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ATTORNEYS-AT-LAW

# NEWSLETTER

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## THE BROADCASTING COMMISSION



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Many Jamaicans had either never heard of, or were unaware of the functions of the Broadcasting Commission (“the Commission”) prior to the recent directives issued by the Commission regarding songs containing certain controversial colloquial terms. This article is intended to shed some light on the Commission, its constitution and functions.

### Composition of the Commission

The Commission was established under section 12 of *The Broadcasting and Radio Re-Diffusion Act* (“the Act”). The First Schedule to the Act details how the Commission is to be constituted. It is provided that the Commission shall consist of not less than five nor more than nine members appointed by the Governor-General after consultation with the Prime Minister and the Leader of the Opposition. Persons who are currently Members of Parliament or of a local authority or who had served or had been a candidate to serve during a period of seven years immediately prior are not qualified to be members of the Commission.

Members are appointed to the Commission for a term of five years and are eligible for reappointment. Members of the Commission may be removed from office due to their inability to discharge their functions, whether arising from infirmity of body or mind, misbehaviour or any other cause. Revocation of an appointment must be recommended by Parliament and carried out by the Governor General. Members are free to resign from the Commission at any time.

### The Functions of the Commission

The functions of the Commission are to:

- (a) advise the Minister on any matter within its knowledge or on which the Minister may seek its advice, including:-
  - (i) the terms and conditions on which licences (such as cable and commercial licences) may be granted;

- (ii) the allocation of time to broadcasting of programmes which are of Jamaican origin, performed by Jamaicans or which are particularly relevant or significant to Jamaica;
- (b) conduct surveys for the purpose of ascertaining the extent to which radio or television transmissions are being received, or are capable of being received within Jamaica;
- (c) undertake, sponsor, or assist in research relating to any operations subject to control or regulation under the Act;
- (d) establish a system for monitoring transmissions by licensees;
- (e) monitor the operations of licensees; and
- (f) receive and investigate complaints in relation to any matter under the Act.

### Directives, Censorship and the Commission

The Commission’s primary role is to regulate and monitor licensees under the Act and advise the Government on relevant issues. The Commission is charged with the responsibility of administering the Act, as well as the *Television and Sound Broadcasting Regulations* (“the Regulations”). Section 31 of the Regulations empowers the Commission to issue directives to licensees in respect of any matter to which the Act and Regulations relate. These Regulations prohibit licensees from, for instance, transmitting:

- any statement or comment concerning race, colour, creed, religion or sex of any person which is abusive or derogatory or pictorial presentation thereof except where same is contained in a news report or in a programme on matters of public interest or is an objective report;
- any malicious, scandalous or defamatory matter;
- any indecent or profane matter, so, however, that any broadcast to which regulation 26 relates shall be deemed not to be indecent (regulation 26 restricts adult programming to the hours of 11 p.m. to 4 a.m.); or
- any portrayal of violence which offends good taste, decency or public morality.

The Children's Code for Programming also contains guidelines to licensees regarding the broadcasting of content appropriate for children. It is these provisions which formed the basis for the Commission's recent directives prohibiting licensees from transmitting recordings, songs or music videos containing or promoting gun lyrics, and the simulation of certain sexual activity.

It is important to note that under the Act, where a licensee has contravened its licence, the Commission may

require a licensee to justify its actions or specify remedial action, failing which, it may direct that an apology be issued. Ultimately, a failure to comply with directions given by the Commission, may result in the suspension of the licence by the Minister upon recommendation by the Commission. Any person who contravenes the Regulations may also be liable to a fine not exceeding ten thousand dollars or to imprisonment not exceeding twelve months.

## MATERNITY LEAVE AND REDUNDANCY



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**T**he *Maternity Leave Act* ("the Act") deals with the employee's entitlement to maternity leave and pay during maternity leave ("maternity pay") in addition to the right of an employer to make the employee's position redundant while the employee is on maternity leave.

### General Provisions

An employer is obligated to grant maternity leave when the employee:

- has been employed for at least a year;
- has expressed an intention to return to work with the employer at the end of maternity leave; and
- where requested has provided a medical report on her pregnancy

### Length of leave

The minimum period prescribed under the Act for maternity leave is 12 weeks.

An employee may elect to return to work after 8 weeks. The maternity leave may be extended by an additional 14 weeks if the employee develops illness as a result of pregnancy or as a result of the state of the child's health.

The employer and employee are free to agree to a longer period than prescribed by the Act.

### Maternity Pay

An employee is entitled to maternity pay for the first eight weeks of maternity leave. The last 4 weeks of that period may be unpaid at the option of the employer.

