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COMMISSION OF INQUIRY – THE WITNESS HEARINGS

ST THERESA’S CATHEDRAL HALL
LAFFAN STREET, HAMILTON, BERMUDA
TUESDAY, OCTOBER 11, 2016

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A P P E A R A N C E S

COMMISSION MEMBERS:

JUDGE SIR ANTHONY EVANS	CHAIRMAN
MS FIONA LUCK	COMMISSIONER
THE HON. JOHN BARRITT, JP	COMMISSIONER
MR KUMI BRADSHAW	COMMISSIONER

COMMISSION LAWYERS / COMMISSION’S COUNSEL:

Mr Jeffrey Elkinson	CONYERS, DILL & PEARMAN
Mr Ben Adamson	CONYERS, DILL & PEARMAN
	Hamilton HM CX, Bermuda

PUBLIC SERVICE COUNSEL:

Ms Venous Memari	LIBERTY LAW CHAMBERS LIMITED
	Hamilton HM 12, Bermuda

Also Present:

Mr Jerome Lynch, QC	UK
Mr Delroy Duncan	Hamilton, Bermuda
Mr Allan Dunch	Hamilton, Bermuda
Mr Eugene Johnson	Hamilton, Bermuda

CLERKS TO THE COMMISSION:

Ms Alberta Dyer-Tucker
Ms Jane Brett

RECORDER:

Mr Rolf Martin

1 (10:00:00 Commission of Inquiry opened by Chairman, Sir Anthony Evans)

2

3 CLERK Good morning, everybody. May I just remind you
4 to have your cell 'phones on either silence or vibrate. Thank you.

5 CHAIRMAN This is likely to be the last day of our present sitting
6 and, so, I want to begin with a few announcements:

7 First, a further public hearing which, in fact, will be
8 our third public hearing, will take place during the week beginning on Monday,
9 the 28th of November, 2016, possibly on that day – the 28th of November – but, in
10 any event, on Wednesday, the 30th of November at 10:00 a.m.

11 Secondly, closing submissions from the parties'
12 representatives and from counsel to the Commission will be heard on
13 Thursday/Friday, the 1st and 2nd of December, 2016. If necessary, oral
14 submissions will be time-limited in order to comply with this time-table.

15 Third, I repeat the Commission's invitation to any
16 member of the public who might wish to contribute to the Inquiry. We are
17 grateful for the many that have been received since we began the Inquiry,
18 however, we must now specify a closing date for such submissions, which will be
19 Friday, the 18th of November, 2016.

20 Finally, I would like to thank many people who
21 have contributed to the holding of this hearing: First, the St Theresa's Church,
22 whose premises we have been able to occupy; secondly, our Clerk and her
23 Assistant, Alberta Dyer Tucker and Jane Brett, who have made all the necessary
24 arrangements with various service providers and, with a few chairs and tables and
25 lengths of blue material, have made this an efficient setting for hearing witnesses;
26 and we thank all of them.

1 Third, we thank the witnesses for their attendance
2 and fourth, last and especially, we thank the Bermuda Security Agents, and Mr
3 Allan Looby, who has done a magnificent job as our Security Officer throughout.
4 Thank you.

5 Now, who is here today as counsel?
6 MR JEFFREY ELKINSON Good morning, Mr Chairman and Members of the
7 Commission, I'm Jeffrey Elkinson, Conyers Dill & Pearman and Mr Hargun has
8 stepped down, just temporarily, and I am taking his place for the remainder of the
9 hearing, and I'm here with Mr Ben Adamson and, for this morning's business, we
10 have a subpoena returnable for this morning that was issued to Bermuda
11 Emissions Control Limited at their registered office; and Mr Delroy Duncan of
12 Trocan Management is here, I understand, and I believe he also has counsel with
13 them. The Commission will be aware, a subpoena had originally issued to
14 Bermuda Emissions Control but one of their primary points was that it was
15 returnable before one commissioner and not four and today we have four
16 commissioners, so, I hope they have the documents that we have asked for in the
17 subpoena, but I'm in your hands, Mr Chairman, as we go forward.

18 CHAIRMAN Yes. Well, I first will ask any counsel present to
19 identify himself.

20 MR EUGENE JOHNSON I'll take that responsibility, Mr Chairman. I'm
21 Eugene Johnson of J2 Chambers, along with Dawn Johnson of the same
22 chambers, representative of Bermuda Emissions Control Limited.

23
24 CHAIRMAN You appear for the Company based here, yes?

25 MR JOHNSON Bermuda Emissions Control, the Company, yes.

26 CHAIRMAN: Thank you.

1 MR JOHNSON And this is Mr Delroy Duncan, who's the Company
2 Secretary.

3 MR DELROY DUNCAN I'm not here as counsel, I'm here as a representative
4 with the Corporate Agent.
5

6 MR CHAIRMAN I see, yes. And, to whom was the subpoena addresses?

7 MR JOHNSON The subpoena is addressed to Bermuda Emissions Control
8 Limited, but it went to the Company Secretary, Mr (indiscernible -Trocan).

9 MR CHAIRMAN Do you appear in response to that subpoena, Mr Duncan?

10 MR DUNCAN Yes, I do.

11 CHAIRMAN Good. And, it was a subpoena to produce certain
12 documents. Do you have the documents?

13 MR DUNCAN No, I don't, and I'll explain why. The position is that there
14 is some history to his. There was an attendance before one member of the
15 Commissions and, at that attendance, the documents were placed in the middle of
16 the table. They were then taken by a representative of Bermuda Emissions
17 Control, so, as I recall it – and I think Mr Adamson will confirm – there was
18 compliance with the subpoena. I was issued with a fresh subpoena. In the
19 interim, I was threatened with suit by Emissions Control. Indeed, they continue to
20 threaten suit against me.

21 CHAIRMAN Well, I think at this point, we must...

22 MR DUNCAN Well, I need to...

23 CHAIRMAN ... spell out why you are a separate entity from BECL
24 Limited.

25 MR DUNCAN Yes, we are the Corporate Management Company, we
26 provide corporate secretarial services and, so, I am here in a capacity unconnected

1 with the Company itself. My Company provides corporate management services
2 for Bermuda Emissions Control, so...

3 CHAIRMAN And your Company is?

4 MR DUNCAN Trocan Management Limited.

5 CHAIRMAN Trocan?

6 MR DUNCAN That's to whom the subpoena was issued.

7 CHAIRMAN Yes, but let's take this in stages. Trocan Management...

8 MR DUNCAN Limited.

9 CHAIRMAN Limited?

10 MR DUNCAN Which is on the subpoena itself.

11 CHAIRMAN Yeah, and you're a director of that Company?

12 MR DUNCAN That's correct.

13 CHAIRMAN Yes, I see. So...

14

15 MR ELKINSON Mr Chairman, may I ask, would it be appropriate whether Mr
16 Duncan be sworn in order to give this?

17 MR JOHNSON What for?

18 CHAIRMAN Well, let's see where we get.

19 MR ELKINSON Certainly, Mr Chairman.

20 CHAIRMAN At the moment, you are making a submission – and,
21 not as counsel – but in your personal capacity as a director.

22 MR DUNCAN Yes. And so, I was threatened with a suit on the
23 day I was sued with a second subpoena. At the hearing of the second subpoena, I
24 believe your two wing Commissioners, Ms Luck and Mr Bradshaw, were present.
25 I indicated what the position was and, as a result of the warning in the subpoena
26 which, obviously, as you see, says: If I fail to comply, it would be at my peril

1 and, the threat of law suit. I instructed counsel. That counsel is Mr Jan
2 Woloniecki.

3 During the course of the afternoon that day, there
4 was a conversation between Mr Woloniecki, myself, and Mr Adamson, and Mr
5 Hargun. It was agreed that, pending the outcome of the law suit, that had been
6 initiated that day by Bermuda Emissions Control, the documents would be held to
7 the Order of the Court by Mr Woloniecki, in a sealed box, which is where they
8 are: At his office in a sealed box.

9 I was advised, although I don't know the entire
10 details...

11

12 **MR CHAIRMAN (Q) – still addressing Mr Duncan (A)**

13 Q Now, just a moment: It was agreed by counsel and,
14 in fact, implemented...

15 A Yes, the document...

16 Q ... that... Are we talking about the original documents, or copies?

17 A Well, the documents. I mean, there are no copies.

18 Q Well, in other words, the original documents.

19 A That's correct, yes.

20 Q (Writing.) "Held in sealed box by Mr Woloniecki."

21 A Yes, at ASW.

22 Q That's the name of the law firm, as they would...?

23 A Yes, Attride-Stirling and Woloniecki.

24 Q Yes?

25 A There have been Court proceedings. Mr Johnson will explain what
26 the Court proceedings are. I'm not fully aware of what they are. I didn't attend

1 the Court proceedings. My understanding is that there was some form of Stay
2 granted, pending the outcome of a dispute between the lawyers for the
3 Commission and Mr Johnson. I received this subpoena – I was away on Friday
4 when it was served – but I received it yesterday. I tried to get ahold of Mr
5 Woloniecki yesterday. I got ahold of him this morning.

6 Q Yes, but again, let's take this by stages. You've given us a great
7 deal of the history but, what was returnable today was a subpoena, issued only last
8 week, in response to a suggestion – as I gather – made by the Chief Justice.

9 A Oh, I don't know.

10 Q Well, that subpoena was issued the late part of last week and, you
11 say, was only served on you yesterday?

12 A It was served on the Office on Friday. I was not in the Island on
13 Friday.

14 Q No, well, very well.

15 A And I received it yesterday, whereupon, I immediately tried to
16 contact counsel.

17 Q Served yesterday, was the 10th of October. No, it was served on
18 Friday, the 7th of October, and seen by you on the 10th?

19 A Yesterday, yes.

20 Q And you've said you do not have the documents, and...

21 A Can I just explain, Mr Chairman? I spoke to Mr Woloniecki this
22 morning and I informed him of the subpoena and I indicated to him that the
23 subpoena was in place; and his response was that he will produce the documents
24 upon being given a Court Order, because his understanding is there was a Court
25 Order prohibiting disclosure of the documents. So, what has happened in the

1 Court proceedings in the interim, I'm totally unaware of and, obviously, it would
2 be a matter for the tribunal in Court, exactly what I have to do.

3 Q What is your position?

4 A I don't have the documents. Mr Woloniecki has the documents. I
5 don't have a position. The position is that, obviously, if there is an Order of this
6 tribunal that is not in any way encumbered by a Court Order, the documents have
7 to be produced, but I'm not sure what's happened in Court. I don't know what's
8 happened in Court.

9 Q Well, you say that you don't have the documents. Do you have
10 any copies of them?

11 A I don't.

12 Q And...

13 A I mean, the documents are kept on a computer. Obviously, the
14 documents can be... Well, I don't know... I'd have to find out whether the
15 documents could be produced again, but I don't have copies we could...

16 Q You can't tell us that, today? You can't tell us whether the
17 documents are held electronically in your Office?

18 A Some of the documents are.

19 Q Oh, they are?

20 A I mean, I didn't produce the copies. Somebody in the Corporate
21 Services Department produced them when requested originally; but the originals
22 were given to Mr Woloniecki.

23 Q And, is there anything else you want to add?

24 A Well, I'm just uncomfortable about being in a position where Mr
25 Madeiros and Mr Smith are threatening to sue me if I hand over the documents,

- 1 and I've got a subpoena that says I'm in peril if I do hand over the documents.
2 So, it's not a very nice position to be in.
- 3 Q Well, you haven't told us about that. Mr Smith and Mr Madeiros,
4 you say are...
- 5 A I did mention that earlier, Mr Chairman, yes.
- 6 Q Well, will you spell it out again?
- 7 A Yes. Mr Donal Smith and Mr John Madeiros...
- 8 Q And they are directors of the Company?
- 9 A They are directors of the Company.
- 10 Q Of BECL?
- 11 A Of BECL, have made it abundantly clear to me that if I hand over
12 the documents, they will sue me. And I also recognize that if I don't hand over the
13 documents, the summons says I'm in peril. So, it's not a nice position to be in.
- 14 Q Yes, of course. If you haven't got the documents, and no control
15 over them, you can't comply with it and they can hardly blame you/can hardly say
16 that you have complied with it.
- 17 A I don't think...
- 18 Q It may be something to...
- 19 A I don't think they see it that way. I think they want to make sure
20 that... How can I put it? That I understand the strength of their position.
- 21 Q Well, the fact is that the documents are electronically recorded in
22 your Office.
- 23 A I don't know if they all are; and that's what I said.
- 24 Q Or, at least, some are, yes.
- 25 A Yes. I don't know if they all are. I'd have to speak to the
26 Corporate Secretary to find out.

1 Q And, have you established yet which of the documents requested
2 are electronically recorded in your Office?

3 A No, I have not. No.

4 Q Yeah.

5 A But, what I can say is that the entire bundle of documents are with
6 Mr Woloniecki in a sealed box, as we understood we were directed to have them
7 kept, pending the outcome of the Court proceedings.

8 Q And, by 'your Office', I mean, of course, Trocan's Office.

9 A Yes.

10 CHAIRMAN Well, now, Mr Johnson.

11 MR JOHNSON Yes?

12 CHAIRMAN You appear for the Company?

13 MR JOHNSON I do, Sir.

14 CHAIRMAN Do you wish to say anything?

15 MR JOHNSON A couple of things: We've had a bit of that story;
16 but I'm instructed to make an application to the Commission; and that is that the
17 subpoena be set aside; and I intend to develop my submissions on that point.

18 The first and most preeminent point that has to be
19 addressed is whether or not...

20 CHAIRMAN Yes, just before you go on, Mr Elkinson – pausing
21 here – is there anything that you want to say and, in particular, is there any reason
22 why we should not hear Mr Johnson's application to set aside the subpoena?

23 MR ELKINSON I think, indeed, it would be appropriate for anyone
24 who feels that a subpoena has been served on them, that there are grounds why
25 the tribunal, or a Court, as the case may be, should not enforce the subpoena; but

1 the rules are very clear and Mr Johnson, I'm aware, does have a copy of the rules
2 because he's been referred to in the Court proceedings.

3 CHAIRMAN Well, yes... I'm so sorry, I don't want you to
4 oppose the application, but is there any reason why we should not hear the
5 application now?

6 MR ELKINSON Well, my point being: It's not that I'm opposing it,
7 Sir, I was just referring to the fact that the rules make it clear how one opposes a
8 subpoena.

9 CHAIRMAN Yes, I see.

10 MR ELKINSON And, if I could refer the tribunal to the Commission
11 of Inquiry rules? Rule 8.

12 CHAIRMAN Yes?

13 MR ELKINSON So, 4, sub 4:

14 "A claim by a person that he is unable to comply with the subpoena." So, this
15 would have been applicable to Mr Duncan, also. "Or, if it's unreasonable, in all
16 the circumstances, to require him to comply with such a subpoena, shall be
17 submitted in writing to the Commission Panel and will be determined by the
18 Chairman, who may revoke or vary the subpoena on that ground."

19 And, then, it's very clear in sub 6, paragraph 8, sub
20 paragraph 6:

21 "Claims under paragraph 4 should be submitted in writing to the Commission
22 panel as soon as possible and, in any event, prior to any return date of the
23 subpoena."

24 CHAIRMAN Yes, thank you.

25

26 BY MR CHAIRMAN (Q) - addressing to Mr Johnson (A)

1 Q Now, Mr Johnson, I think two questions arise from the rule. One
2 is – the more important one, perhaps – why haven't you complied with it. But,
3 this other one is whether this matter should be determined by me alone, or by me
4 with four Commissioners. Now, what do you say about that?

5 A On the first matter...

6 Q No. Who should determine this?

7 A We take the position that all four Commissioners should decide it.

8 Q Well, let's set the rules. Are you quite clear, it says 'Chairman'?

9 A That is true.

10 Q But, can we begin by being sensible about this and agreeing that
11 the four Commissioners should decide this today?

12 A I was actually going to put that position to the Commission.

13 Q Yes... Mr Elkinson, are you happy with that?

14 MR ELKINSON Indeed, Sir. Yes.

15

16 BY MR CHAIRMAN

17 Q So, now we come to the more important question: Why haven't
18 you complied with the rule?

19 A The simple answer is that the Company became aware of the
20 subpoena being issued to it yesterday at 3:30 in the afternoon, which gives us
21 absolutely no time to comply with the rules, as they are set out.

22 Furthermore, with a more wholesome answer...

23 Q Well now, just state who was not aware until...?

24 A The Company was not aware. If we think the Company to be the
25 managing-mind of BECL.

26 Q Until... That was the afternoon of...

1 A Of yesterday.

2 Q Monday, the...

3 MS FIONA LUCK 10TH

4

5 **BY MR CHAIRMAN**

6 Q 10th of October. But it was served on a representative of the
7 Company on Friday?

8 A It was served on Trocan Management Limited but, the person who
9 is the director of that Company and the Secretary of BECL, only came back to the
10 country on Sunday...

11 Q That's Mr Duncan? Yeah.

12 A ... and received it yesterday in the afternoon. So, it was passed on
13 to the managing-mind of the Company yesterday at 3:30.

14 Q And he did not inform the Company until... ?

15 A Until he – I assume, he received it... As soon as he received it
16 yesterday, he passed it on to the Company.

17 Q And you say that was yesterday afternoon?

18 A At 3:30 we received it, yes.

19 Q Yes?

20 A Now, I should say this for fullness:

21 The Company became aware that there was a possibility that a new
22 – a subpoena would be issued – or some form of subpoena – would be issued, by
23 reading the Royal Gazette on Saturday. It came as a quite shock to the Company
24 that the suggestion was being made in the Royal Gazette, because our position is
25 that this Commission has no power to issue a subpoena/had no power at all to
26 issue a subpoena – for anybody – to be returnable today.

1 Q Yes. I've heard but, of course I wasn't there, that the Chief Justice
2 himself had suggested in the hearing – I imagine it was a private hearing – on
3 Thursday...

4 MR ELKINSON It wasn't private, Sir.

5 Q Yes, and that the Company's representatives were present?

6 A We argued against this.

7 Q Yes. So...

8 A The subpoena being lifted.

9 Q So, did you hear the Chief Justice say, on Thursday at the private
10 hearing, that this was one course that the Commission might take?

11 A I think it's a matter of context, Sir. The words might be uttered,
12 but the context cannot be omitted. In the circumstances, this Commission is
13 opposing a set of judicial review proceedings against it.

14 Q No, please, please answer my question. You were present on
15 behalf of the Company at a private hearing on Thursday.

16 MS LUCK It wasn't private. It was public.

17 CHAIRMAN Oh, it was public. Oh, it's public...

18 Well, all the more s

19 Q You were present and, at that hearing, the Chief Justice himself
20 suggested – as I understand – that a further subpoena might be issued?

21 A Well, the question is, what is a further subpoena? Or, what's a
22 different subpoena? And this is what I come to address the Commission about
23 first and foremost. The difficulty is our view/the Company's view is that we've
24 had a subpoena in place since the 22nd of August, 2016. The dates on that
25 subpoena have been adjusted/have been changed and adjusted but, in essence, the
26 request from the Commission is the same. There is a Stay on the subpoena in the

1 Court. The Commission sought to oppose it – to lift it – last Thursday and the
2 Court rejected the Commission’s request. That, in our submission, means that the
3 subpoena – the request for the documents to be produced to this Commission
4 cannot be proceeded with – unless a Court Order says otherwise, which is the
5 reason why that we suspect the Commission moved the Court, or asked the Court,
6 to lift this thing.

7 Q Well, what did the Chief Justice have in mind, so far as you are
8 aware?

9 A Yes, so far as I am aware, putting the context in.

10 Q What... ? Err... ?

11 A We/the Company was of the view – I have to think how to put it?
12 The Company was of the view that, if a new subpoena was to be issued, you
13 would have to discharge the one which is extant. You would have to set it aside
14 and do away with our Court proceedings. If that was done we, obviously, go back
15 to point zero and the new rules would apply. If that’s not done, we simply have
16 an artifice, we simply have a date being changed. Now, the reason why I say:
17 ‘It’s simply a date being changed’

18 Is because under Section 9, this Commission has power to issue subpoenas, or
19 warrants, in the same manner as the Supreme Court does. When a Supreme Court
20 issues a subpoena, the warrant is extant, or actionable, so long as the proceedings
21 are afoot. That’s no different from a Commission which is sitting; and you say, if
22 there’s a Stay, it must obviously suppress this Commission from trying to proceed
23 on it.

24 Now, the consequence of a different view is that a Court can make
25 a Stay, stopping the Commission from recovering documents, or asking for
26 documents, and this Commission can simply issue another piece of paper saying

1 the same thing – which is what happened – to get around that Order. It can't be so.
2 That's our first submission.

3 Q Yes, well, as I understand that, submission is quite simple. You're
4 saying that the new – I'll call it the new subpoena – can't be proceeded with until
5 the first subpoena has been discharged?

6 A In a formal way.

7 Q Formally discharged.

8 A Formally discharged.

9 Q And the Chief Justice, did he have that in mind?

10 A Well, that's the only thing he could have had in mind. And that's
11 why I said the context was important.

12 Q Well, I don't see at the moment why he wouldn't have it in mind,
13 because he expressed/himself suggested that there should be a fresh subpoena.

14 Did he say: But, of course, that the existing one has to be
15 cancelled first?

16 A No.

17 Q No. Thank you.

18 A Not so. But it came in the context of submissions, about the extent
19 of this Commission's request. For instance, in the Summons that we have before
20 us today – the piece of paper – there are one, two, three, four requests; four sets of
21 category documents that the Commission is seeking. In the Court on Thursday
22 last, there was the suggestion by the Company that one, two, three of those
23 request, this Commission already has documents about and, therefore, it makes no
24 sense for them to continue to request that full scope of documents. So, if the
25 Commissioner took the view that the old subpoena, with its whole four requests,

1 was inappropriate and formally discharged it, surely the Court can't say that a
2 fresh subpoena comes under other jurisdictions?

3 Q Yes, well I've got your first point.

4 A Yes.

5 Q Which is that... Well, the Chief Justice didn't appear to mention
6 this: The new subpoena which he suggested can't be proceeded with, you say,
7 until the first one is formally discharged.

8 A Formally discharged.

9 Q Yeah, right. Now, what's your second submission?

10 A The second submission is, even if I'm wrong about that, it's
11 important that the Commission understand the reasons why the Company objects
12 to any compliance with this subpoena.

13 I am instructed to say: It's important that we don't expect, after I
14 make these points, for the Commission to view them with the greatest respect.

15 And the reason I say that is this: These points that I'm about to
16 make are made in extant judicial review proceedings that this Commission
17 opposes. So, through your counsel, they have said that the points that we raise in
18 the judiciary proceedings are hopeless, even though the Chief Justice has given
19 them leave and has directed a substantive hearing be heard on them.

20 In that instance, we say: It will be quite a task for this Commission
21 to open its ears to me now while, at the same time, and maintain a level of
22 impartiality about the subpoena and, at the same time, oppose judicial review
23 proceedings about the very request we're considering today. But, I am duty-
24 bound to put those objections to you.

25 Q Well, you're duty-bound to your client.

26 A Yes.

1 Q But, you're duty-bound to the Court

2 A I am, as well.

3 Q As – well, to the Commission, as counsel – to respect the Court.

4 A That's right.

5 Q And, your duty as counsel is only to make submissions which you
6 think are appropriate in the circumstances.

7 A And, I had to put it on record that we – because it's important to
8 what happens after I make these submissions. Yes.

9 Q Well, let there be no doubt about the position. The fact that your
10 client Company may want you to make submissions does not entitle you to make
11 them unless they are consistent with your duty to the Commission as counsel.

12 A And I think it is, with great respect.

13 Q Well, if you've thought of that, you must proceed.

14 A Yes. So I'll put the objection.

15 When this Commission seeks to use powers of the Section 9 of The
16 Act, The 1935 Act, it's important to recognize that it has no powers greater than
17 the Supreme Court. It doesn't have a jurisdiction the Supreme Court does not
18 have. It has a similar jurisdiction. The Courts have developed rules – a set of
19 tests – for when it can issue a Subpoena Duces Tecum. Those rules are set out in
20 a number of cases, but I can simply set out, or advise you, about what they are.
21 Because the power that you are seeking to exercise is a compulsive one and it
22 intrudes with yet a number of rights of people who are asked to comply.

23 If this Commission had said:

24 'We have a number of requests for you, would you be willing?'

25 And the Company was to turn over those documents, then we wouldn't have the
26 same difficulty that we have now, with the subpoena being issued. But, even if

1 they had turned them over consensually, a Court would still review whether or not
2 it was appropriate to make the request at all.

3 So, there are four of them, as far as the Supreme Court is
4 concerned. I am sure the Commission is aware of it because we've rehearsed it
5 sometime before. It says that there must be a specific identification of the
6 documents. We have no problem with that. We're going to go through all of
7 them, so the Commission understands my position.

8 A specific identification of the documents, it can't be of a fishing
9 or speculative nature. I understand that a Commission has a more inquisitorial
10 function and, therefore, this test is more loose than it would be in a Court context,
11 but the point still holds good, that you must set out and have clear reasons for
12 requesting the documents you request to justify requesting them.

13 Q Yes.

14 A Which is why one of our objections is that, before the issuance of
15 any subpoena, this Commission should write, as a preliminary step, to a party they
16 wish to comply and set out a number of details, the most important of which is
17 why, in particular, they want these documents, and how these documents can help
18 them in their Inquiry – in detail.

19 In this instance, the Commission, instead of going through the
20 voluntary process, sent a letter which was nicely drafted. It was cordial but it
21 contained a poison pill.

22 Q What was the date of that letter?

23 A The 22nd of August, I believe. I'll find it before you make your
24 note.

25 Q Yes.

26 A I believe it's the 22nd of August.

1 Q I'm told, that's right, yes.

2 A The point that appealed to me, the second to last paragraph. It said:
3 "We recognize that you may not want to comply by request, so we're serving a
4 subpoena."

5 So, the compulsory – so the stick was being used before the carrot. That's a
6 problem, we say. This Commission should use the carrot, it's obliged to use the
7 carrot, before using a stick.

8 As far as the second of the test, it dovetails with what I've just
9 said:

10 "The production of documents must be necessary for the fair disposal of the
11 matter."

12 So, when you construe that in the context of an Inquiry, it must be necessary to
13 the matters that the Inquiry is looking into. This comes to the note about that:

14 "The Company has a bit of a problem with how the Commission has construed its
15 terms of reference."

16 The terms of reference – I don't know if the Commission has the document in
17 front of it? I would ask for it to be put in front of it, because I am going to make a
18 slightly nuance point.

19 Q Yes.

20 A In paragraph 1, this it says:

21 "This Commission is to inquire into any potential violation of law or regulations,
22 including the Civil Service conditions of employment and Code of Conduct,
23 financial instructions and Ministerial Code of Conduct by any person or entity
24 which the Commission considers significant, and determine how such violations
25 arose."

1 So, the preeminent concern we say about the Commission/for the Commission is:
2 How any potential breaches, or any actual breaches of financial instructions and
3 Government regulations, or whatever, have occurred. We just had a document
4 this Commission now would seeks from the Company, seemed to be addressed –
5 and I'll say this just advisedly, because I don't know – seemed to be addressed to
6 a slightly different question: Not how? But why?

7 Q I'm afraid I haven't understood that sentence.

8 A In other words, even though this Commission may already have
9 sufficient documentation in its bundles to answer the question:
10 'How did financial instructions get violated? And, what might be done about
11 that?'

12 The set of requests in the subpoena seem to be addressed with:

13 'I know that they happened; I know how they happened, but what can be the
14 underlying reasons for that? Why would anybody do it?'

15 More a/a more insidious question is being posed, namely, is anybody is up to
16 tricks and is that the reason why they haven't complied with financial
17 instructions? And, I say that's a dangerous line to take for a Commission if it
18 hasn't set out, in specific terms, why it takes that position.

19 Q I'm surprised that counsel, with the experience of the Courts,
20 should draw a distinction between how and why in that way, because it's
21 elementary, isn't it, that a person's motive – or reason – may be relevant to the
22 question whether or not an event occurred.

23 A Well, let me be exceptionally clear with this. I'm not saying that
24 this Commission cannot take the view that the documents are needed to answer
25 the why question but, what they must do is be particularly careful with that why
26 question and set out, for the Company's benefit, that that's the question that they

1 have actually posed themselves and want to answer to. And, the reason was it can
2 be expressed by shortly as that.

3 Section 12 of your Act says that, if anybody is concerned with any
4 part of this Commission, they are entitled to legal representation at the whole of
5 the Commission. If the why question is being posed, and the documents are
6 needed for this why question to be answered in some way, shape, or form, or
7 some question to be put about that why question, that would mean the Company
8 takes a very heavy interest in that question – how that question is determined.
9 That means, if you put the question and we give you the documentation at the end
10 of the day, you might be facing the request for us to be represented under Section
11 12, which is a problem – as I understand it – with how the Commission has been
12 conducted so far, and the fact that this is the last day of this sitting, and it only
13 speaks to sit again on the 28th and 30th of November. So, do you see the practical
14 difficulty is, if you were to move to seek these documents, the necessary next step
15 is for the Company to say:

16 ‘We are interested in that why question and our fairness desires/determined a
17 needs for us to be involved in the whole of the Commission, and the whole of the
18 Commission has passed us by.’

19 Q I’m sorry I’m being very slow, but I haven’t followed what you’re
20 saying. You accept that the Commission might be entitled to ask for documents
21 on what you call ‘the why question’?

22 A Might be? Yes.

23 Q Yes. And, then you’ve made submissions about the Company
24 being represented and no application has been made until you’ve appeared today
25 to be represented before the Commission.

26 A And could I tell you why?

- 1 Q So, what's the problem?
- 2 A And could I tell you why that's so?
- 3 Q Yes.
- 4 A When the documents are paying from the Company,
5 compulsorily, you put the Company directly in the frame. That why question
6 becomes a preeminent concern of the Company. These documents are only
7 needed to answer that why question, we say, could only be needed. Once that
8 issue is flagged, the Company is aware that the Commission is looking into that
9 why question and then says it has an interest that must be protected at this
10 Commission.
- 11 Q When did the proceedings, under the first subpoena,
12 come before the Supreme Court?
- 13 A On/I think it was even July. Was it July? Or, was it July or
14 August? I'm not altogether sure. I'll get the answer for you.
- 15 Q And so, the Company, as I would have thought...
- 16 A The 30th of August.
- 17 Q So, since the 30th of August, if not earlier, the Company has known
18 that the Commission was expressing documents in these/expressing interest in
19 these documents and your submission is that that could only be on the basis that
20 they are relevant to what you call 'the why' factor?
- 21 A That's true, yes, part of it.
- 22 Q Yes, and so, I'm not beginning to understand, at the moment why,
23 if the Company wants to be represented under Section 12, it hasn't applied?
- 24 A The Company – I want to be exceedingly clear – the Company
25 does not want to be represented, at this time, under Section 12. The point I'm
26 making is: When we were served with a Subpoena, our step was to move the

1 Court. The Court's proceedings are still outstanding. If this Commission goes on
2 to make a ruling that these objections are unfounded and the documents should be
3 turned over under paying of penalty, that why question becomes a live issue in the
4 Commission as far as the Company is concerned; and then we will necessarily
5 have no choice but to make the submission under Section 12. I'm flagging the
6 practical problem that this created by how we're conducting ourselves as far as
7 the subpoena is concerned.

8 The third of the questions the Commission must turn itself to
9 before issuing a subpoena is that, plainly, it says:
10 "Plainly, a witness Summons will be set aside if the documents are not relevant to
11 the proceeding; but the fact that they are relevant is not, by itself, a necessarily
12 decisive factor."

13 Meaning, you could have relevant documents, but still not require them by way of
14 subpoena because, when you balance the risk to the Company and the interest of
15 the Commission, one may outweigh the other.

16 Q Well, what people say is that they must be necessary, but that's not
17 sufficient of itself?

18 A Sufficient, yes.

19 Q Right, okay.

20 A In this circumstance your/the Commission has not seen these
21 documents, but it can take into account – it's probably obvious – that the type of
22 documents you're seeking are necessarily confidential, necessarily contain
23 sensitive information about all manner of things, sometimes contractual relations
24 with other independent third parties, sometimes contracts which contain
25 confidentiality clauses of their own, sometimes matters that have nothing to do
26 with the general scope of the...

