[**2016**] **JMSC Civ. 119**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015 HCV 05731

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

AND

IN THE MATTER of an Application by **MAURICE ARNOLD TOMLINSON,** alleging a breach of his rights under sections 13(3)(a),13(3)(c),13(3)(g),13(3)(i)(i),13(3) (j) (ii),13(3)(o), 13(3) (p),13(3) (6) and 14 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011

AND

IN THE MATTER of an Application by **MAURICE ARNOLD TOMLINSON** for constitutional redress pursuant to section 19(1) of said Charter

AND

IN THE MATTER of an application made pursuant to Rule 56.9 of the Civil Procedure Rules, 2002 (CPR)

BETWEEN **MAURICE ARNOLD TOMLINSON** **CLAIMANT**

AND **THE ATTORNEY GENERAL OF JAMAICA** **DEFENDANT**

IN CHAMBERS

Ms. Anika Gray, Attorney-at-Law for Claimant;

Ms. Carlene Larmond and **Ms. Carla Thomas** Attorneys-at-Law instructed by the Director of State Proceedings, for the Defendant;

Ms. Danielle Archer, Attorney-at-Law for the proposed Interested Party, the group collectively called "the Churches" (Jamaica Association of Evangelicals, Ethiopian Orthodox Church, Independent Churches, Holiness Christian Church, Christian Brethren Assemblies Jamaica, Jamaica Cause and The Love March Movement);

Ms. Gillian Burgess, Attorney-at-Law for the proposed Interested Party, The Public Defender;

Mr. Ransford Braham Q.C. Attorney-at-Law instructed by Richards, Edwards, Theoc & Associates, for the proposed Interested Party, Jamaica Coalition for a Healthy Society;

Mr. Wendell Wilkins and **Ms. Jameila Thomas,** Attorneys-at-Law, instructed by Lelieth D. Lambie-Thomas & Co. Attorneys-at-Law for the proposed Interested Party, Lawyers Christian Fellowship Ltd

Ms. Caroline Hay for the proposed interested party Hear the Children's Cry Limited; and

Mr. Maurice Saunders, Attorney-at-Law observing for the group Christians for Truth and Justice; and

April 26, and July 6, 2016

Administrative Law – Application to be heard – Factors to be considered- Whether applicants having sufficient interest – Effect of possible prejudice to Claimant-

Extent of participation to be permitted - Whether intervention of Public Defender's supported by statutory remit.

LAING, J

Background

[1] The Claimant is a Jamaican national who is an Attorney-at-Law and a homosexual. He has filed a Fixed Date Claim Form challenging the constitutionality of the criminal prohibition against and penalization of buggery between consenting individuals age 16 or older as contained in sections 76, 77 and 79 of the Offences Against the Persons Act, (OAPA), the Sexual Offences Act, 2009 and the Sexual Offences (Registration of Sex Offenders) Regulations, 2012 ("the Claim").

[2] The Claimant is seeking constitutional redress pursuant to section 19 of the Charter of Fundamental Rights and Freedoms on the basis that these sections criminalize his consensual private acts of intimacy with another man above the age of consent and violate his rights as guaranteed by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011. More specifically, the Claimant alleges that these sections breach sections 13(3)(a), 13(3)(c), 13(3)(g), 13(3)(i)(i), 13(3)(j)(ii), 13(3)(o), 13(3)(p), 13(3)(6) and 14 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.

[3] Pursuant to an order of Brown Beckford J on 23 February 2016, the First Hearing of the Fixed Date Claim Form was adjourned to April 26, 2016 for the hearing of Applications to be added as Interested Parties which were filed by the following parties:

(i) The Public Defender, (on January 14, 2016);

(ii) Jamaica Coalition for a Healthy Society ("JCHS") (on January 29, 2016);

(iii) Lawyers Christian Fellowship Ltd. (on January 29, 2016); and

(iv) The groups collectively called "The Churches" (comprising Jamaica Association of Evangelicals, Independent Churches, Ethiopian Orthodox Church, Christian Brethren Assemblies, Holiness Christian Church, Jamaica Cause and The Love March Movement) (on February 15, 2016)

On 1st April 2016 Hear the Children's Cry Limited filed a Notice of Application. These five parties are referred to herein collectively as "the Applicants".

THE APPLICATIONS

A. Jamaica Coalition for a Healthy Society

[4] In a welcome display of co-operation the Applicants, (without the prompting of the Court) agreed to structure their respective presentations so as to maximize the time that was fixed for the hearing of the applications. In pursuance of this arrangement, Mr. Ransford Braham Q.C., made his presentation second, which he did on behalf of the ("JCHS"). Learned Queen's Counsel made comprehensive submissions on the relevant law which are equally applicable to the other applicants. In an effort to avoid unnecessary repetition in this judgment and in keeping with the spirit of the Applicants' approach, I will first treat with the application on behalf of the JCHS. The JCHS sought the following court orders:

a. to be treated, joined and/or added as an Interested Party with the right to be heard at all hearings of this claim and any appeal(s) that may be filed.
b. to be permitted to appear in person and/or by counsel and make written and oral submission at the hearings.
c. to be permitted to give evidence in this claim by Affidavit.
d. to be permitted to apply for the appointment of an expert.

[5] By way of an affidavit sworn to by its director Wayne West, the JCHS asserted that it had a sufficient interest in the claim. It was averred that in keeping with its objects as set out in its Articles of Incorporation the JCHS has been:

a. fostering the physical, emotional, spiritual and mental well-being of Jamaicans by promoting a nation-wide understanding of Judeo-Christian beliefs as delineated in the Bible to the end that Jamaica will have a healthy society;
b. advocating the daily practice of upholding truth, family, sanctity of marriage, respect for life, justice and social equality and love for all mankind.

