

**BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY**

**HEARINGS: DAY 19**

(TUESDAY 29 JUNE 2021)

International Arbitration Centre  
3<sup>rd</sup> floor Ritter House  
Wickhams Cay II  
Road Town, Tortola

**Before:**

**Commissioner Rt Hon Sir Gary Hickinbottom**

Solicitor General Mrs Jo-Ann Williams-Roberts (instructed by the Attorney General), Mr Niki Olympitis of Withers LLP and Ms Lauren Peaty of Withers LLP appeared for various BVI Government Ministers and public officials.

Paul B Dennis QC of O'Neal Webster appeared for Dr Daniel O Smith.

Counsel to the Commission Mr Bilal Rawat also appeared.

Ms Sonia M Webster, Auditor General, gave evidence.

Dr Daniel O Smith gave evidence.

Mr Neil Smith gave evidence.

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Those present:

Session 1

Mrs Jo-Ann Williams-Roberts, Solicitor General  
Mr Niki Olympitis, Withers LLP

Mr Bilal Rawat

Ms Sonia M Webster

Mr Andrew Gilliland, Martin Kenney & Co solicitors

Mr Steven Chandler, Secretary to the Commission  
Ms Juienna Tasaddiq, Assistant Secretary to the Commission  
Mr Andrew King, Senior Solicitor to the Commission  
Ms Rhea Harrikissoon, Solicitor to the Commission

Constable Javier Smith, Royal Virgin Islands Police Force

Mr Dame Peters, Audio-Visual Technician

Session 2

Mrs Jo-Ann Williams-Roberts, Solicitor General  
Mr Niki Olympitis, Withers LLP

Mr Paul B Dennis QC, O'Neal Webster

Mr Bilal Rawat

Dr Daniel O Smith

Mr Andrew Gilliland, Martin Kenney & Co solicitors

Ms Juienna Tasaddiq, Assistant Secretary to the Commission  
Mr Andrew King, Senior Solicitor to the Commission  
Ms Rhea Harrikissoon, Solicitor to the Commission

Constable Javier Smith, Royal Virgin Islands Police Force

Mr Dame Peters, Audio-Visual Technician

Session 3

Mrs Jo-Ann Williams-Roberts, Solicitor General  
Ms Lauren Peaty, Withers LLP

Mr Bilal Rawat

Mr Neil Smith

Mr Andrew Gilliland, Martin Kenney & Co solicitors

Ms Juienna Tasaddiq, Assistant Secretary to the Commission

Mr Andrew King, Senior Solicitor to the Commission

Ms Rhea Harrikissoon, Solicitor to the Commission

Constable Javier Smith, Royal Virgin Islands Police Force

Mr Dame Peters, Audio-Visual Technician

P R O C E E D I N G S

1  
2 COMMISSIONER HICKINBOTTOM: Good morning,  
3 everyone.

4 SONIA WEBSTER, COMMISSION WITNESS, RESUMED

5 COMMISSIONER HICKINBOTTOM: Auditor General, you  
6 are still bound by your affirmation, you haven't got to  
7 take your affirmation again.

8 Yes, Mr Rawat.

9 MR RAWAT: Thank you, Commissioner.

10 Before we continue with the Auditor General's  
11 evidence, can I for the transcript just introduce the  
12 representation in the room?

13 COMMISSIONER HICKINBOTTOM: Yes.

14 MR RAWAT: This morning we have on behalf of the  
15 Attorney General and the elected Ministers, Solicitor  
16 General Jo-Ann Williams-Roberts and also Niki Olympitis  
17 here from Withers BVI. Andrew Gilligan of Martin Kenney &  
18 Co is present as an observer. The main participants, which  
19 are those represented by Silk Legal are not represented  
20 either in-person or online.

21 COMMISSIONER HICKINBOTTOM: Thank you.

22 MR RAWAT: If I continue now.

23 BY MR RAWAT:

24 Q. Ms Webster, thank you for coming back.

25 Yesterday, we were going through a number of your

1 specific reports, and if I may, I would like to just take  
2 you to another one of those reports which you will find in  
3 Part 2 of the bundles at page 909.

4 We looked yesterday when we were towards the end  
5 of the day at the Audit Report that you produced on the  
6 COVID-19 stimulus grants to farmers and fisherfolk.

7 You have also, if we go to page 909, your office  
8 has produced a report dated the 21st of June 2021, and it's  
9 on COVID-19 stimulus grants to religious institutions,  
10 civic groups, private schools, and daycares.

11 A. That's correct.

12 Q. And can you just confirm that this is the final  
13 version of the Report finished and in the form it's been  
14 submitted?

15 A. It is, sir.

16 Q. Thank you.

17 Just again, if I could ask you--you're very  
18 softly spoken. But if I could ask you just to speak up a  
19 little bit, it will be very helpful. Thank you.

20 Can I take you through some aspects of this  
21 Report. If we have go, please, to paragraph 1, which is at  
22 page 914. You set out at paragraph 1 the purpose of the  
23 audit, and you say: "The audit covers the activity related  
24 to Religious Organisations, Schools and Civic Groups Grant  
25 initiative undertaken by the Government in response to the

1 negative economic impact resulting from COVID-19  
2 shutdowns."

3           And then you go on in paragraph 2 to explain  
4 that, "the purpose of the audit is to provide independent  
5 information and advice on: Whether approved procedures  
6 were followed in the adoption and execution of this  
7 stimulus programme; whether the objectives of the programme  
8 were achieved; and whether the funds were applied with due  
9 regard to the principles of value for money."

10           In doing that work, your office obtained  
11 documents and files from the Ministry of Finance, the  
12 Cabinet Office, the Ministry of Health and Social  
13 Development. You also obtained verification of payment  
14 activity through the Treasury system, and you--and you  
15 conducted interviews with Members of the assessment team.

16           So, are those public officers who were asked to  
17 assess applications for grants?

18           A. Yes, that's correct.

19           Q. At paragraphs 5 and 6 under the heading  
20 "Restriction of Scope," you say this, Auditor General:  
21 "The Auditor General's Office was unable to obtain the  
22 relevant files and information from the Premier's Office  
23 pertaining to the COVID-19 stimulus grants which were  
24 repeatedly requested by e-mail and telephone. This  
25 includes access to databases, documents, reports, and other

1 information relevant to policy development and  
2 implementation of the programmes.

3           The refusal to present this information is in  
4 direct contravention of the VI Constitution and the Audit  
5 Act which provide for this office to have access to  
6 Government documents and records. No public officer  
7 expending public funds has the authority to deny  
8 information requested for audit purposes."

9           When we looked at the Report in relation to  
10 farmers and fisherfolk, you made exactly the same point in  
11 that Report. Were these two audits conducted in parallel?

12           A. They were, yes, sir.

13           Q. And please add to this, if you consider it will  
14 help the Commissioner, but in effect did you encounter  
15 exactly the same resistance from the Premier's Office as  
16 you had in relation to farmers and fisherfolk?

17           A. Yes, sir, exactly the same resistance.

18           Q. And you used the word "deliberate" yesterday  
19 about the farmers and fisherfolk audit.

20           A. Yes, sir, I did. I used the word "deliberate"  
21 with respect to the audit of stimulus funds, and I  
22 explained why yesterday I used those words--used that word.  
23 And it related to a pattern that we saw with respect to not  
24 providing information and basically, what I viewed as an  
25 attempt to delay the audit process or impede the audit

1 process. I say this because the information that we  
2 requested didn't in any way or could not in any way  
3 interfere or impede their work. And we always do this,  
4 when we request information, we do a job in a way that does  
5 not interfere with the Department's processes. The  
6 Department is working with a file and we need it, we will  
7 take the file for a couple of hours, sometimes a couple of  
8 days, but if they're using it, it would be a couple of  
9 hours, we would extract what we need and we would return  
10 that file.

11           If the file is active, we may have an officer sit  
12 in the Department and work with that file. We always try  
13 not to impede or get in the way of a process of a  
14 Department doing its work, and that is consistently so.  
15 That has always been the case, and Departments know this.

16           If you take a file and they need it, they request  
17 it back, I would return it, and there is documentation to  
18 show the transfer of documents, the transfer of files  
19 between my office and the various Departments that we are  
20 working with. But at the very bottom of this, in other  
21 words to do our job, we have to get information from the  
22 Departments.

23           And again, I would like to repeat that this is  
24 public information.

25           Q. And you say that you obtained documents and files



1 from other Ministries, including the Ministry of Finance  
2 and the Cabinet Office?

3 A. Yes, we did.

4 Q. Did they experience any difficulty, those  
5 Ministries that you list here are your paragraph 3 in  
6 providing you with information, documents and files?

7 A. No, no difficulty. No difficulty was reported.  
8 We received the information primarily electronically--which  
9 works for us because then we don't have to produce a lot of  
10 paper, go through a lot of paper--and go through--staff can  
11 use the same information at the same time if it's  
12 electronic. And we haven't gotten any complaints from  
13 those two offices or any other office that they were  
14 impeded by us having that information.

15 Q. Was there any delay in those offices providing  
16 you with the information you requested?

17 A. The only delay would have been in compiling it  
18 and sending it over, but aside from that, we did not--we  
19 got no resistance from the Ministry of Finance, and I'm  
20 speaking to the recent request that we made for this  
21 particular audit, there was no resistance from the Ministry  
22 of Finance, and there was no resistance from the Cabinet  
23 Office. They were simply forwarded per the request.

24 Q. And the third Ministry you mentioned is the  
25 Ministry of Health and Social Development, so I assume

1 there was no resistance from them either?

2 A. The Ministry--there was no resistance from them,  
3 but the issue with that was that we were told that they  
4 were not involved in the process. And, in fact, they were  
5 not involved in the issuing of the grants but initially  
6 there was some involvement. And when we eventually got  
7 back to them and requested the information, it was  
8 forwarded.

9 Q. I see.

10 You say there that information from--relevant  
11 files and information from the Premier's Office were  
12 repeatedly requested by e-mail and telephone. Were you  
13 given any reason as to why your requests could not be  
14 agreed to?

15 A. Initially, we were not given a reason.

16 And subsequent to that, the Permanent Secretary  
17 sent a message, an e-mail saying that Internal Audit was  
18 working on it, and working on the same areas. And that  
19 when they were through with their audit, then we would have  
20 access to the information.

21 And as I mentioned yesterday, when we were told  
22 that, I simply said to her--well, first of all, I should  
23 say that we are used to working in conjunction  
24 of--sometimes with Internal Audit, and if they're working  
25 on an area, we allow them to do their work. And then after

1 we've seen their Report, if we consider that we need to go  
2 in, we would also go in. In a case like this, where we're  
3 working on the same subjects but for different reasons, we  
4 actually share information. They had--at the time they had  
5 the Treasury vouchers in their office, so we would actually  
6 go there and get what we needed at that time that was  
7 relevant to what we were doing. So, we share information.

8           When we were told that Internal Audit is working  
9 on this and when they finish their Report, we will let you  
10 know when you can get the information. I simply said to  
11 her, "okay, provide us with access to the databases because  
12 that does not interfere with Internal Audit processes and  
13 it does not interfere with your office processes." Access  
14 to the databases and access to other information that they  
15 have, because what we're getting from the staff within the  
16 Ministry is that they were instructed not to forward the  
17 information.

18           So, in other words, tell your staff that they can  
19 forward the information as required as long as it doesn't  
20 provide a conflict with Internal Audit. That is a  
21 concession that I don't have to make.

22           Q.    A concession that you did make?

23           A.    Yes.

24           Q.    So, were you trying to find a pragmatic way  
25 through this?

1           A.    Yes.  We were trying to find a way to work with  
2 everyone involved.

3                   And still, we were not able to get  
4 anything--anything--out of that particular Ministry.

5           Q.    And--

6           A.    I should mention, before I go on, we are also--in  
7 terms of reviewing the stimulus grants, we were also  
8 looking at the grants that were issued to SMEs, businesses,  
9 and I mentioned this yesterday.  And initially we were  
10 given access, I think, by the Department to look at the  
11 applications that came in, the application database.  And  
12 that certainly went by.  When we inquired with the  
13 Department why it was no longer available, we were told  
14 that the Premier's Office--the Permanent Secretary had  
15 instructed them to remove the access.

16           Q.    So, just breaking that down a little.  So, the  
17 first point you make is that staff from the Ministry were  
18 told that they had been instructed by the Permanent  
19 Secretary not to send you information.  And that's--where  
20 you say the Ministry there, that's the Premier's Office?

21           A.    That's the Premier's Office.  Well, that's the  
22 Premier's Office and the Department that fell beneath the  
23 Premier's Office, which would be the Trade Department.  
24 What we were told, in fact, when the information was  
25 removed, the access was removed, is that we need to talk to

1 the Permanent Secretary, and the Permanent Secretary's  
2 response is that Internal Audit is looking at this.

3 And Internal Audit will speak for itself when it  
4 comes here, but I know that they had issues actually  
5 getting information from the Premier's Office.

6 Q. And you then spoke about a Department where you  
7 had had access to information, and then it was shut off,  
8 and they were told it was the Permanent Secretary to the  
9 Premier's Office that had done that.

10 A. Yes.

11 Q. Which Department was that?

12 A. The Department of Trade.

13 Q. I see.

14 And does that sit under the Premier's Office?

15 A. It does, yes.

16 Q. There is one linked matter to this that I should  
17 have asked you about yesterday, and that's just the process  
18 of producing these reports, so you will obviously do the  
19 audit?

20 A. Yes.

21 Q. You produce a draft report, and then you give  
22 those who have an interest in the content of the Report an  
23 opportunity to respond?

24 A. Those within Government. And they are--if they  
25 are dealing with individuals outside of government, it's

1 their responsibility to get feedback from those individuals  
2 with respect to those areas. But yes, we send the draft  
3 Report to the Ministry or Department that has been audited.

4 Q. So, this--using, well, this one, which is the  
5 Religious Institutions Audit Report and the Farmers and  
6 Fisherfolk Report, who did you send the draft to?

7 A. The draft was sent to the Premier's Office, a  
8 copy of the draft. But the draft was also sent to the  
9 Ministry of Education, Agriculture and et al. A draft was  
10 sent to the Ministry of Finance. I think those were the  
11 three entities that received a draft of this Report.

12 I'm sorry. It was also sent to the Department of  
13 Agriculture, the Director of Agriculture and Fisheries.

14 Q. And the recipients are then able to send their  
15 responses to you?

16 A. They are, yes.

17 Q. And do you give them a set amount of time to do  
18 that?

19 A. Yes. We normally--we give them two weeks to  
20 respond; and, in this case, it was extended to four weeks.

21 Q. So, on these two reports that we've been looking  
22 at, they had a month to respond in?

23 A. On the Farmers and Fishermen's Report, they had a  
24 month to respond. The Second Report that dealt with  
25 Religious Organisations and Schools, it was more I think

1 two-and-a-half weeks, close to three weeks because that  
2 went out after, but with the extension I asked that both  
3 Reports, the responses for both Reports come in at the same  
4 time.

5 Q. If we look at--you don't need to turn it up,  
6 Auditor General, but the Farmers and Fisherfolk Report has  
7 some appendices attached to it but the actual report  
8 itself, it runs just to 15 pages, doesn't it? If you go to  
9 page 862, so that's the front cover of the Report, if we go  
10 to 864, which is the contents list, there are obviously  
11 appendices, but they're all tabled, but the actual text--

12 A. Starts at 869.

13 Q. Go to 864, that's your contents list for the  
14 Farmers and Fisherfolk Report, and taking it down to--from  
15 the start, the Executive Summary through to  
16 recommendations, it's a 16-page report plus appendices.  
17 And your appendices are essentially tables. When we go to  
18 the stimulus grants to Religious Organisations and Schools,  
19 that is an eight page report; is that right?

20 A. That's correct.

21 Q. So, they're not very lengthy reports?

22 A. No, they're not lengthy reports.

23 Q. So, do you consider that you gave the relevant  
24 ministries and departments sufficient time to respond to  
25 your two Reports?

1           A.     Four weeks is more than sufficient time to  
2 respond to the Farmers and Fishermen Report. The finance  
3 are pretty straightforward.

4                     And in terms of getting information to respond to  
5 these, all the information is in the Premier's Office.  
6 She's in a position to actually look this up and respond to  
7 us.

8                     So, from where we sit, four weeks is more than  
9 sufficient, and four weeks is what we normally would give  
10 to a Department that has a substantial report that involves  
11 a broader topic. This is one topic. And a lot of  
12 time--most of the times a report would have several topics  
13 in it. This is just farmers and fishermen. And from where  
14 I sit, four weeks is sufficient.

15           Q.     Let's go back, please, to page 914, and just to  
16 finish off this part of the questioning, but it's your  
17 position, isn't it, it's your understanding of the Audit  
18 Act that no public officer--but no public officer can--has  
19 any basis to refuse to give you any document or file that  
20 you seek; is that right?

21           A.     That is correct.

22           Q.     Thank you.

23                     If we go now to 915 and look at eight and nine.  
24 In paragraphs 8 and 9 you set out the purpose of the  
25 stimulus programme that was set up, and you say: "To



1 cushion the impact of closures, the Government announced in  
2 May 2020 that it would be allotting funds to assist  
3 daycares, pre-schools, private schools and religious  
4 organisations with the costs relating to reopening and  
5 compliance with health protocols. At the end of July,  
6 organisations interested in receiving assistance were asked  
7 to complete an online application survey to allow for an  
8 evaluation of their individual needs, and that of the  
9 sector as a whole."

10 Now, you go on in your paragraph 10 to explain  
11 that the initial proposed amount for the grant programme  
12 was \$1 million which was increased via Cabinet by an  
13 additional \$1,392,818, so the total budget for the grant  
14 programme came to \$2,392,818.

15 What you say there, if you look at paragraph 13,  
16 is that: "A Cabinet Decision of 8th of July 2020 required  
17 that a committee be established with the responsibility for  
18 structuring and administering the grant Department."

19 Now, was this a committee of Cabinet? Were you  
20 able to establish what kind of committee it was?

21 A. No, it was not a committee of Cabinet. It was a  
22 committee of slated persons from the various departments  
23 who would come together and put together the policy and  
24 recommend how the programme should be administered.

25 Q. So, was it a committee compiled of public

1 officers rather than elected Ministers?

2 A. Yes. It was a committee of public officers.

3 Q. And did it include someone from the Premier's  
4 Office, do you know?

5 A. It did, yes.

6 Q. And you say that the Committee produced a policy  
7 document which stated that "the intention of the programme  
8 was to support the continued operations of the institutions  
9 and assist them with compliance with COVID-19 health and  
10 safety Protocols for re-opening," and also indicated that  
11 all institutions that had reopened after the COVID-19  
12 shutdowns would qualify for some level of grant Award.

13 Now, that's the context of the programme and the  
14 scope of your audit. Can we look at your findings, please,  
15 which start on the next page at paragraph 15.

16 The first finding that you've made in your Report  
17 is that: "The recommended grant awards were adjusted  
18 without any effort to maintain the apportionment within the  
19 available budget."

20 So, could you just clarify that a little for the  
21 Commissioner, and particularly by reference to the table  
22 that we have at 17, in what way were the  
23 recommended--firstly, what were the recommended grant  
24 awards, and secondly, in what way were they adjusted?

25 A. Right. The Committee would have reviewed the

1 applications, and my recollection is that applications  
2 actually had information with respect to the entities and  
3 the expenditure and revenue, and potential losses for the  
4 period. The Committee would have looked at those and  
5 compiled the information and made recommendations as to  
6 what they thought the individual institutions should be  
7 awarded.

8           And at the end of the process, they were able to  
9 come up with a table where the \$1 million, which was the  
10 initial amount, \$1 million was divided among the religious  
11 institutions and the schools and daycares and specific  
12 groups.

13           What happened after that, that submission was  
14 actually then sent to the Premier's Office, and the amounts  
15 were changed within the Premier's Office. The Committee,  
16 for instance, recommended that \$185,000 would be awarded to  
17 religious institutions, and that was changed to  
18 \$1.4 million in the Premier's Office. They recommended  
19 that schools and daycares would get \$788,000. That was  
20 changed to \$907,000. Civic groups they recommended  
21 \$25,000, and it was adjusted to zero, but the actual amount  
22 that was paid to the civic groups, notwithstanding, was  
23 \$55,000.

24           And the adjusted amounts that I have here are  
25 actually not the amounts that were paid because these

1 adjustments, what was sent to Cabinet. So, we have the  
2 Committee recommending \$185,000. Cabinet was asked to  
3 approve the \$1.4 million, and the actual amount that was  
4 paid after Cabinet approved 1.4 million was actually 1.5  
5 was paid.

6 Again, the Committee recommended \$25,000 for the  
7 civic groups. Cabinet did not approve anything because  
8 nothing was submitted to them to approve for civic groups,  
9 but civic groups were paid \$55,000. So, the recommendation  
10 was 25,000, they were paid \$55,000.

11 Schools and daycare, the Committee recommended  
12 \$788,000. It was adjusted by the Premier's Office to  
13 \$907,000, and the actual payments were \$892,000, and this  
14 is at the time we wrote the Report.

15 Q. And for your office, the information gap is  
16 between the recommendations made by the Committee and what  
17 went to Cabinet because that information sits in the  
18 Premier's Office, and the Premier's Office has not given  
19 you that information?

20 A. That's correct. We had no way to assess why they  
21 had changed the amounts and why they had been changed so  
22 drastically, from 185,000 to \$1.4 million, for instance,  
23 for religious institutions.

24 Q. So, sitting here today, Auditor General, you're  
25 in no position to assist the Commissioner with what

1 criteria may have been used in the Premier's Office to  
2 reassess applications?

3 A. I'm in no position--I am in no position to advise  
4 you as to what changes occurred in the Premier's Office or  
5 what criteria was applied to this to effect these changes,  
6 Commissioner.

7 Q. We may come back to that, but let's go to your  
8 second finding which we see at paragraph 18. What you say  
9 in relation to religious institutions is that the grant  
10 award--and this is I think you're breaking down the detail  
11 now--the grant award for religious institutions increased  
12 by 662 percent over the recommended amounts. No criteria  
13 was made available for this increase. 80 percent of the  
14 religious institutions did not apply for assistance. These  
15 were nonetheless approved to receive grants totaling  
16 1 million--is it \$1,060,000?

17 A. Yes, that's correct, sir.

18 Q. And so, just to summarise it, religious  
19 institutions were able to make an application for grants?

20 A. That's correct, sir.

21 Q. The Committee set up by Cabinet assessed the  
22 grants and made a recommendation as to payment?

23 A. Assess the applications.

24 Q. You're right. Thank you for the correction,  
25 that's very important.

1           So, they assessed the application, made a  
2 recommendation. It then went to the Premier's Office.  
3 What happened there you can't say, but the result was that  
4 then Cabinet approved an increased sum which included funds  
5 that went to religious organisations that had never made an  
6 application.

7           A. That's correct.

8           Q. So, it went to organisations, religious  
9 institutions that were never considered by the Committee  
10 set up by Cabinet?

11          A. They were considered by the Committee set up by  
12 Cabinet.

13          Q. It's perhaps if you clarify for me, it's the  
14 finding that 80 percent of the religious institutions did  
15 not apply for assistance.

16          A. But doesn't it--okay, the Committee's process, in  
17 their process, they received information from the Ministry,  
18 the relevant Ministries on schools and daycares, so they  
19 had a list of all the schools and daycares, and which is  
20 why they are able to say 80 percent did not apply.

21                 And the policy was that whether or not--well, the  
22 policy was that all institutions, once you reopen would  
23 be--would qualify for a grant award, but what they did is  
24 schools and churches that did not apply were given a  
25 nominal amount to assist perhaps in the re-opening

1 expenditure, because they hadn't expressed any real  
2 interest in being a part of the programme, they were still  
3 awarded a nominal amount. Take this, you can buy hand  
4 sanitizer, you can set up a hand washing station, so that  
5 was the plan. That was the intent of providing that  
6 nominal amount.

7 But, when it went into the Premier's Office, the  
8 amounts changed significantly.

9 Q. What you say is that the grants--this is at your  
10 paragraph 27. And you say--what you described as the  
11 Ministry's adjustments, and that's the Premier's Office,  
12 but what the Committee had recommended in relation to  
13 religious institutions and civic groups, I think, was a  
14 total grant of 211,000-odd dollars.

15 A. Right.

16 Q. And then that increased seven-fold when it went  
17 to the Premier's Office.

18 A. That's correct.

19 Q. But--and those were then forwarded to Cabinet for  
20 approval, but 15 institutions which were characterized as  
21 "civic groups" were not included on the list at all?

22 A. That is correct, yes.

23 Q. So, there were institutions that had been  
24 assessed for a sum that following whatever happened at the  
25 Premier's Office got even more money, whilst there were

1 others who had similarly been assessed as having a  
2 justifiable application that warranted public funds, after  
3 the Premier's Office effectively were in a position that  
4 they weren't going to receive anything because it wasn't  
5 being sent to Cabinet for approval?

6 A. That's correct.

7 And to illustrate what I just said about the  
8 non-applicant churches actually receiving--

9 Q. Are you looking at one of your appendices? Do  
10 you want to tell us which one it is?

11 A. Yes.

12 It's on page 2--sorry, 921.

13 Q. For the Transcript, this is Appendix 1, the  
14 "Religious Institutions Summary."

15 Is there a particular one that you wanted to draw  
16 the Commissioner's attention to?

17 A. At the top you see the applicants, these are the  
18 applicants, and then right underneath that, non-applicants.  
19 And it starts out with the first one was recommended by the  
20 Committee to get \$2,000, and they were awarded 15,000. The  
21 second one was--these are the non-applicants--was  
22 recommended to get \$1,200, and that institution was awarded  
23 \$20,000.

24 So, this is what is meant when we said that the  
25 amounts were inflated without--without any kind of--without



1 any reference to a criteria. And the churches that did not  
2 apply were simply awarded some large sums without any kind  
3 of documentation to say whether they actually had suffered  
4 any--or what level of any inconvenience they had suffered  
5 as a result of the shutdown.

6 COMMISSIONER HICKINBOTTOM: And what level of  
7 financial reduction that they had suffered as a result of  
8 the shutdown and because all of this comes out of the  
9 paragraphs that you've set out, and no reference to the  
10 number of Members of the church.

11 THE WITNESS: Exactly.

12 COMMISSIONER HICKINBOTTOM: For some of these  
13 churches were very small with eight Members. One church  
14 had eight Members, and consequently the amount per Member  
15 was a number of thousands of pounds.

16 THE WITNESS: That's correct, sir. Yes.

17 COMMISSIONER HICKINBOTTOM: Yes. Thank you very  
18 much.

19 BY MR RAWAT:

20 Q. And looking at your paragraph 28, Auditor  
21 General, what seems to have happened is that the increase  
22 in the award was in fixed amounts, so religious  
23 institutions got \$20,000, \$15,000, \$10,000, and \$7,000.

