMITH, J.A.

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| BETWEEN: | THE MINISTER OF INDUSTRY, COMMERCE AND TECHNOLOGY | 1ST APPELLANT |
| AND | THE ATTORNEY GENERAL OF JAMAICA | 2ND APPELLANT |
| AND | OFFICE OF UTILITIES REGULATION | 3RD APPELLANT |
| AND | INFOCHANNEL LTD | 1ST RESPONDENT |
| AND | STANLEY DOUGLAS BECKFORD | 2ND RESPONDENT |
| AND | CABLE & WIRELESS JA. LTD. | 3rd RESPONDENT |

Mr. Michael Hylton, Q.C., Solicitor General, Miss Katherine Francis & Miss Kathryn Denbow instructed by the Director of State Proceedings for the 1st & 2nd appellants

Mr. Maurice Manning & Mrs Georgia Gibson-Henlin instructed by Nunes Scholefield Deleon and Co. for the 3rd appellant

Dr. Lloyd Barnett & Mr. Harold Brady instructed by Harold Brady and Co. for the 1st respondent

Mrs Pamela Benka-Coker, Q.C., & Mr. Arthur Williams instructed by Arthur Williams and Co. for the 2nd respondent

Miss Hilary Phillips, Q.C., & Mrs. Denise Kitson instructed by Grant Stewart Phillips and Co. for the 3rd respondent/intervener

June 23, 24, 25, 26, 27, July 31, 2003 and 29, 2005

**PAUL HARRISON, J.A:**

On July 31, 2003, we allowed the appeals of the appellants and the appeal of the 3rd respondent/intervener, Cable & Wireless and set aside the orders of the Constitutional Court below. The costs of the said appellants and intervener were ordered to be paid by the 1st and 2nd respondents to be agreed or taxed. These are our reasons in writing.

The telecommunications industry in Jamaica, prior to the year 2000, was largely governed by two statutes, the Telephone Act and the Radio & Telegraph Control Act.

Cable & Wireless Jamaica Ltd., ("Cable & Wireless") held an exclusive licence under the Telephone Act to provide wire telephone services to anyone in Jamaica. This was a monopoly. In addition, Cable & Wireless held a special licence issued under the Radio & Telegraph Control Act to provide international telecommunication services from Jamaica and globally by means of radio and telegraph operations.

Infochannel, the first respondent, incorporated in Jamaica in December 1989, initially provided internet services to its subscribers. No licence was required for this service. However, by a leased circuit agreement with Cable & Wireless, Infochannel was permitted to connect its international data circuit and its computers to Cable & Wireless' terminals, that is, its local access lines. Infochannel consequently was thereby enabled to provide to its customers, value

added information services, such as electronic mail (e-mail), fax and internet services.

In 1998 Infochannel was granted a licence under section 6(1) of the Radio & Telegraph Control Act to operate communication apparatus in its business, namely, a Very Small Aperture Terminal (VSAT) licence. This licence, issued by the Minister, the first appellant, was specifically restricted. It read:

"This station is permitted to transmit data only."

On the day of the issue of the said licence, June 16, 1998, Cable & Wireless claimed that Infochannel had committed breaches of their agreement, namely, by-pass activity.

The prosecution of Infochannel and its chairman which followed was unsuccessful. Consequently, several actions were commenced by both Cable & Wireless and Infochannel against each other.

The contention of Cable & Wireless was that Infochannel was transmitting overseas voice calls into Cable & Wireless' local telephone network bypassing the international gateway operated by Cable & Wireless, in breach of Infochannel's VSAT licence. The Minister reiterated that he had licensed a data service and not a voice service.

On August 31, 1998, Cable & Wireless was granted five operating licences to provide the various services, such as, voice telephony, telegraph and teleprinter services, in the Island, and international telecommunication services to and from Jamaica, as the external common carrier of Jamaica.

Each of these licences had a duration of 25 years from the date of issue.

By a Settlement Agreement dated August 19, 1999, between the first appellant, the first respondent and Cable & Wireless, all the existing actions between the parties were agreed to be discontinued, settled or referred to arbitration. The aim was that the telecommunications market would be regulated by means of statutory provisions and competition introduced. In respect of Infochannel's contention of its right to provide voice telephony, the said agreement provided, in clauses 2 and 3:

> "INFOCHANNEL INTERNET SERVICES
>
> 2. Subject to clause 3 Infochannel shall not use its facilities to terminate International Voice Telephone Calls into the Cable & Wireless network.
>
> 3. The parties agree that Infochannel will provide, solely to its internet subscribers, VOIP and shall cease to provide such services to any other persons.
>
> 3.1 "VOIP" means interactive voice communication where speech is converted for transmission utilizing TCP/IP data transmission techniques."

This agreement was to continue until September 30, 1999, or extended until "... such time that the legal and regulatory framework is implemented."

Clause 8 of the agreement however, reads:

> "8. This agreement is without prejudice to either party's right to maintain their respective contention as to the definition of international voice telephone and does not constitute a waiver of either party's rights."

By an agreement dated September 30, 1999, between the Minister and Cable & Wireless, the parties recognized the existence of part-heard proceedings, (Suit No. M 89/98) between them and resolved to settle the differences in the telecommunications industry both as to Cable & Wireless' claim to exclusivity and the Minister's stance and his issuance of certain VSAT licences. The method was by means of the introduction of statutory provisions governing a new telecommunications framework. As a condition, Cable & Wireless would surrender its five existing licences dated August 31, 1988, and provide certain telecommunication lines and investments. The Minister was required to issue new licences to Cable & Wireless, lay in Parliament the appropriate legislation based on certain Drafting Instructions, effect the surrender of existing VSAT licences for the issuance of new ones in a specified form and to prevent any by-pass operations, in particular, during a Transition Period, consisting of three phases, culminating in full liberalization of the telecommunications industry.

The Telecommunications Act 2000 ("the Act") came into force on March 1, 2000. The objects of the Act as recited in section 3 are to promote and protect the interest of the public by promoting fair and open competition in the provision of specified services, access thereto, protection of customers, universal telecommunications, locally and internationally, and to encourage economically, investment in the relevant infrastructure.

As a consequence of the existence of the Act, the Minister issued to Infochannel:

(i) the Carrier (Infochannel Ltd) Licence, 2000 and

(ii) the Spectrum (Infochannel Ltd) Licence

each dated March 14, 2000. Of these licences, Patrick Terrelonge, the Chairman of Infochannel, in his affidavit dated October 4, 2001, stated:

> "These two licences however did not provide for Infochannel the right to provide Internet services which Infochannel had enjoyed as a service provider of Internet services including Voice Over Internet as specifically defined in its 1998 special licence."

Cable & Wireless was granted under the Act, carrier licence, service provider licence, spectrum licence and a mobile licence, each also dated March 14, 2000.

The Act in section 85 provided for the continuance during the transitional period of certain activities which had been in existence prior to the passing of the Act.

Extensive correspondence followed between the Office of Utilities Regulations the ("OUR"), Infochannel and the Minister, concerning Infochannel's claim to the right to a licence to continue to provide Voice Over Internet services as it did "Prior to the Telecommunications Act 2000 ... pursuant to section 85". The OUR in its letter dated September 28, 2000, acknowledged that Infochannel, having provided internet services to its customers prior to the Act would require a service provider licence to do so after the Act. However, Infochannel's claim to a right to a licence to transmit voice over Internet was resisted by the Minister and the OUR.

The Minister granted to Infochannel;

(i) an Internet Service Provider Licence dated June 25, 2001 for the period June 21, 2001 to December 31, 2003 authorising the licensee:

> "... to provide telecommunications services (excluding voice service) only in relation to internet access, and

(ii) an International Voice Service Provider (Infochannel Ltd) Licence dated July 16, 2001 for the period July 16, 2001 to December 31, 2003, providing, inter alia:

> 3.2 The Licensee is only authorized to resell to the public, international switched minutes obtained from the existing telecommunications carrier".

The existing "telecommunications carrier" was Cable & Wireless. Having received further complaints from Cable & Wireless alleging that Infochannel was committing bypass operations by way of international voice service calls outside of Jamaica in contravention of the Act, the OUR issued to Infochannel a notice of intention to issue a "cease and desist" order under the provisions of section 63(4) of the Act. Infochannel was requested to show cause by October 5, 2001 why the said order should not be made. Infochannel, in response, filed a motion in suit No. M 135 of 2001, on October 4, 2001. Infochannel sought against the Minister and the OUR declarations and damages contending that:

(1) the Minister of Industry, Commerce & Technology and the OUR had committed a breach of its constitutional right to freedom of expression guaranteed by section 22 by failing to grant it a licence under the Telecommunications Act 2000, to provide VOIP services to its customers which services it provided without a licence prior to the passing of the said Act.

(2) the said Act interfered with the rights of both Infochannel and Stanley Beckford to their freedom of expression, and

(3) the said interference and failure to grant the said licence was not reasonably required in any of the circumstances outlined in section 22 of the Constitution.

The respondents relied on sections 13, 18, 20, 22 and 25 of the Constitution of Jamaica and sections 2, 5 and 7 of the Fundamental Rights (Additional Provisions) (Interim) Act.

The Constitutional Court (Reid, Harrison and Mrs N. McIntosh, JJ), granted the respondents' motions declaring that the Minister and the OUR committed breaches of their constitutional right to freedom of expression by refusing to grant to Infochannel the licence to provide VOIP services which Infochannel provided without a licence before the Act and that the exclusive licence granted to Cable & Wireless, the existing telecommunications carrier, under the Act thereby preventing Infochannel from providing VOIP services to its customers, equally breached the respondents' constitutional rights under section 22. The Court ordered damages to be assessed and costs.

The appellants contend that prior to the passing of the Telecommunications Act, 2000, Infochannel had no lawful right to provide VOIP services to its customers and therefore the Act did not interfere with the respondents' rights to freedom of expression. If it did, the fact of interference

was reasonably required in circumstances as provided for in section 22 of the Constitution.

The definition of VOIP service is important in appreciating its function and comparison with the traditional telephone service. The witness David Greenblatt, giving evidence by affidavit dated June 17, 2002 on behalf of Infochannel defined Voice over IP as:

> "... a standard part of data communications that take place over Internet Protocol."

He explained that in IP technology all information is put into "data packets" namely: "... text data (such as a web page) or pieces of video or pieces of voice data."

He further viewed Voice Over IP from a global perspective:

> "19 From a regulatory perspective, most forms of Voice over IP are already permitted worldwide, or are in the process of being opened up – even in the countries that regulate traditional telephony."

and concluded:

> "20 The primary reason for this regulatory acceptance is the fact that Voice over IP is an added - value service on top of an IP data network. Generally, services that closely resemble traditional IP services, such as when they are sold by an ISP or when they are sold with other services, are the most straightforward to differentiate from standard phone calls."

In explaining the traditional telephone service or what he refers to as the "Plain Old Telephone Service" (POTS), the witness Greenblatt, said that

"dedicated connection" is created between the calling party and the called party, and continuing said:

> "13 (b) Voice is transmitted in both directions once the circuit is established. You direct your speech into the mouthpiece, which turns your voice energy into electrical impulses (analogue signal) and sends it down the line. The callee's earpiece does the reverse, turning the analogue signal back into disturbances in the air. When the callee speaks, the same process sends her voice to you."

To summarize his comparison, the witness said:

> "18. In review, traditional circuit voice has very little technology at the ends of the network except for "microphone and speaker." Once the switches complete the voice circuit the voice goes through uninterrupted through a dedicated circuit. In voice over IP, special software and/or hardware converts voice into packets and back into voice. The packets travel in unpredictable paths until they reach their destination and are reassembled."