[6] In pursuance of its objectives it has been organizing a number of conferences exploring the bases for the retention of the buggery law, conducting islandwide presentations and giving interviews declaring its opposition to the aims and purposes of this claim as well as publishing articles and advertisements in the print media in respect of the consequences for Jamaica should the claimant's action be successful.

(1) Sufficient Interest:

[7] The JCHS sought to be added as an "interested party" pursuant to Rules 56.13(1) – (2)(c), and 56.15(1) and (2) of the Civil Procedure Rules 2002 (as amended) ("CPR"). These rules read as follows:

> *" 56.13 (1) At the first hearing the judge must give any directions that may be required to ensure the expeditious and just trial of the claim and the provisions of Parts 25 to 27 of these rules apply.*
>
> *(2) In particular the judge may-*
>
> *…*
>
> *(c) allow any person or body appearing to have sufficient interest in a subject matter of the claim to be heard whether or not served with the claim form.*

56.15 (1) At the hearing of the application the court may allow any person who or body which appears to have a sufficient interest in the subject matter of the claim to make submissions whether or not served with the claim form.

(2) Such a person or body must make submissions y way of a written brief unless the court orders otherwise."

[8] Mr. Braham Q.C. relied on the case of ***Michael Levy v The Attorney General of Jamaica and Jamaican Redevelopment Foundation Inc*** [2012] JMCA Civ 47 to establish that the court has wide powers in managing administrative claims in preparation for the final hearing and in exercising these powers may make such orders as are necessary for the purpose of managing the case and furthering the overriding objective. The court therefore has the discretion to:

"(a) Allow the intervention of interested parties to an action in which they have sufficient interest in the subject matter of the claim; and

(b) Determine the extent of that interested party's participation."

[9] Learned Queen's Counsel submitted that since there is no expressed definition of "sufficient interest" in Rules 56.13 or 56.15 of the CPR, some guidance can be taken from Rule 56.2 of the CPR which deals with "sufficient interest" in the context of an application for judicial review. This includes:

" (a) any person who has been adversely affected by the decision which is the subject of the application;

(b) any body or group acting at the request of a person or persons who would be entitled to apply under paragraph;

(c) any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;

(d) any statutory body where the subject matter falls within its statutory remit;

(e) any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application; or

> *(f) any other person or body who has a right to be heard under the terms of any relevant enactment or the Constitution."*

[10] Counsel also relied on the case of ***R v Inspectorate of Pollution and another, ex parte Greenpeace Ltd. (No. 2)*** [1994] 4 All ER 329, in which the Court adopted the approach taken in ***R v Monopolies and Mergers Commission, ex parte Argyll Group plc*** [1986] 2 All ER 257 at 265, [1986] 1 WLR 763 at 773 as to determining sufficient interest as follows:

> *"The first stage test, which is applied on the application for leave, will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody."*

[11] In ***ex parte Greenpeace Ltd*** the Applicant was seeking to challenge an authorisation to discharge liquid and gaseous radioactive waste from the premises of the Respondent. The court concluded that Greenpeace had sufficient interest because of its national and international standing, and the fact that their approximately 2500 members in the region of concern, would have a genuine perception of danger to their health and safety from a discharge of radioactive waste. In addition, Greenpeace had expertise in environmental matters which could assist the court by preventing a less well informed challenge and thus its intervention would save the court's resources.

[12] Similarly, in ***Canadian Broadcasting League v Canadian Radio-Television & Telecommunications Commission*** [1979] Carswell Nat 16 where the Canadian Broadcasting League (CBL) sought to intervene in an action regarding the control of broadcasting, the court found that broadcasting was an issue affecting the welfare of all Canadians. As such, the court granted CBL intervener status on the basis that it had sufficient interest because of its role and assumed responsibility as a public interest advocate in the field of broadcasting.

[13] The Canadian case of ***(First) The Christian Institute, (Second) Family Education Trust et al*** [2015] CSIH 64 was relied on as being of assistance notwithstanding the difference in the Canadian legislation, since it was argued that it too is grounded in the fundamental principle of sufficient interest. The

Court in that case was said to have adopted a broader test that takes into account the nature of public interest litigation. This test is now regarded as meaning 'genuinely' asserting that "the issue directly affects the section of the public that the petitioner or intervener seeks to represent" and that the person's intervention is likely to assist the court.

[14] It was submitted by learned Queen's Counsel that if one applies the proper test as distilled from the various authorities commended to the Court, JCHS has sufficient interest and is not a 'meddlesome busybody' because, in accordance with Rules 56.2 (a) (b) (c) (e) and (f) of the CPR, JCHS is acting at the request of persons who may be adversely affected by the outcome of the claim.

[15] It was also submitted that similar to ***ex parte Greenpeace*** supra, JCHS has international, regional and national standing, has developed a considerable amount of expertise and has shown considerable care and interest in the subject matter of the action, that is, human rights, buggery legislation, human sexuality and identifying modes of harmful sexual behavior. This has been evidenced by, *inter alia*, the various conferences and events put on by JCHS on the subject matter as well as presentations to parliamentary sub-committees on matters including the retention of the buggery law.

[16] It was also pointed out to the court that JCHS has a well-established role and assumes responsibility as a public interest advocate in the matter and was even granted interested party status in ***Jaghai v AG*** *(unreported), Supreme Court, Jamaica,* Claim No. 2013 HCV 00650. It was argued that just as was the case in ***Canadian Broadcasting League*** supra, if the Claimant's action is successful, a number of the constitutional rights of JCHS would be infringed, namely freedom of speech, freedom of conscience and freedom of religion, just to name a few.

[17] The position counter to the Claimant's view is in real danger of not being presented with the clarity and rigour it demands and not receiving the attention it deserves.