24 A. That's correct, sir.

25 Q. But as the Commissioner points out and as you've

1 pointed out, particularly for those that were  
2 non-applicants, and when we look at your Appendix 1, the  
3 greater number of institutions are non-applicants, aren't  
4 they?

5 A. That is correct, yes.

6 Q. There was no--no documentation on which to assess  
7 the needs of any of those institutions?

8 A. That's--that is correct.

9 Q. And so what you say--and this is at page 923--

10 A. I would like to say for the record that we, in  
11 doing this, we were very aware that the fact that the  
12 religious institutions had not applied for funding. And,  
13 in fact, many of them did not expect to be receiving  
14 checks. And we didn't want to get them caught up in some  
15 sort of Government issue, but the fact is that the money  
16 had been issued, and we needed to account for this. We  
17 needed to be able to speak to it.

18 So, we do understand that they didn't apply, they  
19 didn't expect to get money, and they didn't expect to be in  
20 the middle of a government Inquiry. I just want to put  
21 that in the record.

22 Q. Yeah. I mean, no suggestion of impropriety on  
23 the part of any of these organisations.

24 A. Exactly.

25 Q. They were--they were issued Government money, and

1 that was somebody else's decision, not theirs.

2 A. Exactly.

3 Q. But to bring the point--I mean, looking at your  
4 Appendix 1, in terms of "Religious Institutions Summary,"  
5 of those who made applications, Cabinet approved, and there  
6 is a difference between approval and what they actually  
7 received, but Cabinet approved \$355,000.

8 In terms of non-applicants, Cabinet approved  
9 \$1,060,000. That's at your page 93. Have I understood the  
10 table correctly?

11 A. That is correct, yes.

12 Q. And then the next step in the process was that  
13 once Cabinet had approved the sums to be paid out, it was  
14 for the Treasury Department to issue the checks; is that  
15 right?

16 A. It was for the Ministry--the Premier's Office to  
17 prepare the documentation for the Treasury to make the  
18 payments.

19 Q. I see.

20 So, it goes from Committee to Premier's Office to  
21 Cabinet?

22 A. Yes.

23 Q. Back to the Premier's Office. They prepare the  
24 documentation, and then the Treasury Department issues the  
25 check?

1           A.     Right.

2                     The Treasury Department then raised the check,  
3 which I understand was collected by the Premier's Office,  
4 and the institutions then had to go to the Premier's Office  
5 to collect this check.

6           Q.     I see.

7                     And the--and are they then--it appears to be more  
8 than one gap in the information trail for you because you  
9 don't know the basis on which the Premier's Office  
10 increased the sums that Cabinet were to approve.

11          A.     That's correct.

12          Q.     And is it right you don't know the basis on which  
13 the Premier's Office then decided that religious  
14 institutions should be paid more than the sum the Cabinet  
15 approved?

16          A.     I do not know the basis of that decision.

17          Q.     But ultimately, the last stage in the process is  
18 the Premier's Office is holding the check and the religious  
19 institution turns up to collect it?

20          A.     We were told that there were some that did not.

21          Q.     Some did not.

22          A.     Yes.

23                     We were told--we were not able to verify that.

24          Q.     But that's essentially the process?

25          A.     That is the process.

1 Q. If we understood it correctly.

2 Could we turn to page 918, please, and what you  
3 say there about schools and daycares. This is at your  
4 paragraph 32, Auditor General.

5 You say: "The grant award for schools and  
6 daycares increased by 15 percent over the recommended  
7 amounts in changes that appear to be ad-hoc and without  
8 stated criteria". You point out that compared to religious  
9 organisations, there was--or religion institutions, forgive  
10 me--the response from educational institutions to the  
11 stimulus grant programme was more robust, and so 30 of the  
12 32 schools in the Ministry's database completed the  
13 application survey to be considered for stimulus funding.  
14 And where you say the Ministry's database, which Ministry  
15 are you referring to there?

16 A. The Ministry of Education, Culture--  
17 (Overlapping speakers.)

18 Q. But did it go through the same process in that  
19 the applications were submitted, they were assessed by the  
20 same Committee set up by Cabinet?

21 A. Yes.

22 Q. And then once the assessment was made, it then  
23 went to the Premier's Office?

24 A. Yes, sir. It did go through the same process.

25 Q. And the Premier's Office essentially increased

1 the total grant amount for educational institutions and  
2 daycares.

3 A. That is what happened.

4 Q. If you look at your 36, what you say there was:  
5 "The grant allotment for eleven centers were increased.  
6 Seven had an additional \$20,000 added to the recommended  
7 amount, three others were rounded upwards to \$34,500 each  
8 [and] one was rounded upwards to \$20,000". And then you  
9 add that: "In addition, [the] four centers had their  
10 recommended grant allotment reduced".

11 And so, but for your audit purposes, you did not  
12 have the information as--which allows you to understand how  
13 the Premier's Office decided to increase awards and also,  
14 in relation to four centers, reduce them?

15 A. No, we did not have the information. We could  
16 only observe the changes based on records that we had at  
17 the time during the audit, and these were records from the  
18 Treasury and from other institutions, other Government  
19 offices.

20 Q. What you summarise, the position at your  
21 paragraph 38 in the table, and you make the point that  
22 there's obviously, at least when we were dealing with  
23 school, educational institutions, there is a substantially  
24 greater number of applicants; but in both instances,  
25 applicants and non-applicant, when the matter went to the

1 Premier's Office, the total grants to be awarded were  
2 increased in size; is that right?

3 A. They were increased in total, yes.

4 Q. Yes.

5 So, the total recommended by the Committee was  
6 \$788,754.33. The amount that it was adjusted upwards to by  
7 the Premier's Office was \$907,818. But, in fact, as you  
8 say in the final part of the table, the amount that  
9 actually was paid out was less than had been adjusted; is  
10 that right?

11 A. It was less, but I'd like to point out that  
12 these--the payments are only up to a certain date, and as  
13 the Permanent Secretary was constantly saying, there  
14 was--up until we did this audit, payments were still being  
15 made, and there's a possibility that the few that had not  
16 been paid will, in fact, be paid at a later date. I can't  
17 confirm that because we didn't get any information from the  
18 Premier's Office to say that these individuals are not  
19 going to be paid. So, we have to assume that since there  
20 were proof of payments that that payment was going to  
21 happen.

22 Q. I see.

23 So, it could--I mean, the full amount, the full  
24 900,000 could have been paid out because I think the date  
25 that you took your figures up to is the 20th of May 2021,

1 isn't it?

2 A. Yes, that's correct.

3 Q. You also make the point--and this is at  
4 paragraph 39--that: "Review of the recommended grant  
5 amounts submitted by the Committee showed anomalies where  
6 some smaller institutions were recommended for more  
7 generous grant awards than their larger counterparts". And  
8 you say--you give an example where "a daycare with an  
9 enrollment of 10 was recommended" by the Committee for just  
10 under \$35,000, "whereas a multiple purpose  
11 institution--daycare, primary, and pre-primary--with an  
12 enrollment of 138 students was recommended for" just \$9.5  
13 thousand.

14 And so does that mean that you're  
15 identifying--that you've identified an issue with the way  
16 the Committee, which is the first stage of the process, was  
17 approaching its assessment of applications?

18 A. That's correct, yes.

19 Q. And in paragraph 41, you say: "The anomaly in  
20 grant awards appears to be caused by two factors: The  
21 absence of weighing element" by--"to factor in the size of  
22 the institutions ie number of members; and the Committee's  
23 acceptance of the cost per member, submitted by the  
24 entities (some of which could have been followed up and  
25 adjusted within reason) which accounted for 60% of the



1 weighing", could you just add a little bit more detail to  
2 those two points, please, if you can or if you want? Just  
3 explain for the--to the Commissioner just where you've--why  
4 these two factors are of particular importance to you as  
5 the Auditor General.

6 A. The Committee had--I'm trying to remember--some  
7 stated criteria through its--their assessments. One of the  
8 criteria was institution, and they weighed this, the  
9 Department--I'm sorry--an institution, for instance, would  
10 be assessed on whether it was a church, daycare, a school,  
11 daycare, church, and I'm thinking--institution would be  
12 primary school, daycare, church, and I'm wondering--I'm  
13 thinking there's another factor. I don't have that  
14 information for me, so I'm just going through this from my  
15 memory.

16 So, for institutions there were five factors, and  
17 what we found is that a church that has a school that has a  
18 daycare could weigh higher than a daycare--well, a church  
19 that has school and daycare with only five members, a  
20 daycare with five members, could--would weigh higher than a  
21 daycare that had 200 Members.

22 So, I think the intention was for that particular  
23 factor to accommodate the size, but because how the  
24 churches and daycares are structured, you can have a very  
25 small church that has a preschool with two people in it and

1 a daycare with two and maybe a preprimary with one person,  
2 and that would weigh higher on that scale than an  
3 institution that had 200 members. And because a small  
4 church has all those institutions together, it was awarded  
5 a greater sum.

6 What it didn't take into consideration was the  
7 fact that directly--they didn't take directly into  
8 consideration the fact that some schools, even though it  
9 was a single institution, would have substantially more  
10 attendees than a church that has several students to it but  
11 only a small number.

12 I don't know if I'm making this clear, but  
13 essentially, the criteria that they had to assess size was  
14 ineffective, and it would be better if they had a direct  
15 criteria to weigh the size on the number of participants,  
16 the number of students, the number of attendees to the  
17 church, for instance, rather than having it under  
18 institutions.

19 (Overlapping speakers.)

20 I can come back to that when I have a little bit  
21 more information because I don't have the criteria right  
22 here in front of me.

23 Q. That's fair enough.

24 I mean does it sort of come down to this that the  
25 approach was on how many elements there were to an

1 applicant? So if an applicant was a church, had a daycare,  
2 had a preschool, that would weigh more heavily in favor  
3 whereas what wasn't given sufficient, essentially, was the  
4 number of participants an institution was actually  
5 supporting?

6 A. That's--pretty much sums up--sums it up.

7 The other factor with respect to the applicants  
8 is you are--each entity was required to state an estimate  
9 of what their losses were. And, for instance, we would  
10 have a church that has a hundred members stating that their  
11 losses was \$6,000, and the church that has five members  
12 stating that their losses were \$20,000. And because those  
13 amounts were accepted and put in the database and adjudged.  
14 That church that has five members claiming that their  
15 losses was 20,000--I think one of them claimed that theirs  
16 was over 100,000--they would rank higher as a person, as an  
17 institution in need as opposed to the church with members  
18 that says, well, you know, my losses were--well, we  
19 have--our losses were 20,000, not 5,000 or \$100,000 and  
20 something.

21 And I don't think the Report actually has a  
22 schedule that actually speaks to this, but we do have  
23 schedules in the office that we--where we looked at this,  
24 looked at the assessment and realised there were flaws in  
25 how these were done.

1           Q.    But in terms of the intended process, Cabinet  
2 sets up a committee to consider the applications. That's a  
3 committee of public officers, so they can only recommend an  
4 award. Was the intention at the beginning of this--or was  
5 it your understanding that the intention was, if the  
6 Committee made a recommendation, it would go to Cabinet for  
7 approval, or was it that if the Committee made a  
8 recommendation that would be accepted?

9           A.    Well, the intention has been that if the  
10 Committee makes a recommendation, it would go to the  
11 Premier's Office, and unless there was something that was  
12 drastically out of place, then the recommendation would be  
13 accepted.

14                In this case, where we noticed that there were  
15 anomalies in the amounts, then it was for the information  
16 to be sent back to the Committee and have them to relook,  
17 the criteria. And I just mention that the criteria was a  
18 little bit off, but at the same time it was set up in such  
19 a way that the amounts that were allotted would come back  
20 within the budget. So we have a million dollars to work  
21 with, we're setting out criteria and allow that to compute  
22 what each institution will get based on the submitted  
23 information. And with that, it came back within the  
24 budget.

25                So, basically what I'm saying is that yes, there

1 was an issue with the criteria, and that needed to be  
2 adjusted, and it should have been adjusted, and the  
3 Committee should have been allowed to make corrections to  
4 those bank awards and allowed it to go through within the  
5 budget that was--that had been approved.

6 Q. Could we just go to your conclusion, please, and  
7 if I just go through this with you.

8 What you say was firstly you say this in the  
9 Report: "The Committee established to develop the policy  
10 and procedures for administration of the programme produced  
11 recommendations for grant awards within the approved  
12 budget"[s]. "The awards were changed in the Premier's  
13 Office without regard to the available budget resulting in  
14 a need for substantial additional funding".

15 You then say: "Private educational institutions  
16 and daycares suffered immediate decline in activity as the  
17 territory hastened to mitigate and address its COVID-19  
18 threats, this was compounded by public health COVID-19  
19 precautionary protocols requiring new spending for  
20 reopening and operations. The funding provided served to  
21 alleviate some of the costs associated with the COVID-19  
22 fallout".

23 You continue: "No clear objectives were provided  
24 with respect to the grants awarded to 'civic groups'.  
25 These payments were not approved by Cabinet and appear

1 gratuitous as they do not address any urgent public health  
2 requirements".

3 I'm going to pause there.

4 And is the issue, just so that we're clear, is  
5 that because grants to civic groups, whether they were in  
6 the sums that the Committee intended or not, did not go  
7 before Cabinet for approval? So the decision to award a  
8 civic group a particular sum of money just lay with the  
9 Premier's Office.

10 A. That is correct.

11 Q. If I go to the final conclusion that you may, you  
12 say this: "Religion institutions were affected by the  
13 restrictions, but with fewer overheads, appeared more  
14 resilient in the reported operational activity. The  
15 amounts allotted to religious institutions appear outside  
16 of reason, especially as many of entities did not request  
17 funding and the awards were done without information to  
18 perform nay assessment of needs (if any). Religious  
19 institutions perform important social and cultural roles  
20 which the Government should support in appropriate ways.  
21 The application of public funds in the manner seen in this  
22 programme, with extravagant and unsupported increases in  
23 the COVID-19 stimulus grants awards, create the impression  
24 of an inappropriate turn to influence these institutions  
25 political independence". Have I understood that correctly

1 as--in terms of your final conclusion?

2 A. I believe that is clearer in terms of my final  
3 conclusion, yes.

4 Q. Is there anything you want to add to that final  
5 conclusion?

6 A. No, there is nothing I'd like to add to that  
7 conclusion.

8 Q. You again made a number of recommendations and  
9 appreciate that they're obviously, as they were with  
10 farmers and fisherfolk, very recent. I just wanted to ask  
11 you just to clarify a couple of points in relation to your  
12 recommendations.

13 In the first one you say: "The practice of  
14 issuing public funds to entities that have not applied, or  
15 indicated a need for assistance should cease. There should  
16 always be an assessment and needs justification in issuing  
17 public grants".

18 Now, it may be a very obvious question, but the  
19 point about that there needs to be an assessment and needs  
20 justification, is that something as an approach that you  
21 would say is embedded in the work of the Public Service?

22 A. It is something that should be embedded in the  
23 work of the Public Service, especially when  
24 applying--always when applying public funds.

25 Q. It then says, your second recommendation:

1 "Government programmes should be undertaken by the  
2 oversight ministry. This allows for better long term  
3 monitoring and better outcomes".

4 In this case, who was the oversight Ministry?

5 A. The Ministry of Education for schools and  
6 daycare, and the Ministry of Health and Social Development  
7 for religious institutions.

8 Q. And if we take that recommendation across to the  
9 farmers and fisherfolk, would it be the--the Ministry--it's  
10 the Agriculture and Is fisheries--

11 A. Right.

12 Q. --component of the Ministry?

13 A. Right. And the Department of Agriculture and  
14 Fisheries work together.

15 Q. Your third recommendation is: "Budgets are  
16 intended to guide public spending. Every effort should be  
17 made to ensure that these are observed in the planning and  
18 application of public funds. Where additional funding is  
19 required for a programme, this should be adequately  
20 supported and the amounts justified within reason".

21 Now, that's a recommendation you make in  
22 principle because, of course, you don't have any of the  
23 information and you've not been given any of the  
24 information that would allow you to understand how the  
25 budget changed so drastically.



1 A. That's correct.

2 Q. Your fourth recommendation is: "In no instance  
3 should public spending compromise or appear to undermine  
4 the political independence or impartiality of  
5 non-government institutions".

6 As you know, Auditor General, the Commissioner is  
7 interested in governance, and taking it back to your role  
8 in governance, would you accept this: That impressions  
9 matter in terms of the public's perception and public's  
10 confidence in the installations of governance?

11 A. Absolutely, sir. I agree with that.

12 Q. And an approach that creates the impression of an  
13 inappropriate turn that affects the political independence  
14 and impartiality of non-government institutions is one that  
15 should be avoided, isn't it?

16 A. At all costs, it should be avoided. Agreed.

17 MR RAWAT: Commissioner, I want to move on to  
18 another topic. I just want to ask if the Auditor General  
19 is happy to carry on whether she'd like a short break, but  
20 I leave it to her.

21 COMMISSIONER HICKINBOTTOM: Yes. Before you  
22 respond to that, Auditor General, Solicitor General,  
23 yesterday I indicated that all of the Reports that were  
24 referred to in this open Hearing I propose to publish on  
25 the Commission of Inquiry website. Both the Farmers and

1 Fisherfolk Report that was dealt with yesterday and the  
2 Religious Institutions Report that has been dealt with  
3 today were circulated to all of the participants. None of  
4 them raised any objection with regard to them being  
5 referred to in public, which they have, and so I assume  
6 that there is no objection to them being published on the  
7 COI website. They're final reports; they have been  
8 submitted to the Governor; they haven't yet been placed on  
9 the table in the House of Assembly.

10 SOLICITOR GENERAL: Commissioner, if I may, I  
11 would respond on our return from the break. So give me a  
12 moment to look at it.

13 COMMISSIONER HICKINBOTTOM: At half past 1:00,  
14 yes, certainly. Thank you.

15 SOLICITOR GENERAL: Sorry, when you determine the  
16 break, the present break?

17 COMMISSIONER HICKINBOTTOM: Oh, certainly, yes.  
18 No, that's fine. So, shall we have break now and then the  
19 Solicitor General can respond--

20 SOLICITOR GENERAL: Yes.

21 COMMISSIONER HICKINBOTTOM: --to that. Five  
22 minutes, yes? Thank you very much.

23 (Recess.)

24 COMMISSIONER HICKINBOTTOM: Good. I think we're  
25 ready to start again.

1           Solicitor General.

2           SOLICITOR GENERAL: Thank you, Mr. Commissioner.  
3 We had an opportunity or I had an opportunity to look at  
4 the Report briefly, and I am not content at this moment to  
5 concede or consent to the Report being made public. I've  
6 looked at the procedures that will be required to lay the  
7 document before the House of Assembly, and I'm comfortable  
8 with the fact that the document has not been laid as yet.

9           And I'm also uncomfortable with the level of  
10 personal detail.

11           COMMISSIONER HICKINBOTTOM: In which reports,  
12 Solicitor General?

13           THE WITNESS: In the Report at page, for example,  
14 871. Even within the Reports--

15           COMMISSIONER HICKINBOTTOM: Yes, those are  
16 personal data. Those will obviously have to be redacted.

17           SOLICITOR GENERAL: Yes, Mr. Commissioner. So, I  
18 am uncomfortable with the Report being made public with the  
19 amount of personal data in the Reports themselves and also  
20 in the appendices.

21           COMMISSIONER HICKINBOTTOM: But if those personal  
22 data are redacted, no problem?

23           SOLICITOR GENERAL: Well, I do have a problem,  
24 particularly where the Report should be laid in the House  
25 of Assembly and hasn't been laid as yet.

1           COMMISSIONER HICKINBOTTOM: But it has been  
2 referred to and quoted from quite liberally during the  
3 Hearing.

4           SOLICITOR GENERAL: Yes. And I'm uncomfortable  
5 with that. I'm uncomfortable, however, at this moment with  
6 the Report itself being made public given the level of  
7 personal detail in there and given the fact that it hasn't  
8 been laid on the House of Assembly's table.

9           So while the Reports have been referred to, I  
10 don't think the personal information has been referred to.

11           COMMISSIONER HICKINBOTTOM: No, no, of course.  
12 Because it's personal information and we have been careful  
13 not to refer to it.

14           SOLICITOR GENERAL: Yes.

15           COMMISSIONER HICKINBOTTOM: And if we publish the  
16 Report, then we would obviously exclude the personal data.  
17 That's not an issue. The only issue is that although it's  
18 a Final Report, it hasn't been laid before the House of  
19 Assembly yet.

20           SOLICITOR GENERAL: Yes, Commissioner. I agree.  
21 It hadn't been laid, and I believe we may misstep if we  
22 preempt the House in the manner in which it's going to be  
23 laid and given the fact that it should be laid. I'm  
24 concerned that we may misstep if we do publish the  
25 information prior to it being laid on the House of

1 Assembly's table.

2           So, for those reasons, Commissioner, it would be  
3 my recommendation that the Commission of Inquiry, although  
4 the Report had been mentioned, it will perhaps be  
5 beneficial if those steps can be taken in terms of  
6 redaction or a proper consideration for redaction because I  
7 would not be able to say, just sitting here, if just, you  
8 know, mentioning or redacting the names alone would allow  
9 persons not to know who the references are. I would have  
10 to read the entire paragraph to see if the paragraph  
11 actually makes reference to a person, that person can know  
12 who--even if the name is redacted.

13           So redactions, (1), yes, I think should happen,  
14 but more importantly, I think that it would be proper if  
15 the Reports are laid as well to the House of Assembly  
16 table.

17           So, for those reasons I could not consent to them  
18 being made public at the moment, at this particular day.

19           COMMISSIONER HICKINBOTTOM: Thank you, Solicitor  
20 General. Because I'm anxious to get on with the remaining  
21 evidence of the Auditor General, is the best thing to put  
22 this over, Mr Rawat?

23           MR RAWAT: Yes. I mean, if I can just carry on  
24 with the Auditor General, there are some points I could  
25 make during the day, Commissioner.

1 COMMISSIONER HICKINBOTTOM: Yes, we will deal  
2 with this point, but it won't be published in the meantime.

3 SOLICITOR GENERAL: Thank you so much.

4 COMMISSIONER HICKINBOTTOM: On the basis of the  
5 objection of the Ministers.

6 SOLICITOR GENERAL: Grateful, Commissioner.

7 COMMISSIONER HICKINBOTTOM: Yes, Mr Rawat.

8 MR RAWAT: Thank you.

9 BY MR RAWAT:

10 Q. Auditor General, welcome back. Can I take you  
11 now--we're going back a little bit in time to a Report from  
12 your Office of January 2013. We will find that at  
13 page 619, please.

14 This is the Port Development Project.

15 A. I'm sorry. If we may, before we move on to the  
16 next audit, I just wanted to clarify the point that we  
17 addressed earlier on page 919 when you inquired about the  
18 way, and I have before me--

19 COMMISSIONER HICKINBOTTOM: Yes.

20 THE WITNESS: Right, 919, paragraph 41.

21 I have before me the criteria that was used for  
22 schools, for instance, there were five different weighings  
23 for schools, institutions, and there were daycare,  
24 preschool, primary school, secondary and church, so the  
25 point that I was trying to make is that a small entity, a

1 church that had a daycare of two, a preschool with three  
2 people and a primary school with maybe five, would weigh  
3 higher than a daycare, for instance, that had 200, and  
4 because of that, the smaller institution, the church that  
5 had multiple layers on it was awarded a greater grant, even  
6 though it had fewer participants, fewer Members to attend  
7 to, and that was the flaw within that system. And what was  
8 being suggested in 41 is that a more direct weighing should  
9 have been applied to the actual numbers of students or  
10 actual numbers of Members within a church institution  
11 rather than trying to use this because this was not an  
12 effective measure, and that was the point that was being  
13 made in 41.

14 COMMISSIONER HICKINBOTTOM: No, thank you very  
15 much. Thank you.

16 BY MR RAWAT:

17 Q. Thank you.

18 Let's go to the 2013 Report, please, page 619.  
19 It's a report that relates to the development of the cruise  
20 pier at Wickham's Cay I. If you just look at paragraphs 1  
21 and 2 on page 621, please, you explain there the purpose of  
22 the audit which was an assessment of the processes employed  
23 in procuring and assessing options for the development of  
24 the port facilities, and you explained that it focused on  
25 the compliance and regularity of the processes as they

1 relate to public procurement and transparency, and make the  
2 point that the purpose of the audit was not to assess or  
3 examine the merits or otherwise of the contents of the  
4 proposals or the submissions received for development.  
5 That was the role of a different team, not yours. So, you  
6 were looking at the processes that were adopted to procure  
7 the development.

8 A. That's correct.

9 Q. If we just, for the Transcript, give a little bit  
10 of background, and we will find that at paragraphs 4 and 5.  
11 And to summarise that, the cruise ship pier on Wickham's  
12 Cay was officially opened in November 1994. You explained  
13 that in 1999 it was extended from 555 feet to 746 feet with  
14 two mooring Dolphins being used to give a total more in  
15 facility of 1013 feet. It then subsequently became clear  
16 that the pier was too small to adequately service  
17 increasingly larger cruise ships, and that led--and you  
18 summarized this in the Report to a set of proposals and  
19 agreements that went from 2017--2007 to 2013 and beyond for  
20 a range of different options for the further development of  
21 the Cay.

22 And so, if we look, for example, at paragraph 7,  
23 in 2007, the BVI Port Authority engaged engineers known  
24 as--called CH2MHILL to recommend options for expansion of  
25 the pier, and they produced an evaluation which went to



1 Cabinet, and Cabinet in April 2008 approved an option to  
2 lengthen the pier by 194.6 feet at a cost not to exceed  
3 \$7 million.

4           What then happened was that the project was put  
5 out to tender by the BVI Port Authority, and the lowest bid  
6 that came in was from, is it Misener Marine Construction,  
7 Inc. of Florida, and they had a bid for just over  
8 \$12 million, which was to extend the pier and perform  
9 related works.

10           Now, that bid was then submitted to Cabinet in  
11 September 2008. And what it was doing, was the plan was to  
12 extend the pier by 84 feet, but then use two mooring  
13 dolphins, so that would mean that the pier would actually  
14 be extended by 207 feet, but the proposal was rejected by  
15 Cabinet. It seems from your Report on the basis that  
16 Cabinet understood the proposal to be one extending the  
17 pier by 84 feet when it was, in fact, intended to extend it  
18 by 207, so the result--that was obviously a pause.