1 Q Now, I think I'm right in saying that, when there was a meeting
2 between your Company's representatives and the Commission, less than four
3 Commissioners – because that's the point you've taken – that...

4 A One of the points, Sir, yes.

5 Q Yeah, you've taken the point that it had to be four Commissioners.
6 Now, I understand one thing that was made clear was that the Commission would
7 respect confidentiality and would agree with your clients what steps were
8 necessary to do that.

9 A Well, I've heard – and I've seen the writing from one of the
10 Commissioners, Mr Bradshaw – that this would be a right respected by the
11 Commission.

12 Q Yes.

13 A But, to right it, unfortunately, doesn't obviate our need to protect
14 the documents for this reason:

15 If this Commission wants the documents...

16 Q Well, you do agree the Commission has offered to treat the
17 documents in confidence?

18 A Blindly, yes.

19 Q Yes.

20 A And I put that way for this reason:

21 If the Commission wishes these documents for purposes of its
22 Inquiry, it's only so much confidentiality they can give them. Meaning, if the
23 Commission was to come upon these documents, which we say is the problem
24 anyway – you having the documents, you've seen the sensitivities – if the
25 Commission wants the documents aside, I wish to put a certain matter to a witness
26 about the Emissions Control contract. I'll assume that, if you come to it, you may

1 need to turn over the documents compulsorily, the only necessary conclusion this
2 Commission would reach is that our confidentiality has to be waived so the
3 question can be put for the purpose of the Inquiry.

4 So, it's almost wrong to suggest that an overture by the
5 Commission that you will protect our confidentiality can be given blind. It's a
6 question that's context-driven and it cannot be addressed at this stage.

7 Q Have your clients taken up the offer to reach an agreement on
8 confidentiality?

9 A No, they have not, because their concerns are, if you follow me,
10 more preliminary, that this Commission should not have moved at all to compel
11 without voluntarily seeking these documentations, where a more collegiate
12 discussion could have taken place. But, once it's compulsorily driven, once it's
13 under paying a penalty of punishment, it's going to be more difficult for us to deal
14 with.

15 Q Yes, well, confidentiality is a side issue in this sense, isn't it?

16 A It is, it is.

17 Q Your clients have taken the view the documents will not be
18 produced and have not taken advantage of an offer to discuss confidentiality.

19 A Yes, because they don't believe that the suggestion by the
20 Commission, with the greatest respect, really covers their concerns.

21 Q I don't see that as a separate ground of objection, but...

22 A But it doesn't, just so long as it's kept hold of the view that the
23 Company does not hold the view that the Company does not hold the view that an
24 overture by Mr Bradshaw, the Commission at large, that overture that we've seen,
25 really satisfies the test, or really allows the... Yeah.

26 That actually leads to the fourth of the concerns.

1 Q Yes?

2 A Which is about confidentiality and whether or not other people's
3 legitimate interests are being considered by the Commission. For instance, like
4 say, if there were sensitive documentation. There might be contracts inside these
5 documents that you are not entitled to see; have nothing to do with the Bermuda
6 Emissions Control contract. The request is quite wide-ranging. In fact, it
7 stretches from the inception of the Company to now, even though the
8 Commissioner's terms of reference are, in large part, ring-fenced by the Auditor
9 General's Report from 2009 to 2012.

10 Q Yes. I just ought to clarify one matter.

11 A Yes?

12 Q And I think it's right to say that, as far as I know, your clients are
13 the only Company which have raised this objection.

14 A Yes.

15 Q Are you saying that, what I'll call normal commercial
16 confidentiality applies? Or, are you saying there are special reasons why your
17 client Company should have confidential information which it is entitled to
18 withhold?

19 A I'm saying that it's not – and I have to put it this way – it's not for
20 us to convince you of that point. It's for you, with the greatest respect, to tell the
21 Company and give reasons why this Company should comply with the subpoena.
22 That's the only – and you have to be satisfied with that. It's not for us to satisfy
23 it.

24 Q Well...

25 A What we're saying, though, is that there are documents which
26 might be covered by the normal commercial sensitivity.

1 Q You haven't answered my question.

2 A I, I...

3 Q You have raised the question of confidentiality as one of your
4 fore-points that are relevant.

5 A One of them, yes.

6 Q And, I am asking whether your clients are relying on what I
7 would call, I think it's sufficiently accurate, normal commercial confidentiality?
8 Or, are you saying there are special reasons here – additional reasons – for
9 giving/allowing confidentiality?

10 A Well, there's normal commercial confidentiality with this
11 caveat. The Company is aware of suggestions from inside and very close to
12 Government, that the contracts that it operates for the benefit of Government are
13 under threat, meaning, that there is a desire to apprise the Company business from
14 BECL.

15 Now, the data that is in the documentation that this Commission
16 wishes, if made public, if put to witnesses in public, impinges upon the question
17 of whether... Well, it impinges on this question: Should that documentation be
18 out in the general public for those who may have insidious motives to use it and
19 get the information they wouldn't otherwise have.

20 So, normal commercial sensitivity, with the caveat that there are
21 certain sensitivities, or special circumstances, regarding the Emissions Control
22 contracts, that must be taken into account.

23 Q I'm just making a note of what you've said

24 'Persons within Government have'... Did you call them
25 'pernicious reasons'?

1 A They have said they wish to take the/there is a suggestion is that
2 they wish to apprise the business from BECL.

3 Q For taking... ?

4 A You have what I called 'insidious motives'.

5 Q And that's the reason you say why your client should not make
6 these documents available to the Commission?

7 A That the Commission should be aware of those things and, if it's
8 doing the balancing exercise, should take that into account, that there are certain
9 commercial sensitivities above and beyond the normal.

10 And, then it says that the... And, that's not really a test, is that:
11 "The Court has a power to vary the term of a witness Summons, but should not do
12 so without the concurrence of another advocate."

13 A number of cases are cited and also constitutional law, convention reasons, why
14 that test must be complied with.

15 Now, just to recap, I'm saying that this Commission, for whatever
16 reason, cannot move straight to the compulsory option. It has to try voluntariness
17 first because, otherwise, you can't answer the question if that is necessary to
18 compel. You must set out, in sufficient detail and with adequate reason why you
19 request these documents, allowing the Company to engage in the type of
20 exchange which might be necessary, might be more helpful to this Commission.
21 We've gotten ourselves into a position, a bit of a silo position, because we're
22 being compelled before we've been voluntarily approached. But, most
23 importantly, as far as my conditions are concerned, our attendance today is
24 unjustified and unlawful because the very thing this Commission identified,
25 which would have made it possible for it to do so, meaning, lifting the Stay, did

1 not occur; and those are, in a nutshell, my submissions. If there's anything I need
2 to...

3 Q Mmm.

4 A So, those are, in a nutshell, the – what I call – preliminary concerns
5 about the document. They don't go to exactly what's in the documentation
6 because we are not ready to put out those documents to you so you can make that
7 assessment because this is not a Court, where the Court stands aloof and decides
8 whether something is relevant or not which, by the way of the circuit, another
9 issue as well. I have to raise it at the moment.

10 Because this Commission is the party concerned with a paying in
11 the document in doing the Inquiry, we don't have the level of distance that would
12 normally be the case in a normal piece of civil, or other litigation, where a Judge
13 decides whether this test has been complied with. In circumstances like that, and
14 in light of the fact I started with this, that this Commission is opposing the judicial
15 review proceedings, but preempts preliminary – these same issues – it leads to a
16 number of consequences.

17 One is: My submissions have to be addressed and decided by way
18 of reasons, so they could be tested.

19 Q By way of?

20 A Reasons, reasons must be given. Full reasons must be given so
21 they can be tested by another party and, because of your closeness to the matter –
22 not personally, but as a Commission – there must be some allowance for us to test
23 those reasons with an independent party – which is the Court, in this instance.

24 Q Well, I'm surprised to hear you say that in the present case,
25 because your clients have taken the matter before the Chief Justice and the

1 situation there, on this particular question, is that the new subpoena has been
2 issued at the express suggestion of the Chief Justice.

3 A Well, we don't accept that, that this subpoena has actually been
4 issued at the suggestion of the Chief Justice. Our view is that we have one
5 subpoena that's been stretching from the 22nd of August with the computer paper
6 of the different dates on it.

7 Q Well, you could argue black is white if you like, but there is...

8 A But, do the rules say that?

9 Q There is a new subpoena which was issued at the suggestion of the
10 Chief Justice, which is why I find it surprising you're saying:

11 Ah, the Commission shouldn't act on its/is not in a position to act
12 in its own cause in this matter. The Chief Justice has considered this and has
13 made a suggestion, would you say he's not entitled to make? Or, rather: Oh it's
14 wrong?

15 A He suggested that what the Commission is putting to me, about
16 what the Chief Justice meant, is inconsistent with his decision that the Stay not be
17 lifted because, if this Commission has powers of a Court, the subpoena is extant
18 for the whole of the proceedings in which the documentation is requested.

19 Q That's because the Chief Justice has one point before him. I
20 understand it's only one point, which is whether the objection to the subpoena,
21 based upon the request to appear before one Commissioner, rather than all four,
22 whether that's a valid point or not.

23 A Well, that might be what the Commission's counsel said to the
24 Commission, but the judicial review papers weren't evaluated and – it was
25 acknowledged by the Chief Justice on Thursday – cover a broad range of topics.

1 Well, the broad scope that I've addressed to you today about how to exercise, or
2 when to request a subpoena.

3 So, it's not about simply the four Commissioners meeting. It's
4 about when they meet, how do they decide, and whether they should have – as a
5 preliminary point – taken into account a whole range of things. So, the
6 proceedings that we're talking about are extant and must be decided.

7 Now, can I say this? The suggestion was made on Thursday. I'll
8 make it again in front of the Commission in case it didn't get back to you. The
9 BECL is willing/is willing to find a way out of the current judicial review
10 proceedings. That's why I said you have to have formally discharge the subpoena
11 and do away with the Court Order. We're willing to do that and we're willing to
12 be approached voluntarily so this test can be satisfied.

13 We're willing to come under the rules that the Commissioner took into place,
14 subject to this/subject to the caveat I put through just earlier, the Chairman cannot
15 decide because Section 2, or 1, of The Commission of Inquiry Act said you
16 cannot do that. That's a point that we can take a practical view about. But, we're
17 willing to find out without a judiciary proceeding and the in-path and get to a
18 point where this Commission may very well be able to get some, if not all, of the
19 documents on a voluntary sense. But, for us to get there, we would have to
20 formally discharge the subpoena and have a discussion and we undertake we can
21 have that discussion. We would have it in good faith, but we cannot have it so
22 long as Mr Duncan, or anybody, on behalf of the Company is under compulsion.

23 Q When you say:

24 'If the subpoena is discharged'

25 Do you mean both subpoenas? Or, the first?

1 A Well, our submission, I can't change it because it's, Mr Chair, you
2 suggested it. We take a view there's only one subpoena but, if you say it's two,
3 both of them have to be discharged.

4 Q Good. Well, thank you very much, Mr Johnson.

5 A Thank you.

6 CHAIRMAN Mr Elkinson?

7 MR ELKINSON

8 Thank you, Mr Chairman.

9 My Friend has made various points, some of which
10 are not factually accurate and, I suppose, the starting point might well be his
11 suggestion that his client would respond better to carrots than to sticks.

12 He referred to the letter of the 22nd of August, 2016,
13 from the Commission and that was addressed to Bermuda Emissions Control at
14 their registered office, Trocan Management Limited. And, if I can refer the
15 Commissioners to this letter which is, essentially, a letter informing Trocan of the
16 existence of the Commission of Inquiry, how it has been directed to inquire into
17 the findings of the Auditor General's Report for those years 2010, 2011, 2012;
18 that one of the issues which the Commissioners are inquiring into involves
19 Governmental contracts and one of the contractors, which the Commission would
20 like information about, is Bermuda Emissions Control Limited.

21 The Commissioners go on to state:

22 "We appreciate that the Company may not wish to volunteer such information
23 and, accordingly, enclose the subpoena."

24 And they talk further in this letter about:

25 "... not wishing to unduly inconvenience... happy to work with you in relation to
26 an orderly and efficient protection of the relevant documents and information".

1 “The validity of the Summons is challenged on six grounds, three of which Mr
2 Elkinson succeeded in demonstrating, appeared to be unarguable on their face, in
3 light of the evidence already before the Court. I consider the oppression
4 arguments to be tenuous, but have no sufficient basis to fairly determine that this
5 complaint is wholly unarguable at this present stage.”

6 The same applies to the constitutional complaints, at
7 Section 6, 7, and/or 9, have been infringed:

8 “As freestanding complaints, these constitutional arguments seem extremely
9 dubious. But, in my judgement, Mr Johnson was correct to contend the
10 constitutional rights are engaged by the Summons. This merely means that there
11 is a potential conflict between the issue of the Summons and the recipient’s
12 constitutional rights, so that the legality of the Summons must be assessed against
13 this legal backdrop. At this stage, however, it seems improbable, indeed, that any
14 such potential conflicts as do arise in relations to Sections 7 and 9 will be shown
15 to be constitutionally impermissible, having regard to the array of potentially
16 justifying public- interest considerations upon which the Commission of Inquiry
17 will be able to rely.

18 “The most arguable point appears to me, at this stage, to be the following ground
19 of complaint which engages common law fair hearing rights, ultimately protected
20 by Section 6-8 of the Constitution.”

21 The Summons was unlawful because it required
22 BECL Trocan to appear at time when the Commission was not sitting. The
23 Summons required the production of documents at a hearing at which only one
24 Commissioner was present. Was that a lawful hearing?

25 And, I’m going to pause here because that was the
26 main point and, again, was the point repeated by the Chief Justice last Thursday,

1 as being the one substantive point that was outstanding in relation to that
2 subpoena that had been issued. At that time, the procedural rules of the
3 Commission had not been issued and the Chief Justice goes on to state as to:
4 “The Commission of Inquiry has yet to publish procedural rules to explain to the
5 recipient of Summonses what its quorum procedures are. It is arguable that the
6 Commission of Inquiry has no power to fix a special quorum for different
7 categories of meetings because that power is vested in the Governor/Premier
8 alone, under Section 1.1 of The Act, as Mr Johnson pointed out.”

9 At paragraph 33

10 “These complaints are both technical and of practical importance for the further
11 conduct of the Commission of Inquiry’s work, this Court, having decided that the
12 Commission is lawfully established.”

13 So, our submission to the Commissioners is that the specific subpoena that was
14 issued that is the subject matter of the judicial review, is ring-fenced, which is
15 why the Chief Justice, in the hearing last Thursday, made the suggestion:

16 “I don’t see why you cannot issue another subpoena, given that the
17 Commissioners are sitting, all four of them.”

18 My Friend says you must construe, in a most technical way, the...

19

20 **MR CHAIRMAN**

21 Q Can I just make a note of that? You say you understood the Chief
22 Justice’s suggestion of issuing a new subpoena arose from the fact that there are
23 our Commissioners sitting at the moment. He said:

24 “The only point really arguable in the previous proceedings is whether the
25 subpoena could be returnable before one Commissioner.”

26 And the Chief Justice was saying:

1 “Well, you’ve got four Commissioners; you can issue a new subpoena and then
2 that point will disappear.”

3 Is that what he said?

4 A It’s not that the point will disappear because My Friend is still free
5 to proceed with his judicial review on these original
6 subpoenas.

7 Q Oh, I see. But the point would not arise in relation to a new
8 subpoena?

9 A That the point cannot arise in relation to a new subpoena because
10 the issue of whether the Premier, or the Governor could somehow delegate to the
11 Commissioners the power for the Commissioners themselves to delegate one
12 Commissioner to sit alone.

13 Q Thank you.

14 A And then, the other points of My Friend are equally
15 extraordinary in the context of a subpoena (duces tacum). We still use the Latin
16 expression, which is ‘a subpoena to bring along the documents’. Mr Duncan was
17 asked to bring documents. We understand that copies may well still lie with Mr
18 Duncan in his Office, in electronic form, which is how – I believe – we were able
19 to have so many copies around before. It may be appropriate, in due course, to
20 consider whether Mr Duncan can find out definitively whether those copies can
21 be obtained from his computers relating to this Company.

22 But, to deal finally with these other points raised by My Friend
23 of...

24 CHAIRMAN Before we move on... We’re, in fact, in new
25 territory here, in the sense that the basic Common Law rules assume that there are
26 original documents of which there may be copies, but they’re all physical

1 documents. What's the situation when the documents are held electronically, so
2 that any number of prints can be made? They're not strictly copies of anything,
3 they are, in themselves, prints of what is held electronically.

4 A It's an excellent question from the Chairman and, if I had thought
5 of it myself, I would have brought with me the relevant legislation which, in
6 Bermuda, allows records to be kept electronically and the keeper of the records is
7 able to certify that these are the records from our computer and that these copies
8 are as good as originals for that purpose.

9 I am not sure whether that's contained in The Evidence Act, or one
10 of the other Acts, but it does exist. I am quite comfortable in saying that; and I'm
11 sure My Friend will correct me if I'm wrong.

12 Q Well, the converse of that, if it applies, would mean that a
13 subpoena could be directed to the person who controls the computer, the
14 electronic version, and require him to produce a printed copy. Is that how it
15 would work?

16 A Well, no. Just by asking for copies of the documents, the fact –
17 and that is what the subpoena says, Sir, 'Not originals'; it actually asks for copies.
18 So, by directing that to the Registered Office to the management Company, they
19 would produce the documents as copies and it would only be if someone took the
20 point adverse, saying:

21 'Oh, well, this isn't the proper document; this doesn't reflect what it said, that the
22 keeper of the records would certify.'

23 Q Yes. If the request is for copies in the context, I suppose you
24 would say it could only mean a printout.

25 A Indeed, Sir.

26 Q It doesn't mean a photocopy of a printout?

1 A No, and even if it was a photocopy of a printout that, in itself,
2 would be sufficient unless there were questions as to the authenticity of the
3 document.

4 Q Yes, right. Yes, thank you.

5 A So, in relation to the concept of a subpoena to bring along
6 documents, the issue of relevance simply doesn't arise in the context of this form
7 of subpoena. Certainly, no tribunal can issue a subpoena, as My Friend describes
8 it, simply to go on a fishing expedition. But, equally, in response to that, it has
9 been made clear to the Bermuda Emissions Control Limited by correspondence
10 and by Affidavit, in the judicial review proceedings, why these documents are
11 required.

12 Mr Bradshaw, on behalf of the Commission, swore an Affidavit in
13 the judicial review proceedings, setting out the basis of the need for these
14 documents, with reference to the Auditor General's Report and how, in Section 3
15 of the Report, under the Section and Table, "Significant Contracts not Tendered",
16 Table 6 showed Transport Control making a payment of \$2,081,170 and, at the
17 further Table, Table 6.5, which is a reference to the previous table, it refers to
18 Bermuda Emissions Control Limited, \$2,081,170. And, this has been
19 emphasized, both in Mr Bradshaw's Affidavit and in the correspondence, that this
20 information that has been sought is required by the Commissioners to consider
21 before them having regard to their mandate from the Premier. And, My Friend
22 says, 'Well, your mandate is only how.'

23 To understand how, we need to know why. And, it is quite
24 astounding that, as regards to subpoenas for documents, that this is the only one
25 that has been contested despite, as you addressed, Mr Chairman, the fact that an

1 undertaking as regards confidentiality was expressly asked for and given to
2 Bermuda Emissions Control Limited as regards their commercial interest.

3 If there are other more sensitive interests, whether there is some
4 basis for the plea of refusal based on self-incrimination, so be it, but let it be said.

5 I think I've covered the points raised by Mr Johnson, Sir.
6

7 Q Yes. I think Mr Johnson was saying this. He said there was
8 subpoena number one, which went before the Supreme Court. The suggestion
9 was made that, as a result of that suggestion, we now have subpoena number two.
10 His submission, I think, is that subpoena two can't have any validity unless
11 subpoena one is formally discharged. What do you say about that?

12 A I find that there's no rational basis for that and neither is there any
13 authoritative basis for that. As a matter of practicality and common sense, there is
14 no basis because the Chief Justice is concerned to proceed with the technical issue
15 of whether the Commissioners can delegate, to one Commissioner, the power to
16 receive documents by way of subpoena. That matter will proceed if the applicant
17 wishes to advance that application but, for the meantime, a fresh subpoena that is
18 perfectly valid, is of effect. And, if My Friend wishes and wants to say that
19 argument has force:

20 (a) He would have firstly protected to the Chief Justice at the time. But,
21 (b) More importantly, he could proceed to obtain some Order from the Courts if
22 he thought the Commissioners did not have power to proceed on the second
23 subpoena.

24 So, I don't believe he will do that because I think he
25 knows he's will get short-shrift from the Courts in any such application.

1 Q The Chief Justice did say that the point would become academic,
2 the one against four – the delegation point – if the matter could be brought before
3 four Commissioners.

4 A If I could rephrase what you have just said to me, Mr Chairman?
5 The Chief Justice suggested that the matter could proceed before four
6 Commissioners on a new subpoena, but he certainly is prepared to deal with the
7 issue, as raised on the judicial review, that the Commissioners can delegate, or
8 not, their power to receive a subpoena to one Commissioner.

9 Q Yes. I see that, in his judgement... And, of course, this was after
10 the first hearing... Paragraph 34, the Judge/Chief Justice said, quote:

11 It is possible that these points may not have to be formally
12 determined by this Court because the Commission, in the interim, elects to adopt
13 procedural rules which make these points largely academic.

14 That's what I had in mind.

15 A Yes, I think, said overture. I think that the Chief Justice had in
16 mind some of the points would disappear i.e. contesting, as My Friend has, the
17 validity of a subpoena, before the Commissioners. But, I think, in relation to our
18 Application to lift the Stay, he formed the view that he would like to deal with
19 this issue of delegation, which isn't clear from the text books or the authority.

20 Q I see, yes.

21 A Although, as a matter of common sense, one would say:

22 Why would not one Commissioner simply be sitting there to
23 receive documents?

24 Q Yes. Yes, well, common sense doesn't seem to bear a large part in
25 that submission, or in that issue, but it has to be dealt with as a matter of Law.

26 A And I'm sure lawyers will enjoy the argument.

1 Q Yes. Just one more question on the same lines:
2 If the Commission orders the second subpoena to stand
3 independently of the first, would there be any need for...? The first subpoena
4 would have to stand for the purposes of the Court proceedings, but would there be
5 any need for that to stand for any other purpose? In other words, would you seek
6 to enforce that subpoena?

7 A No, I think, given the way the proceedings now are framed, I think
8 it would be a purely academic exercise to see whether Commissioners have power
9 and, once determined one way or the other, the matter having been dealt with
10 outside of the Court, vis a vis the documents, then no further...

11 Q But, that would be a matter for the Chief Justice, wouldn't it, not
12 for us?

13 A Yes.

14 Q Yes,

15 A Yes, indeed, Sir, yes. Yes, I mean, certainly, as Commissioners,
16 you would no longer want to pursue that subpoena.

17 Q Yes, let's just repeat that:

18 If the second subpoena takes effect, in other words, if Mr
19 Johnson's argument that it can't because the first hasn't been formally discharged
20 is wrong, then the second subpoena would take effect – apart from the need to go
21 back to the Chief Justice on the first subpoena, would there be any need to keep
22 the first subpoena in existence?

23 A No.

24 Q No. Thank you.

25 Yes, Mr Johnson, do you want to reply?
26

1 **MR JOHNSTON**

2 Yes. It's always difficult to take a judgement after a leave
3 application, and take it as if it's the definitive word on a subject. At a leave
4 application, the Court was dealing with, predominantly... The Chief Justice was
5 dealing predominantly with the question of the Commission of Inquiry's virus...
6 put it like that. And, on the question of the procedural rules, he dealt with it very
7 quickly, because that's what you're entitled to do as the Chief Justice.

8 To take the words in paragraphs 31 to 34 as a prescription
9 for how to behave is to misunderstand the Court process, with the greatest respect.
10 We have privy for the Chief Justice with one question and that is: Is our case
11 arguable? Should we get leave.

12 If it's arguable, we argue at the substantive hearing where
13 the format is put to the authorities and whatnot, and the preliminary views in this
14 judgement, which is unusual – to have a judgement at that stage – but the
15 preliminary views may very well be proved to be false.

16 So, I'm only cautioning the Commission to take the words
17 and the judgement as prescriptions, as definitive words, when the reality: They're
18 only preliminary views based on nothing but a very surface analysis of the issues.

19 But, be that as it may, I wish to remind the Commission of
20 what was actually ordered after that hearing – half the hearing. What was
21 challenged was the decision of the Commission to summon Bermuda Emissions
22 Control to appear before them on 29th August, 2016, and provide documents to
23 the Commission – a Summons dated the 22nd of August, 2016 – and was made on
24 the assumption that, made on the assumption that the earlier Summons was
25 formally discharged, the one to Mr Smith of the Company.

1 It's important to note that the earlier Summons was dated
2 the 16th of July/the 11th of July, sorry, the 11th of July, addressed to Mr Smith of
3 the Company, and it included the same poison-pill that came in every one, all the
4 others, that we appreciate that you may not feel able to validate this information,
5 so we enclose a subpoena.

6 So, the suggestion from Mr Elkinson, that there was
7 a voluntary request made to Mr Smith that was not complied with, is false. The
8 first thing this Commission did, with respect to BECL, was to issue a subpoena;
9 and that same subpoena has existed in its terms throughout. But, what the Court
10 ordered, after we challenged the decision to issue the subpoena, or to request the
11 documents, it ordered that the Summonses are Stayed, pursuant to RSC 53 3 10,
12 until final determination of BECL's application for judicial review, or until
13 further Order of this Court. That's an Order dated the 7th of September, 2016,
14 paragraph 4.

15 So, when you see it just like that, about in the
16 context with what the Court actually ordered, he was stopping this Commission
17 from requesting documents from anybody, with effect to BECL, until the Court
18 said otherwise, which was the reason why your counsel marched into Court and
19 saw a listing of that Stay. The Chief Justice was not persuaded by those
20 arguments, was not persuaded that the only issue was that you sit with four
21 people, otherwise he would have discharged the Stay. He recognized that there
22 were broader issues of public importance, and otherwise, that had to be
23 determined at a full judicial review hearing. We canvassed the idea of expediting
24 those proceedings so a definitive view could be reached. Your counsel did not
25 take up that offer, instead decided to do an end-run around the Supreme Court by

1 whether it would discharge the earlier subpoena, whether it would issue a
2 subpoena which is true in its form and effect, knowing its form and effect, under
3 the new rules.

4 But, what we have here is a copy, your signature, Sir, is electronic.
5 It's a copy, with the date changed. So, in effect, you're saying to the/you're
6 snubbing your nose at the Court and saying:

7 'Notwithstanding what arguments might be made against us about
8 issuing a subpoena, we'll issue another subpoena in the same terms and face the
9 consequences if we have to.'

10 Q You say the Chief Justice had in mind a different subpoena?

11 A A different subpoena, different scope.

12 Q Not for the same documents?

13 A Not the same documents.

14 Q Well, I don't...

15 A A limited scope of outside documents because the first three sets
16 of categories, categories of documents you see, the submission was made and you
17 have them, in the 200 pages in front of you.

18 Q The Chief Justice meant a second subpoena, seeking other
19 documents i.e. not those covered by the first subpoena?

20 A Yes, I'm actually being reminded about the hearing and I hate to
21 do this, because we don't have a transcript about the hearing where the
22 Commissioner can understand. It's almost wrong for us to assume what the Chief
23 Justice meant. We should go on the basis of what the Orders are and, on the basis
24 of the Orders, there's no accredited issue to sum/discipline.

1 Q Yes. Well, we start with your submission. Your submission is,
2 The Chief Justice made this suggestion, but you say he can't have had it in mind,
3 that it should be a new subpoena for the same document?

4 A Because it's unlawful; because it's completely contradictory to the
5 idea of having a Stay over the...

6 Q That's your submission.

7 A That is the submission.

8 If I could just address a few of the points Mr Elkinson raised
9 before I sit? There is the suggestion that the Commission's already done what it
10 has to be with respect to BECL. They've already told them why these documents
11 are needed; and there is a reference in Mr Bradshaw's Affidavit, in the Court
12 proceeding, as satisfying that purpose, of satisfying that aim. And, in those
13 Affidavits, there is a reference to Section 3 of the Auditor's Report, but I wish to
14 address the inconsistency with Mr Bradshaw's position in the Affidavits and what
15 was actually said in earlier stages of this Commission.

16 In your opening statement to this Commission, the Bermuda
17 Emissions Control contract was identified specifically as an additional matter,
18 which was only pulled in by virtue of Section 9, or paragraph 9, of "The Terms of
19 Reference". Your counsel reiterated that in their own statements so, to suggest
20 that the reason why we want the documents is because it's in Section 3 of the
21 Auditor's Report, meaning, paragraph 1 of your Terms of Reference, is at odds
22 with the position that is being taken by the Company when it redresses evidence
23 in the judicial review proceedings.

24 But, even though that's the case, our submission is more
25 wholesome than that. Our submission is: No matter what Mr Bradshaw said in
26 his Affidavit, it's not enough information/not enough to satisfy the test of the

1 particularity you need to address to compel a document. He has not said exactly
2 what this Commission seeks to do; he's not said why it wants it. He's simply
3 given a broad categorization/a broad request: Because we're looking into the
4 Emissions contract, give us everything we want, which does not satisfy him, that
5 we did that – we say.

6 What we are alive to, and we would have liked to have seen these
7 in the rules that are made about when you issue a subpoena, alive to is that
8 particular nuance between, like I said, the how question – and how I put it – the
9 why question. If you're addressing the why question, you should make it
10 exceedingly plain to the party that you're addressing the why question, and why
11 you're addressing that question, or what things you have in mind, or if a situation
12 you come across, so that the Company can address that, first voluntarily and then,
13 if necessary, by compulsion. So the test, we don't say it satisfies.

14 As far as the basis, the lack of a basis, for the suggestion that a
15 Summons extends, I started also by saying that you have the same powers as the
16 Supreme Court. The Supreme Court's powers are found in the Rules of the
17 Supreme Court, Order 38. Order 38-18, is a (pedantial) point says that:
18 “Once a Subpoena is issued, it continues that effect until the conclusion of the
19 trial at which the attendance of the witness is required.”

20 It's a practical rule to avoid the very situation we have found ourselves in today.

21 And then, the last point/the last point is this:
22 I served the suggestion from the/from you, Sir, that you can address a subpoena to
23 whoever holds the electronic documents. It could be somebody at Trocan
24 Management, somebody of lesser authority than Mr Duncan, who is a Company
25 Secretary. We advised, or cautioned, you about that, because the actual decision

1 to turn over Company documents is held by those with the managing-mind of the
2 Company.

3 There is authority for the proposition that, if a Subpoena is issued
4 to a set Company Secretary and the Company passes a Resolution saying that the
5 documents are no longer under the control of anybody but the Company directors,
6 or whoever it is, they cannot produce documents, notwithstanding. They can
7 come to him and say:

8 'I have a Resolution saying I don't have control of the documents, you can't
9 compel me'.

10 Leaving the responsibility for answering the subpoena, or the responsibilities for
11 not answering it, to the Company, and that's... So, it's very... I'm just cautioning.

12 Q Are you saying that's the situation here?

13 A And, that is the situation. The Company has given express
14 instructions to Mr Duncan not to provide the documents and, if he was to do so,
15 we will sue him.

16 Q Now, is there any evidence of that?

17 A Yes, there... well, as a matter of fact, there's a person letter
18 between ourselves and Mr Duncan; but he's told you on the record that we've
19 threatened suit.

20 Q No, is there any evidence?

21 A That we've told him?

22 Q That the Company has instructed Mr Delroy Duncan not...

23 A Yes, it is, from the very earliest of these matters... Before the 29th,
24 or, before the 29th of August.

25 Q Well, can you just tell us where we found it?

1 A Well, you won't find that in anything in front of you. It's a matter
2 between ourselves and Mr Duncan. He can either confirm it, or you can't but it's
3 quite clear in the record, and that's the basis for us saying and him saying to you,
4 I'm between a rock and a hard place. If I don't produce the documents, I could be
5 taken for contempt of Court. If I do produce the documents, I will be sued... And
6 I'm confirming that.