(2) Adducing Evidence

[18] Counsel submitted that this is a claim in which the JCHS wishes to file evidence. Counsel relied on the case of ***Michael Levy*** supra, in which the Court of Appeal upheld the Supreme Court's decision to allow the interested party to make use of and rely on affidavits and exhibits, in addition to filing written submissions. The basis of this was the fact that the court has wide powers in managing the preparation of claims for the final hearing. As such, the court could order participation from the interested party in this manner.

[19] The case of ***McKay v Manitoba*** (1989) 2 S.C.R. 357 a persuasive case from Canada (on the basis that the Charter of Canada is similar to the Jamaican Charter) was also relied on in regards to this point. In that case, Cory J indicated that the presentation of facts is an essential pre-requisite to a proper consideration of constitutional issues raised under the Canadian Charter.

[20] The ***Manitoba*** case was endorsed in ***Danson v Ontario (AG),*** [1990] 2 S.C.R. 1086 where it was highlighted that a challenge to the Charter must not be in a vacuum. Rather, a proper factual foundation must exist before measuring legislation against the provisions of the Charter.

> *"In general, any Charter challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases, as in nature, has always been abhorred."*

[21] It was further submitted that if the Claimant is permitted to adduce certain evidence in support of his arguments on the invalidity of the provisions, then, the interested parties should be able to support their arguments as well. Additionally, the court would have to examine the Charter from a public, economic, social and health standpoint and JCHS can assist by providing expert evidence. The submissions of JCHS would provide a more meaningful and effective proceedings as well as a more balanced judgment.

[22] It was argued that support for the JCHS's position can be found in the case of ***Caleb Orozco v the AG of Belize,*** Claim No. 668 of 2010 decided on the 27th April 2012, a case from the Supreme Court of Belize, where the same wording as that of Rule 56.15(1) and (2) of the Jamaican CPR was addressed. The importance of participation of the interested parties was highlighted in a similar circumstance. It is therefore submitted that the court allow JCHS to adduce expert evidence, appear at hearings and give submissions in determining the dispute.

B. *Lawyers' Christian Fellowship Limited (LCF)*

[23] The Notice of Application on behalf of LCF claims similar relief to that of the JCHF. The LCF was permitted, without any objection, to amend the notice of application to seek an order that it be at liberty to present evidence by affidavit if permitted to intervene. Mr. Wendel Wilkins submitted that if permitted, LCF intended to make submissions primarily on question of law but on questions of fact including the likely implications on the society if the relief claimed by the Claimant is granted. Evidence in support of the application by LCF is contained in the affidavit of Mrs. Helene Coley Nicholson which speaks to

a. *Managing and continuing the work of the Lawyers' Christian Fellowship.*
b. *To "promote and defend laws and systems grounded in Christian values for the wellbeing of the country".*

(1) Sufficient Interest

[24] Mr. Wendel Wilkins also submitted that the court should have regard to CPR 56.2 (2) when considering what constitutes a sufficient interest. Counsel asked the court to consider the case of ***Northern Jamaica Conversation Association et al*** (unreported), Supreme Court, Jamaica, Claim No. HCV 3022 of 2005, in which Mr. Justice Sykes considered whether the applicant had sufficient interest in the subject matter of the claim. The application in that case was made after the claim

for judicial review had been determined. Thus, there had to be a consideration of whether the cases dealing with judicial review and sufficient interest applied to the facts of the case. It was indicated that those cases could provide a framework for the application. Sykes J opined at pp 26 as follows:

> *"It may be said that cases on sufficient interest have arisen mainly in the context of an application for judicial review and are not applicable to the instant application. Assuming that argument to be correct, the cases nonetheless provide some framework in which to view the current application."*

[25] In addition, the case of ***Jamaicans for Justice v Police Services Commission & The Attorney General*** [2015] JMCA Civ 12, was relied on in which Morrison JA (as he then was) discussed the issue of sufficient interest (albeit in the context of an application for judicial review). In this judgment it was pointed out that, *inter alia*, the Court should adopt a very liberal approach to standing and that this liberal approach is more so applicable in cases which raise a constitutional dimension. Further, it was indicated that the list in Rule 56.2(2) of the CPR was "*intended to be indicative rather than an exhaustive list*."

[26] It was therefore submitted that Rule 56.2 of the CPR is only the starting point in relation to the current matter as 56.15 deals not only with applications for judicial review but all applications for an administrative order.

[27] Reliance was also placed on the case of ***Alberta Sports & Recreation Association for the Blind v Edmonton*** a decision of the Alberta Court of Queen's Bench, to solidify this point. Here Ritter J opined-

> *"where there is a challenge to legislation pursuant to the Charter of Rights and Freedoms, the courts are prepared to give a less stringent interpretation of the normal requirements for intervenor status"*

[28] Furthermore, in ***Canadian Labour Congress v Bhindi*** (1985) 17 D.L.R (4th) 193 (B.C.C.A), the point was made that in applying a liberal approach to standing, the court should not reject assistance from the wider community when Anderson JA stated-

> *"I would add on this point that it is important in dealing with Charter issues raised for the first time, that the courts have the assistance of argument from all segments of the community. The courts should not resist but should welcome such assistance."*

[29] Mr. Wilkins submitted that LCF did not have a sufficient interest in the claim of The Churches

C. *The Churches*

The Notice of Application on behalf of the Churches was largely similar to that of the other Applicants. The evidence on their behalves is contained in the affidavit of which speaks to

> *"Adopting and promoting Judeo Christian beliefs as authorized by the Holy Bible. These beliefs affect their concept of family life and marriage and sexual intercourse".*

[30] Ms. Danielle Archer representing the Churches adopted the submissions of Mr. Braham QC and Mr. Wilkins and relied on the more detailed submissions made in writing.

