

REPORT OF THE PARLIAMENTARY STANDING COMMITTEE ON THE PUBLIC ACCOUNTS ON THE SPECIAL REPORT OF THE AUDITOR GENERAL ON THE MISUSE OF PUBLIC FUNDS

TO HIS HONOUR THE SPEAKER AND THE MEMBERS OF THE HONOURABLE HOUSE OF ASSEMBLY:

The Parliamentary Standing Committee on the Public Accounts has the honour of submitting the following Report:

1 Introduction

Your Public Accounts Committee (PAC) is pleased to report to the Honourable House of Assembly that we have reviewed the outstanding section *Inappropriate Use of Public Funds for Payment of Personal Legal Expenses* of the Special Report on the Misuse of Public Funds as produced by the Auditor General and tabled in this Honourable House on 3 March, 2012. This PAC Report covers the second section of the Auditor General's report; the first section was reported on by PAC on 20 July, 2012.

2 Meetings

PAC held nine meetings on this report with the Auditor General and staff, current and former public officers, and had deliberations amongst the committee. Below are the dates of the meetings:

- 12 September, 2013
- 19 September, 2013
- 3 October, 2013
- 24 October, 2013
- 31 October, 2013
- 13 February, 2014
- 14 February, 2014
- 23 April, 2014
- 29 May, 2014

3 Witnesses

PAC sought clarity on the matters raised in the report from a number of current and former Ministers and current and former public officers. The list below identifies the persons who provided information to PAC and how it was provided. All oral testimony was held "in camera". Written submissions received by PAC have been included in this report.

Oral Testimony

- Robert Horton, former Permanent Secretary of Public Works
- Anthony Manders, current Financial Secretary
- Randy Rochester, former Permanent Secretary of Public Works

Written Submission

- Doctor the Honourable Ewart F. Brown, J.P., former Premier
- Honourable Derrick V. Burgess, J.P., M.P., former Minister of Public Works

Invited to Attend

- Honourable Paula A. Cox, J.P., former Premier and Minister of Finance
- Kathy Lightbourne-Simmons, former Permanent Secretary of Legal Affairs
- Michael J. Scott, J.P., M.P., former Attorney-General
- Kim N. Wilson, J.P., M.P., former Attorney-General

4 Findings

- a. PAC found that a contract with the Canadian law firm was ratified by Cabinet and executed by the Solicitor General on behalf of the Government.
- b. The main contention was how an action approved by Cabinet for the Government of Bermuda ended up as a lawsuit filed in the name of former Premier Ewart Brown and former Minister Derrick Burgess.
- c. PAC, like the Office of the Auditor General, was unable to ascertain precisely by whom or when authorisation was given for the legal action to be filed in the name of former Premier Ewart Brown and former Minister Derrick Burgess (as opposed to the Government of Bermuda). The Ministry of Justice, in its response, stated that, "the personal action was the only means by which the Government could take action against those responsible for essentially attacking the Government via its Ministers." This determination arose from the fact that a Government cannot be a plaintiff in a defamation action.
- d. Given that the action was filed in the names of former Premier Ewart Brown and former Minister Derrick Burgess, and although Dr. Brown and Mr. Burgess have stated publicly that any proceeds would not have benefited them personally, the PAC was provided with

no legal or contractual evidence to support this. Though the action may have been for a government purpose, the lack of documentation regarding any potential damages allowed for the possibility for someone to personally benefit from the lawsuit. While PAC is not accusing former Premier Ewart Brown and former Minister Derrick Burgess of seeking to profit from this action, there was no documentation provided to PAC or to the Office of the Auditor General that satisfies this dilemma.