In my view, the witness Greenblatt, by explaining:

> "In IP technology, all information is put into data packets ... All packets in IP contain data ... they are simply binary ones and zeros."

merely described the method by which IP technology functions. It is by this method voice is sent by one caller which converts the voice to the data and voice is received by the callee on the other end, the data having been reconverted to voice. Both end products are voice. Therefore voice is sent utilizing the IP technology, thereby designating the process as Voice Over IP or VOIP. The witness Greenblatt seeks to explain that:

> (1) the traditional telephone voice service is effected by circuit-switched connection, where voice is transformed by electrical impulses and transported by direct connections, an analogue process, and is a voice service, whereas;
>
> (2) In VOIP, voice is converted into data packets and transported over the Internet Protocol and reconverted to voice, and is a data service.

This distinction in my view, is less than convincing. The reliance by the Constitutional Court on this witness in concluding as a finding of fact that VOIP is a data service and not a voice service, by accepting Greenblatt's statement that:

> "VOIP is a standard part of data communications that takes place over the Internet Protocol ..."

may have been misplaced.

In the Constitutional Court, Reid, J. said:

> "Having had the benefit of reading in draft the judgment of my brother Harrison, J. I would hold that VOIP is a standard part of data communication that takes place over the Internet Protocol and that what is transmitted over the VSAT, are digital data packets generated by computer processing application."
> (Emphasis added)

Harrison, J. said:

> "I accept the evidence given by Greenblatt and find that VOIP is a standard part of data communications that takes place over Internet Protocol. What in fact that is transmitted over the VSAT, are digital data packets generated by a computer processing application."
> (Emphasis added)

On the contrary, it seems to me even on Greenblatt's affidavit, it is the use of digital data packets which is a part of the process involved in Voice Over Internet communications.

The Constitutional Court seems not to have made full use of the affidavit evidence before it and therefore this Court is obliged to examine such evidence as it relates to the finding of facts.

The learned judges in the Constitutional Court failed to consider the entire affidavit evidence before them, and in particular the affidavit evidence of David McBean and Courtney Jackson in coming to their conclusion on the facts.

David McBean, the Regional Vice President of Online Services, Cable & Wireless (West Indies) who holds a Bachelor of Science (B.Sc.) degree in Electrical and Computer Engineering (U.W.I.) and a Doctorate of Philosophy (D.Phil.) in Engineering Science (Oxon), (University of Oxford), in his affidavit dated July 4, 2002, stated:

> "3. That since 1986 I have been principally engaged in the field of Electronic & Telecommunications in managerial and executive capacities in various companies, namely Burroughs Computer Ltd., the Jamaica Telephone Company, Telecommunications of Jamaica Ltd., Air Jamaica and Cable & Wireless, and I have authored publications in this discipline. That I was also the Deputy Chairman of The Spectrum Management Authority between 1999 and 2001."

Pointing out that both in Jamaica and internationally, the regulatory bodies have drawn a distinction between forms of service, notably, voice, data, broadcast or fax, he said:

> "5. ... the Federal Communications Commission (FCC) in the United States of America (USA) and the Office of Telecommunications (Oftel) in the United Kingdom are amongst several international regulatory agencies who have recognized the distinction between the provision of different types of service and have discrete rulings on voice, data and broadband services, despite the wide proliferation of Internet Protocol (IP) and Internet providers who have the capabilities to provide the respective services. ..."

Voice services, he said, refer to interactive audio communication, between parties over an electromagnetic network, whereby:

> "7. ... speech has always had to be converted to an electrical and or electromagnet signal, using various encoding and decoding techniques."

Data services, he said, typically refers to non-video, non-voice and non-fax information:

> " 8. ... which has been sent via electromagnetic communications and involves the exchange of information between two or more computers."

He referred to the technological advances over the last 20 years, which have improved both the network and the devices to facilitate voice services, but he said:

> "11. ... Nevertheless, in the telecommunications industry, there is a distinction between voice

> services and data services, irrespective of the technologies used in transporting the services."

He referred to the practice of regulating "services offered" rather than "technologies" and explained:

> "12. Therefore a conversation between two parties over a network has always been considered to be a voice service, and been regulated as such, despite the form of the voice having been changed via the technology employed in transmission."

Maintaining that a distinction must be made between "data transmission techniques" and "data services", he said that:

> "14. ... a licence to transmit data would be referring to the class of service being provided rather than the means of transportation of that service."

He disagreed with the witness Greenblatt that voice services on the Public Switched Network are provided by using only "circuit switched networks and analogue transmission" because voice services are transmitted using various other technologies. Accepting as correct, Greenblatt's description of the methods of transmission of information on circuit switched networks and packet switched networks, he remarked:

> "20. ... However, it would be fallacious to conclude that voice services are limited to transmission over circuit switched networks, and not packet switched networks ..."

Concluding that Voice Over Internet Protocol (VOIP) is a voice service, he said:

> "18. ... Internet Protocol (IP) is one of the methods of encoding voice information for transmission

> and cannot be viewed as a data service in itself, in the same way in which had the voice been transmitted by fibre-optic technology one would not regard the carrier as providing light services. That accordingly, the argument being advanced which seeks to distinguish VOIP as a data service, because it is encoded into packets and then decoded, is not tenable. That accordingly I disagree with his conclusions set out in paragraphs 11 to 16 thereof, in which he seeks to define VOIP as not being a voice service, by virtue of his defining it as an Internet value-added service."

The judges in the Constitutional Court failed to consider the evidence of David McBean in their determination as to whether or not VOIP was a voice or a data service, in its provision by Infochannel to its customers.

The witness Courtney Jackson, a trained engineer, the holder of a Masters of Science (M.Sc.) degree in Electrical Engineering and a Masters of Science (M.Sc.) degree in Systems Engineering and Deputy Director General for Telecommunications at the OUR, explained the "bypass operations" in which Infochannel was engaged circumventing the international network of the licensed international voice carrier, Cable & Wireless in the provision of international voice service. He agreed that Voice Over International Protocol was a voice service by which voice is transmitted by use of the Internet transmitting it in the form of "data as bits packaged into packets and routed through a network – called routers and gateways ...". Neither was the evidence of this witness considered by the Constitutional Court.

In my view, on the expert evidence available, the Court below was in error to find that VOIP was a data service rather than a voice service.

VOIP or Voice Over Internet Protocol is defined in Newton's Telecom Dictionary, 17th Edition, February 2001 as:

> "The Technology used to transmit voice conversations over a data network using the Internet Protocol. Such data network may be the Internet or a corporate Intranet. ... There are several potential benefits to moving voice over data network using Internet Protocol. First you may save some money. Second, you may achieve benefits of managing a voice and data network as one network ..."

A definition of "data" is also contained in Newton's (supra). It reads:

> "Data. This is AT&T Bell Lab's definition. 'A representation of facts, concepts or instructions in a formalized manner, suitable for communication, interpretation or processing'. Typically anything other than voice."

Besides, the expert evidence before the Court below precluding Infochannel from providing voice services, both the previous adjudication and the statutory provisions re-inforce this restriction. (See **INFOCHANNEL *Ltd v Cable & Wireless Jamaica Ltd,*** SCCA No. 99/2000 delivered on December 20, 2000, in which the Court of Appeal upheld the decision of Reckord, J refusing the mandatory interlocutory injunction sought by Infochannel claiming a right to provide voice services to its customers by the use of its VSAT licence).

A directive issued by the European Commission and published in the European Commission Official Journal C Series on January 10, 1998, in an article entitled "Commission defines its position on Internet Telephony in the context of

the liberalisation of the Community telecommunications markets" is helpful. It reads, inter alia:

> "... the Commission adopted a notice defining its policy on voice telephony in respect of telephony via the Internet ... telephony via the Internet is not subject to the regulation applying to voice telephony until a certain number of conditions have been met. ...
>
> Under Community law the provision of voice on the Internet is not 'voice telephony' at present ...
>
> Internet telephony will be defined as voice telephony ... only if and when (certain) conditions are met (conditions listed) ... Currently, Internet telephony does not meet all these criteria, and therefore will not be considered as voice telephony for the time being."

This notification issued by the European Commission, confirms the view that Voice Over Internet Protocol is undoubtedly classified as a voice service technologically, but as a matter of policy was not yet to be subject to regulation.

The primary determinant of the question "what is 'voice' services,?" is therefore, the statutory and policy stance of each particular territory or state, taking into consideration its technological development. In the instant case, the Minister, aware of the Internet services being offered by Infochannel, statutorily, excluded it from providing voice services. I agree with the Solicitor General that if the Court below is correct to hold that Infochannel could lawfully provide voice services, the restriction in its VSAT licence to "data only" would be rendered meaningless.

Still further, the statutory provisions do not aid Infochannel nor support the finding of the Court below.

Section 85 of the Telecommunications Act, as a transitional provision, permitted a person who, before the passing of the Act, had been "engaged in providing specified services" or "owned or operated a facility, for which no licence was required," either "under the Radio and Telegraph Control Act or the Telephone Act," to continue to do so for 90 days after the Telecommunications Act" came into force or until a licence was granted or the application therefor withdrawn. Since no licence was required for the provision of Internet services, simpliciter, Infochannel could continue with the provision of that service. "Specified Service" is defined in section 2 of the Telecommunications Act as:

> "... a telecommunications service or such other service as may be prescribed."

The terms and conditions of the VSAT licence issued to Infochannel restricting it to "data only" although strictly referrable to the use of apparatus under the Radio and Telegraph Control Act, restricted Infochannel to the provision of a data service. The said section 2 defines data service as:

> "... a specified service other than a voice service."

Infochannel is not therefore aided by the statutory provisions of section 85.

There is no basis in the claim of Infochannel, as upheld by the Court below, that VOIP is a data service and not a voice service and that it had the right to, and was lawfully providing the latter service prior to the passing of the Telecommunications Act.

Both respondents, Infochannel and Beckford, complain that the relevant provisions of the Telecommunications Act, were unconstitutional, in that the Act deprived them of the right to provide and the right to receive respectively, VOIP. The Court below agreed.

Section 22 of the Constitution contained in Chapter III, guaranteeing certain fundamental rights and freedoms, inter alia reads:

> "22.-(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication.
>
> (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) which is reasonably required - ...
>
> (ii) for the purpose of protecting the reputations, rights and freedoms of other persons, ... or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments. ..."

However, these rights are not absolute in themselves. Restraints of such rights and freedoms are imposed in the Constitution itself. Section 13 recites the entitlement of every person in Jamaica to "the fundamental rights and freedoms of the individual," which however, are "... subject to respect for the rights and freedoms of others and for the public interest. ..."

Against this background, the principle still exists that the presumption of constitutionality exists in respect of all Acts of Parliament. (See ***Hinds v Regina*** (1975) 24 WIR 326).

Because of this presumption a challenger to the statute has an initial burden to prove its unconstitutionality. In the instant case that burden rested on the respondents, Infochannel and Stanley Beckford, to show:

(1) that there was a restriction on the right to the freedom of expression and if so,

(2) such restrictions were not reasonably required to be imposed by the Minister, for any of the purposes stated in section 22 of the Constitution.

Despite this, the Minister did present evidence that the restraint was reasonably required in the context of section 22(2). In that regard, the courts have allowed to Parliament a wide margin of appreciation in its view that the said restrictions are reasonably required. See ***Nyambirai v National Social Security Authority and Another*** [1996] 1 LRC 64 (Zimbabwe Supreme Court) in which Gubbay, C.J. acknowledged the superior knowledge and experience of national authorities of local conditions, as opposed to the judiciary. In the instant case the Minister had available to him an appreciable range of information and advice, and expressed himself openly, describing the issues which influenced the passage of the Telecommunications Act.

The breach of this right guaranteed by section 22(1) of the Constitution and complained of by Infochannel and Beckford was the hindrance to use VOIP service. If this right did not exist prior to the passing of the Act, it would not be

held to have been hindered. In my view there was no evidence of a prior right to provide and receive voice services claimed by Infochannel and Beckford. No constitutional rights protected by section 22(1) were therefore infringed in that regard.