[31] The case of ***R v Morgentaler*** [1993] 1 SCR 462 was used to highlight the purpose of an intervening party. The Supreme Court of Canada stated-

> *"the purpose of intervention is to present the court with submissions which are useful and different from the perspective of a non-party who a special interest or particular expertise in the subject matter of the appeal".*

[32] It was pointed out that in cases with a constitutional dimension, the courts are generally more lenient in granting intervener status as was highlighted in ***R v Trang*** [2002] 8 W.W.R 755

[33] The case of ***Law Society of Upper Canada v Skapinker*** (1984), 9 D.L.R (4th) 161 (S.C.C.) was also relied on to support the position posited that if an applicant can show its interest will be affected by the outcome of the litigation, intervener status should be granted.

[34] It was also submitted that Rule 56.13(1) – (2) (c) of the CPR should be interpreted bearing in mind Rule 1.1(1) and rule 1.2(2) of the CPR. That is, the court must give effect to the CPR having regard to the overriding objective. The case of ***R v Industrial Disputed Tribunal (ex parte J Wray and Nephew Limited)*** *(unreported), Supreme Court, Jamaica, Claim No.* 2009 HCV 04798 was also relied on to support this point and it was argued that notwithstanding the fact that this case dealt with an interested party being 'directly affected', the case is equally applicable to parties with sufficient interest in an action.

[35] The Churches also pointed out that the ***ex parte Argyll Group*** case was developed in ***R v Dept. of Transport, ex p Presvac Engineering Ltd.*** (1989) which pointed out that being sufficiently affected is a matter of discretion. Also, the case of ***American Airlines Inc v Canada (Competition Tribunal)*** 1988 Carswell Nat 676, 54 D.L.R. (4th) 741 was relied on where the court held that courts and tribunals have inherent power to control their own procedure and may permit interventions on terms and conditions that they believe appropriate in the circumstances. Additionally, the court held that the term "representations" extended to the interveners being able to adduce evidence in order to establish the factual underpinnings for the arguments they might wish to make.

[36] Further, it was submitted that there is an inherent danger that the Claimant would only present facts and circumstances that would not provide the court with the totality of the context of his claim. That is, that the claimant would not present the Churches view in a manner that is fair, balanced and representative of its teachings.

[37] Counsel also made the point that the Public Defender would not be able to accurately represent the view of the Churches since the Public Defender has already publicly expressed a view on the issue of homosexuality which is arguably inconsistent with that of the Churches.

[38] It was further submitted that while the intervention would add to the length and complexity of the trial, the additional expense is on balance, justified. Also, as the individual religious groups are represented by one person, and the application to intervene was made at the onset of the matter, this application will not prejudice any of the parties or the court by inducing any delay. Counsel also suggested that the applicants and the parties in general could make appropriate use of technology in seeking to reduce costs by, for example effecting service of bundles and documents electronically and the Applicants could also absorb some of the costs themselves so as not to overburden the Claimant.

D. *Hear the Childrens' Cry Limited*

[39] The relief sought by Hear the Children's Cry was consistent with the other Applicants. The Application was supported by the affidavit of Betty Ann Blaine and speaks to the role of the group in:

a. Protecting the rights of children in Jamaica.
b. Addressing issues such as sexual and other activity to include violence against children, the impact of the breakdown of the family upon children and other issues which challenge children.

[40] Ms. Caroline Hay, cognisant of the time constraint that she faced wisely adopted the submissions made on behalf of the other Applicants and made additional succinct points emphasising the necessity for the group to be heard because of the specific interests which it represented. Counsel relied on **ex parte Greenpeace** and the dicta of Morrision JA in the **Jamaicans for Justice** cases (supra) but also commended for the Court's consideration the case of **R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd** [1995] 1 All ER 611 on the issue of locus standi.

E. *The Public Defender*

[41] The application of the Public Defender holds a special place in that on the one hand it is the only application that is not being resisted by the Claimant but on the other hand, it is the only application that is being opposed by the Attorney General.

[42] The Public Defender like the other Applicants, seeks to be added as an interested party and seeks leave to make oral and written submissions at the hearing of the substantive matter. The Public Defender did not in her Notice of Application seek an order to be permitted to file evidence for use at the hearing of the claim.

[43] The Public Defender is a Commission of Parliament created by section 4 of the Public Defender (Interim) Act (the "PD Act") for the purpose of protecting and enforcing the rights of citizens. The Public Defender asserts that given its remit it ought to be added as an interested party since the proceedings involve issues of constitutional breaches and a direct challenge to the constitutionality of legislation governing the conduct of persons.

[44] The evidence on behalf of the Public Defender is contained in the an Affidavit dated January 14, 2016 sworn to by Mrs. Arlene Harrison Henry, the Public Defender of Jamaica, in which she states that she is:

> *"of the view the resolution of the issues in the claim and the decision on whether or not to grant the relief sought would affect a class of citizens in Jamaica, and in the circumstances the Public Defender has a sufficient interest in the matter".*

[45] It was submitted by Counsel Ms. Gillian Burgess on behalf of the Public Defender, consistent with the other Applicant's positions, that the governing criterion for interested party status is proof of sufficient interest in the subject matter. Also relying on **Greenpeace,** Counsel submitted that the issue of sufficient interest for purposes of *locus standi* is a mixed question of law and fact, considering the relationship between the applicant and the matter to which

the application relates having regard to all the circumstances of the case. As a matter of law Counsel relied on **Attorney General of St Lucia v Francois** LC 2004 CA.3 in which the Court held that the Eastern Caribbean CPR Part 56.2 "provides very liberal and relaxed rules of standing for application for judicial review" and submitted that the position articulated by the court applied equally to this application.

