

## **Bermuda opening statement**

This is the Second Public Hearing held by the Commission of Inquiry established by the Hon Premier Michael Dunkley on 24<sup>th</sup> February 2016.

Notice of the Hearing was first given in our Opening Statement at our first Hearing on June 27<sup>th</sup>. It was confirmed in our Press Statement on 12<sup>th</sup> September 2016 which also advised that the Premier had provided an extension to the Commission until December 31 2016.

Let me introduce again the Commission members, myself as chairman of the Commission and my fellow members who are Mr. John Barritt, Ms. Fiona Luck and Mr. Kumi Bradshaw.

Alberta Dyer-Tucker is the Secretary to the Commission. (In the formal language of the Commissions of Inquiry Act 1935, she is the Clerk appointed under section 5.)

As chairman and on behalf of the Commission I have appointed Messrs. Narinder Hargun, Jeffrey Elkinson and Ben Adamson of the firm Conyers Dill & Pearman as Counsel to the Inquiry.

I should emphasize that we are conducting an impartial, judicial Inquiry pursuant to the 1935 Act and that we shall make our proceedings as transparent as we properly can.

The Commission's website [inquirybermuda.com](http://inquirybermuda.com) includes an up-to-date account of our activities, and I need only say that this Public Hearing is for the purpose of obtaining oral evidence

from the comparatively small number of witnesses who were concerned with, or responsible for the matters that gave rise to the concerns expressed in The Report of the Auditor General on the Consolidated Fund of the Government of Bermuda for the financial years ending 31 March 2010, 2011 and 2012.

At the end of each day's hearings it is our intention to post to our website the witness statements where evidence has been given that day.

It is anticipated that additional documents that may be referred to during oral evidence will be posted to the website by the end of day tomorrow.

### **Our Terms of Reference**

“Having regard to the Report of the Auditor General on the Consolidated Fund of the Government of Bermuda for the Financial Years ending 31<sup>st</sup> March in 2010, 2011 and 2012 and with regard to any matter arising under Section 3 of the Report to

#### **Scope of Inquiry**

1. Inquire into any potential violation of law or regulations, including the Civil Service Conditions of Employment and Code of Conduct, Financial Instructions and Ministerial Code of Conduct, by any person or entity, which the Commission considers significant and determine how such violations arose:

## References to other agencies

2. Refer any evidence of possible criminal activity, which the Commission may identify, to the Director of Public Prosecutions and the Police;
3. Refer any evidence of possible disciplinary offence, which the Commission may identify, to the Head of the Civil Service.
4. Draw to the attention of the Minister of Finance any matter, which the Commission may identify, appropriate for surcharge under section 29, of the Public Treasury (Administration and Payments) Act, 1969;
5. Draw to the attention of the Minister of Legal Affairs (as the Enforcement Authority for Bermuda) any matter, which the Commission may identify, appropriate for civil asset recovery under Part IIIA of the Proceeds of Crime Act 1997;
6. Draw to the attention of the Attorney General any matter, which the Commission may identify, appropriate for civil proceedings before the courts;

## Recommendations for the future

7. Consider the adequacy of current safeguards and the system of financial accountability for the Government of Bermuda;

8. Make recommendations to prevent and/or to reduce the risk of recurrences of any violation identified and to mitigate financial, operational and reputational risks to the Government of Bermuda;

Any other Matter

9. Consider any other matter, which the Commission considers relevant to any of the foregoing.

It is important to underline the opening reference to Section 3 of the Report for two reasons. First, because the Chief Justice has held that it governs and limits the scope of the numbered paragraphs which follow. *Bermuda Emissions Control Limited v The Premier and Others 2016 Civil Jurisdiction 322*. Secondly because that is where the Auditor General said “Many of the observations point to a general failure to follow the rules (Financial Instructions) established by Government for the safeguarding of public assets”.

Her concerns are then described under a number of headings which can conveniently be sub-divided into two groups; first, what we have called third party issues, where third parties were awarded government contracts or received public monies; and secondly, internal accounting and procedural issues where she identified possible failures in the handling of and accounting for government funds.

