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BY EMAIL ONLY

14 February 2025

To the Cabinet Secretary
cc. the Hon Attorney General

Dear Sirs

RE: PRE-ACTION PROTOCOL FOR JUDICIAL REVIEW OF CABINET DECISION

A. INTRODUCTION

1. We act for Stuart Mailer, Patricia Bradley and Christine Rose-Smyth ("**the Plaintiffs**").
2. The proposed Defendant is the Cabinet of the Cayman Islands ("**the Cabinet**").
3. This is a letter before action under the Pre-action Protocol for Judicial Review. It relates to the National Conservation Council ("**the NCC**"). The decision under challenge ("**the Decision**") is the Cabinet's decision, gazetted on 12 February 2025, to (a) remove Stuart Mailer, Lisa Hurlston-McKenzie, Pierre M. Foster, Lucille Seymour MBE, Patricia Bradley and Stephen Broadbelt ("**the removed members**") from the NCC and (b) to appoint Gilbert McLean, Ezzard Miller, Capt. Eugene Ebanks, Dr. A. Steve McField, Arden McLean, Paula Tatham, and Kenny Ryan to the NCC ("**the new appointments**").
4. As explained below, the Decision is the latest in a series of efforts by the current Cabinet to weaken the NCC's ability to perform its statutory function of promoting conservation in the Cayman Islands.
5. For the reasons set out below, we ask the Cabinet to revoke the Decision because it is unlawful. If the Cabinet does not agree to revoke the Decision, the Plaintiffs intend to issue an application for leave to apply for judicial review and a direction that the grant of leave shall operate as a stay of the Decision ("**the Proposed Claim**").

6. We require you to answer this letter by no later than **4pm on 20 February 2025**. This level of expedition is necessary so that we can, if necessary, apply to the Grand Court for a stay of the Decision in advance of the NCC's next meeting on 26 February 2025. An urgent stay is appropriate because, on the Plaintiff's case, the NCC is now unlawfully constituted and any decisions taken by its present constitution will be invalid, such that the balance of convenience favours maintaining the status quo ante. If you fail to respond by 4pm on 20 February 2025 or do not agree to revoke the Decision, we may issue the Proposed Claim without further notice.
7. The background to the Proposed Claim is set out at section B below. The applicable legal framework is set out at section C. The grounds of claim are set out at section D. The action we require you to take to avert the proposed claim is set out at section E. We address the timing of the proposed claim at section F.

B. BACKGROUND

8. On 1 September 2023, the Court of Appeal upheld the NCC's claim that, under the National Conservation Act, all public bodies are prohibited from taking action that might harm an environmentally protected area without the approval of the NCC. On 30 April 2024, the Privy Council refused the Central Planning Authority permission to appeal against the Court of Appeal's ruling.
9. On 13 February 2024, the Central Planning Authority granted planning permission for a road in East End in a way that breached the National Conservation Act (as the Court of Appeal had explained on 1 September 2023). The Central Planning Authority refused to agree to the unlawful grant of permission being quashed and the NCC therefore issued a claim for judicial review on 3 May 2024, pursuant to its statutory mandate to promote conservation in the Cayman Islands. The Minister for Sustainability & Climate Resiliency and Wellness sought to undermine the NCC's ability to do so by refusing to authorise the NCC to pay for legal representation.
10. On 8 July 2024, the Premier was reported to deny "*plans to kick scientists off the National Conservation Council or to 'weaken' environmental legislation*"¹.
11. On 31 December 2024, the Cabinet laid before Parliament the National Conservation (Amendment) Bill 2024. Contrary to the Premier's statement on 8 July 2024, the proposal included:
 - (1) The removal of the requirement for the Cabinet's appointments to the NCC to have any scientific or technical expertise (clause 18); and
 - (2) The repeal of the environmental protection provisions on which the Court of Appeal had adjudicated (clause 12).

¹ <https://www.caymancompass.com/2024/07/08/premier-confirms-plans-to-amend-conservation-law-hits-back-at-gossip/>

12. On 31 January 2025, the Cabinet withdrew the National Conservation (Amendment) Bill 2024.
13. On 5 February 2025, the Grand Court allowed the NCC's claim against the Central Planning Authority in respect of the road in East End.
14. On 12 February 2025, the Cabinet gazetted its Decision to remove six members of the NCC. The Decision was recorded to have been taken on 11 February 2025.
15. On 12 February 2025, the Minister for Sustainability & Climate Resiliency and Wellness wrote to the removed members in the following terms:

"I am writing to advise that at a Meeting held 11 February 2025, Cabinet reviewed the membership of the National Conservation Council (NCC) and decided to revoke your appointment.