- e. Given that the lawsuit was filed in the names of former Premier Ewart Brown and former Minister Derrick Burgess, and given that they may have stood to benefit from a successful suit, the Auditor General argues that this was a misuse of public funds. The PAC agrees with the Auditor General in the strict letter of the law that a lawsuit in private names can be viewed as a violation of Financial Instructions; however, given the unusual circumstances of this case, the Public Accounts Committee acknowledges the Government's position that it considered this action to be for a "government purpose" and thus in line with existing Financial Instructions.
- f. PAC is wholly dismayed by the unwillingness of Attorney-General's Chambers to share information with the Office of the Auditor General and does not accept their claim of privilege. Audit functions cannot be properly executed if government departments claim legal privilege and block access to documents. Although the Members of the PAC are not lawyers, we did not see the need to spend government funds on seeking an independent legal opinion to validate what we all saw as patently obvious. We fully support the Auditor General's position that she is a servant of the government and, given the contract was between the government and the law firm, any information requested should have been provided to the Auditor General. In our attempt to further understand the Government's reasoning for not sharing the requested information with the Auditor General, PAC tried to speak with the former Permanent Secretary in the Ministry of Legal Affairs. Unfortunately, the Committee did not get to speak with Ms. Lightbourne-Simmons as she had left Government at the time of the hearings. PAC is also dismayed that the former Attorney-General Michael Scott, when asked to attend PAC, declined the opportunity to attend to provide PAC additional clarity regarding these events. PAC believes that our report would have been more complete if we had participation from these two officers.
- g. PAC takes note that the retainer agreement between the Government of Bermuda and Lax O'Sullivan Partners was terminated in September 2011 in line with the Auditor General's recommendation.
- h. PAC takes note of the Auditor General's recommendation that surcharged funds be paid back, but does not support the recommendation – as the Committee accepts the explanation that Cabinet approved the funds and it was the view of Cabinet that the funding was for a "government purpose".

5 Recommendations

- a. PAC recommends that the Government examine amending Financial Instructions to allow for the Cabinet to support a civil action taken on behalf of a Minister against anyone who defames and damages the reputation or credibility of the Minister when he or she is carrying out his or her duties. The PAC also recommends that any amendment to Financial Instructions make it clear that any proceeds from any such action revert to the Government of Bermuda.
- b. PAC recommends that the Government ensures that the Auditor General receives access to all Government files without delay. The Office of the Auditor General must have the cooperation of the executive of the day to be effective – the lack of access to information gives the impression, whether rightly or wrongly, of something to hide. The PAC recognises the doctrine of legal privilege, however if such communication is to a legal team funded by the government, it is the opinion of this Committee that the Office of the Auditor General should have access to any information requested in accordance with the section 14 of the Audit Act 1990.

6 Conclusion

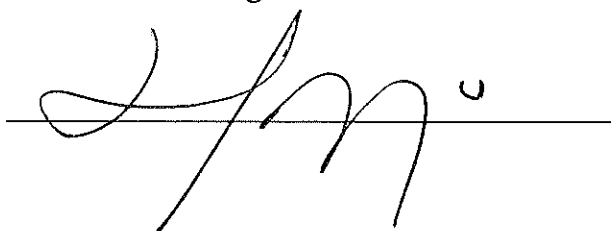
- a. PAC would like to acknowledge the advice and assistance provided by the Auditor General, Mrs. Heather Jacobs Matthews, and her professional staff during our deliberations; as well as the sterling work done on behalf of the Committee by Deputy Clerk to the Legislature, Mr. Clark W Somner. PAC would also like to acknowledge the contributions of the Honourable Jeanne Atherden, J.P., M.P., who served on PAC prior to being appointed a Minister.
- b. PAC recommends that the Minister of Finance be requested to inform the Honourable House of Assembly of the action that is to be taken on the recommendations submitted in this report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Mr. E. David Burt, J.P., M.P. – Chairman

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Ms. Lovitta F. Foggo, J.P., M.P.

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Mr. Terry E. Lister, J.P., M.P.



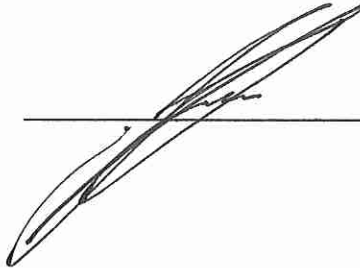
Mr. N. H. Cole Simons J.P., M.P.