[46] As it relates to the factual component of the claim Counsel referred to section 13 of the PD Act, the relevant portion of which provides that;

> *13.-(1) Subject to this section, the Public Defender shall investigate any action taken where he is of the opinion:*
>
> *(a) That any person or body of persons –*
>
> *(i) has sustained injustice as a result of any action taken by an authority or an officer or member of such authority, in the exercise of the administrative functions of that authority; or*
>
> *(ii) has suffered, is suffering or is likely to suffer an infringement of his constitutional rights as a result of any action taken by an authority or an officer or member of that authority;…*

[47] It was submitted that the statutory remit of the Public Defender is congruous with the enquiry to be embarked upon in the substantive claim and that the Public Defender is charged with the specific duty of protecting and enforcing human rights of all persons in the island, which includes the right which the Claimant is asserting has been violated. As a consequence the Public Defender as a matter of fact has a sufficient interest in the matter to justify being added as an interested party.

The Attorney General's opposition to the Public Defender's application

[48] The Attorney General argued that based on the legal framework of the PD Act the Public Defender is not permitted to exercise the function she now wishes to do by applying to join the proceedings as an interested party. It was submitted that the interpretation to be attached to the purpose of the Public Defender's office extended beyond the sections of the PD Act which outline the functions

attached to the office. Those functions that are set out in Part III of the PD Act illustrate clearly that the main functions of the office are investigatory.

[49] Ms. Larmond argued that Section 15(5) of the PD Act also supports the assertion that the office holds an instructive function in that it provides as follows

> *15 (5) The Public Defender shall ensure that any person who alleges that his constitutional rights have been or are likely to be infringed is provided with ready access to professional advice and where necessary to legal representation.*

Counsel also asked the Court to note that PD Act devotes the entire Part IV to outlining the process of investigation.

[50] The thrust of the Attorney General's objection was that the Public Defender may opt to investigate only certain prescribed actions by either application or of her own volition, however as it relates to an alleged constitutional infringement this such investigation cannot be pursued unless it has been initiated pursuant to a complaint. Where there is such a complaint of a constitutional breach, section 15(5) of the PD Act provides that the responsibility of the Public Defender is to ensure that persons making such allegations are provided with access to professional advice and legal representation, the office is not responsible for providing such advice or representation. On the strength of these arguments the Court was urged to accept that the Application made by the Public Defender to join the proceeding is misconceived and ultra vires the PD Act.

Claimant's Submissions

(a) *Nature and extent of intervenor participation*

[51] Counsel for the Claimant Ms. Anika Gray, submitted that the Applicants are to be treated as applying for the granting of 'intervenor' status where each has a "sufficient interest" in the subject matter and not 'party' status. Counsel submitted that the term "interested party" is not used in CPR 56 or anywhere in the CPR for that matter. In making this point a comparison was made between Rule 56.15 of

the Jamaican CPR where the words "sufficient interest" was used and Rule 54.17 of the United Kingdom (UK) CPR which speaks to the threshold of an interested 'party' being that of a person who is 'directly affected' by the claim. It was argued using a comparison with the position in the UK, that this distinction between an intervenor and an interested party is important with intervenors being given much more limited rights of participation. As a consequence the Applicants (if successful) should not have all the rights of parties in the claim and the Court should direct that an intervenor is allowed to either make submissions by way of written brief or make oral submission at the hearing.

(b) *Sufficient Interest:*

[52] The Claimant concurred with the position advanced by the Applicants that since there was no definition of what "sufficient interest" is in Rule 56.15 of the CPR. As such, Rule 56.2 of the CPR could be of assistance to the court in determining its meaning in the context of Rule 56.15 of the CPR.

[53] It was also submitted by the Claimants that where pursuant to the CPR, the Court is given a discretion, it must be applied with consideration for the overriding objectives of dealing with cases justly. In doing so, the Claimants submitted that guidance ought to be taken from the Canadian courts in this regard where principles were developed to aid in exercising the discretion of granting 'intervener' status bearing in mind the overriding objective. Among the relevant principles used as a guide are the following:

> (a)That the person or group must have more than a mere interest or desire to help.
>
> (b)The person/organization cannot intervene solely because they might have expertise in the legislation or law being applied in the claim.
>
> (c) The intervener can be denied if its perspective is already well represented by a party to the proceedings.

(d) Even where intervener status is granted, the intervener's role is limited to simply providing written arguments except where the court permits short oral arguments.

[54] It was argued that the application of these principles will save the expenses of the parties, allow the proceedings to be completed expeditiously and fairly, erase the potential of unfairness to actual parties and result in there being no unnecessary delay.

[55] Save for the Public Defender it was submitted that none of the Applicants have sufficient interest to be admitted as intervenors. The bases of these submissions were addressed in respect of each Applicant separately and is summarised below.

(i) Public Defender

[56] It was submitted that the Public Defender, has a sufficient interest in the claim by virtue of Rule 56.2(2)(d) of the CPR. This is because the Public Defender falls within the category of a statutory body with a subject matter which falls within its statutory remit. The Public Defender's statutory power arises from the Public Defender (Interim) Act 2000 which specifically created the commission of the Public Defender for the purpose of "*protecting and promoting the rights of citizens."*

[57] As this case concerns the violations of many constitutional rights, the Public Defender's knowledge and expertise will provide invaluable assistance to the court. In addition, under section 13(1) of the Public Defender (Interim) Act 2000, the Public Defender has the power to investigate any action taken where any person/body of persons has (i) sustained injustice as a result of administrative actions; or (ii) suffered, suffering or is likely to suffer an infringement of constitutional rights as a result of action taken by an authority. Thus, the Public

Defender has an obligation to participate in and to protect the rights of the Claimant in this matter.