On behalf of Cabinet, I would like to take this opportunity to thank you for your service to the Council, and the wider Cayman Islands, during your tenure as a Member and Chairman of the NCC. We are grateful for your contributions and wish you all the best in your future endeavours."
16. The removed members were part-way through their tenure (which was not due to expire until 1 August 2025). Their positions were remunerated at a rate of CI\$100 for members and \$125 for the Chairman per meeting and the effect of their removal was that they lost this remuneration.
17. The Cabinet did not give the six members any notice of its intention to remove them or the grounds on which it intended to remove them and did not afford the six members any opportunity to make representations. The Cabinet did not provide any reasons for its Decision. The Cabinet did not explain whether or on what basis it considered the replacement members to have any relevant scientific or technical expertise.
18. On 13 February 2025, the Ministry of Sustainability & Climate Resiliency and Wellness published a press release. This recorded the Minister to state: *"I believe that the changes will establish a better balance for the community on a whole and be seen to be fair for all. It should be noted that the re-appointment of some members ensures continuity. The members bring a vast array of experience and expertise, as well as the vigour and passion necessary to serve the Cayman Islands in this capacity."*
19. Parliament will dissolve on 1 March 2025 in advance of the General Election on 30 April 2025.
20. The Cabinet's course of conduct and the timing of the Decision indicate that it has replaced the six members as a penalty for promoting conservation in the Cayman Islands in accordance with the National Conservation Act and for the purpose of weakening the NCC's performance of its statutory mandate to promote conservation in the Cayman Islands.

C. LEGAL FRAMEWORK

21. Section 3(2) and schedule 2 to the National Conservation Act provide that:

- (1) The NCC consists of thirteen voting members, including (a) the Director or his nominee from the Department of Environment, (b) the Deputy Director of Research in the Department of Environment, (c) the Director of the Department of Agriculture or his nominee from the Department of Agriculture; (d) the Director of Planning or his nominee from the Department of Planning; (e) a person nominated by the National Trust and appointed by the Cabinet; and (f) eight persons appointed by the Cabinet.
- (2) Of the eight persons appointed by the Cabinet, at least four must have “*relevant scientific or technical expertise*”. In this context, “*relevant*” means relevant to the functions of the NCC. Section 3(9) specifies that the functions of the NCC include: promoting the biological diversity and the conservation and sustainable use of natural resources in the Islands; establishing policies for the conservation and sustainable use of natural resources, including the use of wetlands and wetland resources; maintaining protected areas and conservation areas; conserving, maintaining and restoring populations and critical habitats of protected species; and promoting wider understanding and awareness of the significance of the ecological systems of the Islands and the benefits of conserving natural resources.
- (3) Members appointed by Cabinet shall hold office for a term of two years and shall be eligible for re-appointment.
- (4) Members are paid an allowance.

22. Paragraph 6 of schedule 2 to the National Conservation Act provides that “*The Cabinet may revoke the membership of an appointed person*”. However, that power is subject to a number of qualifications.

23. First, the effect of section 11(4) of the Public Authorities Act is that the Cabinet may only terminate a person’s appointment if it is satisfied that “(a) *the member is not fulfilling the mandate of the public authority set by Cabinet; (b) the member has, in the opinion of the Cabinet, an unacceptable conflict of interest; (c) the member’s conduct is detrimental to the effective governance of the board; (d) the member has been absent from three consecutive meetings of the board without the consent of the chairperson of the board; (e) the member’s conduct brings the public authority into disrepute; (f) the member becomes bankrupt; or (g) the member is convicted of an offence for which that member is sentenced by a court to a term of imprisonment*”.

24. Second, section 19(1) of the Constitution requires that all decisions and acts of public officials (which “*includes a public or governmental body*” and therefore includes the Cabinet) must be procedurally fair. Where a public body seeks to remove a person from an appointment conferred pursuant to statute, the irreducible requirements of procedural fairness include the right to notice of the grounds for removal, the right to be heard in answer to those grounds and, if the

representations are rejected, the reasons for the removal (*Ridge v Baldwin* [1964] AC 40, 132, *per* Lord Hodson and *Manning v Ramjohn* [2011] UKPC 20). For example, if the ground for proposed removal is that the member is not fulfilling the mandate of the public authority set by Cabinet (s.11(4)(a)), then the member is entitled to know the basis of the allegation, to make representations in response and to have those representations conscientiously considered before a decision is taken.

