

CONSTITUTIONAL REFORM

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PART 8

The Rt. Honourable Sir Lynden Pindling, one of the Founding Fathers of our Constitution, in an address at the Colloquium on Political Reform, Constitutional Change and National Development at the College of The Bahamas on the 23rd June 1998, advocated that we expand the fundamental rights protected under the Bill of Rights of the Bahamian Constitution to include “**The right of a citizen to good health and a clean environment.**”

PROTECTION OF THE ENVIRONMENT

The Bahamian Constitution, as a living document, should be amended, like the United States Constitution which itself has been amended 27 times, to reflect the shared expectations of and experiences of succeeding generations of Bahamians. Today, due to the lack of a rational development strategy, we are faced with the rapid loss of aspects of the natural environment and cultural heritage of The Bahamas. The current national development strategy of development, based on attracting large foreign direct investments in resort tourism, has transformed the physical landscape and way of life of communities throughout the Archipelago of The Bahamas. There needs to be a firm balance between development and

preservation of physical and cultural environment. While the current development strategy has created jobs for Bahamians, it is having an adverse impact on the environment, the quality of life of future generations of Bahamians, who will have to live pollution filled lives, without easy access to the beaches, historical and cultural sites, damped waste in our waters from cruise ships and others in the Bahamian territorial waters, the destruction of marine life and the coral reefs. The patrimony of future generations of Bahamians will be destroyed, unless we treat the right to good health and a clean environment as fundamental rights protected by the Constitution.

The right of every Bahamian community to preserve its quality of life and be consulted before any public decision is taken to approve the construction and operation of a projects that may adversely affect a Bahamian community was affirmed by the Court of Appeal of The Bahamas in the case of **Responsible Development of Abaco (RDA) Ltd v. The Right Hon. Hubert A. Ingraham and Others** SCCivApp. No. 138 of 2010. The issue related to a decision of BEC to construct a power plant at Wilson City, Abaco, and the right of the community to be adequately consulted before the decision was taken. In a judgment by the Honourable Madam Justice Allen, President of the Court of Appeal, in which Justices of appeal the Honourable Mr. Justice Blackman and the Honourable Mr. Justice John both concurred, she observed, at paragraph 15, that **“It cannot be doubted that the exercise of that power was subject to the rights or legitimate expectations of residents of The Bahamas generally, and in this case to the rights and legitimate expectations of residents of Wilson City, in particular,**

not to have their quality of life adversely affected by the construction and operation of the power plant in their neighborhood.” At the hearing of the appeal, the power plant had already been constructed, nevertheless the Court of Appeal ordered BEC to conduct a process of full and proper public consultation with the community of Abaco on the operation of the plant going forward. The Court held that **“the appellants had a legitimate expectation to be adequately and meaningfully consulted in the decision-making process relative to the location and construction of the power plant at Wilson City, Abaco, which was breached by the respondents. “**

UNITED STATES EXPERIENCE

The United States federal regulation of the environment is based on the National Environmental Policy Act, 1970, under which is established the Council on Environmental Quality, which advises the President. The Environmental Protection Agency was also created in 1970. The Common Sense Initiative Council, comprising representatives of government, business and environmentalists take an industry specific approach to solving environmental problems. One feature of the United States legislations which is instructive is the **“private attorneys general”** provision which enables an individual to challenge government’s environmental decisions such as the grant of a permit and generally to demand both government and private sector compliance with the law. For example, the Endangered Species Act contains a provision which states that “any person may commence a civil suit” to enforce the provisions under the Act. In rejecting the Secretary of the Interior’s position that the

Petitioner lacked the requisite standing, Justice Scalia, writing for the U.S. Supreme Court in the case **Bennet v. Spear** 117 S.Ct. 1154 (1997), held:

“That the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so-called `private attorneys general.’ ”

These private attorneys general provisions in environmental laws in the United States have enabled environmentalists to ensure a more equitable balance between development and preservation. For example, environmentalists have been able to influence the United States federal Government to protect the habitats of the northern spotted owl, the Mexican spotted owl and the grey wolf by limiting development on nearly 18 million acres of land.

In The Bahamas, the Government is often compromised when regulating foreign direct investment, given the practice among the political parties of relying on secret campaign contributions from foreign investors who are proposing or conducting foreign direct investment, with environmental implications. Therefore, the regulation of business should not be left exclusively to the initiative, monitoring and enforcement by the Government. I suggest that, like the United States, every Bahamian should be able to act as a “private attorney general” in the preservation and protection of our environmental laws.

PUBLIC ACCESS TO BEACHES

Access to the beaches for recreation, exercise and leisure is important part of the Bahamian culture and traditional way of life, as island communities. However, due to the lack of a rational development strategy, public access to the beaches on New Providence has been severely restricted over the past 30 years, due to the public policy of unrestricted touristic and other development, primarily by foreign investors. Due to this pattern of development, we have seen, notwithstanding recent beach restoration projects, restriction to Governor's Beach, Delaporte Beach, Cabbage Beach, Yamacraw Beach and Montague Beach.

One social or economic class, foreign or local, should not be allowed to dominate the use of beaches in The Bahamas. We must, in our public policy, strike an equitable balance between the accommodation of economic development and the right of all of our people to have reasonable access to the beach resources of our country. Smart urban planning will protect the natural, historical and cultural patrimony of this country for future generations of Bahamians and visitors.

There is a growing recognition in the Caribbean region generally that the citizens' right in a healthy and productive natural and social environment should be treated as a fundamental right. The Constitutional Commission of Jamaica in its Final Report, dated February, 1994, recommended that the Jamaican Constitution should be amended to include, amongst other things, "**the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage**". Similarly, the Report of the Constitutional Review

Commission of Barbados, dated December, 1998, recommended that the Barbadian Constitution be amended to include, amongst other things, the duty and responsibility of every person in Barbados **“to value and preserve the rich heritage of Barbadian culture”** and to **“create and maintain a clean and healthy environment and have compassion for living creatures”**. Further, the Barbadian Commission recommended that the Constitution be amended so that the State shall have the responsibility to **“ensure that the beaches and public areas are accessible to all and do not become the exclusive preserve of any one sector of the community”** and to **“give the highest priority in the planning and execution of government policy to the preservation and protection of the natural environment of Barbados, which it shall hold as a sacred trust for future generations”**. The current laissez faire policy of The Bahamas with respect to the Bahamian environment is out of step with the growing regional consensus that we must, through the Constitution, statutes and common law, pronounce a rational policy for the preservation and protection of our natural environment and cultural and historical heritage.

RECOMMENDATIONS

Since our Constitution is the most authoritative statement of the Bahamian community’s aspirations, expectations and policies, I recommend that our Constitution be amended to include the following provisions:

1. Every person shall have the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological, cultural and historical heritage.
2. Every community should be adequately and meaningfully consulted in the decision-making process before the approval of any project that may adversely affect the quality of life and welfare of any Bahamian community.
3. The State shall ensure that the beaches and public areas are accessible to all and do not become the exclusive preserve of any one sector of the community.
4. The State shall give the highest priority in the planning and execution of government policy to the preservation and protection of the natural environment and cultural heritage of The Bahamas, which it shall hold as a sacred trust for future generations of Bahamians.

Finally, all future environmental legislations presented to the House of Assembly should contain a “private attorney general” provision which will enable any Bahamian citizen to challenge an environmental decision by a public authority to protect the good health of Bahamians and visitors and the ensure a clean environment.