



**LGBTI Aware Caribbean**

# “Love and Respect”: Q&A on Jamaican TV ad court case

*Updated February 2016*

## **1. Why is this case important?**

Stigma, discrimination and sometimes murderous violence remain pervasive threats to the health and human rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) people in Jamaica, denying them basic, universal rights to personal safety, dignity and equality. Homophobia and transphobia also drive LGBTI Jamaicans underground, away from HIV prevention, treatment, care and support interventions. They also impede the government’s willingness and ability to properly target HIV services to a population at heightened risk. This contributes to a vastly disproportionate HIV prevalence among Jamaican gay men and other men who have sex with men (MSM) — 32.3 per cent, compared to a prevalence of 1.8 per cent in the population as a whole. An effective way to end homophobia and transphobia, and to thereby help strengthen the response to HIV, is to ensure that LGBTI communities can be visible and safe in Jamaica, rather than being forced to live in secret.

Therefore, in 2012, Jamaican human rights activists and AIDS-Free World produced “Love and Respect,” a short, 30-second video advertisement calling for respect for the basic human rights of Jamaican LGBTI people.

The advertisement is available via the Canadian HIV/AIDS Legal Network’s web site. It can be viewed at <http://youtu.be/AZwCW1LREXk>.

However, to date, television stations in Jamaica have refused to air it as a paid advertisement, prompting this legal proceeding. The outcome of this court case will be a key milestone for advancing human rights in Jamaica, including for LGBTI people.

## **2. What is the legal timeline for this case?**

The advertisement was produced in early 2012. Maurice Tomlinson, a Jamaican human rights activist who is now a senior policy analyst at the Canadian HIV/AIDS Legal Network, appears in the ad. In February 2012, he approached several major television stations in Jamaica to purchase air time to screen the ad. However, despite repeated inquiries over several months, the stations refused to air the ad — even after the Broadcasting Commission of Jamaica had confirmed that the ad does not violate any of Jamaica’s broadcasting laws or regulations.

Given this refusal, Tomlinson eventually launched a constitutional claim in the courts in October 2012. In his claim, he asked the court to declare that the TV stations’ refusal to air the ad was an unjustifiable

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breach of his constitutional right to freedom of expression and his right to disseminate and distribute ideas through any media — rights guaranteed by ss. 13(3)(c) and (d) of Jamaica’s *Charter of Fundamental Rights and Freedoms*. He also asked the court to order that the defendant TV stations air the “Love and Respect” ad in exchange for the standard fee for paid advertisements.

In November 2013, the Supreme Court of Judicature ruled partly in Tomlinson’s favour, finding that he had “standing” to bring the court action and that Jamaica’s new constitution does indeed impose obligations on private parties to respect *Charter* rights. However, it ruled against his claim that the TV stations had breached his rights by refusing to air the ad. Careful review of the three separate judgments written by the judges who first heard his case confirmed Tomlinson’s view, and ours, that the judges made a number of significant errors in their reasoning for denying his claim.

Therefore, in August 2014, Tomlinson launched an appeal of that decision, with the support of the Canadian HIV/AIDS Legal Network. The appeal was heard by the Jamaican Court of Appeal in February 2016.

### **3. What are the grounds for the appeal?**

There are numerous grounds of appeal being argued by Tomlinson and his lawyers, and also several arguments on counter-appeal put forward by the defendant TV stations. However, the essence of the case turns on a few key issues.

In his appeal, Tomlinson is arguing that the lower court erred in its approach to interpreting the scope of his rights under Jamaica’s *Charter* to freedom of expression and to disseminate information via the media, and the corresponding scope of the TV stations’ obligations to respect and give effect to those rights. Tomlinson also argues that the lower court erred in balancing his *Charter* rights against the TV stations’ claims that their editorial discretion and private property rights entitled them to refuse to air the “Love and Respect” ad. He asserts that the lower court failed to sufficiently consider the powerful role, and corresponding responsibilities, of the media in a democratic society, particularly the power of TV stations such as the defendants as effective gatekeepers of access to the media. Furthermore, his claim also outlines how the TV stations have failed to provide any constitutionally acceptable justification for refusing to air the ad, and that, at a minimum, TV stations have a constitutional obligation not to refuse access to the media on arbitrary, discriminatory or otherwise unreasonable grounds.