25. Third, the Cabinet may not exercise its powers of appointment under the National Conservation Act in a way that frustrates the purpose of the Act (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997). The essential purpose of the National Conservation Act is to promote (rather than weaken) the conservation of natural resources in the Cayman Islands.
26. Fourth, the Cabinet is not permitted to use its powers of appointment as a system of patronage or to further its political aims. As Lord Diplock held in *Thomas v Attorney-General of Trinidad and Tobago* [1982] AC 113, 123-124: “Under a party system of government such as exists in Trinidad and Tobago and was expected to exist after independence in other Commonwealth countries whose constitutions followed the Westminster model, dismissal at pleasure would make it possible to operate what in the United States at one time became known as the 'spoils' system upon a change of government, and would even enable a government, composed of the leaders of the political party that happened to be in power, to dismiss all members of the public service who were not members of the ruling party and prepared to treat the proper performance of their public duties as subordinate to the furtherance of that party's political aims”.
27. Fifth, the Cabinet is required to ask the right question (*i.e.* are the grounds for termination specified by section 11(4) of the Public Authorities Act made out?) and to take reasonable steps to acquaint itself with the relevant information to enable it to answer it correctly (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065 *per* Lord Diplock). The obvious source of information on the performance of the members who the Cabinet proposed to remove from the NCC was the members of the NCC whose performance was not being questioned.
28. Sixth, section 11(2) of the Public Authorities Act provides that “to ensure continuity of a board, no more than two-thirds of the board members shall be replaced at any one time unless special circumstances arise”. Read with schedule 2 to the National Conservation Act, this means no more than two-thirds of the board members who are appointed by the Cabinet (*i.e.* no more than 6 members) may be replaced at any one time unless the Cabinet has identified special circumstances.
29. Seventh, the Cabinet has a constitutional duty to give written reasons for removing a person from the NCC if asked to do so: section 19(2) of the Constitution.
30. There are two qualifications to the Cabinet’s power to appoint new members to the NCC.

31. First, in relation to the requirement to have four members with “*relevant scientific or technical expertise*”, the Cabinet is required to ask the right question (*i.e.* does the person proposed to be appointed have scientific or technical expertise that is relevant to the functions of the NCC?) and to take reasonable steps to acquaint itself with the relevant information to enable it to answer it correctly (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065 per Lord Diplock).
32. Second, under section 9(4) of the Public Authorities Act, before making an appointment, the Cabinet must obtain and consider full disclosure of that person’s interests to establish that no conflict of interest exists. Clearly there were issues to consider, for example, the Official Hansard Report records that on 12 December 2013, Arden McLean said “*Let me begin by laying my cards on the table, like I have done many times publicly before, and that is that I am not a conservationist. I am no tree hugger.*”

D. GROUNDS FOR JUDICIAL REVIEW

Ground 1: procedural unfairness

33. As set out paragraph 24 above, the Cabinet owed a duty of procedural fairness to the removed members. It was, as a minimum, required to notify them of the grounds for their proposed removal, to afford them an opportunity to make representations and conscientiously to consider those representations before taking the Decision. The Cabinet failed to do that. Instead, the Decision was peremptory, and the Cabinet failed to afford the removed members any procedural safeguards at all. The Decision was therefore unlawful because it breached section 19(1) of the Constitution and/or common law standards of fairness.

Ground 2: no lawful basis for removal

34. It is unclear why the Cabinet dismissed the removed members because it failed to provide any reasons for its decision, contrary to the duty to act fairly and/or contrary to the common law duty to provide reasons.
35. Without prejudice to the obligation to provide contemporaneous reasons, the Plaintiffs hereby request written reasons for the Decision pursuant to section 19(2) of the Constitution. We require those reasons by no later than 4pm on 20 February 2025. Those reasons must be the actual contemporaneous reasons for the Decision and we expect you to disclose the contemporaneous record of the reasons in accordance with your duty of candour. We anticipate that this will be in the form of the minutes of the Cabinet meeting on 11 February 2025. If the Cabinet did not identify any reasons for the Decision when it was taken, we expect you to say so.
36. In the absence of reasons, it appears that:

- (1) First, the Decision was *ultra vires* in that the removals were not identified to be for one or more of the reasons prescribed by section 11(4) of the Public

Authorities Act. Indeed, the termination letter indicates that the Cabinet did not consider that any of the grounds for termination in section 11(4) were satisfied.