(ii) Jamaica Coalition for a Healthy Society (JCHS)

[58] The Claimant submitted that using Rule 56.2 of the CPR as a guide to determine sufficient interest, JCHS would not be considered to have sufficient interest in this claim as the success of this claim will not adversely affect the rights of the applicant or any Jamaicans and JCHS has failed to prove otherwise. It was argued that as the subject matter of these proceedings only concerns the conduct which it is argued is made illegal by the impugned provisions of the Offences Against the Person Act, the JCHS will still be able to practice their religion, share their beliefs regarding same-sex relationships and disseminate information about their beliefs, if the claim were to be successful. The Claimants makes this point as follows:

> *"The fact that, should the Claimant succeed, men may have consensual sex with each other without risk of prosecution and incarceration under Jamaican law, in no way trenches on the freedom of conscience or expression of others."*

In other words, the JCHS' right to equality before the law will not be affected if this claim succeeds. As the law stands now, the rights of the Claimant and other men or women in the gay, Lesbians Gay Bisexual and Transgender (LGBT) or Men who have Sex with Men (MSM) community, are infringed by the existence of these laws. Their rights would be protected if the law changes and if this is done, all people would then be equally unaffected by these invalid laws.

[59] Further, the success of the Claim will create a healthier environment for all Jamaicans with increased enjoyment of constitutional rights of some Jamaicans who would no longer be subject to unjustifiable criminal sanction for consensual conduct. This will be achieved by removing a key element of stigmatizing and discrimination that currently undermines the health of some Jamaicans. By doing

this, the dissemination of public health information would increase and better assist those persons who engage in the current criminalized conduct.

Irrelevance

[60] It was submitted that the JCHS wanting to provide evidence to show that granting the constitutional remedies sought would not address the HIV pandemic is irrelevant to the Claimant's position that his rights and others are affected by the result of this law on being able to receive proper public health education or treatment. Also, the fact that other countries maintain buggery laws is irrelevant. Similarly, the religious views of JCHS and the fact that they have advocated on this does not give them expertise in this matter for the breach of constitutional rights of the Claimant and others.

[61] Further, the fact that the applicant shares their philosophy with other Jamaicans is irrelevant as to whether the law respects constitutional rights. Popular opinion should not justify a violation without reason. Therefore, JCHS has no sufficient interest or relevance to the claim.

[62] The Claimant also sought to distinguish the cases of ***Canadian Broadcasting League*** and ***ex parte Greenpeace*** on their particular facts. It was also argued that in ***ex parte Greenpeace*** the applicant had extensive expertise in the area of environmental protection and the court held that it was a respected body with a genuine interest in the issues raised with 2500 supporters in the area of concern who might not otherwise have an effective means of bringing their concerns before the court if the applicant were denied locus standi. It was suggested that on the contrary, in the present case, JCHS or none of its members will be positively or negatively affected by the success of the claim and they simply wish to raise moral objections. Furthermore Counsel suggested that JCHS does not have any expertise in the subject matter of the claim.

(iii) Lawyers' Christian Fellowship (LCF)

[63] It was submitted on behalf of the Claimant that the grounds given by LCF are insufficient for it to be granted intervenor status. The point made was that it is irrelevant that one of the purposes of the company is "*to promote and defend the laws and systems grounded in Christian values for the well being of the country.*" The ability of the LCF to promote their religious beliefs will not be affected by the removal of criminal prohibitions punishing, buggery.

[64] It was further submitted that freedom of religion is about being free from state coercion regarding holding religious beliefs or practicing one's religion. It does not mean that any one religious group or adherents of a particular faith has the freedom to force its religious values on others through state action. Additionally, on grounds similar to the opposition to the application of JCHS, it was argued that LCF has no expertise on the matter.

[65] Counsel for the Claimant challenged the assertion that the success of the claim would result in the promotion and facilitation of a "lifestyle" objectionable to the Applicant on the basis that just as LCF is not entitled to enforce their values on others, the change in the laws will not force anyone to engage in that activity.

(iv) The Churches

[66] Similar submissions were made in respect of the position of The Churches, namely that The Churches' rights will not be adversely affected by the success of this claim and therefore have no sufficient interest in the claim nor do they have expertise in the matter. It was argued that The Churches' constitutional rights will not be affected, nor is there a risk of discrimination to The Churches on the basis of religion. Furthermore, the outcomes feared by The Churches are not the result of the success of this claim and the change in the laws would not promote or encourage those activities.

Interests of Applicants can be adequately represented by the Attorney General

[67] It was submitted that the Attorney General would be able to use the resources of the state and arrange public fora with these groups to hear their views and reduce them to writing. These views could form part of the Attorney General's submissions. This would also result in less costs and expense for the Claimant. Furthermore, the Claimant has already made applications to appoint expert witnesses to speak on the key issues in the Claim including public health concerns relating to HIV/AIDS.

[68] The Claimants also submitted that although the LCF played a role in the legislative discussions leading up to passing the Charter, which they claim gives them expertise in respect of the Charter provisions, those discussions are a matter of public record. These can be made available to both the Claimant and the Defendant.

Whether if sufficient interest is established, participation should be limited

[69] The position of the Claimant was that all of the Applicants are advancing similar, if not the same propositions which are based on their common religious beliefs. To grant each applicant intervener status would result in a waste of the Court's time and resources as well as cause an unjustified burden on the actual parties.

[70] The Applicants also wish to participate by filing evidence and making representations if intervener status is granted to them. The Claimant noted that the case of ***American Airlines*** was relied on by the Applicants to make the point that if they are granted intervener status, they would have all the rights of a party. However, Counsel for the Claimant argued that the ***American Airlines*** case is distinguishable from the present case as that decision rested on the interpretation of the Competition Act which expressly provided for the interveners to "*make representations relevant to the proceedings.*" Those words are not included in the Jamaican CPR and as such, the Applicants would have no such right.

