

12 August 2015

Re: Report of the Auditor General:
National Land Development and Government Real Property

Madam Speaker

I rise to give this explanation on the matter of the Auditor General's July 2015 report entitled "*National Land Development and Government Real Property*".

Lest this honourable house be led astray by some of the Auditor General's statements, I wanted to take this opportunity to outline some very important points, namely the following:

1. That both the Health City and NRA Agreements were and remain good for this country.
2. That the Auditor General's role is narrow and without authority to determine whether the agreement is lawful; and,
3. That the Auditor General's statements have no relation to the facts of the case presented by the four ladies from West Bay.

First Madam Speaker, both the Health City & NRA Agreements have conferred, and continue to confer, great benefits on the Cayman Islands, and were negotiated during a period of depressed economic activity in this country. Both Agreements have created jobs during construction and the benefits of these Agreements will be seen for years to come, in terms of construction, economic investment, local economic spinoffs as well as attracting further investment to these shores. Both Shetty and Dart continue to make investments in this community and its economy.

The Auditor's reckless misuse of his position has seriously damaged the reputation of the Cayman Islands by calling into question any agreement that a foreign investor who wishes to invest in the Cayman Islands may make with Government.

Second, and most important Madam Speaker, I would like to address the Auditor General's statements about these Agreements being unlawful. I would argue that the Auditor General has done what he accused the Cayman Islands Government of doing, by exercising a role that he has no legal authority to exercise.

The Auditor General's powers and duties are set forth in section 114, especially subsection (3), of the Constitution, and in section 60 of the Public Management and Finance Law (**PMFL**) (2013 Revision). Relevantly, section 60(1) provides:

60. (1) The Auditor General shall -

(c) on his own initiative or at the request of the Legislative Assembly or of any of its committees or subcommittees, conduct investigations and value for money audits, into -

(i) the management of executive financial transactions;

ii) the financial management of any ministry, portfolio, statutory authority or government company or the Office of the Complaints Commissioner; or the Office of the Information Commissioner; and

(iii) the economy, efficiency and effectiveness with which any ministry, portfolio, the Office of the Complaints Commissioner, the Office of the Information Commissioner, or any statutory authority or government company has used its resources in discharging its functions and in its financial dealings;

Subsection (4) which reads:

(4) For the purposes of subsection (2), the objective of a compliance audit shall be to enable the Auditor General to report on the audited entity's compliance with a particular set of criteria when incurring expenditure and such criteria may be derived from relevant financial reporting frameworks, laws, regulations, terms of contracts or funding agreements, or may be other criteria deemed by the Auditor General to be suitable.

Madam Speaker, these provisions of the PMFL makes it clear that the Auditor General has responsibility for carry “financial” audits, **not legal audits**.

Under the Cayman Islands’ Constitution, like any constitution of a modern democratic state, the job of determining whether an agreement is lawful or not belongs with the Courts, not with the Auditor General. That’s right Madam Speaker, declaring an agreement to be unlawful is a **judicial** function to be carried out by a court, and I daresay such a ruling could only be made following a hearing in public at which the affected parties are represented and able to be heard. I doubt that the Cayman Islands Constitution expected to confer that authority on the Auditor General.

The Auditor General calls into question the role of Elected Cabinet Ministers. Madam Speaker, under our Constitution, the Cabinet of the Cayman Islands has “Executive Authority”. Under section 43 of Cayman’s Constitution, executive authority is vested in Her Majesty and is exercised on her behalf “by the Government, consisting of the Governor as Her Majesty’s representative **and the Cabinet, either directly or through public officers**”.

The Auditor General's interpretation of Cayman's governance structure is fundamentally flawed. He says that the Agreements are unlawful because Ministers "*acted outside their legal roles by becoming involved in the selection of means*"; and "*no approval [of the agreements] from the Legislative Assembly was sought*". How can the Auditor General rely solely on his interpretation of the Public Management Finance Law and completely ignore the Constitution?

According to the Auditor General (based on the PMFL, with only passing reference to the Constitution, Cayman's governance framework is this:

- Ministers set policy, with only limited means of influencing program delivery;
- Chief Officers craft plans to deliver the outcomes and to oversee implementation; and
- the Legislative Assembly approves all expenditure.

In particular, the Auditor General states throughout the report that Ministers have a policy-only role, and that they are not to become involved in the "selection of means" or operational implementation.

This conception of Cayman's governance framework is at the heart of the A-G's assertion that the NRA and Health City agreements were unlawful for two reasons:

1. the Ministers "*acted outside their legal roles by becoming involved in the selection of means*"; and

2. no approval [of the agreements] from the Legislative Assembly was sought.

Madam Speaker, no doubt all members of this honourable house are aware of the provisions of the Constitution and their respective roles. However, for the benefit of the listening and viewing public and indeed the Auditor General, it is very important to note the following provisions of our Cayman Constitution:

- a. Section 44(3) states *The Cabinet shall have responsibility for the formulation of policy, including directing the implementation of such policy*, insofar as it relates to every aspect of government except those matters for which the Governor has special responsibility.
- b. Section 108 states *“all public officers must—implement Government policy to the best of their ability and in accordance with the directions given to them by the Cabinet or other responsible person or authority”*.