- (2) Second, the Decision was in breach of the *Padfield* principle and/or for an improper purpose, in that the removed members were removed because (a) they had conscientiously performed their duties, including by ensuring that the Central Planning Authority was not permitted to breach the National Conservation Act and (b) the Cabinet wished the NCC to perform its statutory functions less assiduously.
- (3) Third, there were no rational grounds for removal and/or the Cabinet failed to conduct reasonable inquiries to ascertain whether the criteria in section 11(4) Public Authorities Act were made out (or reasonable inquiries into whether removal was otherwise justified). In particular, the Cabinet failed to consult the Director of the Department of Environment, the Deputy Director of the Department of Environment, the Director of the Department of Agriculture, the Director of the Planning Department, the National Trust, or the Cabinet appointee who the Cabinet did not propose to remove.
- (4) Fourth, the Cabinet failed to identify any special circumstances that justified removing more than two-thirds of the Cabinet appointees at once, in breach of section 11(2) of the Public Authorities Act.

Ground 3: no lawful basis for the new appointments

37. If the removals were unlawful, then it follows that there was no power to make the new appointments.

38. However, even if the removals were lawful, the new appointments were unlawful in that:

- (1) First, the Gazette indicates that the Cabinet considered Ezzard Miller, Arden McLean and Kenny Ryan to have relevant technical expertise for the purposes of the paragraph 1(1)(f) of schedule 2 to the National Conservation Act. However, it appears that the Cabinet failed to make reasonable inquiries to ascertain whether those individuals possessed technical expertise relevant to the NCC's statutory functions and/or that the Cabinet could not reasonably have concluded that they possessed such expertise. Mr Miller is a former pharmacist, business owner, human resources manager and Member of Parliament. In an opinion piece published by the Cayman News Service on 2 February 2025 he expressed impatience with the opinions of environmental experts who, he considered, sought "*to hoodwink us country folk*". He preferred "*common sense*" to the opinions of experts. He appears to have no relevant technical expertise. Mr McLean spent eight years as a marine engineer more than 40 years ago. He then worked for the Caribbean Utilities Company for 18 years, retiring in 2000, before acting as a Member of Parliament from 2000 to 2021. He appears to have no relevant up to date technical expertise. Mr Ryan was an electrical engineer and was then Deputy District Commissioner and

District Commissioner for the Sister Islands. He appears to have no relevant technical expertise.

- (2) Second, it appears that the Cabinet failed, before taking the Decision, to obtain and consider full disclosure of the interests of each proposed new member to establish that no conflict of interest existed.

E. ACTION REQUIRED

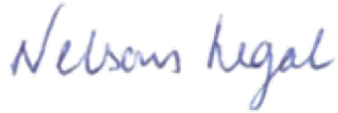
39. To avert the Proposed Claim, the Plaintiffs require you to confirm by no later than 4pm on 20 February 2025 that the Cabinet will, before 26 February 2025, revoke the Decision.
40. If the Cabinet does not agree to take that action, we require you to provide the following pursuant to section 19(2) of the Constitution and your duty of candour:
- (1) A written record of the contemporaneous reasons for the Cabinet's decision.
 - (2) A copy of the minutes of the Cabinet meeting that led to the Decision.
 - (3) Copies of all material that was considered by the Cabinet before taking the Decision, including any reports, briefing papers or other material.

F. THE TIMING OF THE PROPOSED CLAIM

41. If you do not confirm by 4pm on 20 February 2025 that the Cabinet will, before 26 February 2025, revoke the Decision then the Plaintiffs intend to file an application for leave to apply for judicial review without further notice.
42. As part of that application, the Plaintiffs will seek a direction that the grant of leave shall operate as a stay of the proceedings to which the application relates (Order 53 rule 3(10) of the Grand Court Rules). In this context, "*proceedings*" means any decision taken by a public authority (*R v Secretary of State for Education and Science, ex p Avon County Council* [1991] 1 QB 558). Accordingly, a stay would have the effect that, pending further order, the Decision would have no effect, such that (a) the removed members would not stand removed and (b) the new appointments would not be effective.
43. If it is necessary to issue the application, the Plaintiffs will ask the Grand Court to determine it in advance of the NCC's next meeting, which is due to take place on 26 February 2025. One option for the Court would be to grant a temporary stay on the papers pending a return hearing.
44. Even if the Cabinet does not agree to revoke the Decision, please state by 4pm on 20 February 2025:

- (1) Whether the Cabinet will consent to an order temporarily staying the Decision until further order (so as to afford the Court more time to consider the claim); and/or
- (2) If the Court grants a temporary stay, whether the Cabinet would wish to be represented at a return hearing and, if so, how long the Cabinet would wish to be afforded to prepare for the return hearing.

Yours faithfully,

A handwritten signature in blue ink that reads "Nelsons Legal". The signature is written in a cursive, flowing style.

NELSONS LEGAL