19           And then when we go to 2009, you had pressure  
20 from carriers about the facility, and so proposals were  
21 made by both Royal Caribbean and Disney for the expansion  
22 of the pier, and there was in 2011 a proposal from Disney  
23 which stipulated a \$12 million loan facility to be  
24 amortized over a 10-year period at an interest rate of  
25 6 percent which would then be used to construct a two span

1 pier extension and a welcome center. I think the plan as  
2 you write there was that it will be--the work would be  
3 carried out by Misener Marine Construction, Inc. with  
4 CH2MHILL as the project manager. And the work would then  
5 run from July 2011 to November 2012.

6 Disney were then to be given preferential  
7 berthing privileges at one of the two berths for 15 years,  
8 and the proposal reached the point where Heads of Terms  
9 were signed on the 11th of October 2011 between  
10 representatives from Disney, the Premier and the managing  
11 Director of the BVI Port Authority.

12 But then the agreement was terminated, and it was  
13 terminated, I think, from your Report, because there was at  
14 this point a change in Government; is that correct?

15 A. That is correct, yes.

16 Q. So, if we move through to paragraph 20, what then  
17 happened, the Report explains, was that, following the  
18 change in Government, which is in 2011, a consultant was  
19 engaged by the Ministry of Communication and Works to  
20 liaise with the Port Authority and advise on port-related  
21 matters. And you say that in the Report: "Through a  
22 process that has not been adequately explained, three  
23 proposals were received by the Ministry, and these came  
24 from CaribInvest, Trident Development Enterprise, LLC, and  
25 Tortola Port Partners, I'll call them TPP from now on. But

1 that these proposals went to the Ministry, did they, rather  
2 than to the Port Authority?

3 A. That's correct, yes.

4 Q. The Ministry decided to accept the proposal of  
5 Tortola Port Partners, which detailed a \$57 million  
6 investment.

7 A. Sorry, Tortola Port Partners.

8 Q. Yes, sorry. So I will correct that for the  
9 Transcript.

10 So to recap, there were three proposals received  
11 by the Ministry. The Ministry took a decision to accept  
12 the proposal from Tortola Port Partners, which was as a  
13 proposal, involved a \$57 million investment, which would  
14 cover not only the pier expansion but development of what's  
15 described as the uplands, so part of the land around the  
16 cruise pier.

17 A. Yes.

18 Q. And that would be on a 49-year marine and land  
19 lease arrangement. If we go to paragraph 23, the Report  
20 says this: "Despite the magnitude of the newly proposed  
21 development, examinations of the record do not indicate any  
22 comprehensive planning or revised needs analysis to  
23 redefine the scope of the project and development of the  
24 upland. The provisions of the Public Finance Management  
25 Regulations with respect to public procurement were largely

1 ignored. The Protocols for Effective Financial Management  
2 that were executed on 23rd of April 2012 between the  
3 Government of the Virgin Islands and the UK Minister for  
4 Overseas Territories were not in place during the early  
5 part of the project. The provisions of this document  
6 however, echo general good practice with respect to major  
7 project planning and financing that should have been  
8 considered and observed in the development of the project."

9 Now, just pausing there, why was it significant  
10 that the Public Finance Management Regulations with respect  
11 to public procurement were largely ignored?

12 A. Because these relate to a transparency of  
13 process, and it also related to the Government--it ties in  
14 to the Government getting value for money on major  
15 projects, any projects, in fact. So, by ignoring those  
16 processes, we don't know whether there were better options  
17 available, whether there were more cost effective options  
18 available. And we frankly don't know how these proposals  
19 were arrived at, all three of those proposals. There's  
20 nothing to indicate how those were arrived at.

21 Q. Now, if you look at paragraph 26, a point was  
22 made in the report is that significantly the Town and  
23 Country Planning Department, which is the Government's  
24 primary advisor on development, ideas, concepts and  
25 planning issues was notably absent from the cross agency

1 consultations solicited for this major development. Why  
2 was that--firstly, do you consider that to be a significant  
3 failure in the way the project was approached?

4 A. Absolutely.

5 When you consider that this is property in the  
6 middle of town, this is prime property in the middle of  
7 town, and there would have been discussions--other  
8 discussions with other agencies and how this would be used  
9 potentially on how this would be used. And the Town and  
10 Country Planning Department may have had other ideas on how  
11 the area of the plan might be developed.

12 And the project was being moved forward without  
13 their input.

14 The Town and Country Planning would also have  
15 processes, guidelines on how property within the town area  
16 can be developed in terms of density, in terms of what type  
17 of buildings can go where. And because they were skipped  
18 from this process, the benefit of that analysis was not  
19 received for this project.

20 Q. You say at paragraph 27, Auditor General, and I  
21 say "you." I'm using that interchangeably with the Audit  
22 Office.

23 A. That's fine.

24 Q. The Report says that the process of securing  
25 stakeholder consultations to better define the project and

1 gain support for the development commenced after Heads of  
2 Understandings were executed with the developer, and that's  
3 TPP. This should have taken place before tendering or  
4 otherwise securing a contract.

5           Why was it important that this process take place  
6 before tendering?

7           A. It should have taken place before tendering to  
8 involve all the stakeholders and to get a better  
9 understanding of what was required for the port, what was  
10 needed, what was required as opposed to--what happened  
11 was--what resulted is that we got something that came out  
12 of one individual or maybe two--I'm not even sure because  
13 there was no documentation to show how this was developed  
14 in the early stage. We got a proposal that came from one  
15 individual as opposed to a wide consultation with all the  
16 stakeholders including the Government Departments,  
17 including the Port Authority which has responsibility for  
18 this particular project. And as a result, there was no way  
19 of knowing after--at the time this was signed, there was no  
20 way of knowing that this was actually the best option for  
21 the Port Authority. There was option for the cruise ship  
22 pier, but it was something that we had already signed on  
23 to.

24           Q. You make the point, or the Report makes the point  
25 that the process had resulted in some significant

1 amendments to the proposal, in particular there was  
2 increase in the proposed investment from 57 million to  
3 \$70,400,000 with an additional 18,400,000 being allocated  
4 to community investments.

5 A. That's correct.

6 Q. And then picking up on the point that you made  
7 about the Port Authority, if we go to paragraphs 31  
8 onwards, the point that is made in the Report is that the  
9 project was controlled by the Ministry of Communication and  
10 Works to the exclusion of the Port Authority and its Board  
11 which, in fact, was the body that had responsibility.

12 A. That's correct. Yes.

13 Q. And so, the body that had responsibility, the  
14 Board of the BVI Port Authority, was, in reality, reduced  
15 just to endorsing the decisions made by the Ministry?

16 A. There were--that is correct, yes.

17 Q. From an Auditor General point of view, why was  
18 that a concern?

19 A. Well, it was a major circumvention of the rules  
20 in that the Port Authority is the governing body for any  
21 kind of development activity with respect to the port. The  
22 Board is the decision-making body. They should be the ones  
23 to decide whether the port needs to be expanded, how much  
24 it should be expanded, how much money they are willing to  
25 put into this or they can put into this, and when this

1 activity should happen. But all those decisions were being  
2 made by the Ministry and without consultation of the Board.  
3 The Board was then--after the decisions were made, the  
4 Board was then instructed to pass the required resolutions  
5 so that they could be moved forward, so the project could  
6 move forward as planned by the Ministry. And that was the  
7 information that was received from the files and from the  
8 Board during the examination.

9 Q. And it's a Board that carries the risk, isn't it?

10 A. It is the Board that carries the risk.

11 Q. Another point--and we pick this up at  
12 paragraph 43--42 and 43 of the Report under the heading of  
13 "independent legal review," you make the point that the  
14 Attorney General's Chambers was consulted throughout the  
15 process for legal advice in respect to the Government's  
16 interests. But in June 2012, the Financial Secretary  
17 sought an independent review from Baker & McKenzie,  
18 specialists in the field of public-private partnerships,  
19 and they, Baker & McKenzie, looked at the documents, all of  
20 which we noted had actually been drafted by the developer.

21 Now, what your Report points out, and this is  
22 at--the Baker & McKenzie review raised a number of concerns  
23 with respect to the Government's position in the  
24 partnership, including the allocation of risks was drafted  
25 in a manner to heavily favor the developers; that there was



1 an absence of Performance Standards; that there was an  
2 absence of a positive obligation on the developer to carry  
3 out an environmental assessment and abide by its  
4 conclusions; there was a failure of agreements to give the  
5 authority approval rights for the initial design and any  
6 change; there was an absence of a provision stipulating  
7 ownership of the pier; there was an absence of safeguards  
8 preventing the developer from transferring shares at least  
9 until after the works were complete. That's not the  
10 entirety of it, but those are some of the concerns that  
11 were raised by the Baker & McKenzie review.

12           You also raise at 44 and 45 in the Report other  
13 concerns, which was, firstly, one over a need for--other  
14 points were raised by Baker & McKenzie was need for  
15 insurance provisions to be revised by an insurance advisor  
16 to ensure adequate coverage. And then at 45, the Report  
17 says this: "The initial process which was being expedited  
18 contained several shortcomings which could function to the  
19 detriment of the Government and the Port Authority.  
20 Efforts to secure independent expert knowledge on the  
21 format, structure and provisions of PPP agreements was  
22 sought only after steps were in the advanced stages for  
23 drafting the terms of the parties legal relationship."

24           So, is the point at 45 being made there that, in  
25 effect, the Government was playing catch up? It was taking

1 steps that it should have done before it started entering  
2 into a legal relationship?

3 A. Exactly.

4 Q. So that it had a proper understanding of what it  
5 was going into?

6 A. Yes, that is the point being made at 45.

7 Q. If you go to 47. And I'll pick it up at 46.  
8 What the Report--and this is your Audit Report explains,  
9 was that: "The process was discontinued and the project  
10 put to public tender in an expedited process which may have  
11 limited the number of possible responses."

12 So, up until this point, effectively this had  
13 been run by the Ministry of Communication--of Works and  
14 Communications, and then what we see in 2012 is that the  
15 Ministry of Finance takes over; is that right?

16 A. That is correct.

17 Q. And so, what the Ministry of Finance did was to  
18 publish on its website a request for expressions of  
19 interests, and that was on the 31st of July 2012, and what  
20 those came to was that the requirements were--or included a  
21 cruise pier which must, at minimum, accommodate vessels  
22 with a minimum length of 1,300 feet, development of  
23 approximately 4-acres of vacant reclaimed land in the  
24 immediate vicinity of the cruise pier. I think that's the  
25 upland that we referred to earlier.

1           A.    Yes.

2           Q.    And a construction schedule that allowed for  
3 readiness for use by January 2014. The other point that  
4 was made was that the use of local partners was strongly  
5 encouraged.

6                    The initial--or the period for submission--and  
7 this is at 51 in the Report--was two weeks, but it was then  
8 extended to 12th of September 2012. And if we go to your  
9 paragraph 52, what you say is: "The  
10 publication"--Expressions of Interests were published  
11 in--yeah, the Expression of Interest was published in local  
12 newspapers, and then in a publication called Daily  
13 Commercial News, which was Canadian-based, so it appeared  
14 in the BVI Beacon, the Island Sun on two occasions, Stand  
15 Point, another local publication, and then in one overseas  
16 publication which was Canadian-based.

17                    You make the point at 52 that: "The publications  
18 above," those I have just set out, "provided a submission  
19 period of less than two weeks for a project envisioned to  
20 cost between 50 million and \$75 million. The extended  
21 submission date of 12th of September 2012 was not found in  
22 any of the publications examined. In addition, no evidence  
23 was found to support assertions that the tender was also  
24 advertised in The Wall Street Journal."

25                    So, it follows, doesn't it, from this part of the

1 Audit Report was that the time--such a short time period  
2 was utterly inadequate for a project of this magnitude?

3 A. That's correct.

4 Q. In effect, there was inadequate notice, not  
5 just--of the Expression of Interests, so it was inadequate  
6 publication of it?

7 A. That was what the audit found at the time, yes.  
8 That was the finding.

9 Q. What that Expression of Interests did result in  
10 was three proposals, which were from GLF Construction  
11 Corporation, Tortola Port Partners and Royal Caribbean  
12 Cruises Limited/Decco. So, all of these were considered by  
13 Committee. They were all invited to submit tenders, and  
14 only two of them submitted tenders. And the Committee was  
15 comprised of the Deputy Financial Secretary and  
16 representatives from the Ministry of Natural Resources and  
17 Labour, Ministry of Communication and Works, and the Public  
18 Works Department. So, on that Committee that considered  
19 the submissions, there wasn't anybody from the BVI Port  
20 Authority?

21 A. No, there was not.

22 Q. Only two tenders were received.

23 A. I should mention, though, that the Financial  
24 Secretary is a Member of the Board of the Port Authority.

25 Q. I think I should--we should clarify actually

1 because I think my question was wrongly put because what we  
2 say--you say is that--

3 A. But the Board was not invite to be a part of  
4 this.

5 The Financial Secretary sits on the Board of the  
6 Port Authority as the Government's representative, so  
7 strictly speaking, there should have been another Member  
8 there to represent the Board properly.

9 Q. But the tenders were then examined by a separate  
10 Committee to negotiate a PPP contract, and that Committee  
11 did have the Chairman of the BVI Port Authority on it,  
12 didn't it, if you look at 55?

13 A. Yes, that's correct.

14 Q. But at the time of the audit, which is obviously  
15 January 2013, that process of assessing the tenders and  
16 negotiating was still ongoing, wasn't it?

17 A. It was, yes.

18 Q. What you say, though, at paragraph 57 is "the  
19 intention was to have the process expedited to accommodate  
20 an early construction schedule. However, the provisions in  
21 the invitation for expression of interest mirrored the  
22 previously accepted proposal from Tortola Port Partners to  
23 a considerable extent which may have created an unfair  
24 advantage. This opens the door whereby the impartiality of  
25 the process could be challenged. In particular the

1 requirements that the developer be partnered with the  
2 cruise line; commitment from said cruise line to have the  
3 BVI as a medium to long-term destination; requirement that  
4 the successful tenderer provide training, et cetera."

5           And so, on one view, the risk was that the  
6 Government could face a challenge that they hadn't by  
7 putting this out to tender, engaged in an open and  
8 transparent process?

9           A.   Basically, yes, that's what this is saying. That  
10 by putting this out to tender and using the criteria of the  
11 information that they already had received from one of the  
12 tenderers, they were creating a situation where they could  
13 potentially be sued or a situation where the process could  
14 appear to be unfair, unfairly biased towards that  
15 particular company.

16           Q.   If you look at paragraph 58, you say: "The tying  
17 together of the dock expansion to the development of the  
18 upland without making allowance for the possibility of  
19 separate submissions and assessment limited the  
20 government's ability to achieve value for money and  
21 precluded other parties that might have been qualified to  
22 perform one or the other engagement. In particular local  
23 developers and investors."

24                   Is there anything you could add to that just to  
25 put it into context?

1           A.    No.  I think that pretty much speaks for itself.

2           Q.    And the point is that, by tying dock expansion to  
3 development of the land, you were shutting out local  
4 developers and investors, weren't you?

5           A.    That's correct.

6                    By tying the two together, what you are basically  
7 saying is that we would only consider major contractors,  
8 major contractors that possibly the BVI did not have--they  
9 didn't have the expertise to, for instance, to do both the  
10 dock and the upland.

11                   And one of the requirements was the encouragement  
12 of local partnerships which potentially could address this  
13 but by not having the upland separate, that shut out the  
14 local contractors who might be able to actually present a  
15 proposal independent of having to rely on an external  
16 partner to actually participate in this really significant  
17 project, and this is what this was saying.

18           Q.    At paragraph 59, the Report makes the point that  
19 an additional requirement was that there should be an  
20 opportunity of at least 20 percent of local ownership in  
21 the venue--in the venture, forgive me, which you say may  
22 have been in response to local criticism regarding the  
23 absence of local investment in the previous proposal.  No  
24 details were incorporated as to the format in which this  
25 should take place, however, and at what point in the

1 process.

2 But the Report continues: "In satisfying this  
3 requirement the Royal Caribbean Cruise Lines' proposal  
4 partnered with the local firm Romasco which has maintained  
5 an interest in the development before it became active.  
6 The subsequent submission by Tortola Port Partners named  
7 the BVI Investment Club as its local partner."

8 What the point that you made was that "the  
9 involvement of BVI Investment Club raises potential issues  
10 of conflicts of interest in the following respect: The  
11 principal of PFK (BVI) Ltd., the firm engaged to prepare a  
12 business case for the initial Tortola Port Partners/BVIG  
13 PPP is also President of, and public figure for, the BVI  
14 Investment Club."

15 And second, "the declarations of interest for  
16 election candidates published and Gazetted on  
17 10 October 2011 show more than one elected member with  
18 shareholding interests in subsidiary companies owned by the  
19 BVI Investment Club."

20 Now, that's again, a point, aside from being a  
21 point of substance; it's also a point of impression; isn't  
22 it?

23 A. It is.

24 Q. Because there is a clear conflict of interest if  
25 you are an elected Member and you have a shareholding



1 linked to BVI Investment Club, and that club is involved in  
2 a major publicly funded project?

3 A. That is true.

4 What I would like to point out, though, is that  
5 the information was taken from the Declaration of Interests  
6 by election candidates, and what we were unable to  
7 ascertain, get any independent information on, is whether  
8 or not these individuals were still actually Members of the  
9 BVI Investment Club at the time of the audit. In  
10 particular, our office contacted the Registrar of Interests  
11 who should have this information, and her position was  
12 that, well, you know, the only people who can see this  
13 Register is the Members themselves, and I had a discussion  
14 with the Attorney General who was not willing to commit one  
15 way or the other with respect to whether or not we should  
16 have access to this information.

17 And I think the point was made a few days ago,  
18 that without access, the Registrar is really limited in its  
19 use, and I think this is something that should be changed.

20 Q. But from the perspective of the Commissioner has  
21 heard evidence already in relation to the Registrar of  
22 Interests, and Witnesses have given different views about  
23 whether the Register--any Register of Interests should be  
24 public and the extent to which it should be public. But  
25 from the perspective of an Auditor General, a public

1 officer under the Constitution, would it be your view that  
2 your office should be entitled to see information and to  
3 receive information held by the Registrar of Interests,  
4 even if that information cannot otherwise be made public?

5 A. Absolutely.

6 Q. Can I just take you to your conclusion on here.  
7 And this is obviously a conclusion in relation to a report  
8 made in 2013. But you say this: "The process of  
9 addressing the pier expansion needs commenced in 2007 with  
10 a professional project assessment and competitive tendering  
11 for a project which should have cost just over \$12 million.  
12 This ended in inaction due to insufficient information  
13 being provided to the Cabinet. The project was  
14 subsequently allowed to evolve into an undefined  
15 large-scale development which bypassed much of the planning  
16 and preliminary approval processes required for prudent and  
17 transparent management of public projects. Subsequent  
18 tendering of the works was performed to satisfy PFMR  
19 provisions--that's Public Finance Management Regulations  
20 provisions--on procurement but in a fashion which did not  
21 allow for broad scale participation of other qualifying  
22 developers. The highly specific nature of the project  
23 requirements created an advantage in favor of the  
24 previously selected developer (TPP)."

25 At the time that this Report was prepared, the

1 project was being overseen by the Ministry of Finance.

2 A. That is correct, yes.

3 Q. Was it still a concern for you, as Auditor  
4 General, but the BVI Port Authority, as the body corporate  
5 responsible for this area, was still being shut out of the  
6 process?

7 A. It was a concern, yes.

8 Q. I'm not going to read out the three  
9 recommendations that you made, but can you remember whether  
10 or not or what response you received to those three  
11 recommendations?

12 A. My recollection is that we did not receive a  
13 response to these three recommendations.

14 Q. Could I move now to a different report, and what  
15 we were looking at was, I think, a "money for value"  
16 report, Section 12 report, but I just want to take you to  
17 page 748, if I may.

18 We're now--sorry, I'm giving you a moment,  
19 please, 784, I'm sorry.

20 COMMISSIONER HICKINBOTTOM: 784?

21 MR RAWAT: 784.

22 BY MR RAWAT:

23 Q. This is your--the Report dated the 24th of  
24 August 2018, and it's titled "Special Report Elmore Stoutt  
25 High School Perimeter Wall."

1           Can I again, just to try to set the scene, take  
2 you, please, to paragraph 4 which is on 789.

3           This is a detailed report, Auditor General, so I  
4 probably will need your help to try and translate it as we  
5 go along, but in terms of background, you set out  
6 background in paragraphs 4 and 6, and if I summarise that,  
7 in late 2014, the principal of the Elmore Stoutt High  
8 School wrote to the Ministry, and that's the Ministry--what  
9 was then the Ministry of Education and Culture.

10          A.     That's correct.

11          Q.     And that was headed at that time by the  
12 Honourable Myron Walwyn, wasn't it?

13          A.     That's correct, yes.

14          Q.     And what Ms Underhill did was to request that the  
15 security of the Western perimeter of the school be urgently  
16 addressed, and it was a request that was supported by a  
17 report from the Commissioner of Police.

18                 So, in response, the Ministry obtained an  
19 estimate from SA Architect in October 2014, and that was  
20 for the design and erection of a block wall around the  
21 school with a total cost, as you record at paragraph 5, of  
22 just over \$828,000; is that right?

23          A.     That is correct, yes.

24          Q.     And what you say at 6 and 7 was that the work was  
25 done in two phases. Phase 1 was undertaken in

1 December 2014, and that was intended to address the more  
2 problematic areas, and then in 2015, you had Phase 2.

3 Now, you were asked to audit Phase 2, but as you  
4 say in your Report, for completeness, you also carried out  
5 an audit in relation to Phase 1.

6 A. That is correct.

7 Q. Now, if we deal with your findings in relation to  
8 Phase 1, first of all, if you go to paragraphs 89, please,  
9 in the Report, that's at page 801, Phase 1 was undertaken  
10 in December 2014. It used funds from the secondary school  
11 budget of that year. A plan was submitted to the Town and  
12 Country Planning Department for Phase 1, and what it  
13 stipulated was that there would be a 180 feet block wall  
14 with a cost estimate of just over \$156,000.

15 Now, what you say there is that in accordance  
16 with the public finance management regulations, there  
17 should either have been a tendering process or a Cabinet  
18 waiver. And in this case, neither was pursued. I  
19 appreciate it's a bit of time, but later were you able, as  
20 part of the audit, to find out why neither option was  
21 pursued?

22 A. No, we were not.

23 Q. What you did find, and you record it in these  
24 paragraphs, but I will summarise, was that the work to be  
25 done in Phase 1 was scaled back from 180 feet to 120 feet.

1 The work orders were issued to 11 contractors for the  
2 works, so it wasn't even done as a petty contract. It was  
3 done as work orders?

4 A. That is correct, yes.

5 Q. And I think, correct me if I'm wrong, but for  
6 work orders they go up to \$10,000?

7 A. Yes, they do. They go up to \$10,000, and they do  
8 not require any kind of competitive submission.

9 Q. And six contractors got \$9,989.65 each for wall  
10 construction. Five contractors received work orders for  
11 rail installation and painting, and that was for \$7,357.90  
12 each, and you make the point that the sixth rail  
13 contract--rail/paint contract was not issued.

14 And what you make the point, and you see this at  
15 your paragraph 1(a), if you want to look at it, was the  
16 effect of--it's paragraph 100(a), sorry. The total work  
17 orders came to \$96,727.40, which is just below the \$100,000  
18 ceiling, which would have required a major contract  
19 procurement process.

20 A. That is correct, yes.

21 Q. And so, was the way of avoiding that by scaling  
22 down the works from 180 feet to 120, and by not issuing  
23 that final sixth rail/paint contract?

24 A. That was the appearance of this particular aspect  
25 of the project. By not issuing that final contract, the

1 State didn't meet the major contract threshold.

2 Q. And if you look at your paragraph 92, there were  
3 excavation costs of \$4,400 that were not paid until 2015.  
4 Did the effect of not doing that mean that that kept the  
5 amount of money spent in 2014 below the--below the \$100,000  
6 threshold?

7 A. Yes, it did.

8 Q. So, that was a way of also avoiding the need to  
9 go and use a major contract procurement process?

10 A. And to get a waiver, yes.

11 Q. And what you make the point in relation to Phase  
12 1--and you say this at paragraph 94--was that "at the time  
13 the project was stopped, the works on this section of the  
14 project was incomplete as none of the wall sections had  
15 been painted."

16 A. That is correct, yes.

17 Q. If we go to Phase 2, and we go back to your  
18 paragraph 11, which you will find at page 790--no, 791,  
19 please. And again, I'm going to try and summarise some of  
20 this, Ms Webster, but if I go too quickly or I miss  
21 something out that you think is important, please do stop  
22 me. In relation to Phase 2, there was a planning aspect,  
23 and what happened was that on the 4th of February 2015, the  
24 Minister of Education and Culture submitted a funding  
25 request to Cabinet for \$824,000 to complete Phase 2, and a

1 request for a waiver of the tender process to expedite  
2 execution. You note in the Report, and this is at  
3 paragraph 12: "The application for the waiver premised  
4 that a tender process would be lengthy and likely to result  
5 in more expensive estimates, but no information was  
6 provided in the business case in support of this nor was  
7 there any cost analysis or implementation plan." Now, when  
8 you referred to a "business case," what in particular are  
9 you referring to?

10 A. The Protocols for Effective Management actually  
11 require a business case, a major contract, a major project,  
12 and the business case should have details of all that is  
13 mentioned here, alternatives that were considered, the  
14 impact of the project, and certain other the details and in  
15 examining the business case, none of this was actually  
16 considered--none of this was actually discussed. What we  
17 had was a document that was headed "business case" simply,  
18 I think, for the intent of meeting the requirement that a  
19 business case should be submitted, but the detailed amount  
20 of the award that should have been put into actually  
21 putting that together and explaining the projects and its  
22 costs benefit analysis and the impact and other effects was  
23 not done, which is why we found that the business case was  
24 insufficient to support the premise that they should be  
25 treated as a waiver. It should be subject to a waiver.



1           COMMISSIONER HICKINBOTTOM: And you mentioned it,  
2 what requires a business case to be put forward for waiver  
3 of tender purposes?

4           THE WITNESS: I think it's the Protocols for  
5 Effective Management.

6           COMMISSIONER HICKINBOTTOM: Yes, thank you.

7           THE WITNESS: I need to go back and check that.

8           BY MR RAWAT:

9           Q. What then happened was that the tender process  
10 was, indeed, waived; funding was approved; and contracts  
11 and work orders were issued so that the work could start  
12 from the 1st of March 2015. You say that at your paragraph  
13 14. If we look at 15, the point that the Audit Report  
14 makes at 15 going on is that "the project was planned and  
15 managed in its entirety by the Ministry of Education and  
16 Culture", and so, it did not draw upon the expertise of the  
17 Public Works Department, which as you know, is equipped to  
18 provide architectural quantity surveying contracting and  
19 project management services, and the project--the Public  
20 Works Department were not involved at all in the management  
21 or the oversight of the project.