Furthermore, the right to freedom of expression does not confer a right to use someone else's property for such expression. The Federal Appeal Court of Canada in construing the Canadian Charter of Human Rights in respect of the freedom of expression, in ***Re New Brunswick Broadcasting Co., Ltd v Canadian Radio-Television and Telecommunications Commission*** (1985) 13 DLR ($4^{th}$) 77 (per Thurlow, CJ), said:

> "... the argument confuses the freedom guaranteed by the Charter with a right to the use of property and is not sustainable. The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so."
> (Emphasis added)

Infochannel had no unrestricted right to use Cable & Wireless' facilities in particular, its telephone lines. It could do so, as it did previously, by the leased circuit agreement, on payment for such use. Beckford who was contractually linked to Infochannel, could still obtain numerous services, including the Internet, e-mail and fax, either from Infochannel or some other entity. There was no curtailment of their rights to freedom of expression.

Assuming that the Act of 2000 created a restriction on the respondents' right to freedom of expression by way of VOIP, such restriction would not be a

breach of their constitutional rights, unless it was shown to have been not reasonably required, in any of the circumstances of section 22(2).

Neither Infochannel nor Beckford produced any evidence to show that the restriction, was not reasonably required in the circumstances.

The Minister, by his affidavit dated June 18, 2002, revealed that in order that the broad mass of the citizens of Jamaica might benefit fully from the then worldwide revolution in information and technology, he had to develop a particular Government policy. The objectives were:

> "a) To encourage and aid in the development of wireless telephony;
>
> b) To expand international communication;
>
> c) To provide universal service (affordable local telephone service so that most of the population has access to phone service);
>
> d) To increase teledensity (the number of telephone lines per 100 population) throughout the Island;
>
> e) To increase the level of telephone penetration (the proportion of residences with telephone services);
>
> f) To move from what could be termed an exclusive licence framework to regulated competition, thereby increasing the variety of services available and the number of companies offering these services."

The Minister displayed a commendable balance in the achievement of these objectives. In paragraph 10, he said:

> "10. Taking into account the factors referred to below, I considered that development of such a policy and attainment of these objectives would be best accomplished through the introduction of regulated competition into the telecommunications sector, while at the same time having due regard to the rights of currently-licensed telecommunications providers in the Country. The implementation of this new policy of regulated competition would be through a phased transition plan, whereby competition would be introduced into the telecommunications sector in three phases commencing with the issuing of certain types of licences, with full competition beginning three years after the commencement of the first phase."

He considered the protracted litigation in various suits involving Cable & Wireless, Infochannel and himself, as Minister, the expense and issues involved and the time frame involved. He commented that:

> "... the policy objectives ... could not have been achieved while the matter (litigation) was pending."

The agreement of September 30, 1999 between the Government of Jamaica and Cable & Wireless was entered into as a consequence. Under this agreement, Cable & Wireless would:

(1) surrender its existing licences, including its monopolistic 25 year licence granted in 1988 to the year 2013, in exchange for new licences under the new Act;

(2) install 100,000 new telephone lines during the first year and 217, 000 in the 2nd and 3rd three-year liberalization period ending in March 2003;

(3) install 60 Internet terminals in post offices for members of the public within 18 months of the coming into effect of the Act;

(4) provide scholarships worth $16,000,000.00 per annum to the Caribbean Institute of Technology within the said first 3-year period;

(5) make contributions in goods or services to the value of $90,000,000.00 towards the refurbishment of the Goodyear Factory in St Thomas within the said period;

(6) pay $80,000,000.00 to the agency created under the Act to provide the duties of spectrum management.

No compensation was payable to Cable & Wireless for its surrender of its licences. The liberalization of the telecommunications industry was to be effected gradually, in three phases up to February 2003, after which there would be full liberalization of the industry and full and free competition.

This phased liberalization was instituted to effect a gradual progression from the existing monopolistic regime to one of free competition in the industry.

The Minister, in effecting the changes in the industry had the benefit of the advice of:

(1) Dr Donald Walwyn, Senior Lecturer, Department of Physics, University of the West Indies. In his affidavit dated March 4 1999, he traced the development of technology in local and global telecommunications, the use of the Internet, micro processor, VSAT and fibre optics in the process, and advised how countries like Jamaica could benefit in "this new landscape."

He stated that:

> "These VSAT terminals can be used for either voice or high grade data communications - or both."

and suggested that:

> "... An environment, which encourages a large number of players to participate, at this time, is probably the best way to ensure that all technological opportunities are fully explored, and the most suitable solutions survive and flourish."

(2) Dr Hopeton Dunn, Communications Policy Analyst and Senior Lecturer at the University of the West Indies. His doctoral degree was completed in Media Management and Telecommunications Policy at City University, London, England. He has several publications on telecommunications media and development.

In his affidavit dated March 4, 1999, he outlined the development in the telecommunications technology, the policy consideration and particularly the benefits to countries like Jamaica. In the areas of international call centres, tele-medicine, agriculture, real estate and tourism, investments and general job creation, the role of governments in regulating a liberalized telecommunications industry, would provide "the basis for improved economic development and provision of better social services."

He was of the opinion that:

> "A regime offering greater choice of telecommunication providers, with a wider range of rates and service options, lower costs for domestic and high volume commercial users and more jobs in conventional and value added services are among the likely benefits of a more competitive regime in Jamaica's telecommunications environment."

Further evidence that any restriction of the right to communicate, was "reasonably required" for purposes permitted under section 22(2) of the

Constitution, was contained in the affidavits of Hugh Oliver Cross dated March 8, 1999, and Jerry A Hausman dated April 9, 1999. The Constitutional Court declined to consider the evidence ruling them as inadmissible. In so ruling that Court was in error.

The Judicature (Constitutional Redress) Rules, 2000 which came into operation on March 20, 2000, in paragraph 3(1), reads:

> "3-(1) An application to the Court pursuant to section 25 of the Constitution for redress by any person which alleges that any of the provisions of sections 14-24 inclusive of the Constitution has been, is being or is likely to be contravened in relation to him shall be made by motion to the court supported by affidavit or affidavits."

Paragraph 3(5) reads:

> "(5) The provisions of the Judicature (Civil Procedure Code) Law shall apply to all proceedings under these rules with such variation as circumstances may require."

Section 406 of the said Code provided that:

> "406 Upon any motion ... evidence may be given by affidavit. ..."

and the sections following are concerned with the form and contents of affidavits (sections 408 to 411).

An affidavit will be excluded if it contains scandalous material (section 413), alterations and interlineations not initialled (section 414), an inappropriate jurat (section 415) or if it may involve the appearance of bias (section 418 and 419). Neither of the said two affidavits was said to contain any of the above

disqualifying features. The provisions of sections 424 and 425, which permit affidavits to be used in Chambers, cannot be read to override the express provisions of the Constitutional Redress Rules. The affidavits of Cross and Hausman, speaking as they do to the state of affairs existing immediately proximate to the Minister's act of effecting the passage of the Telecommunications Act, were current, relevant to the state of affairs then existing and admissible as evidence containing material on which the Constitutional Court could have relied.

Senior Vice President, Engineering, Cable & Wireless, Hugh Oliver Cross, in his affidavit dated March 8, 1999, stated that Cable & Wireless in 1999, had established a modern telecommunications network and infrastructure described as, "...one of the most modern and resilient in the world." This was accomplished by its capital expenditure of over Jamaican $27 billion improving the use of technology over the period 1990 to 1999.

He also advanced that Cable & Wireless digitalized its domestic and cellular networks ahead of countries such as the United States of America, Canada and some European countries. It introduced fibre optic cabling into its network in 1983 (which cable is almost completely laid around the entire coast of Jamaica). It also introduced the wireless-in-the-loop technology which attracted several telecommunications companies to Jamaica to observe its functions. The five (5) operating licences granted to Cable & Wireless in 1998, facilitated this

capital expenditure, with the understanding that it would recover its investment over the period of its licence.

His affidavit further stated that the advanced telecommunications network created the ability to establish in Jamaica international call centres, tele-medicine, tele-working of secretaries or executive from home or office, computer data bases to facilitate more efficient methods of farming, fishing and general informatics. Cable & Wireless increased its telephone lines from 89,000 to over 500,000 and its waiting list from 70,000 to a demand for service up to 170,000 during the period 1989 to 1998. Cable & Wireless' rates are among the lowest in the world, including rates in some developed countries where competition is strong. Cable & Wireless as the exclusive provider of external telecommunications service in Jamaica, had the reasonable expectation that with its substantial capital investment and licence to continue to 2013, it would not be required to surrender its licence, but would be permitted to earn a reasonable return on its investment.

Jerry A. Hausman, Professor of Economics, Department of Economics, Massachusetts Institute of Technology, in his affidavit dated April 9, 1999, by the use of statistical techniques, he analyses economic data and the study of the behaviour of consumers, firms and markets. He produced a report in respect of the external communications services provided by Cable & Wireless in Jamaica in terms of its exclusive licences. Telecommunications fixed wire-line networks, he

said, consists of the local network, provided at "... an extremely high fixed cost ..." and a long distance network, which also connects international call networks.

Wireless local loop, is used to replace some areas of the local network, with radio transmission. This requires a high fixed cost investment and Cable & Wireless is at the forefront of the utilization of this wireless system. Because of the high fixed cost of the local network, a single local telecommunications provider is usually permitted in both developed and developing countries, minimizing competition. Such a provider is also permitted some exclusivity in national long distance or international long distance service, utilizing its profits in the latter service to subsidize "below cost provisions of local telephone service."

He explained that governments do employ a system of regulated monopoly or regulated competition. A number of developed countries, and Jamaica, use a rate of return regulation which allows the establishment of tariffs to permit the telecommunications company to earn profits on its capital investment. He said:

> "Whether an exclusive licence is granted or competition is permitted, regulation is still required. ... Government choice between an exclusive license and competition can depend on a number of economic factors. Among the most important factor is the level of telephone penetration (the proportion of residences with telephone service) ...teledensity ...."

He noted that Jamaica is categorized by the World Bank as a country with a lower middle income economy with a highly developed bauxite, agricultural and food processing sectors, and an important tourism sector. However, it lacks a

significant amount of large business activity to create the demand for telecommunication services and so provide substantial revenues to subsidize residential and small business telecommunication services, as one finds in some other Caribbean countries.

The significant investment of Cable & Wireless in Jamaica's local network has led to a teledensity in Jamaica of 18.1 which is comparatively high by international standards, placing Jamaica in the top 25% teledensity "in its income category in 1997," making its performance "... impressive relative to countries that are comparable in income and development." This investment of J$27.8 billion by Cable & Wireless over the period 1989-1998, modernizing the network with a complete digital network, with fibre optic and wireless local loop, is a larger per capita investment up to 1997, than several telecommunications companies existing in the United States. In Professor Hausman's opinion:

> "... the terms and conditions of the Exclusive License are consistent with international government and industry practices. CWJ is regulated by rate of return (ROR) regulation, which is a well accepted form of regulation used in Canada and other countries today ....."

Referring to the external international licence of Cable & Wireless, he said:

> "The duration of the External License of 25 years is also consistent with international standards surveyed below. The most important economic factor that affects license duration is the sunk and irreversible nature of the majority of telecommunications network investment. Most investment in fibre optic networks, copper loops, and other transmission equipment is sunk and irreversible investment – it cannot be redeployed except at a large capital loss.

> Furthermore, the depreciation lives for much telecommunications equipment is 20 years or more. Thus, for a licensee to have the economic incentive to make these long-lived investments, which are largely sunk investments, security of tenure is required. Otherwise, a company could make hundreds of millions of dollars of new investment and then not make a reasonable return on the investment because political events could cause a subsequent government to curtail the profits of the company. Thus, exclusive licences with tenure of 20-25 years are quite common in telecommunications."