This Witness Hearing will be more concerned with the former group than with the latter. The Auditor General listed these under six headings – these were: -

- Section 3.1 Failure to comply with Financial Instructions and other rules relating to the award of government contracts, listing individual contracts and projects under subparagraphs 3.1.1 to 3.1.7 inclusive;
- Section 3.2 Millions paid without signed contracts or agreements;
- Section 3.3 Significant contracts not tendered;
- Section 3.4 Duplicate payments
- Section 3.5 Overpayments; and
- Section 3.6 Millions paid for professional services without prior approval.

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Before describing how we have approached our task of inquiring into these matters, culminating in the oral evidence that we shall hear over the next 10 days or so, I shall refer to certain legal issues.

First, the legal background; secondly, the (scope) of our Inquiry; and thirdly, the purpose of our Inquiry as it is defined in our Terms of Reference, which were issued by the Premier on 24 February 2016.

First, the legal background. In Bermuda, this is provided by the Commissions of Inquiry Act, 1935, which was amended in 1944, and in subsequent years to 2015. In the United Kingdom, the corresponding enactment was the Tribunal and Inquiries Act, 1921. Over the years, a number of high-profile Inquiries were held under that Act, and rules and practices were developed for the protection of witnesses and interested persons generally, alongside the public need for the issues to be thoroughly explored, so far as possible. In 2006 there was fresh legislation, the Inquiries Act 2005 and the Inquiry Rules Act 2006 which gave statutory force to many of these rules; but there has been no corresponding enactment or updating of the rules in Bermuda. In these circumstances, we have thought it right to learn from the British – and in one case, Irish – authorities, and to interpret and apply the Bermuda Act in accordance with the principles developed there.

Secondly, the width of our Inquiry. We have taken the view that it may include government contracts that were made before the three-year period began, because the Auditor General was concerned that payments were being made under earlier contracts to third parties during the relevant period. The Chief Justice held that in principle that approach is correct, in his

recent judgment in *BECL Ltd. v. The Premier, Commission members and the Attorney General* September 7 2016

A different but related issue has arisen in connection with government contracts that have been made or negotiated since the three-year period expired. Our view was set out in the Statement that I made at our First Public Hearing on 27 June 2016. It seems to us that we are required to consider current as well as past government practice, for example with regard to the tendering process for government contracts, because we are asked not only about the past but also to make recommendations for the future, which includes taking account of the present.

The Commission's remit extends to considering the adequacy of current safeguards and the system of financial accountability for the Government of Bermuda (paragraph 7 of the Commission Terms of Reference). The Commission believes that this mandate includes obtaining information on the safeguards and processes in place for dealing with the tendering of the airport project, which is the largest capital project currently under negotiation by the Government of Bermuda.

The Commission also wishes to advise that after the Government's press conference and statement relating to the airport project last Friday, 23<sup>rd</sup> September 2016, the Government has followed the procedure which the Commission

established for those who wish to make objection to any matter which the Commission proposes to examine as part of its inquiry. Written objections to the inclusion of the airport were received yesterday (Monday) from the Attorney General's Chambers on behalf of the Government. In accordance with our procedure, the Commission has communicated its decision on those objections to the Attorney General and now awaits the Attorney General's response. Any further application which the Attorney General may wish to make will be heard together with other Applications that any person wishes to make tomorrow morning September 29<sup>th</sup> at 10am.

In this connection, the Commission also wishes to state, because the issue has been raised publicly, that no undertaking was ever given to the Government that we would not inquire into the airport project.

Thirdly, the purpose of our Inquiry. We have to remind ourselves that our task is limited to establishing the relevant facts, so far as we can. We are not required to make any findings as to wrongdoing, whether criminal or in any other sense, and we have no power to form or express any view as to whether wrongdoing occurred. With regard to criminal liability, our Terms of Reference require us to refer "possible criminal activity" to the appropriate public official; likewise, with regard to possible disciplinary action against a public servant, or possible civil liability or any other financial penalty.

In summary, we shall try to establish all relevant facts and expose them to the public gaze, so far as lawful privilege - private as well as public – will allow. That is something which a police inquiry cannot do.