22           A. That is correct.

23           (Overlapping speakers.)

24           A. I should add, though, that the Public Works  
25 Department at some stage reviewed some preliminary plans

1 for the redevelopment of the perimeter. I think that was  
2 an early--it preceded this, and it's not--this project, as  
3 it moved forward, did not refer to that, but I'm aware that  
4 the Public Works Department did, in fact, look at some  
5 preliminary plans some years prior that dealt with the  
6 perimeter--the perimeter and how it would be redesigned.

7 Q. But certainly from the point of view from the  
8 point when Phase 2 started, they weren't involved from then  
9 on?

10 A. No, they were not--they were not this part of it.

11 Q. And you've made the point that--the second point  
12 you make is that expertise in the Ministry of Finance  
13 Project Management Unit was not engaged, notwithstanding  
14 that Cabinet had made it a requirement that the Ministry  
15 should involve this unit with the management of the  
16 project?

17 A. That's correct.

18 Q. And we see that, if we look, in fact, at--and  
19 this is just for your note, Commissioner, it's also  
20 referred to at paragraph 78, but I don't need to take the  
21 Auditor General to it.

22 So, Public Works Department is not brought in,  
23 neither is the Ministry of Finance Project Management Unit.  
24 What then happens is an SA Architect then takes on  
25 responsibility for overseeing the works, and they

1 report--report to the Ministry on progress, SA Architect  
2 signs payment requests to certify that the contractors had  
3 completed their work and were entitled to be paid.

4 A. That's correct.

5 Q. You note, and if we look at this, it's  
6 paragraph 21, there was no segregation of duties or  
7 secondary checks. This allowed for incongruences and the  
8 bill of quantities to go uncorrected and contractors to be  
9 paid for unfinished work resulting in a project that was  
10 incomplete and overcosted.

11 So, if we go back to your 20, what you said is  
12 that the arrangement was that SA Architect was overseeing  
13 everything?

14 A. Yes, Commissioner.

15 Q. And was then reporting back to the Ministry.

16 When you say that segregation of duties or  
17 secondary checks were absent, what would you have expected  
18 to see if this was being properly managed?

19 A. I would have expected for Public Works to at  
20 least have a role in this, and I would have also expected  
21 that Public Works would have reviewed the bill of  
22 quantities that were developed for this project, and they  
23 would have picked up--possibly picked up that there was  
24 some issues with those bill of quantities; but that did not  
25 happen.

1 I also would have expected that the Ministry of  
2 Finance might have been consulted as was required by the  
3 Cabinet decision, and that did not happen.

4 Q. If we go through to look at paragraph 22, and I'm  
5 again, going to try and summarise this, it's paragraphs 22  
6 to 30 that I'm going to summarize. You begin paragraph 22,  
7 and this is Part 2 of your Report which is headed  
8 "Execution," you say "the project was sectioned and costed  
9 to allow for multiple contractors." And so the way that  
10 was done was that the work was divided into sections; so  
11 there was division one was perimeter sections, division two  
12 were wall sections, which included columns and railings;  
13 and then division three was the contracting sections, which  
14 effectively meant subdividing into three job types, which  
15 were, wall construction, rail installation and wall  
16 painting, and other works.

17 If we look at 31 now, your Report then explains  
18 that 70 independent contractors were engaged by the  
19 Ministry of Education and Culture using 15 petty contracts  
20 and 64 work orders to complete a wall that was 1,562 feet  
21 long. And the system you say, made it possible to have two  
22 different contractors working on the same segments of wall;  
23 is that right?

24 A. That is correct.

25 Q. So what one contractor could be coming along

1 having been given the work order to build the wall, whilst  
2 there was another Contractor there responsible for  
3 installing the rails and painting both sides of the wall?

4 A. That is correct, yes.

5 Q. If we look at 37 now, and that's looking through  
6 to 51, again I will try and summarise. And these are  
7 findings that the Audit Report made in relation to the  
8 costings of the work. The first one was that the approved  
9 estimate for constructing the walls and the columns was  
10 just under \$195,000.

11 A. Sorry? Could you--

12 Q. Perhaps you can help me with this. If you look  
13 at paragraph 41, please. What you did as part of the audit  
14 was to examine the bill of quantities, and the point you  
15 make at paragraph 41 is that the approved amount was, and I  
16 will give the correct figure, \$194,920.

17 A. Yes, that is correct.

18 Q. But actually the costing for--and this is for  
19 constructing the wall and columns--the costing was actually  
20 \$502,423.50?

21 A. Yes, that is correct.

22 Q. The next point to draw up, perhaps, that we see  
23 at paragraph 37, and again it's a disconnect that your  
24 Report identifies between the approved estimate and the  
25 amounts issued to contractors, so the approved estimate was

1 \$828,000, just a little bit over, four dollars over. Do  
2 you have that?

3 A. That's right.

4 Q. But the actual payments made out was \$985,690.  
5 So, again, there was an excess of just over  
6 \$157,000?

7 A. That is correct.

8 Q. It's what you've described as a "disconnect,"  
9 Auditor General, between the two.

10 If we go to 49.

11 A. Should I point out that the actual payment was  
12 \$985,000. The approved estimate was \$828,000 for the  
13 entire thing to complete the project. The actual payment  
14 was \$985,000 with a substantial amount of work still  
15 outstanding, which means that the government would have to  
16 put more money in to complete the project.

17 COMMISSIONER HICKINBOTTOM: Yes, the table says  
18 that the rail installation and wall painting was only  
19 40 percent complete.

20 THE WITNESS: That's correct, yes.

21 BY MR RAWAT:

22 Q. And so, what you have is not only that it's had  
23 to overrun its cost but even having overrun its cost, it  
24 still hadn't completed the work?

25 A. That is true, yes.

1 Q. And if we can pick that up at, if we go to  
2 paragraph 64 on page 798. If we look at paragraph 64, what  
3 was estimated by the Ministry was that an amount of  
4 \$251,000 was now needed to complete the entire perimeter  
5 wall project.

6 A. That is correct, yes.

7 Q. Sorry to make you jump around the Report, but can  
8 we go back to paragraph 43.

9 If I've understood the Report correctly, what  
10 your team did as part of the audit was when assessing the  
11 rates and quantities used in the bill of quantities, you  
12 conducted a comparative analysis with four similar projects  
13 for reinforced blocked walls that have been costed and  
14 supervised by the Public Works Department in 2015 petty  
15 contracts?

16 A. Yes, that is correct.

17 Q. You make the point that, on that analysis, the  
18 construction costs estimated by the Public Works Department  
19 varied from \$175 to \$236 per square yard with an average  
20 cost therefore of just over \$201 per square yard?

21 A. Yes, that is correct.

22 Q. Now, you then applied--you took the highest rate,  
23 the highest rate, the PWD rate, and you applied that to  
24 this project, and that gave a contract cost per wall  
25 segment of \$3,828 when, as you then record, the actual cost

1 issued in the contracts was \$9,461, so just about  
2 two-and-a-half times more?

3 A. Right.

4 And this is applying to the wall segment and does  
5 not include the rails or the painting. This is just  
6 construction of the block wall. The costs then based on  
7 the PWDs--the benchmarks that we used from PWD, came up  
8 to--the highest one came up to 3,000--each of those  
9 contracts that were issued for \$9,000 should really have  
10 been closer to \$3,828, about \$4,000, which is more than  
11 twice what--the contracts issued were more than twice what  
12 they should have been, almost three times.

13 Q. And it's a point you make at paragraph 45(a),  
14 that the rates applied for the wall at the high school were  
15 in general greater than those used by the Public Works  
16 Department, in some cases it was doubled.

17 You also at (b) noted inconsistencies in the bill  
18 of quantities for the wall construction, and you give  
19 examples, so the bill of quantities used for a  
20 20-foot--22-foot segment of wall, the bill of quantities  
21 used 44 square yards for rendering, but 80 square yards for  
22 painting whereas the actual area was, you say, 32.4 square  
23 yards?

24 A. That is correct.

25 Q. The railings, which were 10-foot by 3-foot, were



1 costed, so the railings were 10-foot by 3-foot giving you  
2 30 square feet. That was costed for 70 square feet.

3 And then the bars per sets of railings were 6.6  
4 square yards on both sides but were costed for 33 square  
5 yards.

6 So, putting it in sort of layman's terms, the  
7 effect was that there was no correlation between the wall  
8 segment and what was needed and the figures in the bill of  
9 quantities?

10 A. That is correct, yes.

11 Q. If you go to 796 and point (c), you say this: "A  
12 loss of economies of scale was incurred in splitting the  
13 contract." So, this is--perhaps goes back to a point that  
14 we were canvassing yesterday about the--from your Annual  
15 Reports about the approach of splitting contracts, and  
16 you've given an example. But could you add anything to  
17 just why splitting contract creates that loss of economies  
18 of scale?

19 A. We could see it here in this example that we  
20 looked at. Normally for a project such as this, you may  
21 need, I don't know, maybe 20 trucking, 20, 20, 30 for  
22 projects such as this to cleanup afterwards, to pick up  
23 debris as you go to cleanup afterwards, I would say max,  
24 and being generous, a hundred.

25 And in this case, we spent--we paid for 405

1 trucks for this project, the trucking fees for that. And I  
2 haven't seen any Public Work contract that dealt with all  
3 of this size or even bigger paying for 405 trucking  
4 excursions, and that's what happens when you split up the  
5 contract. Every piece has its own specific cost, and you  
6 don't benefit from by and large scale of doing things all  
7 at the same time because all the contractors are going to  
8 claim for the same activity that really should be shared.  
9 Even if they had agreed that we would have one trucking  
10 company that would assist with the Project, one or two, and  
11 when called them when needed, it would not be 405. That's  
12 just an example of how the costs was escalated in one area  
13 specific to trucking, but there would be others.

14 Q. If I take you, Auditor General, just look at  
15 paragraph 65, please, which is on 798. And this is  
16 about--headed "Inconsistencies in the Execution of the  
17 Works and Damage," and the point that you make there is  
18 that "throughout the project inconsistencies were noted,"  
19 for example in the length and height of the wall, so some  
20 wall segments were between 8 to 9 feet and not 10 feet as  
21 was specified. Some railings were of irregular height.  
22 You also say at 66 noted inconsistencies in the rendering  
23 of the wall, in some areas the block wall was visible  
24 through the unpainted plaster.

25 So, stepping back from that, does that suggest

1 that there was a failure of--this goes back to the  
2 secondary checkpoint, that there was no one there checking  
3 the quality of the work that was done?

4 A. It points to inadequate quality control on the  
5 project, and I can't speak to how much the--how frequently  
6 the project manager was there, what he was doing when he  
7 was there. I don't know. But the fact that there were  
8 inconsistencies in the height of the wall, in the rendering  
9 of the plaster and in other areas--the rail, for  
10 instance--in the case that there wasn't sufficient  
11 oversight, and you know, these are--in some cases these are  
12 things that could be easily fixed so that you would have a  
13 more professional looking finished wall or finished product  
14 when the project was done.

15 Q. So, again, stepping back from it, what there was  
16 was just a significant inflation of the costs, wasn't  
17 there? That's what it comes down to?

18 A. That is what it comes down to, yes.

19 Q. And can you--did you identify as part of the  
20 audit any reason for why that happened?

21 A. Well, the main reason why that happened was  
22 because the contract was split into several parts, and you  
23 had to accommodate a profit for each contractor, and there  
24 was the losses in economies of scale. That was the main  
25 reason, that it was split into several parts.

1 Q. Could you go to 69, which is at 799, please.  
2 It's a section of the Report Part 3 headed "Procedural  
3 Issues and Irregularities."

4 Before I continue as well, I think your voice is  
5 dropping a little, Auditor General, so by all means pull  
6 the microphone closer but if you could remember just to  
7 speak up.

8 What you say in these Sections, and the first bit  
9 is under "contractors," you say that regulation 181 of the  
10 Public Finance Management Regulation requires government  
11 offices to obtain a list of pre-qualified contractors from  
12 the Ministry of Finance for procurement services and  
13 construction works where there has been no tender process.

14 A. That is correct.

15 Q. In this case, what you note is that there was no  
16 consultation with the Ministry of Finance's Project  
17 Management Unit or the Public Works Department on the  
18 selection or eligibility of contractors. The contractors  
19 that were used and the work orders assigned was entirely  
20 down to the Minister of Education and Culture; is that  
21 right?

22 A. That is right.

23 Q. I think it's helpful if I just actually read it  
24 out, what you say at paragraph 71: "The contractors used  
25 on the project were selected by the Minister of Education

1 and Culture. The Assistant Secretary who provided project  
2 liaison services within the ministry advised that the  
3 contracts and work orders sections and amounts were  
4 assigned to individuals based only on instructions received  
5 from the Minister."

6 So, where you say the Assistant Secretary  
7 advised, that's a public officer in the Ministry of  
8 Education and Culture speaking directly to the audit teams?

9 A. Yes, that is correct.

10 Q. You then say that, of the 70 contractors used on  
11 the project, 40 did not have construction trade licenses.  
12 And as I understand it, this is at paragraph 74. Those  
13 aren't required for work orders.

14 A. They are required for any contractor. What is  
15 not required for a work order is for Government--for a  
16 government office who is doing the project using the work  
17 order, they don't have to ask for it. But any contractor  
18 that's doing work in the BVI should have a trade licence.

19 Q. I see.

20 But if you're paid under a work order, you don't  
21 have to produce your trade licence?

22 A. You don't have to produce it to the Government.  
23 The Government doesn't have to ask for it.

24 Q. But again--

25 A. That's actually a policy rather than a

1 regulation.

2 Q. But again, not asking for the trade licence  
3 brings risk, doesn't it?

4 A. It does, yes.

5 Q. As your paragraph 72 shows, the majority of those  
6 who--contractors who worked on the project did not have  
7 trade licences?

8 A. The bottom line is that the work orders are  
9 really intended for small jobs that can be done and  
10 shouldn't require a whole lot of bureaucracy. So, if you  
11 need to have different of the government's departments  
12 cleaned, you can hire somebody on a work order to get that  
13 done, for instance. It's not intended for major--for  
14 contractual work, a detailed contract for work. It's  
15 intended for simple jobs. Which is why it's kept simple.  
16 The requirements are kept simple.

17 Q. Did you, having done your audit, consider this to  
18 be a major contract project?

19 A. I consider it to be--well, it is--in terms of the  
20 amount, the fact that it exceeds \$100,000, it's a major  
21 contract--project. In terms of what we are discussing now  
22 with respect to work orders it's something that requires  
23 more than just picking someone up and saying, well, you do  
24 this. The petty contract requires that you meet certain  
25 criteria for a reason, and the petty contract is intended

1 to facilitate small jobs such as this.

2 I mean, there are scales moving upwards from the  
3 work order to the petty contract and the immediate  
4 contract, each has a separate requirement. And the bottom  
5 line is that work orders are actually not intended for this  
6 type of work. When that project--when that was developed,  
7 it was intended for small--small jobs that the Government  
8 might have to do and without incurring a whole lot of  
9 bureaucracy to get that done. What we're seeing is an  
10 evolution of the work orders becoming more significant  
11 because they're easy and they don't have a lot of  
12 requirements. And I think there is a danger that that  
13 brings in, a risk that that brings in as well, and it  
14 should be curtailed.

15 Q. And the point you made that, in this project,  
16 what Cabinet approved was the project to be split up for  
17 the purpose of issuing petty contracts?

18 A. Cabinet specified that the projects should be  
19 done via petty contracts, yes.

20 Q. And Cabinet waived the need for a tender process.  
21 But the point you make is that the Cabinet didn't allow for  
22 the project to cover implementation by work orders?

23 A. That is correct, yes.

24 Q. You've already--and this is at 75, you've already  
25 confirmed that work orders can be used for construction

1 work or services not exceeding \$10,000. What you say is  
2 that Public Finance Management Regulation 189 prohibits the  
3 issuing of multiple work orders on the same job, so it  
4 prohibits--I mean, you--you can't use work orders to avoid  
5 the need to have a petty contract, is that what it comes  
6 to?

7 A. You should not use work orders to avoid doing a  
8 petty contract. That's pretty much what it comes down to.  
9 So, it's basically splitting the petty contract into  
10 smaller parts so that you can issue work orders. And I see  
11 I have here that work orders can be used for construction  
12 work for services not exceeding 10,000, but it doesn't take  
13 away from the fact that any construction--any person who  
14 puts himself up as a contractor or to do construction work  
15 independent of any other agency should have a trade  
16 licence.

17 Q. If you go over overleaf to 77, please. What your  
18 Report also says is that there was no process to ensure  
19 that Social Security and payroll tax obligations are met  
20 from work order contracts resulting in payments that are  
21 gratuitous and contrary to Government regulations. So, was  
22 this--would you have expected to see a process, if this  
23 project was being run in the way it should have been?

24 A. A process for the deduction of payroll tax?

25 Q. Yes.



1           A.     That's the process that's used for petty  
2 contracts.  And because work orders we use, it was not  
3 implied in this particular instance.

4           Q.     I see.

5                     So, if you use work orders, you don't need to  
6 have a process in place?

7           A.     If you use work orders, strictly speaking, you  
8 should be deducting the Social Security and payroll tax.  
9 If you use work orders, and then you're claiming that they  
10 don't have to be a contractor, they don't have to have a  
11 trade licence, then in effect you're employing them as  
12 laborers, and you should be deducting the POA and Social  
13 Security from the payments that you give them.

14          Q.     If we look at the section of the Report which is  
15 headed "Project Management", you say that "Cabinet's  
16 approval stipulated that the Ministry of Finance's Project  
17 Management Unit would assist with the management of this  
18 project."  As you've already said, it did not happen in  
19 this case but rather management was outsourced by the  
20 Ministry to an independent contractor in 2014 without  
21 competitive solicitation or vetting by any of the two  
22 government agencies that you name, which is the Ministry of  
23 Finance Project Management Unit or the Public Works  
24 Department.

25                     That Project Manager--and I take it that's SA

1 Architect--that Project Manager was paid, you note, by the  
2 BVI Government a total of \$265,110 in 2016 for this and  
3 other projects under the Ministry of Education and Culture.

4 So, the \$265,000 was not just for the school wall  
5 project; it was for other projects?

6 A. It was for the school and other projects, yes, on  
7 the different petty contracts.

8 Q. And am I right to say is this a reference to SA  
9 Architects as the project manager?

10 A. That is correct, yes.

11 Q. Do you remember when we were looking at your  
12 Annual Reports and I asked you about one of the general  
13 points you made about Ministers going beyond their  
14 portfolios?

15 A. Yes.

16 Q. Would you consider here where you have, despite  
17 Cabinet stipulation, the Project Management Unit  
18 disregarded the Public Works Department not consulted but  
19 rather you have the Ministry of Education and Culture  
20 engaging an independent Project Manager, would this be an  
21 example of a ministry going beyond the portfolio?

22 A. What we're seeing is an evolution of what's  
23 happening within the Ministries, and I think the excuse  
24 that's been used a lot is that Public Works has not  
25 adequately resourced. We now have Project Managers in--I

1 know we have one in Health, we have in Education, and I'm  
2 not sure whether we have one right now in Natural Resources  
3 and Labour. But we have the Ministries now doing their own  
4 project management per se.

5           And this Ministry, building a wall around a  
6 school, I think that would fall fairly within their  
7 portfolio, but the task of managing that process really  
8 should involve the agencies that are skilled in doing that,  
9 which would be Public Works Department and the Ministry of  
10 Finance has a project unit, especially since those that  
11 have been mentioned. The project does fall within the  
12 Ministry, but what normally happens or what should have  
13 happened is that it should have brought in that the  
14 agencies to be a part of the process and to make sure that  
15 it's run properly.

16           Q. If you look now, please, at your 81 and 82 where  
17 you deal with budget and payments. You say that the  
18 Project in its entirety was estimated to cost just over  
19 \$828,000. Despite this, no request was made to the  
20 Ministry of Finance for an independent subhead/subledger to  
21 facilitate prudent management of the funds; which were,  
22 instead, added to the school rehabilitation subhead. And  
23 you say "this meant that there were no controls to limit  
24 the total spending to the approved amount or to alert the  
25 Ministry when spending limits were being reached. As a

1 result payments were made over the authorized amount,  
2 possibly without the Ministry being aware of the excess."

3 So, just again, in layman's terms, Auditor  
4 General, what should the Ministry have done in terms of  
5 handling this budget?

6 A. Well, basically, the Ministry was given a budget  
7 of 800--just over \$800,000, and what should have happened  
8 is that a separate account should have been set up with  
9 limits up to that amount, that budgeted amount, where the  
10 Ministry could spend from, and which would allow them to  
11 monitor where they are in terms of their funding, and what  
12 areas possibly that they were overspending, and that wasn't  
13 done.

14 What actually happened was the funds were just  
15 treated as part of the Ministry's developments account, and  
16 that they would have been lumped in with some other things.  
17 And in spending and spending more than of what was  
18 allotted, the likelihood is that they also used funds that  
19 should have been used for a different project. So, that's  
20 the effect of the overspending as we're using the funds  
21 that should have been spent on something else.

22 So, without that separate account, there  
23 wasn't--there wasn't any easy way to actually manage what  
24 was happening in terms of spending and in terms of where  
25 they were with the budget, that particular budget.

1 Q. Another point that you have noted in your Report  
2 is under the heading "Payment Discrepancies," and if I take  
3 you to paragraph 85, you say, Auditor General, that in some  
4 cases payments were made where the work was incomplete, and  
5 this was especially apparent in what you called the 2014  
6 focus area. That's the first phase of the project. And  
7 Contractors were being--effectively, Contractors were paid  
8 in full for work that was incomplete or not done; is that  
9 right?

10 A. That is correct, yes.

11 Q. And can I just ask you about "Planning Approval".  
12 Both in relation to what I call "Phase 1," which was in  
13 December 2014, and in relation to Phase 2, do I understand  
14 the Report correctly, what you're saying is there was a  
15 requirement to submit plans and get authority from the  
16 Planning Authority but it wasn't done until after the work  
17 had been done?

18 A. Yes, that is correct.

19 Q. And so, you make the point at 88 that the process  
20 of getting approval after the fact rendered the process  
21 irrelevant. There was no purpose really in doing it and no  
22 value in doing it if it's after the event; is that right?

23 A. That is right, yes.

24 Q. Could I take you to your conclusions. I'm just  
25 going to take you three them, and I'll start at

1 paragraph 100.

2           You say: "The project's manner of execution and  
3 its outcome underscore why procurement rules are required.  
4 The project gives an" experience of an agency--so I'm going  
5 to read that again. "The project gives an appearance of an  
6 agency that sought to avoid the procurement requirements  
7 that have been established to secure value for money on  
8 government projects. This can be seen in:

9           A. The scaling down of the 2014 works from 180 feet to  
10 120 feet and non-issuing of the final rail contract to  
11 avoid major contract regulations that would come into play  
12 with the project reaching \$100,000 ceiling,

13           B. Waiver of the tender process to avoid  
14 competition submissions,

15           C. wide-scale use of work orders that are  
16 intended to be used for small one-off jobs,

17           D. Use of un-vetted contractors,

18           E. Micro splitting of the project,

19           F. Exclusion of other government agencies.

20           I'm going to pause there. By "micro splitting"  
21 of the project, are you referring to the approach of  
22 separating it into essentially, as we went through,  
23 perimeter sections, job types, et cetera?

24           A. By separating--why have 70 contractors to build a  
25 very small wall. A reasonably small wall. And yes, they

1 having multiple contractors doing work on a small segment  
2 of work, which, you know, was completely unnecessary.

3 Q. At your paragraph 101, you continue:  
4 "Significant discrepancies in the costing"[s] "of the  
5 section"[s], "in particular the per-unit measurements used  
6 to derive itemised costs, resulted in overpriced  
7 contracts".

8 102, this is your paragraph 102: "Failure to  
9 involve pertinent government agencies eliminated checks  
10 that may have identified over-costing on the bill of  
11 quantities and result in more efficient and economical  
12 execution". That's the failure to involve the project  
13 management unit and the Public Works Department; is that  
14 right?

15 A. That is correct, yes.

16 Q. Then you go on at paragraph 103: "Division of  
17 the project into multiple parts eliminated possible  
18 economies of scale and further escalated the costs to  
19 Government".

20 You go on to say: "Use of unlicensed contractors  
21 constitute a breach of Trade Licence Regulations (by the  
22 individuals and by the Government). It may also have  
23 facilitated breaches of the Inland Revenue and Social  
24 Security requirements.

25 Your next conclusion is that: "There was

1 insufficient ministerial oversight on this project. Some  
2 of this is demonstrated by:

3 A. Payments were made in full on contract segments that  
4 were incomplete.

5 B. Bill of quantities were adopted and used for  
6 contracting" purposed "costs when a mathematical cross  
7 check of these could have ascertained that they were  
8 incompatible with the authorised costs;

9 C. The Ministry's attributing the excess project  
10 expenditure to the variation for the bus pickup area  
11 without undertaking an active examination of why the  
12 project costs were overrun".

13 Let's pause there. Could you just explain, if  
14 you can, a little bit more about that point c because it's  
15 not something I've asked--I've taken you through, if it's  
16 elsewhere in the Report.

17 A. Right. In making an application for additional  
18 funding because the project actually ran out of money and  
19 it was stopped by the Ministry of Finance, in making the  
20 application to get additional funding, the Ministry stated  
21 that the excess, the over-expenditure was caused by a  
22 modification that was made to amend the wall, to allow for  
23 buses to drop off the kids at the back of the perimeter  
24 when, in fact, that was not the real reason why the project  
25 had been overspent.



1           And I don't mean to be unfair, the Minister at  
2 the time when it made that representation might have  
3 actually believed it, but if they looked at it closely they  
4 would have realized that the project was actually  
5 over-costed, and that was the reason why we had excess  
6 expenditure on the project.

7           Q.    Now, I want to ask you just one thing about that,  
8 paragraph 105. You say: "insufficient ministerial  
9 oversight on this project". It may be suggested that it's  
10 not the job of a Minister to conduct any such oversight.

11          A.    I'm sorry? Where were you looking at?

12          Q.    If you go--it's page 803, and you look at  
13 paragraph 105. You say--

14          A.    Oh, well, actually, that's probably the wrong  
15 term that was used. It--in that sense it means the  
16 Ministry as opposed to the Minister.

17          Q.    And so it's--is the point that if a Ministry has  
18 decided to embark on a project of this sort in the way that  
19 it did, the use of an independent project manager, not  
20 using the PMU or PWD, et cetera, points you've made, then  
21 each needs to make sure that it does maintain oversight on  
22 the project.