So you see Madam Speaker, in accordance with the Constitution, the executive, as represented by **Cabinet, is responsible for not only formulating policy but implementing it; and civil servants are required to act under the direction of the government in Cabinet**. And this only makes perfect sense, as Ministers are responsible to the Legislative Assembly whose members, in turn, are accountable to the electors. Under the Auditor General’s scheme, non-elected civil servants are responsible for “operational decision-making”.

As I said Madam Speaker, this conception of Cayman’s governance structure is fundamentally flawed. The Auditor General’s perception of governance structure is fundamentally at odds with the Westminster

doctrine of the separation of powers as reflected in the Constitution; it introduces a fourth arm of government: Chief Officers who actually deliver policy outcomes. Nowhere does the Constitution refer to Chief Officers.

Section 38(1) of the PMFL (2013 Revision) sets forth the duties of chief officers in these terms:

38. (1) The chief officer of a ministry or portfolio shall ensure that his ministry or portfolio -

(a) complies with its duties under section 37;

(b) delivers the outputs specified in his annual budget statement prepared in accordance with section 42;

(c) achieves the ownership performance specified in his annual budget statement prepared in accordance with section 42; and

(d) complies with this Law.

Nothing in this provision alters the position under the Constitution that chief officers, like other civil servants, are under the direction of Cabinet in general and relevant Ministers in particular.

Madam Speaker, as I said earlier, the Auditor General rests his case in the Public Management Finance Law. Is this enough to make the Auditor General's statements correct? The answer is "NO". Even though the Public Management Finance Law was enacted in this honourable house, a law of the Legislative Assembly could NOT amend our Constitution. In other words, nothing in the Public Management Finance Law alters the position under the Constitution that chief officers, like other civil servants, are under the direction of Cabinet in general and relevant Ministers in particular.

Madam Speaker, the Auditor General also states that Government in Cabinet needs to seek and receive LA approval prior to undertaking new initiatives. This cannot be correct. If that were so, the business of government would grind to a halt. In accordance with the Constitution, the correct position is that Government requires an appropriation of the Legislative Assembly before it incurs any expenses or liabilities. The broad scheme of the PMFL is that there is an annual budget process culminating in an annual plan that the Legislative Assembly reviews and authorizes appropriation”.

And Madam Speaker, it is worth noting that under the Health City Agreement, CIG did not incur any financial expenditures or liabilities, for example:

- a. the tax and work-permit concessions are not “expenditures” within the meaning of the PMFL;
- b. the commitment to upgrade the airport is very contingent: it only applies where CIG is satisfied, acting reasonably, that there is a significant increase in the number of visitors to Grand Cayman for medical treatment. Further, any subsequent decision to upgrade the airport would require an appropriation from the Legislative Assembly; in this regard, one should note that the commitment, like all of CIG’s other commitments, applies “only to the extent those undertakings are permissible by the laws of the Cayman Islands”;

- c. in relation to water usage, CIG merely committed itself to “[t]o request the assistance of the relevant utilities service provider in providing all necessary or desirable infrastructure support for water, and to request its board to consider providing water supply at a preferential rate for a fixed period of time”;
- d. in relation to air travel, again CIG merely committed itself to “work with Cayman Airways”.

Madam Speaker, the Auditor General seems to think that there were little to no Value for Money Assessments undertaken with these Agreements. While the Auditor General does have a role to undertake VFM audits, his commentary related to the Agreements and their VFM, were unfair and unsubstantiated. In both cases, VFM analyses were undertaken.

Madam Speaker, I trust my remarks so far have illustrated the fact that the Auditor General had no legal basis to make an assessment regarding the legality of the Health City and NRA Agreements. His reliance on the narrow focus of the PMFL, instead of the Cayman Islands Constitution, casts serious doubt on the reliability of his report.

So what motivated the Auditor General to make these assertions? What seems to motivate the Auditor General is a profound distrust of politicians. His answer is to keep politicians as far away as possible from developers by having senior civil servants undertake “operational decision-making” (albeit in accordance with policy objectives set by Ministers). Not only is this contrary to what the Constitution provides, but it wouldn’t work. Why is it assumed that civil servants would be above corruption? Under the Westminster system, one of the safeguards against corruption by Ministers,

or maladministration generally, is transparency: they are accountable to the legislature and, in turn, to the voters.

Whilst this might be an imperfect system, it is to be preferred to the A-G's governance framework under which unelected, unaccountable senior civil servants make operational decisions. Why shouldn't Ministers "select means" (to use the Auditor General's description) to carry out the policy agenda upon which they were elected? There are other reasons why the Auditor General's governance framework would not work. Under that framework, civil servants would not make deals that expanded Cayman's economy; they would be afraid to do so. The result would be a diminished Gross Domestic Product, and rising unemployment. Even if they did enter into deals, who would sign agreements or give consent to a development on behalf of Cayman Islands Government? Civil servants? Where in the Constitution do they have that power? Politicians are elected by the populace to govern, no one else is !!