Ruling on the Application of the Public Defender

[71] The Court finds considerable merit in the submission made on behalf of the Attorney General as to the statutory remit of the Public Defender. The Court accepts that 13.-(1)(a)(ii) of the PD Act which provides that the Public Defender shall investigate any action taken where he is of the opinion that any person or body of persons authority has suffered, is suffering or is likely to suffer an infringement of his constitutional rights as a result of any action taken by an authority or an officer or member of that authority, is qualified by section 15 (1)(b). Section 15(1)(b) provides that an investigation pursuant to subsection (1)(a)(ii) of section 13 may be undertaken by the Public Defender on a complaint made to him pursuant to section 14. This section has to be construed in the conjunction with section 15(1)(a) which provides that subsections (1)(a)(i), (3) and (4) of section 13 may be undertaken by the Public Defender on his own initiative or on a complaint made to him pursuant to section 14. One can reasonably conclude that the intention of the draftsman was to make it abundantly clear that the Public Defender's investigation of an actual or likely breach of a constitution right must be preceded by a complaint pursuant to section 14. In any event the PD Act provides that the nature of the Public Defender's intervention ought to be by way of investigation and in my view it would be a strained construction to find that such investigation includes the Public Defender's participation in a claim as a interested party.

[72] The Public Defender relies on its statutory remit as a basis of its assertion that it has a sufficient interest in the subject matter of the claim. In Ms. Burgess's words "it would almost be a dereliction of duty for the Public Defender not to seek to intervene in the proceedings". I do not agree. To the extent that the application of the Public Defender is founded on a statutory duty, for the reason outlined in the preceding paragraph I find that there is no such statutory remit.

[73] Even if I am wrong in my conclusions as to the limits of the Public Defender's statutory remit there are other reasons why in my view that application of the

Public Defender ought not to be granted. As acknowledged in the written submissions on behalf of the Public Defender, the issue joined between the parties in the substantive claim is undoubtedly one of significant public interest. Counsel accurately expresses the context of the litigation as follows:

> *"…The issue of homosexuality, and by extension the issue of the laws on buggery, has spawned, and continue to spawn opponents and proponents in equal measure, in all spheres of the Jamaican society.*
>
> *Whatever the ultimate decision in the substantive matter, socio-political waves will be created in the Jamaican Society. Anti-gay interests have long signalled that they are prepared to defend the buggery laws with every effort and all their resources. According to them it goes against the natural order of things. The pro-gay interests, with equal determination, have resolved to have the buggery laws repealed. According to them it, is a blatant violation of fundamental rights and such laws are therefore unconstitutional."*

[74] The position was advanced that the Public Defender, a statutory creature independent of any arm or organ of the state, and charged with the statutory duty to protect the rights of persons, is in the centre of this nationally divisive issue. I wholeheartedly disagree. The Public Defender by this application is seeking to voluntarily insert herself directly into the centre of a nationally divisive issue which for the office of the Public Defender, is potentially toxic.

[75] As has been correctly identified Counsel for the Public Defender, there two diametrically opposed positions - two sides with the battle lines drawn. There are only two possible results, the buggery laws either infringe the constitution, or they do not? Presumably, the Public Defender's submissions to the Court would be of little assistance if they are neutral. If they are not going to be neutral, which position would the Public Defender take? The Claimant's support of the Public Defender's application suggests that there is already a view formed, by the Claimant, (not unreasonably), as to the Public Defender's stance on the issue. The obvious danger is that regardless of the side which the Public Defender chooses, she runs the risk of the losing the trust of, or worse, completely alienating, the other side. Public confidence in the office may also be further

negatively affected if the Public Defender supports or advances a position which the Court ultimately finds to be plainly wrong.

[76] The grant of the application is discretionary and after balancing the possible benefit to be gained by the Public Defender's participation against the likely negative impact to that public office arising from such participation, having regard to the statutory remit of the Public Defender's office, I am of the opinion that the Court ought to exercise its discretion in refusing the application of the Public Defender.

Discussion and analysis in respect of the other Applicants

[77] Counsel for the Claimant has made heavy weather of the distinction between an "*interested party*" as used in the UK CPR and an "*intervenor*". In my view, too much emphasis need not be placed on the precise label used for purposes of these applications. The use, or what is argued to be the misuse of the term "interested party" may have its origins in the absence of the term from our CPR and the fact that the term, for convenience if for no other reason, has become one that is informally used to represent a party that is joining proceedings pursuant to CPR 56.13(2)(c).

[78] There is typically an appreciation of the fact that the ambit of the participation of this party is limited and in this case the recognition of the possible limits on the extent of the participation is demonstrated by the application by the Applicants for an order to be permitted to file affidavit evidence. It is also reflected in the amendment obtained by LCF to specifically seek such an order, that relief having been omitted from its notice of application as it was originally filed (although the application when advanced was said to be made out of an abundance of caution).

[79] As Sykes J observed **R v Industrial Disputes tribunal (Ex parte J. Wray and Nephew Limited)** at paragraph 39:

Part 56 distinguishes between persons "directly affected" and any person or body having "a sufficient interest" (rule 56.2, 56.11 and 56.13). While it is clear that any person who is directly affected must necessarily have a sufficient interest, it is not true to say that every person who has a sufficient interest is directly affected.

[80] It is common ground between the parties and also accepted by the Applicants, that in the absence of a definition of sufficient interest in CPR 56.13(2) (c) the Court is entitled to enlist in aid the provisions of CPR 56.2. Numerous authorities have been provided to the Court addressing the issue of sufficient interest and these have been referred to earlier when I reviewed the various submissions of Counsel. I do not think it is necessary to repeat the specific references to these cases which have already been quoted as part of the submissions of Counsel for the Applicants. In my view, one does not need to look any further than the analysis of Morrison JA (as he then was) in The **Jamaicans for Justice** case for what can be considered to be the distilled product of these cases. As the learned Judge puts it in paragraph 71 of the judgment:

As the cases have shown, the liberal approach to standing has been at its most pronounced in cases with a public interest in preserving the rule of law or, where applicable, a constitutional dimension. In such cases it seems to me, the courts have been less concerned with the right which a particular applicant seeks to protect than with the nature of the interest.