7 Q No, but has there been a Resolution of the Company, or of the
8 directors?

9 A The suggestion was made/was made by the Company that a
10 Resolution be drawn. This is the difficulty, and I'll put it slow... I'll go softly
11 with this:

12 The suggestion was made that the Resolution be drawn, the
13 decision made, but the people responsible for drawing up Resolutions just
14 happens to be the Company Secretary, which is under threat.

15 Q Mmm hmm.

16 A So, the Resolution has not appeared to the Company, but clear
17 directions have been given that it be done so... and that was as early as 28th of
18 July/28th off August, 2016. So, Mr Duncan really does not have the authority to
19 produce the documents, not in the Company's mind.

20 Q Well, I'm not following that. You say... ?

21 A The Company has taken the view and advised the Secretary. The
22 directors have taken the view, had a meeting and advised the Secretary that he has
23 no power to turn over the documents. In other words, if there's to be any
24 consequences, the Company will face them alone. The Secretary doesn't have to
25 have anything to do with it.

1 Q The directors have advised Secretary not to release documents, that
2 the Secretary has not yet drawn up the Resolution?

3 A And the reason why that's so, appears obvious because, if the
4 Resolution is drawn, the position of being between a rock and a hard place is
5 exacerbated. So, I understand it, but the Company has taken a very definitive
6 view that the document should not be produced by Mr Duncan which is why we
7 say they're not produced and why, on the first statement he returned, when the
8 ducks were put on the table, they were taken off the table by the Company's
9 directors.

10 Q Yes. The second subpoena is directed to whom?

11 A To Trocan Management – the second paper. I'm not here to
12 accept.

13

14 MR ELKINSON To the Company, Sir, to the Company.

15 CHAIRMAN It's addressed to the Company.

16 MR JOHNSON To the Company, yes.

17

18 **BY MR CHAIRMAN**

19 Q And, so, your submission would mean that the Order would only
20 be made against the Company, not against Mr... ?

21 A Mr Duncan.

22 Q Delroy Duncan? Yes.

23 A That's right. So, the consequences of that can be addressed in the
24 Court, if it has to be, in the accordance of time, by the Company and not with the
25 Secretary, who has no authority.

26 Q Yes. Good. Mr Duncan, do you want to say any more?

1 **MR DUNCAN**

2 Yes, perhaps I could just explain. On the first case on, I think the
3 28th of August, I can't remember exactly what date it was when I appeared before
4 Mr Bradshaw, sitting as a single member of a Commission; Mr Adamson was
5 counsel of the Commission. I placed the documents in the centre of the table and
6 they were taken by a director. So I... I think Mr Adamson will confirm that I did,
7 in fact, comply with the requirement of *Duces Tecum*, because I have been
8 requested to produce Resolutions to the effect that the Company no longer
9 authorizes me to produce the documents. I've tried to resist that and, each
10 occasion on which I've tried to resist that, I've been threatened with suit, either by
11 Mr Smith, Mr Madeiros, and now you've heard it officially through counsel, so, I
12 mean, I'm in a hopeless position, really, and, I mean, the best I can do is to just
13 take my hands off it; but I can tell you that the Company is not happy that the
14 Resolution has not been passed, but I just don't want to touch this. That's the
15 position I'm in right now.

16

17 **BY MR CHAIRMAN (Q) addressing Mr Duncan (A)**

18 Q Just one thing on the technicalities of this. These documents/so-
19 called documents are recorded electronically in your Office, is that right?

20 A I'm not sure. I think a number of them are, but the actual
21 Corporate Secretary, she may have had to contact... I'm not sure whether she
22 contacted Appleby's, because the Company was somewhere else before... I'm not
23 sure exactly where the all are. Some of them are, but not all of them may be, so,
24 I'd have to confirm that but, what took place was that before the first production
25 of the documents, quite a bit of work was done to collate them and put them in the

1 form that was produced at the Commission and put in the centre of the table. So,
2 I cannot tell you whether they are all electronically recorded. I don't know that.

3 Q But, if they are not recorded electronically in your Office, they
4 must be held somewhere else, if they exist at all?

5 A Yes, yeah, they would be.

6 Q And, where would that be?

7 A I don't know. That's what I'm saying. I didn't actually...
8 Somebody in my Office produced them. I took the binder, complied with the
9 subpoena and put them in the middle of the table.

10 Q They may be held somewhere else?

11 A That's correct.

12 Q Yeah.

13 MR JOHN BARRITT Are those the documents that are
14 held by Attride-Stirling and Woloniecki?

15 MR JOHNSON Yes. In fact, to be clear about that, the Court
16 ordered that the documents be submitted to Court and, at the last hearing on
17 Thursday, we all assumed/proceeded on the assumptions these documents were in
18 Court, right here, with Mr Attride-Stirling was, in this-here box.

19 But, the matter was raised with the Chief Justice
20 that, if we're to comply with a subpoena – if it's going to be discharged in
21 compliance with a subpoena – then, obviously, we need those documents back.
22 Obviously, you have to make a more wholesome Order than what you've made;
23 and his response to us was:
24 'I'll have to think about that, look at the file, issue a fresh Summons in both
25 directions to expedite and, potentially, to take the document out of Court because
26 we are live to the view that some of the issues might very well be academic and

1 the Summons, if it's discharged formally, we might find some light at the end of
2 the tunnel but, unless we do that, we're in a bit of a bind.'

3 CHAIRMAN Thank you. Mr Elkinson?

4 MR ELKINSON Yes, I have...

5 CHAIRMAN You want to say something? Yes,.

6 MR ELKINSON Yes, just some factual points, Commissioners:

7 As regards what was actually ordered in the judicial review, as
8 opposed to My Friend just glossed, making it appear that the judicial review
9 ruling is some sort of gloss on what the Chief Justice was thinking, It is
10 summarized at paragraphs 37, 38, and 39:

11 "And, importantly, as regards to the subpoena under discussion..."

12 The reason that the Chief Justice, I think, would have emphasized again on
13 Thursday, how the it would continue to proceed, in the last two sentences:

14 "Commissions of Inquiry are a rare occurrence in Bermuda. The procedural
15 challenges, which have been made, raise questions of public importance in a non-
16 developed area of Bermudian Law."

17 And, for assistance to the tribunal, given that it has been doubted as to what
18 exactly the Chief Justice said in the implications, whilst normally, I would not
19 necessarily refer to the Royal Gazette as authoritative as to what has been
20 determined anywhere, the Chief Justice's Ruling is recorded in Saturday's edition.

21 And, just reading one paragraph of the newspaper: "Mr Kawaley said..."

22 CHAIRMAN I'm sorry, I'm going to stop you.

23 MR ELKINSON Sir..

24 CHAIRMAN We've got the Chief Justice's judgement.

25 MR ELKINSON Yes, of the previous hearing, the 7th of September.

26 MS FIONA LUCK In the previous hearing.

1 CHAIRMAN Oh, I see. The only recording you've got of the 7th is...

2 MR ELKINSON Of last Thursday.

3 CHAIRMAN Yes, right.

4 MR ELKINSON When we appeared before the Chief Justice on the 6th of
5 October... And, it appears in a couple of places in the article:

6 "Mr Kawaley", the Chief Justice, the Reporter is referring to,
7 "suggested the matter could be resolved by the issuance of the new subpoena,
8 requiring BECL to show its documents to all four Commissioners, which the
9 Commission enacted the following day."

10 So, certainly, the Reporter heard what we have submitted to the Commissioners.

11 And, just finally, it does appear, from what Mr Johnson says, that
12 it's accepted that there is now a new subpoena, served on the Company and that
13 the Company will not – regardless of what this body will decide today, if it does
14 decide that the Subpoena is valid and has effect – will not produce. That does
15 seem like an extreme contempt and, I'm sure Mr Johnson has his find of the
16 consequences of that, and as against the Company. Certainly, as regards Mr
17 Duncan, we take no issue that he is, indeed, in a terrible position, he has firm
18 offers of management-company service, and this is effectively abusing both him
19 and that management-service in their role that they provide.

20

21 CHAIRMAN

22 Well, the one question I wanted to raise you with it:
23 Paragraph 4 of the Judgement of the Chief Justice says, in terms, that Mr Justice
24 Helman in fact, rather than the Chief Justice, had ordered BECL to deliver the
25 documents sought, forthwith to the Court until – 0under-seal – to be held until the

1 determination of the injunction application, or until further... Now, did the Chief
2 Justice vary that Order?

3 MR ELKINSON No, he did not.

4 CHAIRMAN Therefore, I'm wondering how we can make an Order for
5 the documents to be produced without it going back to the Court?

6 MR ELKINSON Because there are documents in various locations at the
7 moment. There is copies at ASW; there is copies in the Court; and there are
8 electronic copies within the Company by virtue of the management of Trocan;
9 and we say we simply want the ones from Trocan.

10 As envisaged by the Chief Justice, because it's to be remembered
11 that the application last Thursday was to lift that very Stay; and the Chief Justice,
12 as emphasized by paragraph 39 in his prior ruling, wants the matter ring-fenced,
13 so he can deal with the matter by way of it being in one of public importance
14 regarding how Commissions of Inquiry should deal with future subpoenas.

15 Q Yes. Good. Well, we'll consider...

16 MR JOHNSON I'm sorry, Mr Chairman.

17 CHAIRMAN Oh.

18 MR JOHNSTON I'm sorry, Mr Chairman... Out of this... this is a
19 document...

20 CHAIRMAN What is this?

21 MR JOHNSON This is the Order from the 7th, because it's very important
22 that you have it. I don't know if you've seen it, but it's...

23 CHAIRMAN And that was the Order of Mr Justice Helman?

24 MR JOHNSON That's the Order... And, none of that is... This is Mr
25 Justice Kawaley, on the 7th... None of that Order's been varied.

26 CHAIRMAN It's dated 7th September, signed by the CJ.

- 1 MR JOHNSON And that's the Order that records what the Chief Justice
2 actually decided in their Judgement. The Judgement is simply the elaboration and
3 sometimes...
- 4 CHAIRMAN Well, there is no express referenced here to the documents
5 being held meanwhile.
- 6 MR JOHNSON Oh, that's because of the previous Order for the...
- 7 CHAIRMAN Yes, and paragraph 6 says that all previous Orders of this
8 Court...
- 9 MR JOHNSON Are affirmed, yes.
- 10 CHAIRMAN ... are affirmed. That's what you will know. Is there a
11 copy of this document?
- 12 MR JOHNSON You can have that document.
- 13 CHAIRMAN Well, it's the original.
- 14 MR JOHNSON Yeah, counsel should have it, I don't know.
- 15 CHAIRMAN Yes. Well, I'm happy about having originals. I think, let
16 me give this to Mr Elkinson for him to, perhaps, have a copy.
- 17 MR JOHNSON Yes. You should have it already, but if he doesn't, okay.
- 18 MR ELKINSON Thank you. No, it was never served on, so, I haven't seen
19 this before.
- 20 CHAIRMAN I see. Good. Well, we'll take a few moments to –
21 in fact, we'
22
- 23 **(11:42:42 Recess break taken) (12:43:48 Recess break ended)**
- 24
- 25 CLERK Ladies and gentlemen, the Commission will resume
26 now. Please take your seats, thank you.

1 **CHAIRMAN** I'm sorry that we've kept you rather longer than
2 anticipated, but I am able to give a ruling, which is the ruling of all four
3 Commissioners.

4 A Summons was issued by the Commission on
5 the 7th of October, addressed to Bermuda Emissions Control Limited, a Bermuda
6 Hamilton Company, and marked quote:

7 'FAO/For the Attention of Mr Delroy Duncan,
8 Trocan Management Limited.'

9 The Summon required the Company to attend here
10 this morning in order to/and to produce four categories of Company records that
11 are described in it. Production was required here at 10:00 o'clock this morning.

12 Mr Johnson, of counsel, and Mrs Johnson, have
13 appeared for the Company. Mr Delroy Duncan has appeared in person. I will say
14 no more, until the end of this ruling, about Mr Delroy Duncan's personal position.

15 On behalf of the Company, Mr Johnson objected to
16 the validity of the Summons under rule 8 of the Commission's rules of procedure.
17 That rule requires the objection to be made in writing to the Chairman, who will
18 determine whether or not to revoke or vary the Subpoena on the ground put
19 forward.

20 In fact, the objection was not made in writing and
21 that was on the ground that we were told the Summons was not seen by Mr
22 Duncan, or on behalf of the Company, until yesterday afternoon. In those
23 circumstances, Mr Johnson has made the objection orally today, and it was
24 agreed/expressly agreed by him, and by counsel for the Commission, that all four
25 members of the Commission being present, the ruling should be made by them as
26 a body. I should give something of the background:

1 seal until the determination of the injunction application, or until further Order of
2 this Court.

3 End of the quote.

4 The Chief Justice's Order upheld that/or, affirmed
5 that former Order made by Mr Justice Helman. That Order clearly was made on
6 the basis that what was called, quote: The documents sought, unquote, would be
7 and were, at the time of the Chief Justice's Judgement, being held by the Court
8 under seal. And that was subject to any further Order by the Court.

9 Now, we do not consider that it would be
10 appropriate for the Commission to attempt, or to appear to bypass that Order by
11 requiring the Company to make further hard copies of documents which may be
12 held electronically by Trocan, or by Mr Duncan, on its behalf. Therefore, whilst
13 we consider that the first objection should be dismissed, we feel unable to compel
14 production of the documents without leave from the Court, as Mr Justice
15 Helman's Order requires. Matters further complicated, because we are told that,
16 quote: The documents, unquote, meaning, physical copies of documents which
17 are stored electronically with Trocan, or, maybe elsewhere, are held by Mr
18 Woloniecki, of counsel, pursuant to an agreement made between counsel in the
19 course of the former proceedings.

20 It's not necessary for us to resolve that issue today.
21 It will be a matter for the Court. And so, in conclusion, we reject the claims made
22 under rule 8, sub-rule 4 of the Commission's rules. We order production of the
23 documents specified in what I've call the new, or the third Summons, subject to
24 obtaining leave from the Court, pursuant to the Order of Mr Justice Helman.

25 We further direct that the application to the Court
26 be made forthwith. We appreciate the difficulties caused by the pending

1 Hurricane. The Commission, meaning all four members, will be able to receive
2 the documents at 2:00 pm on Friday, the 14th of October – that's 2:00 pm this
3 week – and requires the parties to use their best endeavor to obtain the Court's
4 ruling before that time.

5 If there are any further Submissions on the practical
6 aspects of what I've just said, we will, of course, hear them now.

7 Finally, with regard to Mr Delroy Duncan, all we
8 propose to say is that the Summons in question, and the Order we have made, was
9 issued against – and the Order is made against – a Company, not against Trocan,
10 or against him personally. If, as we understand, he has a role as the director of the
11 Company, he may be indirectly involved; but we say no more than that.

12

13 MR JOHNSON Mr Chairman, one practical concern that arises from
14 what I call the active part of the Order, which is that the parties should forfeit/go
15 to the Court and get an Order. The difficulty we have of this side is, to be plain,
16 we don't know what Rule, or what power, the Commission is using to direct us to
17 do such a thing.

18 CHAIRMAN Mm hmm.

19 MR JOHNSON And it's important that we know because if the
20 Commission makes an Order, it expects to be backed by some consequence, and
21 we're trying to figure out what rule you're using to tell us to do something, almost
22 in the form of a mandatory injunction, almost a mandatory Order.

23 Are you asking us to go into make an Order against
24 ourselves in the judicial review proceedings, with the greatest of respect, and I'm
25 just trying to determine what authority you would have to Order us to do that?

1 MR ELKINSON I, for one, have no difficulty with the Order of the
2 Commissioners. We always – a litigant party to proceedings – always has the
3 right to make an application to the Court in the course of ongoing proceedings.
4 We would issue an urgent Summons, seeking a return date on the basis, as the
5 Commissioners have just set out, prior to that designated time and, hopefully,
6 obtain the appropriate Order. If Mr Johnson wants to object to short notice, well,
7 that's his prerogative. But we understand the Commissioners' ruling and will act
8 accordingly.

9 MR JOHNSON I'm sorry, I'm sorry. My concerns are more
10 important than that. It's not a question of whether or not the Commission can file
11 its own Summons and go to Court. There's also a second part that we're meeting
12 again at 2:00 pm on the 14th. The difficulty is most of the active part of that
13 decision is not in your hands/in the hands of the Court. If the Court says to us, I
14 can't hear you before the 14th – take that as a hypothetical – and we're trying to
15 determine what is the consequence of that. And the only way to determine the
16 consequence is to know what authority of power you have.

17 CHAIRMAN Understandably, Mr Johnson, you've not seen a
18 written version of this ruling. Our Order is that the documents be produced, but
19 that is subject to obtaining leave from the Court, pursuant to Mr Justice Helman's
20 Order. What followed was addressing a practical difficulty because your clients
21 are taking the point that there have to be four Commissioners present, not just
22 one.

23 We are here this week, but not on present plans
24 beyond that. Therefore, what we have said is that we will be available to receive
25 them at 2:00 pm on Friday, the 14th of October. What we do direct – if you object
26 to a formal direction, it can be an informal direction – require the parties to use

1 their best endeavours to obtain the Court's ruling before that time. If the Court
2 rules in favour of releasing the documents, then there's no problem. If it rules
3 against it, there will be no problem. I would have thought that your clients were
4 at least capable, given the current Hurricane and other difficulties, were at least
5 capable of what we've said is using their best endeavours to getting this matter
6 sorted out before the Court by Friday.

7 MR JOHNSON It's possible. I was just wondering whether or not
8 that was a compulsive power you were using, or whether you were simply asking
9 us to do what we can to make sure.

10 CHAIRMAN It wasn't expressed as an Order.

11 MR JOHNSON Thank you.

12 CHAIRMAN It expressed a hope that your clients will be
13 prepared to cooperate and use their best endeavours. If that's a fall on hope, so be
14 it.

15 MR JOHNSON In those circumstances, yes, thank you.

16 CHAIRMAN Any other practical difficulties that you see in this?

17 MR ELKINSON No, none that we can see at this moment, Sir.

18 Thank you.

19 CHAIRMAN Yeah. And I've made plain opposition with regard
20 to Mr Duncan. The Order is against the Company, not against him, or Trocan.

21 Good. Well, we adjourn now until – it's exactly
22 1:00 pm – until 2:00 o'clock.

23

24 **(01:00:03 Lunch break taken) (02:03:01 Lunch break ended)**

25

1 CLERK Good afternoon, everyone. Would you please make
2 sure that any cellular devices are switched to off or to vibrate. We are just about
3 to start.

4

5 **MR JEROME LYNCH, QC** Good afternoon, Sir. I have a short
6 application to start with, in respect of the subpoena issued for Allan DeSilva. I
7 have foreshadowed this. There are three grounds upon which we seek for you to
8 set aside this subpoena at this time.

9 Firstly this: Daniel Lemoigne was the Project
10 Manager of the project which has been described as the Port Royal Golf Course
11 Project. That is the matter upon which you seek to have Mr DeSilva questioned
12 by your counsel. He, we have come to understand, was contacted by lawyers,
13 instructed on behalf of the Attorney-General of Bermuda, with a view to
14 providing evidence and material for this Inquiry. I'm not quite sure how that has
15 happened, but we are in possession of a list of questions which seem right on
16 point, of 25 questions that he was asked to provide. The document I have is dated
17 the 3rd of August. He was contacted by e-mail, we understand, on the 7th of July,
18 and arrangements were being made for him to be seen by those lawyers.

19 We have not been told of any of this, and it is only
20 by Securitas route that we've come to find out. Given that he was the Project
21 Manager of this particular project, it seemed to us that this was a matter that was
22 highly pertinent and that, if material was gained as a result of these inquiries, we
23 ought to have it. So, I have no idea whether you do, Sir, or what the outcome has
24 been, or, where we are in respect of that?

1 CHAIRMAN No. Well, I can say, on behalf of the four
2 Commissioners, straight away, we have no knowledge of that approach and we
3 haven't authorized it.

4 MR LYNCH Well, it's an extraordinary thing in that
5 circumstance.

6 CHAIRMAN I could ask our Clerk whether...

7 MR BARRITT Would you say the letter was said they were writing
8 on behalf of the Commission?

9 MR LYNCH I have, in my possession, a private e-mail from Mr
10 Lemoigne, setting out the circumstances in which he came to be spoken to by two
11 lawyers from a law firm appointed by, he thought, the Attorney-General. The
12 firm is called Couley. I suspect they were probably London-based, or maybe
13 France-based, as he lives in France.

14 And attempts were made to speak to him and,
15 indeed, they did speak to him for 45 minutes. One imagines notes were taken and
16 some information gained. Subsequent to that, a document has been passed to me
17 dated the 3rd of August, 2016, with 25 separate questions that they wanted him to
18 address. I have no idea whether or not he did address those. We haven't been
19 able to ascertain that, but, it may be that somebody is in possession of this
20 material. If they are, even if it's not you, we ought to be. I know not whether
21 your counsel have been able to obtain... ?

22 CHAIRMAN No. Well I can say, categorically and publicly, the
23 Commission, meaning the Commissioners, and our Clerk and Staff have no idea
24 about this approach; know nothing at all about it; and we certainly don't have any
25 answers.

1 MR LYNCH Well, I'm grateful for that information, but it leads
2 me to believe that the people, therefore, who are carrying out that inquiry, are part
3 of the Police inquiry that is being carried out in respect of Dr Ewart Brown. Now,
4 if that is the case, and it coincides with this period that you're investigating and
5 one of the very matters you're investigating, I once again invite you, Sir, to
6 consider subpoenaing the Police Commissioner as to the material that he might
7 have in his possession.

8 I am concerned, as you will understand on behalf of
9 my clients, that they might not expose themselves unnecessarily to risk when
10 there is material that may be in the hands of the authorities' state here, which we
11 are not privy to and which may be party/may be part of an ongoing investigation
12 and, given what, Sir, you've said just now, it would appear that, if it hasn't come
13 from you, it's clearly come from somebody associated with this Inquiry.

14 For my part, I have no difficulty with you seeing the
15 25 questions that we've been provided with.

16 CHAIRMAN No, I think the less we see of that, the better.

17 MR LYNCH Maybe. It may be that you would not wish to allow
18 it. I understand that; but it is a matter of concern, as you will understand, and it's
19 something I foreshadowed, now ten days ago or so.

20 CHAIRMAN Yes, well, putting that another way, if I may, this
21 raises the question of: How do we proceed with the instructions we've been given
22 to look into certain matters, if there is, or may be, a concurrent Police
23 investigation?

24 MR LYNCH Mmm.

25 CHAIRMAN At the moment, we don't see any reason why that
26 should require us not to make the investigation we've been asked to make.

1 Secondly, in order for it to seem right to us to contemplate interrogating the
2 Police, or asking them, what evidence they've got, that's an entirely separate
3 matter.

4 MR LYNCH Well, can I say this?

5 CHAIRMAN But this is not a ruling on what you've just said.

6 MR LYNCH No, I appreciate that.

7 CHAIRMAN But, it's a statement:

8 a) this question has already arisen and,

9 b) that's the position we've adopted on it.

10 MR LYNCH Our submission is straightforward. Before you
11 consider whether to either issue a subpoena, or withdraw it in the circumstances
12 we are now in, it seems to us important that you should have, in your possession,
13 such information as might be available for you to determine whether it would be
14 right and proper, bearing in mind any individual's rights to privilege that exists if
15 such an inquiry is being made. And I have no idea, and neither do you, Sir,
16 whether the inquiry that's currently being carried out, who it actually involves.
17 We know, certainly, that Dr Brown is the focus of that inquiry but, whether that
18 involves – and necessarily would evolve – potential co-defendants as part of the
19 overall investigation – it is our submission that, in the absence of having any
20 information at all about where we are with that, it would be wrong to compel
21 anyone to give evidence in those circumstances.

22 CHAIRMAN I don't want my silence to be taken as assent to your
23 proposition...

24 MR LYNCH And I don't, for a moment.

25 CHAIRMAN ... that we know what the Police have, or what's
26 going on. We don't.

- 1 MR LYNCH No.
- 2 CHAIRMAN As I said to you the other day, we do know, or do
3 understand from the Police in response to an inquiry we made, that certain
4 transactions are, or may be, or have been, under Police investigation. That's all
5 we know.
- 6 MR LYNCH Yes, but when I asked you last time whether you'd
7 reveal that, you said no, so I'm not going to ask you again.
- 8 CHAIRMAN I won't go further than that.
- 9 MR LYNCH No, I understand.
- 10 CHAIRMAN And the other thing is you mentioned Dr Brown as
11 being the principal object. We don't know that.
- 12 MR LYNCH Well, we do. And it is generally public knowledge
13 because the Commissioner of Police has made it public knowledge that he is the
14 focus of an investigation into these matters.
- 15 CHAIRMAN I see, mmm. Yes.
- 16 MR LYNCH And, indeed, responded to a...
- 17 CHAIRMAN Yeah, but we are in this position. We have a duty to
18 inquire into certain matters.
- 19 MR LYNCH Yes.
- 20 CHAIRMAN The question is whether our duty is changed by the
21 fact that there is, or may be, a current Police investigation and our view, as you
22 know, and seek to change our view, if you like, but our view is that that doesn't
23 release us from our obligation.
- 24 MR LYNCH No, and I'm not suggesting it should and you'll
25 have noted the fact that I have not made an application at any stage, or invited the
26 Commission, either in writing or orally to, as it were, bring their investigation to

1 an end or, at least, suspended for any period of time; and I've not sought to do
2 that.

3 CHAIRMAN Yes. No, well, that's most helpful, if I may say so;
4 responsible of you as well.

5 MR LYNCH But the position must be this: There's a distinction
6 between your duty and obligation to investigate as you are required so to do, as
7 opposed to the individual's right to be safe-guarded against potential privilege.

8 CHAIRMAN Yes. But, again, our position as already stated, but
9 please say if you think we should change it, is that of course any witness before
10 the tribunal would be granted the full privilege that is available to any witness
11 who appears in Court. That is a matter for the witness, not for us and, therefore,
12 we find difficulty in saying that we're going to excuse a particular witness from
13 answering questions because we think he might be entitled to obtain privilege
14 that's for him.

15 MR LYNCH Well, the difficulty with that approach, if I may say
16 so, is this: Is that, first of all you're privy to information, he is not. You know
17 which particular projects are being investigated by the Police, even if you don't
18 know every person that is currently being investigated.

19 CHAIRMAN Just a moment. Sorry, that's not quite right. We
20 asked about certain specific projects and we were told, yes, they are, or have been
21 subject to Police investigation. We didn't go further than that. We don't know
22 any more than that.

23 MR LYCH Well, if that's the position, then it places you in an
24 even more invidious a situation because your situation is you can't even exercise
25 what I would submit is your duty to safe-guard the individuals' rights as they
26 currently stand under the Constitution because you're not able to say whether this

1 is one of those particular projects that's being investigated and, therefore, I warn
2 you now, this is an investigation that's being carried out by the Police and it's a
3 matter for you to seek to evoke your right to privilege if you so choose.

4 CHAIRMAN But, that's why we come back to the point I made.
5 We will give every witness the full right to claim privilege but, as we understand
6 it, it is a privilege for the witness to claim. It is not the tribunal's duty to, so-to-
7 speak, impose it upon him.

8 MR LNCH Well, it's not a question of imposition, with respect,
9 you're the one who's issuing the subpoena. It's one thing to invite a person to
10 give evidence and then he could seek to claim privilege, if he so chooses. It's
11 quite a different matter to force someone into the witness box and then to proceed
12 to ask them questions in the circumstances that we have here because he does not
13 know whether it is right or not to claim privilege for any question that might be
14 asked of him, save the obvious name and address, because he's in a difficult
15 ignorant position.

16 CHAIRMAN Nor can we know, before we've asked our
17 questions, nor can we know whether he might or might not be entitled, or feel
18 able to claim privilege.

19 MR LYNCH Well, the problem we have is this, isn't it? It is that,
20 on the face of it there is some information to suggest that there is a collateral
21 inquiry/investigation which clearly involves this particular project, if what we
22 have received is correct, if the information we have is correct. We see no reason
23 to think it could be anything other than that.

24 Against that background, he has been subpoenaed
25 with a series of questions which you set out in that subpoena, which makes clear
26 what it is that you're interested in and those questions, as you will appreciate, are

1 fairly pointed. When one asks the question, what discussions and/or
2 communications, if any, did you...

3 CHAIRMAN Can I just interrupt. We have not, so far, read out in
4 open Court, the terms of any subpoena, or disputed subpoena. Of course, you're
5 most welcome to, at liberty to, but we don't require you to read them out.

6 MR LYNCH Well, I mean, I don't have any difficulty with
7 reading them out because they are part of the subpoena, as opposed to a letter
8 attached to the subpoena, unlike some of the others which, where there's been a
9 separate subpoena.

10 CHAIRMAN Yes.

11 MR LYNCH And then a series of questions in a separate
12 document. These are all contained within the subpoena and they are pointed
13 questions. I don't need to read them all, but you'll know yourself because you, no
14 doubt, had a hand in them. The position is that you're asking questions such as
15 the first one:

16 "What discussions and/or communications, if any, did you or anyone else
17 associated with the Company have with the Government Ministers prior to the
18 awarding of the contract by Trustees of the Port Royal Golf Course?"

19 Well, the implication of that very widely drafted question is that, if he did, that
20 might suggest some impropriety, either on his part, or on the part of the Minister.
21 If that is the position, then he is at risk if there is an ongoing inquiry which
22 suggests that that is what it is that they are looking at. And, against that
23 background, how can he possibly do anything but to invoke his right to privilege,
24 against a situation in which he is being potentially investigated and you, Sir, the
25 Commission, have taken a view that you are not going to subpoena the
26 Commissioner of Police, or, at least, to establish even the specific projects that are

1 being investigated; and who is being investigated; and on what grounds? What
2 counts? What sort of material are they looking at?

3 CHAIRMAN I think I can say this: That if you, on behalf of Mr
4 DeSilva, say:

5 'There is a question in respect of which he is entitled to and does claim privilege.'
6 Then maybe it's unnecessary for him to come into the witness box to claim it.
7 But, at the very least, it would be necessary for you, on his behalf, to claim the
8 privilege. But I understand you're not doing that?

9 MR LYNCH Well, I would wish to take instructions from him
10 against that background, in the light of what you've just said, and I would...

11 CHAIRMAN You may remember, in relation to another witness, I
12 did put the question to you. Are you saying that my client cannot answer any
13 questions on any of these topics because he will claim privilege, and you said that
14 would be a charade, and I agreed that we would obviously be sensible in trying to
15 avoid a charade.

16 MR LYNCH Yes.

17 CHAIRMAN But we are observing certain procedural rules and it
18 is for the witness to claim the privilege in question.

19 MR LYNCH Yes, well, if you're content for him to do that
20 through me, then...

21 CHAIRMAN I don't commit myself, but I say, if you were, we
22 could look at that situation.

23 MR LYNCH Well, his case is slightly different to the other
24 example because he is dealing with one project only and it's three areas that
25 you're looking at, which are defined in your subpoena. So, I would seek a few
26 minutes, if I may, with my client, to see where we are.

1 CHAIRMAN You'd like us to rise for a few minutes?
2 MR LYNCH Please?
3 CHAIRMAN Yes, well, we can do that, but I wanted to be plain:
4 I'm not making an offer, so-to-speak.
5 MR LYNCH No, no, I understand that.
6 CHAIRMAN But, if you do say that to us, we will be in different
7 territory and I don't say, for a moment, we will certainly agree.
8 MR LYNCH No, I follow that entirely.
9 CHAIRMAN But we may be able to work out something.
10 MR LYNCH May we have just a few minutes?
11 CHAIRMAN Yes.
12 MR LYNCH I think we only will require a few minutes.