### **4. Why is this a landmark case in Jamaica?**

This is a landmark constitutional case in Jamaica in two respects. It is the first appeal to raise the issue of human rights of LGBTI people. It is also the first time the Court of Appeal will consider how respecting the rights protected under Jamaica’s 2011 *Charter of Fundamental Rights and Freedoms* is the responsibility not only of the government, but also of private actors, including corporations. It is one of a handful of such cases to date in the world, drawing upon court decisions from other jurisdictions such as South Africa, Canada, Ireland and the United States. This means the decision of the Court of Appeal will have ramifications well beyond the immediate issue of airing an ad supporting human rights for LGBTI people. The Court will have to consider the critical role and responsibilities of large media corporations in a democracy, and its decision will also help define the scope of protection of human rights for all Jamaicans under their new constitution.

## **5. What is the Court of Appeal being asked to do?**

Tomlinson is asking the Court of Appeal to:

- affirm the decision of the lower court that *Charter* rights must be respected by private parties, such as the TV stations in this case;
- declare that the TV stations' refusal to air the "Love and Respect" ad was an unjustifiable breach of his *Charter* rights to freedom of expression and to disseminate ideas through the media; and
- order the TV stations to air the ad upon payment of the standard fees.

## **6. Why is only one television station now defending its original decision not to air the ad?**

The initial court proceeding was started against the two major private TV stations, Television Jamaica (TVJ) and CVM Television. Later, the Public Broadcasting Corporation of Jamaica was also added as a third defendant when it, too, refused to air the ad. In pursuing his appeal before the Jamaica Court of Appeal, Tomlinson decided to pursue the case solely against the two private broadcasters, TVJ and CVM. Both stations filed their respective counter-appeals in response.

However, while we do not yet know their reason, a few days before the hearing of the appeal, we learned that CVM Television had decided to withdraw its lawyers at the start of the hearing. CVM appears to have decided not to contest this appeal any further. At this time, it is not yet clear whether they will now agree air the ad in Jamaica.

## **7. How will Jamaicans benefit from the ad?**

Jamaica has been described as one of the most homophobic (and transphobic) places on earth. Consensual sex among adult men remains a crime punishable by up to 10 years' imprisonment with hard labour. Violent acts against members of the LGBTI community are tragically common, including mob attacks. Sometimes LGBTI Jamaicans experience such violence at the hands of their own family members. Too often, police have either been complicit in such violence or tacitly condoned it with a refusal or failure to intervene or to investigate such incidents. With some welcome and important exceptions, too many religious leaders have encouraged prejudice and discrimination, while some leading musicians and cultural figures have sanctioned and fomented violence. As noted above, this hostile environment also contributes to an extremely high HIV prevalence among gay men and MSM — one of the highest worldwide. Societal pressure and homophobia also force some MSM to have relationships with women, which creates further opportunities for "bridging" of the HIV epidemic between populations.

Greater, positive visibility and public acceptance of LGBTI Jamaicans is good for their health and well-being, and reducing the level of homophobia will also reduce the level of violence and crime in Jamaica, as well as the country's HIV prevalence overall. Very importantly, promoting respect for the rights of LGBTI Jamaicans also contributes to building a broader, national democratic culture of respect for basic, universal human rights, which benefits all Jamaicans.

**8. Who is in the advertisement? Do they face any risks for speaking out publicly in this way?**

Maurice Tomlinson, Jamaican human rights lawyer and activist, formerly with AIDS-Free World and now a senior policy analyst at the Canadian HIV/AIDS Legal Network, appears as the gay man in the PA and is also the claimant in this court case. Tomlinson was forced to flee his homeland because of the homophobia and hate he personally encountered. Another long-standing, well-respected Jamaican human rights activist, Yvonne McCalla Sobers, plays the role of Maurice's aunt in the PA and explains that she loves and respects him, regardless of his sexual orientation. While advocacy for the human rights of Jamaican LGBTI can carry risks, both Maurice and Yvonne are aware of the security measures that have to be taken and have employed these.

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To view the "Love and Respect" advertisement, visit <http://youtu.be/AZwCW1LREXk>.

**For more information and media inquiries:**

Lauryn Kronick  
Communications and Outreach Officer  
Canadian HIV/AIDS Legal Network  
[lkronick@aidslaw.ca](mailto:lkronick@aidslaw.ca)  
+1 416 595-1666 ext. 236