In conclusion, he said that the terms and conditions of the Cable & Wireless licence including the rate of return on investment of 17.5% to 22%, and the duration of licence of 20-25 years were "consistent with international industry norms." The exclusive licence granted to Cable & Wireless was a reasonable economic decision for a government of a state such as Jamaica to make.

This affidavit evidence of Hugh Cross and Professor Hausman, previously agreed between counsel to be admissible by consent, was excluded by the Constitutional Court without a proper basis. The Court thereby deprived itself of considerable material which could have assisted in the determination of the issue of whether or not the restriction was reasonably required.

Any restriction on the transmission of voice or data, as a general rule, is a potential restriction on the freedom of expression prohibited by section 22(1) of the Jamaican Constitution. However, the Constitution itself, mindful of the potential breach, provided in section 22(2) exceptions, in that, no breach of such freedom arises if the restriction imposed:

> "(a) ... is reasonably required –

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons ... or regulating telehphony, telegraphy, posts, wireless broadcasting, television or other means of communication. ..."

The "wide margin of appreciation" recognized in the ***Nyambirai*** case (supra) as accorded to Parliament permits the courts to examine the facts available in order to determine whether the restriction imposed by Parliament and complained of, were not "reasonably required", and as such could be regarded as a constitutional breach. A most helpful decision is that of the Supreme Court of Papua New Guinea in ***NTN Pty Ltd and NBN Ltd v The State*** [1988] LRC (Const) 333. The applicants, an Australian company and its corporate manager entered into agreement on May 25, 1985, with the Government of Papua New Guinea and as a consequence established a television station and facilities. They were issued with licences under the Radio Communications Act to commence broadcasts on July 14, 1986. Subsequent regulations and a statute prohibited the operation of a television station, even under licence before January 31, 1998. The applicants challenged the statute as being in breach of their fundamental constitutional right to freedom of expression. It was held that the Act was unconstitutional and invalid. However, the Court also held that the temporary prohibition on television broadcasting was valid and a permissible restriction on one's constitutional right and on that basis necessary to achieve the purpose of public welfare. The restriction was "reasonably practicable in a democratic

society," as permitted by section 38(1) of the Constitution. Barnett, J. referring to the restriction of 14 months, at page 359, said:

> "Such a short delay in the commencement of a new venture in mass media communications is not unreasonable for the apparently genuine reason of formulating a policy and setting legislative controls in place, so as to reduce a potentially dangerous threat to public welfare and to maximise the very significant benefits for the public welfare which are latent in this powerful mass communications media."

In the instant case, the three-year period of postponement prior to full liberalization, provided by the Telecommunications Act, together with the agreement of September 1999, were necessary to protect the rights and freedoms of the public.

The Minister, as stated in his affidavit evidence before the Court below, advanced the policy objective of the Government to effect full liberalization of the telecommunications industry and foster increased competition for the benefit of the public. Section 3 of the Telecommunications Act reiterated these objectives. He secured and had available to him expert advice on the status of the telecommunication industry in Jamaica and the method by which the said objectives could be achieved. The witness Hugh Cross highlighted the advanced modern technological network and infrastructure created by Cable & Wireless in Jamaica and its vast investment over the period leading up to 1999. Professor Hausman, conscious of the large investment of Cable & Wireless in Jamaica in excess of J$27.8 billion, and the high teledensity of the communication services did not disapprove of the exclusive licences held by Cable & Wireless. On the

contrary, he saw its performance as "impressive", and comparable to some developed countries. He projected that a system of a "regulated monopoly" or "regulated competition" can be economically successful depending on the prevailing conditions in a country.

In the telecommunications case of ***Retrofit (Pvt) Ltd v Minister of Information, Posts and Telecommunications*** [1996] 4 LRC 512, the Zimbabwe Supreme Court held that there was an interference with the freedom of expression of the applicant who wished to provide a mobile telephone service, in circumstances where the respondent, a public body, had a monopoly in the provision of all telephone services. The basis of the finding is not the monopolistic licence per se but the fact that the telecommunications service was so grossly inefficient inadequate and further deteriorating to the extent that the public lacked the means to communicate freely and in some cases, could not communicate at all. In ***Cable & Wireless (Dominica) Ltd v Marpin Telecoms and Broadcasting Co.*** [2000] 57 WIR 141, the Judicial Committee of the Privy Council found that the restriction imposed by the grant of a 25 year licence to Cable and Wireless was an unnecessary monopoly in Dominica. The licence was granted after the passing of their Telecommunications Act.

I agree with the submission of the Solicitor General for the 1st and 2nd appellants that the Constitution of Dominica in section 10, in order to justify an interference with the freedom of expression, requires that it be shown that the

restriction is reasonably required for the purpose of "... regulating the technical administration or technical operation of telephony. ..." That exception is narrowly circumscribed, in contrast to the more expansive comparative provisions of section 22(2) of the Constitution of Jamaica.

In the instant case, rather than maintaining the monopoly of Cable & Wireless by the provisions of the Act as Dr. Barnett suggests, the Minister by the September 1999 agreement, succeeded in removing the monopoly, which, Cable & Wireless reasonably expected that it would enjoy until the year 2013. In view of Cable and Wireless' substantial investment and anticipated economic benefits, a phased introduction of liberalization by the Minister was, in my view, a mature, balanced and just approach, for the benefit of Cable and Wireless' licensing rights as also Internet service providers, including Infochannel and the public in general.

The Telecommunications Act, 2000, in section 3, declares as its objects, among others, the promotion and protection of the interest of the public by fair and open competition in the provision of specified services and telecommunications equipment. It provides for universal access to telecommunications locally and internationally encouraging investments and the use of infrastructure, in the provision of telecommunications services. The Act also provides for the licensing of services, local and international, the protection of consumers, the powers and immunities of service providers, the certification standards of equipment, remedies of aggrieved persons, the powers of the

Minister and the making of rules. Prima facie, therefore, the Act is intended to regulate telephony.

The Act recognizes the Office of Utilities Regulation ("the OUR") established under the Office of Utilities Regulation Act, as the entity to "... regulate telecommunications ... (that is) ... specified services and facilities. ..."

The OUR receives and processes application for a licence and makes recommendations to the Minister. The OUR does not in effect, grant licences. I agree with counsel for the OUR that the Constitutional Court was in error to find that the OUR acted in breach of its statutory functions. On the contrary, the OUR, in its letter dated September 28, 2000, referred to its recommendation that the service provider licence should be granted to Infochannel.

The OUR thereby fulfilled its statutory functions. There is no evidence that it acted otherwise, in the matter.

Rule 1.16(4) of the Court of Appeal Rules permits this Court to "draw any inference of fact which it considers is justified on the evidence."

In all the circumstances, it is my view, that there was no infringement of the constitutional rights of Infochannel and Beckford to their freedom of expression guaranteed by section 22(1) of the Constitution. The Minister, on relevant facts and material available to him, employed the Act, in a manner which was reasonably required for the purpose of "regulating telephony" in Jamaica (section 22(2)). The Constitutional Court was in error. For the above

reasons I agreed that the appeals should be allowed with costs to the appellants Cable & Wireless to be agreed or taxed.

**PANTON, J.A.**

1. This appeal, which we allowed, was against a decision of the Constitutional Court (Reid, Karl Harrison and Norma McIntosh, JJ) on December 20, 2002, wherein it was declared that :

> (a) it was unconstitutional and in breach of Infochannel's constitutional rights of freedom of expression for the Minister of Industry Commerce and Technology and/or the Office of Utilities Regulation to refuse the grant of a licence to Infochannel to continue to provide the telecommunications services including voice over internet service which it provided to its customers prior to the passage of the Telecommunications Act, 2000 ;
>
> (b) the telecommunications services carried on by Infochannel prior to the Telecommunications Act 2000 are protected by section 22 of the Constitution;
>
> (c) the exclusive licence granted to Cable and Wireless Jamaica Limited by the Telecommunications Act 2000 which makes unlawful the provision of voice over internet service by Infochannel contravenes the latter's fundamental right to freedom of expression granted by section 22 of the Constitution;
>
> (d) the breaches of Infochannel's constitutional rights are also breaches of the constitutional rights of Stanley Beckford, a customer of Infochannel; and

(e) Infochannel and Stanley Beckford were entitled to damages, which were to be assessed, and to costs.

2. The Constitutional Court had before it an amended notice of motion dated 27th February, 2002, seeking the declarations that were made. In addition, declarations were sought in respect of alleged deprivation of the protection of the law and the enjoyment of property rights enshrined in sections 13, 18 and 20 of the Constitution, and also in relation to alleged deprivation of the right to fair treatment protected by section 5 of the Fundamental Rights (Additional Provisions)(Interim) Act. This motion was grounded on an affidavit of Patrick Terrelonge sworn to on the 4th October, 2001.

3. Terrelonge, the chairman and chief executive officer of Infochannel Limited, said that Infochannel was incorporated in Jamaica on the 5th December, 1989, to offer to the public value-added information services based upon telecommunications transmissions and computer networking technology. These services, he said, were offered to Infochannel's subscribers since 1995. One of the value-added information services is access to the internet. Another such service is voice over internet. In order to provide its internet services including voice over internet, Infochannel requires:

(i) International telecommunications facilities to bring in and to transmit out data;

(ii) Computer and electronic equipment to collect and process data;

(iii) An internal link between Infochannel's computers and Cable and Wireless (Jamaica) Limited's local telephone network terminal located at Infochannel; and

(iv) Transmission over the local dial-up lines.

4. Cable and Wireless had been issued an exclusive licence effective from the 1st September, 1988, to provide telephone services for public and private purposes in all parts of Jamaica for twenty-five years. By an agreement dated December 21, 1994, between Cable and Wireless and the Fair Trading Commission, Infochannel was permitted to attach or connect its internet network and facilities to the local Cable and Wireless telephonic network system.

5. Terrelonge's affidavit had attached to it a licence issued on the 16th June, 1998, to Infochannel under the Radio and Telegraph Control Act. That licence authorised Infochannel to establish, maintain and use radio and telegraph stations or apparatus, for the purposes of operating a wireless telecommunications service between Infochannel's offices in Jamaica and its offices located outside Jamaica in respect of the provisions of its internet services in Jamaica. There was also attached to the licence a document headed "First Schedule" indicating the name and location of the station, the call sign, frequency, emission designation, and transmitter power. The document also indicated that the station was permitted to transmit data only.

6. Infochannel regarded the grant of the licence as enabling it to bring in data, including voice over internet as data, by means of satellite communications directly into its computer system, independent of the international data circuit

previously provided by Cable and Wireless. There followed various suits between Infochannel and Cable and Wireless, and one in 1999 between Cable and Wireless and the Minister, wherein Cable and Wireless claimed exclusivity over all forms of telecommunications in, out and through Jamaica. This latter suit was discontinued. Then, in an agreement dated August 19, 1999, between the Minister, Cable and Wireless and Infochannel, all actions were discontinued.

7. The major features of the agreement which was to be in force until September 30, 1999, when a new legal and regulatory framework for the internet services being provided by Infochannel was expected to be formulated, were the following:

(a) the discontinuance of the actions between Cable and Wireless and Infochannel;

(b) the commencement of negotiations for the settlement of the actions;

(c) the submission to arbitration of any matter not settled by 17th September, 1999;

(d) Infochannel should not use its facilities to terminate international voice telephone calls into the network of Cable and Wireless;

(e) Infochannel would provide VOIP solely to its internet subscribers;

(f) VOIP means interactive voice communication where speech is converted for transmission utilising TCP/IP data transmission techniques;

(g) Cable and Wireless would be free to implement appropriate technologies and procedures to protect its network from the termination of international voice telephone calls, inclusive of

VOIP, provided that there was no interference with the provision of internet services by Infochannel to its internet subscribers or the provision of VOIP and/or voice over internet to the extent provided for in the agreement; and

(h) the agreement was without prejudice to the rights of Cable and Wireless and Infochannel to maintain their respective contention as to the definition of international voice telephony, and did not constitute a waiver of any rights.

