

## **CONSTITUTIONAL CHALLENGE**

A challenge to the Constitutionality of legislation passed in 2000 regarding privacy and property rights and the exercise of Executive powers has been before the courts for the past five years. In case you are under the impression this case is solely concerned with client/lawyer privilege, it is not. It is about the country and your property.

The presumption of a right to assurance that the government in power acts in accordance with The Constitution is only a presumption until tested in the courts and an independent judiciary rules on the issues. In this instance they are:

**A. Whether the government is obliged to defend sovereignty and to pass laws consistent with the Constitution in the interest of the Bahamian people.**

**B. Whether the Constitution protects the citizens' fundamental rights, or whether those rights cede to the exercise of power by the Executive.**

Other countries in the Commonwealth challenged financial laws similar to those passed in 2000 that purported to co-opt lawyers and others to aid in enforcing the laws through their legal and business practices. Those challenges were successful, and the laws declared unconstitutional where they violated fundamental human rights.

### **A. SOVEREIGNTY OF THE BAHAMAS CHALLENGED BY THE OECD**

The Financial Laws have been, and will be supplemented by "guidelines" passed on to "Financial Institutions" through the Compliance Commission of The Bahamas, from the FATF, the financial arm of the OECD. The OECD is an overseas organization representing the developed countries. The guidelines are not laws or regulations passed by our Parliament, but in practice they set standards and procedures by which "compliance" is to be measured. These can be a moving goal post. The Bahamas Compliance Commission reports to the FATF and /or the Caribbean FATF.

In an interview (Tribune May 30<sup>th</sup> 2006) Mr. James Smith, Minister of State for Finance referred to 'regulatory standards as "constantly evolving".' He further commented on the OECD's latest report on "compliance" issues, as follows: ***"It's been an argument that has been made in the Bahamas for some time, that we have gone 'way beyond' the OECD countries, which is why it is so important to insist on a level playing field."***

If our Government is using that argument against the OECD, why is it vigorously opposing the Constitutional challenge by Ginton & Esfakis over the past five years, the objective of which is to preserve the "level playing field" on fundamental human rights for Bahamian citizens?

### **B. PRESUMPTION OF INNOCENCE**

The Constitution grants citizens, and others in the Bahamas, the right to a presumption of innocence, a fair trial by an independent court, protection of person and property from unwarranted searches and seizures, and a right to give and receive information relating to his private affairs in confidence. Ginton and Esfakis contend this is no longer the case.

The Constitution sets out a system of checks and balances against the executive's misuse of power. Glinton & Esfakis contend that the Financial Laws represent a breach of the Constitution and misuse of power, and do not fulfill the intent and obligations of the Constitution.

The over-riding question is whether we are prepared to face the challenge to fundamental rights now: whether we have sufficient moral constitution to preserve our legal Constitution.

The following sixteen items identify the issues being contested:

1. *Do the laws violate the fundamental rights provisions of the Constitution such as:*
  - *The presumption of innocence*
  - *The right of freedom from unwarranted search*
  - *The right to confidentiality regarding private communications*
  - *The right not to be unjustly deprived of property?*
2. *Do the Financial Laws deprive a client of the protection of lawyer-client privilege?*
3. *Should attorneys be required by the Financial Laws to report on their clients with or without the consent of the client?*
4. *Do the Financial Laws put the Plaintiffs (and other lawyers) as officers of the Supreme Court, in a position of conflict, between the duty and obligations which the laws create for them, and the client's right to confidentiality of his information?*
5. *The Hawkesbill Creek Agreement has not been amended or repealed. Do the Financial Laws violate the rights of the 1st Plaintiff (and other attorneys licensed by the Port Authority of Grand Bahamas) as Licensee under the Hawksbill Creek Agreement?*
6. *Do the provisions of the Financial Laws circumvent the powers of the Public Service Commission?*
7. *Do the provisions relating to the Financial Intelligence Unit (FIU) defeat a person's right to trial by an independent and impartial court?*
8. *Is the Financial Intelligence Unit (FIU) given powers and immunities reserved for the Supreme Court and its judges alone and is therefore ultra vires the Constitution?*
9. *Is the FIU ultra vires the Constitution because it purports to usurp Parliament's legislative function of determining what the law should be?*
10. *Does the Central Bank of the Bahamas Act (CBBA) have the authority to deny the fundamental right of a person to the presumption of innocence until proven guilty by an impartial court?*
11. *Does the CBBA defeat a person's right to protection against the arbitrary and compulsory deprivation of property without due process of law?*

*12. Is the Banks and Trust Companies Regulation Act (BTCRA) ultra vires when it purports to give the Governor of the Central Bank, and a Magistrate, powers to exercise a discretion reserved for judges in the higher judiciary, which affect fundamental rights?*

*13. Does the BTCRA circumvent the constitutional separation of powers by virtue of the judicial power purported to be vested in the Governor of the Central Bank?*

*14. Do the Financial Laws by designating the Plaintiffs (and other lawyers) as "Financial Institutions") purport to regulate and redefine the Plaintiffs' duties and functions as Officers of the Court, and Counsel and Attorneys of the Supreme Court?*

*15. Do the Financial Laws thereby defeat the role of the Plaintiffs as officers of the court and thereby also defeat the constitutional separation of powers?*

*16. Can the reasons for which the legislation was passed, justify the alleged erosion or abrogation of fundamental rights in a democratic society?*

Ask yourself whether we are simply occupants of the Islands in the Stream and not the owners of the land we occupy? Are we willing to subject our freedoms and property rights to the ideologies of those with the loudest voices and political power? Do we naively believe that our "rights" and freedoms are somehow "guaranteed" and no effort is required to make sure they prevail?

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