13

14 **(Counsel/Client meeting break taken) (Counsel/Client meeting break ended)**

15

16 MR LYNCH Right, we're ready.
17 CHAIRMAN Yeah, okay.
18 MR LYNCH Through me Mr Allan DeSilva does claim his
19 privilege in respect of those matters set out in the subpoena that was served on
20 him on the 29th of August, and the basis of doing so, we submit, is that he is at a
21 distinct disadvantage in that he and his lawyers do not know to what extent a
22 parallel criminal investigation is being carried out and to what extent it involves
23 him. We gained that knowledge from what we've already set out by way of the
24 inquiries made of Mr Daniel Lemoigne who, after all, was the Project Manager.
25 We add to that the fact that the Commission has
26 made it clear that they do not propose to issue any kind of subpoena to the

1 Commissioner of Police to inquire further as to the extent to which some
2 information might be gained to be able to inform you, the Commission, and
3 through you, his lawyers, so that they can consider whether to invoke it against
4 the background of certain knowledge, as opposed to the doubt that we are
5 currently in.

6 We would wish to add to that two other matters in
7 brief, as providing support for our concerns as to the potential dangers that he
8 faces. One is this, is that it does have the appearance, the subpoena against Allan
9 DeSilva, as being a somewhat disingenuous approach to try to get the man who
10 digs the holes to give evidence when his brother, Zane, is the man who runs the
11 business. Everybody knows that in this country – runs the business – He is the
12 Deputy Chairman of the Board of Trustees and the Chair of the House Committee
13 at that Golf Course at the time that you are inquiring into and it has the
14 appearance, at least, of trying to get one of the brothers to give evidence which
15 might implicate not only himself, but his brother. That all has got to be seen
16 against the background that, when this case was opened to you on the first public
17 day of the hearing, that it was in relation to the Port Royal Golf Course, that
18 when certain facts were being laid before you, you found yourself saying that this
19 appeared to you to be straightforward fraud.

20 All of those are factors which we would submit
21 vitiate against this witness giving evidence, for fear that he is going to be
22 prejudiced by doing so.

23 Those are our submissions as to why that he should
24 claim his privilege. Of course, I don't withdraw the original application that I
25 make that the subpoena should be withdrawn, in which case, he would not need to

1 claim his privilege. But, if it is not to be withdrawn, then we would ask you, Sir,
2 for a ruling on that matter.

3 CHAIRMAN Yes. Forgive me for saying so, but you've
4 addressed us on a number of points, or supporting points.

5 MR LYNCH Yes.

6 CHAIRMAN But the essential question is whether, through you,
7 your client is claiming the privilege against self-incrimination.

8 MR LYNCH Yes.

9 CHAIRMAN ... In relation to each of the three questions asked in
10 the subpoena?

11 MR LYNCH Yes, yes.

12 CHAIRMAN Yes. And you would invite us to proceed on that
13 basis?

14 MR LYNCH That we would.

15 CHAIRMAN Yeah. Mr Elkinson?

16 MR ELKINSON Thank you, Mr Chairman.

17 Very briefly, the counsel for the Inquiry is here, not
18 just to make sure that rules of the Inquiry are fulfilled, but also that fundamental
19 rights are protected; and Mr Lynch has quite properly highlighted a fundamental
20 right of any person not to incriminate themselves as regards any criminal
21 offenses, and possible criminal offenses.

22 Though we would suggest that he's wrong to say
23 that it's your duty, somehow, to invoke that privilege for the witness, I think the
24 proper course has been taken which is that the witness was invoking the privilege
25 and we have no difficulty with it being given through counsel.

1 MR ELKINSON I would say that it is on instructions Mr Lynch is
2 giving this statement to the Commissioners. He is setting out the position of the
3 witness and, on that basis, I would have thought that the witness has asserted the
4 privilege; and that's the key point here: The witness is asserting a privilege and
5 the Tribunal is recognizing it.

6 CHAIRMAN Yes, thank you. Mr Lynch?

7 MR LYNCH The only thing I would want to say about that is that
8 the privilege, as described by My Friend, is not entirely accurate. The privilege
9 against self-incrimination does not mean an admission that I might have
10 committed an offence with a person. 'At Baed' means at all. And I want to make
11 that clear, this being a public forum, that there is absolutely no admission at all of
12 that happening and you, Sir, as a Judge over many years, will understand that
13 there are many cases at which you presided in the Court of Appeal, no doubt,
14 where you overturned convictions that were wrong in the first place. And, it is
15 the privilege to prevent anyone from exposing themselves to the risk of being
16 prosecuted. That is the privilege he invokes.

17 And we have, as I have indicated, and neither do
18 you, have any idea what the Police have, and that is the reason why he seeks to
19 invoke it.

20 CHAIRMAN Can I say, straight away? Your submission that it is
21 not, in any way an admission of guilt of any offence, is certainly correct. That's
22 why I asked Mr Elkinson to spell out the privilege, and you do take issue with the
23 way he put it?

24 MR LYNCH I do, yes.

25 CHAIRMAN Oh.

26 MR LYNCH I do take issue.

- 1 CHAIRMAN What's the issue?
- 2 MR LYNCH Well, the issue was that he says... The way he put it
3 was that it was... The self-incrimination against someone who may have
4 committed an offence.
- 5 MR ELKINSON No, possibility.
- 6 MR LYNCH Possibility of committing an offence. And, the
7 position is, that I want to make clear that isn't – as I understand it – the right self-
8 incrimination. The right to a self-incrimination is not to expose yourself to the
9 risk of being prosecuted as it holds to the possibility...
- 10 CHAIRMAN Well, this may be an acute point, and maybe we'll
11 have to contemplate Mr DeSilva claiming the privilege for himself in a proper
12 form; but the essence of the privilege is that answering – the witness asserts – that
13 answering the questions would expose him to the possibility of prosecution.
- 14 MR LYNCH Well...
- 15 CHAIRMAN That's as I understand it; and I think that's what Mr
16 Elkinson said.
- 17 MR LYNCH Well, he said 'the possibility of prosecution'. The
18 difficulty with that definition in the light of the fact that we don't have any of the
19 information of the Inquiry being conducted by the Police, is that we can't...
20 There's nothing to measure it against and, whereas, ordinarily if one were
21 provided with certain materials, whether it's criminal or a civil case, you would
22 be able to look at that material and make a judgement about whether or not
23 answering the question truthfully would, or would not, put you in that position.
- 24 In his situation, he has no idea whether the answer
25 to any of these questions may, or may not, because he says/would say, I've done
26 nothing wrong. The problem is that the Police, in carrying out their inquiries may

1 have information which we are wholly unaware of – and you are wholly unaware
2 of. It's against that background that he must, it seems to us, at least seek to
3 protect himself against the prospect – I'll use one inference – the possibility that
4 the Police are in possession of material which might contradict anything he says
5 and, therefore, expose him to the risk of...

6 CHAIRMAN I think we must pursue this. If you're accepting that
7 the privilege is against exposing oneself to the possibility of prosecution, then I
8 think we have reached a common ground.

9 MR LYNCH I'm not going to argue against that.

10 CHAIRMAN And your instructions go that far.

11 MR DESILVA Of course.

12 CHAIRMAN Yes, thank you.

13 It comes down to five words, I think. The
14 privileges against the possibility of prosecution.

15 MR LYNCH And they're wrong. Yes.

16 CHAIRMAN It's certainly no admission of guilt.

17 MR LYNCH It's certainly not an admission, that he may, or may
18 not, have committed an offence; on the contrary.

19 CHAIRMAN I'll just raise this, because it's right we should
20 explore these things. You've referred to the need to know what information the
21 Police have, what is the real risk of prosecution. I'm not sure that comes into it.
22 The witness claims the privilege because he doesn't want to expose himself to the
23 possibility of prosecution. I don't think that depends upon how much information
24 the Police may have at the moment, or be likely to get in the future. His privilege
25 is against exposing himself to the possibility that he will be prosecuted for a
26 criminal offence.

1 MR LYNCH Ordinarily, that can only be done when one weighs
2 up what material is. We don't have that material. That's the difficulty we're in.
3 It's not a case of somebody being able to answer certain questions when it comes
4 to a particular point in their evidence, they'd be able to say,
5 'Well, I know that this is something that might expose me and, therefore, I choose
6 not to answer'.

7 That's not where we are. Where we are is, in an
8 Inquiry, which is being conducted with a view to ascertaining certain facts and, as
9 a result of being subpoenaed to give evidence and, in the absence of any material
10 from the Police who clearly are investigating a number of these projects... We
11 don't even know if it's this project or not and, against that background, I have to
12 give him certain advice, and I have, and he has chosen to accept that advice.

13 CHAIRMAN Yes. However, I think it is for the witness to decide
14 whether to claim the privilege.

15 MR LYNCH Of course, it must inevitably.

16 CHAIRMAN And you're happy that you have instructions which
17 permit you, or require you to claim the privilege on his behalf?

18 MR LYNCH Sir, my position has always been the same: As a
19 lawyer, I give advice and they either accept it or reject it.

20 CHAIRMAN Yeah, but your instructions allow you to make the
21 formal claim for privilege on his behalf?

22 MR LYNCH Yes.

23 CHAIRMAN Thank you. Good.

24 Well, you'd like us to decide whether the subpoena should be set aside?

25 MR LYNCH First.

1 CHAIRMAN Yes. Is there anything else that you want to say, or
2 Mr Elkinson? I'm not sure you've dealt with that issue?

3 MR ELKINSON I didn't, Mr Chairman. The subpoena is in the
4 terms that are before you, small Roman i, ii, and iii and I think, perhaps, I did
5 touch on it but, in response to the subpoena and to a letter from the Commission
6 themselves inviting the witness, or the intended witness, to give an Affidavit, or
7 cooperate, the Commission enclosed a subpoena in the event that the witness did
8 not want to do so; and this letter, in response, set out the letter of the 15th of
9 September, 2016, from My Friend, Mr Lynch, to the tribunal... Set out why it was
10 inappropriate for the Subpoena to issue... And one of the bases of rejection of the
11 request was that the tribunal was using powers of compulsion, and not seeking to
12 have the witness voluntarily provide the evidence.

13 It is our submission that that is incorrect by the
14 terms of the letter of the Commissioners, which did invite the witness to cooperate
15 and to provide an Affidavit; and there was complaint that the Commission's own
16 rules were not being abided by, by having gone straight to its subpoena. But the
17 Commission is the best interpreter of its own rules, and the Commission in that
18 letter to the witness did, indeed, invite the witness to cooperate, so, we say there is
19 no breach of the Commission's rules.

20 CHAIRMAN Mm hmm.

21 MR ELKINSON And, again, the excuse being proffered about the
22 considerable burden on our client, bearing in mind that we are dealing with
23 offences going back between ten and seven years ago.

24 CHAIRMAN That hasn't been pursued today.

25 MR ELKINSON Well, I presumed that Mr Lynch was setting out that
26 these were the bases for his rejection of the subpoena in its entirety.

1 asked were simple questions and we fully appreciate that the true situation is that
2 he wishes to rely on his right of refusing to answer the questions on the grounds
3 that the answer may incriminate him.

4 CHAIRMAN Yes, good. Anything you want to add, Mr Lynch?

5 MR LYNCH Only this: First of all, My Learned Friend used the
6 expression succinct questions. And I would invite you, Sir, to consider whether
7 they are, indeed, succinct. By rolling up several questions in one and inviting, as
8 it were, a yes or no answer is, in our respectful submission, completely wrong,
9 and you would not permit, one suspects, any question of that kind to be asked
10 orally which, when it's drafted so widely, they're not succinct at all. What they
11 are is compendious questions dealing with highly contentious issues. I've read
12 the first one. The second one:

13 "Did you, or your Company, or any Company owned or controlled by the
14 Company or yourself, make any political contributions in the period 2006 to -09?
15 If so, please provide details."

16 What an extraordinary question, when his brother was a Member of Parliament,
17 but anyway:

18 "Did you or your Company, or any Company owned or controlled by the
19 Company or yourself provide, whether directly or indirectly, economic or other
20 benefits outside the normal course of business to individuals in or linked to
21 Government in the period 2006 to 2009? If so, please provide details."

22 These are not succinct questions, they're detailed questions, which is why I wrote
23 the letter to you, Sir, in the way that I did. The net result is that, against the
24 background that we've already explored – and I don't repeat – answering those
25 questions does place him in jeopardy, and that's why he claims the privilege that
26 he does.

- 1 MR LYNCH I'm not sure which is, but, at the moment I feel
2 better standing. Thank you.
- 3 CHAIRMAN We make the following ruling on Mr Lynch's
4 applications:
- 5 1) We refuse the application to set aside the subpoena, that is, the subpoena dated
6 29th of August, 2016, addressed to Mr Allan DeSilva.
- 7 2) Counsel, acting on his client's instructions, his client being present at this
8 hearing, claims lawful privilege for his client against self-incrimination in relation
9 to each of the three questions asked in the subpoena. In these circumstances, and
10 in relation to this witness, the Commission accepts that it is unnecessary for him
11 to be called as a witness in response to the Summons.
- 12 Thank you very much.
- 13 MR LYNCH May he withdraw?
- 14 CHAIRMAN Yes, Sir.
- 15 MR LYNCH You can go or stay, as you choose.
- 16 Sir, there is an extant application. I've not
17 understood that it was necessary for me to go beyond that which I'd set out in
18 writing.
- 19 CHAIRMAN No. well, let's take that... This is in relation to Mr
20 Brady?
- 21 MR LYNCH It is.
- 22 CHAIRMAN Yes, well, we received a written application for
23 leave to cross-examine Mr Brady, outlining certain matters that you want to cover
24 with him.
- 25 MR LYNCH Yes.
- 26 CHAIRMAN And we grant leave accordingly.

- 1 MR LYNCH Thank you.
- 2 MR ELKINSON I wonder, before the witness takes the stand, just to
3 say, in relation to the grant of leave to cross-examine, Mr Lynch has helpfully set
4 out the areas of which he wants to do so and, as regards those, normally one
5 would establish a foundation as to why that evidence is relevant to the
6 Commission of Inquiry and, it may well be that we could do so by objecting to
7 certain questions being asked in the course of Mr Lynch's cross-examination, but
8 it may equally be helpful if Mr Lynch could establish why, in relation to the four
9 areas he wishes to cross-examine on, in relation to each of those, how they arise
10 in the course of either the evidence of the witness that he represents or, in the
11 evidence of Mr Brady, and that it is relevant to the terms of reference of the
12 Commission of Inquiry.
- 13 CHAIRMAN Well, I think, first the application is made by Mr
14 Lynch as counsel for Lee Matvey and the Hon Derrick Burgess, both of whom
15 have given evidence.
- 16 MR ELKINSON Yes, indeed.
- 17 CHAIRMAN And, I think, by permitting Mr Lynch to cross-
18 examine on these topics, we have effectively agreed that he may canvas those
19 topics. If I may say so, I quite agree with you that, when it comes to detail cross-
20 examination, we'll have to consider to what extent a basis is made out but, in the
21 face of it... Oh, let me put it this... Our leave to Mr Lynch goes no further than a
22 general permission, based on this general description of the areas.?
- 23 MR ELKINSON That's helpful, Mr Chairman, thank you.
- 24 MR ALAN DUNCH If I may, Mr Chairman?
- 25 CHAIRMAN Oh, Mr Dunch, you're here as counsel for Mr
26 Brady?

1 MR DUNCH Yes, again I appear before you in my capacity as
2 counsel for Mr Brady, somewhat unexpectedly, I have to say, but nevertheless... I
3 am not concerned about any of these questions in particular, but the third question
4 does bother me and I just want to flag it for you, because I'm content to leave it in
5 your hands, Mr Chairman. But, in asking for leave to question Mr Brady about
6 his relationship with other contractors and, in particular Apex, I fail to see, having
7 listened again to the evidence that Mr Brady gave before you a few days ago, how
8 that could possibly arise out of his examination in chief and I raise with you, Mr
9 Chairman, this thought that, really, that question can only be intended to do one
10 thing – or, that line of questioning can only be intended to do one thing – and that
11 is to cast dispersions on Mr Brady's character.

12 Clearly, in asking about relationships with
13 contractors, the innuendo to be drawn is that there was something inappropriate or
14 improper going on. Now, whilst Mr Brady will, of course, give you the answers
15 that he will, if and to the extent Mr Lynch goes down that track, then I'm just
16 flagging for you that I will object and wish to be heard.

17 CHAIRMAN Yes, I think you're right, if I may say so, in not
18 suggesting that no questions on that topic could be relevant but, equally, you
19 reserve the right to object, but particular questions may go further than is justified.

20 MR DUNCH That's right, Mr Chairman, I just want the
21 Commission to be alive to what, as certainly I perceive, the motivation behind
22 that to be. So that you, yourself, may consider it appropriate to shut it down
23 without the need for objection.

24 CHAIRMAN Yes. Well perhaps, Mr Lynch, I should go this
25 further... Of course, we've seen your summary of the topics on which you would
26 cross-examine.

- 1 MR LYNCH Yes.
- 2 CHAIRMAN We give you leave on the basis that those would
3 seem to be appropriate topics but we're not giving leave for individual questions
4 which may, or may not, fall within those headings.
- 5 MR LYNCH I have no doubt that lawyers to my left, lawyers to
6 my right, and lawyers to me fore, will stop me if I go too far.
- 7 CHAIRMAN Yes, well you're not a vacuum.
- 8 MR ELKINSON Exercise some self-restraint.
- 9 CHAIRMAN Yes, yes.
- 10 MR LYNCH I've not been known for that I have to say.
- 11 MR DUNCH Is Mr Brady still under oath?
- 12 CHAIRMAN Well now, Mr Brady, I think, when you appeared
13 before you took an oath?
- 14 MR LAWRENCE BRADY That's correct.
- 15 CHAIRMAN And that oath still holds good for your present
16 appearance. Thank you.
- 17 MR BRADY This is fine.

18 **EXAMINATION OF MR L. BRADY**

- 19 **BY MR LYNCH**
- 20 Q Can I start by saying I'm sorry you've had to be recalled, but I
21 misunderstood when you were giving your evidence, otherwise I would have been
22 here.
- 23 In order to give some context to the questions I want to ask you,
24 I'm going to ask you to look at a number of documents, I hope briefly, otherwise
25 the questions will just be in a vacuum and they won't be of much assistance to
26 anyone.

- 1 So, can I ask you, please to have, first of all, the bundle which is
2 the Commission of Inquiry bundle, binder 1, and if you would be so good as to
3 turn to Tab 10. Just so that we get some chronology and understand where
4 we're going – we need not dwell upon any of the early documents – but, in 2007,
5 certainly on the 15th of January, 20007, when I believe this document was first put
6 in for favour...
- 7 A Which document?
- 8 Q Page 1.
- 9 A Page 1, okay.
- 10 Q You were not the Chief Architect, you were a Senior Architect, is
11 that right?
- 12 A Correct, in December of two thousand and...
- 13 Q Yes. And Mr Burgess was not the Minister?
- 14 A That's correct.
- 15 Q It was Mr Lister?
- 16 A Yes.
- 17 Q Thank you. And, what had happened was that there had been, for a
18 number of years – and you might be able to help us with this – for a number of
19 years, there had been some discussion about creating the new Courts?
- 20 A Correct.
- 21 Q And, I think the master plan was originally drafted by CS & P,
22 back in... As long ago as '97?
- 23 AQ That's correct.
- 24 Q How did they come to be instructed?
- 25 A That was before my time, I don't...

- 1 Q But, I think you could help us to this extent: That, whoever it was
2 that instructed them, agreed to cover their cost of \$45,000, plus expenses?
- 3 A I don't remember that document.
- 4 Q Well, it's on your file, but we needn't spend any time on it. But,
5 after that, two years later, they were also responsible for drafting the schematic
6 designs for the Police Station and Magistrates Court?
- 7 A Correct.
- 8 Q And I think that was at a time when they were charging \$123,000,
9 plus expenses?
- 10 A That was under a different Chief Architect.
- 11 Q Again, you were not the Chief Architect?
- 12 A No.
- 13 Q The reason why I'm asking you these question is because it took
14 ten years before we got to the point where contracts were being put together.
- 15 A When you say 'contracts', contracts... ?
- 16 Q Well, agreement to enter into the building of these Courts and
17 Police Station didn't happen until 2007?
- 18 A That's right.
- 19 Q Yeah. So, from its inception in two thousand and – 1997 – it was
20 ten years before we got to the point of which...
- 21 A Correct, yes.
- 22 Q The Government moving forward with it?
- 23 A Yes.
- 24 Q And so that I'm clear about that, please, are you aware of any
25 change to the design, the schematic designs and the master plan, between '97 and
26 2007?

- 1 A I think there were a number of changes.
- 2 Q There were?
- 3 A Yeah.
- 4 Q Who drafted those changes?
- 5 A That would be with Works & Engineering in conjunction with
6 Carruthers Shaw, or CS & P in Canada.
- 7 Q There were, nonetheless, substantial changes to what needed to
8 happen, not least, because of pace – the need to have cells with facilities for
9 recording, and the like?
- 10 A Over a period of time, things changed.
- 11 Q Yeah. Would you agree that they hadn't changed as much as they
12 ought to have changed before signing the contract in 2007?
- 13 A I can't say that.
- 14 Q You won't say that?
- 15 A No.
- 16 Q In any event, CS & P gained oversight for – I use that word loosely
17 – for the construction with the then Chief Architect - again, it still wasn't you – to
18 have the Courts and the Police Station built?
- 19 A Mmm hmm.
- 20 Q And their cost for that was \$3.2 million. Can you confirm that?
- 21 A No, I can't confirm that.
- 22 Q Alright, well, if necessary we can turn it up. It's in the
23 documents... But, returning to the start of 2007, you, at that time a Senior
24 Architect... And we could see from page 1 that the advertisement went up –
25 people do express their interest, yes?
- 26 A Correct.

1 Q Over the page, please. And, lest one gets nervous, I'm not going to
2 go through every page. I just want to set the scene. We can see that somebody by
3 the name of Joseph Galea sent this e-mail to Derrick Binns which was, as it were,
4 setting out those who had an interest, or they expressed an interest, in building the
5 Courts?

6 A That's correct.

7 Q And the upshot of it was that this Landmark Construction, Lisgar
8 you can see is mentioned there and they were described as being in the middle
9 four, close in scoring, especially five and six, they were number seven?

10 A Mmm, correct.

11 Q Can I just understand it then, that, at this stage when they'd
12 expressed an interest, how were they ranked one to ten?

13 A I don't think they were ranked from one to ten. It was just a matter
14 of who was short-listed in the process.

15 Q Is that right, that they were not ranked at that stage?

16 A No, it wasn't a ranking at all.

17 Q Well, what do you mean by that? Go to the third paragraph...
18 Joseph (Galea), he was working with you, wasn't he?

19 A That's correct.

20 Q And, at this stage, would he have been junior to you?

21 A No, he was actually Chief Architect at that point.

22 Q He was the Chief at the time?

23 A Yes, mm hmm.

24 Q Alright. So, he was working with you and we can see you're the
25 first person copied into that e-mail, yes?

26 A Correct.

- 1 Q And, if you go down to the bottom paragraph, it describes there:
2 “The top three were considered to be definitely contenders to bid”?
- 3 A Again, with that, actually, in this, I think they weren’t sort of
4 contenders to bid. I think they were short-listed into the next go-around
5 because...
- 6 Q Which part of the letter are you looking at?
- 7 A The middle portion.
- 8 Q No, go down to the bottom.
- 9 A Mm hmm.
- 10 Q And it says:
11 “The ranking that resulted was as follows”.
12 Alright?
13 And then you’ve got one through to ten.
- 14 A Right.
- 15 Q And the top three were considered to be definitely contenders to
16 bid?
- 17 A Yeah.
- 18 Q So, they were ranked, weren’t they, at that time?
- 19 A Well, yeah. I didn’t realize they were ranked like that, but we
20 weren’t really ranking them, as such, at this point. Yeah.
- 21 Q It looks like a ranking, doesn’t it?
- 22 A Yeah, it does. It does.
- 23 Q Right, okay.
- 24 A Yeah.
- 25 Q And, the reason why I’m asking is because Landmark Construction
26 was ranked seventh.

- 1 A Mm hmm.
- 2 Q Correct?
- 3 A Correct, by this document.
- 4 Q And the plan had been to, as it were, invite five to come for
5 interviews?
- 6 A No, erm...
- 7 Q Wasn't it?
- 8 A No, everyone who made it into the bottom list were actually
9 invited to come for the interviews. They all came for interviews.
- 10 Q All ten?
- 11 A All ten. We interviewed all of them.
- 12 Q And, when you look at that letter you see, at the bottom, it says:
13 "It was agreed to send letters of regret to the last three Companies and to organize
14 interviews with the other seven to identify the final five."?
- 15 A We had interviews with all of them, with Trinity Construction,
16 Building Blocks, and Ambling. Every one of them, we had interviews with.
- 17 Q All ten were interviewed?
- 18 A Yes.
- 19 Q And, is that what we see, if we turn to our page 10-20? The top
20 right-hand corner.
- 21 A Mm hmm. Yeah.
- 22 Q Yes?
- 23 A Correct.
- 24 Q This is a ranking arrangement, isn't it, that you have in deciding
25 who was going to be taken to the next level?
- 26 A That's right. But, I said, we interviewed all of them. All those...

- 1 Q Yes, well I can see that all ten were... Is that before this letter was
2 written, or after?
- 3 A This here, I can't say for sure, but I know we had interviews with
4 every contractor.
- 5 Q But, the upshot of that was that Landmark, on this particular
6 exercise, came seventh?
- 7 A Mm hmm.
- 8 Q Yes?
- 9 A Yeah, seventh on this list here, yes.
- 10 Q Yes, they were seventh. And, am I to understand, from this
11 document, that there were six people who scored?
- 12 A Er...
- 13 Q Well, it says: "Panel Members' Scores" at the top.
- 14 A Oh, sorry, six people, yes.
- 15 Q And, you've got one through to six.
- 16 A Yes, Sir. there were a number of people on the panel, yes.
- 17 Q Right. And, were we all satisfied that they didn't have any
18 connection with any of these Companies?
- 19 A Never asked the question that had any connection with companies.
- 20 Q Well, do we know who they are?
- 21 A The Companies or the people?
- 22 Q Do we know who these six people are?
- 23 A Yes, they should be in one of these e-mails here, who, on these
24 documents.
- 25 Q Well, I haven't been able to work it out, so, anyone who can help
26 me, I'd be grateful for assistance.

- 1 A Yeah.
- 2 Q In any event, six people conducted the interview and they ranked
3 Landmark Construction as seventh?
- 4 A Mm hmm.
- 5 Q Yes?
- 6 A Correct.
- 7 Q Can we take it from that, that ordinarily, then, Landmark would not
8 have been asked to come back, if you were looking for the top five?
- 9 A Er... I... I can't say. I mean, you know, we did go out to all of
10 them. We interviewed all of them.
- 11 Q Well, I've seen that.
- 12 A Yeah. So, Landmark was invited to tender.
- 13 Q Well, three were not, apparently, according to your e-mail. I don't
14 want to send any time on it.
- 15 A Mmm hmm.
- 16 Q But, if we go to the next page.
- 17 A 22.
- 18 MR DUNCH It's not 22.
- 19 MR LYNCH The e-mail from the Department.
- 20 MR BRADY What page?
- 21 MR LYNCH We were just looking at the same e-
22 mail, Joseph Galea's e-mail, which is to Dr Derrick Binns, and copied to you.
23 "It was agreed... ", the very last lines, "It was agreed to send letters of regret to the
24 last three Companies... "
- 25 MR ELKINSON Page 51
- 26 MR BRADY Page 51?

1 MR LYNCH No, 10ii, ten, little two.
2 MR DUNCH At the top, but on the bottom of 51.
3 MR BRADY Two, little two.
4 MR LYNCH It's the e-mail we were just looking
5 at a moment ago.
6 MR ELKINSON The second page in.
7 MR BRADY Okay. The top?
8 MR LYNCH Yes? The last line.
9 MR BRADY Oh yeah.
10
11 **BY MR LYNCH**
12 Q "It was agreed to send letters of regret to the last three Companies
13 and to organize interviews with the other seven to identify the final five."?
14 A That's what it says here. But, I didn't write that.
15 Q Alright, well, whatever the position was, the fact is that three were
16 rejected at some point, leaving seven and, if we go to – if we're in doubt about
17 that – if you go to page 10.10, top right-hand corner, you can see that the firm has
18 been selected, that firm, D&J Construction has been selected with four other
19 firms, to bid for the work.
20 A Right, I see it there, yes.
21 Q And, if you go across the page, Building Blocks, they were not one
22 of those to be bidding for the work?
23 A That's correct.
24 Q So, there's been a weeding-out process, if I can put it like that, at
25 an early stage – after the interviews?
26 A After all interviews, yes.

- 1 Q Yes. And that left some seven or so to apply?
- 2 A I'm aware of, yeah.
- 3 Q It does. That one appears from the e-mail?
- 4 A Yeah.
- 5 Q And, of course, Landmark Lisgar were one of those that did, and
6 we've got the contract/their bid in this bundle. Well, I don't want to spend any
7 time on it.
- 8 A Yeah, they applied and interviewed, yes.
- 9 Q Can I ask you, please, if you would be good enough to have a look
10 at the Cabinet Minutes that we have, 10-4, and see if you can just help us about
11 this? It's in the little bid folder and it's being handed to you now, thank you very
12 much. And, I appreciate you were not at the Cabinet Meeting, but I want you to
13 see if you can just help us about this. It's, if you go, it's about half-way... No, it's
14 about a third of the way through.
- 15 A Mm hmm. What page number?
- 16 Q In the top right-hand corner, you should have 10-4.
- 17 A 10-4? Yes, I've got it.
- 18 Q And it sets out partly what we've just been looking at. It then says
19 this... Do you see it? One, two, three, four paragraphs down:
20 "The Attorney General, Minister of Justice, asked the Minister to ensure that this
21 project moved forward as expeditiously as possible, particularly since the
22 provisions of PACE Legislation could not be adhered to in the present Police
23 Station."
24 Did you see that?
- 25 A Correct.

- 1 Q Yeah. Did you understand that there was a degree of pressure to
2 move quickly in respect of this application of this project?
- 3 A This was being handled by the Chief Architect.
- 4 Q Yes. Did you understand that the Department were being put
5 under some pressure to deal with this project quickly – expeditiously?
- 6 A I can't say that, no.
- 7 Q You didn't know?
- 8 A I said I can't say that.
- 9 Q Were you working at all on this project?
- 10 A Yes, I was working on it.
- 11 Q Well, was that not expressed to you, then, we need to get a move
12 on here because? After all, they drew the plans up ten years ago?
- 13 A It wasn't expressed like that. We were moving forward with the
14 project and there was not any sort of deadline of when it was supposed to be out.
15 It started and stopped a number of times during these years.
- 16 Q I take it you didn't take kindly to being pressed into needing it
17 expeditiously?
- 18 A I wouldn't say that. But we moved accordingly.
- 19 Q Alright. Well, you can put that to one side for the moment, please.
20 In fact, actually, while we have it open, why don't we just do what we missed?
21 Back to our other bundle, please Sir.
- 22 A Sure.
- 23 Q If you go, please, next to paragraph/page 10, Tab 10, page 32.
- 24 A 32?
- 25 Q 32, yes. I'll start with 27, I think... No, 32, because it's the one
26 we're not allowed on. 32, please.

- 1 A 32.
- 2 Q It's in the little binder, I'm sorry, I've mis-paginated it, thinking it
3 was in the large binder and I got it right the first time. It's in the small one.
- 4 A What page is that?
- 5 Q It's 10-32. It just follows on from the Cabinet paper we were
6 looking at.
- 7 A Sure.
- 8 Q A couple of pages on.
- 9 A Okay.
- 10 Q I just want to ask you about this.
- 11 A Mm.
- 12 Q I want to see if you can help us:
13 So, Landmark had been told that their bidder/that they are a bidder,
14 and they've tendered their bid. And then, we have this, please. In the
15 memorandum by the Minister of Works and Engineering. You were working on
16 this project at this time.
- 17 A Correct.
- 18 Q This is dated the 22nd of October of 2007, alright?
- 19 A Mm hmm.
- 20 Q You weren't yet the Chief Architect, am I right?
- 21 A No.
- 22 Q But not far off?
- 23 A Not far off.
- 24 Q And, what this is, is a paper that is presented to the Cabinet and is
25 obviously prepared by someone.?
- 26 A Correct.

