



TO ALL MEDIA

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**Supreme Court Upholds Ombudsman's Certification of Contempt
against Mayor and Deputy Mayor of Corporation of Hamilton**

Hamilton, Bermuda: Yesterday, the Supreme Court upheld the Ombudsman for Bermuda's Certificate of Contempt of Court and held the Mayor and Deputy Mayor of the City of Hamilton to be guilty of contempt.

Failure to comply with the Ombudsman's summons constituted Contempt of Court

The Supreme Court held that, in the absence of a lawful excuse, the failure of the Corporations' two most senior executives to comply with the Ombudsman's Summonses constituted a contempt of Court: *"The contempt occurred because the Respondents, who had been doing their best to cooperate with an investigation they did not truly welcome, most likely because they were heavily committed to matters which they considered to be far more important, allowed their personal irritation to get the better of their judgment. In the result they have effectively compelled the Ombudsman to issue the present proceedings to prove an ultimately obvious legal point."* It is now clear that *"When the Ombudsman issues a summons, it has the same legal force as a court order, and cannot be ignored by the summonsed parties at their own whim"*.

Ms. Brock stated: *"I am delighted that the Supreme Court has upheld my certification of Contempt of Court for failure to comply with a Summons to attend. This is a precedent-setting case for the entire Commonwealth. I did a quick survey of Ombudsman colleagues and those who responded had never faced a situation of witnesses failing to comply with Summons'. In fact, most have never had to issue Summons' because their requests for interviews are fully respected by the citizens of their countries. Bermuda is truly sometimes "Another World". I had issued the Summons' in this case only because I learned that the Respondents had decided not to attend scheduled interviews and also planned to be abroad most of August. It was very important for the progress of the investigation that I be able to interview them before Cup Match. I must add that our experience of the last eight years is that face to face interviews are infinitely more forthcoming than written questions."*

Legal Representation for witnesses at interview stage is at the Ombudsman's discretion

The Respondents failed to advance any credible reasons why legal representation was required at the interview stage. Indeed, the Supreme Court observed that the desire for legal representation appeared to be based on “*a deep-seated hostility to the very idea of the investigation and a failure to fully comprehend the character and purpose of the Ombudsman's role*”.

Ms. Brock noted: “*of course at the stage when I make adverse comments in a recommendation or report, people have a right to legal representation and to be heard. This is established in Ombudsman statutes all over the world. The Chief Justice indicated during the hearing that he had conducted his own research and found that the state of Victoria in Australia permits witnesses to have legal representation during the investigation stage. I am not aware of any other jurisdiction in the world that permits this. In fact, two Ombudsman statutes – for British Virgin Islands and Montserrat – expressly exclude a right to legal representation during interviews.*”

The Supreme Court surmised that, based on the evidence before it, “*no recognized grounds for legal representation presently existed because the Ombudsman has not yet reached the stage of revealing to the Respondents any specific adverse comments which she is contemplating including in her report*”. Further, “*the express power conferred on the Ombudsman to regulate investigations as she sees fit (subject to the terms of the Act) is incompatible with the idea of interviewees having an implied right to legal representation at the interview stage*”.

The Supreme Court noted that there is a statutory right (under s. 17(2) of the Ombudsman Act) to legal representation at the stage when the Ombudsman writes a recommendation or report, she makes adverse comments against any person or authority. Before that stage, it is at her discretion to allow legal representation: “*I find that the Ombudsman is subject to an implied duty to consider whether the rules of natural justice require, in any particular case, the subject of an investigation to be afforded access to legal representation as any relevant stage of that process before the rights under s.17(2) are engaged. The rules of natural justice are far too fluid to permit any inflexible policy to exclude access to legal advice in all cases even though the statutory context may justify the practical view that the need for counsel will only arise in exceptional cases at the investigative phase.*”

Ms. Brock responded: “*Absolutely, I agree with the Court that in each particular case, there may be reasons to allow for legal representation. This has to be balanced against the tendency to inject the adversarial techniques of judicial proceedings into investigations. Other than Victoria, I have learned of only a couple of jurisdictions that have allowed lawyers to attend interviews in the last five years. In one Caribbean island, an Ombudsman once actually requested a lawyer to explain a technical matter that the witness could not. Another is Ontario where, in the last five years lawyers have been*

allowed 6 or 7 times (out of approximately 75,000 investigations). Most of these cases were instances where the witness expressed concern that the questions being posed trespassed on areas protected by lawyer/client privilege. Even in Victoria, lawyers may not interject, ask questions unless given leave, or seek to put forward their client's views."

Role of the Ombudsman

The Supreme Court noted: "The Office of the Ombudsman in Bermuda is still a comparatively new one and the number of persons in Bermuda, be they public officials or ordinary citizens who have an instinctive appreciation for the principles underlying the review of administrative action is probably comparatively small...Bermuda's formal constitutional adoption of democratic governance in 1968 was merely a legal and political step into modernity; the Ombudsman Act, designed to facilitate practical good governance in modern real world terms, is still an infant less than ten years old. Against this background the idea of an investigation into whether the processed deployed by the Corporation in granting a lease conformed to best good governance standards in terms of, inter alia, requirements of transparency and public consultation might be viewed, understandably, as revolutionary in public policy terms."

Ms. Brock stated: "Of course, I am very happy that the role of the Ombudsman has been clarified and shown to be worthy of respect. This can be inferred from the fact that the Supreme Court marked its disapproval of the Respondents' conduct by making a provisional award of indemnity costs against the Respondents. The question of precise penalties to be exacted on the Mayor and Deputy Mayor has been left open to further argument at a later hearing. Given that there have been relatively few Court challenges around the world of Ombudsman jurisdiction and powers, this case is not only important for Bermuda but for all Commonwealth jurisdictions. I imagine that this decision will be used in years to come as it provides helpful guidance on the right to legal representation during an Ombudsman's investigation.

Colleagues are already noting that this case will prompt them to consider criteria for allowing legal representation during interviews. Although almost everyone has the discretion to allow lawyers, most had not established criteria because they have never exercised their discretion."

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Editor's Notes:

- The Ombudsman is an independent Officer of the Constitution, appointed under s. 93 by the Governor (after he has consulted with the Premier and Opposition Leader).
- As a “corporation which is established by Act of the Legislature”, the Corporation of Hamilton is within the jurisdiction of the Ombudsman under s.3(d) of the Ombudsman Act 2004 (“Act”).
- S.12(5) of the Act provides that the Ombudsman may regulate investigations and proceedings as she sees fit.
- S. 17 of the Act provides that the Ombudsman shall not make an adverse statement about anyone in a report unless she gives them an opportunity to be heard. They may be represented by an attorney or any other person at a hearing.
- The Ombudsman for Bermuda was represented by Nathaniel Turner of Attride-Stirling & Woloniecki .

More information: www.ombudsman.bm; Bermuda Ombudsman on Facebook; tel. 441-296-6541.