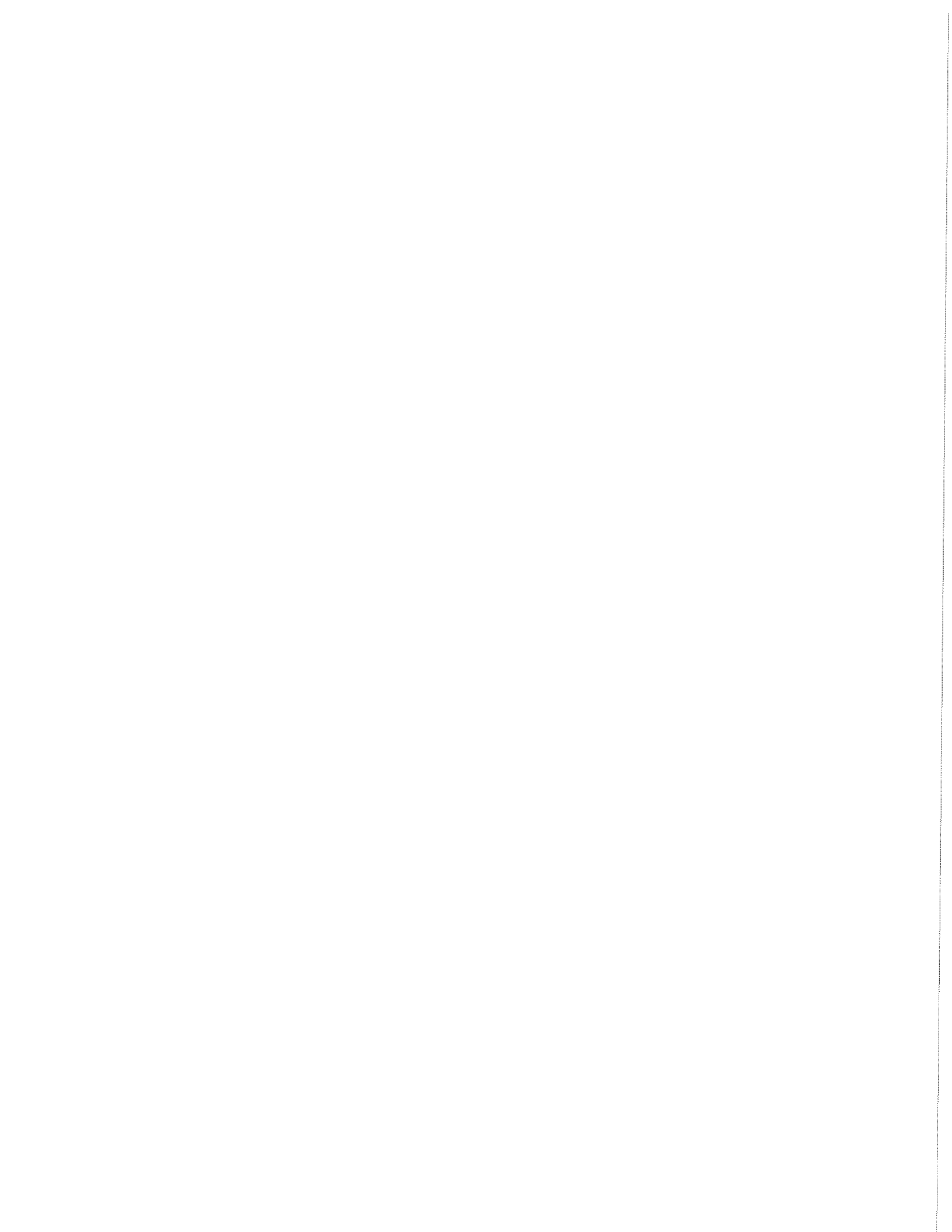
Mr. Glen C. Smith, J.P., M.P.



Mr. Jefferson C. Sousa, J.P., M.P.




Dated: 6th June, 2014





To: The Chairman of The Public Accounts Committee of the House of Assembly

From: Dr. the Hon. Ewart F. Brown, Former Premier of Bermuda (2006-2010) 

Date: October 31, 2013

Re: Submission Regarding Pursuit of Legal Claims as a Result of the Issuance of Fraudulent Cheques

Honourable Sir:

I have been asked by a member of the PAC if I would like to submit a written statement on the above-mentioned issue.

I have decided to do so for one reason and that is to place on the public record a statement from one of the two public officers whose integrity was directly attacked.

First, Mr. Chairman, please allow me to shed some light on the core issues at hand.