- 1 Q Do you know who prepared it?
- 2 A Looking at this, I would say I probably prepared it.
- 3 Q You did?
- 4 A Yeah.
- 5 Q So, this is a Cabinet paper, prepared probably by you? Would that
6 be fair, if I write that down?
- 7 A Yes.
- 8 Q Alright. Can you go over the page please, paragraph 7?
- 9 A Mm hmm.
- 10 Q And, it sets out there the various bids that have been received, and
11 the net result was, by this stage, there were only two bidders left, were there not?
- 12 A Yes, that's right.
- 13 Q After all seven were asked to bid, for a variety of reasons, a
14 number had fallen out, fallen by the wayside?
- 15 A I wouldn't say 'fallen out'. They just decided to decline
16 submitting a bid, so they wouldn't, you know...
- 17 Q Well, that's just language. They didn't bid?
- 18 A They didn't submit a bid, no.
- 19 Q One other did put in a bid, but was regarded as not being a proper
20 bid? I think all it said was: 'Give me some more time' or something like that?
- 21 A Basically, yes.
- 22 Q Yes. So, you were left just with two, after this whole process?
- 23 A Mm hmm.
- 24 Q And, here we are now, in October, it having started at the
25 beginning of the year; and what you're left with is two people who put in bids:
26 Apex and Landmark Lisgar?

- 1 A Correct.
- 2 Q Did you get on with Apex?
- 3 A I never had any dealings with Apex.
- 4 Q What about... Well, I think they were a new Company, weren't
- 5 they?
- 6 A When you say 'new', what does new mean? I really can't answer
- 7 that.
- 8 Q Well, recently registered would do.
- 9 A I wouldn't know that either. I mean...
- 10 Q Do you know Mr Lopes?
- 11 A I know Mr Lopes, yeah.
- 12 Q How well do you know Mr Lopes?
- 13 A As well as I know anyone else. I mean, it's...
- 14 Q That's not very helpful.
- 15 A Well, I know...
- 16 Q Is he a friend?
- 17 A I have a lot of friends, yeah.
- 18 Q You tried to help us?
- 19 A Yeah, when you say 'a friend'...
- 20 Q Is he a friend or not?
- 21 A Yeah, I would say he's a friend.
- 22 Q And, is Mr Matvey a friend?
- 23 A I thought we were friends during the construction time, yes.
- 24 Q You'd known Mr Lopes a good deal longer than you had known
- 25 Mr Matvey?
- 26 A Yes, I would say that, yes.

- 1 Q Anyhow, you'd set out in your memo, that was to be given to the
2 Mister to take to Cabinet, the fact that those two Companies, Apex and Landmark
3 have put in bids that were below the original Ministry's estimate of the cost of the
4 project?
- 5 A Correct.
- 6 Q And there was about a million dollars in it.
- 7 A When you say 'in it', the difference between the two?
- 8 Q In the difference between the two projects.
- 9 A Yes.
- 10 Q ... the two Companies, yes?
- 11 A It was about \$900,000, I believe.
- 12 Q Well, really, we're going to argue about \$22,000? Anyway, never
13 mind, Paragraph 8:
14 "Landmark Lisgar Construction Company failed to complete the required cost
15 breakdown by elements. Without this information, it is difficult for the Ministry
16 to assess their bid. Normally, such an omission would render the bid as
17 insufficient."
18 Meaning, it would be dead in the water, wouldn't it?
- 19 A Correct.
- 20 Q Am I right about that?
- 21 A Yes.
- 22 Q Can I take it then that, when the bid was opened – the tender of
23 bids that come and you opened them on that day, whatever it was – I don't know
24 if it was you, but whoever did in the Department, opened the bids: One, because
25 he had asked for more time, is clearly out of it; and you were left with these two,
26 correct?

- 1 A Correct.
- 2 Q Ordinarily, you would have said, Well Landmark Lisgar is out. It
3 doesn't get over the hurdle that's necessary for such a bid and, therefore, Apex
4 should get the job?
- 5 A No.
- 6 Q No?
- 7 A Because, if the bids were open – as an open bid – that the
8 contractors' representatives were there during the opening of the bids. The
9 numbers were read out and, at that point in time, we always tell the contractors:
10 'Until we complete our analysis of their submissions, none of these numbers are
11 to be taken to be someone's winning or losing the contract.'
- 12 Q You don't get it automatically?
- 13 A Absolutely. And, I say, the bids were opened in the presence of
14 the contractors.
- 15 Q Yes.
- 16 A Or the representatives.
- 17 Q But, what does 'bid insufficient' mean?
- 18 A That means they didn't provide the information required in order to
19 make it a proper assessment.
- 20 Q And, ordinarily, would not be taken into account?
- 21 A Yes, but we didn't have that information until we actually did our
22 complete analysis.
- 23 Q Forgive me, I think we're going around a little bit in circles here.
- 24 A No, it's...
- 25 Q I just need to understand the position. Let us suppose there were
26 five successful bids.

- 1 A Right.
- 2 Q Alright?
- 3 A Mm hmm.
- 4 Q One of which was described as insufficient. Would that bid
5 automatically be put to one side?
- 6 A We didn't describe them as insufficient at that point in time. We
7 did not turn and say that. It was not until after we did our analysis to see what
8 was in the documents. It wasn't just a sheet of paper. There are a number of
9 sheets of paper that we had to look through and compare.
- 10 Q Sure, but, you know Mr Brady, your drafting, you've told us
11 probably drafted this document, and you said, normally, such an omission would
12 render the bid as insufficient?
- 13 A After we've completed our analysis.
- 14 Q Well, that's not what you said. But, anyway, be that as it may...
15 Was there a reason why you were prepared to consider that bid at that stage?
- 16 A What bid at what stage?
- 17 Q Their bid, at the time at which they were bidding?
- 18 A Whose bid?
- 19 Q Hmm?
- 20 A Whose bid? You say 'their'...
- 21 Q Landmark Lisgar.
- 22 A We consider any bids, until we do our analysis find.
- 23 Q Right. So, when you say then, normally such an omission would
24 render the bid as insufficient. That doesn't mean anything because you – what
25 you would do – is to look at the detail of their bid.
- 26 A Absolutely. No.

1 Q Well, why did you put it in there, bearing in mind this is a
2 document for the Cabinet?

3 A Well, because, again, at the time we opened the bids and reviewed
4 them, at that time in front of the Contractors, we had not started our analysis of
5 them.

6 Q Then, we get to paragraph 10:
7 “Both bidders have submitted bids that are comparable to the Ministry’s estimate,
8 differing from each other by only 1.4%, just shy of a million dollars. While Apex
9 Construction Management Limited has undertaken major projects in Bermuda,
10 Landmark Lisgar Construction Company brings the experience of their Canadian
11 partner, Lisgar Construction Company. Based on the total bid, both Companies
12 are evenly balanced.”

13 A I’m sorry, actually. I didn’t write that at all, actually. I’m thinking
14 I...

15 Q I’m sorry?

16 A Actually, looking at this document, I did not write it.

17 Q Somebody wrote it.

18 A Yeah, someone.

19 Q Somebody wrote it.

20 A Yeah.

21 Q It wasn’t you?

22 A No, because we wouldn’t translate ‘evenly balanced’.

23 Q I’m sorry?

24 A I would not have put that in, to say it was evenly balanced.

- 1 Q In any event, paragraph 11 says:
2 “Accordingly, Cabinet is invited to approve their Apex Construction
3 Management, or Landmark Lisgar Construction, as the Construction Manager.
4 A No.
5 ... who is also the constructor for the new Magistrates Hamilton
6 project.”
7 A No, this isn’t the one I wrote.
8 Q No?
9 A No, because...
10 Q So, this is one that’s been amended by someone else
11 A Yes, mm hmm.
12 Q Do you see the hand-writing on the bottom?
13 A Yes.
14 Q Whose is that?
15 A I can’t/couldn’t tell you.
16 Q Not yours?
17 A Not my hand-writing/not my hand-writing.
18 Q And you don’t recognize it?
19 A It’s not my hand-writing. As soon as you got to that last paragraph
20 which said there are – paragraph 10 – saying that:
21 ‘most Companies are evenly balanced’
22 And in paragraph 11:
23 ‘... either Apex Construction, or Landmark Lisgar’
24 No, it’s... Sorry.
25 Q You’re saying it’s... ?

1 A In the beginning/the beginning portion of it was very similar to
2 what I had written, but...

3 Q You drafted one and someone's amended it?

4 A Yes.

5 Q Alright.

6

7 **CHAIRMAN**

8 Well, Mr Lynch, we've heard quite a lot of evidence about this and, if you look at
9 the date on this memorandum that you're reading now, it's the 22nd of October,
10 and the evidence we've heard is the matter went to the Cabinet first, on the 23rd of
11 October and that this memorandum was revised with some contribution from the
12 Minister on the day before.

13 MR LYNCH So I understand

14 CHAIRMAN Yes.

15

16 **BY MR LYNCH**

17 Q What I need to understand from you, please, is that you had been
18 the author of this document, but it had been amended?

19 A I can't say I'm the author of this thing, because it's no longer my
20 document. I drafted a recommendation and it's been changed. So, I can't say I...

21 Q Over the page, please, because what we've got is then there, that
22 the Cabinet meeting in which it was made clear... If you go to page 10-35...

23 A 10-5, or 34, 35?

24 Q Hmm?

25 A 35, you say?

26 Q Yeah, 10-35.

1 A Sure.

2 Q This is the next day, as Chairman has pointed out. It went to the
3 Cabinet meeting. Three paragraphs down, about halfway through that paragraph,
4 the third paragraph:

5 “It was the Minister’s view that both Companies were evenly balanced and he
6 asked Landmark... And he asked”, sorry, “Cabinet to either approve Apex, or
7 Landmark, as the Construction Manager for the project.”

8 Yes? You see that?

9 A I see that, yes.

10 Q Which reflects what was contained in the memo, which you say
11 you didn’t...

12 A It’s not my memo.

13 Q I understand. The response was this:

14 “In response to questions from his colleagues, the Minister confirmed that he was
15 not recommending... That he was”, forgive me thank you, “that he was
16 recommending that Landmark should be awarded the contract.”

17 Right?

18 And, then right at the bottom:

19 “The Premier was of the view the memorandum should contain a clear rationale
20 for recommending a Company.”

21 And that’s what they were asked to do; to go away and prepare a clear rationale,
22 alright?

23 Can we have a look at that, please? If you go to the big bundle,

24 A The big bundle. Mm hmm.

25 Q 10-27, “Tender Evaluation”, do you see that?

26 A I’m just coming to it now. Yes;

- 1 Q Right. This is at “Tender Evaluation”. Can you tell us whether
2 this was/when this was prepared?
- 3 A This one here would have been prepared again in October.
- 4 Q October?
- 5 A I’m just trying to remember. Ah?
- 6 Q Before or after the Cabinet meeting?
- 7 A I couldn’t tell you.
- 8 Q Someone’s hand-written on the top ‘27th of October’. I don’t know
9 what that means, but...
- 10 A I did an evaluation – whether this is incorporated, or my
11 comments, or, if this is another document that’s been amended, I, you know...
- 12 Q I don’t believe that that’s what the counsel for the Commission are
13 saying about this document. But, is this one that you wrote?
- 14 A It looks like what I wrote, similar to that other memo. It looks like
15 portions of it I wrote, until I can actually evaluate all of the paragraphs, I can’t...
- 16 Q We’re going to look at just some of it in a moment but, can you
17 just leave a pin in it, as it were.
- 18 A Sure.
- 19 Q But you may, or may not have been the author of this one.
- 20 A Okay.
- 21 Q What is it? I mean, it’s meant to be, as it says I assume, a tender
22 evaluation, looking at the tenders that there have been.
- 23 A Yes, mm hmm.
- 24 Q Can we assume that this is something that you ought to have done
25 before drafting the Cabinet paper?

- 1 A Yes, that's what we would normally do. That's the way it's
2 normally done.
- 3 Q For some reason, somebody's written '27th of October' in the top
4 right-hand corner. It's not your hand-writing, I take it?
- 5 A No, it's not my hand-writing. No.
- 6 Q And the document itself is undated, isn't it?
- 7 A Yes.
- 8 Q Can we also take it that it would have been prepared in order to
9 answer which bidder should be recommended for the job?
- 10 A It is a/it would be a recommendation, yeah.
- 11 Q And, as a recommendation, it would be your Department's advice
12 to the Minister as to which direction he ought to go?
- 13 A Correct.
- 14 Q As with lawyers, advice is but advice.
- 15 A Yes.
- 16 Q And they can either accept it or reject it.
- 17 A Correct.
- 18 Q Can I just understand this, please:
19 When you've put this document together, you go through the whole of the history
20 and that's what you've done.
- 21 A Mm.
- 22 Q But, can we look over-page, please, at 10-28?
- 23 A Yes.
- 24 Q That's when we come to the three Companies that were a part of
25 the bidding that you opened on that day, I think at 3:00 o'clock on the 14th of
26 September.

- 1 A Yes.
- 2 Q And then, we get the box at 4b, which sets out the costs of the two
3 successful – I say successful – the two bidders who put in their bids, correct?
- 4 A Mmm, correct.
- 5 Q And then you give us a little of the history over the page, 29,
6 please. You set out in a number of sub-paragraphs what you describe as
7 qualifications and/qualifications to the bid, which would otherwise have rendered
8 the bid non-compliant.
- 9 A Right.
- 10 Q Am I right about that?
- 11 A Correct.
- 12 Q And when... I don't want to deal with everything, but just having a
13 look at the first one:
- 14 (a) There was an assumption of a bonus to be paid if the project had been
15 finished inside of Budget?
- 16 A Correct. Well, this is what the contractor has put forward. This
17 wasn't what Works & Engineering had offered.
- 18 Q No, no. What you had done initially was to suggest that something
19 like that might be part of the bidding process.
- 20 A That was suggested way back in the pre-qualifying portion, yeah.
- 21 Q Whenever. It was suggested there was nothing further from you
22 and, what was put into his bid was a suggestion of what it might look like?
- 23 A Erm... that's what he put in, but that wasn't what was asked for.
- 24 Q Yes. Was that a reason for rejecting?
- 25 A No. That wasn't a reason for rejecting. But we turned around –
26 the issue with that is that he qualified his bid. We're not looking at apples with

1 apples. He's now put something else into the equation which then doesn't allow
2 us to properly evaluate everyone's bids.

3 Q Well, the idea of a bonus is quite a good idea, isn't it?

4 A We looked at that in the beginning, but we saw complications in
5 trying to sort of establish that.

6 Q Well, I mean, if you come inside Budget, and you could have some
7 – the person who's building gets something back from what the amount that's
8 saved is, and that's an incentive for them to bring it inside Budget, isn't it?

9 A That wasn't part of the bidding process here. It wasn't part of the
10 bid.

11 Q Anyway, whatever your position, can we take it that this would not
12 have disqualified them?

13 A Not in totality, but it isn't/it's something that we didn't ask for, and
14 the one thing we always ask for is:
15 'Do not qualify your bids.'

16 We make it perfectly clear to the contractors:

17 'Just put down what we ask you to include in your bid.'

18 Q Alright. Does that mean that it would disqualify them?

19 A Not totally. We'll look at it but, you know, we won't try and
20 disqualify him for that.

21 Q Alright, next point: The offer of a net saving within 30 days of the
22 bid date, in other words, if you agree – you, the Government agree – through your
23 Minister, to accept their bid, there will be a saving, a small sum, or a sum,
24 knocked off the overall price?

25 A That's if they were given the job within 30 days.

26 Q Yes.

- 1 A So, if we went 31 days, that was off the table, so...
- 2 Q Yes. It's an incentive for you to move quickly.
- 3 A Well, again, unfortunately, all these things go to Cabinet, Cabinet
4 decides. And Cabinet doesn't move that quickly.
- 5 Q I'm not blaming you.
- 6 A No.
- 7 Q I'm simply saying that this was a... Was this a qualified bid?
- 8 A It gets further down there, yes. It's a continuation.
- 9 Q Did it disqualify them?
- 10 A I wouldn't disqualify them. We'll look at that.
- 11 Q At little c:
12 "An inclusion of an allowance of \$300,000 from foreseeable and extraordinary
13 increases, which didn't seem to tally with some other part of their bid."
14 Was that a problem? Would that disqualify them?
- 15 A Well, yes, because now we're getting into... We're going to put
16 money in and we may not have, you know, that's starting to really qualify the bids
17 now and it continues where they keep on qualifying the bids.
- 18 Q They later qualified that by changing it, didn't they?
- 19 A They actually increased it, I believe.
- 20 Q Yeah, to \$600.
- 21 A Yeah.
- 22 Q Not the sort of thing you might have expected if they were trying
23 to win it.
- 24 A Well, again...
- 25 Q Unless they were being honest.

- 1 A These are the reasons why we prefer they just answer, or fill out,
2 the bid forms – what we put forward.
- 3 Q Would it disqualify... ? Sorry.
- 4 A So that we don't get into these grey areas.
- 5 Q But, would it disqualify them?
- 6 A It's getting very close to that, getting very close to that.
- 7 Q Next d, "Ordering Materials" and that the payment for those
8 materials should be made at the point of ordering, rather than the point of delivery
9 into this country.
- 10 A Yes.
- 11 Q Would that disqualify them?
- 12 A Again, it's under financial instructions, we could only pay for
13 goods and services received. So, what they're saying is that they want payment
14 made for goods in another country which we don't have any control over.
- 15 Q Temporary work permits, that you should, obviously, take into
16 account that there may be a need to get temporary work permits. Would that be
17 a... ?
- 18 A I would say that you're really getting into disqualifying them,
19 because we don't have any control over Immigration. You can't make promises
20 in that regard.
- 21 Q Can we look then: Having reviewed all of those things, you say, if
22 this is your document, this, don't you?
23 'The bid, as received, was considered incomplete and conditional because of the
24 additional qualifying statements, assumptions or comments. The bid can,
25 therefore, be deemed to be non-responsive, meaning disqualified.'

- 1 A Yeah. Again, I think you hit on the point where they didn't fill out
2 the forms, the proper bidding documents. There are a lot of things that were un...
- 3 Q It's in their bid, isn't it?
- 4 A That's right.
- 5 Q They just put all included, or something like that?
- 6 A Yes, yeah. And that...
- 7 Q So, that, taken together with these, will disqualify them, wouldn't
8 it?
- 9 A Yes.
- 10 Q Why?
- 11 A Because it doesn't allow us to do our proper analysis on the
12 project.
- 13 Q And, even though he had written afterwards, clarifying each of
14 those matters, or most of them? If you go over the page. In any case – second
15 paragraph, second sentence:
16 “In any case, Mr McLeod's letter did not make any changes to the qualifications,
17 assumptions, submitted with the original bid and, for this reason, the bid is still
18 considered non-responsive.”
- 19 A I believe that came in about 20 days later, or something like that.
- 20 Q Whatever it was, it doesn't matter.
- 21 A Yeah.
- 22 Q The fact is it was regarded as non-responsive.
- 23 A That's right.
- 24 Q Does it come to this? That the net result of that bid ought to have
25 disqualified them from the beginning?
- 26 A We tried to give them a chance where we could.

1 Q So, once you've given them a chance and
2 they respond in the letter in which they did, did that put them then on a level
3 footing with Apex?

4 A I wouldn't say it put them on a level footing. I think we did our
5 analysis based on the information that was provided. So, in terms of level
6 footing? Did Landmark have a better footing because they had more time to
7 prepare versus Apex? No. We just reviewed the information that was available
8 to us.

9 Q Yes.

10 A And that...

11 Q What I'd like to know, you see, is what it was that prompted you to
12 recommend Apex over Landmark?

13 A Again, based on the history and the, sort of, qualification of the
14 bids and a lot of these unknown elements i.e. Immigration approval for people,
15 also the allowances being changed around. It was just an unknown amount.

16 Q Forgive me, if you were going to make an assessment of this – a
17 genuine assessment of this, why not simply pick up the telephone and say to Mr
18 Matvey: Look, we can't take into account any of these conditional features. Why
19 not do that?

20 A No, because we had to do our analysis and give it back to the PS.

21 Q Well, that's the short way of doing it, isn't it? We're prepared to
22 give you a/we're prepared to weigh you with the other Company, but what we
23 can't do is to take into account all those things that otherwise would disqualify
24 you.

1 A No, no. The thing is, we make our recommendation and Cabinet
2 decides, and that's what we do. We put our information together; we send it up to
3 the Permanent Secretary, and they make the decisions.

4 Q I just want to be clear in my own head, please. What is it – what is
5 it, that once you've gone through that analysis and looked at all of those things,
6 and yet they're still in the running – still in the running – what is it that
7 determines whether you should go with Apex, or with Landmark?

8 A Well, one of them is a Bermuda Company. The other thing is that,
9 you know, their previous experience in larger projects.

10 Q Well, yes?

11 A So we looked at all that.

12 Q Landmark have just done the Bus Station, haven't they?

13 A Yeah. And...

14 Q Well, that's experience. They've just finished it.?

15 A And we marked it down as part of their experience. But, in the
16 light of all the information that was provided to us and based on their submission,
17 that was the recommendation that was put forward.

18 Q It wasn't anything to do with the fact that Mr Lopes was your
19 friend?

20 A Not at all.

21

22 **MR ALAN DUNCH**

23 That, Mr Chairman, is where we get into the
24 dangerous water that I have flagged. There is nothing in Mr Brady's examination
25 in chief on this. It's a subject that was never canvassed and it's clearly being

- 1 CHAIRMAN Mmm
2 MR LYNCH Alright, in any event having,
3 as it were...
4 CHAIRMAN Since we have paused there,
5 I'm a little bit concerned about the time. You will have had the best part of an – if
6 we run through to 4:00 o'clock – you will have had the best part of an hour.
7 MR LYNCH Yes.
8 EXAMINATION
9 **BY MR LYNCH**
10 Q Can we just please then look next at... You have become the Chief
11 Architect of the Department by November?
12 A Yes.
13 Q And, in that role, you assumed responsibility, then, for the whole
14 of the Department, did you not?
15 A Correct.
16 Q Now, am I right in saying that, from the point at which you were
17 appointed as the Chief Architect, your advice and input were increasingly
18 rejected?
19 A That's fair to say, yes.
20 Q So, from/can we take it then, from virtually the day that you
21 became the Chief Architect, you were being side-lined?
22 A I think, more so in 2008, as time went on.
23 Q I'm only relying on what you said in your statement.
24 A Yes, I'm saying, after... I mean, they didn't take my
25 recommendation for the project, which is fine. I say, we make a recommendation,
26 Cabinet decides, and that's the role we play.

- 1 Q Yes.
- 2 A When it came into the other items, again, like you said Mr Lynch,
3 you provide advice and you could take it or leave it.
- 4 Q Just looking at page 10-39, please, in our bundle. You see, there's
5 an e-mail there from you to Dr Binns. This is an e-mail... Had you been
6 appointed as Chief Architect by the 19th of November, 2007?
- 7 A I believe it was, yeah. I... maybe not? Maybe not.
- 8 Q In or around that time?
- 9 A Yeah, it was close to that time.
- 10 Q Thank you. You may well have been appointed by then.
- 11 A Yeah.
- 12 Q In any event, just looking at this e-mail – you say this, don't you?
13 In the middle of the page:
14 "I refer to your draft of a statement that needed to be used for the Press
15 Conference on the intent to award a contract to Landmark Lisgar, in particular,
16 the statement that follows:
17 'An analysis of the submissions led to the decision to enter into contractual
18 discussions with Landmark at Lisgar.
- 19 A Mm.
- 20 Q For the clarification and the record, I would like to reaffirm that
21 the analysis carried out on the three submissions received by the Technical
22 Officer in the Department came to a different conclusion'."
- 23 Did you suppose, when you wrote that e-mail, that they didn't know that you had
24 made a recommendation for a different outcome?
- 25 A I think it's quite clear that they knew I made a recommendation.

- 1 Q Yeah. So, what was the point of making the e-mail/writing the e-
2 mail?
- 3 A Well, I think it's quite evident that they selected Landmark Lisgar,
4 which wasn't the recommendation I made...
- 5 Q So?
- 6 A Well, just making a statement.
- 7 Q Is there something wrong with that assertion that you put in quotes:
8 "An analysis of the submissions led to the decision to enter into contractual
9 discussions with Landmark"?
- 10 A Because, at that point in time, the analysis – I didn't know of any
11 analysis being made, and that's why you see, in the next paragraph up from The
12 Permanent Secretary... He noted that the Minister did his own analysis, which I
13 was unaware of.
- 14 Q Yes. Or, were you put out by the fact?
- 15 A No. It's the... It's within his role to do that – his responsibility.
- 16 Q There's nothing wrong with that sentiment, is there – and analysis?
- 17 A It's entirely up to the Minister and the Permanent Secretary.
- 18 Q Next, please. Can I just ask you to look over the page? Do you
19 recognize the memo? It's over the page.
- 20 A Correct.
- 21 Q It's dated the 7th of November. This memo was written before
22 your e-mail. Can I just ask you though, this?
- 23 A It's a different year.
- 24 Q Yes, it's at 2008. Sorry, the following year. Can I ask you this,
25 please? Do you know why this was written?

- 1 A I believe that Ms Kokosky was just finishing up her term at Works
2 & Engineering and she was going back to Canada, and I...
- 3 Q So, this was as a final note to the file, was it?
- 4 A That's what she's put in.
- 5 Q Would you agree that this was quite unusual?
- 6 A No. Unusual compared to what? She was just making a statement
7 of what she took/thought happening on the project; and she wanted to just leave
8 something behind, that's all.
- 9 Q Did you ask to do it? Did you ask her for it?
- 10 A I wouldn't say I asked her to do it. I said, make sure that she has
11 notes of her activities on the project noted.
- 12 Q Later that self-same year, there was an audit done. We see it at 10-
13 65, in which virtually everything that's in that memo is lifted and put into the
14 audit.
- 15 A 10-65? Mm hmm. Well, again, once you put it on file, it's on file
16 for the auditors to come look at the files.
- 17 Q Can you turn, please, to your bundle.
- 18 A What's my bundle? Which one?
- 19 Q It's 10-43, back to 10-43.
- 20 A 10-43?
- 21 Q That's the one we've just been looking at, the note to the file.
22 Bearing in mind where we are at this time, this is just...
- 23 A Where are we, on what page?
- 24 Q Sorry, the one we were looking at, the note by Kokoski.
- 25 A Right.

1 Q Yeah? That went/it was a note that she made to the file. Bearing
2 in mind, this is on the 7th of November of 2008.

3 A Right.

4 Q Would you say, at this point in time, you'd pretty much fallen out
5 with the Minister?

6 A I wouldn't say I'd fallen out with the Minister. I still was there to
7 serve the Minister in my capacity of Chief Architect.

8 Q Were you doing that?

9 A If he felt that he didn't want to communicate with me, that's
10 entirely up to him.

11 Q Did you have any idea why that might be so?

12 A I can't answer that.

13 Q In any event, as I've said, this found itself within weeks into the
14 Auditor General's Report, which is at 10-65.

15 A Right.

16 Q And then, later that year, or very close to that time – within weeks
17 – there was a pair of cheques found, were there not, on the file?

18 A No, that's not correct.

19

20 CHAIRMAN Mr Lynch, I'm going to stop you at that
21 point. We had some evidence about these cheques before and I specifically noted
22 that your list of questions didn't include any reference to them.

23 MR LYNCH Yes. I'm simply trying to get out the
24 motivation, or why the fall-out might have taken place.

25 CHAIRMAN Yes, though we have had evidence
26 about that bit.

1 MR LYNCH Mm, alright.

2

3 **BY MR LYNCH**

4 Q But, is it the case that, certainly by 2009, you'd fallen out with the
5 Minister?

6 A Again, I didn't fall out with the Minister. It wasn't my
7 interpretation I fell out with him.

8 Q And yet, you were, in effect, excluded, were you not, from this
9 contract? Your Department?

10 A Yes. That's the Minister's decision.

11 Q Yes. Can you think of any reason why you were being excluded?

12 A Again, you would have to ask the Minister, or the previous
13 Minister, for that.

14 Q Are you able to help us? Was any explanation ever give to you?

15 A None.

16 Q Why it was that you were, in effect, being excluded from what
17 was, after all, the biggest project the country was doing at the time?

18 A None whatsoever. It's left up to the Minister and the Permanent
19 Secretary to assign whoever they want to projects.

20 Q And, were you...? Can you turn, please, to page 26?

21 A 10-26?

22 Q 26 in your bundle, that is to say, it's behind your material. So, it's
23 binder 2.

24 A Oh, binder 2, sorry. What Tab is that, Mr Lynch?

25 Q It's Tab 3. There was, prior to that, at the end of the last year... If
26 you go back one page, you'll see there's a letter from Robert Horton to...

1 A What, what, what... ?

2 Q Sorry.

3 A Just let me find what page you're looking at.

4 Q Yes. The pages are now on the bottom, and it should have
5 twenty... Well, it's obscured, unfortunately, by the writing on the page itself but,
6 if you go to...

7 A Which Tab?

8 Q Just go through the pages. It's Tab 3, and you should have 26 and
9 then an 'LB' underneath it.

10 CHAIRMAN

11 Is is Bundle 2, Tab 3?

12 MS LUCK Witness, yeah.

13 CHAIRMAN and page 26.

14 MS LUCK 26.

15 MR LYNCH Well, I want 24, but you can't see 24, so, I was
16 going to use 26 to go back to it. Do you see?

17 MR BRADY Yes.

18

19 **BY MR LYNCH**

20 Q This is a letter from/dated the 2nd of December of 2008, in which
21 the Permanent Secretary, Robert Horton, has, as it were, dismissed, or, seeks to
22 dismiss, the Company who'd been the architects, Carruthers Shaw & Partners.
23 Up until that time, would you agree that there had been considerable problems
24 with the contract between the architects in Canada and the builders in Bermuda?

25 A Considerable... ?

26 Q Problems.

- 1 A I wouldn't say 'considerable problems'. There are issues that they
2 had, but nothing that couldn't have been resolved.
- 3 Q Was it not the case that the problems had become so acute, the
4 relationship between your Department, the architects in Canada, and the builders
5 here in Bermuda, that they were also being terminated from the contract. You,
6 having been taken out of the equation?
- 7 A Again, that's the right of the Minister and the Permanent Secretary.
- 8 Q Whether it's his right or not, do you agree that the problems had
9 become so acute, firstly with your Department, and the with them?
- 10 A No, I wouldn't say that at all.
- 11 Q You wouldn't?
- 12 A No.
- 13 Q Can you help us as to why it was necessary then, to dismiss the
14 Canadian Company?
- 15 A I/you have to ask the previous Minister, I can't answer that.
- 16 Q You weren't privy to that?
- 17 A No.
- 18 Q And then, over the page. Do you see from you, at page 26? An e-
19 mail that was sent to you by Craig Goodman?
- 20 A Mm hmm.
- 21 Q Who was the CS&P architects.
- 22 A Correct.
- 23 Q If you go down the page, halfway down the page.
- 24 A Yes, mm hmm.
- 25 Q From him to you, saying:

1 “Lawrence, with reference to the letter received from Mr Horton yesterday, please
2 advise formally onsite engineering to stop work.”

3 Do you see that?

4 A Yes,

5 Q That was his people to stop doing anything, isn't it?

6 A Yes.

7 Q And, your response to that was, above:

8 “I've been directed/ I have directed Lucy to inform onsite of your instructions in
9 regards to your reference to a letter received yesterday from Mr Horton.”

10 A Mm.

11 Q I have not been copied in on this document, or invited to any
12 meetings with the Permanent Secretary relating to this project since August.