[81] I have already referred to Ms Burgess' description of the interest, passion and divisiveness that the issue of buggery generates. Each application has been supported by affidavits attesting to the role each applicant plays in the wider society and the grounds for their addition as "interested parties" in the present claim. Within the grounds of the applications (as well as Submissions of the Applicants), each Applicant expressed the aims of their respective organization/group.

[82] In adopting the more liberal and relaxed approach to standing embraced by the Courts in the plethora of authorities to which reference has previously been made, I am further fortified in the correctness of this approach because of the nature of the Claim and the public interest it has generated and continues to

generate. If ever there was a matter which begged for a liberal approach to standing in order to facilitate the participation of a wide cross section of the public who have a genuine interest in the topic, this certainly is it.

[83] I find on balance of probabilities that the Applicants are not "busybodies". They are well respected advocacy groups or interest groups, who have proven track records of participating in the public discourse relating to buggery and related issues. They have publicly advanced positions in opposition to the repeal of the buggery laws. They represent a broad and diverse cross section of the Jamaican population and I find that they each have a sufficient interest in the claim to justify being permitted to participate in the proceedings. The fact that it is arguable that their members might not be "*directly affected*" as suggested by the Claimant in that they would still be able to exercise their choice of religion and sexual preference if the buggery laws are repealed, is of no moment. That is not the test.

[84] I have considered the submission of the Claimant that there is similarity in the positions of the Applicants in that they are all opposed to the repeal of the buggery laws, primarily on religious grounds. It was also argued that their positions could be represented by the Attorney General. Whereas at the root the Applicants do have similar positions, their views are not homogenous. Similarly the evidence they have filed indicates a nuanced approach on the part of each to the bases for arguing that the buggery law should not be repealed. I am of the view that even if it were possible, it would be impractical for the Attorney General to properly represent the views of the Applicants at the hearing of the claim.

[85] The point was made by Mr. Braham Q.C., that section 13(2) of the constitution makes it clear that rights are not without limitation in a democracy. Counsel submitted that among the issues which the Court will have to consider is the impact on the wider society of the relief the Claimant is seeking and this will require evidence, possibly expert evidence of medical doctors or epidemiologists. Furthermore the Court will have to consider whether the majority of Jamaicans

consider homosexuality and more specifically buggery to be repugnant. I agree with these submissions entirely and I find that the Applicants ought to be allowed to file evidence in affidavit.

[86] Ms. Gray argued that according to CPR 56.13(2)(c) and (d) and CPR 15(1) and (2) should only permit the Applicants to make written submissions or exceptionally, oral submissions. The Issue was considered in **Michael Levy v The Attorney General of Jamaica and Jamaica Redevelopment Foundation**. In that case the Jamaican Court of Appeal upheld the validity of general case management orders made by a Judge granted permission to parties to file evidence in an application for judicial review where another judge had granted them permission to participate in those proceedings and to make oral submissions at the hearing. It is therefore clear to me that this court in exercising its general case management powers can give the Applicants permission to file evidence including expert evidence and to make oral submissions supported by written skeleton arguments. The Court is generally assisted when parties' oral arguments are supported by their submissions in writing and I do not see why that would not also be the case at the hearing at this claim.

[87] Ms. Gray for the Claimant did make a quite important point in relation to the need for the Court to weigh any prejudice that may be occasioned by the Claimant, against the possible benefit that may be derived from each Applicant's participation, that is, what may be described as the "cost vs contribution" element. Ms Gray also submitted that the Claimant had no inkling that other parties would wish to join the claim and is a single individual to whom the costs would be burdensome.

[88] These are factors which the Court has considered at length. I have recognized the risk of the additional time and cost to the Claimant in now having to face multiple additional "interested parties", and especially the additional resources which may have to be devoted to responding to evidence. However the Court has not been provided with any evidence on which it could conclude that the

Claimant will not have access to sufficient resources to effectively present his claim and to properly respond to the Applicants. I also accept the submission by Mr Wilkins, that the Claimant as Counsel familiar with these matters, ought to have contemplated that the public interest generated by this Claim would in all likelihood attract applications by various persons and groups seeking the right to to participate. However, whether the Claimant anticipated the level of interest or not, bears little significance in the Court's determination. What is of considerably more significance is that I have concluded that the nature of the Claim, taking into account the widespread national interest and the contribution that each Application will bring to the trial, will outweigh any possible prejudice to the Claimant.

[89] Mr. Wilkins has expressed confidence in the Court exercising its case management powers so as to fairly balance the interests of the Claimant and the Applicant and to ensure that the Claimant is not prejudiced. Naturally, I share his confidence. The Court will use its powers to ensure that the trial does not become unwieldy or from the Claimants perspective, unduly burdensome. Counsel for the Applicants have also suggested a number of practical devices which may be employed, and there is no reason why they cannot be utilized.

[90] My confidence is also bolstered by the tremendous level of cooperation displayed by Counsel for the Applicants at the hearing of this application. As a consequence of the time allotments for presentations agreed among Counsel (to which I referred at the start of the judgment), there was the absence of unnecessary repetition in the presentations. Counsel, where possible, adopted the submissions of others and appropriate references were made to the skeleton arguments without regurgitating the contents thereof. I am optimistic that a similar approach can be adopted by Counsel at the hearing of the substantive claim. In the event that Counsel is seen to be using the Court's time inefficiently, the Court always has the option of assisting Counsel in focussing on the areas where Counsel's emphasis might be best directed in order to be of paramount assistance to the court.

[91] For the reasons given herein I make the following orders:

> *1. The application of the Public Defender is refused.*
>
> *2. The Applicants (save for the Public Defender) are permitted to appear in person and/or by Counsel and make written and oral submission at the hearing of the Fixed Date Claim Form filed on behalf of the Claimant herein.*
>
> *3. The Applicants (save for the Public Defender) are permitted to file evidence by affidavit in this Claim, the time for the filing of such evidence is to be determined, (together with such consequential orders as may be necessary).*