1. Cheques were fraudulently prepared and placed in Government files; the cheques were ostensibly payable to the sitting Premier and a Minister, and were made out as if those two public officers had received kickbacks from a Government project – very grave offenses. This is a fact.

2. The Government of the day took steps to provide legal counsel to represent the officers of the Government and to track down the suspects in Bermuda and Canada.

In the first instance, such an egregious attempt to "frame" the Premier of a country as well as a senior minister would have, in other jurisdictions, been treated as a serious and treacherous incident and not brushed off by the Prosecutors of the day. In fact, THE issue on the table would have been the effort of the Government to identify the perpetrators, not the issue of who paid for the legal services.

When leaders of a Government are the victims of an attempt to defraud (notwithstanding the amateurish techniques used), it is not primarily an attack on the individual officeholders. Rather it is a frontal assault on the OFFICES held by the Individuals.

Mr. Chairman, I have spoken with political leaders worldwide and not ONE agreed with the Auditor General's position that the legal expenses incurred in this case by the Government of Bermuda should have been incurred by the individual ministers.

Why, members of the PAC, did the Auditor General come to the conclusion that this was a personal legal matter and not a responsibility of the Government?

Yes, the case was filed in Toronto in our personal names. But surely the Auditor General could have taken a few minutes to find out that governments cannot sue for libel, that there was no subterfuge present – that Cabinet of the day discussed this issue and determined that filing suit in the officials' names was the only strategy left available to the Government. For whatever reasons, when this egregious crime was committed against the highest level of our Bermuda Government, Scotland Yard was not asked to investigate; the FBI was not called to assist; the Canadian Government did not receive a request for extradition of the culprits via the United Kingdom. Why not? We really should ask ourselves THAT question – perhaps on another day.

As the Ministry of Justice and subsequently the then Premier stated: "The funding of the Ontario Action by Government was, in the judgment of the Government, an appropriate course to follow in the interest of the Government, the Country and Bermuda's international reputation and in this regard, we considered the funding of this action to be for a Government purpose in that the personal action was the only means by which the Government could take action against those responsible for essentially attacking the Government via its Ministers... These very serious allegations of corruption made against the serving Premier of Bermuda as well as a (present) senior Minister, went to the heart of Government and therefore the funding of this action was justified as being for a Government purpose."

I will certainly be residing on a more celestial plane when I begin to understand why the Auditor General came to the conclusion that this was a personal matter and shouted loudly, scathingly and erroneously that there had been a misuse of public funds.

Auditors, by their very nature are charged with examining documents and processes and impartially advising cures and remedies where applicable. The Auditor General did not have on my authority alone the intent of Cabinet in authorizing the action in Canada. She had the view of an entire sitting Government. To the extent that minutes and documentation were insufficient in effecting any recovery by Government of monies potentially received, would not a more reasoned and rational course have been to require that there be a written, irreversible assignment of interests in favor of the Government of Bermuda?

That the Auditor General would impugn the integrity of the very Government officials who were so grossly violated is a travesty. That this Honourable Committee would convene around the subject of whether in this instance Government should support a private legal action – as if the action were in fact private – and not illustrate for the world to see that Bermuda public officials must be respected and defended, is an even greater travesty. The query brings dishonour to us as an island nation and is a vestige of partisan politics that we must end. We simply cannot afford to continue to ask questions for which we all truly know the answers, and that bring reputational damage to us as a nation.

That all of Bermuda, including the Government and the Opposition, did not join together to chase the perpetrators who would commit such a heinous act against standing officials, is beyond belief. That instead of finding these criminals even today, the focus is still on the victims and not the perpetrators – that is the greatest travesty.

In conclusion, Mr. Chairman, I dream a dream that one day there will be one Bermuda. There will be one Bermuda who will unite behind her leaders against those who would have the nerve to try to dismantle our duly elected Government – whether PLP or OBA.

Clearly, Mr. Chairman, this sordid affair of the forged cheques was handled in such a manner as to shift the majority of the legal expenses to the victims of the fraud. We have absorbed those expenses to the best of our abilities and well beyond the level of the Bermuda Government's contribution.