But beyond this Madam Speaker, and this is my final point, the Auditor General's faulty arguments have given rise to some unfortunate consequences.

1. We now hear statements from the four ladies from West Bay, who now claim, on the basis of the Auditor General's statements, that they should have won their case in the Courts. Madam Speaker, the two cases cannot be compared equally. The Auditor General's arguments are based on the PMFL whereas the four ladies tried to base their case on the Constitution. In both bases, their arguments are faulty.

Since the execution of the NRA Agreement on December 15th 2011, Dart has invested more than US \$141 million on projects included in that economic stimulus partnership, including the following:

- Dart invested US \$33 million in the Esterley Tibbetts Highway extension to West Bay including the road to Batabano, connection to Willie Farrington and landscaping. This represents cost of the road only; the bridge, embankment, utilities relocation and required land acquisition were additional costs borne by Dart.
- Dart provided Government with US \$5 million in funding for community projects.
- Dart has invested more than US \$3 million in construction and improvements to Public Beach with works ongoing.
- Dart has spent more than US \$100 million to date on development and construction costs for the Kimpton resort with an estimated investment total of US \$309 million by its November 2016 opening.

Anyone trying to say that the Shetty deal is bad – ought to consider the facts. Firstly we agreed with the project;

- To provide high quality medical care at an affordable cost to the largest number of patients with special attention to those who are poor and vulnerable.
- To create a Centre of Excellence in the Cayman Islands, providing leading edge tertiary care for patients in the US, Caribbean, and surrounding regions.
- The medical facility will include Hospitals, a Medical University, Assisted Living quarters and a Biotech research center.
- World class clinicians from India, Canada, US, and Europe are being recruited.
- The Facility is to be managed by lean management systems with a focus on high outcomes and very high efficiency.
- Phase 1 of HCCI has 104 beds and is one of only two Joint Commission International (JCI), USA accredited multispecialty hospitals in the Caribbean.

- The hospital has 5 multispecialty and super-specialty Operating Theaters and is fully equipped with a CT, MRI, Hybrid ORs and a Gamma Camera
- HCCI will be built out to a 2000 bed hospital facility, completed in multiple phases over 10-15 years, providing cutting-edge tertiary care across specialties including Cardiac, Neurosurgery, Orthopedics, Cancer Care and Transplants
- HCCI uses state of the art technology to ensure accurate diagnoses and improved ICU patient monitoring.

The facts also show that; -

- Health City Cayman Islands will be the preferred hospital for the residents of the Cayman Islands, thus saving residents time and money (rates are approximately 50-60% lower than US rates).
- Increased tourism as Health City Cayman Islands will cater to Medical Tourists from the Caribbean region, Latin America and North America.
- The success of HCCI will appeal to investors.
- Jobs for Caymanians will be created within the HCCI hospital, within the HCCI development (made up of Healthcare, Retail, Residential, Hospitality and Commercial businesses) and outside of the development in additional businesses necessary to support the development.
- To date HCCI has spent over US\$ 80 million including the following:
 - US\$ 60 million in construction
 - US\$ 20 million in operational costs
 - US\$7 million paid in government fees and duties
- Over 63% Caymanians used from the over 400 constructions jobs.
- Over US\$ 13 million paid to Caymanians and local operators during construction.
- Over 5000 patients consults
- Over 450 procedures performed
- Estimated savings to government in healthcare cost to locals date over US\$ 5,000,000

- 167 employees of which 57 are Caymanian(including senior staff and one medical doctor)
- HCCI has a comprehensive training program for Caymanian staff members.
- Caymanians now have local access to a super specialty Tertiary care facility, previously not available to them.
- 199 student interns have been through the HCCI student intern program so far.
- 2,500 students have personally toured the hospital, including 360 of which has expressed a desire to choose healthcare as their career choice. 60 students have confirmed that they will pursue medical studies post high school, to eventually become Caymanian doctors and surgeons.
- The 2015/16 school year will have approximately 300 students participate in the intern program.

Phase Two will consist of another 300 beds that will add Neurology / Oncology / Ophthalmology / Nephrology / Urology and Gastroenterology services. This Phase will also include a 300-room hotel that will cater to post-care visitors as well as their attending relatives. The hotel is in close proximity to the main hospital facilities to allow close care and quick attendance by hospital staff, as well as well as easy access for mobile diagnostic equipment, should the need occur.

So when the multiplier effect is taken in to consideration the Dart and the Shetty projects are worth millions to these islands.

2. Importantly however, the Auditor General's report has cast doubt among foreign and local investors, at a time when Cayman needs more investment.

Madam Speaker, I wonder if it would be prudent to ask the Honourable Attorney General's office to weigh in on the merits of the Auditor's General's statements regarding the legality of the Agreements. I must ask, is the Auditor General a Judge – is he a planning adjudicator or an adjustor? No! He need to stick to what he has responsibility for – value for money audit. That report and any such report can't take his responsibilities to the extent he has gone. If so you can believe this administration wouldn't get anything done – nor any other one.

Thank you Madam Speaker.