8. On September 30, 1999, the Government of Jamaica and Cable and Wireless entered into a separate agreement whereby the latter agreed to surrender the operating licences it had, in consideration for the adoption and implementation and bringing into law new legislation consistent with the Government's telecommunications policy. The legislation was intended to establish a framework whereby all sections of the telecommunications market would move towards full, fair and competitive conditions on a phased basis and ensure that existing and future services to uneconomic areas and uneconomic customers would be supported by universal service contributions from all licensees on an equitable basis. During the transition to full competition, Government undertook that providers of telecommunications services and owners and operators of telecommunications facilities would be licensed strictly in the terms set out in the annexures to the agreement. These providers and operators included Cable and Wireless and Infochannel.

9. The Minister, in an affidavit dated 18th June, 2002, has stated the position of the Government quite clearly. The policy objectives were set out thus:

(a) to encourage and aid in the development of wireless telephony;

(b) to expand international communication;

(c) to provide universal service (affordable local telephone service so that most of the population has access to phone service);

(d) to increase teledensity (the number of telephone lines per 100 population) throughout the island:

(e) to increase the level of telephone penetration (the proportion of residences with telephone service); and

(f) to move from what could be termed an exclusive licence framework to regulated competition, thereby increasing the variety of services available and the number of companies offering these services.

The Minister said he considered that development of such a policy and the attainment of the objectives would best be accomplished through the introduction of regulated competition. He decided to proceed by means of a phased transition plan, culminating in full competition beginning three years after the start of the first phase of the plan. He secured an agreement with Cable and Wireless which ensured that the latter would install 217,000 lines within three years of the enactment of the Telecommunications Act, as well as 60 internet terminals within 18 months of the coming into effect of the Act. These terminals would be provided in post offices thereby allowing for access to the public. Cable and Wireless would also provide scholarships worth J$16 million annually tenable

at the Caribbean Institute of Technology for the first three years after the coming into force of the Act.

There would be three phases, during the first two of which bypass operations circumventing the international network of Cable and Wireless would be prohibited. During phase three, beginning three years from the commencement of the date of the Act, licences would be issued in keeping with the Act. So, no new international facilities would be issued until the third phase.

10. The Telecommunications Act came into effect on March 1, 2000. It repealed the Telephone Act and amended sections 2, 5, 6, 7, 8, 9, 10, 11, 13, and 16 of the Radio and Telegraph Control Act by deleting the words 'telegraph' and 'telegraphy', and also deleting the definitions of 'telecommunications' and 'telegraphy'. Under the new legislation, the Office of Utilities Regulation (hereinafter referred to as OUR) was assigned certain duties. Infochannel applied by letter dated the 22nd February, 2000, to OUR for a licence for specified services pursuant to the Telecommunications Act. In this application, Infochannel asserted that prior to the Telecommunications Act it had "owned and operated facilities and was engaged in providing a variety of specified services including voice over internet and or IP Telephony for which licences were not required under the Telephone Act or the Radio and Telegraph Control Act". The OUR responded on the 24th February, 2000, indicating that Infochannel's request was premature.

11. In August 2000, Infochannel received from the Ministry of Industry Commerce and Technology two licences dated March 14, 2000, which did not give Infochannel the right to provide internet services including voice over internet as specifically defined in the 1998 special licence. After months of correspondence between Infochannel and the OUR, with interventions from the Minister, the OUR by letter dated June 8, 2001, informed Infochannel that it had recommended to the Minister the issue of an internet service provider licence to Infochannel. That licence has not been issued.

12. Shortly after the coming into effect of the Telecommunications Act, Cable and Wireless complained to the OUR that Infochannel was conducting operations in breach of the said Act. This was disputed by Infochannel. Cable and Wireless, nevertheless, altered the characteristics of a number of the access lines supplied by them to Infochannel, thereby preventing and blocking Infochannel from "being able to initiate dial-up calls and thus preventing communication to, from and between Infochannel and its subscribers and users of its internet services including voice over internet...". The conversion of the access lines had been done with the consent of the OUR.

13. Infochannel filed suit in relation to what it regarded as a breach of the terms and conditions of its relationship with Cable and Wireless. That suit failed. In January, 2001, Cable and Wireless again advised the OUR of Infochannel's alleged breach of the Telecommunications Act. Infochannel again disputed this. However, the OUR authorized Cable and Wireless to discontinue its telephonic

services to Infochannel. This action by the OUR is regarded by Infochannel as a breach of the Constitution. Infochannel also claims that section 51 of the Telecommunications Act is unconstitutional, if its effect is to deny them the right of freedom of expression.

14. There is no dispute that the Telecommunications Act prevented the Minister from granting a licence to Infochannel to provide voice over internet protocol (VOIP) until after February 28, 2003. In this appeal, the only service that is in issue is VOIP. A fundamental difference exists between Infochannel on the one hand and the respondents on the other in relation to the nature of the service that Infochannel was entitled to provide prior to the Telecommunications Act. The Constitutional Court was required to determine whether VOIP was a voice service or a data service. Infochannel submitted that it was a data service whereas the first and second appellants submitted that it was a voice service.

15. In support of its contention that the service was a data service, Infochannel relied on the affidavit of David Greenblatt, the chief executive officer of Adir Technologies Incorporated, " a Delaware registered software company that sells multiple products to enable the use of voice over the internet, commonly called VOIP or Voice over IP". According to Mr. Greenblatt, in order that Infochannel may provide direct connection to the internet to its subscribers it "must of necessity utilize the local telecommunications infrastructure". He compares the traditional circuit-switched voice system with the new voice over IP system which is value-added or enhanced service. The former, he regards as a

voice transmission process whereas communication by the latter process "is a standard part of data communications that take place over internet protocol". He opines that "although voice is spoken and heard on the line, in voice over IP, the process is one of a value-added service over a traditional IP data network".

16. The first and second appellants, through affidavits from the Minister and others, have pointed to the need for the telecommunications industry in Jamaica to be unlocked, that is, to be removed from the grip that it has been in since 1988 when monopolistic licences were granted to Cable and Wireless. At the time of such grants, there was justification for same but with the rapid advance in technology, through the improvement in satellite systems and fiber optic cables, the idea of a monopoly has become virtually obsolete. There have been new developments in micro-chip computer applications and the process of digitalization which have altered the cost and complexity of signal switching, routing and information processing. This has made it possible for telecommunications services to be provided on a less cost intensive and more efficient basis by a range of competing service providers. As Dr. Hopeton Dunn states in paragraph 5 of his affidavit dated 4th March, 1999:

> "The convergence of these emerging technologies also began to create a major globally integrated industry, linking telephones, computers, data and broadcasting services and a host of new commercial and industrial applications using wireless or wired telephony infrastructure. Whereas in the past the traditional industry was based on voice telephony and limited telex services, the new emerging industry made possible the digital transmission of all types of information in the form of data, graphics, video and

> music as well as voice, with the possibility of these services being provided at a cheaper cost than conventional analogue technology could deliver."

And at paragraph 6, he says:

> "These developments opened up greater possibilities for competition, involving innovative entrepreneurs of all sizes and specializations. More importantly the new technologies significantly improved the prospects of economic development for emerging economies such as Jamaica in terms of the employment prospects, ease of marketability of products, increased growth in tourism and the ability of big and small players in businesses to access remote and sophisticated markets. The options for economic applications are diverse."

17. The Minister, in an affidavit sworn to on the 5th March, 1999, expressed his reliance on the views of Dr. Dunn and Dr. Donald Walwyn. The former is a communications policy analyst and senior lecturer at the University of the West Indies. He is the holder of a Masters degree in communications policy and completed a doctoral degree in media management and telecommunications policy at the City University, London. The latter holds a Ph.D. in Physics and is a senior lecturer in the Department of Physics at the University of the West Indies. Between 1974 and 1997, he worked with the Jamaica Telephone Co. and its successor Cable and Wireless Jamaica Limited. Immediately prior to his departure from Cable and Wireless, he was senior vice president in charge of the network systems. His duties pertained to telephone exchanges, earth satellite stations, submarine cables and cellular systems.

18. Dr. Walwyn describes the changes that have taken place in telecommunications within the past twenty-five years as "revolutionary and phenomenal. The changes have been rapid, and with the introduction of technologies, the telecommunications sector has been transformed from what were basically services in telephony and telex to such an extent that the revolution will impact significantly on each and every country in the world. It will to a large extent affect the lives of human beings wherever they are situated".

19. Dr. Walwyn, in paragraphs 13 to 20 of his affidavit, gives a description of the communications systems and methods and an idea of what the future holds as well as the type of action needed for Jamaica to benefit economically from the revolution that is taking place. He compares the disadvantages of terrestrial wireless systems, which are affected by topography, with the satellite system which allows wireless communications to reach practically anywhere. Satellite terminals may be fixed or mobile, with the fixed ones handling large volumes of communication traffic such as international telephone calls whereas the mobile ones are used normally for personal communication such as the cellular service. The terminal that is designed to handle relatively low volumes of communication traffic is called a "Very Small Aperture Terminal" (VSAT). This terminal can be used for either voice or high grade data communications, or both. The VSAT is rapidly being embraced by individual users and businesses. It enables businesses to obtain vital communication links under circumstances where terrestrial links could not be provided in a timely manner. VSAT allows users to link their

communication systems to networks which are located very far away. Without VSAT, the only networks which can be conveniently accessed are those provided by local operators. With VSAT, a business in New Kingston, for example, can get dial tone from the telephone network in New York city.

20. In Dr. Walwyn's view, the telecommunications landscape presents a picture of a pending massive transformation in the way in which the world does business and in the lives of its inhabitants. The participation of Jamaica in this revolution depends on its readiness to accept the new technologies, in particular, its physical infrastructure and the legal and regulatory regimes under which the new service providers can operate. To achieve the desirable end, Jamaica needs investors to build the following infrastructure:

(a) high speed high capacity communication links to hubs in the developed world, particularly, a direct submarine optical fibre link between Jamaica and the United States of America;

(b) a re-wiring of the country to provide the necessary high speed communication links; and

(c) intelligent network elements to direct the communication services needed to implement the myriad sophisticated new services which are expected to be implemented.

21. In the light of the information and advice available to it, the Government of Jamaica concluded that a single service provider in the area of telecommunications was not in the best interests of the country, and that a new policy in this regard had to be developed as quickly as possible. At the heart of

that policy was the need for competition to be introduced in the provision of the services. It was in this context that the VSAT licences were granted. These licences were restricted to the transmission of data.

22. So far as the telecommunications policy and the Telecommunications Act are concerned, the drafting instructions agreed between the Minister and Cable and Wireless reflected the views of many other stakeholders in the telecommunications industry, including Infochannel who were all consulted extensively relative to all the issues. The Act was also the subject of extensive debate in Parliament, and several members of the public including counsel for Infochannel were invited to make presentations thereon to a Joint Select Committee of Parliament.

23. In an affidavit dated 27th June, 2002, Winston Haye, Director General of the OUR, disputed the February 22, 2000 claim advanced by Infochannel to the right to provide internet services including voice over internet. The OUR did not accept the position of Infochannel in relation to the transitional provisions of the Telecommunications Act. Having received the relevant application from Infochannel, and having received Ministerial direction, the OUR issued its recommendation on June 8, 2001, for Infochannel to be granted an ISP licence under the Telecommunications Act.

24. Subsequently, the OUR, after receiving complaints from Cable and Wireless, performed its statutory duty as the regulator under the Telecommunications Act by conducting investigations and hearings, and as a

result does not accept Infochannel's position on the question of voice over internet.

