COMMENTARY ON WINNFM ON GOVERNANCE - CHARLES WILKIN QC 12TH JANUARY 2017.

The major issue in the Federal election of February 2015 was governance. Team Unity which won the election campaigned heavily on the need for accountability and transparency in government. In its manifesto Team Unity promised Freedom of Information, Campaign finance regulation, Integrity in Public Life and anti corruption laws; it promised term limits on the Prime Minister, mandatory balanced budgets and debt limits; it promised Civil Service Reform and review of the powers of Senators; it promised to create an Integrity Commission, to expand the powers of the Ombudsman and to activate the Public Accounts Committee. Team Unity promised to institutionalize a system of consultation between Government and the public on issues of public importance. Team Unity has since referred to those promises as part of its good governance agenda.

It is of course the prerogative of any government to decide if and when to fulfill its campaign promises. Whether or not the Team Unity government fulfills any or all of its good governance agenda and whatever timetable it choses to do so, it is nevertheless important that there be extensive and continuous public debate on the subject. The public have a vested interest and fundamental right in promoting efficient, transparent and accountable

governance, in preventing corruption and in improving the integrity of public leadership.

This is a particularly sensitive and conflicting issue for politicians as the laws on good governance are meant to control their behavior and constrain the exercise of their vast power. Politicians should not therefore be left alone in secret to craft the legislation and other measures for implementation of the good governance agenda. The society has to insist on fully effective legislation and to be actively involved in the debate on the structures to make it work. Civil society should be at the forefront of the debate and the media should participate, educate and facilitate. That is the essence of democracy.

As my contribution to the process I plan to do a series of commentaries on this issue. In this commentary I will focus on some of the protection from the abuse of government power now afforded by the law to citizens.

As it is topical I begin with conflicts of interest on the part of Ministers of Government. A Minister who allows his personal interests to conflict with his public duties breaches his Oath of Office and may be guilty of misfeasance in public office. Engagement by a Minister in business, a profession or occupation is a breach of duty and misfeasance in public office. The law allows anyone whose business is financially affected by the active engagement by a Minister in a competing business to sue the Minister. Claims available include damages for loss suffered and an

injunction to stop the Minister. The Minister cannot therefore hide behind Cabinet for protection.

The last National Assembly passed an Integrity in Public Life Act but, for reasons best known to it, the Government of the day did not bring it into force. I will be reviewing the issue of Integrity in Public Life in detail in a future commentary but the Act is worth referring to in so far as it addresses conflicts of interest by Ministers and members of the Opposition. The Act contains a Code of Conduct which it requires public officers, including Ministers of Government and opposition politicians, to sign and to follow. That code contains the following provisions:

"A conflict of interest arises from a situation in which a public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties.

A public official private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organization with whom he or she has had business or potential relations. It also includes any liability whether financial or work relating thereto.

Since the public official is usually the only person who knows whether he or she is in that situation, he or she has a personal responsibility to

(a) be alert to any actual or potential conflict of interest;
(b) take steps to avoid such conflict;
(c) disclose to his or her superiors any such conflict as soon as he or she becomes aware of it;
(d) comply with any final decision to withdraw from the situation or to divest himself or herself of the advantage causing the conflict.

Whenever required to do so, a public official should declare whether or not he or she has a conflict of interest"

The pending Integrity in Public Life Act also has enforcement mechanisms, including prosecution, for breach of the Code of Ethics.

Those are wide and excellent provisions which should be adopted by the Team Unity government. I look forward to hearing from the government on the subject. In this regard it should be noted that the Representatives of the Peoples Action Movement when in opposition introduced into the National Assembly their own Integrity in Public Life Bill. Will that Bill be reintroduced now that they are in power?

I move to judicial review. Judicial review is the process by which the High Court can on application of a member of the public affected examine a

decision made or an action taken by a public body on grounds that the decision or action is

- unlawful or
- biased or
- made in abuse of power or discretion or
- there was lack of due process or
- the decision made or the action taken was contrary to the established legal standards of reasonableness.

Under this process the Court has the power to quash (in common language cancel) the action or decision. In appropriate cases the court can compel the public body to act in a particular way. The court can also award damages and issue injunctions to stop the action or freeze the decision complained of. This process is being used more frequently now that people are more aware of their rights and is a useful tool to address abuses by government officials and to enforce transparency in decision making by those entrusted with public authority.

The Eastern Caribbean Court of Appeal has within the last month issued a significant ruling on judicial review. The ruling is in a case in Nevis by which a citizen challenged a planning approval decision. The Government defended the application for judicial review on the ground that the litigation was out of time having been started more than six months after the decision complained of had been made. In making that defence the Government relied on the Public Authorities Protection Act (referred to by its acronym of PAPA). PAPA restricts to six months the time for bringing an

action against a person for any act done in pursuance of a statutory power or of a public duty. The Court of Appeal ruled that PAPA does not apply to proceedings for judicial review.

A little more to put PAPA in context. PAPA has been on the statute books since 1916 when St. Kitts and Nevis were colonies of Britain. It was based on a British Act of 1892 which was abolished in Britain in 1954. The type of restriction imposed on the citizen and the protection afforded to government by PAPA has no place in a democratic society. It is a disgrace that, in this supposedly enlightened age, Government should, while claiming to be accountable and transparent, resort to that antiquated, autocratic type of protection. Ordinary individuals have a limitation period of, for the most part, six years. Government with all its resources and power should be subject to the same.

An example of the unfairness of PAPA is that it inhibited families of the 230 plus people who died in the Christena disaster in 1970 from suing the government for the obvious negligence of the Government employees responsible for vastly overcrowding the ferry causing it to sink in the channel between St. Kitts and Nevis. Now that the Courts have taken PAPA away from abuse by Government in judicial review proceedings it should be abolished entirely. In fact that should have happened at the latest at independence. Abolition of PAPA should be the first order of business on the good governance agenda.

Also less than a month ago the Privy Council issued an important decision in a Trinidad case which is binding on St. Kitts and Nevis. In that decision the Privy Council expanded recourse under the constitutional right to protection of the law in relation to abuse of power, prejudice and unfairness by Government in its decisions affecting an individual. The Caribbean Court of Justice has taken a similar line. This recourse may be available in addition to or where judicial review is not available and is therefore added protection for the citizen from abuses of power by government.

However, transparency and accountability should not be dependent on the citizen having to take legal action against the government. Legal action can be costly and time consuming. Legislation should be enacted to mandate good governance and to deter corruption and there should be government funded systems in place to compel disclosure, to investigate instances of abuse and to hold those responsible to account.