13 A Yes.

14 Q That didn't mean to say you didn't have, did you, a weather-eye on
15 what was happening in respect of the project?

16 A You say a weather-eye? I mean...

17 Q I mean, you were still in touch, were you not, with the project?

18 A When you say 'in touch', Ms Kokoski was the person who ran the
19 day-to-day operations of the project.

20 Q Yes, under your supervision?

21 A Not under my supervision. She was the person that was day-to-day
22 operations. My job was for the rest of the Office, and managing other projects as
23 well, and people.

24 Q Okay, now, of course, but she was working under you in your
25 Department?

- 1 A In some cases. But, in some cases, she was working directly for the
2 Minister and the Permanent Secretary. She was getting her instructions directly
3 from them.
- 4 Q You understand what I mean by a 'weather-eye', don't you?
- 5 A No, you tell me.
- 6 Q You don't?
- 7 A No.
- 8 Q And then, over the page, please, at 28.
- 9 A Mm hmm.
- 10 Q Lucy Chung writes to you, or copies you in, rather, saying it's her
11 understanding that the Architects Department is no longer involved with the
12 Magistrates Court project?
- 13 A Because, by this time, that's when Conyers & Associates were taken on by
14 the Minister.
- 15 Q It is just in this window, between December and January, that the whole
16 business, and I don't want to go into it, but the whole business of the cheques
17 being found on the files, were found, isn't it?
- 18 A When you say 'found on the files', again, you're going into an area that
19 that's not correct.
- 20 Q That's not correct?
- 21 A No.
- 22 Q Alright. In any event, did you feel that you had been effectively
23 side-lined, right from the outset of your involvement as the Chief Architect, by
24 the Ministry?
- 25 A Pretty much, yeah.
- 26 Q Who did you raise that with?

- 1 A I didn't raise it with anyone. It was just an observation, and it
2 was...
- 3 Q Were you put out by that fact? You understand what I mean 'put
4 out', don't you?
- 5 A I don't know. I mean, again, it's... I was working on other
6 projects of similar importance, and it's at the direction of the Minister and
7 Permanent Secretary.
- 8 Q Well, I mean again, it was in respect of that that you were arrested,
9 weren't you?
- 10 A In respect to what?
- 11 Q The business of the cheques, you were arrested.
- 12 A Somewhat, yeah. Yeah.
- 13 Q What it did was to effectively neuter you from being able to carry
14 out your job.
- 15 A Well, from that point, yeah, that they virtually side-lined me from
16 that point, yeah.
- 17 Q But, there's no correlation at all between what happened with the
18 file and these cheques, and your being put out?
- 19 A I see no correlation.
- 20 Q No correlation. I mean, you put the cheques on the file, didn't
21 you?
- 22 A No.
- 23 Q You didn't?
- 24 A No.
- 25 Q Really? Thank you.

1 CHAIRMAN Mm hmm. Mr Dunch, do you want to ask
2 any questions?

3
4 **MR DUNCH** Just one, Mr Chairman.

5
6 Mr Brady, Mr Lynch asked you about if you knew whether or not,
7 or what you knew about the problems that led to the dismissal of CSP. I think we
8 went over this when I questioned you earlier but, just to be clear:
9 Is it not the case that the problem that led to the dismissal of CSP was the fact
10 that, as architects for the project, they refused to certify payments that the
11 Minister had insisted they certify?

12 **MR BRADY** That, I would say, is completely correct.

13 **MR DUNCH** Thank you.

14 **MR ELKINSON** I have one question

15 **CHAIRMAN** Mr Elkinson, yes you can.

16 **MR ELKINSON** Thank you. Mr Brady, if you'd would just refer to
17 the small binder 3, 10-32. Now, I'd invite you to look at this document. You've
18 already been shown it by Mr Lynch.

19 **MR BRADY** Mmmmm.

20 **MR ELKINSON** You will have two pages.

21 **MR BRADY** Correct.

22 **MR ELKINSON** With a final paragraph concluding accordingly'.

23 **MR BRADY** Final paragraph, saying 'accordingly'?

24 **MR ELKINSON** Yes. Can you confirm to the tribunal whether or
25 not you were the author of this particular document, being the Cabinet
26 memorandum?

1 MR BRADY No.
2 MR ELKINSON Thank you.
3 CHAIRMAN We have no questions for you, Mr Brady. Thank
4 you very much for coming back. And, that concludes your further evidence.
5 MR BRADY Thank you, Mr Chairman.
6 CHAIRMAN Thank you.
7 MR BRADY Thank you, Mr Chair.
8 MR DUNCH Mr Chairman, is it alright if we withdraw?
9 CHAIRMAN Well, oh certainly. I was just going to say, we'll
10 take a ten-minute break.
11 MR ELKINSON A couple of minutes break?
12 CHAIRMAN And, Mr Manders is due to come afterwards.
13 MR ELKINSON Yes, that'll be the last witness of the day.
14 Sir.
15 CHAIRMAN And Mr Lynch, and Mr Dunch, you're certainly free
16 to leave. Thank you.
17 MR DUNCH Thank you so much.
18 MR LYNCH Thank you.
19
20 **(04:07:52 Afternoon break taken) (04:21:08 Afternoon break ended)**
21
22 **WITNESS, MR ANTHONY MANDERS, IS SWORN IN**
23 CHAIRMAN Thank you. Do sit down, Mr Manders.
24 MR ANTHONY MANDERS Thank you.
25 MR ELKINSON Good afternoon, Mr Manders.
26 MR MANDERS Good afternoon.

1 MR ELKINSON I'm Jeffrey Elkinson. I'm counsel to the
2 Commission of Inquiry. We have the Commissioners and we have Ms Memari,
3 who is your counsel.

4 **EXAMINATION OF MR MANDERS**

5 **BY MR ELKINSON**

6 Q Mr Manders, you are the Financial Secretary?

7 A Correct.

8 Q And you have, in the last couple of months, prepared some witness
9 statements?

10 A Correct.

11 Q And, if you look in front of you there, for your convenience, in the
12 binder of "Witness Statements", Tab 16. It's opened in front of you there. You
13 should find a witness statement of yourself?

14 A Correct.

15 Q And, if you could just look at the back page, you will see that it's
16 dated 19th of September.

17 And, if you could confirm?

18 A That's correct.

19 Q And, if you could confirm that that witness statement, the contents
20 of it are true, to the best of your knowledge and belief?

21 A Correct, yes.

22 Q And, a second witness statement, further along. And, again, if you
23 could confirm the contents of that are true, to the best of your knowledge and
24 belief.

25 A Yes, correct.

1 Q And you have finally provided the Commissioners of Inquiry a
2 letter, 8th of July, which is in front of you there.

3 A Yes, correct.

4 Q Yes. So, Mr Manders, could you just inform the Commissioners of
5 the role of the Financial Secretary?

6 A The Financial Secretary is similar to the Chief Financial Officer in
7 the private sector: Organization, responsible for financial management across
8 Government, debt management, pension fund oversight, ensuring that
9 Government's accounts are prepared on time, all treasury functions across
10 Government, cash management. Then, we have the Accountant General below
11 the Ministry of Finance. And we're responsible for everything that the
12 Accountant General does. We're responsible for social insurance, so we oversee
13 all of Government's Pension Funds, and we also have the Tax Commissioner with
14 us, so we also ensure that all Government's revenues are collected on a timely
15 basis, and we also ensure that Government is liquid then.

16 That's where I'm just coming from – raising debt to Bermuda
17 Government. So it's a long list of items that the Financial Secretary is responsible
18 for.

19 Q I think we have enough debt, we don't need it raised, Mr Manders.
20 So, in relation to that role, you have given the Commission of Inquiry various
21 explanations and details concerning certain structures within Government, the
22 Office of Project Management and Procurement has been explained. And, in
23 particular, you were asked about the LF Wade International Airport Project.

24 A Correct.

25

- 1 MR JOHN BARRITT Mr Elkinson, can I just stop you for a minute? I just
2 want to, so I don't get myself in the same pickle I've been in previously. I have
3 an unsigned second statement from Mr Manders, and I'm looking at Ms Memari
4 now for confirmation that it hasn't changed any from the one we received because
5 it was awaiting Mr Manders' signature upon his return.
- 6 MS VENOUS MEMARI That is correct, but may I ask how many pages it is?
7 MR BARRITT Six.
8 MS MEMARI And thirty-three paragraphs, correct?
9 MR BARRITT I have thirty-four.
10 MS MEMARI Then, it would be different from the final signed
11 statement.
12 MR BARRITT Okay, well, if I can...
13 MS MEMARI I have a clean copy that is not marked.
14 MR BARRITT If I come upon something that... I expect you...
15 CHAIRMAN Well, if you have a spare copy... ?
16 MR BARRITT It's just, I've marked mine.
17 CHAIRMAN Well, you can keep it.
18 MS MEMARI This is clean.
19 CHAIRMAN Thank you very much.
20 MS MEMARI Thank you. I believe it was e-mailed to counsel and
21 the Commission last evening.
22 MR BARRITT Last evening?
23 MS MEMARI Yes. I do apologize for any inconvenience but, as
24 you know, Mr Manders has been away on Government...
25 MR BARRITT Yes. No, no, I understood that, that's why we're
26 asked the question. Thanks. Thank you, Mr Elkinson, I'm sorry.

1 CHAIRMAN And, did you happen to know why the paragraph
2 numbering is different?

3 MS MEMARI Not by memory, I would have to check.

4 MR BARRITT I'm looking now.

5 CHAIRMAN Yes, well that will come out as we go along.

6 MS MEMARI I'll compare. Thank you.

7 CHAIRMAN Let's carry on.

8

9 **BY MR ELKINSON**

10 Q Thank you, Mr Chairman. Mr Manders, the area of focus for the
11 tribunal at this stage, given your clear explanations and your witness statements as
12 regards other matters, is the sole-source engagement of Canadian Commercial
13 Corporation; and the evidence tot the tribunal of Mr Curtis Stovell, the
14 Accountant General, was rather detailed about the history from his perspective.

15 A Mm hmm.

16 Q And the issue that seemed to be focused upon was whether there
17 was a need for compliance with financial instructions. And, there was some
18 suggestion, initially, that the project didn't need to comply with financial
19 instructions. And then, it seemed to be that waivers were then sought as regards
20 certain aspects of financial instructions.

21 Do you wish, in brief, to summarize to the Commissioners
22 how you went about seeking the waiver?

23 A Correct, yeah.

24 Q Thank you.

25 A The redevelopment of the Airport, using the Canadian Commerce
26 Corporation, was a unique way to procure. Over various years and the

1 Governments have looked at using public-private partnerships obviously to
2 develop critical infrastructure needs. A key reason for that is a lot of
3 Governments had incurred a good bit of debt and, so, you use public-private
4 partnerships to ensure that the debt that is needed to build the infrastructure has
5 gone to private sector and you also use it to transfer various risks.

6 The public-partnerships, the first public-private partnership done in
7 Bermuda was the Bermuda Hospital Board. I actually was on the Project Board
8 for that and that was a very successful project, where the Hospital was built on
9 time, on spec, and on budget. Any overruns, obviously, go to the private sector.

10 So, the use of public-private partnerships has been looked at by the
11 previous administration. I recall, back in 2010, a diagnostic review was done on
12 various capital projects and it was determined which ones would be suitable for
13 public-private partnerships. Following that diagnostic review, it was decided that
14 the King Edward Memorial Hospital would be developed using a public-private
15 partnership.

16 So, there had been some preliminary work done already on public-
17 private partnerships. When the new Government came in Office, one of their key
18 economic management and fiscal, with fiscal objectives, was to stimulate the
19 economy by not deficit-spending because, obviously, the levels of debt was
20 significantly high, but by allowing the private sector to carry out various projects.
21 Some were done in hotels where Government provided the framework for hotels
22 to develop it.

23 The unique opportunity to develop the LF Wade Airport actually
24 came about – it originally came about from, I believe, the General Manager of the
25 Airport, Mr Aaron Adderley, had been to conferences with other airport directors

1 and he came across this unique way, where they had actually built the airport in
2 Quito, Ecuador, so I think he...

3 CHAIRMAN Who were they?

4 MR MANDERS It was using the CCC model, where the Ecuador
5 Government...

6 CHAIRMAN No, but you said he discovered at a conference that
7 they had built the Airport in Quito. Who were they?

8 MR MANDERS Right, using the CCC...

9 CHAIRMAN Who are they? Yeah, but who were they?

10 MR MANDERS Oh, Quito Airport, the General Manager of Quito
11 Airport. He was explaining to Mr Adderley how the Canadian Commerce
12 Corporation in conjunction with Aecon had built the Quito Airport using the CCC
13 approach.

14 So, Aaron had also put on a conference in Hamilton
15 Princess with various business key-stakeholders, you know, talking about the
16 redevelopment of the Airport. The redevelopment of the Airport has been around
17 for years. The former administration had proposals to develop the Airport, but the
18 way to finance it couldn't be determined. Obviously, the amount of debt would
19 have been too high, so, it really wasn't developed.

20 MR KUMI BRADSHAW A quick question for you: When did this happen, as
21 far as Mr Adderley getting introduced, through Quito, to CCC and Aecon?

22 MR MANDERS It had to be early 2014, I believe.

23 MR BRADSHAW So, early 2014?

24 MR MANDERS Yeah, and that led to a contingent from Bermuda,
25 including the Attorney General, Minister of Finance, myself, and Mr Adderley
26 actually going to CCC, just to explore the option of redeveloping the Airport. The

1 Minister had announced in this 2013/14 Budget that he's going to be looking to
2 developing Government infrastructure using public-private partnerships. So, from
3 that meeting, June 2014...

4

5 **BY MR ELKINSON**

6 Q Well, where did it take place Mr Manders?

7 A In the Office of CCC.

8 Q Which are where?

9 A Toronto, Canada, right. So, we visited CCC, looked at how they
10 had... At that meeting, actually, was the General Manager of the Quito Airport,
11 who actually gave, you know, flying marks on how they procured the Airport in
12 Quito. If you look at CCC website, that's one of the flagship models that they
13 have developed around the World.

14 So, following that meeting, more due diligence was done by the
15 Department of Airport Operation, the Ministry of Finance, and the Minister of
16 Finance decided that he wanted to explore this option further. So, back, and the
17 first thing he did was prepared a Cabinet memo to get Cabinet's approval on the
18 CCC approach, listing the various benefits, such as... How it works is that you
19 procure expertise from Canada through Canadian Commerce Corporation. They
20 select the vendor; they select the contractor; they do significant due diligence on
21 that vendor and the key – one of the main reasons why the Minister was intrigued
22 with this was that the Canadian Commerce Corporation actually guarantees the
23 actual building of the Airport on time, on spec, and on budget.

24 Q So...

25 A So, it's unique? It's, in my opinion, better than a performance
26 bond, which is 10%, and you have to rely on insurance companies. Here, you

1 have a triple A-rated country guaranteeing the procurement of a key asset,
2 namely, the Bermuda Airport. So...

3 Q I was just going to stop you there to just/so that there's no doubt
4 that the reason you have such faith is that the CCC is actually an arm of the
5 Canadian Government?

6 A Correct. So, the full faith and credit of the Canadian Government
7 is backing CCC. So, together, a triple-A-rated country.

8

9 CHAIRMAN I can see that the Canadian organization as a Government-
10 owned Company.

11 MR MANDERS Yes.

12 CHAIRMAN ... might guaranty the payment to the contractor,
13 but who actually pays the contractor?

14 MR MANDERS The contractor is paid by... It's a/not your typical
15 capital development. The contractor is paid, it's a thirty-year concession. The
16 contractor is paid by revenues from the Airport. It's a concession, thirty-year
17 concession. So, the first part of the...

18 CHAIRMAN Yes, but you... Well, can you just explain, because
19 you don't get any revenues until you've got the Airport.

20 MR MANDERS Right.

21 CHAIRMAN So, who pays the contractor.

22 MR MANDERS The contractor, they raise debt. So they go out to
23 the capital markets, raise debt, and they're responsible for getting the Airport
24 built. Right after financial close, they go to the capital markets; they raise
25 whatever they need to build the Airport, so, they have the debt to pay for the

1 Q And, as regards the waiver sought...?

2 A Yeah?

3 Q ... from the Accountant General...

4 A Mm hmm.

5 Q When you first saw the waiver, what did you understand that
6 waiver entitled you to?

7 A Well, it was always the issue with this whole process is that this is
8 a public-private partnership. Government currently has no guidelines, no
9 procedures, no instructions of how to procure for a public-private partnership.
10 Obviously, we have financial instructions, but the drafting of financial
11 instructions is really for capital projects, where a Government is procuring it,
12 they're designing it, building it, paying for it. So, all the financial instructions is
13 keyed towards a typical procurement.

14 So, when we first got this opportunity, it was unclear how financial
15 instructions actually applied to the... Because this, in my opinion, is a public-
16 private partnership... And, it's not a procurement, it's the Bermuda Government
17 joining with the Canadian Government through CCC to develop an Airport and
18 both parties sharing the upside and the downside. So, when that came about, the
19 Minister of Finance was also in the process of seeking approval from the UK
20 Foreign & Commonwealth Office because it was unclear whether we needed an
21 entrustment letter or not. So, in that process we/I had spoken to the Minister and
22 he said, Well, we've got to at least check with Accountant General, to get his
23 views of how this/how financial instructions applies to this, in conjunction with
24 you seeking your approval for entrustment from the FCO.

25 So, we/the same e-mail that the Minister of Finance was drafting to
26 the Governor to explain why he thinks we should get a waiver from financial

1 instructions to sole-source the redevelopment of the Airport, using the CCC
2 Government to Government approach. I spoke to Curtis and I said, Well, look at
3 this and see how you think it's applied to financial instructions and, using the
4 same rationale that the Minister used, obviously, the on time, on spec, on budget,
5 with the overruns... We know that... We wanted to protect the treasury,
6 transferring the risk to the private sector, and one of the other key reasons was the
7 time-limit.

8 The Minister of Finance, to go through a typical 3-P procurement
9 process, it's extremely long. You go through a RFQ. So, we/I sent that e-mail to
10 Curtis and then Curtis came back with the first memo that he provided to us,
11 based on the knowledge that he had at that time, which was any information on
12 CCC, provided their draft Letter of Agreement and the draft MOU, so, based on
13 his understanding of the transaction at that time, he provided the first memo that
14 he would have sent to the Ministry of Finance.

15 But, as I mentioned before, we've not actually paying CCC for
16 anything.

17 Q So, when you describe it as a 'public-private', it's really a public-
18 public?

19 A Yes, yeah. It's a 3-P. We're, yeah, where Bermuda Government
20 and Canadian Government are joining as partners to strategically build a key asset
21 that the Bermuda Government needs so, it's a public-public, with the private
22 sector. The private sector will come in, because Aecon chooses, I mean, CCC
23 would choose private sector entity to actually procure it.

24 Q Yes. I think that's part of the issue that arose between the Ministry
25 and the Accountant General because, if I'm correct, the Ministry believed that the
26 waiver covered the choosing by CCC of Aecon.

1 A Yeah, we sought permission for the public-private partnership deal,
2 which is Bermuda Government contracting with the CCC. That's the process,
3 that's you know, who CCC select – they have sought – if Aecon brought the deal
4 to CCC, or CCC brought Aecon to the deal, the CCC has sole-procurement
5 discretion, so they have entities. And I speak to CCC all the time. They have
6 entities that approach CCC and not all of the time they say yes. And, mainly how
7 CCC do deals is from entities actually approaching them. So, whoever brought
8 the deal to who, it's irrelevant, because the main thing is that CCC obviously has
9 procurement discretion and, if Aecon didn't fit their stringent due diligence
10 requirements, obviously they're going to say, 'No we don't want to partner with
11 you', and, if they say no, obviously Government will look at procuring this a
12 different way altogether, because one of the main reasons was the financial
13 backing of the CCC – by extension, the Canadian Government – to build the
14 Airport on time, on spec, and on budget.

15 Q So that, if I may, Commissioners, the memorandum in particular
16 that Mr Manders is heading to, is that of 7th of March, 2016, which is in Mr
17 Manders' page 138.

18 MR BARRITT The first memo is on page 28 – 28, 5th of September.

19 MR ELKINSON Depending, ah... I'm using, sorry, I'm using the
20 different... I'm using the number at the bottom, WSAM138, which is page 122 on
21 the top right. Oh, and the first memo? I was going to the later one. The earlier
22 one is "AM53", so that would be page 38.

23 MR BARRITT You see, Mr Elkinson, for us, they haven't been collated in
24 the witness binder. We're working from the actual statements in the Annexes.

25 MR ELKINSON Ah, I'm so sorry.

- 1 MR BARRITT And there's a numbering system to the Annexes
2 where the pages are written in the top right-hand corner. So, if...
- 3 MR ELKINSON Yes, so page 38.
- 4 MR BARRITT Yeah, that would be helpful, if we... Yeah. Yes,
5 now, page 38 is...
- 6 MR ELKINSON It's the same one, as page 38.
- 7 MR BARRITT The same one?
- 8 MR ELKINSON Yeah..
- 9 MR BARRITT 25th of...
- 10 MR ELKINSON 11th of May, 2015?
- 11 MR BARRITT No, no. 25th of September, 2014?
- 12 MR BARRITT 11th of May, 2015, is actually page 37 in our
13 bundles.
- 14 CHAIRMAN No.
- 15 MR ELKINSON I'm sorry. I looked across... 37. Were you able to
16 pull that up, Mr Manders, are you able to keep up with us?
- 17 MR MANDERS Oh, it's top of the page.
- 18 MR ELKINSON Top of the page, if it's hand-written?
- 19 MR MANDERS Yeah.
- 20 MR ELKINSON Is it?
- 21 MR MANDERS Yeah.
- 22 MR ELKINSON Yes? 37.
- 23 MR MANDERS 37, okay. Correct, yeah.
- 24 CHAIRMAN Well, let's not get bogged down. 35 is the
25 memorandum from Mr Manders on the 26th September, 19/2014.
- 26 MR BARRITT That's "Delegation".

1 CHAIRMAN Then, we've gone onto 36, which is Monday, May
2 the 11th, 2015.

3 MR ELKINSON Yes.

4 CHAIRMAN And, the memo from the Accountant General, dated
5 the 11th of May, is page 37.

6 MR ELKINSON Yes, thank you.

7

8 **BY MR ELKINSON**

9 Q So, just as you were describing the sequence here, if the
10 Commissioners don't mind, I will deal with May, 2015, as opposed to going
11 backwards, which Mr Manders has already covered?

12 So, this was from the Accountant General to you?

13 A Yes.

14 Q And he's explaining why he waived/what he had waived in relation
15 to your original request?

16 A Correct.

17 Q And then, further information was to be provided?

18 A Yeah, I provided/we provided that information.

19 Q And this related to this go/no-go redevelopment decision.?

20 A Yeah.

21 Q And then, he raises the point, in the second-last paragraph, whole
22 paragraph.

23 A Mm hmm.

24 Q "Additionally, note that, based on the information available, I
25 consider the use of a General Contractor, hand-picked by CCC, to also be a sole-
26 source requiring Accountant General approval to waive financial instructions

1 requirements for multiple quotes. It is my expectation that a formal request to
2 sole-source will be forthcoming to me in writing to that effect, allowing me and
3 the Office of Procurement Management...

4 A Yes.

5 Q "... sufficient time to digest query and respond."

6 And so, your response to that...?

7 A Is that we done/Bermuda Government doesn't contract Aecon, it's
8 CCC. The transaction is an agreement between Bermuda Government and the
9 Canadian Commerce Corporation, even though Bermuda has the ability to do due
10 diligence on Aecon, we do not select Aecon. It's selected by CCC. So, the
11 permission that was granted – in our opinion – was for the whole transaction,
12 Government contracting with CCC; because if CCC's selected them, CCC has
13 hired them, you know, to do the work, Bermuda Government actually doesn't pay
14 Aecon anything. So, it's not a contractor that we should/the Government should
15 have sought permission to sole-source, because the procurement discretion is with
16 CCC. That was the rationale and I, you know, myself and Mr Stovell's been
17 going back and forward with that. Like I said, it's a unique transaction and, in my
18 opinion, it doesn't fit technically within financial instructions. But, that's always
19 been the Ministry's position that CCC has sole-procurement discretion. They
20 selected Aecon, they're the ones that take the risk – the most important thing –
21 they're the ones that take the risk with the supplier that they choose.

22 Q Because, as we see from the memorandum of Mr Stovell, on the 7th
23 of March, 2016, page 122... He actually recites as if I were... Just waiting for you
24 to pull it up.

25 A 122 up top, yeah? Yes.

1 Q He recites, in the fourth paragraph, about what his initial
2 understanding was.

3 A Right.

4 Q And, perhaps you would explain to the Commissioners what stage
5 this memo was written at?

6 A You mean that Curtis...? Well, that would have been after I had
7 sent my memo of November 15th that was in there, based on my read of... Yeah,
8 this is basically explaining: He had given his original sole-source waiver based on
9 the fact that he thought that CCC had selected/had brought the...

10 Q Aecon had brought...

11 A Aecon that, yeah: CCC had brought Aecon into the project, rather
12 than the opposite way around, where Aecon had reached out to CCC.

13 Q So... I think this is the last of the memorandum from...?

14 A Yeah.

15 Q ... from Mr Stovell?

16 A Yeah, this is the last memorandum and, as you could see, along
17 with getting the approval from the Accountant General, we also had to get the
18 approval from the FCO, which required a new entrustment, that was issued in
19 July, 2016; and the requirements in that entrustment, very stringent, where
20 Government has to produce an evidence-based report.

21 Just going back to sole-sourcing. Obviously, you can sole-source.
22 Most Governments around the, legally, you could sole-source. The key with
23 when you do sole-source, there has to be mechanisms to ensure that it's value for
24 money in the transaction, and the Government has gone through great lengths to
25 ensure value for money.

1 When we initially brought this to the FCO's attention they,
2 obviously, wanted to ensure that we had value for money, so, the FCO and the
3 Ministry of Finance actually engaged Deloitte and...

4 Q FCO?

5 A Yeah, Foreign & Commonwealth Office... And the Ministry of
6 Finance engaged Deloitte. One of the suggestions they had made, that we should
7 get an independent appraisal of the CCC approach. At that time, we were a long
8 way from making an investment decision and financial close, so, it was,
9 obviously, it would be gaps in the whole process.

10 So, the FCO suggested that we hire one of the accounting firms,
11 bid a tender to, and Deloitte were the successful bidder and, what they did is
12 looked at.. Compared the procurement strategies that we were using to the UK's
13 Treasury's Green Books. I'm not familiar, if you're familiar with that, but those
14 requirements are twenty times as more stringent than financial instructions
15 because it takes a capital project from business case... One with the business case,
16 right to the end of construction. So, Deloitte proved...

17 MR BARRITT Is there, what you're talking about now is not the first
18 Deloitte report? You're talking about the subsequent one?

19 MR MANDERS It's only been one Deloitte report.

20 MR BRADSHAW So, you're talking about the one where... ?

21 MR BARRITT You're talking about the Deloitte report that was
22 produced, which both Government and FCO paid for?

23 MR MANDERS Right, right.

24 MR BRADSHAW Where they did the Green Book comparison?

25 MR MANDERS Right, they looked at the Green Book.

26 MR BARRITT They looked at the five cases.

- 1 MR MANDERS Beg your pardon?
- 2 MR BRADSHAW They looked at the five cases.
- 3 MR MANDERS Right, the five cases. So, they produced the report,
4 which was tabled by the Minister of Finance in The House of Assembly and then,
5 at part of the entrustment, we had to first agree to the measures that Government
6 had taken to fill the gaps that Deloitte had noticed in that report/had recorded in
7 that report. Obviously it would have been gaps because we weren't close,
8 anywhere near to financial closing, and had to be a significant more buildup of the
9 actual business case and things of that nature.
- 10 So, we have actually, at this point, agreed to the
11 measures, and the Accountant General notes it in his latest memo that we have
12 agreed with the FCO the reports that we're going to produce to ensure and just to
13 add credibility to the whole process. So, these are reports that Government agree
14 to do and we're in the process of producing these edited in space reports and the
15 Minister of Finance will table them in the House of Assembly before the deal
16 closes.
- 17 So these are various reports that our external
18 consultants are preparing and, also with that, we're getting an independent
19 Company from Canada that's not been involved. Obviously, we've had...
- 20 MR BRADSHAW I was just going to say: Before which aspect of the
21 deal closing? Before financial close?
- 22 MR MANDERS Before financial close, right.
- 23 MR BRADSHAW And that'll be tabled before whom?
- 24 MR MANDERS Yeah, that'll be tabled before financial close.
- 25 MR BRADSHAW Before Cabinet, you said?

- 1 MR MANDERS Cabinet have... The process that we are at this
2 stage:
3 We have had the approval for the MOU – Memorandum of Understanding, Letter
4 of Agreement, Airport Development Agreement. The next stage in the process is
5 to sign off on the Definitive Project Agreement. That is the final Agreement, to
6 say what Government/what's the outcome, what is Government committed to, and
7 what the project, or the private sector's committed to. But, before that, we did...
8 The last part of the process was to, for CCC, Aecon, and the Bermuda
9 Government to agree to our Airport Development Agreement, and that Airport
10 Development Agreement has been tabled in the legislature; and that report clearly
11 shows all of the obligations of Government and all of the obligations that CCC,
12 through Aecon, are responsible for with regard to this project.
- 13 MR BARRITT Which report is that?
14 MR MANDERS The Airport Development Agreement.
15 MR BARRITT The one that's missing all the Schedules?
16 MR MANDERS Right, the Schedules are not there because the
17 schedules are, obviously, commercially sensitive.
18 MR BARRITT Yeah, we know the line that's taken, but I just
19 wanted to make sure that I understood what you meant.
20 MR MANDERS Yeah.
21 MR BARRITT When you said something had been tabled.
22 MR MANDERS But it does – I don't know if you had the
23 opportunity to read it? But, if you read it, it does have all of the obligations that
24 Government is committed to.
25 CHAIRMAN All of the obligations?
26 MR MANDERS Tax concessions, what we re...

1 MR BARRITT Mr Manders, now is probably not the place to
2 disagree.

3 MR BRADSHAW No, you don't want that. You don't want to
4 disagree.

5 MR BARRITT But, I have to tell you, I've just... I have a great
6 deal of difficulty understanding an agreement where, even the definitions of some
7 of the terms are in the Schedules, and I can't see the Schedules. But, let's not go
8 there today.

9

10 **BY MR ELKINSON**

11 Q Was the Office of Project Management & Procurement involved in
12 the process?

13 A Yeah, they've asked questions, providing oversight, which is
14 required, which they're required under The Act. I did reach out to the Acting
15 Director, and he did provide information, and said his oversight of the project, just
16 like any other projects, would be strengthened if the Code of Practice was
17 introduced, but...

18 MR BRADSHAW When did they first get involved?

19 MR MANDERS Well, it's a new Acting Director now. I recall the
20 previous Acting Director was asking questions about the project, but at an
21 oversight level.

22 MR BRADSHAW How far back? I'm just trying to get a feel for time-
23 line.

24 MR MANDERS I would say even before the LOA was started. It
25 was signed in November, 2014, so, even before November 2014.

26 MR BRADSHAW Before November, 2014?

1 MR MANDERS Right. But they have had a few Directors. The
2 first, the interim Director, did ask queries about, you know, what level of due
3 diligence we do.

4 So, they have been providing a level of oversight
5 and, when the current Acting Directors come in, he's invited in on all of the calls
6 that the Government Advisory team have weekly. So, he is providing the level,
7 some level of oversight that's required under The Public Treasury Act but, in his
8 response that I've included in my statement, he said that that would be
9 strengthened with the Code of Practice being brought into force.

10 MR ELKINSON Thank you, Mr Manders. Ms Memari may have
11 some points she wishes to raise?

12 CHAIRMAN No, have you finished with the Airport?

13 MR ELKINSON I have, Sir, yes.

14 CHAIRMAN Yes. Yes, well, have you any questions?

15 MS MEMARI No questions, just right now, thank you.

16 CHAIRMAN No, right. Mr Barritt?

17

18 **BY MR BARRITT**

19 Q Okay. Mr Manders, bear with me here. I have a number of
20 questions I want to ask, and I preface that by saying this, that:

21 One of the... A common thread to many of the projects we've looked at under the
22 Auditor General's Report for -10, -11, -12...