25. In his judgment, Reid, J. said:

> "Having had the benefit of reading in draft the judgment of my brother Harrison, J., I would hold that VOIP is a standard part of data communication that takes place over the Internet Protocol and that what is transmitted over the VSAT are digital data packets generated by compute processing application."

Norma McIntosh, J. also expressed agreement with the reasons stated by Harrison, J. So, on the question of whether Infochannel was engaged in transmitting voice or data prior to the Telecommunications Act, the reasoning of the Constitutional Court is contained in the judgment of Harrison, J. He placed the contending positions of the parties thus:

> " The applicants contend that VOIP is a standard part of data communications that takes place over the Internet Protocol and accordingly it ought to be classified as data ... The respondents contend on the other hand that VOIP is a voice service. They seem however to acknowledge that at some point there is a data component..."

He concluded thus:

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

26. Both Reid, J. and Harrison, J. found that Infochannel was hindered in its operations as a result of section 85 of the Telecommunications Act. Reid, J. stated it thus:

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

Harrison, J. put his position this way:

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

As stated, it appears that Reid, J. restricts the hindrance to the offer of VOIP whereas Harrison, J. regards it as extending to the telecommunications services generally, including VOIP.

27. In relation to the question of freedom of expression, Reid, J. expressed the view that it had not been clearly shown that "the increases in multiple licences justifies extension of the monopoly of CWJ nor that the period of three years phased liberalization was reasonably required allowing even the "wide margin of appreciation" to be accorded to Parliament". This seems to be nothing more than an expression of agreement with the submission of Dr. Barnett, without stating why that position was to be preferred. Inferentially, he held that there had been a breach of section 22 of the Constitution.

Harrison, J. stated his appreciation of the question for determination in this manner:

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

Having reviewed the evidence and the submissions, he concluded thus:

> "I do believe however despite the reduction in the number of years of Cable and Wireless' licence, that a continued monopoly for even three years is not justifiable having regards to the Minister's policy statements. The dicta of Kaufman, C.J. in **Berkey Photo Inc v. Eastman Kodak Co.** (1979) 603 (sic) is quite apt where he had condemned the use of monopoly and stated:
>
> "Because like all power it is laden with the possibility of abuse; because it encourages sloth rather than the active quest for excellence; and because it tends to damage the very fabric of our economy and our society, monopoly power is inherently evil".
>
> It is beyond any question also that the grant of multiple cellular licences is a worthy objective but this does not mean that the increase of cellular service justifies the continuation of the monopoly. It is my considered view that without the monopoly Cable and Wireless would remain free to implement the increase in the number of telephone lines and other services to the public. In fact, the existence of competitors may be a strong inducement for it to do so with increased expedition".

The learned judge continued:

> "I do agree with Dr. Barnett that the Minister had no reasonable justification for sacrificing the rights of the Applicants and many other Jamaicans to placate the claims of Cable and Wireless. He really should have allowed the Judicial Review proceedings to be

finalized in order to see whether or not Cable and Wireless had an exclusive licence under the provisions of the RTC ...".

He concluded:

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

Accordingly, I find that:

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

28. The sum total of the judgments is that the Telecommunications Act has breached the constitutional right of the respondents to freedom of expression, by stipulating a period of three years for the phasing out of the monopoly that Cable and Wireless had secured by contract in 1988 for a period of twenty-five years.

## ***29. <u>The grounds of appeal</u>***

The grounds of appeal may be summarized thus:

The learned judges erred in finding/holding –

(i) that voice over internet protocol is a data service, not a voice service, and Infochannel was lawfully providing same prior to the Telecommunications Act;

(ii) that Beckford had a constitutional right to access voice over internet protocol from Infochannel;

(iii) that the relevant provisions of the Telecommunications Act were unconstitutional;

(iv) that the OUR was in breach of Infochannel's constitutional rights of freedom of expression;

(v) that the OUR's failure to grant Infochannel a telecommunications licence to provide telecommunication services including voice over internet protocol was a breach of Beckford's constitutional rights of freedom of expression;

(vi) that the OUR could be liable in damages for contravening Infochannel's and Beckford's constitutional rights;

(vii) that the period of three years phased liberalization of the telecommunications industry was not reasonably required in all the circumstances; and

(viii) that there had been an extension of the monopoly of Cable and Wireless rather than a substantial curtailment of same; and accordingly failed to consider the prevailing circumstances of the promulgation of the Telecommunications Act.

The ninth ground of this summary of grounds is that the learned judges erred in refusing to admit and consider relevant and material evidence, namely, the

affidavits of Hugh Cross dated March 8, 1999, and Jerry A. Hausman dated April 9, 1999.

30. The affidavits of Cross and Hausman were filed in suit M 89 of 1998 which involved the Minister and Cable and Wireless. In her oral and written submissions to us, Miss Hilary Phillips, Q.C., said that there had been an agreement between junior counsel for Infochannel and counsel for Cable and Wireless in relation to the use of these affidavits in the proceedings before the Constitutional Court. I accept this statement by learned Queen's Counsel. Such was the nature of the agreement and understanding between the parties that Infochannel was allowed to rely on other affidavits filed by the Minister, Dr. Hopeton Dunn and Dr. Donald Walwyn in the said suit. However, the Constitutional Court denied Cable and Wireless the use of the affidavits of Cross and Hausman on the basis that the proceedings were in open court as opposed to chambers.

31. It seems that the Constitutional Court, in giving that reason, was relying on section 425 of the Judicature (Civil Procedure Code) Law which falls under Title 35 under the heading **"Affidavits and Evidence in Chambers"** The section reads:

> "All affidavits which have been previously made and read in Court upon any proceeding in a cause or matter may be used before the Judge in Chambers".

It seems, however, that the Court overlooked the following factors:

(a) section 425 relates to proceedings in Chambers;

(b) section 406 provides that upon any motion evidence may be given by affidavit;

(c) the instant proceedings were in open Court; and

(d) the parties had consented to the use of the respective affidavits.

In view of the consent of the parties, the decision of the Court in this regard lacked balance and a sense of fairness. The parties having agreed on the use of the documents for these proceedings, the Constitutional Court ought not to have allowed Infochannel the benefit of the use of the documents agreed to by Cable and Wireless while the latter was denied the use of the documents agreed to by Infochannel. Furthermore, when it is considered that the affidavits of Cross and Hausman were responses to the affidavit of the Minister dated the 5th March, 1999, which was presented as part of Infochannel's case, the lack of balance is obvious. In that affidavit, the Minister had expressed his reliance on the views of persons such as Drs. Dunn and Walwyn. The Minister, being a party to the proceedings in which the affidavits were filed, would have been aware of these responses which were filed in the 1998 suit and so would have had their contents in mind when he settled the suit with Cable and Wireless, and also in formulating the new telecommunications policy.

32. I am of the view therefore that the Constitutional Court erred in refusing to admit the affidavits in evidence. In failing to do so, it denied itself the opportunity of gaining a fuller understanding of what may have influenced and motivated the settling of the suit with Cable and Wireless as well as the

formulation of the telecommunications policy. Harrison, J. was, accordingly, not in a position to conclude that the Minister "really should have allowed the Judicial Review proceedings to be finalized in order to see whether or not Cable and Wireless had an exclusive licence under the provisions of the RTC".

33. ***Voice or data***

It has already been mentioned that the appellants, except OUR, submitted that a determination of whether Infochannel was lawfully entitled to provide a voice service, as opposed to a data service, in its internet business, prior to the Telecommunications Act was important to the determination of the appeal. They maintained that it was a voice service that was being provided, whereas Infochannel was only licensed to provide a data service. On the other hand, Infochannel contended that VOIP (Voice Over Internet Protocol) is not a voice service, but rather a data service. In this regard, reliance was placed on a directive of the European Commission, the approach of the United States Federal Communications Commission, the International Telecommunications Union's "Internet Reports IP Telephony 2001', and on what the written submissions on behalf of Infochannel refer to as "The South Africa Experience".

34. "The South Africa Experience" refers to the opinion of the authors of "Global Telecommunications Law and Practice" on South Africa's Telecommunications Act 1995. The written submission on this aspect refers to page 5226 of the work as carrying a suggestion of the authors that even if the South African Act defines voice to include instances when voice is converted to

data, such an interpretation of the meaning would be untenable. The written submission, however, overlooks other statements of the authors which seriously qualify the view just expressed. For example, on the said page, after the aforementioned view, the authors state:

> "...it is unfortunate that there exists no clear indication either way as to the exact meaning of "voice" as it is used in this context. This lack of certainty causes a great deal of debate in the South African telecommunication sector, with Telkom maintaining that these forms of communication (i.e. Internet telephony) constitute "voice" while others (notably the private industry enterprises) maintain otherwise. SATRA has, unfortunately, made no determination as yet in this regard, although it can be expected that it will be requested to do so in due course".

I take SATRA to be the regulatory authority for telecommunications in South Africa.

Earlier, on page 5224, the authors had expressed themselves thus:

> "It is highly problematic as the term "voice" has not been defined in any of the Telecommunications Act, the Telkom VANS Licence or the Telkom PSTS Licence. Also, the prohibition is extremely wide in that VANS providers are not merely prohibited from offering voice services; they may not permit voice to be carried over their networks. The exact extent of this restriction has yet to be determined by SATRA or the Courts, but it is becoming increasingly important for some authoritative determination to be made, especially as new technologies that convert "raw" voice to data before sending it across a network (such as Internet telephony) are rapidly being deployed. To determine the meaning of the word "voice" in this context (and in the absence of any specific definition), the intention of the legislature must be ascertained".

35. It is my view that "the South Africa Experience" has not aided the respondents' cause considering that when the full context of the passages relied

on by the respondents is considered, there is no basis for the respondents to assert that voice over internet is a data service as opposed to a voice service. The authors are in fact hoping that the regulatory authority or the Courts will make a determination in the matter.

36. So far as the directive of the European Commission is concerned, it is clear that the Commission was dealing with a definition of its own policy to suit its own situation. I do not think that anyone would be so bold as to suggest that the Commission's directive transcends the walls of the European Community and its member states as a matter of course, and so, by extension, has reached the Caribbean sea, particularly Jamaica. Notwithstanding the directive's limited area of application, no harm is done by looking at what has been put forward as being of assistance in the definition of voice over internet.

37. In the wake of the full liberalisation of most of the Community telecommunications market on 1 January, 1998, the Commission adopted a notice defining its policy on voice telephony in respect of telephony via the Internet. According to that notice, telephony via the Internet was not subject to the regulation applicable to voice telephony until certain conditions had been met. The notice was a supplement to the Commission's 1995 communication on the status and implementation of the Commission's earlier liberalisation directives. It (the notice) was based on a broad public consultation held over an eight week period, a few months earlier. The notice distinguished between three categories of voice services, namely:

(a) commercial services provided from personal computer to personal computer :

(b) commercial services provided between personal computer and telephone handsets connected to the public switched network; and

(c) calls between two telephone handsets connected to the public switched network.

In 1998, (c) above was the only type that was close to being regarded as voice telephony. The law in the European Community provided that voice on the internet was not voice telephony, so member states were not allowed to subject voice on the internet to individual licensing procedures. For internet telephony to be defined as voice telephony and so be subject to standard voice telephony regulation, certain stated conditions had to be fulfilled. In 1998, internet telephony did not meet the criteria, and so for the time being it would not be considered as voice telephony.

It is clear therefore that the directive of the European Commission is merely stating that which it understands to be the law in the European Community which, up to this point in time, does not presume to legislate for the world.

38. The approach of the Federal Communications Commission need not detain us as we were merely provided with a page reference in "Global Telecommunications Law and Practice" and told that the Commission "failed to classify VOIP as a telecommunications service for universal service purposes, that is to say a voice service". I fail to see how the Federal Communications

Commission's failure is of importance to what we have to determine. Suffice it to say that I do not know the circumstances that led to the stance taken by the Commission. I would be very wary, without more, to accept that the Commission's position is of any importance to us, given what I perceive as the known position of many public bodies in the United States of America to make determinations on the basis of what they see as their own national interest, without due regard for the interests of other nations. Nor should one ignore the fact that political expediency quite often forms the basis for some determinations. The failure of the Federal Communications Commission to so classify VOIP may well be one of those determinations. That cannot be ruled out, in the absence of full knowledge of all the circumstances.