An employer is not obligated to provide maternity pay:

- where the employee failed to inform the employer of the expected date of delivery at least 2 weeks before the date (or as soon as reasonably practicable);
- where the employee fails to comply with a request for a medical certificate; or
- if the employer has done so on at least three previous occasions in respect of that employee, during the course of her employment.

### Right To Return To Work And Redundancy

An employee is entitled to return to work under the same or similar conditions of employment save for the instance in which the employee's position is made redundant.

If a redundancy exercise occurs during maternity leave an employer is obligated to find alternative employment, where available, even with a successor/associated company if necessary. The terms and conditions of employment must not be less favourable than those which existed at the time the maternity leave was granted.

### Offences

If an employer fails:

- to grant maternity leave;
- wrongfully prevents an employee from returning to work and/or;
- terminates a contract of employment for reason of pregnancy

the employer is subject to criminal charges and upon conviction is liable to a fine or imprisonment in default of payment. Additionally, the employee may initiate suit against the employer.

### Redundancy Payments to Employee on Maternity Leave

Under the Act an employee on maternity leave whose position has been made redundant is treated for the purposes of the *Employment (Termination and Redundancy Payments) Act*-

- as having been continuously employed by her employer until the notified day of return; and
- as if her employment had been terminated by her employer by reason of redundancy and without notice on the notified day of return.

The Act therefore has the effect of potentially increasing the sum payable to the employee for redundancy and will automatically entitle the employee to pay in lieu of notice.

It should also be noted that, as is now required by law in every redundancy exercise, the employer must notify the Ministry of Labour of the intended redundancy.



## RIGHT OF ACCESS TO MEDICAL RECORDS



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Information contained in medical records is increasingly required for a variety of purposes by health insurance companies, employers, schools, credit agencies and, of course, for litigation. In each of these circumstances, a patient has a vital interest in being able to view what is recorded in his medical records as the records can affect education, career advancement and entitlement to insurance and

other benefits.

### Does a patient have a right of access to his or her medical records?

There is no legislation in Jamaica regulating the issue of a patient's access to his or her medical records and it is therefore governed by the common law. However, there does not appear to be any local case law and regard must be had to the law in other jurisdictions.

It is generally accepted that the health care provider who compiled the medical records is the owner of those records. Nevertheless, it has been held that a patient has a right of access to the information contained in his or her records. A health care provider is therefore not entitled to exercise his or her ownership rights to deny, without reason, access to an enquiring patient. This right of access arises from the very nature of the doctor/patient relationship, which is one of the relationships legally recognized as involving trust and confidence. The infor-

mation conveyed to the doctor by the patient in the course of the relationship is treated as being held by the doctor on a sort of trust. This confers on the patient a beneficial interest in the information contained in the medical records and mandates the health care provider to permit patients access to the records.

Since the patient's right is limited to one of access only and not outright ownership of the medical records, it is important to note that the patient is never entitled to the tangible records themselves. As owner, every health care provider is entitled to the physical custody of the original record. The business of that provider could hardly survive the removal of records from its premises. Consequently, patients are only entitled, upon request, to examine records and where appropriate, to make copies upon payment of any reasonable photo copying charges imposed.

The health care provider, in appropriate circumstances, can refuse to permit access. However, this decision cannot be made arbitrarily. Refusal to allow access can only be warranted where it can be shown that there is a real potential for harm to the patient or a third party. A decision to refuse access can always be challenged in the court and where appropriate, a court order will be made for the release of the records notwithstanding the health care provider's refusal. In the United Kingdom, the right of access to medical records is governed by the Access to Health Records Act. Perhaps it is time for Parliament to pass similar legislation in Jamaica.

## NO PARKING



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Many unsuspecting motorists have parked in areas where it would seem that parking is permissible, only to return and find that their vehicles are missing. After the initial shock has subsided, many scenarios present themselves: has my car been stolen? Has my vehicle been towed? The realization that your vehicle has been towed and not stolen should cause a feeling of relief. Instead, this tends

to result in anguish and one often wonders "Why has my car been towed? "What gives them the right?"

The basis for the designation of parking areas is rooted in the *Parish Council Act* ("PCA") and the *Road Traffic Act* ("RTA"). Section 121 (1) (c) of the PCA gives the Parish Council ("Council") the power to make regulations as it relates to prohibiting, regulating or suspending traffic of any kind whatsoever in any thoroughfare or public place. The *Kingston and Saint Andrew Corporation Act* ("KSAC Act") contains a similar provision. The above sections give the Councils the authority to make regulations as regards parking.