23 A Mm hmm.

24 Q Is where things have started out as a national imperative and the
25 thing that we're focusing in on is the oversight that is provided, or not provided,

1 with respect to these projects that go outside of financial instructions. So, bear
2 with me if you would, please, I'm going to ask these questions:
3 We see the flurry of e-mails that occurred, I think on September the 25th, between
4 yourself and Mr Stovell, in which you were pressing him for a memo because the
5 Minister of Finance needed it because the Governor...

6 A No, I wasn't pressing him. I was asking him for a memo and I
7 gave him the time he needed to write the memo.

8 Q Okay, you weren't pressing him?

9 A No.

10 Q And, one of the things that I noted from that was that one of the
11 things that was driving it is that the Governor felt that the Accountant General
12 needed to sign off on this for the purposes of dealing with the Foreign &
13 Commonwealth Office.

14 A The Governor asked about it, but he had discussed that internally
15 even before I sought from the Minister.

16 Q That you were going to seek it as well?

17 A Yeah, yeah.

18 Q Okay, fair enough. And, as I look at the first memo that Mr
19 Stovell provided, he set out in it, I think quite clearly, what he thought he was
20 being asked to do, and to provide an opinion on and, out of all the e-mails that
21 you provided – thank you very much – I never saw anywhere in there where
22 anybody from the Ministry of Finance, through yourself, or otherwise, disagreed
23 with his analysis of what he'd been asked to do and the answer he provided.

24 A I wouldn't agree with that. That's been the Minister's position
25 from – I mean, you might not have seen it in his e-mails – that we are signing up
26 to a Government-to-Government contract, where Bermuda Government signs a

1 contract with the Canadian Commerce Corporation. The CCC team is responsible
2 for building the airport, and the CCC team is selected by the Canadian Commerce
3 Corporation. So...

4 Q I know what the Ministry of Finance's position is, as I look at it,
5 but I'm looking at Mr Stovell's memo that he wrote on the 25th, or 26th of
6 September, in which he said:

7 'This is what I'm being asked to do, and this is my opinion, and this is why I give
8 a waiver for CCC.'

9 A Yes.

10 Q And I didn't see anyone come back and disagree with him on that.

11 A If you look at my Memos all through, the last memo...

12 Q Okay, well show me... Okay, just very briefly then, show me
13 where you disagree.

14 A It's a lot of e-mails where I've said that the Minister's position has
15 been that this is a Government-to-Government contract. We really – and I was,
16 you know, myself and Curtis are professionals. This is nothing that's out of the
17 ordinary where people have a difference of opinion, so...

18 Q No, no. I see clearly the difference of opinion and, frankly, I'll tell
19 you now, I think it's a good thing to see this kind of tension between the
20 Accountant General and the Finance...

21 A No tension (chuckling).

22 Q I don't mean that in that sense

23 A Okay.

24 Q Oversight, between the Accountant General and the Financial
25 Secretary as to what each of their responsibilities are and how they see things. I
26 don't see that as a negative at all. In fact, if I take you to page 47, 48...

- 1 A Top or bottom?
- 2 Q The top, of forty, yeah, 47 and 48. I'm using this free system of
3 your Annex.
- 4 A Okay.
- 5 Q And, this is November 19th, 2015, sometime after the memo of
6 September 25th is written.
- 7 A Yes?
- 8 Q And now, from my point of view – bear in mind, I'm only seeing
9 what you're showing me – now comes in e-mails from you. Some of the
10 explanation and justification for this project that Mr Stovell obviously, may not
11 have had to hand when he wrote the memo of September 25th.
- 12 A Right. And that's the issue that we didn't have all of the
13 information, so this has been a progression of approval. When the first approval
14 was granted, all we had was the LOA and that's all Mr Stovell asked for, CCC
15 white page, MOU, and the Letter of Agreement, so, this has been information
16 that, as both of us got a better understanding of the deal, further information was
17 asked and we've provided all of the information that the Accountant General has
18 requested.
- 19 Q I'm not saying you haven't, but I'm trying to understand how we
20 get to where we are today, so we can better understand...
- 21 A A lot of back and forward, and explaining.
- 22 Q Yeah. Clearly, we could see that. Like, I mean, on page 31 there's
23 an e-mail from yourself to Mr Stovell, the Accountant General, on Friday the 26th
24 of September and this is after you've received his memo I think, and the only
25 point you make is one point:

1 “Could you rephrased the part about reservations and say you are unable to
2 confirm that the project can sustain the level of debt.”

3 A Yeah, mm hmm.

4 Q And, to my way of thinking, that was the only disagreement at that
5 stage, on the record, as we see it, with respect to what he was saying on
6 September 25th in his memo.

7 A Obviously, what he was saying, it’s how we interpret it. You
8 might have interpreted his memo different from how I interpreted it.

9 Q Well, I thought there was this disagreement between you and the
10 Accountant General as to what he had given a waiver...

11 A I wouldn’t say a disagreement.

12 Q Well, how would you...

13 A A difference of opinions.

14 Q Well, differences of opinion lead to disagreements and they
15 constitute disagreements but, okay, let’s not argue over semantics, if that’s alright
16 with you?

17 And I saw, at one stage, also on September twenty... Now, what
18 was this? “The Involvement of the OPP”. Again, this is another e-mail on
19 September the 26th, page 27:

20 “Please see the attached.”

21 I think this is his memo.

22 “I’ve attached it in PF and Word. It may not be exactly what you are looking for,
23 though.”

24 I wasn’t quite sure. He obviously thought you wanted something different than he
25 gave?

26 A I don’t know what he was...

- 1 Q No, you don't know what he meant.
- 2 A Yeah, I can't say. You would have to ask the Accountant General
3 that, Mr Barritt.
- 4 Q Fair enough. No, we had him and I don't know that I had that e-
5 mail when he was here giving evidence.
- 6 If I could, in your witness statement now, and I think I've seen
7 where some of the numbering has occurred but, hopefully, we'll be on the right
8 track here. What I have is paragraph number 9. You have:
9 "Under the circumstances, the Ministry acknowledges the points raised by the
10 Accountant General throughout the process and note the following two points.
11 "Even though Bermuda has the right to conduct its own due diligence concerning
12 the quality of the CCC team membership, qualification and CC's selection of
13 methodology, the Bermuda Government does not engage contractors."
14 And that's a point I think you've made today.
- 15 A Yes.
- 16 Q What about the Bermuda Government's obligations, never mind
17 whether we have the right to conduct due diligence, but isn't there an obligation
18 on somebody's part to conduct due diligence...?
- 19 A Due diligence.
- 20 Q ... with respect to how this contract is carried out?
- 21 A Correct. The...
- 22 Q And who's doing that for us?
- 23 A You mean? Which contract? Actually we're working towards a
24 Project Agreement.
- 25 Q Well, all of them, all of them.

1 A Once you do the Project Agreement, and working with Bermuda
2 Government, you have a Financial Adviser, who's similar to the Bermuda
3 Hospital deal – Financial Adviser, Legal Adviser, Technical Adviser, that are
4 working for Bermuda to ensure that the Project Agreement has the best terms for
5 Bermuda.

6 That's what the advisers do, and we have the Airport General
7 Manager chips, all his Staff, I look at things. So, once you get to the Project
8 Agreement, the obligations to build and run the airport are away from
9 Government. We, obviously... And, during the construction period, you have
10 CCC – who's got a vested interest in it; you have the lenders – who have a vested
11 interest in it. So this is not your typical... and I guess public-private partnerships
12 are kind of new to Bermuda... This is not your typical procurement, where
13 Government's designing, building, and paying for, to build a school, and then you
14 have the quantity surveyors looking all, and Government's paying for everything.

15 Once we get to that Project Agreement, if it's drafted properly, all
16 of the protections that Bermuda Government need should be in that Project
17 Agreement.

18 Q Okay, I understand that. I guess...

19 A So, it's a public-private partnership. The responsibility for
20 building the Airport rests with CCC, and they have various cheques and balances
21 all over that process.

22 Q Okay. Until we get to that appoint, and where the Project
23 Agreement is signed, I was asking you: Who are the team advisers? Under whom
24 are they operating? Because, at one stage we see that Mr Stovell points out that
25 the oversight for this project, or the responsibility, needs to be delegated from
26 Works & Engineering.

1 A Yeah, well, if you....

2 Q And an official delegation was done by yourself.

3 A Yeah, yeah.

4 Q I'm sorry, by the Minister of Finance.

5 A But that, that's, if you look at The Airport Civil Aviation Act, it's
6 clear that the Minister responsible for the Airport has the powers to fix the Airport
7 up whichever way he desires. The authority is with him. Now, the financial
8 instructions, there's a conflict, so, that's why we did the transfer. We transferred
9 the accounting responsibilities from Public Works to the Ministry of Tourism &
10 Transport, even though part of The Civil Aviation Act, the Minister of Transport,
11 or the Minister responsible for the Airport already has that ability, or power, to
12 construct the Airport.

13 Q Okay.

14 MR BRADSHAW Are you saying, because that conflict that –
15 that's the reason? That the fact that there was, or, what you're stating, what I'm
16 hearing from you is there was a conflict due to financial instructions, so, to go
17 around financial instructions, you transferred that responsibility. Is that what
18 you're saying?

19 MR MANDERS No, I'm saying that The Civil Aviation Act
20 clearly gives responsibility for redeveloping the Airport to the Minister
21 responsible for the Airport. That would be the Minister of Tourism & Transport.

22 Financial instructions says that every capital project
23 must be dealt with by Public Works and the Permanent Secretary of Public
24 Works. All of the Airport projects have always been done by the Airport, not
25 through the Public Works, so that was just regularizing what The Civil Aviation
26 Act already provides for.

1

2 **BY MR BARRITT**

3 Q Understood. Although we've also...

4 A But just getting back to governance and, if you looked at my
5 statement, the point 30, 31 and 32, the governance structure of this project – you
6 know what I'm saying – this is a significant project for Bermuda Government and
7 you agree, you have to have the proper governance around that project. So,
8 Cabinet actually created a governance structure, where you have a Project Board,
9 which is the Minister of Finance, the Minister of Public Works, the Minister of
10 Tourism & Transport, the Minister of Economic Development...

11 Q Okay, slow down. Slow down so we can all catch this.

12 A (Chuckling)... who meet every week to get updated from the
13 Government Advisory Team, which is technical officers and all of the advisers for
14 Government, and they get updated every week, or whenever there's a meeting,
15 basically every week.

16 So the reason for this – this is a significant Project Agreement – so,
17 if you have four or five Ministers already being involved, heavily involved, in the
18 project, knowing what's happening with it, when it goes to Cabinet, instead of one
19 Minister putting forward the Project Agreement – because the Project Agreement
20 has to be approved by Cabinet – you have four or five Ministers that are already
21 well-versed with what Government is committing to with this Project Agreement.

22 So, the governance structure, there's another oversight that we
23 have in this project. It's tons of oversights that we have in this project and it
24 should be that way, because this is a sole-source project.

1 Q Yeah, fair enough, and that's why I asked the question, so we can
2 get some idea of what oversight is being provided and, underneath them, I
3 presume as you said, there's a team of advisers as well?

4 A Correct.

5 Q Some of – could you tell us who they are?

6 A CIBC is a financial adviser; HNTB is a technical adviser; Lee
7 Fisher is a traffic forecast and adviser; Bennett Jones is a legal adviser.

8 Q And these are the people who are monitoring the project as it goes
9 forward and actually doing the contract negotiation then, as well?

10 A Correct. Along with Government officials.

11 Q With CCC?

12 A Yeah. And CCC; and negotiating with CCC and Aecon.

13 Q Okay, I just want to go back to this Deloitte report. I understood
14 Deloitte – somewhere in here I read – are now employed as doing something for
15 Government? Post the report? Or, they just did the report and that's it?

16 A They did the report and posted the report. Before we agreed to the
17 measures that we were going to send to the Foreign & Commonwealth Office, we
18 asked Deloitte to look to say:

19 These are the lists of reports that we're going to prepare to deal with all of the
20 gaps, or whatever, you've identified in this report. Do you agree what we're
21 sending to the FCO?

22 Obviously, if the Bermuda Government and FCO engaged Deloitte
23 to look at this report, when FCO gets our list the first persons they're going to call
24 is Deloitte. So it was proactive to ask Deloitte to look at what we were proposing
25 to send to the Foreign & Commonwealth Office and they actually agreed to what
26 we sent and now we have the final signoff from the Foreign & Commonwealth

1 Office, to say that we agree with the initiatives Government's going to take to
2 improve the value for money and risk-strength throughout the Project.

3 Q Is that something that's included in your e-mails? Is it subsequent?

4 A I think Curtis' last – one of his last memos – he actually has that
5 entrustment letter, I believe.

6

7 CHAIRMAN He says it's very, under...

8 MR BARRITT Now, there's something I...

9 CHAIRMAN The second condition, that's the last one.

10 MR BARRITT The second condition's been met then?

11 MR MANDERS Mm?

12 CHAIRMAN No, not yet.

13 MR BARRITT The second condition hasn't been met?

14 MR MANDERS Beg your pardon, my ear's a little...

15 MR BARRITT The second condition in his memo...

16 MR MANDERS Oh, the second condition is the evidence-based
17 report and that has to be met, yeah. All of the reports that we have to produce.

18 MR BRADSHAW So, that has not been met, as yet?

19 MR MANDERS No.

20 MR BRADSHAW Okay.

21 MR MANDERS A lot of these Reports, you really can't complete,
22 until all of the terms of the contract have been finalized, because you've got to do
23 value for money analysis, all sorts of analysis, so a lot of them really can't be
24 completed until the deal actually closes.

25 MR BRADSHAW So, are you suggesting then, that value, like, a value
26 for money exercise, would only be able to be performed after it's signed?

- 1 MR MANDERS The final one, final version, the final version.
2 Already, if you look, it's a lot/a few options reports which have various value for
3 money calculations. The Minister just posted one, where he gave three options of
4 how we could have procured this Airport, either by the typical design build,
5 where Government borrows; traditional 3-P, where you go out to tender; and the
6 Government-to-Government approach. So, but the final... And value for money is
7 not just MPV numbers; he's looking at all of the benefits.
- 8 MR BRADSHAW So, I guess what I'm hearing from you then is that
9 value for money exercises have been performed already?
- 10 MR MANDERS Right. And so...
- 11 MR BRADSHAW And...
- 12 MR MANDERS We're getting an independent now, value for money
13 report that's going to be produced as one of these evidence-based reports. And
14 that's going to be produced by, not the external consultants, who obviously have
15 an interest in the project but they're independent; they're going to look at this
16 deal, compare it to other Airport concession deals and say:
17 'Is this market standard? Is this not market standard?'
- 18 MR BRADSHAW And, that's part of your... See, so, part of your
19 value for money exercise is to look and say:
20 'Is this deal better than, or worse than, another deal without that.'
- 21 MR MANDERS It's at market standards, right.
- 22 MR BRADSHAW Okay.
- 23 MR MANDERS We want it to be market.
- 24 MS FIONA LUCK And, who's doing that independent study?
- 25 MR MANDERS Beg your pardon?
- 26 MS LUCK Who is doing that independent study?

1 MR MANDERS It's a Canadian Company. I can't... It's SV... I
2 can't remember the name, but it would be tabled, along with all of the evidence-
3 based reports.

4 MR BRADSHAW And, just to clarify. My understanding of a
5 comment I just heard you make, was that:
6 "If the deal is market-standard, then that would be perceived as checking the box
7 for value for money."

8 Is that correct?

9 MR MANDERS Yeah, one of the...

10 MR BRADSHAW One of the boxes?

11 MR MANDERS Yeah, along with the other evidence-based reports,
12 which should give a/add credibility to Government's selection of the sole-source
13 option to redevelop the Airport.

14

15 **BY MR BARRITT**

16 Q One of the things that I recall at Deloitte – please tell me whether
17 I'm wrong in this assessment, that one of the criticisms in the Deloitte report, that
18 was produced was that all of the research that had been done to that point was
19 done by Aecon, as opposed to independently. So, you're now doing
20 independent...

21 A No, that's not true.

22 Q That's not true?

23 A No, it's a lot of reports that the Department of Airport Operations
24 have conducted, various reports. If you look at the Deloitte report, they looked at,
25 if you look at the amount of... And it's been so long since I've looked at the
26 report... They looked at hundreds of reports that were produced, that they looked

1 at, and that was their, you know, they had/if they said something, that's not true;
2 because, we/Government had tons of reports previously. There was a whole
3 redevelopment plan done back in 2008, 2009.

4 Q No, I understand that. I meant, they looked at different things, like
5 the economic case, the financial case, the business case, and...

6 A I'm unsure.

7 Q And...

8 A Five cases.

9 Q I seem to recall them saying, at one stage, there was lack of
10 independent research, that some of the critical stuff was provided by Aecon to the
11 Bermuda Government, as opposed to independent.

12 A Yeah, I can't...

13 Q But, you don't recall that?

14 A No.

15 Q Okay, fair enough. One of the things you said... Can I keep
16 going?

17 MS LUCK Yeah, I have one question, but if you want to get yours...

18 MR BARRITT And then I'll back off and circle back and see whether I've
19 missed anything.

20 MS LUCK Mm hmm.

21

22 **BY MR BARRITT**

23 Q In paragraph 10, you said:

24 "At this time, the Office of Project Management & Procurement are, to the best of
25 their ability, fulfilling their role in relation to the project in, accordance with The
26 Public Treasury Act, 1969."

1 Why did you feel the need to include the words 'are, to the best of their ability'?

2 A That was, basically I consulted with the Director and he said they
3 would... If the Code of Practice had been implemented in accordance with The
4 Public Treasury Act and, if you read the last part of the statement, that's on the
5 advice of the Director of... I can't say speak to them and, maybe you need to
6 speak to the old Director.

7 Q No, no, but you used the words 'are to the best of their ability'.

8 A Because they are doing some oversight and I had just taken what
9 he had provided to me to qualify what I'm saying.

10 Q Okay, let's just, let's just...

11 A I don't want to say, 'Yes, they're providing the oversight that they
12 need to do,' and he says, 'Well, it could be strengthened if the Code of Practice in
13 The Public Treasury Act was brought into force by the Government. That would
14 strengthen what they can do.'

15 Q And, not to veer too much, but we understand there's a 16th draft of
16 that still kicking about, that it...

17 A I commented on that quite a-ways ago, yeah.

18 Q Yeah, it's still, it's still... And, so, we're curious to know what role
19 the OPMP would play in this project and what role it can play going forward, in
20 governance generally within Government.

21 A That's what they were set up for, to provide oversight of capital
22 projects and procurement in general. So, once they get fully staffed and the Code
23 of Practice has been in place, has been brought in force, I think that would add a
24 bit of extra oversight of all of the – not just capital because we haven't been doing
25 much capital projects – procurement in general; and I've noticed an improvement
26 even though the Office has not been fully staffed and, when that Office – the

1 OPMP – actually I gave it that name because, when it first came into force, the
2 former Minister, Paula Cox, was one of her ideas and she said she wanted that
3 and, when it was first established, the first thing that we did was make sure that
4 all contracts actually came through the Office of OPMP. It was, basically, the
5 Ministry of Finance, you know, before they reached Cabinet; and they should sign
6 to ensure that, you know, persons have gone through the proper tendering process.

7 And that's happening now, even though they're not fully staffed, I
8 think they're adding value to the process now, and I'm sure it's, pretty sure it's
9 been significant improvements in procurement all across Government.

10 Q Can you tell us why they were moved from the Ministry of Finance
11 to the Cabinet Office?

12 A That's above my pay-grade.

13 Q That's, yeah, okay... Above your pay-grade? I thought you were
14 right near the top?

15 A No, that's, well... (chuckling)

16 Q Okay.

17 MS LUCK So, can I just ask?

18 MR MANDERS Please.

19

20 **BY MS LUCK**

21 Q So, on a day-to-day basis, what will the OPMP be doing on the
22 Airport contract?

23 A On the Airport?

24 Q Yes.

25 A Not day-to-day. Whatever he has the technical and the resources
26 to do, I/we invite him to... We used to have weekly Government Advisory Teams

1 calls, and he would sit on some of the calls and he would ask questions. So, to get
2 that, you really need to speak to the Office of Project Management &
3 Procurement.

4 Q So, it's advisory?

5 A Yeah, and oversight.

6 Q It's not signing off on anything? It's not taking responsibility.

7 A No, no. Oversight.

8 Q It's purely advisory?

9 A Oversight, yeah.

10 Q Okay. John, can I just ask a question?

11 MR BARRITT Please, go ahead. Give me a chance to...

12 MS LUCK So, could we just go back to the
13 whole delegation issue?

14 MR BARRITT Okay.

15 MR MANDERS Delegation, right.

16

17 **BY MS LUCK**

18 Q So, page 32 in the top corner of your – this is an e-mail from Curtis
19 Stovell to yourself.

20 A 32, 32?

21 Q Dated February the 2nd, 2015.

22 A Yes.

23 Q And, this is where we're talking about the whole issue of
24 delegation of authority; and you've already talked about the conflict between the
25 Minister of Transport has the responsibility under The Airports Act, but I'm more
26 interested in – it talks about: This is about who the Accounting Officer is for the

- 1 Project. There's a lot of time listening to Accounting Officers and what their
2 roles are.
- 3 A Yes.
- 4 Q So, who is the Accounting Officer for the Airport?
- 5 A For the Airport Project? It would be the Permanent Secretary of
6 Tourism & Transport. If you...
- 7 Q And, what is their role?
- 8 A Their role would be to work with the Director of Airport
9 Operations and to ensure that anything which is obviously Budget, all of the costs
10 for the Airport Redevelopment Project, which is mainly consultant fees, is
11 currently with the Department of Airport Operations. So, from the Airport
12 perspective, they would have to ensure that all of those budgeted funds that the
13 Ministry has budgeted for the Airport Redevelopment Project have been
14 sourced...
- 15 Q This is outside of construction? This is pure...
- 16 A This is outside of construction, and that's the construct... Right.
- 17 Q Out of construction. So, construction is all in one bucket and the
18 Accounting Officer will have no role whatsoever in any of that?
- 19 A No, no.
- 20 Q None at all?
- 21 A No, no. That's really the responsibility of the Canadian Commerce
22 Corporation, and they have the oversight of that and, you know, that's a public-
23 private partnership.
- 24 Q So, this responsibility is with respect of what I call the periphery
25 costs?
- 26 A Yeah, but the...

1 Q Around consultants, I mean, what else would be in that bucket?

2 A The intent is once, and Government's passing legislation, who
3 would have oversight of the construction and all that, would be a quango that's
4 going to be established, and they will be staffed-up with persons they're going to
5 have to oversee the concession here, and during the construction phase. So, that's
6 who would ultimately have, from Government's side, oversight of the project,
7 understanding that the actual building and the on time, on spec, on budget, is still
8 with the Canadian Commerce Corporation.

9 So, that's who would have the ultimate oversight during the thirty-
10 year concession and the construction period. So, legislation is going to the House
11 of Assembly now to create an Airport quango, and that would be one of their
12 responsibilities.

13 Q And, then, how does that interact with the Project Board?

14 A Beg your pardon?

15 Q How does the quango interact with the Project Board?

16 A Well, the Project Board, once the Project Agreement has been
17 signed and Cabinet has approved it, it wouldn't be any need, because you would
18 have a separate Board overseeing Airport quango, who would be responsible and,
19 obviously, that Board would be appointed by a Minister.

20 Q So, the Project Board is made up of Ministers at the moment?

21 A Correct.

22 Q Once the deal is signed...

23 A Once the project... Their role is to get the Project Agreement
24 through Cabinet.

25 Q Okay. And then they'll be disbanded?

26 A Yeah.

- 1 Q And, then the quango, which...
- 2 A The quango would be Head of Operations.
- 3 Q ... will/will not consist of Ministers?
- 4 A That would Board-appointed by the Minister of Tourism, just like
- 5 any other quango.
- 6 Q But, completely independent.
- 7 A Not completely independent. You always have a... If the
- 8 Minister's appointing a Board, it's never completely independent. Government's
- 9 going to be providing grants to the quango.
- 10 Q No, I meant in terms of its representation. I mean, there won't be
- 11 any...
- 12 A Oh, it's not going to be a Department.
- 13 Q There won't be a Minister on it, there won't be a Civil Servant on
- 14 it?
- 15 A No, it might be the CEO of Civil Aviation. It all depends.
- 16 Sometimes these Boards do have Civil Servants on them.
- 17 Q It's a big job.
- 18 A Yeah.
- 19
- 20 **BY MR BRADSHAW**
- 21 Q Okay? Sir, I have a couple of questions. Sorry about this. A
- 22 couple of questions. Well, maybe more than a couple.
- 23 One of the things I noticed you said was that, "Government
- 24 currently has no guidelines as far as PPP Projects." Is that fair to say?
- 25 A Yeah.

1 Q Okay. Would it be fair, you know, on a positive side, that one of
2 our recommendations look at what that process might look like if Government is
3 going to be going forward exploring?

4 A Yeah, if Government's going to do public-private partnerships.

5 Q So, might make your job, and everybody else's job easier?

6 A That would be a great idea to ensure that you have specific
7 guidelines for public-private partnerships. And I, you know it's been, during this
8 process, the consultants have been having workshops with, not just people
9 involved with the projects, but other Civil Servants. Actually it was supposed to
10 be a meeting with Senior Civil Servants, CCSE, where the advisers would meet
11 with the Civil Service Executive, just to go over the project, to see what the
12 Project Agreement entails, because it's going to be a lot of approvals that are
13 going to be needed. So, obviously, that would be a recommendation coming that
14 we do need guidelines for public-private partnerships. I had provided to the
15 Director, a while ago, about solicited proposals. A lot of Governments are set up
16 where...

17 Q To the Director, which Director?

18 A Huh?

19 Q To which Director are you talking about?

20 A The Director of OPMP where, obviously, sometimes people do
21 come to Government with ideas. It might be a good idea.

22 But, there's no process in Government how you could actually get
23 that idea out. You can do an RP, if somebody's given you proprietary
24 information and then you'll RP on that. So, that's another area where you could
25 get some sort of guidelines to enhance the overall procurement process in

1 Government, considering that the public-private partnerships and solicited
2 proposals could be, you know, on the increase.

3 Q Mm hmm. Thank you. I guess another thing I noted earlier on,
4 and I wrote down, was that you said that... Or, what I hear you say was that,:
5 "This is a good deal because we're not paying, quote/unquote CCC for anything."
6 Is that/does that...? Did I hear you correctly?

7 A I didn't say it was a good deal before that. Nothing comes free.

8 Q Oh, okay. Sorry.

9 A I said the part of the deal that intrigued the Minister of Finance is
10 the on time, on spec, on budget, where we're not in current debt to fund this
11 project.

12 Obviously, Government's made a decision to forgive the revenue
13 from the Airport, so, even though you're not paying, you're forgiving revenue.

14 Q Okay. And I/so the crux of what I saw, or what they wrote down
15 was not paying CCC for anything; and what you've just explained is that we're
16 forgiving revenue, so, I guess we're giving up some sort of future revenues and
17 potential future profits, or what have you, in exchange for not necessarily putting
18 debt in our balance sheet. Is that... ?

19 A That's one of the reasons. But that is upside, if Government...
20 And this is still being negotiated... The Agreement is going to allow for any
21 upside above a certain threshold that Government will share in the profits. So, it's
22 more of a, like I said, a public-partnership. It's a joint venture between
23 Government and the Canadian Government.

24 Q And, I guess for me, again, without delving into any deal points, or
25 what have you, the question is that I just have, would be:
26 Who's protecting Bermuda's interest around that part of the deal?

1 I'm understanding that we're giving up, I think, what I understood you to say, was
2 thirty years' worth of revenue.

3 A Mm hmm.

4 Q Again, I've dealt with some fairly large and complicated deals
5 from time to time, and 'the devil's always in the details'.

6 A Mm hmm.

7 Q And the question is just: Do we have folks who are representing
8 our – and by 'our' I mean Bermuda's interests in this regard.

9 A Yeah. Yeah, you've obviously...

10 Q And the question is, beyond just that is, if our interests are not
11 appropriately represented, who's responsible? Would it be you, as Financial
12 Secretary?

13 A That's why we're doing all of the evidence-based reports. It would
14 be who signs off on the project is the Cabinet.

15 Q Okay, so, Cabinet possibly, would be responsible.

16 A Cabinet agreed, from the beginning, that this was the way to
17 procure the project, from Memorandum of Understanding, Letter of Agreement.
18 This is a public policy decision, taken by the Bermuda Government, to procure
19 the Bermuda Airport, using a public-private partnership.

20 The Minister – you could look at the Annex –where the Minister of
21 Finance clearly articulates the reasons why Government has decided to procure
22 the Airport using this project. So, this is a public policy decision. It's not
23 Anthony Manders' decision. My job is to make sure that we get the best deal to
24 our ability; but this is public policy procurement decision which Cabinet
25 ultimately has the final say in.

1 Q From that, from the evidence you just gave, or the information you
2 just shared, and speak of Mr Stovell, my understanding from his response was
3 that we've already passed the go/no-go dates?

4 A Yeah.

5 Q So, is that correct?

6 A The go/no-go date, the significant – once you sign the Airport
7 Development Agreement that says what's the next phase, then Aecon had did
8 quite a bit of work, preparatory work. They're still doing preparatory work, but
9 they had spent millions of dollars up to the ADA stage – go/no-go date.

10 Once you get to the go or no-go day, you get past the Airport
11 Development Agreement, and it lays out what Government's responsible for. So,
12 if we cancel the Agreement for some reason, we have to reimburse Aecon, which
13 is fair. If they walk away from the deal, then, we don't have to do anything.

14 So, its various off-ramp, which is all laid out in the ADA,
15 provisions in the ADA, that allows Government to walk away from the deal and,
16 if Aecon is not, we could walk away. And Aecon, if they think Government's not
17 doing what we have to do. So, the ADA clearly lays out all of the obligations to
18 get to Project Agreement. And the Minister already explained in his Ministerial
19 Statement of what Government's responsible for after you get across the go/no-go
20 date.

21 Q So, would it then be fair for me to then conjure that: If – let's say,
22 for whatever reason, - Cabinet said, No, they don't want to proceed.

23 A Mm hmm?

24 Q That we are effectively – we, as Bermudians, are effectively –
25 quote/unquote, on the hook already for a certain obligation?

1 A Correct, but you would have all of the information that CCC, and
2 Aecon's prepared to CCC, would be our information. They've/the geological
3 work, it's not like you're paying for something with no value. You're going to
4 pay for all of the information that they're done will come to Bermuda
5 Government, and, we could go out using that to use another person to redevelop
6 the Airport.

7 So that's, you know, up until the ADA, everything was on Aecon.
8 They spent millions of dollars and the obviously thought it was a good deal. They
9 wanted to progress the deal; and Government decided – Cabinet decided – to go
10 past that stage, because they still thought this was the best deal that we could
11 work with the procure the Airport.

12 Q Okay. One last question: This deals with the evidence-based
13 Report... Sorry, forgive you... My understanding from both Mr Manders' – sorry,
14 not Mr Manders, forgive me, not you – Mr Stovell's memo and, from the
15 information that came via the FCO, I think you called them?

16 A That's Foreign & Commonwealth Office.

17 Q Yeah, FCO, sorry.

18 A Yeah.

19 Q Was that – this Letter of Entrustment that we got from the UK said
20 that we need to have this evidence-based report, and that was also condition of Mr
21 Stovell providing a waiver... Actually it's going to be two questions... A waiver
22 to financial instructions as regards sole-source, this tendering thing, the sole-
23 source.

24 A Mm hmm.

25 Q Fair, right? So, what happens if that evidence-based Report is
26 judged not to be appropriate? Or, deemed to be insufficient? What happens then?

1 A The Government will make the decision to move, or not move,
2 forward with the project.

3 Q Okay.

4 A I don't think the FCO can say no. I mean, we did what we said.
5 It's no clauses said they have to sign off on this Foreign & Commonwealth. They
6 have to sign off this evidence-based report. The Government will just produce the
7 reports that as required. It's anticipated, that these reports will provide the
8 evidence that people are looking for, and the Government, to satisfy the
9 Government and add credibility to the project, and Cabinet would decide whether
10 to move forward or not.