39. Finally, on this aspect, the respondents rely on remarks stated on page 43, chapter 4 of the International Telecommunication Union's Internet Reports, IP Telephony, published in December 2000. The passages that have been quoted do not assist the respondents. The last sentence reads:

> "Hence the regulatory advantage of Internet Telephony - being treated as something other than voice, even though **voice is the actual service being offered** (particularly in the case of Phone- to -Phone service)."

The highlighted words make it clear that the actual service being offered is a voice service.

40. The four areas from which the respondents sought assistance to have the service defined as a data service have failed them. In the circumstances, one still

has to look at the reasoning of the Constitutional Court in respect of the affidavit evidence that was placed before it. Alas, the judgments do not appear to disclose any reasoning thereon. Reid, J., said this:

> "Having had the benefit of reading in draft the judgment of my brother Harrison, J., I would hold that VOIP is a part of data communication that takes place over the Internet Protocol and that what is transmitted over the VSAT are digital data packets generated by computer processing application."

Harrison, J., said:

> "I disagree with the submissions made on behalf of the respondents. I accept the evidence given by Greenblatt and find that VOIP is a standard part of data communications that takes place over the Internet Protocol."

And that is the sum total of that which was said as to how the Court arrived at its decision.

41. I am of the view that the treatment of the affidavit evidence by the Constitutional Court was insubstantial, and I say so with much respect to the learned judges of that Court. In the absence of any analysis from the learned judges to demonstrate their reason for holding that Mr. Greenblatt's view was to be preferred, the Court of Appeal has an obligation to analyse and examine the affidavit evidence to see whether the Constitutional Court's view can be sustained. It is observed that the Constitutional Court made no mention of the opinion given by Dr. David McBean in his affidavit dated 4th July, 2002; and no reason has been given for this failure.

42. In looking at the affidavit evidence, I am mindful of the fact that there has been no cross-examination thereon. A Court is always handicapped in the making of a decision as to which witness to accept as credible or reliable when more than one witness has given affidavits that give conflicting factual situations or differing expert views, and there has been no cross-examination. In **John v. Rees** (1970) 1 Ch. 345, the proceedings before Megarry, J. were on motion, and all the evidence was in the form of affidavits and exhibits. At page 368 B, he said:

> "The affidavits are not only numerous (there are over 60 in action No. 1), but also far from harmonious; without any oral evidence, and in particular without the aid of cross-examination, it is impossible to resolve such conflicts."

In more recent times, the Privy Council commented on a similar situation in **Lascelles Augustus Chin v. Audrey Ramona Chin**, Privy Council Appeal No. 61 of 1999, delivered on the 12th of February, 2001. In that case, at issue was the respective shareholdings of the parties in Lasco Foods Ltd. The parties had filed affidavits with the intention that they were to be assessed and construed in determining the shareholdings. At the hearing in Chambers, in the Supreme Court, the attorneys declined an invitation to cross-examine. In the end, no findings of fact were made on the affidavits which contained sharply conflicting evidence. The credibility of the parties had not been tested. The decision at first instance was then made on the basis of the share register kept by the Registrar

of Companies. An appeal to the Court of Appeal was allowed. On further appeal to the Privy Council, their Lordships held that:

> "the Court of Appeal, in the absence of any factual findings made at the trial and there having been no cross-examination at the trial, was in no...position... to assess the respective credibility of the parties."

In the circumstances, the case was remitted for a re-hearing in the Supreme Court. The Privy Council also ordered that directions be given for the parties to be cross-examined.

43. In the instant case, the Constitutional Court was required to make a judgment as to voice or data on the basis of the differing opinions of Mr. Greenblatt and Dr. McBean. The Court, in relying on Mr. Greenblatt's affidavit, determined that the service was a data service. However, nothing was said as to why preference was given to Mr. Greenblatt's opinion as opposed to that of Dr. McBean. Credibility was not so much an issue in this situation. It was more a question of assessing whose opinion was more reliable given the qualifications and experience of the deponents. In the absence of reasons for the choice that was made, it is my view that the appellate tribunal is entitled, if not obliged, to review the determination that was made by the Constitutional Court. And, if it is found to be flawed, the appellate tribunal will substitute its view on the matter.

44. Mr. Greenblatt is chief executive officer of a software company that sells multiple products to enable the use of voice over the internet. He was formerly employed as the chief operating officer at a company which is one of the world leaders in the services of voice over the internet. He has a Bachelor of Arts (B.A.)

in mathematics and a Master of Arts (M.A.) in computer science and is pursuing studies towards a doctorate in that discipline. He has written six textbooks on IBM's midrange of computer systems, dealing with technical insights, system performance and operations. The following statements were made by Mr. Greenblatt in his affidavit:

> "(a) in voice over IP, voice is spoken and heard on the line - the process is one of value added service over a traditional IP data network;
>
> (b) in voice over IP, special software and/or hardware converts voice into packets and back into voice; the packets travel in unpredictable paths until they reach their destination and are re-assembled; and
>
> (c) voice over IP is an added-value service on top of an IP data network."

These statements, it seems to me, do not definitively confirm that VOIP is a data service as opposed to a voice service. Nevertheless, they formed the basis for the Constitutional Court's finding that VOIP is a data service. I do not think that this conclusion by Mr. Greenblatt can stand up to scrutiny, neither from a technical nor a common sense point of view. And, I say this with the greatest of respect.

45. Dr. McBean has a Bachelor of Science degree in electrical and computer engineering, and holds a Ph.D from Oxford University in engineering science. Since 1988, he has been principally engaged in the field of electronics and telecommunications. He gave the opinion that in any analysis of the issue raised in Mr. Greenblatt's affidavit, it is necessary to draw a distinction between the

mode of transmission of information as opposed to the service being transmitted.

In paragraphs 7 to 9 of his affidavit on page 378, he defines the two services.

> Para. 7: "**Voice services** refer to interactive audio communication, facilitating normal conversation between two or more parties over an electromagnetic network. In order to facilitate a voice call, speech has always had to be converted to an electrical or electromagnetic signal, using various encoding and decoding techniques".
>
> Para. 8: "Typically, **data services** refer to non-video, non-voice and non-fax information which has been sent via electromagnetic communications and involves the exchange of information between two or more computers. For example, word processing, spreadsheets, data input/output between specialised software programs for weather pattern analysis and mathematical manipulation. This has given rise to the data-processing industry, which provides data manipulation and data entry services. In Jamaica, several companies, most notably in the Montego Bay Freezone are engaged in data processing. This has never been interpreted as processing voice services".
>
> Para. 9: "Historically the voice network used primarily analogue and circuit switched technologies, while data networks have used digital networks. This led to separate networks being used to transmit voice and data, using separate transmission and decoding technologies. Hence the networks used to transmit data were referred to as data networks, which transmitted data services, and a similar situation obtained for voice services and voice networks".

46. Dr. McBean further said:

> Para. 11: "These network advances have also allowed for the same networks to carry different types of services. Therefore, as an example, satellite links now carry fax, broadcast, video and telephony over the same transmission links. The same networks are now being used to transmit both data and voice services

by telecommunications service providers, as obtains with the Cable and Wireless network. Nevertheless, in the telecommunications industry, there is a distinction between voice services and data services, irrespective of the technologies used, in transporting the services".

Para. 12: "Throughout all of these advances however, the regulators have sought to regulate services offered, rather than technologies used. So for example, the regulation of broadcast television and voice telephony have remained separate, despite often times being transmitted over the same medium. Therefore, a conversation between two parties over a network has always been considered to be a voice service, and been regulated as such, despite the form of the voice having been changed via the technology employed in transmission".

47. Finally, on this issue, Dr. McBean gives this compelling opinion:

Para. 18: "...Internet Protocol is one of the methods of encoding voice information for transmission and cannot be viewed as a data service in itself, in the same way in which had voice been transmitted by fibre-optic technology one would not regard the carrier as providing light services. That accordingly the argument being advanced which seeks to distinguish VOIP as a data service, because it is encoded into packets and then decoded, is not tenable. That accordingly, I disagree with his (Greenblatt's) conclusions... in which he seeks to define VOIP as not being voice service, by virtue of his defining it as an Internet value-added service".

Para. 19: "..in the provision of all voice services, the voice is encoded by some means (whether by packets, time-division multiplexing or other methods) to be transmitted on an electromagnetic network. However, upon the decoding, voice, as is commonly understood, is of necessity transmitted by the provider in order for it to reach the telephone network".

48. It is my view that, given the detailed descriptions of the services as set out by Dr. McBean compared with the bald statements of Mr. Greenblatt, the Constitutional Court erred in accepting Mr. Greenblatt's statement that VOIP is a data service. The definitions and illustrations given by Dr. McBean leave no room for doubt that VOIP is indeed a voice service. It should be added that there has been no answer to Dr. McBean's point that one cannot view internet protocol as a data service in itself "in the same way in which had voice been transmitted by fibre-optic technology one would not regard the carrier as providing light services". For a clear and full understanding of the analogy, one need only add that the Concise Oxford Dictionary defines "fibre optics" as "optics employing thin glass fibres, usually for the transmission of light, especially modulated to carry signals."

In my view, this simple illustration by Dr. McBean provides the knock-out punch to the argument advanced on behalf of Infochannel. In effect, it disposes of the appeal in favour of the appellants as Infochannel's and Beckford's various contentions hinge on the determination of whether internet protocol is a voice service or a data service.

49 ***Freedom of expression***

Section 22 of the Constitution provides protection for freedom of expression. It reads:

> " (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom

to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication.

(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) which is reasonably required-

(i) in the interests of defence, public safety public order, public morality or public health; or

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or

(b) which imposes restrictions upon public officers, police officers or upon members of a defence force".

50. In keeping with the agreement between the Government of Jamaica and Cable and Wireless, the Telecommunications Act provided for phased introduction of full competition in the telecommunications industry. It will be recalled that Cable and Wireless had been issued an exclusive licence effective the 1st September, 1988, to provide telephone services for public and private purposes in all parts of Jamaica for twenty-five years. It will also be recalled that

in December, 1994, Infochannel was permitted to attach or connect its internet network and facilities to the Cable and Wireless telephonic network system.

51. The Telecommunications Act provided for the achieving of full competition in three Phases. The period for each Phase is set out in section 77, whereas section 78 sets out the powers of the Minister during the respective phases. The first eighteen months of the Act's existence form Phase 1 which is followed by Phase II covering the next eighteen months, with Phase III beginning on the day next after the day on which Phase II ended. Phase 1 commenced on March 1, 2000, and during that period the Minister was empowered to grant spectrum licences, certain types of carrier licences, certain types of service provider licences, as well as dealer licences. During Phase II which began on September 1, 2001, the Minister was authorized to grant domestic carrier licences, domestic voice service provider licences and service provider licences to a person who is licensed under the Broadcasting and Radio Redifusion Act to provide subscriber television service, authorizing that person to provide services in relation to internet access excluding voice services. In addititon, during Phase II, the Minister was authorized to grant any licence that he had the power to grant during Phase 1, except domestic mobile carrier licences and domestic mobile service provider licences. Since March 1, 2003, the industry has been open to full competition, without restriction on the licences that may be granted.

52. In the Constitutional Court, Reid, J. held that it had "not been shown that the increases in multiple licences justified extension of the monopoly of Cable

and Wireless, nor that the period of three years phased liberalization was reasonably required allowing even the wide margin of appreciation to be accorded to Parliament". Regrettably, it cannot be said that Reid, J. attempted to demonstrate his reasoning on the matter. Consequently, I have found it difficult to appreciate his summary dismissal of "the wide margin of appreciation to be accorded to Parliament".