23          A.    That is correct, yes.

24          Q.    And from what you found and what we've gone  
25 through, your conclusion is that there was a failure to do

1 that.

2 A. That is correct.

3 Q. If we go just to 106, rather, paragraph 106, you  
4 continue in terms of your conclusions: "The subjective  
5 manner with which contractors were selected and assigned  
6 introduces issues of inappropriate political influence into  
7 the procurement process".

8 Does that link back to what the Assistant  
9 Secretary told you?

10 A. Yes, it is--it does.

11 Q. You then go on to say: "No evidence was  
12 presented to show that this was open, impartial, on merit  
13 or in-keeping with the Public Finance Management  
14 Regulations".

15 If there was, as was done in this case, a process  
16 where multiple contractors were going to be engaged, what  
17 evidence would you have wanted to see to show that there  
18 was an open and impartial process?

19 A. Well, the process is aligned by the Public  
20 Finance Management Regulations, where you have to contact  
21 the Ministry of Finance and get a list of approved  
22 contractors to do the work, and from that list you  
23 determine who will be sourced for the project.

24 The other option would be to, failing that, the  
25 alternative would be to contact Public Works and get from

1 them a list of potential contractors to do the work and use  
2 that as a basis for proceeding.

3 Q. You then say: "This process is contrary to best  
4 practices and contrary and contributes to a culture where  
5 contractors expect gratuitous public contracts from public  
6 representatives without due regard to fairness,  
7 transparency and proficiency in the selection process".  
8 And you conclude: "It also compromises the government's  
9 ability to achieve fair value on money spent, both in terms  
10 of the monetary cost to the public, and the quality of the  
11 work rendered".

12 I'm not going to read out the recommendations  
13 that you made, Auditor General. This Report, as the  
14 Commissioner has indicated, will be put on our website, and  
15 others can, if they wish, look at those recommendations.

16 But briefly, I want to go to one matter that may  
17 be linked to the recommendations. But overall what was the  
18 response to your recommendations?

19 A. The response to the Report and the recommendation  
20 basically was that the Auditor General should not be--well,  
21 let me just cut it short and say the response was not a  
22 positive one.

23 Q. It was such--and this--I hope you'll find this;  
24 it's probably just nestling under your computer, but you  
25 issued a press release on the 17th of December 2018.

1           A.    Under, yes.

2           Q.    And I just wanted to look at that with you.  It's  
3 not in the bundle, but it is on the table, probably just  
4 sitting underneath the computer.  It's not going to be in  
5 that pack.  It's--I can see it from where I am, but I think  
6 you will be able to--

7           A.    Oh, this it.

8           Q.    And the next document that's there?

9           A.    Okay, thank you.  Sorry.

10          Q.    This was a press release that you issued, Auditor  
11 General, on the 17th of December 2018, and I want to go  
12 through it with you, in fairness to you.  But first, how  
13 often do you have to issue press releases?

14          A.    Not often, not very often at all.

15          Q.    What I'm going to do is just go through it, first  
16 of all, and then go--there's an addendum to it, but you  
17 say:  "I am pleased that the audit report on the Elmore  
18 Stoutt High School Perimeter Wall has now been properly  
19 made public and is available for all to examine and  
20 consider".

21                "I'm concerned, firstly that government projects  
22 are allowed to be managed with so little regard for public  
23 resources, but more acutely because the response coming out  
24 of the Ministry does nothing to convey confidence that  
25 steps will be taken to secure improvements in the

1 implementation and management of future public projects".

2 "The reports of this office go through several  
3 vetting processes to ensure they are factual and supported.  
4 When the institutions that support public transparency and  
5 good governance are attacked and undermined at will, and  
6 Government regulations and parliamentary procedures are  
7 deliberately disregarded, we risk becoming a society where  
8 the rules that affect democracy and fairness are eroded and  
9 rewritten in plain sight, and public servants accede to  
10 questionable activity for fear of political reprisals.  
11 This is a dangerous place to be and cannot be the society  
12 that we want the BVI to descend into".

13 "Government officers and members of the general  
14 public must continue to ask for accountability in  
15 government and insist on better management of public funds  
16 regardless of political affiliation. To do otherwise is to  
17 consent to the wasting of limited public resources and the  
18 erosion of national integrity both of which are essential  
19 for the development of the territory and prosperity of  
20 future generations".

21 The Office of the Auditor General is pleased to  
22 present the Report on the Elmore Stoutt High School  
23 Perimeter Wall to the public and we will continue to do our  
24 part in ensuring that accountability is pursued and  
25 democracy is sustained".

1           And you signed this press release.

2           Now, before I turn to the--I suppose the annex to  
3 the press release, when you refer to parliamentary  
4 procedures being deliberately disregarded, did you have  
5 anything specific in mind?

6           A.    Yes.  The Report was actually taken in to the  
7 public before it was tabled by the Minister.

8           Q.    Did you find out who took it in to the public?

9           A.    The Minister took it out into the public, and he  
10 had a press release about it.  It wasn't something that was  
11 secretive.

12          Q.    So the way the process should have worked is the  
13 Report, your Final Report, goes to--I think in this case  
14 it's a Section 20 report so it goes to the Governor.  It  
15 then has to be laid before the House of Assembly.  After  
16 that process it becomes public.

17          A.    That is correct.

18          Q.    And in this instance, before that process had  
19 been concluded, the Minister decided to take it to the  
20 public.

21          A.    Yes, yes.

22          Q.    And with a press release?

23          A.    With not a press release but an open press  
24 discussion.  It was taken to the public and he basically  
25 had a--not a press release, a press--

1 COMMISSIONER HICKINBOTTOM: Conference.

2 THE WITNESS: --a press briefing, a press  
3 conference, so to speak--yes, thank you, Commissioner--on  
4 the subject. Well, arrangements were made to have the  
5 document tabled, and there was no warning. We just  
6 suddenly saw that it was in the press and statements were  
7 made--or being made about it.

8 BY MR RAWAT:

9 Q. And so you issued this press statement in  
10 response.

11 A. I issued a press statement after the document was  
12 tabled. It was--the document was tabled, I think, shortly  
13 thereafter. I'm the not sure it was the following week.  
14 So, taking it into public preempted that process, and we  
15 waited until it was tabled so that I could make the  
16 statement and present the Report so that--in a proper way.

17 Q. And the--

18 (Overlapping speakers.)

19 A. (Unclear.)

20 Q. And the Minister concerned was the Minister for  
21 Education and Culture at the time.

22 A. That is correct, yes.

23 Q. That was The Honourable Myron Walwyn.

24 A. Correct, yes.

25 Q. Now, what you did--

1 MR RAWAT: And I think again, Commissioner, if  
2 it's all right, I'd like to take the Auditor General  
3 through the additional points she made.

4 COMMISSIONER HICKINBOTTOM: Yes.

5 BY MR RAWAT:

6 Q. Auditor General, the--your press statement  
7 carried with it a document that was headed "Fact-check".

8 A. If I could turn to it, yes.

9 Q. What I'd like to do is to put to you--there is a  
10 column which is headed Minister's Assertions as presented  
11 in his statement that now is reported in 284 News  
12 interview.

13 The second column's finding and then the third  
14 column is the Auditor General's response, what I'll do is  
15 go through the first two and perhaps allow you to deal with  
16 the response side, if I may.

17 The first assertion that was made by the Minister  
18 was that the Public Works Department was not consulted  
19 during the audit process, you have responded that that was  
20 false. Please just set out for the Commissioner why--the  
21 basis of that response.

22 A. Yes. The assertion was false because not only  
23 did we consult with Public Works, we did so on a number of  
24 occasions. The auditor who worked on this project visited  
25 Public Works on multiple occasions and met with both the



1 Public Works Director, who was there at the time, and the  
2 one who preceded him, and he met with both of them  
3 together, in person.

4 We also, at one stage, requested Public Works to  
5 do a costing because we read through the figures and we  
6 thought that, you know, this doesn't look right, we should  
7 get Public Works and Government specialists to look at  
8 this. So we asked them to do a costing for the project,  
9 and basically the individual we spoke to to do the costing  
10 agreed and then afterward came back because the Director of  
11 Public Works informed us that his office was not involved  
12 in this project and he does not want to at this stage  
13 become involved in the project. So the project was  
14 completed without that particular costing that was  
15 requested.

16 But getting back to the main assertion that  
17 Public Works was not consulted, this is actually false  
18 and--false and misinformed.

19 Q. The second assertion that you--in your press  
20 statement, you say that the Minister made was that the  
21 Audit Report valued the wall at \$372,000, and you say that  
22 was false. Again, can you just explain why to the  
23 Commissioner, please.

24 A. Yes, Commissioner, and this actually took us by  
25 surprise since we--there was no valuation, no audit

1 valuation of the wall in a report at all, and we realized  
2 afterwards what the Minister was referring to.

3 Starting--that starting point is that there's no  
4 valuation, absolutely none, within the Audit Report that we  
5 did. We did a benchmark against the Public Works' rates  
6 and compared those to the rates that were used on this  
7 project and found that there were--the rates that were used  
8 were significantly greater.

9 In any event, what we learned in reviewing the  
10 Minister's comments was that he had taken some information  
11 from the report that referred directly to the wall,  
12 building of the wall only and extrapolated that to--over  
13 the entire project and came up with a figure that would  
14 relate only to building the wall. It does not include, for  
15 instance, the rails, putting in the rails, and painting the  
16 walls, wall sides, or even the excavation work.

17 So, he basically used incomplete information to  
18 come up with a figure and then attributed that figure to  
19 the Audit Department, which was completely false.

20 Q. The third assertion that's in your fact-check  
21 list is Ministry's procedures satisfied Government  
22 requirements for payments, and you've marked that as  
23 "false". Can you explain your response as you set it out  
24 there?

25 A. Right. The Government process has a great deal

1 of steps that you have to go through in order to get a  
2 payment made. For a project such as this, there must be a  
3 certification that the work was done, and what we  
4 found--and that is false because what we found is that the  
5 Ministry actually prepared certificates claiming that the  
6 work was completed in certain areas when, in fact, it was  
7 not done, and this is actually a circumvention rule; this  
8 is a breach of Public Finance Management Regulations to do  
9 this and go behind that. So, in that sense, to say that  
10 the Ministry's procedure satisfied Government requirements  
11 was false.

12           And I think the Minister took it a little bit  
13 further because he implied that the Treasury would not have  
14 paid if he hadn't met the requirements, and I have here  
15 that the Treasury can't go out and check to see whether or  
16 not his certificates are actually accurate or  
17 representative. The Treasury has to rely on the  
18 certificates, has to rely on the individuals who prepared  
19 these to actually be able to do their jobs, and that's what  
20 they did in this particular case, and it turns out that the  
21 certificate that was presented for payment was actually  
22 false, was incorrect.

23           Q. Your fourth point is that there are no quantity  
24 surveyors in the Auditor General Office, and you've marked  
25 that as true, and, I think, what you say, and I'll deal

1 with this, you say: "The Audit office does not provide  
2 quantity surveying services. Nor does it claim to".

3 A. That is correct.

4 Q. At 5., the Minister's assertion was recorded as:  
5 "The Auditor General has requested more resources for staff  
6 and training", and you've said "true" to that. Again,  
7 please explain a little more to the Commissioner your  
8 response.

9 A. Of course, Commissioner.

10 And I think I alluded to this yesterday that  
11 we--and the Minister can make this comment because I have  
12 made it in Standing Finance, and I've made it in Standing  
13 Finance more than once, and I made the comment elsewhere as  
14 well. The officers on the staff, and as I said to you  
15 yesterday, at this particular moment, we are probably at  
16 about 50 percent of what our authorised numbers should be.

17 And I also said yesterday that I'm hoping to  
18 build, firstly, our PFM Section back to what it needs to  
19 be, and then address the needs of our financial Section,  
20 which is, I think, is a little bit better off right now  
21 than the PFM Section.

22 So, I would agree that the office is  
23 understaffed, and when we can get more individuals, more  
24 suitable, qualified individuals within the office, I'm  
25 hoping that we can more of these types of audits, actually,

1 more PFM audits, and keep on top of our requirements for  
2 the financial audits that we need to be doing as well.

3 COMMISSIONER HICKINBOTTOM: I'm sorry, does  
4 the--did the lack of staff/training undermine the validity  
5 of this Report?

6 THE WITNESS: No, of course, of course not.

7 COMMISSIONER HICKINBOTTOM: That's the  
8 suggestion.

9 THE WITNESS: No.

10 COMMISSIONER HICKINBOTTOM: No.

11 THE WITNESS: Definitely not.

12 BY MR RAWAT:

13 Q. And the sixth point is attached to the Audit  
14 Report should have been a Public Works Department  
15 valuation, and you've said to that that that is false, and  
16 I'll read your answer.

17 Your response is: "The Minister does not  
18 determine what goes into, or is attached to, an audit  
19 report".

20 I should have said that, going on with the press  
21 statement, you have a conclusion to the press statement  
22 which is on the last page and reads as follows: "The  
23 statements made by the Minister in the interview on 284  
24 News and elsewhere in the press are both incorrect and  
25 misleading. The contents of the report are clear. As

1 Auditor General, I stand behind the contents of the Report,  
2 and I fully support the members of my staff who work on the  
3 public's behalf to promote improved public accountability  
4 and transparency".

5 Commissioner, I've reached a natural break.  
6 There is one more report that I need to go through with the  
7 Auditor General, but I'm sure she is probably very keen to  
8 have some lunch now, and I think, yes, is very keen to have  
9 a break. So can I suggest could we break for lunch,  
10 perhaps, for half an hour.

11 COMMISSIONER HICKINBOTTOM: Shall we try and come  
12 back about quarter to 2:00?

13 MR RAWAT: Thank you.

14 COMMISSIONER HICKINBOTTOM: Yes? Quarter to  
15 2:00. Thank you very much.

16 (Recess.)

17 COMMISSIONER HICKINBOTTOM: Good. Thank you. I  
18 think we're ready to recommence.

19 Just to make it clear and just so that it's not  
20 forgotten, I still have to deal with the issue of the  
21 publication of the two COVID reports that the Auditor  
22 General has produced, and I'll deal with submissions on  
23 that at the end of the evidence today. I don't want to  
24 keep any of the witnesses waiting. Thank you.

25 MR RAWAT: Yes, thank you, Commissioner.

1 BY MR RAWAT:

2 Q. Auditor General, could I take you, please, to  
3 page 817 in the bundle. This is the first page of a report  
4 published or issued by your office on the 27th of  
5 January 2020, and it is the Report into the Government's  
6 financing of BVI Airways' Direct Flights to Miami.

7 Again, I'd like, with your assistance, to just go  
8 through some of the details set out in this Report, but is  
9 of course, one of those that will be published on the COI's  
10 website. No issue has been taken with this.

11 To give some background, first of all, the--if we  
12 start with 823, please. And look at paragraphs 1 and 2,  
13 where you set out the objective of the audit, and you say:  
14 It "covered the activity related to the BVI Government's  
15 financing of BVI Airways' et al proposal to introduce  
16 direct commercial flights between the Terrence B Lettsome  
17 International Airport and Miami International Airport as  
18 approved by Cabinet on 23 September 2015".

19 That's where you--we're looking at. We need to  
20 give that a little bit of background, and we can take that  
21 again from your Report. But if you go to paragraph 10, you  
22 deal with your Report in six stages, Auditor General, and  
23 I'll deal with each stage in turn. But Part 1 is "The  
24 proposal", and at paragraph 10, you give some background,  
25 which if I try to summarise is as follows, and that is:

1 "In November 2013 ... the BVI's Government's" long-standing  
2 Legal Counsel "in Washington D.C.", Lester Hyman,  
3 "introduced Bruce Bradley", who was a Washington,  
4 D.C.-based real estate developer, "to the then Premier" of  
5 the BVI, Dr The Honourable "Orlando Smith".

6 Mr Bradley was seeking financing and support from  
7 the Premier to establish a direct commercial air service  
8 "between the BVI and Miami using British Aerospace Avro"  
9 Jets.

10 To further this, Mr Bradley entered into a  
11 partnership with Jerry Willoughby of BVI Airways and Scott  
12 Weisman of Colchester Aviation. What then happened was  
13 that--and you deal with this at paragraph 14--on the 5th of  
14 June 2014, the Government signed a Memorandum of  
15 Understanding with Bruce Bradley's company, Castleton  
16 Holdings LLC, to allow for an exploration of the viability  
17 of the project.

18 The--and this is at paragraph 15, there were  
19 obligations set out under the MOU, and both obligations for  
20 Castleton and obligations for the Government. But it  
21 included the requiring, the commissioning of a feasibility  
22 study and marketing plan for the project from Sixel  
23 Consulting Group Incorporated and also the commissioning of  
24 a pavement condition study, which was a study to look at  
25 the Terrence B Lettsome Airport runway. You note in your



1 Report--and this is at paragraph 17 both studies--"The cost  
2 of both studies was to be shared equally" between "the  
3 Government and Castleton". That's Bruce Bradley's company.

4           And if we move on--and this is at  
5 paragraph 16--was that Sixel Consulting Group issued a  
6 report in September 2014--sorry, paragraph 19 this is--and  
7 it was--I won't set it out, but it was a positive report in  
8 that is it said that the programme offered a "low cost and  
9 execution risk solution". It provides "the BVI with a  
10 significant opportunity to increase penetration of the"  
11 annual air market, and would potentially stimulate BVI air  
12 passenger traffic from new markets, and it would produce a  
13 good return in terms of cash flow.

14           What then happened, however, was that on the 14th  
15 of December 2014, the Premier rejected the proposal, and  
16 that was because of concerns over the cost commitment and  
17 skepticism about the growth assumptions being put forward  
18 in the Sixel proposal, and there were a number of key areas  
19 that were identified.

20           If I go--take you to paragraph 33, that's the  
21 point we had reached in 14--by 14 December 2014, and that  
22 was that the project had been refused, but then you  
23 say--and this is at your paragraph 34: "Following the  
24 Government's rejection of the proposal in December 2014,  
25 the Premier was contacted by the Government's U.S. Legal

1 Counsel and lobbyist, Lester Hyman, in an emotive missive  
2 which sought to arrange an urgent meeting in January 2015".  
3 This, "Mr Hyman suggested "would allow the parties to meet  
4 in isolation with a view to ironing out the issues of  
5 interline arrangements and capping the Government's  
6 financial exposure so that the parties could 'enter into a  
7 definitive agreement as contemplated by the MOU within two  
8 weeks'".

9 Now, interline arrangements as I understand it,  
10 are arrangements where airlines carry out services on  
11 behalf of other airlines.

12 A. Yes. It makes air travel easier.

13 Q. And so the question I wanted to ask you about  
14 paragraph 34 was the use of the phrase "emotive missive",  
15 where does that come from, if you can remember?

16 A. It comes from the tone of the e-mail that we  
17 reviewed. Essentially, it appealed to his emotional senses  
18 rather than to his business senses, and this is where we  
19 put--in fact, it's a trend that we noted in Mr Hyman's  
20 correspondence quite often when addressing Honourable  
21 Premier that was somewhat inappropriate.

22 Q. The next step that happened was that the  
23 Government then engaged a local accounting firm, BDO, in  
24 January 2015 to assess the merits of the proposal, and  
25 BDO's study concluded that the proposal--and this is the

1 proposal outlined in the MOU--I haven't given the detail of  
2 that--but that it was inequitable because it required the  
3 Government to bear the costs and risks while the operator  
4 parties were guaranteed the returns, and the Report  
5 identified a number of operational concerns around the  
6 aircraft and advised that these needed to be addressed, and  
7 that the financial terms needed to be renegotiated to more  
8 appropriately apportion risk and reward.

9           If I take you to paragraph 36, what then happened  
10 was that on the 26th of August 2015, the Government and  
11 what you call the "operator parties"--and that's the group  
12 of people I mentioned at the beginning, which was Mr Hyman,  
13 Mr Bradley with Castleton, BVI Airways, and Colchester  
14 Aviation, Government--and those parties arrived at a basic  
15 position, which then led to a decision paper being  
16 submitted to Cabinet, and Cabinet approving a number of  
17 conditions to pave the way for an agreement between the  
18 parties.

19           Now, the conditions including at two, that--if we  
20 take one and two together--that the Government would  
21 support BVI Airways in providing a direct flight between  
22 BVI and Miami for a three-year period, and that support  
23 would take the form of financial input of \$7 million  
24 distributed in annual statements--installments. There  
25 would be full disclosure of financials by BVI Airways. The

1 Government would have a seat on the BVI Airways Board. At  
2 least 10 percent of the shares in the new venture will be  
3 made available for local investors. The financial model  
4 would be vigorously scrutinized by the Ministry of Finance  
5 and consultants, and the Attorney General's Chambers would  
6 vet the agreement prior to it being signed.

7           What you say also is that, firstly, that the  
8 conditions were all approved by Cabinet. Secondly that,  
9 information provided to the Cabinet also stated that  
10 Castleton, a company owned by Bruce Bradley, would be  
11 investing in excess of \$6 million into the venture.

12           But you also note, and this is at paragraph 39,  
13 that: "The BDO financial assessment report that  
14 recommended changes for a more equitable arrangement was  
15 not included among the papers presented to Cabinet".

16           A. That's correct.

17           Q. In any event, the project continued, and the next  
18 step was the signing of a framework agreement, which was  
19 signed on the 7th of December 2015, which adopted the terms  
20 of the MOU, the Memorandum of Understanding. You set out  
21 the detail of that in your Report, and it runs across one  
22 and a bit pages, but it includes that BVI Airways would  
23 launch a commercial air service by 31 October 2016, that  
24 the operator parties have the right to immediately  
25 terminate if the BVI Government failed to provide a Letter

1 of Credit for \$7 million by the 19th of January 2016; the  
2 Government had the right to terminate with 30 days' notice  
3 if the service was not commenced by the 31st of  
4 December 2016; and the Government was to reimburse BVI  
5 Airways for start-up costs, operating losses during the  
6 initial three years up to a total of \$7 million. The  
7 Government was also to guarantee BVI Airways an annual  
8 Return on Investment of at least 20 percent. And what you  
9 note on this is at paragraph 41 was that although there was  
10 initial proposal to share in--the Government's share in the  
11 profits, that wasn't included in the framework agreements;  
12 is that right?

13 A. That is correct, yes.

14 Q. What the Government's return would be--and their  
15 only return, and this was on the \$7 million investment,  
16 would be repayment of the guaranteed amount, but that was  
17 contingent on available funds being available--funds being  
18 available after other provisions were satisfied.

19 A. Yes, that's correct.

20 Q. So, again in layman's terms, the repayment of the  
21 Government's monies was not top of the list.

22 A. No, it was not top of the list.

23 Q. The next part of your Report deals with  
24 implementation.

25 Now, under the Framework Agreement, the

1 seven--the amount that the Government was going to put into  
2 the venture was to be paid in installments; is that right?

3 A. That is correct, yes.

4 Q. But the problem that the Government experienced  
5 was that it could not secure the Letter of Credit that was  
6 required under the Framework Agreement.

7 A. That is correct.

8 Q. And so, what Government did was to make various  
9 early payments to BVI Airways, and by May 2016, it had  
10 remitted to the airline \$5 million, looking at your  
11 paragraph 47.

12 A. Yes, that is correct.

13 Q. And on the payment schedule that was under the  
14 Framework Agreement, the BVI Government was only required  
15 to pay \$2.9 million at that point.

16 A. Yes, that is correct.

17 Q. Now, the final \$2 million, under the Framework  
18 Agreement, was only due after the air service was  
19 successfully launched, but what followed was an addendum to  
20 the Framework Agreement, and that was intended to remedy  
21 the breach that was caused by the Government's failure to  
22 obtain the Letter of Credit. And what that required the  
23 Government to do was to deposit the remaining \$2 million in  
24 an escrow account for the benefit of BVI Airways but also  
25 to make an additional payment of \$200,000. Have I

1 understood your Report correctly?

2 A. Yes, you have.

3 Q. And so, what we have is that even before the  
4 airline is successfully launched, \$5 million has gone to  
5 BVI Airways, \$2 million is sitting in an escrow account,  
6 and on top of making that \$7 million, but on top of that  
7 the BVI Government is now giving additional funds \$200,000  
8 to BVI Airways.

9 A. Yes, that is correct.

10 Q. If you look at 53, there was an agreement in  
11 relation to the escrow funds that, of the \$2 million,  
12 \$1.2 million was going to be paid on the 30th of May 2017,  
13 and \$800,000 was going to be paid on 30th of November 2017,  
14 and that was to Colchester Aviation, LLC, which was a major  
15 shareholder in BVI Airways. There was, you note, no  
16 requirement for performance included.

17 But what then happened was that the  
18 then-Financial Secretary terminated that arrangement and  
19 authorised the release of the funds to the operator parties  
20 on the 11th of January. So, that was before the payment  
21 dates had arisen, the remainder of the funds was paid  
22 across to BVI Airways.

23 A. That is correct, yes.

24 Q. Now, you say at 54: "No authorization from  
25 Cabinet was obtained for this early release".

1           Now, is authorisation required if you're  
2 Financial Secretary?

3           A.    It is, yes.

4           Q.    If we look at 55, you then make the point in the  
5 report that there was a protracted approval process, and by  
6 that you mean that there had to be an approval process with  
7 UK and U.S. regulatory authorities for flights between the  
8 BVI and Miami, and that process lasted for more than a  
9 year-and-a-half.

10          A.    Yes, it did.

11          Q.    And what you say at 64 was that flights to Miami  
12 were, under the agreement, scheduled to commence by  
13 October 2016. The date was subsequently extended by eight  
14 months, taking us to June 2017. But apart from regular  
15 announcements and promises of service, no steps were taken  
16 to commence flights either regionally or as planned  
17 internationally into the US after the approval process was  
18 complete.

19                So, as far as you could ascertain from the  
20 information provided to you, Auditor General, there was no  
21 steps taken to actually get in place an ability to commence  
22 plights?

23          A.    There was no--there were no steps taken to  
24 actually commence flights from the BVI to any destination.

25          Q.    What you say--and this is at 66, if we go there,



1 if I could have a moment, please.

2 Two-and-a-half months after approval was  
3 obtained, the airline took an inaugural flight, and that  
4 was a charter to transport the BVI National Athletics Team  
5 to Mexico.

6 A. Curaçao.

7 Q. Sorry, yes, for the CARIFTA Games.

8 A. That's correct, yes.

9 Q. And then BVI Airways then actually commenced a  
10 leasing agree--arrangement with one of the aircrafts to an  
11 airline operating between Haiti and Cuba.

12 A. Yes, that is--

13 Q. So, was the effect that they effectively reduced  
14 the complement of planes that they had to do a flight  
15 between BVI and Miami?