Section 54 of the RTA provides that, the Kingston and St. Andrew Corporation or a Parish Council, may at the request of the Island Traffic Authority, make rules, prohibiting, restricting or regulating the parking of motor vehicles in any road or public place. These rules may include the imposition of charges in respect of vehicles left in any such road or public place, and may prescribe the method of collection of such charges, for example by the insertion of coins in a parking meter. The RTA also stipulates the various charges to be assessed whenever a vehicle is towed.

*The Road Traffic (Kingston and Saint Andrew Corporation) (Inspection and Testing of Parking Meters and Removal of Vehicles) Regulations*, and the *Road Traffic (Kingston and Saint Andrew Corporation) (Parking) Regulations* provide for the designation of parking areas and the removal of vehicles that are in breach of these parking regulations. The Council may then store the vehicles pending the recovery by the owner, and it is required to exercise all reasonable care to ensure that the vehicle or its content is protected from damage.

Although it is clear from section 121 of the PCA that the various Councils are empowered to make regulations as



regards parking, only a few have actually passed these regulations. Some of the most notable are the *Parking (Savannah-La-Mar) Regulations*, the *Parish Council (Traffic Control, Montego Bay Regulations)*; similar regulations were also made in the *Parish Council (Traffic Control) (Port Antonio) Regulations*.

The power to designate parking and non-parking areas is vested in the Parish Council by statute. The exercise of this power often appears arbitrary as there are no clear criteria by which the Councils are to designate such areas. The only requirement under the *Road Traffic (Kingston and Saint Andrew Corporation) (Parking)*

*Regulations* is that whenever the Kingston and St. Andrew Corporation intends to establish parking places on any road in the Corporate Area, it shall define the area on the road where vehicles may be lawfully left or parked.

The markings may be in the form prescribed by the Council and may include parking signs or yellow painted curbs in prohibited areas. The onus is thus left on the driver of the motor vehicle to carefully scrutinize the area to determine whether it is an area designated for parking. Failure to do this might result in your day being spoilt.

## POWERS OF THE CONTRACTOR-GENERAL



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The Government of Jamaica is one of the largest purchasers of both goods and services within the Jamaican economy. As a result, persons usually submit bids and are awarded contracts based on specified criteria. The office of the Contractor General, created by the *Contractor General Act* (“the Act”), acts on behalf of Parliament in the monitoring of the award and implementation of these government contracts.

The Act stipulates that the Contractor General has the power to investigate the:

- means by which contractors are registered with the National Contracts Commission;
- tender process under which bids are submitted and evaluated;
- award of government contracts, which are defined in the Act as including “any licence, permit or other concession or authority issued by a public body or agreement entered into by a public body for the carrying out of building or other works or for the supply of any goods or services.”
- implementation of the terms of the contracts; and
- circumstances under which prescribed licences are granted, issued, used, suspended or revoked.

### Public Bodies

The Contractor General’s powers apply to public bodies within the definition of the Act. Such public bodies include Ministries, government agencies, statutory bodies and authorities and companies in which the Government of Jamaica is able to influence policy due to its share holding or financial input. Case law interpreting the ambit of the Act suggests that a public body, within the scope of the Act, may include a company in which the government holds a minority interest but in which it is in such a position to influence the policy of the company. As a result, the Contractor General can exercise his su-

pervisory role in respect of contracts entered into by such companies.

### Contracts Outside of the Contractor General’s Purview

The Contractor General is precluded from monitoring the award and/or implementation of government contracts entered into for the purposes of defence or for the supply of equipment to the Jamaica Constabulary Force, the Jamaica Defence Force or the Island Special Constabulary Force. In addition, the courts have determined that contracts for the sale of land do not fall within the definition of “government contracts” under the Act and accordingly the Contractor General is precluded from monitoring the award and implementation of such contracts.

### Investigative Powers of the Contractor General

The Act bestows the Contractor General with wide investigative powers. He may initiate investigations on his own accord and during investigations is entitled to have access to all documents and records belonging to the government, which would prejudice the security or the defence of Jamaica. The Contractor General may also have access to premises on which a government contract is carried out and the documents which are in the possession of persons who are not public officers. After his entry upon relevant premises, the Contractor General has the power to retain such documents or other property which he may deem necessary to the investigations. For the purposes of the investigations, he has the power of a Judge of the Supreme Court in examining witnesses and requesting the production of documents.

While the Act stipulates that the Contractor General “shall not be subject to the direction or control of any other person or authority”, the reports resulting from his investigations are laid before Parliament if such reports recommend disciplinary action against an officer of a public body. The findings of the report and fair and accurate comments on the report are the subject of absolute privilege. This means that a defamation action against the maker of the statement cannot be sustained.