Harrison, J. identified the issue for determination as being whether it was reasonably justified for there to be a postponement of three years before full liberalization came into effect. He considered the submissions and then expressed himself thus:

> "I do believe however despite the reduction in the number of years of Cable and Wireless' licence, that a continued monopoly for even three years is not justifiable having regards to the Minister's policy statements... It is beyond question also that the grant of multiple cellular licences is a worthy objective but this does not mean that the increase of cellular service justifies the continuation of the monopoly... I do agree with Dr. Barnett that the Minister had no reasonable justification for sacrificing the rights of the applicants and many other Jamaicans to placate the claims of Cable and Wireless. He really should have allowed the Judicial Review proceedings to be finalized in order to see whether or not Cable and Wireless had an exclusive licence under the provisions of the RTC." (page 550 of the record)

53. Harrison, J. concluded:

> "...I am satisfied that a postponement of the rights of the applicants for a period of three years before full liberalization of the telecommunications industry takes place was not the least drastic means available to the first respondent for the achievement of the stated

> objectives. In my view, the argument is quite sound that you cannot barter the rights of citizens generally in order to settle the claim of one person or to avoid litigation. It is my considered view therefore that the applicants have succeeded in showing that it should not be accepted that the restriction placed upon the first applicant's internet service provider licence pursuant to the Telecommunications Act 2000 is reasonably required to regulate telephony or other means of communication and/ or to protect the rights and freedoms of others". (page 551 of the record)

In arriving at his conclusion, the learned judge relied on the judgment in the Zimbabwean case **Retrofit v Posts & Telecommunications Corp** [1996] 4 L.R.C. 489. This case, he said, "was authority for the proposition that any provision in law which has the effect, whatever its purpose, of hindering the right to receive and impart ideas and information... violates the protection of this paramount right". It was on the bases set out in paragraphs 52 and 53 herein that the Telecommunications Act 2000 was held to have been in violation of the constitutional right of free expression which Infochannel and Mr. Beckford enjoy in Jamaica.

54. The learned Solicitor General was quite correct in saying that the Constitutional Court gave the Minister and Parliament no margin of appreciation at all. The learned judges below put themselves in the shoes of the Minister and Parliament and concluded that they would not have taken the same course. The question therefore is whether they were right in the approach they took. In relation to the violation of the constitutional right of freedom of expression, the first and second appellants submitted that there is nothing that is protected by

section 22 of the Constitution which has been prevented. The Constitution, they said, does not confer a right to communicate over one's own means of communication, and the right to free expression is not infringed because one has to use a third party's medium of communication.

55. The first and second appellants further submitted that there was an important distinction between "broadcasting" ( for example radio and television) and "telecommunications" (for example, telephone and internet). In the former, they said, an interference with the means of expression may affect free expression (for example, in the refusal of a licence) whereas it might not be so when restrictions are placed on the use of one's own means. A person who is not permitted to set up a new telephone network is not prevented from transmitting his message, it was argued, as he can use the existing network to like effect. In the instant case, Cable and Wireless was obliged, by virtue of the agreement it had with the Government of Jamaica, to provide a telecommunications system accessible to Infochannel and Mr. Beckford. Hence, there was no interference with their freedom of expression.

56. These appellants sought to distinguish the **Retrofit*** decisions (there were two) from the instant case. Their submission was to the effect that a postponement of full liberalization for three years and the securing of certain benefits through the agreement between the Government and Cable and

*Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation, Attorney-General intervening [1996] 4 LRC 489.

*Retrofit (Pvt)Ltd v Minister of Information, Posts and Telecommunications [1996] 4 LRC 512

Wireless during the interim involved a recognition and protection by the Government of Jamaica of the right of its people to access to services which would afford them the ability to exercise their freedom of expression. The submission stressed the need for there to be a balancing process. In the instant case, it was said, the balance was between the benefits of the agreement and the challenged legislation as against the gravity of the infringement of the right (if there was an infringement). A factor that should constantly be borne in mind, it was submitted, was that the agreement and the Act were designed to pave the way for regulated competition and the enhancement of the Jamaican people's right to freedom of expression.

57. The third appellant submitted that the Telecommunications Act, by authorising the refusal to grant Infochannel a licence to offer voice over internet protocol under Phases I and II, had created a temporary restriction which was inconsistent with section 22 (1) of the Constitution. This restriction was a violation of Infochannel's fundamental rights under section 22(1). However, the temporary restriction was saved by section 22(2) as being "reasonably required" for the purpose of regulating telephony. Accordingly, the restriction on voice over internet protocol did not impair Infochannel's or Beckford's freedom to "hold opinions and to receive and impart ideas and information without interference", as provided for in section 22(1).

58. The third appellant further submitted that in exercising its discretion when an infringement is complained of, the Court should be minded to act with a

certain degree of restraint having regard to the context or factual circumstances in each case. This is so, the submission went, because certain values are at the core of the freedom of expression. In support of this, a passage was cited from the case **Committee for the Commonwealth of Canada v. Canada** [1991] 1 S.C.R. 139:

> "the values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfilment, (2) as a means of attaining the truth, (3) as a method of securing participation by members of the society in social, including political, decision-making, and (4) as maintaining a balance between stability and change in the society."

The third appellant therefore invited this Court to approach the scrutiny of the infringing provisions of the Telecommunications Act which do not impinge on the core values of freedom of expression with a greater degree of deference.

59. The third appellant contended that the cases relied on by the respondents to advance the view that there had been an interference with the right to freedom of expression were all concerned with the hindrance to the means of communication whereas in the instant case there was no restriction on the means of communication save to the extent that it could not be used for voice services. Here, the means of communication is IP technology/network.

60. The main submissions of Cable and Wireless on this aspect of the case were that:

> (i) Infochannel and Beckford have failed conclusively as they have not established the

existence of any interference or hindrance with their right to free expression:

(ii) section 22 of the Constitution does not confer right to free expression over one's own means of communication; and

(iii) the right to free expression cannot be regarded as having been abrogated by the fact that Infochannel and Beckford were obliged to use Cable and Wireless' means of communication for a limited period of time.

Furthermore, Cable and Wireless contended that the proposition that an exclusive provider of telecommunications inevitably infringes freedom of expression is not borne out by judicial decisions relating to freedom of information and telecommunications anywhere in the world.

61. Infochannel and Beckford have vigorously challenged the view that has been advanced that there has been no breach of section 22 seeing that they have available to them the monopoly services of Cable and Wireless. They contend that there has been interference with their rights and there was nothing to indicate that the interference was "reasonably required" in the interest of one of the constitutionally prescribed objectives. The onus, they stressed, rests on those who support the interference to demonstrate that it was "reasonably required." The evidence presented to the Constitutional Court, according to these respondents, did not demonstrate that the Minister's action was the least obstructive method of interfering with the respondents' rights, nor were the measures adopted "reasonably required" to attain the legislative

objectives of the policy of liberalization and competition. Accordingly, they submitted that the Constitutional Court was right in its determination.

62. Dr. Barnett submitted that in dealing with the question of the reasonableness of the statutory provision, the true test in the Jamaican situation is three-fold:

> (i) the constitutional legitimacy of the objective of the legislation;
>
> (ii) the rational connection between the means adopted for restricting the freedom and the legitimate objective; and
>
> (iii) the reasonableness of the measures adopted and whether or not those measures constitute the least intrusive method of achieving the objective.

He was of the view that no aspect of the three-fold test had been satisfied. Accordingly, he said, the judgment of the Constitutional Court was right.

63. Mrs. Benka-Coker for Beckford adopted the submissions of Dr. Barnett. She added that it could not be argued that Beckford was not entitled to be heard, or that he would not be entitled to redress as the wording of the constitution is sufficiently wide to protect his rights and fundamental freedoms. It was fallacious to argue, she said, that Beckford's right to protection was dependent on that of Infochannel.

64. It is with much interest that I observe the reliance that has been placed by Infochannel and Beckford on authorities emanating from Zimbabwe. I sympathize fully with the reasoning that has characterized the judgments that

have been cited. However, the context in which cases are born ought not to be shunned when such cases are being considered. I would be surprised if there is disagreement with the view that what is "reasonably required" in a given situation in Zimbabwe will not necessarily be "reasonably required" in Jamaica. In my view, great care has to be taken in assessing the respective, relevant situations to ensure that there is not just a mere importing and implanting of a foreign answer or solution to a local problem.

65. I am of the view that the appellants are on very sound ground so far as there is the appearance that the learned judges below have placed themselves in the shoes of the Minister, and have in effect made a decision that only the Minister is authorized to make in circumstances where the Minister cannot be said not to have availed himself of all the relevant facts and necessary advice. It may well be that Infochannel and Beckford were restricted in their activities by the introduction of the phased system. Although there was no denial of their right to freedom of speech, the avenue of expression was temporarily limited, given the plans that the Minister had for the industry. It is a cruel irony that the respondents' submissions tend to ignore the historical situation. However, even if the construction that is sought to be placed thereon by the respondents is admitted, then section 22(2) of the Constitution adequately deals with the situation. It follows therefore in my view that the restriction was reasonably necessary for the purpose of regulating telephony.

66. The Constitutional Court ordered that damages were payable to Infochannel and Beckford for contravention of their constitutional rights. So far as the OUR was concerned, the Court attached blame to it for its failure and or refusal to grant Infochannel a telecommunications licence to continue to provide the telecommunications services which it had provided prior to the passage of the Telecommunications Act 2000. It is my view that the Court failed to recognize that the OUR was not in a position to grant any licence to anyone. The OUR is a creature of statute. It can do only that which it is allowed to do by the relevant legislation. There is no legislation authorizing the OUR to grant licences. Accordingly, the OUR cannot be held liable for a failure or refusal to grant anyone a licence.

67. The OUR was established by the Office of Utilities Regulation Act (Act 13 of 1995). That Act was amended by Act 14 of 2000. The OUR is a body corporate, and the Second Schedule to the Act provides for the appointment of the Director-General by the Governor-General on the recommendation of the Prime Minister from among persons who are qualified as having had experience of and shown capacity in, matters relating to industry, finance, economics, engineering, accountancy, commerce or law. Section 4(1) of the 1995 Act stated that it was the duty of the OUR to "**receive and process all applications for a licence to provide any utility service** required by virtue of the provisions of any Act, and to make such **recommendations to the responsible Minister** in relation to the application as the Office considers necessary or desirable". The

2000 Act now provides in section 4(1)(b) for the OUR to "**receive and process applications for a licence to provide a prescribed utility service** and make such **recommendations to the Minister** in relation to the application as the Office considers necessary or desirable". It is beyond doubt, therefore, that the OUR has never been empowered by the Act that created it to **grant** licences.

68. The Telecommunications Act, 2000, also affects the functioning of the OUR. Section 4 empowers the OUR to regulate telecommunications in accordance with the Act and, for that purpose, the OUR shall "receive and process applications for a licence under this Act and make such recommendations to the Minister in relation to the application as the Office considers necessary or desirable". So, here again, there is no power to grant a licence.

69. The foregoing are my reasons for agreeing with my learned brothers that the Constitutional Court was in error in ruling that there had been breaches of the constitutional rights of Infochannel and Beckford.

**SMITH, J.A.**

I have had the opportunity of reading in draft the Judgments of P. Harrison and S. Panton, JJA. I agree with their reasoning and conclusions. There is nothing I can usefully add.

**P. HARRISON, J.A.**

**ORDER**

1. Appeals of the appellants and the appeal of the 3rd respondent/intervener, Cable and Wireless allowed.

2. Orders of the Constitutional Court set aside.

3. Costs of the said appellant and intervener ordered to be paid by the 1st and 2nd respondents to be agreed or taxed.