16 A. I'm sure that they had ability to do flights.  
17 They just were not doing it between the BVI and any other  
18 destination. They had a crew, and they had the airlines,  
19 but no flights commenced between the BVI and Miami or  
20 anywhere else in the Caribbean.

21 Q. There was an announcement by the Miami airport  
22 Director in June 2017 that BVI Airways would be commencing  
23 its route in July 2017, but what you note in your Report is  
24 that there was immediately accounted in the press by BVI  
25 Airways asserting that the Director of Miami airport had

1 jumped the gun, and then four weeks later BVI Airways  
2 suspended operations, citing lack of fundings, and that's  
3 when the project effectively came to an end.

4 A. That is correct, yes.

5 Q. And you remember that one of the things that  
6 Cabinet was told was that Castleton would put \$6 million  
7 into the venture. This is your paragraph 72. You note  
8 that that never materialised, so you couldn't see that sum  
9 being put into this venture at all.

10 A. That money never actually got into the venture,  
11 and we actually questioned the individual about it and  
12 didn't get a satisfactory answer, I think. There's a  
13 comment in here.

14 Q. So, in terms of what monies went in to finance  
15 the venture, was it the \$7 million from the BVI Government?

16 A. Only the \$7 million from the BVI Government, to  
17 my knowledge. I don't know of any other amount it went to.

18 Q. If I take you to paragraph 80, please, this is a  
19 section headed "Depleted Operational Funds (Pre-operational  
20 Financial Statements)", and you say: "The expenditure  
21 reported in pre-operational financial statements submitted  
22 by the airline to the BVI Government are unsupported and  
23 inconsistent with other records rendering them unreliable".

24 What you note, and this is at your paragraph 81,  
25 was that the BVI Airways submitted just one set of

1 financial statements which were unaudited and covered the  
2 period from the beginning of January 2016 to 31st of  
3 March 2017. And that was the extent of the financial  
4 records they provided to the BVI Government?

5 A. That is correct, yes.

6 Q. You highlight a number of matters of concern, but  
7 what you say--and this is at the bottom of 82, you say:

8 "The Financial Statements showed that the company received  
9 zero income but incurred \$4.25 million in expenses of which  
10 \$3.07 million was allegedly paid in salaries and  
11 professional services".

12 A. That is correct.

13 Q. And in terms of the airline had an accountant in  
14 the BVI who submitted payroll information and financial  
15 statements to the Internal Revenue Department here in the  
16 BVI. And if I understand the Report correctly, your team  
17 conducted a verification exercise on the salary amounts put  
18 in; is that right?

19 A. Yes, that's correct.

20 Q. And what you found was that the amounts in the  
21 Pre-operational Financial Statements were either  
22 substantially overstated or the payroll taxes submitted to  
23 the Government were severely underreported. So you  
24 couldn't match the two across?

25 A. The two were not nearly--nowhere close, actually.

1 There was a significant difference between the two.

2 Q. What you also found was that, although the  
3 operators were asserting they'd invested over \$2 million  
4 into the venture, other than the Government financing,  
5 there was nothing to show that BVI Airways received any  
6 other kind of investment or loan financing.

7 A. That's correct. Based on the statements they  
8 submitted, there was no evidence that they had actually  
9 invested anything into the company.

10 Q. And what you also concluded was that, in 2017,  
11 Colchester Aviation LLC spent \$3.3 million in unidentified  
12 expense, and your conclusion at 90 was that: "An audit  
13 must be performed by a firm of independent accountants for  
14 both companies in order to provide accurate information on  
15 their expenditure activity and afford assurance on how the  
16 Government's monies were applied". That's an audit of BVI  
17 Airways and Colchester Aviation; is that right?

18 A. That is correct, yes.

19 Q. What power would the Government have to sort of  
20 compel an audit of that sort?

21 A. The Government cannot compel an audit of that  
22 sort. It's--the most it can do is request that these  
23 agencies actually do commission such an audit, and I think  
24 only a court of law can actually make them to do this.

25 Outside of that, we had an audit done on this.

1 The records that were submitted are not reliable.

2 Q. The next point you make in your Report is that,  
3 as this was all going on, and in anticipation of this  
4 service commencing, the BVI Airport Authority undertook  
5 various upgrades to facilities, which came to--well, costs  
6 of \$735,000, which the Authority then sought reimbursement  
7 from the Government for.

8 Now, obviously, because BVI Airways didn't  
9 actually operate, but those upgraded facilities were never  
10 used by this airline, were they?

11 A. No, they were not used by BVI Airways.

12 Q. Do you know whether the Government did reimburse  
13 the Airport Authority?

14 A. At the time we did this exercise, they had not  
15 been reimbursed.

16 Q. If I go to paragraph 96, under the heading  
17 "Government Oversight Imbalance", you say: "There were  
18 inadequate Government checks and balances in the oversight  
19 of the venture leading to unilateral decisions being made  
20 on significant matters".

21 Now, one of the points you pick up in the Report  
22 is the position of the Financial Secretary because you make  
23 the point that the Financial Secretary was assigned the  
24 role of the Government's official liaison with the project,  
25 which allowed the operators to have ongoing high-level

1 access and support from within the Government, but as you  
2 say, created foreseeable issues.

3 So, what issues, in your opinion, were  
4 foreseeable?

5 A. What is said here is that it created a conflict  
6 whereby the Financial Secretary's obligation to ensure the  
7 successful launching of the project may have obscured his  
8 public duty as a primary custodian of Government's  
9 finances. In other words, he had the authority to do  
10 certain things as Financial Secretary and perhaps the  
11 obligation, as he saw it, to assist the airline in  
12 achieving its goal might have caused a blur in those  
13 obligations, both a conflict, and I think things might have  
14 happened that could have been prevented, if there was  
15 adequate separation of duties.

16 Q. In effect, he was trying to wear two hats. He  
17 was trying to do whatever--or he was placed in a position  
18 where, as the official liaison, he had to do whatever he  
19 could to ensure the success of the venture.

20 A. Exactly.

21 Q. But as Financial Secretary he also had to act  
22 with prudence and with regard to the public purse.

23 A short while ago, we were looking at an earlier  
24 part of the Report. I drew attention to two things: The  
25 fact that payments were made in advance of the Letter of

1 Credit and not according to the installment payment plan in  
2 the Framework Agreement; and secondly, the decision to  
3 release the escrow payments.

4 Do you see those two decisions as example where  
5 that line is blurred?

6 A. Yes, absolutely, sir.

7 Q. What you also say--and this is at  
8 paragraph 100--is that the position of the Attorney  
9 General, who was vetting the legal documents, and the  
10 Accountant General, who was making the payments, was that  
11 they were making periodic objections, and that there  
12 were--the Attorney General made amendments to draft  
13 agreements, and these agreements had all been initially  
14 drafted by the operators, I take--as I understand it.

15 A. That is correct, yes.

16 Q. And so the Attorney General was making amendments  
17 to these draft agreements intended to protect the  
18 Government's interests, but none of these were adopted; is  
19 that right?

20 A. I would say none of them were adopted. A  
21 significant number of them were not adopted. And in  
22 particular, one of the objections the Attorney General  
23 was--made repeatedly was commercially--I'm trying to  
24 remember the term that was used. It basically didn't hold  
25 the operators fully liable--let me get this--to use the

1 commercially best efforts, I think it was, that was a part  
2 of the agreement, and the Attorney General would repeatedly  
3 delete that phrase from the documents and they would go  
4 back in.

5 Q. In terms of--

6 COMMISSIONER HICKINBOTTOM: Just one moment.

7 (Pause for technical adjustment.)

8 COMMISSIONER HICKINBOTTOM: It's all right. It's  
9 sometimes just a small adjustment helps with the recording,  
10 Ms Webster.

11 (Pause.)

12 COMMISSIONER HICKINBOTTOM: Yes, thank you very  
13 much.

14 BY MR RAWAT:

15 Q. The next part of your Report covers Government  
16 compliance and due diligence, and that's at page 839, and  
17 you made a number of findings in respect of compliance and  
18 diligence, and the first one was that the Report that was  
19 done by Sixel Consulting was, you say, the Government's  
20 answer the requirement, the Protocols for Effective  
21 Financial Management for a business case. But you point  
22 out that the Report focused only on one solution and did  
23 not consider alternatives, and you say that the analysis  
24 appeared optimistic in its break-even projections.

25 Just so, if an entity wants to produce a business



1 case that fits in with the Protocols for Effective  
2 Financial Management is a prerequisite that you do consider  
3 and set out alternatives?

4 A. Yes.

5 Q. You make the point also that none of the  
6 recommendations made in the BDO Report were adopted, so  
7 that Report, which was much more cautious than the Sixel  
8 study, none of--that didn't find its way into the Framework  
9 Agreement at all; is that right?

10 A. That is correct.

11 Q. And at paragraph 111, you say that: "Both the  
12 Protocols and the Public Finance Management Regulations  
13 require that projects undergo a tendering process". But  
14 "there was no invitation for competitive submissions nor  
15 was there any comprehensive examination of alternatives  
16 such as costs of improving the ferry system or pursuing an  
17 established airline to undertake the route. This venture",  
18 you say, "was unsolicited and unplanned".

19 And so, was there a complete bypassing of the  
20 tendering process?

21 A. Yes, there was a complete bypassing of the  
22 tendering process. And of at no stage during the  
23 discussions were any steps actually taken to initiate that  
24 process.

25 Q. And what you also point out, again in terms of

1 the compliance, was that there were a number of decisions  
2 that were made or conditions that Cabinet set which, in  
3 effect were disregarded. So Cabinet had authorized a  
4 maximum of \$7 million to be paid in even installments over  
5 three years, but that wasn't mirrored in the payment  
6 schedule in the Framework Agreement.

7 A. That is correct.

8 Q. Cabinet required that the agreement be contingent  
9 on the completion of interline agreements with major  
10 airlines and also that the Ministry of Finance subject the  
11 financial model to scrutiny. That was ignored.

12 A. That was not complied with, yes.

13 Q. How does it work? I mean, if you take the  
14 Framework Agreement as an example, if Cabinet has  
15 authorised a particular payment plan and that is varied,  
16 does it then have to come back to Cabinet? Is that how it  
17 should work?

18 A. It should come back to Cabinet. And, in fact,  
19 when the draft documents were vetted again by the Attorney  
20 General Chambers, it was brought to their attention that  
21 the plan that was in the document did not match what  
22 Cabinet had approved.

23 Q. And which--who was the lead Ministry on this  
24 project?

25 A. The lead Ministry would have been the Premier's

1 Office.

2 Q. What you've also set out--and we see this at--if  
3 we go to paragraph 119--and you've detailed this. I don't  
4 need to go through the detail of it, but those parties who  
5 were--or you say who spearheaded the proposal in 2013  
6 brought promises and a proposal but no experience in  
7 establishing or operating an airline.

8 So, what you've done in your Report is you've  
9 looked at the particular parties that approached the BVI  
10 Government and looked at their background and history, and  
11 it's evident from what you've set out in your Report,  
12 Auditor General, that they had no particular experience in  
13 operating an airline. Their backgrounds were in law,  
14 investment, real estate, and banking; is that right?

15 A. That is correct.

16 Q. If we go now to paragraph--

17 A. With one exception, Jerry Willoughby actually had  
18 some background as an aviation practitioner, who was the  
19 only individual that could speak to it, but not as a--I  
20 haven't seen anything where he was involved in setting up  
21 and running.

22 Q. And on the Government side, did the Government  
23 have anybody to advise them in terms of setting up an  
24 airline? Was there anybody on this side to be able to  
25 assist the Government?

1           A.    No.  There was nobody from the industry per se to  
2 assist the Government in setting up an airline.  I think  
3 most of the advice related to this project came from the  
4 Attorney General Chambers, who were very good at cautioning  
5 the Government with respect to what he was seeing at the  
6 time; but someone from the industry, no.

7           Q.    If you go to page 845, please.  This is part of  
8 the Report where you--it's headed "Contentions", and in  
9 effect it--perhaps it could also be described as "disputes"  
10 because it sets out perhaps the breakdown of relationships  
11 between the two sides.  And what you make the point which  
12 you alluded to earlier or to, Auditor General, is that:  
13 "Towards the end, the operator parties' tone shifted to  
14 accusatory and uncooperative even as they solicited  
15 additional public funding from the Government.  The  
16 accusations and contentions arose around issues related to  
17 the airport development, exclusivity, financing and  
18 confidentiality".

19                So just the one bit I want to focus on is just  
20 the subject of exclusivity.  You say at paragraph 151:  
21 "From the beginning the subject of exclusivity was  
22 continuously raised by the operator parties and repeatedly  
23 rejected by the Government which viewed the suggestion as  
24 impractical and unsustainable".  Could you just explain  
25 "exclusivity", please.

1           A.    "Exclusivity" meant that the airline would be  
2 given the sole rights to fly between the BVI and Miami.  
3 And none of the other airlines, larger airlines that might  
4 come on board after the extension of the airport, the  
5 extension of the runway, none of those would be allowed to  
6 partake in that, and certainly not without the approval of  
7 this particular airline. And the Government thought that  
8 was not a workable position, especially if it was going to  
9 invest in a substantial amount of money in extending  
10 that--in extending the runway and developing the airport.

11                So, every time this subject was brought up, it  
12 was rejected by the Government, and at no time during the  
13 discussions was there any leeway in terms of exclusivity  
14 because it was simply not a workable solution for a  
15 developing territory.

16           Q.    If you go to 156--155 which is at page 846.  
17 There, you take us to July 2016, by which time the full  
18 7 million had been paid over under the Framework Agreement  
19 plus an additional 200,000 by the Government to BVI  
20 Airways. But then you say that: "Nonetheless, by  
21 February 2017, the operator parties had again approached  
22 the Government for further financial support. This request  
23 failed to garner sufficient support amongst legislators who  
24 were averse to investing more public funds into an  
25 operation that had yet to deliver".

1           So, from that point, after the 200,000, was it  
2 the Government's position that they were not going to be  
3 funding--putting any more funds into this venture?

4           A.     That was the position. They wanted to see some  
5 results before they could even consider opening a  
6 discussion into the possibility of assisting further.

7           And I think at that stage, too, there was a lot  
8 of public response to what was going on, and the Government  
9 was taking note of that and didn't want to run further  
10 afoul with this particular project.

11          Q.     But what then happened, obviously, was the  
12 correspondence continued with the operator parties seeking  
13 more public funding from the Government, and that continued  
14 for some time.

15          A.     It did, yes.

16          Q.     In terms of the Government being able to obtain  
17 information about the financial position of BVI Airways, if  
18 you go to 172, please--or 171; let's look at that. That's  
19 at 849. 171.

20          A "law firm of Conyers Dill and Pearman was  
21 engaged by the Government in 2017 to assist with resolving  
22 issues related to the general non-performance of the  
23 venture". Conyers made repeated requests, but no  
24 information was provided to them by the operator parties  
25 other than the unsupported financial statements that you

1 were able to look at. So, that was all that Conyers were  
2 able to get at them.

3           What you say at 172 was that under the Framework  
4 Agreement, BVI Airways were required to submit quarterly  
5 financial statements, and that would show the progression  
6 of the activity for the airline, provide management  
7 information of the company's operations, and you say: "The  
8 quarterly statements were never provided".

9           Who were they expected to provide quarterly  
10 statements to?

11           A. To the Government, to the BVI Government.

12           Q. Was it any particular Ministry? Was it to the  
13 Premier's Office or to the--

14           A. This would have been to the Premier's Office  
15 since there were the--that was the office that was  
16 responsible, that was guiding this entire process, and the  
17 Financial Secretary was actually the person who was acting  
18 on behalf of the Government, so I would imagine that it  
19 would have be done through him.

20           Q. So, what you note is that there was a set of  
21 financial statements, which is the ones that you've looked  
22 at from BVI Airways: "Financial Statements (in summary  
23 form) were [also] received from Colchester Aviation", which  
24 was a major shareholder in BVI Airways. But: "The  
25 statements" you say "for both companies" were "unaudited

1 and unsupported". And then: "Other information  
2 [requested] such as the current Registers of Directors and  
3 Beneficial Owners of the operator companies and the  
4 evidence of ownership of the aircraft was not forwarded".

5 A. That is correct.

6 Q. Again, Auditor General, just sort of in layman's  
7 term, you have a situation where the Government has paid  
8 across 7 million to an airline, and is the position  
9 that--and we're looking at sort of sometime in 2017, that  
10 at that point the Government would not have had an even  
11 complete picture of the financial position of BVI Airways  
12 and its major shareholders.

13 A. That is correct, yes.

14 Q. And the Government would not have been--even been  
15 able to say who owned the aircraft that were due to fly  
16 between BVI and Miami.

17 A. Also correct, sir.

18 Q. You then deal--I don't think I need to do it--but  
19 you set out in your Report the termination of the system.  
20 And, in fact, you say matters came to a head when the  
21 Premier--well: "Matters came to a head in May 2017 when  
22 information reached the Government alluded to plans by the  
23 operator parties to sell/or lease the planes that had been  
24 acquired for the ... flights". And the Premier then issued  
25 a letter before action. And ultimately the venture was



1 shut down. That was announced on the 18th of July 2012,  
2 which was on the cusp of BVI Airways receiving final  
3 authorisation to commence mandated flights.

4 And then the ultimate result was that on the 1st  
5 of October 2018, the Government engaged Martin Kenney & Co  
6 "to undertake a cross border investigation with a view to  
7 obtaining evidence to facilitate the recovery of  
8 \$7.2 million" that had been "advanced to BVI Airways".

9 A. Correct.

10 Q. What you say--and this is your conclusion, that  
11 section, and it's at 193, you concluded that: "The manner  
12 in which the project was introduced and progressed suggests  
13 that the operator parties were attempting to take advantage  
14 of the Territory's existing airlift issues by providing a  
15 solution that would guarantee them above market returns  
16 without the financial risk. This conclusion is consistent  
17 with the observations made in the BDO Report and is borne  
18 out by the fact that despite initial promises of  
19 \$5 million - \$6 million investment, the summary  
20 pre-operational financial statements show very little  
21 investment input by the operator parties".

22 You then say--and you've headed that "Risk-Free  
23 Investment"--is the position was that the Government bore  
24 all the risk?

25 A. That is correct, yes.

1 Q. And under "Anti-Competitive Requests", you say:  
2 "The Framework Agreement was crafted by the operator  
3 parties and heavily favoured their interests. Despite  
4 this, they continued to expect and insist on additional  
5 preferential treatment from the Government in the form of  
6 continued financial support and concessions to secure their  
7 profitability, even if this meant compromising the  
8 interests of Territory. This was demonstrated by their  
9 insistence that the Government should postpone the airport  
10 runway expansion and their repeated requests for  
11 exclusivity to eliminate any possible"  
12 competitive--"competition that would impact their  
13 profitability. When their requests were not accommodated,  
14 the operator parties, having not invested any of their own  
15 resources, opted to abandon the venture".

16 You point again to the fact that--and this is  
17 at--there was no accurate accounting of how the amounts  
18 that the Government had put into the venture were applied,  
19 and you've noted a number of project implementation  
20 failings where you say: "The Government erred in many  
21 respects in the implementation of this project. Some of  
22 these were in:

23 i. Contracting an airlift agreement with parties  
24 who lacked relevant industry experience and operational  
25 contacts;

1           ii. Agreeing to a 'joint engagement' of its  
2 technical experts to examine feasibility of the project".  
3 That's the fact the Sixel study and the paper conditions  
4 that they were jointly commissioned;

5           iii. Failing to adopt the BDO advice;

6           iv. Allowing [the] emotive and urgent pushing  
7 from the operator parties to dictate Government's  
8 involvement in the venture.

9           I'm going to pause there. I mean, we saw that  
10 that you--that term was used at the beginning. Across the  
11 correspondence that you saw, was that tone reflective of  
12 the approach that the operator parties took to Government?

13           A. It was reflective of the approach that one  
14 individual in particular took, and that was--I'm trying to  
15 remember his name.

16           COMMISSIONER HICKINBOTTOM: Lester Hyman, I  
17 think?

18           THE WITNESS: Lester Hyman. It was reflective of  
19 his approach.

20           And normally, the correspondence would be  
21 touching on business and then a whole lot on the personal  
22 relationship that existed between the Premier and himself.

23           And this is a term that I don't use in my  
24 reports, and this is a rare report that you'll see motive  
25 on correspondence being mentioned because it fits such an

1 important part in pushing the project forward, appealing to  
2 the emotional side and the good nature of an individual,  
3 and that's what initially drove the project, and at the  
4 end, when it was falling apart, this is what was used to  
5 try to keep the Government involved and try to keep the  
6 Government giving in terms of financial support.

7 BY MR RAWAT:

8 Q. You then go on to say:

9 v. Failing to adopt the amendments made by the  
10 Attorney General in the draft agreements;

11 vi. Failing to secure 1 written commitment from  
12 the operator parties of their financial input into the  
13 venture and to ensure that this obligation was incorporated  
14 into the terms of the Framework Agreement.

15 Just to clarify that one, so on your audit, the  
16 operator party who'd also be investing in the venture did  
17 not make its way into the Framework Agreement.

18 A. No, it did not.

19 Q. So, that was--was that just sort of extraneous  
20 documentation that was put in front of Cabinet but  
21 ultimately just didn't get incorporated into a contract?

22 A. It completely fell out of the discussion.

23 Q. Effectively--the next point you make is:

24 vii. Effectively removing the performance  
25 requirement from the agreement that required BVI Airways to

1 commence flights before receiving the final \$2.0 million  
2 Government advance.

3 And then the last one you say is:

4 viii. Assigning the individual in charge of the  
5 Government's finance serve as the primary facilitator to  
6 implementation. There was no higher financial authority to  
7 question or prevent his decision" made early--"to make  
8 early and complete payments to BVI Airways, which were  
9 contrary to Cabinet authorizations".

10 You've made again, Auditor General, a number of  
11 recommendations. I won't read them out, but, save for one,  
12 that you say: "Senior managers are the Government's  
13 gatekeepers [and] should not assume roles that can create a  
14 conflict with their public fiduciary duties".

15 But in terms of the response to your  
16 recommendations, can you assist the Commissioner with what  
17 response you received to those recommendations?

18 A. Basically justifications on what--the response  
19 was dealing with the matters that arose and justifications,  
20 and why they were handled that way, and that was it.

21 Q. Just give me a moment, please.

22 (Pause.)

23 MR RAWAT: Commissioner, I think I've reached the  
24 end of my planned questions. It may be--I don't know  
25 whether the--just to invite the Auditor General if there's

1 any other matters that she wishes to add, based on the  
2 questions that I've put to her, if she wants to make those  
3 points to you at this stage; it might be helpful.

4 COMMISSIONER HICKINBOTTOM: Ms Webster, two  
5 things. Could I just ask one question. It's a small  
6 question about procedure.

7 When you have produced your Report and you've  
8 explained how that's done, the relevant Ministry, et cetera  
9 has an opportunity to have their input into what is  
10 effectively a draft report before the final report is  
11 produced. You produce the final report, and then you  
12 report to whomever is appropriate, in a Section 20 case to  
13 the Governor.

14 And then the report is then sent to the House of  
15 Assembly to be tabled, then I think it's--I think they have  
16 a debate or a discussion about the report. But once your  
17 Report is finalised and it's sent to the Governor and then  
18 it's sent to the House of Assembly and then published, the  
19 report, I assume, doesn't change.

20 THE WITNESS: No, it doesn't change.

21 COMMISSIONER HICKINBOTTOM: So, I mean, to goes  
22 to the Government, it goes to the House of Assembly, it's  
23 discussed but it doesn't change before publication.

24 THE WITNESS: No, it doesn't.

25 COMMISSIONER HICKINBOTTOM: No. Thank you very

1 much.

2 Is there anything else, Auditor General, that you  
3 want to add to all of the evidence you've so helpfully  
4 given over the last couple of days?

5 THE WITNESS: Just to (unclear).

6 COMMISSIONER HICKINBOTTOM: I'm sorry. Could you  
7 draw the microphone a bit closer because the Stenographer  
8 just needs to capture what you're saying.

9 THE WITNESS: Okay. I was saying that the report  
10 doesn't change, but if there is a significant something  
11 that we might have missed somewhere, we would put an  
12 addendum at a later report, and that would be close to the  
13 front of the report so that it's noticed as (voice trails  
14 off).

15 COMMISSIONER HICKINBOTTOM: I understand. I  
16 understand. That's helpful. Thank you.

17 Anything else to add, Auditor General, to the  
18 evidence that you've given?

19 THE WITNESS: I can say that I've been Auditor  
20 General for almost--almost 30 years, and that would not be  
21 an exaggeration. I certainly have served in the Audit  
22 Office for almost 30 years, and what I've seen over that  
23 period of time is a willingness in public officers to  
24 basically bypass the rules and make excuses for having  
25 bypassed the rules. And the concern is that with that over

1 a period of time, it's becoming the culture within the  
2 Government that it's acceptable to disregard the  
3 procurement requirements, to disregard certain processes  
4 that have to be done.

5 And I think there needs to be an understanding  
6 that those rules are put in place to protect the  
7 Government. They're put in place to protect transparency.  
8 They're put in place to protect this Territory because  
9 without them, it's a slippery slope, and my concern is that  
10 we are becoming used to what is happening, and if it  
11 doesn't stop, it's going to be a very costly exercise for  
12 the Territory in the long run.

13 COMMISSIONER HICKINBOTTOM: Thank you very much.

14 BY MR RAWAT:

15 Q. May I ask just one question that comes from the  
16 Commissioner's last question.

17 I've seen you to a number of reports, Auditor  
18 General, and those are the reports that will be published on  
19 the COI's website. In relation to those reports, they  
20 obviously span a number of years, but in no case did you  
21 have to add an addendum.

22 A. No, we have not.

23 Q. Thank you very much.

24 MR RAWAT: The only final thing I would like to  
25 say, Commissioner, is, first of all, to thank the Auditor



1 General for the evidence that she's given today and  
2 yesterday.

3           Secondly, to thank her for her patience in  
4 dealing with the COI and the time that she's given to  
5 assisting us over the last two days.

6           And finally, to thank her very much for the way  
7 in which she has given her evidence.

8           COMMISSIONER HICKINBOTTOM: And can I echo that,  
9 Ms Webster. Thank you for your time which is quite a bit  
10 of time, but it's been very valuable for me, and thank you  
11 for the clear and forthright way you've given your  
12 evidence. It's much appreciated.

13           (Witness steps down.)

14           MR RAWAT: Might we rise, Commissioner, briefly  
15 whilst we reset the room for the next witness.

16           COMMISSIONER HICKINBOTTOM: Yes. Thank you.

17           (Recess.)

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Session 2

COMMISSIONER HICKINBOTTOM: The first point is your application to assist in representing Dr Orlando Smith whilst he gives his evidence, I've seen your application, thank you very much.