What will happen if a witness, who might be expected to be able to answer a relevant question, refuses to give evidence or to answer the question, or to produce specific documents that may contain the answer? To a limited extent, that has already occurred, and we are on notice that the issue may arise during this Hearing. If and when it does arise, we will expect and be grateful for legal submissions regarding the course we should adopt. The Commission has the same powers as the Supreme Court to compel the attendance of witnesses and the production of documents (section 9 of the 1935 Act).

Witnesses will be entitled to claim privileges that are available to them in Court. We may need to consider whether a refusal to give evidence (or to produce documents) can be taken into account when deciding, as we are required to do, not the issue of guilt but the specific question whether it is “possible” that wrongdoing occurred.

Again any submissions counsel may wish to make on these issues will be welcomed.

I return to the factual matters with which the Hearing will be concerned. The oral evidence will represent the climax of a thorough and detailed investigation into the matters raised by the Auditor General that has taken place since the Commission began its work in April 2016. This has involved a huge amount

of work by individual members of the Commission and by its counsel, Conyers Dill & Pearman. The process has been as follows. The Auditor General identified certain contracts or types of contracts as matters of particular concern, including government contracts that were awarded without Cabinet approval even when that was required by the Government's own Financial Instructions, or without an appropriate tendering process, or without adequate explanation as to why the contract award was made. With limited resources and in view of time constraints, and on the advice of counsel, we decided to concentrate on one aspect in particular, that is, the issue of tendering: were contracts put out to tender, as required by Financial Instructions? If not, was the exception permitted by the Financial Instructions or other rules? If Cabinet Approval was required, was it obtained? If not, why not?

With regard to our limited resources I pause here to note that the Commission has had no investigators at our disposal, forensic or otherwise. Our budget did not provide for this. I should add that we have not had access to any police files of any matters, which are (or have been) under active police investigation, although we have been made aware that some of the contracts into which we are inquiring are (or have been) the subject of those investigations.

The Auditor General's Report identified various government departments where it appeared that Financial Instructions had been or might have been breached. This made it possible for us to identify the senior public servants and the government

Ministers who were responsible for the contracts in question. Relevant documents were obtained, voluntarily in general but where necessary by issuing subpoenas to produce them. Each of the persons identified in this way was requested to make a written statement and to answer specific questions regarding the contract or contracts in question. Each person so asked was offered legal advice and assistance from counsel to the Commission at no cost to themselves and with safeguards to protect their own interests. In the result, only a small number accepted that offer. A few declined to produce any witness statement before the hearing.

The result of this preparatory work is up to 20 witnesses are likely to be called to give evidence at the Hearing. These witnesses include those who have prepared witness statements in advance - we are thankful for the cooperation - as well as those who have not done so; their evidence inevitably will be more time consuming. Every effort has been made to arrange dates convenient to the witnesses concerned.

Each witness will be examined, and cross-examined when appropriate, by counsel to the Commission. Applications to be represented by counsel, whether as of right or with leave from the Commission pursuant to section 12 of the 1935 Act, will be heard by the Commission at the outset of the Hearing and thereafter as may be convenient. Likewise, the Commission will hear and consider any applications that may be made for leave to examine or cross-examine witnesses on behalf of

other interested parties, to the extent permitted by the Rules published on 8<sup>th</sup> September 2016.

I should place it on record finally that it appears from the inquiries we have made so far that no witness is likely to dissent from the Auditor General's view that there was a widespread even systemic disregard of the requirements of the Financial Instructions during at least the early part of the period with which we are concerned and before it. But we also have reason to believe that from late 2009 onwards some steps were taken to discover why that was so, and to remedy defects in the procedures. Thus in 2009/10 the firm KPMG was instructed to conduct a diagnostic review of how six selected capital projects compared with leading international practices and to report on them to the then Minister of Finance. Its Report contributed to the Good Governance Acts of 2011 and 2012 which followed.

### **The Future**

Financial Instructions are revised from time to time (including 2011 and 2013) and we will have to consider whether the current edition provides a satisfactory safeguard, in practice as well as on paper, against any weaknesses that we may find existed during the earlier period and which continue to exist.

Now we will proceed to the Opening Statement from Counsel to the Commission and we anticipate this will take the remainder of the day. We will start hearing evidence from witnesses on Thursday afternoon which leaves Thursday

morning, tomorrow morning, available to consider any applications that may be made.