11 Q Okay. And...

12 MS LUCK So, the FCO has no further involvement, you're
13 saying?

14 MR BRADSHAW Well...

15 MR MANDERS We have to submit the Reports to them. Obviously,
16 they're going to review them.

17 MS LUCK Right.

18 MR BRADSHAW Yeah.

19 MS LUCK And, if they don't meet their... ?

20 MR MANDERS I don't think they have ability to say no, or you
21 can't move forward with the project. I'm not a lawyer, but it's – but they don't
22 have – I don't think they could say no.

23 MR BARRITT (Whispering) That's a rubric that'll have to be
24 crossed.

25

26 **BY MR BRADSHAW**

1 Q And, I guess, the last, so, the last area of my question is this:
2 We've primarily looked at this, getting to this point of getting the Airport built,
3 right? So, the Airport's build now, and now there's an obligation as per this
4 concession. What if – and I don't even need to know what the controls are – but,
5 are there practical controls in place to protect the interest of Bermuda and
6 Bermudians for that thirty-year period, going forward, and to make sure that
7 we're getting value for money for that period going forward? Because we are
8 giving up thirty years' worth of revenue as per what I'm hearing from you.

9 A Yeah.

10 Q Are those in place, and...

11 A That would all be in the Project Agreement, where you have key
12 indicators. I mean, these Airport concession deals have all of that...

13 A And, who will judge – who will ultimately be the judge of that?

14 A The...

15 Q Who will ultimately be the judge that will – the person who will...
16 We've had evidence from various folks, who have come forward and said: 'Well
17 that wasn't really my responsibility,' or, 'It's such-and-such's responsibility.'

18 My question as a Bermudian is, ultimately, you know: When the
19 flag gets raised, who's responsible for making sure these controls are in place and,
20 if they do a great job, who would laud and, if it ends up being problematic? Who
21 do we go to and say: Can you please help us with this?

22 A This will all be in the Project Agreement. So, the standards are set,
23 Cabinet would agree the Project Agreement and all of the key performance-
24 indicators will be – just like any other concession Airport Agreement – and the
25 Airport quango would have the oversight over the concessionaire. If they're not

1 up to standard, then it would be provisions that they could get punished. There
2 will be fines and things of that nature, all in the Project Agreement.

3 Q Okay.

4 MR BARRITT Can I go? Yeah, there are a couple of things I... The one
5 thing I was looking for, Mr Manders, that actually wasn't an exhibit in your
6 Annex. It was in Mr Stovell's Annex to his witness statement; and I don't know
7 whether you can be referred to it. It's page 103 of Mr Stovell's Annex: "Second
8 Witness Statement", and, it looks to me to be a letter from someone, an
9 economist, in the OT Directorate, in the Foreign & Commonwealth Office and it's
10 to you, and it's in April 8th, 2016, and I just want to draw this to your attention.

11 MR ELKINSON Page 103.

12 MR MANDERS 103?

13

14 **BY MR BARRITT**

15 Q I just, I wanted to follow up. This seems to be a
16 letter that's written after they received details of the measures the Bermuda
17 Government is going to...

18 A I think I've got the – 103?

19 Q 103 in the bottom.

20 MR ELKINSON

21 Hand-written, or... ?

22 MR BARRITT Hand-written.

23 MR MANDERS At the bottom?

24 MR BARRITT Hand-written at the bottom, yeah.

25 MR MANDERS I've got 103 at the top?

26 MR ELKINSON No, on the bottom, near Tab 10?

1 MR MANDERS Huh?
2 MR ELKINSON Near Tab 10.
3 MR MANDERS Oh, Tab 10. 103, yeah.

4

5 **BY MR BARRITT**

6 Q Yeah, it's an e-mail to you from a Mr Stephan...

7 A Mmm hmm. FCO, yeah.

8 Q The FCO, yeah. And they're following up on the measures that the
9 Bermuda Government says it's going to put in place as a result of the Deloitte
10 Report and the findings. And, the person does say:
11 "In fairness", at the bottom: "While there are some concerns remaining, I believe
12 that the measures that the Government of Bermuda has identified do, in large part,
13 address the deficiencies identified in the Report. "

14 But, over the page, on 104, and I'll just quote a couple to
15 you under the Commercial case. It says:

16 "The measures that the Government of Bermuda proposed to remedy gaps in the
17 Commercial case help but do not necessarily guaranty a full, robust, Commercial
18 case."

19 And, then it goes on to say:

20 "The proposed Assessment Report is welcome, but must include an assessment of
21 how to drive value and minimize risk from a Government of Bermuda
22 perspective, rather than just from the perspective of your commercial partners."

23 And, under "Financial Case", it notes:

24 "However, there is no mention of two deficiencies highlighted in the Report,
25 namely, the need for a peer review for the financial model and the need for the

1 financial model to be updated to study concession structure and all costs to the
2 Government of Bermuda related to the Airport.”

3 And, my question to you was going to be:

4 ‘Are these being addressed? How are they being addressed? And, where will we
5 see evidence that they are being addressed?’

6 A And, there’s another letter after this, where we clearly –
7 and it might not be in Mr Stovell’s bundle, but we did go back with them to say
8 how... And I don’t have the letter, because that’s not part of what I was...

9 MR BARRITT Well, you can’t speak to it now, in terms of
10 what’s... ?

11 MR MANDERS I can’t, because we sent a letter back to the FCO to
12 clearly say how we’re going to address all of that and that’s when we got the final
13 letter to say we’re satisfied. There was another letter went after this, and then I
14 think you have the final...

15 MR ELKINSON

16 There’s one at page 80 of Tab 10, from the Foreign & Commonwealth Office.
17 Page 80, same Tab. Is that the one you’re referring to?

18 MR BARRITT Yes, it...

19 CHAIRMAN We don’t – is this September 10?

20 **BY MR BARRITT**

21 Q No, that’s the... Yeah, that seems to be a letter of confirmation, but
22 paragraph 6 almost says the same thing I’ve just said:

23 “At the official level, we’ve requested to see the critical path to understand the
24 key milestones of this project and opportunities for closer engagement around the
25 risk register. Such steps should also help to support the completion of future
26 requirements.”

1 And so, I was just asking Mr Manders if he could, and I guess he can't, from
2 memory, tell us what some of these things...

3 A I would have to get the letter that we sent back to the Foreign &
4 Commonwealth, but we did reply to that.

5 Q Perhaps you could – could you send it to us after today?

6 A Sure, no problem.

7 Q Or, anything you think is related.

8 A I could send you where we are with this whole process and...

9 Q Well, that's because we're trying to understand how – if you've
10 gathered from most of our questions, even though we may be stumbling and
11 fumbling, we're on the outside here as to what the oversight will be (cough),
12 going forward. For instance, let me ask you this questions: Who's counting the
13 pennies right now, in terms of what's being spent by the Bermuda Government on
14 this project?

15 A The Department of Tourism & Transport, whose budget we
16 allocated those funds, so, everybody's looking at consultants. I mean, the cost
17 now is what we're paying consultants, and that's all being managed. We have to
18 get to the end of the Project Agreement. You have to rely on consultants; it's no
19 different with these Projects. It's like the Bermuda Hospital Board.

20 Q Right, I understand it, but I'm just wondering who's counting... ?

21 A It's a thirty-year concession. The Ministry of Finance is counting.

22 Q Is counting? You're the ones providing the oversight on how
23 that's being spent?

24 A Yeah, and along with Transport, we provide oversight on
25 everybody's budget (chuckle).

1 Q Well, I know what they're supposed to do, let's put it that way.

2 We're just trying to figure out whether it's being done and who's responsible.

3 Incidentally, has there been a sort of cost to the question that Mr
4 Bradshaw was asking – a sort of cost model exercise done, in terms of what we're
5 giving up, in terms of potential revenue and fees, and what we're getting by way
6 of return?

7 A Yeah, yeah. I could send you that report too. The Ministry just
8 posted – the Minister of Finance posted an option-based report, where you look at
9 the three options, whether we procure it and paid out all the debt; whether we fix
10 it up; or whether we do a Government-to-Government approach. It was just three
11 options.

12 Q No, I meant: Once you isolate out, you choose this approach which
13 Government's going to do, as this 3-P Project with CCC – PPP with CCC.

14 A That's been costed, yeah, with the information now.

15 Q Well, no, where someone says, okay, this is what happens: Once
16 the Airport's built, this is what we're giving up in terms of revenue, and this is
17 what we get in return.

18 A And, yeah, that's been done.

19 Q That's in that report?

20 A Yeah.

21 Q Okay.

22 A It goes thirty years, and it projects all of the cash flow and this
23 constant – this got some back, even at a discount rate – finance stuff.

24 Q It's all there?

25 A Yeah.

26 Q Okay.

1 A That's one of the options. You know, all of the options have been
2 costed out.

3 Q Proper scenario? Okay.

4 A Yes.

5 Q Okay.

6 A Different scenarios. It's an options-based report. I could send that
7 to you too, if you want it.

8 Q Well, that would be nice, if you would? Thank you.

9 And, finally... In this question, I think everybody in Bermuda
10 probably asked. There's no Project Agreement and yet Aecon seems to be
11 signing contracts with all sorts of people here in Bermuda to get on to further the
12 project. Do you know on what basis that is happening?

13 A That's basis on them assuming that the Project Agreement gets
14 signed. If it doesn't get signed, then all of the costs that are –nothing's been
15 signed – I could guaranty you that. They've just moving... Because, when they
16 get to financial close, that date, financial close, everything shifts from Bermuda
17 Government to Aecon, just about.

18 Q So, they're taking the risk for that?

19 A Yeah, they're taking the risk.

20 Q Not the Bermuda Government?

21 A They're taking the risk. Yeah.

22 MR BRADSHAW Well, they wouldn't. As you suggested, if we say no-go,
23 we will have an obligation to them.

24 MR MANDERS Right. But, the contract, if that's signed off to a
25 contract and they are committed to something and then, before financial closing –
26 and financial closing doesn't happen – then it's their cost.

1 CHAIRMAN Then, there's one more question from...

2 MS LUCK This is non-Airport related? You did it in your first
3 witness statement.

4 MR MANDERS you talked about the Office of Procurement.

5 MR BARRITT I haven't done that.

6 MR MANDERS Procurement?

7 MS LUCK Are you going to ask any questions on that?

8 MR BRADSHAW Finished with the Airport?

9 MR ELKINSON I did, and I was stopping there.

10 MS LUCK Oh, I'm sorry, I'm sorry.

11 MR ELKINSON But, please feel free (chuckle).

12 CHAIRMAN Yes, we'll stick to the Airport.

13 MS LUCK Sorry. It's short. We understand...

14 CHAIRMAN No, we'll come to that later. We won't do that.

15 MR BARRITT If we're off the Airport, then you're going to move
16 to the other?

17 CHAIRMAN Yes, I think that's what you said.

18 MS LUCK No, he thinks he's already touched on them,

19 MR ELKINSON I know I touched on it and that was as far as I was
20 going to go.

21 CHAIRMAN Alright.

22 MR BARRITT Oh, there are no further questions you want to ask?

23 MS LUCK Yeah, that's how I understood it.

24 MR BARRITT Oh, okay then, I have more questions.

25 CHAIRMAN I'm going to ask just a couple of questions about the
26 Airport.

1 **BY MR CHAIRMAN**

2 Q You've said more than once, that this is a project which has
3 Cabinet approval?

4 A Yeah.

5 Q But you have found it necessary to go to the Accountant General
6 on the basis that the financial instructions do apply and that he should give a
7 waiver for the sole-source agreement?

8 A Under/out of an abundance of caution, yes.

9 Q You have done that?

10 A Yeah.

11 Q And he gave a waiver for the Government of Bermuda's agreement
12 with the Government of Canada

13 A Correct.

14 Q With CCC?

15 A Right.

16 Q Yes. What he says is that he's never given a waiver for the
17 arrangements with Aecon, whom he regards as a single-source contractor. That's
18 right, isn't it?

19 A That's what... Yeah.

20 Q And, the way it rests at the moment is that he has said: Well, I will
21 give a waiver when the Bermuda Government has satisfied the requirements of
22 the British Government.

23 A Correct, basically.

24 Q With regard to value for money, etc. That's where we are, isn't it?

25 A That's where we are.

- 1 Q Yes. Now, what I wanted to ask you is: Is there any direct contract
2 between Bermuda and Aecon?
- 3 A No. No, no, that's...
- 4 Q And Aecon will be, in common parlance, the contractor?
- 5 A Correct – the prime contractor would be CCC.
- 6 Q Yes.
- 7 A Right. No contracts between Bermuda Government and Aecon.
- 8 Q No. And, who chose Aecon?
- 9 A The CCC. Obviously, we all did due diligence. They're one of the
10 biggest companies in Aecon. We had the right to do due diligence. But, CCC
11 would have selected Aecon even though Aecon brought in the project.
- 12 Q But, that's the nub of your difference with...
- 13 A Yes.
- 14 Q ... Accountant General, isn't it?
- 15 A Sort of.
- 16 Q Because he says he understood...
- 17 A Right
- 18 Q ... that Bermuda had gone to Canada's Government, CCC.
- 19 A Which we did.
- 20 Q And then, they chose Aecon.
- 21 A Which they did.
- 22 Q Well, they may have approved it, but he seems to be under the
23 impression – and I think you've agreed – that the original arrangement was with
24 Aecon, not a formal contract; and it was Aecon who, so to speak, took you to the
25 CCC?
- 26 A They didn't take us to the CCC.

1 Q What?

2 A They took the project to CCC, and CCC do have the sole-
3 procurement discretion on who they choose, or don't choose. My understanding
4 is other Companies could have went to CCC and said: Look, I'm interested in this
5 project. That's my understanding; and they said: We're satisfied and we think
6 Aecon is the best contractor for this project

7 Q Yes. And, underlying the Accountant General's concern, is the
8 fact that no one chose Aecon. Aecon chose themselves.

9 A No, CCC selected Aecon. They had to. It's CCC's been through –
10 they still...

11 Q No, they've approved Aecon as a contractor but, one of the points
12 that's been made is that CCC – the way things have developed – has never
13 considered any other large contractor.

14 A Yeah, I mean, I – and I can't speak for CCC maybe, but I am under
15 the impression that other Companies, when they are aware of this, would
16 approach CCC.

17 Q You're under the impression?

18 A I can't speculate, but I think I'm seen that. I speak to CCC persons
19 all the time, and they say: This is the way how most of their projects get done.
20 Companies see opportunities, they go to CCC and CCC say: We think this is a
21 project that will fit under the CCC umbrella.

22 Q And I think that's the nub of the Accountant General's concern.

23 A Yeah.

24 Q I can't take the initiative. They bring CCC along with them and
25 they approach the Government of Bermuda and says: 'You can make a contract
26 with CCC', and it's all guaranteed and everything. That's right, isn't it?

- 1 A Yeah. We, as far as our Ministry's position, is that we have an
2 agreement with the Canadian Commerce Corporation.
- 3 Q Yeah. Now...
- 4 A Who they select, or approve, it's really – because they're taking
5 the risk, not us.
- 6 Q Now, in the most recent memo, Mr Stovell, the Accountant
7 General, is saying:
8 "Well, I wasn't given all the facts. I thought this was an agreement with CCC."
9 A Which it is.
- 10 Q And, "I was not" – which it is – but, "I was told anything about
11 Aecon. I thought Aecon would follow from CCC."
12 Whereas, he says that he now thinks the position is that it was CCC that followed
13 on from Aecon. And that was a misunderstanding, according...
- 14 A Yeah.
- 15 Q Yes
- 16 A Yeah.
- 17 Q How did that misunderstanding arise?
- 18 A Ah, as I keep saying, that the Ministry's position is – this is CCC
19 approving a contractor. The agreement is between purely Bermuda Government –
20 this is how we look at it – just Bermuda Government and Canadian Government,
21 through the Canadian Commerce Corporation. They're assuming all of the risks
22 for building the Airport.
- 23 Q No, I'm not asking you to justify that transaction.
- 24 A Mm.

1 Q That's what Mr Stovell approved. He gave a sole-source waiver for
2 the CCC agreement. He knew nothing about Aecon and I'm asking you: How did
3 that misunderstanding arise?

4 A I can't speak, because we were just asking for approval for the
5 transaction, using the Government-to-Government approach.

6 Q Yes. Well, let's assume he was told nothing about Aecon.

7 A Mm hmm.

8 Q And, let's...

9 A And it wasn't – it wouldn't have been because we were hiding it
10 from him.

11 Q Well, let me just ask you: Let's assume he was told nothing about
12 Aecon and let's assume that the situation arose in the way you've described.
13 Aecon were able to say, 'We'll get CCC backing.'

14 How did it come about that he was invited to approve this
15 transaction and was not told a word about Aecon?

16 A I can't speak to that, because the approval we had was a
17 Government-to-Government approach. The LOA had the CCC team. They're
18 going to select a CCC team and that's the agreement that we signed, a
19 Government-to-Government approach. As though it really wasn't... Who they
20 picked was not even considered, it was just the Government-to-Government
21 approach which we were seeking approval for. Who CCC selected, it's really –
22 they take all of the risk, as I keep saying. It's a Government-to-Government
23 approach. That's all we were asking approval for. Who CCC selected, or
24 approved for the contract, it's really up to them. They still have the procurement
25 discretion on who builds that Airport.

26 MR BARRITT When was Mr Stovell told this?

1 **BY MR CHAIRMAN**

2 Q But, who approached the Accountant General for his waiver?

3 A That would have been me.

4 Q Yes.

5 A We would have had a call.

6 Q And, can you not explain how it came about that he was not given
7 the full story? Which is that Aecon were on the scene, certainly at the same time
8 as CCC and, possibly, before CCC.

9 A I can't say. We were doing a Government-to-Government
10 approach and that's... it didn't even cross my mind to say who was being
11 selected.

12 We were seeking to develop the Airport using the CCC-to-
13 Government approach. All of the benefits are laid out. And, so, it didn't even
14 occur because, really I mean, they could have selected somebody else. It's the
15 approach, Government-to-Government approach. That's what I keep saying, that
16 the Ministry agreed to.

17 Q Yeah. Well I won't pursue that any more. But, let me just ask you
18 this... No, I think it would probably be repeating it again

19 A Yeah.

20 Q But... No, we'll leave it there.

21

22 **BY MR BRADSHAW**

23 Q Yeah, just a couple of questions about things that you stated. I'm
24 just going to touch on two things:

25 1) I said/I told him to call the specific verbiage man about these specific words
26 down: "I'm not paying CCC for anything."

- 1 Right?
- 2 Q And, another word that I just wrote – another thing I just wrote
3 down is: “They’re taking the risk, not us.”
- 4 A Building the Airport? You were correct.
- 5 Q Mm hmm. And those are the perspectives that you hold and the
6 Ministry hold? Is that fair to say?
- 7 A The – say that again, the first one?
- 8 Q Is it fair to say that’s your perspective and the perspective of those
9 in the Ministry as well?
- 10 A That CCC is taking the risk?
- 11 Q That we’re not paying CCC for anything, number one.
- 12 A Correct.
- 13 Q And that they’re taking the risk, not us.
- 14 A Right.
- 15 Q And you, so you...
- 16 A That’s factual, yeah.
- 17 Q However, you’ve also stated that this goes – whether this goes
18 forward, or not – there are obligations is tied to this deal.
- 19 A Say that again.
- 20 Q You’ve also stated that, whether or not, this goes forward, there are
21 obligations tied. So, there is a risk, actually.
- 22 A Yeah, that this deal – when I say ‘risk’, I mean – building the
23 Airport Project on time, on spec, and on budget.
- 24 Q So, it’s about completion.
- 25 A Construction, yeah. Completion.

1 Q So, is the perspective more about completion of the project, as
2 opposed to what economic impact it is, down the line?

3 A No, everything's being considered. I'm not sure what you're
4 asking.

5 Q Okay.

6

7 **BY CHAIRMAN**

8 Q Okay. I do just have one final question: Regardless of whether
9 Aecon was chosen by Bermuda or by CCC, Aecon is, in fact, a single-source
10 provider, isn't it?

11 A Correct.

12 Q Yes.

13 A Through the Government Department approach, yeah.

14 Q What? As it (indiscernible 05:53:56) and the waves. yes? And,
15 the position is that the Accountant General has agreed to approve that, in
16 accordance with the financial instructions, provided the Bermuda Government can
17 give satisfactory assurances, basically about value for money?

18 A Correct.

19 Q Thank you. Now, you had a...?

20 MS LUCK Mine's... I'm sorry.

21 CHAIRMAN Oh?

22 MS MEMARI I do apologize. Before we move on from the
23 Airport Project, because I believe you're moving on from that, may I just ask a
24 point – a question – on a point of clarification?

25 In terms of the Chair's question about the
26 information which was provided to the Accountant General, upon which he

1 gave/provided that letter. If I can ask you to turn to Mr Stovell's Witness
2 Statement and Annexes?

3 MR ELKINSON Tab 10.

4 MS MEMARI Tab 10? I don't have that, Sir.

5

6 BY MS MEMARI

7 Q Could you please turn to page 1 of the Annex, hand-written at the
8 bottom?

9 A Page 1?

10 Q 1, of the Annex.

11 MR ELKINSON The first hand-written page.

12 MR MANDERS Still in Tab 10?

13 MR ELKINSON Yes.

14 MR MANDERS Which page, on 10?

15 MR ELKINSON Number 1, hand-written, on the
16 right.

17 CHAIRMAN What is the document?

18 MR MANDERS I'm lost that.

19 MS MEMARI It's an e-mail that's you
20 forwarded to Mr Stovell on the 26th of September, 2014.

21 MR ELKINSON Shall I get up?

22 CHAIRMAN No thanks.

23 MR BARRITT Curtis, can you give me a call

24 on this?

25 MS MEMARI Yes.

1 MR BARRITT The Minister wants to get a
2 response for the Governor in today. He was pressing hard.

3 MS MEMARI Thank you.
4

5 **BY MS MEMARI**

6 Q So, basically, what you have done there is forwarded...

7 A Yeah.

8 Q ... The exchange of e-mails between the Governor and the
9 Minister of Finance.

10 A That's what I did.

11 Q And, that same information he had before he gave you that
12 memorandum on the 25th.

13 A Right.

14 Q That's all. Thank you.

15 MS LUCK So, can I ask my question (chuckling).
16

17 **BY MS LUCK**

18 Q It's a small point: On your first witness statement...

19 A My first witness statement?

20 Q Yes, I know that was a long time ago, but...

21 A Yeah, that was a long time ago.

22 Q But, where we were asking you about the Office of Project
23 Management & Procurement,

24 A Project Management & Procurement, yes.

1 Q And, if we go to your... In my witness statements you have. I
2 think it would be the same as yours, because this one is signed. It is paragraph
3 number 16.

4 A Paragraph number?

5 Q 16.

6 A 16? Yeah.

7 Q Yeah. And you just talk about this Office of the Contractor
8 General.

9 A Correct.

10 Q And, it's sort of the first time, I think, we'd heard about it. And so,
11 I'd really love to understand what it is and how it fits in with OPMP.

12 A That was just an initiative that the OBA had in their mandate when
13 they came into Office, and the Management Consultant Services just looked at
14 how other Offices' Office of Contractor Generals were established around the
15 World; and considered whether we could replace the OPMP with the Office of the
16 Contractor General, but their recommendation is: Keep OPMP as it is. It was
17 just...

18 Q So, there is no Office of the Contractor General?

19 A No. It's no.

20 Q So, that's gone away?

21 A It's no Office of the Contractor General on the way.

22 Q Okay. Okay, thank you.

23 CHAIRMAN Good. Well, any more questions? Mr
24 Elkinson?

25 MR ELKINSON There are some peripheral questions, Mr
26 Chairman, and I don't want to prolong it.

1 **BY MR ELKINSON**

2 Q Just while you're in that document, 29, your reference to "Reports
3 at Breaches", according to the current FI.

4 A 28? 29?

5 Q Paragraph 29.

6 A Yeah.

7 Q Have there, in fact been Reports? Because this is the new
8 obligation that Government employees immediately notify the Accountant
9 General of any breaches of financial instructions.

10 A Yeah, there have been reports to the Accountant General from
11 Departments, correct.

12 Q And, I believe you've put in a table setting out those issues?

13 A Yeah, I did include a table.

14 Q Just to refer the Commissioners to those.

15

16 **BY MR BARRITT**

17 When did that come into effect, self-reporting, 214?

18 A The... Okay, I'm hurting my club-wrist.

19 Q I'm sorry, in paragraph 27-214, "Notification of Breach of
20 Financial Instructions":

21 "Government employees must immediately notify the Accountant General of any
22 breaches of financial instruction."

23 A That's always been in financial instructions.

24 Q Yeah, that's what I thought. It's always been there.

25 A Yeah.

- 1 Q Has anyone ever been taken up for failing to report a breach that
2 they knew about?
- 3 A How would they know (chuckle)?
- 4 Q Well, something comes to light.
- 5 A If something comes to the light, then they would...
- 6 Q Like, we've come to, like...
- 7 A Mm hmm?
- 8 Q Like, I'll give you a for instance: The Sandys 360, the duplicate
9 payment.
- 10 A Mm hmm.
- 11 Q Mr Stovell told us, as far as he knows, no one had ever been
12 disciplined for that; and the money's been spent and they're not going to get it
13 back.
- 14 A Yes.
- 15 Q Somebody didn't do a report on that until, I guess, until it came out
16 in the Auditor General's Report. And, that's what I mean. Anybody ever been
17 disciplined for failing to report an offence?
- 18 A I can't speak because, if you don't report, how would you know. I
19 mean, you go to the Auditor General's Report and you might say: Okay, what
20 happened here?
- 21 And, it could be a reason why that payment was made in error. I
22 can't...
- 23 Q It could be a reason why it was paid in error? Do you know what
24 happened there?
- 25 A No. I know it was the previous Government did have a... They
26 provided grants to send to 360 and previously, they provided capital grants that

1 were going to the Bank to assist them. So, it was part of Government providing
2 assistance to Sandy's 360

3 It was the emergency payments and then, they were sent over
4 again, and somebody duplicated them. That's what – that's my understanding.

5 Q I didn't see that on the list of people who were – that no one was
6 disciplined for that?

7 A Yeah.

8 Q That's just gone – forgotten.

9 A Yeah. And I think – my understanding – that it was a plan to get
10 that back, but it offset in future grants, because they didn't have the... The
11 money, actually – my understanding – didn't go to Sandy's 360. It went to assist
12 with their debt; and Government already had committed capital grants in the
13 Budget.

14 If you look at the '11/'12 Budget, it clearly states that Government
15 was assisting Sandys 360. So, it was nothing that was reported and it's nothing...

16 MR BRADSHAW You said 'to the debt'. To the Bank debt?
17 Or, to the trade debt?

18 MR MANDERS Bank.

19 MR BRADSHAW Okay.

20 MR MANDERS For the capital building, you know,
21 the capital debt.

22 CHAIRMAN Good. Well, no questions, Mr... No.

23 MR ELKINSON That's – that concludes it, Mr

24 Chairman.

25 MR BARRITT I have one more, if I could?
26

1 **BY MR BARRITT**

2 Q Mr Manders, I don't want to engage you on legal argument on this.
3 I just want to get an understanding of what/how the Ministry of Finance
4 approaches this issue. It's the one of supplementary estimates.

5 A Supplementary estimates?

6 Q It's also featured in the Auditor General's Report. It's one of the
7 items in Section 3.

8 A Correct.

9 Q And, in your letter, you addressed it to us. That's your letter of...
10 Oh, July 8th?

11 A Yeah.

12 Q Mine's undated actually, but in any event, in which you said that:
13 "Section 96 of the Bermuda Constitution recognizes the dynamic nature of
14 budgets and that is where sometimes expenditures have to be made and the House
15 isn't sitting.

16 "Money is spent and supplementary estimates come up later.

17 A Mm hmm.

18 Q And, over the years I think we've seen how 'later' has become
19 really late. But, no, we won't go there. And, one of the things I wanted to as you
20 – because it's come up – is another Section of our Constitution. I think it's "The
21 Constitution Order". I don't have mine here with me right now. It says:
22 "No money should be expended on behalf of the Bermuda Government, unless
23 issued under the warrant of the Minister of Finance."

24 Are you familiar with that provision?

25 A Mm hmm. Yeah, very.

26 Q And then, it also goes on to say that:

1 “The Minister of Finance can only provide that warrant where money has been
2 approved, by way of appropriations.

3 A Correct.

4 Q ... in the Budget

5 A Correct.

6 Q ... or, by supplementary estimate.

7 A Correct.

8 Q So, there’s almost, as it were, they are in opposition, almost?

9 A No, the warrant is just the beginning of the fiscal year. That’s all
10 the warrant is. You have a warrant to pay money into the next year. That’s the...

11 Q But, it says:

12 “The Minister of Finance should not be giving/allowing money to be spent, unless
13 it’s been authorized by Budget, or by Supplementary Estimate.”

14 So, how does the Ministry of Finance get around that?

15 A Warrant is totally different from a supplementary. A warrant just
16 gives you the ability to start spending money in a new fiscal year. So, that’s
17 nothing to do with a supplementary estimate. The Constitution is pretty clear. It
18 gives the Government the ability to spend monies that are appropriated and to
19 spend monies on supplementary estimates on or after the money has been spent.
20 And, you clearly went through the instances – it could be a hurricane in the
21 middle of the Summer. So, if you look at all of the supplementaries, I mean, since
22 I’ve been in the Ministry of Finance, all supplementaries... We typically do
23 supplementaries in February, so, supplementaries are approved before the money
24 is actually spent.

25 You could look through the last two to three years and see...

26 Q That’s the case now? Yeah.

1 A Yeah, that's been the case for the last three or four years. It's
2 always instances where someone puts a supplementary estimate in. You have an
3 accounting estimate and something came up that the, maybe the Accounting
4 Officer didn't know – you might have to accrue for vacation liability, or
5 something of that nature and it might be a bit different from what the accrual you
6 put in; and you go over the Budget.

7 So, you always have supplementaries. We do two supplementary
8 estimates. The majority what happened before March 31st, and we've been strict
9 with that right up over the last three or four years and then, after the accounts get
10 signed off, it might be a need for a second supplementary, just to take care of any
11 other overages that might happen from, like I said, accruals that were under-
12 estimated, or things of that nature.

13 Q Okay then.

14

15 CHAIRMAN

16 Well, thank you very much, Mr Manders. It's very late, but we're grateful to you
17 for coming so late.

18 MR MANDERS No problem.

19 CHAIRMAN And for staying and answering the questions with, if
20 I may say so, good nature and good humour.

21 MR MANDERS (Chuckling.)

22 CHAIRMAN And that also concludes this hearing, the sittings of
23 the Commission, subject to the possibility, we will reconvene on Friday afternoon
24 at 2:00 pm, weather permitting, and depending upon the position in the Court.

25 MR ELKINSON We have made application, Mr Chairman.

26 CHAIRMAN Yes.

1 MR ELKINSON And we have a hearing on Friday set for 10:30 am.
2 CHAIRMAN Oh, good. Yes.
3 MR ELKINSON But, whether it will come to fruition, is another
4 matter.
5 CHAIRMAN Yes, well, that/that's... Yes.
6 MR ELKINSON The consequences of it are also...
7 CHAIRMAN Yes. And, as I stated at the beginning of today's
8 hearing: We will hold a further public hearing in the week of 28th November,
9 Monday – possibly on that Monday, but certainly, we will be sitting on
10 Wednesday, the 30th of November.
11 And, I can now adjourn this hearing until then.

12
13
14
15

(06:06:00: Commission of Inquiry is Adjourned)

End of Day's Proceedings

16 **C E R T I F I C A T I O N**

17

18 With reference to the transcription herewith, Commission of Inquiry, held
19 October 11th, at the St Theresa's Hall, Hamilton, Bermuda, this is to certify
20 that under my supervision, was recorded by Mr Rolf Martin, technician and
21 transcribed by Ms Priscilla Belvin Johnson, transcriptionist.

22

23 

24 Doris M. Goodman

Dated: October 26, 2016

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