Let me say at the outset I propose to let you assist him, but subject to any other submissions you make, not under Section 12. Section 12 would make him a participant in the COI, which would mean that at least prima facie he would be entitled to have sent to him all of the documents on any topic in the COI, which I suspect neither he nor you would want because there is a lot of information.

But I can, under the COI Rules, allow you to be with him during the time he gives his evidence. And if there are any other witnesses where you want to sit in effectively as an observer, but if you want to take part in respect of any of the other witnesses, then please let us know, and we will almost certainly accommodate that.

So, substantively, yes, but not quite under the provision that you applied under. Not your fault.

MR HUNT: Yes. Well, thank you very much for that indication, Commissioner, and I believe that that is an imminently reasonable approach with which we are quite happy.

1 COMMISSIONER HICKINBOTTOM: Good. Thank you very  
2 much.

3 Mr Rawat.

4 MR RAWAT: Thank you, Commissioner.

5 Can I, before I begin, just for the record just  
6 record the representation that's in the room this  
7 afternoon.

8 COMMISSIONER HICKINBOTTOM: Yes.

9 MR RAWAT: We have as we had this morning, the  
10 Solicitor General, Jo-Ann Williams-Roberts, who is here on  
11 behalf of the Attorney General and the elected Minister,  
12 and that is together with Lauren Peaty of Withers BVI.

13 As you've indicated, Mr Paul B. Dennis QC is here  
14 on behalf of Dr Orlando Smith who is going to be our next  
15 witness. There is no representation either in person or  
16 remotely from Silk Legal who represent a number of Members  
17 of the House of Assembly.

18 COMMISSIONER HICKINBOTTOM: Yes. Thank you.

19 MR RAWAT: Our next witness is Dr Daniel Orlando  
20 Smith. Dr Smith has previously given evidence to you,  
21 Commissioner, so there is no need for him to be sworn  
22 again.

23 COMMISSIONER HICKINBOTTOM: Thank you very much.

24 DR. DANIEL O SMITH, COMMISSION WITNESS, RESUMED

25 BY MR RAWAT:

1 Q. Dr Smith, thank you for returning to give  
2 evidence to the Commission. I won't go through the,  
3 perhaps, long Preamble that I did on the last occasion with  
4 witnesses, but save to say that there are a number of  
5 bundles that you'll see in front of you on the desk. We  
6 wouldn't need to go through every single page, but I will  
7 take you to one or two documents if I may as we go through  
8 your evidence.

9 A. Thank you.

10 Q. Can I also ask, as I do every witness, please do  
11 remember to keep your voice up and to speak slowly. The  
12 microphone that you'll see in front of you will record your  
13 voice but it won't amplify it, so it's very important that  
14 everyone hears what you have to say and that your answers  
15 are recorded accurately.

16 Could I take you--you should have a bundle that's  
17 labeled Part 2 there. It's one of the bigger Lever Arch  
18 files. On the side it should be labeled Part 2.

19 COMMISSIONER HICKINBOTTOM: I think it's one of  
20 these here.

21 BY MR RAWAT:

22 Q. It's one of the bigger ones.

23 COMMISSIONER HICKINBOTTOM: It's one of those.

24 BY MR RAWAT:

25 Q. And if you're at that, the first page should be

1 517, which is in the bottom right-hand corner.

2 If you go through, please, to page 817. If I've  
3 taken you to the right page, Dr Smith, you should have the  
4 Auditor General's report on the government's financing of  
5 BVI Airways direct flights to Miami.

6 A. That's correct.

7 Q. And that's what I'd like to ask you some  
8 questions about this afternoon.

9 If--I appreciate that this is going to be a  
10 subject with which you're familiar, and so hopefully I  
11 won't have to read out chunks of this Report to you. I'm  
12 sure it's a report that you're also aware of.

13 A. I am.

14 Q. From when it was issued. But if you do need me  
15 to take you to any part of it to assist your memory, please  
16 do ask me.

17 A. Thank you.

18 Q. We have just gone through with the Auditor  
19 General the detail of this report, and in her Report she  
20 sets out the background which really led to the BVI  
21 Government entering into a Framework Agreement ultimately  
22 with BVI Airways, and the first event that the Auditor  
23 General's Report points to is, in November 2013, Lester  
24 Hyman, who was the BVI's U.S. legal counsel and lobbyist  
25 had been in that role for some 26 years, introduced Bruce

1 Bradley, who was a prospective investor and realtor to you.  
2 Prior to that meeting, had you had any contact with  
3 Mr Bradley at all?

4 A. No, I had no contact with Mr Bradley before that.

5 Q. A point that the Auditor General makes is that  
6 this was a sort of unsolicited and unplanned approach. Is  
7 that your recollection of what happened?

8 A. Mr Hyman was a legal representative, a lawyer in  
9 the United States. I was aware that we were interested in  
10 improving our airlift situation, particularly to Miami, so  
11 I think he was on the lookout for any opportunity that he  
12 thought would interest the BVI Government.

13 Q. I see.

14 And did Mr Hyman eventually, was he eventually an  
15 investor in BVI Airways?

16 A. Not that I--no.

17 Q. So, he merely facilitated the introduction?

18 A. Yes.

19 Q. That introduction and meeting ultimately led, and  
20 you can see that at page 824, if you need reminding,  
21 Dr Smith, it led to a Memorandum of Understanding in  
22 June 2014 between the BVI Government of which you were then  
23 Premier and Bruce Bradley, specifically with Bruce  
24 Bradley's company Castleton Holdings. I will let you go to  
25 the page if you want, it's 824.

1           A.     824.

2           Q.     The Memorandum of Understanding stipulates that  
3     Castleton would undertake certain steps and that the  
4     Government had certain obligations under the Memorandum of  
5     Understanding.

6                     One of the steps that was required was Castleton  
7     to commission a Feasibility Study, and that was done by  
8     Sixel Consulting Group, and there was also the  
9     commissioning of a pavement condition study concerning the  
10    runway at the airport here in the Virgin Islands.

11                    The cost of both studies is recorded as being  
12    shared equally by the Government and by Castleton?

13           A.     That's correct.

14           Q.     Now, one of the points that the Auditor General  
15    has made or I suppose one of the questions she's raised,  
16    was the fact that these studies were jointly financed. Why  
17    was that considered a better option for the Government than  
18    commissioning your own independent studies?

19           A.     It was decided that we needed a study to be able  
20    to identify that this project was feasible, and this study  
21    would benefit both the Mr Bradley and the Government, and  
22    this is why we decided to do it as a joint study. We both  
23    paid for the study.

24                    If I go back a little bit, if I may, to the first  
25    question. When we were first approached by Mr Bradley with

1 Mr Hyman, one of the reasons why we were interested is  
2 because at that time, as Minister of Finance and Minister  
3 of Economic Development, I was very concerned about the  
4 economic development of the BVI as far as the Financial  
5 Services and toward this concern. As you probably recall,  
6 financial services had been under quite severe strictures  
7 over the past number of years, and--I mean, we knew that we  
8 had to concentrate more on developing our tourism product.

9 In order to develop the tourism product, we long  
10 thought with our country was rare, that a direct flight  
11 from Miami to the BVI was important; hence, we got into  
12 this.

13 We had advertisement the flights before that  
14 flight which came via St. Thomas via Puerto Rico via St.  
15 Maarten, but they all entailed delays and inconvenienced  
16 passengers who could easily stop off in St. Thomas or St.  
17 Maarten or Puerto Rico, without having to come all the way  
18 to Tortola, and so we were convinced that this would help  
19 develop the economy of the BVI along with other things such  
20 as getting more hospitality establishments and so--

21 Q. You say, Dr Smith, that this had been a long-held  
22 view?

23 A. Yes.

24 Q. Your view or view of other Members of the  
25 Cabinet--



1 A. Other Members of the Cabinet, yes.

2 Q. Prior to this approach in November 2013--and you  
3 told the Commissioner that Mr Hyman was aware that this was  
4 something that the Government was considering, but prior to  
5 that approach, had the Government taken any steps itself to  
6 investigation the feasibility of this option?

7 A. We had had before a relationship with American  
8 Airlines between Puerto Rico and St. Thomas, which we give  
9 them--guarantee the seats et cetera. But after some time  
10 the American Airlines pulled out of the Territory, and  
11 there was no appetite for them to get back in from Puerto  
12 Rico or Tortola or even from Miami to Tortola. American  
13 Airlines was the main airline in the Caribbean in those  
14 days.

15 Q. But had you, for example, approached any other  
16 established airlines to see if there was interest in them  
17 putting in place a flight from BVI to Miami?

18 A. I personally had not. I think Mr Hyman was on  
19 the lookout for such an opportunity for us.

20 Q. Mr Hyman acted for the BVI Government for 26  
21 years.

22 A. That's correct.

23 Q. So, I think if my math is right, from taking you  
24 back to the time when you gave evidence to the Register of  
25 Interests, you had been acting for the BVI Government even

1 before you came into politics?

2 A. That's correct.

3 Q. What was the nature of your relationship with  
4 Mr Hyman?

5 A. I met him after he came to the BVI, and we became  
6 acquaintances, so--and we'd often--we had breakfast  
7 together sometimes or visit his home for functions just as  
8 what occurred with any other person in the BVI.

9 Q. Would you--was he more than an acquaintance?  
10 Would you describe him as a friend?

11 A. A friend, yes.

12 Q. So, did you develop, in your time as Premier and  
13 Minister of Finance, had you developed a personal  
14 relationship with Mr Hyman?

15 A. He was a friend. I would not say a very close  
16 personal relationship, no, I don't do that.

17 Q. If you look at 827, the next step in the sequence  
18 of events taking it shortly, was that after the Memorandum  
19 of Understanding and the obtaining of the Sixel Consulting  
20 report, ultimately, on the 14th of December 2014, you, as  
21 Premier, rejected the proposal--and this is at  
22 paragraph 32, if you want to look at it, sir--what the  
23 Auditor General records was that you rejected the proposal  
24 to become involved in the venture citing concerns about  
25 cost commitment and skepticism with the growth assumptions

1 put forth in the proposal. Now, that seems to be the  
2 proposal in the Sixel Consulting report.

3 Can you assist the Commissioner further with just  
4 what particular concerns did you have as of December 2014?

5 A. We were concerned that the costs to the  
6 Government was too high. What we were entering into was an  
7 arrangement which most Caribbean countries have with  
8 airlines--that is, they receive guarantees. So with that  
9 similar kind of arrangement that we went into, we were  
10 concerned that the cost for the Government was too high.

11 We also had further--a company BDO to do an  
12 assessment of that project for us, and they also agreed  
13 that the cost was too high.

14 Q. I see.

15 A. They gave that Report--and the final decision not  
16 to continue into the relationship at that particular point  
17 had been in January 2015.

18 Q. Can I come back to that in a moment, the BDO  
19 Report, but what I wanted to draw your attention to is  
20 paragraph 34 of the Auditor General's Report because, after  
21 you as Premier had rejected the proposal, the Auditor  
22 General records that you were contacted by Lester Hyman in  
23 an emotive missive which sought to arrange an urgent  
24 meeting in January 2015. The Auditor General's evidence  
25 today--I think, bringing it together--was that at times the

1 correspondence that the BVI Government and yourself as the  
2 Premier of the BVI Government received from what she calls  
3 in her Report the operator parties, those running BVI  
4 Airways was emotive; that it crossed the line and that its  
5 tone wasn't appropriate at times.

6 Did you consider that, and we are talking  
7 obviously of a process that spanned years. Did you  
8 consider that the correspondence to you was emotive?

9 A. On occasion, yes. My responses about it being  
10 calm.

11 Q. But did you see that as an attempt to take  
12 advantage of a personal relationship?

13 A. Not necessarily.

14 When Mr Hyman spoke with me or wrote, he was very  
15 far into the development of the service which he thought  
16 was key toward the continuing development of his project in  
17 the BVI. That was my understanding. And this would be  
18 naturally very supportive of that. That was my  
19 understanding at that time.

20 Q. Stepping back from this, this project spanned  
21 2013 through to 2017 when it came to an end. We are now in  
22 2021.

23 I mean, who was Mr Hyman acting for ultimately?  
24 Do you think that he was acting in the interests of the BVI  
25 Government or do you think he was acting in the interest of

1 those who invested in BVI Airways?

2 A. Could I ask a question before I continue?

3 COMMISSIONER HICKINBOTTOM: Yes.

4 THE WITNESS: There was a representative from  
5 Martin Kenney & Company.

6 COMMISSIONER HICKINBOTTOM: He's here.

7 MR RAWAT: He's here.

8 THE WITNESS: Okay. Good. Fine.

9 Initially, during the course of the discussion,  
10 he was always represented himself as Government's legal  
11 representative. It was after all that had been over and we  
12 engaged Martin Kenney & Company that we recognized that  
13 there was some conflict.

14 BY MR RAWAT:

15 Q. Prior to that, prior to the engagement of Martin  
16 Kenney & Company, had it occurred to you, as Premier, that  
17 there might be a conflict?

18 A. No, there did not seem to be a conflict. I think  
19 he was--my impression that he was concerned that they were  
20 obligating the airlift that was necessary for the  
21 Territory.

22 Q. You've mentioned already, Dr Smith, the BDO  
23 Report, and it's mentioned at paragraph 35, so BDO, a local  
24 accounting firm, engaged in January 2015 to carry out a  
25 financial analysis of the proposal, of the merits of the

1 proposal, and I think if you turn to page 839, the Auditor  
2 General helpfully summarises the points made in the BDO  
3 Report as follows: The "that 20 percent Interest Rate  
4 contemplated under the MOU is far too aggressive given the  
5 lack of risk borne by Castleton," and "BDO recommended an  
6 Interest Rate between 5 percent and 8 percent." The  
7 reference to 20 percent was in relation to financial  
8 support being given by the BVI Government.

9 The second point that the Auditor General draws  
10 from the BDO Report was that Government should not proceed  
11 unless Interline Agreements are completed.

12 The third is that the Government would be taking  
13 on a significant liability risk by signing a revenue  
14 guarantee contract with parties that apparently lacked  
15 relevant operational experience.

16 And last, the age of the aircraft would likely  
17 lead to greater maintenance costs, more modern aircraft  
18 should be considered, even though they would be more  
19 expensive to lease.

20 Now, I think what can be said about BDO's advice,  
21 it was not as optimistic as Sixel's advice had been. And  
22 in fact, it was quite the opposite, wasn't it?

23 A. Correct, yes.

24 Q. Now, did it give you pause for thought?

25 A. It was partly--largely as a result of that advice

1 by BDO that we stopped the project. That was what I  
2 called--what I termed in 2014 project, that was when we  
3 asked BDO to come in and review that proposal.

4 Q. And so what then happened was that there was  
5 further discussion nonetheless, and on the 26th of  
6 August 2015, the BVI Government and operator parties  
7 arrived at what the Auditor General says was a basic  
8 position for an agreement. And there was a meeting in  
9 August 2015, which then led to a decision paper being  
10 submitted to Cabinet.

11 A. Okay. Let me--thank you. Let me just--

12 Q. Please.

13 A. --emphasize that there were two different  
14 agreements that we would be pursuing in 2014 ended with  
15 the--after the BDO Report, the Report was on that  
16 agreement, and that agreement which we terminated that.

17 And after that in the following year, in August I  
18 think, that's when we had a new proposal, a different  
19 proposal, from the operator parties.

20 Q. And was that again a proposal facilitated by  
21 Mr Hyman?

22 A. Yes.

23 Q. The decision--well, the Cabinet gave approval  
24 to--at a meeting on the 25th of September to a number of  
25 conditions that had been set out in the Position Paper?

1 A. That's correct.

2 Q. And I won't read them all out, but they are  
3 listed if you need them in the Auditor General's Report but  
4 one of the points she makes is that the BDO Report was not  
5 included amongst the papers presented to Cabinet. Can you  
6 explain why that wasn't done?

7 A. The BDO Report was not on the project that we  
8 presented to Cabinet. The BDO Report was on the 2014  
9 project which we discontinued.

10 Q. Well, if we--you've got two projects, your 2014  
11 project and now a 2015 project?

12 A. Correct, yes.

13 Q. Can you tell the Commissioner, what were the  
14 substantial differences between the two projects?

15 A. In the 2014 project, we were subsidizing having a  
16 seat, essentially, on an ongoing basis. In the 2015  
17 project, we were--the Government had decided that our  
18 contribution would be no more than \$7 million. In the 2014  
19 project would have been up to \$10 million, and we decided  
20 to scrap that and go with a different arrangement, and the  
21 Government's contribution would be put in earlier and not  
22 on an annual basis, depending on the seat arrangements.

23 Q. I see.

24 So, in terms of taking that proposal to Cabinet--

25 A. Yes.



1 Q. --you couldn't rely on your evidence on the BDO  
2 Report because that related to a different proposal.

3 What independent advice had you taken at that  
4 time?

5 A. The advice we considered, the Report, the BDO  
6 Report, when we were looking at the new arrangement.

7 For example, that is one reason why we decided  
8 that the amount of government intervention must be capped  
9 at \$7 million, whereas in the former arrangement it was up  
10 to \$10 million, so there were aspects of the BDO Report  
11 which informed us or to negotiate about the other one in  
12 the 2015 project.

13 Q. But you didn't then get anybody else to come in,  
14 a consultant or anything to say, well, this is our proposal  
15 because the proposal you put to Cabinet, as I understand  
16 it, was a proposal that had been developed following  
17 further meetings--

18 A. That's correct.

19 Q. --between yourselves and the operator parties.  
20 And who conducted those meetings from the BVI Government  
21 side?

22 A. They were--the persons at the meeting were three:  
23 There was the Financial Secretary; there was the head of  
24 the Tourism Board; and there was another individual from  
25 the Airport Authority.

1 Q. And were you, yourself, involved in those  
2 meetings?

3 A. I was not at the meeting, no.

4 Q. So, it was sort of a delegation from the BVI  
5 Government that took it forward?

6 A. Correct, yes.

7 Q. But what you didn't get was--if you like, came to  
8 an agreement with the operator parties, a new agreement,  
9 the 2015 proposal which you took to Cabinet?

10 A. Correct, yes.

11 Q. But you didn't get an independent expert to come  
12 in and say well, this is what we propose to Cabinet, tell  
13 us whether it's a viable option or not. You didn't ask  
14 that question?

15 A. We did not get an independent expert for several  
16 reasons: First of all, we did have the BDO Report, which  
17 referred to the flight between Miami and BVI, and it would  
18 have had references which would have been useful in the  
19 other report, which we used. That's why, like I said  
20 before, we decided to cap our investment by 7 million as  
21 opposed to 10 which was in the 2014 project.

22 And rather than the person from the Tourist  
23 Board, he was well-versed in matters of tourism, and there  
24 was a gentleman from the Airport Authority who was  
25 well-versed in the operations of the Airport Authority.

1           COMMISSIONER HICKINBOTTOM: Dr Smith, although I  
2 understand that, in 2015, the maximum exposure of the  
3 Government was reduced from \$10 million to \$7 million.

4           THE WITNESS: Yes.

5           COMMISSIONER HICKINBOTTOM: Because the revenue  
6 stream was taken away. I understand that, and that's  
7 obviously to the advantage of the BVI Government. But in  
8 terms of the other points raised by BDO, which are referred  
9 to in this Report, because this Report refers to that  
10 account in 2015. The Interest Rate it referred to being  
11 20 percent, which was far too aggressive, it said, that  
12 Interline Agreements must be completed, it said; age of the  
13 aircraft would lead to greater maintenance costs, it says;  
14 and the Parties with whom you were contracting apparently  
15 lacked relevant operational experience.

16           But all of those points were part of the 2015  
17 agreement?

18           THE WITNESS: I can address those right now.

19           First of all, let's take the Interline Agreement.  
20 We had many discussions on the Interline Agreement with  
21 previous airlines, but what we understood is that you  
22 cannot have an Interline Agreement until you're flying, so  
23 once the airline got off the ground, then we would be able  
24 to negotiate to get Interline Agreements with other  
25 airlines.

1           COMMISSIONER HICKINBOTTOM: So, the BDO  
2 point--the BDO point, as it's set out in this Report, is  
3 that you shouldn't proceed unless they have been completed,  
4 so you accepted that Interline Agreements were necessary,  
5 but you consider that they couldn't be put in place until  
6 the main agreement was up and running.

7           THE WITNESS: Until the planes are flying, that's  
8 correct.

9           COMMISSIONER HICKINBOTTOM: Yes.

10          THE WITNESS: And could you remind me of the  
11 other point?

12          COMMISSIONER HICKINBOTTOM: Certainly. The  
13 Interest Rate of 20 percent.

14          THE WITNESS: Oh, that was changed with the new--

15          COMMISSIONER HICKINBOTTOM: That was changed with  
16 the new agreement?

17          THE WITNESS: Yes.

18          COMMISSIONER HICKINBOTTOM: The other apparently  
19 lacked relevant operation experience.

20          THE WITNESS: Yes. Let me answer that. There  
21 was three people involved. There was Mr Bradley and Mr --

22          BY MR RAWAT:

23          Q. Willoughby. Is Willoughby another one?

24          A. And Weisman.

25          Q. Willoughby?

1           A.     Mr Bradley and Mr Weisman. They were two  
2 successful businesspeople. Mr Weisman was a banker and an  
3 investment manager person, and Mr. Bradley was a serious  
4 investment--serious investments going with him, and very  
5 successful. So they had the acumen for--the business  
6 acumen, to be able to do this. Mr. Willoughby, he was a  
7 pilot. He was in the--he retired from the U.S. Air Force  
8 as a general, and he was also an instructor with the U.S.  
9 Air Force, so he had knowledge about the winds and  
10 management and so forth, and also brought in with them a  
11 senior pilot who could assist with the operations.

12                   COMMISSIONER HICKINBOTTOM: Thank you.

13                   BY MR RAWAT:

14           Q.     But to go back to the Interline Agreement, that  
15 seems to have been one of the conditions that Cabinet put  
16 on the agreement because what the Auditor General's Report  
17 records is that the agreement would be contingent on the  
18 completion of Interline Agreements with major air carriers  
19 operating via Miami International Airport, and so it seemed  
20 to be that although you said that your understanding was  
21 that these could not be put in place until flights had  
22 commenced, Cabinets' position seemed to be that, unless you  
23 had Interline Agreements--and this is at page 828--unless  
24 you had Interline Agreements in place, the agreement could  
25 not proceed?

1           A.     After we explored the reality of Interline  
2 Agreements, our Cabinet colleague--our Cabinet--my Cabinet  
3 colleagues understood the situation.

4           Q.     But did the Framework Agreement ever come back to  
5 Cabinet for reappraisal?

6           A.     No, not that I have knowledge.

7           Q.     From that point.

8                     One of the other points that's made was that  
9 Cabinet was told that Castleton, which was Bruce Bradley's  
10 company, would be investing \$6 million into the venture.  
11 Does that accord with your recollection? Were you told  
12 that as well?

13          A.     Yes.

14          Q.     Was that commitment ever obtained in writing?

15          A.     No. That commitment was not obtained in writing.

16          Q.     And it didn't form part of the Framework  
17 Agreement ultimately, did it?

18          A.     No, but the Financial Secretary, the Ministry of  
19 Finance, they do diligence on the individuals involved and  
20 determined that they were, well, you know, satisfactory in  
21 order to carry out this enterprise.

22                     While we were arranging with the operator parties  
23 was a service, and this is what the Premier spoke about.  
24 We were getting the service from them, that is flights  
25 between Miami and BVI, we're contributing a certain amount,

1 up to \$7 million, to this service.

2 Q. I suppose that the ultimate problem was the  
3 Government got to contribute 7 million but it never got the  
4 service?

5 A. Well, we didn't get to that, yeah.

6 Q. What Cabinet also required in terms of the  
7 agreement that it approved was that the financial model  
8 would be vigorously scrutinized by the Ministry of Finance  
9 and consultants to verify the anticipated payouts by the  
10 Government. Now, according to the Auditor General's  
11 Report, that requirement was disregarded by the Government.  
12 Can you explain why that didn't happen?

13 A. We had an agreement with--in the framework after  
14 the Cabinet passed, we had an agreement to give certain  
15 amounts of money at certain times, which was determined by  
16 Cabinet, and this is what we were being guided with when we  
17 started the operations.

18 Q. But aside from the agreement--and that's an  
19 agreement to pay 7 million in specific installments, isn't  
20 it?

21 A. Yes, the agreement to pay that, and the agreement  
22 on their side was to provide a service between BVI and  
23 Miami.

24 Q. But what Cabinet had asked for was that the  
25 financial model be scrutinized by the Ministry of Finance,

1 so what I take from that was that the Ministry of Finance  
2 would undertake an assessment of the financial position of  
3 BVI Airways, the financial position of the Investors, the  
4 financial viability of the project.

5 And what the Auditor General's report effectively  
6 says is that that scrutiny did not happen in this case, and  
7 my question, Dr Smith, is just why didn't it happen?

8 A. What I can tell you is that the Ministry of  
9 Finance did do a search on the operator parties to  
10 determine their financial capacity to undertake this  
11 operation, and they were satisfied that they could.

12 Q. You were Minister of finance at that point.

13 A. Yes.

14 Q. That's your Ministry undertaking as served?

15 A. That's correct.

16 Q. Were you satisfied about the extent of the due  
17 diligence that was done?

18 A. I was satisfied with that. My Financial  
19 Secretary informed me.

20 Q. Did your Financial Secretary, which is Neal Smith  
21 at that time?

22 A. Yes.

23 Q. Did he take the results of that scrutiny to  
24 Cabinet?

25 A. No. That was not taken to Cabinet. There was no



1 requirement to take it back to Cabinet. Cabinet gave the  
2 Ministry, the Premier an agreement to go forward and  
3 develop with the airline, and so that is what we were  
4 doing.

5 Q. So, who was going to assess or decide that the  
6 degree of scrutiny undertaken by the Ministry of Finance  
7 was sufficient?

8 A. The Ministry of Finance, in all previous  
9 arrangements, of any business arrangements, they always  
10 carried out the due diligence in these matters.

11 Q. But what we're talking about, Mr Smith--I'm  
12 sorry, I will let you finish.

13 A. It depends on the--on what you're--maybe what  
14 you're progressing. In this case, we were actually having  
15 the service and providing a seat guaranteed ahead of the  
16 flights, and it was they determined that the persons  
17 involved had the capacity, the financial capacity, to be  
18 able to support that.

19 Q. So, just so that we can understand your  
20 evidence--and this is you as Minister of Finance--you were  
21 satisfied from what you were told by your Financial  
22 Secretary that this was a justified use of \$7 million of  
23 public money?

24 A. Yes.

25 Q. You were satisfied, from your Financial

1 Secretary, that the individuals who were the operator  
2 parties, which is Mr Bradley and Mr Willoughby and  
3 Mr Weisman, were capable of running an airline that would  
4 fly people from the BVI to Miami and back?