However, we will remain eternally horrified and saddened by the fact that the Bermuda Government withdrew its support even as our protectors – the British Government – chose to do nothing in the face of this despicable act. I cannot imagine what ends of the earth would have been reached for reckonings had any Governor been so framed. I personally dream a dream for Bermuda when we will accord our own hierarchical offices – not the people in them – the respect the offices are due. If that had been the case when these forged cheques were planted in files to bring shame and downfall to a sitting Bermuda Government, we would not be having this discussion. Indeed, you would not be receiving this submission.

Thank you for your time and the opportunity to present my statement.

Respectfully Submitted,



Dr. the Hon. Ewart F. Brown
October 31, 2013

To: Chairman of the Public Accounts Committee of the House of Assembly

FROM: The Honourable Derrick V. Burgess, JP, MP

Date: 4 November 2013

RE: Submission Regarding Pursuit of Legal Claims as a Result of the Issuance of Fraudulent Cheques

Honourable Sir:

I have been asked by a member of the PAC if I would like to submit a written statement on the above-mentioned matter.

I have decided to do so because as a sitting Member of Parliament, former Minister and former Deputy Premier of these islands, it is my intention to ensure that Offices for which I humbly served or continue to serve are not besmirched by baseless accusations and malfeasance.

In 2009 when the incident of cheques in the names of D. Burgess and Dr. E. Brown were shown to Governor Sir Richard Gozney and Finance Minister the Hon. Paula Cox by the Auditor General intimating that the Premier and I had used our offices for personal benefit, I was shocked that an Auditor General would make public statements impugning names of sitting Government officials without performing due diligence. Indeed the premise of due diligence is a fundamental tenet of the Auditor General in any jurisdiction and certainly, I would expect that the esteemed Auditor General in Bermuda would act accordingly. Nevertheless, without carefully investigating the matter the Auditor General publicly defamed the character of the Premier of Bermuda and a sitting Cabinet Minister.

The Auditor General had the tenacity to submit our endeavours to clear our names to a Special Report intimating that we had done something fundamentally wrong. That is, Dr. Brown and I were condemned as villains without a trial. And even as the cheques were found to be fraudulent, the Auditor General relentlessly continued to blemish our names by declaring that efforts to clear our names was construed by her as a misuse of public funds.

And whilst the Auditor General continued to defame Dr. Brown and I, the perpetrators of this crime were never pursued by the Auditor General. Nor has Government of Bermuda pursued this crime with the same zeal that I believe is required.

Cabinet approved funding to remunerate lawyers in Canada to bring the perpetrators of this crime to justice. I believe that as sitting members of Parliament, albeit the Premier of the country and a Cabinet Minister it is/was incumbent upon the Government to provide legal representation to protect the Offices for which their members serve. However, the Auditor General of Bermuda has insisted that the funds should be repaid to the Government of Bermuda.

Let me point out that originally, the writ was in the name of the Bermuda Government. However, following guidance received from the Canadian lawyers, the writ was put in the individual names of Dr. Brown and Derrick Burgess because in Canada Governments cannot sue for libel.

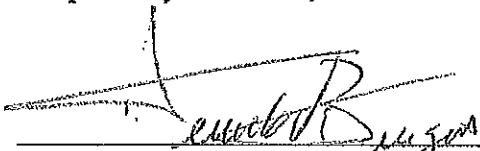
It should be noted that no rules or regulations were violated by paying for the defense of myself or the then Premier. There were no violations of Financial Instructions, so there is no legitimacy in the request of the Auditor General that we repay monies used for legal representation of the Office.

It would appear that the Auditor General has vindicated the perpetrators. The architect of this crime remains free having never been brought to justice. On the other hand, the victims of the crime are suffering twofold at the hands of the perpetrators and at the hands of the Auditor General.

I beseech the Public Accounts Committee to focus on the perpetrators of this heinous crime so that they may be brought to justice. I further beseech the Public Accounts Committee to nullify the actions of the Auditor General in declaring that the Hon Dr. Ewart Brown and I had misused public funds and to state that as sitting Members of Parliament it was the right and the duty of this great Government to protect its honourable members.

I appreciate the opportunity to present my statement.

Respectfully submitted,



Hon. Derrick V. Burgess, JP, MP

4 November 2013