5 A. I was, yes.

6 Q. And you were satisfied that those individuals had  
7 the financial viability themselves to invest in an airline?

8 A. I was satisfied.

9 Q. But did you see documents? Was it just--were you  
10 just told "we've done the check, we've done our due  
11 diligence, it's all okay," or did you say "well, show me  
12 the report, show me some evidence"?

13 A. No, I didn't say "show me the evidence." My  
14 Financial Secretary, he did the work as he would have done  
15 in most other cases like this.

16 Q. One of the other conditions that or the terms  
17 that Cabinet approved was that the Attorney General's  
18 Chambers would vet the agreement prior to it being signed,  
19 and a point--and if I can take you to it, but it's at  
20 paragraph 100 of her--page 838, please, Dr Smith. The  
21 Auditor General records that, "throughout the  
22 venture"--this is at paragraph 100--"there were periodic  
23 objections from the Attorney General who vetted the legal  
24 documents, all of which originated from the operating  
25 parties, and the Accountant General who was tasked with

1 making the payments. Significantly, several of the  
2 amendments made to the draft agreements by the Attorney  
3 General that were intended to protect Government's  
4 interests and import balance and certainty into the  
5 agreement were reversed by the operator parties and  
6 subsequently not adopted."

7           Were you aware that the Attorney General was  
8 raising concerns about the Agreements?

9           A. I was aware the Attorney General made comments,  
10 and they were discussed, and a position was arrived at,  
11 which we went forward with.

12           Q. The conclusion of the Auditor General is that  
13 significant amendments, the Attorney General's advice  
14 should be made to the draft agreement were not implemented.  
15 Why was that the case?

16           A. Many of the company recommendations that he made  
17 were adopted, some were not, because there was continued  
18 discussion between myself and the Ministry and Mr Hyman,  
19 the other Attorney involved, and we saw that they wanted to  
20 adopt it for the ones that we should adopt.

21           Q. And so you were satisfied that these agreements,  
22 both as Minister of Finance and Premier, that these  
23 agreements were appropriate for the BVI Government to enter  
24 into?

25           A. I was satisfied at that time, yes.

1 Q. Were you not concerned with 2015 that the  
2 Government was entering into a position where it was  
3 carrying the risks whilst the operator parties were going  
4 to enjoy the profit?

5 A. What we were--as I said before, what we were  
6 doing is negotiating for a service between the BVI and  
7 Miami, and we were giving a seat guarantee, which was put  
8 at the front of this whole Agreement. And so, once we got  
9 the service that we wanted, the costs would have been  
10 justified.

11 Q. And the services you wanted was just someone to  
12 fly people from Miami to the BVI?

13 A. The service we wanted was an operation, to fly  
14 people between Miami and BVI.

15 Q. Do you consider now that the BVI Government did  
16 go into this transaction with full awareness of the risks?

17 A. We did go into it with all the considerations  
18 that we were just discussing.

19 Q. It is a significant amount of public money. I  
20 take your evidence, Dr Smith, about the fact that this was  
21 an issue, especially after American Airlines pulled out,  
22 that the Government wanted to address.

23 A. Um-hmm.

24 Q. But if you wanted to put such a scheme in place,  
25 if you wanted to have flights, direct flights, operating

1 into the BVI from Miami, why did you not seek competitive  
2 submissions? Why not put it out to tender and see what you  
3 could get rather than entering into an arrangement with  
4 three investors that was negotiated, it seemed, by a  
5 long-standing lobbyist and lawyer to the BVI Government?

6 A. When we considered the options--as I said to you,  
7 the American Airlines which flew to BVI from Puerto Rico,  
8 discontinued their engagement, and there were no other  
9 airlines who were flying in that arena at the time. There  
10 were two local airlines in the BVI, but they were not  
11 expanding at that point to be able to satisfy those needs.

12 Q. But with respect--it may be me in the way I've  
13 put the question, but if you wanted to get an airline to  
14 consider this proposal, why not go and--go to the market  
15 and see if there was interest? What seems to have happened  
16 in this case is that Mr Hyman approached you in 2013, and  
17 the discussions then continued.

18 A. Um-hmm.

19 Q. And the Government at no point stepped out of  
20 those discussions and said, "let's go and talk to somebody  
21 else and see if they can do us a better deal." That was  
22 the position, wasn't it?

23 A. That is true, but as I said earlier, Mr Hyman was  
24 essentially also interested in having us be there at their  
25 service, not necessarily from the operator party that we

1 engaged with but before that, and we followed this lead and  
2 went with these operator parties.

3 As we said, we could have negotiated with  
4 American Airlines or some other airline, but American  
5 Airlines actually pulled out of that area and weren't  
6 interested, and they were the main carrier.

7 Q. But what you--I mean, other than American  
8 Airlines, is your evidence that there were no other  
9 established airlines that the Government could have spoken  
10 to about taking this route on?

11 A. We could have spoken to Liat, for example, but  
12 given the way Liat was operating, either they were not  
13 interested at that time flying between Miami and BVI.

14 We had earlier, about maybe two years before, we  
15 had discussion with another company group, but we did  
16 not--we weren't satisfied with that discussion.

17 Q. But once you were, so we can understand it, once  
18 from 2013 when that first approach was made by Mr Hyman,  
19 the Government did not at any point after that go and speak  
20 to any other airlines about taking over the route?

21 A. Not after that, no.

22 Q. Nor did the Government say, "well, here we are.  
23 We have three men who've appeared on the horizon and want  
24 to do this route. Let's go and see if there's anybody else  
25 who also wants to take it on"?

1           A.    At that point, we did not.

2           Q.    But basically up until July 2017, when it shut  
3 down, you hadn't had any discussions with anybody else, had  
4 you?

5           A.    No.  We continued the engagement with this group.

6           Q.    And the point is, isn't it, Dr Smith, I know  
7 we're all operating with hindsight, but from November 2013,  
8 although the terms changed, as you've explained, there was  
9 a 2014 agreement and a 2015 one, but throughout it all, the  
10 Government was negotiating and contracting with the same  
11 individuals?

12          A.    That is correct, yes.

13          Q.    And in between, the Government and those  
14 individuals was Lester Hyman?

15          A.    That is correct.

16          Q.    And you considered Mr Hyman to be acting on  
17 behalf of the BVI Government?

18          A.    That is correct.

19          Q.    But--and you did not see the potential conflict  
20 of interest that he was effectively not just acting on your  
21 behalf but he was a middle man at best between yourselves  
22 and the operator parties?

23          A.    No, we did not see the conflict at that time, no.

24                I will also--I could also point out to the fact  
25 that many years before, there was a gentleman, a Mr "Krix"

1 (phonetic) I believe that came down, a person who came to  
2 the BVI and built a hotel called "Prospect Reef," and he  
3 started an airline as well, and it was--he selected one of  
4 the local persons to manage it, and it performed very well  
5 until it went out of business many years later.

6 So, we have a history--a history of individuals  
7 engaging in starting services between--for the BVI between  
8 BVI and Puerto Rico and St. Thomas and other places.

9 Q. I fully accept that there is that history, and  
10 obviously, as you've explained, there is good reason why  
11 the Government giving tourism--the importance of tourism to  
12 the Territory would want a direct flight, but my questions  
13 are directed to how \$7 million of public money ended up  
14 going in one direction, and you didn't actually get the  
15 service that you contracted for because that was the  
16 outcome, wasn't it, Mr Smith?

17 A. That is true.

18 Q. Could I just take you, please, to paragraph 41,  
19 which you'll find on page 830.

20 A. Could you repeat it?

21 Q. 830, please, Dr Smith. What the Auditor  
22 General's Report does is it sets out the--and I will take  
23 you back to 828, please, at paragraph 14. What the Auditor  
24 General concludes is a Framework Agreement between the  
25 parties was signed on the 7th of December 2015 to commence



1 the project, and she then says: "This adopted the terms of  
2 the MOU, of the Memorandum of Understanding, and included,"  
3 and then she sets out a lot of detail. But the Memorandum  
4 of Understanding pre-dated the decision--the end of the  
5 2014 arrangement. So what appears to have happened is that  
6 there weren't just two discrete proposals. You didn't just  
7 have a 2014 and a 2015, but when you signed the Framework  
8 Agreement, imported into it were details from a Memorandum  
9 of Understanding that dated from the very beginning.

10 Do you see the point I'm making?

11 A. No. I think there was never--there was a  
12 separate Memorandum of Understanding. That Memorandum of  
13 Understanding related to 2014, that ended with 2014.

14 Q. If you look, please, at 40, in terms of timeline  
15 and termination provisions, one of the points that the  
16 Auditor General has made in her evidence this afternoon was  
17 to the reference to because it says "BVI Airways was to use  
18 its commercially reasonable efforts to launch an operator  
19 commercial air service by 31st of October 2016." And the  
20 Auditor General pointed to that phrase "commercially  
21 reasonable efforts" as one of those terms that the Attorney  
22 General sought to have taken out of the agreement because  
23 it didn't favor the Government's interests. Do you  
24 remember the Attorney General arguing against the use of  
25 "commercially reasonable efforts"?

1 A. There was a discussion about that point.

2 Q. And why did the Attorney General's advice not  
3 hold sway?

4 A. The Attorney General was giving advice, and we  
5 were listening--we were also receiving advice from our  
6 other Attorney who was representing BVI for many years.

7 Q. And who was that?

8 A. That was Mr Hyman.

9 And we were looking at advice from the persons  
10 operating the airport in BVI.

11 And when we considered the Investment in what the  
12 Government was investing, we saw no reason why they could  
13 not, and given the fact that they were going to put in,  
14 as--what did they say, 6 million, we saw no reason why they  
15 could not perform what we asked to perform and operate that  
16 site.

17 Q. The problem for the Government, however, was that  
18 the offer to put in 6 million didn't find its way into the  
19 Framework Agreement, did it?

20 A. Yes, because the offer to--the offer to inject  
21 6 million, that was on the operator party's part, to do  
22 what they had to do with the flights and the crew and all  
23 that. What was in the agreement was that what the  
24 Government was going to do to get a flight to the BVI which  
25 would, of course, involve having the proper airport

1 personnel and the pilot and the stewardesses and all that.

2 Q. If by looking at the Framework Agreement, the  
3 detail of which is in the Auditor's Report, it places  
4 obligations not just on the Government but also on BVI  
5 Airways. And that's the point the Auditor General makes,  
6 that there is an obligation on the BVI Government to get a  
7 Letter of Credit for 7 million.

8 A. That's true.

9 Q. And that's there. That's an obligation on the  
10 Government. There's an obligation on the Government to  
11 appoint a special liaison to ensure timely responses and  
12 resolution of issues, to facilitate approvals and provide  
13 assistance with the respect to facilities.

14 So, the Government has an obligation to reimburse  
15 BVI Airways for start-up costs and operating losses up to a  
16 total of 7 million, but also BVI Airways had an obligation  
17 to launch and operate a commercial service.

18 And the two points that I would welcome your  
19 assistance on are, firstly, a slight returning to it, but  
20 what was left in that Framework Agreement was against the  
21 Attorney General's advice, that the term "commercially  
22 reasonable efforts," and so BVI Airways did not have an  
23 absolute obligation to get an airline in place by the 31st  
24 of October. They just had to use best efforts, basically,  
25 Dr Smith.

1           A.    Commercially reasonable.  They had an obligation  
2 to do that based on the money that were being put in by the  
3 Government of the British Virgin Islands.

4           Q.    And what the Government didn't get back in this  
5 Framework Agreement in writing in the agreement was a  
6 commitment from the operator parties to put \$6 million into  
7 the venture.

8           A.    No, because as I said, we had an agreement that  
9 they would provide a flight between BVI and Miami.  They  
10 were supposed to do whatever had to be done to provide that  
11 flight and maintain it.  For example, they were supposed to  
12 get flight crews, they were supposed to get permission to  
13 fly from the United Kingdom Government, supposed to get  
14 permission to fly from the United States Government,  
15 they're supposed to maintain the aircraft and all the other  
16 things that they had to do.

17          Q.    If you look, please, at 829, under "Financing  
18 Provisions," what is said there is that:  "The Government  
19 to guarantee to BVI Airways an annual Return on Investment  
20 of at least 20 percent."

21                   Now, that's one of the points that was made in  
22 the BDO Report.  The BDO Report said the 20 percent  
23 Interest Rate contemplated under the Memorandum of  
24 Understanding was far too aggressive given the lack of risk  
25 and recommended an Interest Rate between 5 and 8 percent.

1 So, what you had was under the 2014 proposal that the  
2 Government had to guarantee an annual return of 20 percent.  
3 BDO said no, that's far too aggressive, far too much.

4 You paused, you stopped, you moved on to a new  
5 agreement, 2015, which you've been telling the Commissioner  
6 about, but in the ultimate document that frames that 2015  
7 Agreement which is the Framework Agreement, 20 percent is  
8 back in so, there is still risk there to the BVI  
9 Government, isn't there?

10 A. We always recognized that there was risk in  
11 starting an airlines and getting it going, but we also knew  
12 that we wanted to have this service which would help to  
13 improve the economy of the British Virgin Islands. The  
14 money that the Government was putting into the airlines on  
15 our analysis, it was sufficient to get that airline off the  
16 ground and get it started, and then they were to continue  
17 and do whatever was necessary, get all the flight crews and  
18 the everything else to make sure that we had a service.

19 Q. The point is one of--this is value for money?

20 A. I understand.

21 Q. Because it's not just about the BVI Government  
22 putting in 7 million to get them started and then expect  
23 them to keep it running. It's that what the Government  
24 agreed to do was to guarantee those operator parties, those  
25 investors in BVI Airways, who were not obliged under the

1 Framework Agreement to bring any of their own money into  
2 it. What the Government signed on the dotted line to do  
3 was to guarantee that they would get a return of at least  
4 20 percent?

5 COMMISSIONER HICKINBOTTOM: I mean, it's to do  
6 with risk, isn't it, Dr Smith? Everybody knows that  
7 setting up an airline is a risky business. And it's where  
8 the risks lie, and the thrust of the Report is that the  
9 risks lay all on the Government, not on the operators  
10 because the Government were putting in \$7 million, the  
11 Government were abating all of the airport authority fees  
12 et cetera, the Government were going to guarantee BVI  
13 Airways an annual return of at least 20 percent.

14 On the BVI Airways part, they were guaranteeing  
15 no money. They were not guaranteeing getting an aircraft  
16 off the ground. Their only obligation was to use  
17 commercial reasonable efforts to launch the air service,  
18 and it's the balance of risk.

19 THE WITNESS: Yes. But when we say "commercially  
20 reasonable efforts to launch a service," all these--the  
21 Government has put in, contributed to the ability for them  
22 to launch the service, so we expected that all that risk  
23 and all that had to provide the circumstance for them to be  
24 able to provide the flights that we asked.

25 COMMISSIONER HICKINBOTTOM: But that's an

1 aspiration, and I understand that, but in terms of risk,  
2 what risk did BVI Airways have? No money risk. They  
3 weren't putting any money in. They had no risk at all, and  
4 the Government had substantial risk because, as I've said,  
5 everyone knows that running an airline is a risky business.

6 THE WITNESS: Um-hmm. But if you were to  
7 consider the model that we were looking at to make sure  
8 that where all Caribbean countries engage by having seats--

9 COMMISSIONER HICKINBOTTOM: Guaranteed.

10 THE WITNESS: Guarantees. This is a situation  
11 where the Government has put up--our Government should be  
12 putting forward monies to get, you know, to have the  
13 service. And the monies that we were putting up here was  
14 taken--and it was essentially the guarantee to get the  
15 service.

16 COMMISSIONER HICKINBOTTOM: Yes, thank you.

17 BY MR RAWAT:

18 Q. Could I take you to about the monies that the  
19 Government put in, if I take you, please, to page 831, if  
20 you go to paragraph 44, what the Auditor General explains  
21 on this page is that, firstly, that under the Framework  
22 Agreement, the Government had to establish an irrevocable,  
23 transferable Letter of Credit for \$7 million by 19th of  
24 January 2016, and there is, and we see at the table that's  
25 at 47, a payment schedule by which sums would be paid. And

1 this was agreed by Cabinet, it seems.

2 A. Yes.

3 Q. The problem that arose for the Government was  
4 that it could not get the 7 million Letter of Credit.  
5 You're nodding, Dr Smith, but--

6 A. That's correct.

7 Q. --I need you to say "yes" or "no".

8 And then what happened was that the Government  
9 paid monies in advance of the payment scheduled, so it  
10 started paying moneys, and ultimately I think it paid  
11 7 million--\$5 million to BVI Airways, so it paid sums of  
12 money early to deal with the fact that there wasn't a  
13 Letter of Credit. What was then done was that an escrow  
14 account was set up so that the remaining 2 million would  
15 then sit in that escrow account for the benefit of BVI  
16 Airways, and then what then happened was that you went  
17 above the \$7 million cap and gave BVI Airways an extra  
18 \$200,000. And these seem to have been arrangements that  
19 were put in place to get around the difficulties around the  
20 Letter of Credit. Is that your recollection, Dr Smith?

21 A. The Letter of Credit, which was supposed to be  
22 had, was the financial instrument that would allow the  
23 operator parties to be able to say to a bank, we can borrow  
24 some money or to say to investors, we have this arrangement  
25 with BVI which is a solid arrangement and you're welcome to



1 come in and we can do that. So, that was what the Letter  
2 of Credit was for. But we had difficulty getting the  
3 Letter of Credit. It was impossible. It took a long time,  
4 but we were not able to get it.

5 And then because of that, we basically  
6 established an escrow account, and this was taken back to  
7 the Cabinet to approve the escrow account.

8 Now, because it wasn't a Letter of Credit, we  
9 essentially were placed in that escrow account monies which  
10 were for various times in that escrow account so that it  
11 could be withdrawn at the various times to support the  
12 venture.

13 Q. I see. What then happened, however, was that the  
14 Financial Secretary terminated the escrow arrangement and  
15 authorized the release of all the monies to BVI Airways,  
16 and what the Auditor General noted was that no  
17 authorization from Cabinet was obtained for this early  
18 release.

19 Were you aware that no authority had been  
20 obtained from Cabinet to release the sums?

21 A. When we went to Cabinet to establish the Letter  
22 of Credit, and that didn't happen, then we went back to the  
23 Cabinet to establish the escrow account to be able to put  
24 monies into the escrow account, and there was some banking  
25 charges and everything, which as credit \$200,000 came in

1 without establishing that escrow account, as I understand  
2 it.

3           The escrow account was dissolved when it was  
4 necessary to provide the rest of the monies so that the  
5 operations could continue.

6           Q.    But were you aware that no authorization had been  
7 obtained from Cabinet to dissolve the escrow account?

8           A.    Yes, I was.

9           Q.    Did you sanction that?

10          A.    What I--what I did do was sanction the giving  
11 advancing of the funds to the airline, especially the  
12 2 million at that point. We were looking at where we were  
13 with the establishment of the airline service. They were  
14 quite a long way into getting that service up, and that is  
15 they had obtained the planes, they had obtained the crews,  
16 they had obtained the arrangements at the BVI Airport, and  
17 they were well on their way to obtaining the permissions to  
18 fly from UK Government, and had started with the U.S.

19 Government. So, when we looked at where we were, we  
20 thought okay, then we should be able to advance the last  
21 \$2 million, and then we would expect the flights to be up  
22 and running by the time that they were supposed to be.

23          Q.    And so, did you authorize the Financial Secretary  
24 to release those funds?

25          A.    I did authorize the Financial Secretary to

1 release those \$2 million, yes.

2 Q. And you did that knowing that authorization from  
3 Cabinet was required?

4 A. I did that on the basis that we were at the point  
5 where we were virtually ready--almost ready to take off,  
6 and we thought that it would be right to get the flight  
7 going.

8 Q. But as we understand it from the Auditor  
9 General's Report, taking that step requires Cabinet  
10 authorization?

11 A. Yes. We did not get Cabinet authorization at  
12 that time, but we did have discussions with Members. And  
13 later on we did-- that is, later on after it happened, we  
14 did take the paper--when we took the Cabinet paper  
15 to--about in joining Mr Hyman--not Mr Hyman, Mr Martin  
16 Kenney, then all of that was put into that Cabinet paper  
17 for retroactive assessment by the Government--in the  
18 Cabinet.

19 Q. By which time you had given all the money to BVI  
20 Airways and, in fact, BVI Airways had ground to a halt and  
21 ceased trading. That's when Martin Kenney got involved,  
22 wasn't it?

23 A. That was after they had gotten all the  
24 information to fly both from the United Kingdom and from  
25 the United States, and that's when they ground to a

1 halt--that is when after--that is when I continued to have  
2 discussions with them about financing because the  
3 Government--we were not at that point prepared to go back  
4 to the Government and terminate to give them any more  
5 monies. That was not in question at all.

6 Q. You presumably appreciated, however, that  
7 perhaps, contrary to the initial intent of the BVI  
8 Government, because the Framework Agreement provides that  
9 BVI Airways would use all commercially reasonable efforts  
10 to have flights operating by the 31st of October 2016. The  
11 original payment schedule for the 7 million envisaged that  
12 there would be payments from the BVI Government after  
13 flights had started, so the original payments scheduled  
14 envisaged that monies would be paid in November 2016,  
15 May 2017, and July 2017.

16 And, in fact, all the monies were paid across  
17 before the 31st of October 2016, and all the monies were  
18 paid across before a single flight had occurred. Did you  
19 appreciate that that occurred, that that was the position  
20 that the Government had found itself in?

21 A. All the monies, the last \$2 million was paid  
22 across before the flight happened. But after we could not  
23 get the Letter of Credit, we then extended the time before  
24 they were supposed to fly so that it would give enough time  
25 to have everything in place because of the time it took to

1 get the Letter of Credit sorted out.

2 Q. One of the points that the Auditor General makes  
3 in her report, Dr Smith, is that there was very limited  
4 financial information provided to the BVI Government about  
5 the viability of BVI Airways. BVI Airways was supposed to  
6 provide quarterly statements, quarterly Financial  
7 Statements, and these were never provided, according to the  
8 Auditor General.

9 Were you aware, as Minister of Finance, that no  
10 such statements were being submitted?

11 A. I was not initially aware, but then I became  
12 aware, and we asked for these statements, and there was a  
13 director, BVI Director on the Board, and he asked for those  
14 statements. We did receive some statement, but they were  
15 not complete.

16 Q. The Auditor General says one set of statements  
17 were received, which were--or what was received was  
18 unaudited and unsupported. But did you receive those  
19 statements after all of the 7 million had been paid across?

20 A. That was after, yes.

21 Q. And so, at the time that you paid 7 million  
22 across to BVI Airways, they were not complying with the  
23 Framework Agreement in giving you quarterly statements?

24 A. They were given statements. I cannot at this  
25 point remember if they were giving quarterly, what the

1 statements were like.

2 Q. According to the Auditor General, the one set of  
3 Financial Statements that were provided, were provided on  
4 the 22nd of May 2017, so that was after all of the monies  
5 had been paid across.

6 So, it would seem, wouldn't it, that at the time  
7 you paid 7 million across to BVI Airways, the Government  
8 had not been provided with any substantive financial  
9 evidence to show the financial health of BVI Airways?

10 A. There were some statements provided, not the  
11 details that we wanted but there were some statements  
12 provided.

13 Q. Can I move on to just a different topic, if I  
14 may, please, Dr Smith. You should have on the table in  
15 front of you, you should have a loose-leaf document which  
16 should be headed--it's Public Accounts Committee Final  
17 Report on the Cruise Ship Port Development.

18 If I can ask your assistance. This is about the  
19 Cruise Ship Port Development, which the Auditor General  
20 reported on in 2013. I think this is the 2014 Report.

21 Now, one part of this is, if I take you to  
22 page 9, I just want--firstly, a question of dates, but to  
23 set the scene for you, the evidence that the Commissioner  
24 has heard from the Auditor General explains that when there  
25 was the port development at Wickham's Cay, it was first of

1 all led by the Minister of Communications and Works, but  
2 there came a point--and this is why I have taken you to  
3 page 9, when the Ministry of Finance took over. Now, this  
4 was in August 2012. Were you Minister of Finance in  
5 August 2012?

6 A. I was.

7 Q. If I can just take you through this, what the  
8 Public Accounts Committee said was that the Committee  
9 examined the process through which the project was tendered  
10 by the Ministry of Finance after it was brought to a halt  
11 in August 2012, and the non-binding agreement with TPP  
12 terminated.

13 Now, that TPP is Tortola Port Partners.

14 A. Correct.

15 Q. And what the finding of the Public Accounts  
16 Committee is that the tendering process was lacking in  
17 transparency and fairness and was a further usurpation of  
18 the authority's role, the authority being the Port  
19 Authority who would have been responsible for the pier and  
20 for the land around it.

21 They identified two or three main areas of  
22 concern. The first was that the Ministry of Finance put  
23 out a--sought an Expression of Interest, and what the  
24 Committee said was "the length of time provided to  
25 tenderers to prepare this complex, high value long-term

1 project was insufficient to allow for adequate  
2 investigation, technical evaluation and preparation of the  
3 comprehensive submissions required for this project. The  
4 initial notice allowed for a two-week period ending on 16th  
5 August 2012. Two extensions were granted, first to 28th of  
6 August and then to 12th September 2012 for a total of six  
7 weeks but the time frame still fell short of that required  
8 for a project of this magnitude."

9           So, would you--was that, taking you back to your  
10 time as Minister of Finance, this was a criticism, it was a  
11 criticism flagged up by the Auditor General but also made  
12 by the Public Accounts Committee that, in effect, the  
13 Ministry of Finance gave too short a time window on this  
14 tender process. Was that a criticism that you accepted as  
15 Minister of Finance?

16           A. It was--I would say that at the time it was a bit  
17 short, but this process was--went on for a considerable  
18 time, and the persons involved, I think they both knew what  
19 was going on, and it was thought then by the Ministry that  
20 that would have been adequate time for them to make the  
21 presentations.

22           Q. Now, you say that the persons who were involved  
23 knew what was going on, which persons do you have in mind?

24           A. When I say persons involved, I mean this process  
25 had been going on for quite some time, and many



1 people--other companies--I can't remember the companies  
2 offhand--they knew what was going on, some of them had  
3 expressed interest, so it was about them getting ready over  
4 this period of time.

5 Q. The company--and this is at (b), it's the second  
6 criticism made by the Public Accounts Committee, the  
7 company that had been previously involved and up until then  
8 was Tortola Port Partners and only them. When the tender  
9 process was put out--and this is from the Auditor General  
10 today--the tender process was put out, there were three  
11 expressions, three responses to the expressions of  
12 interests, and then subsequently two submissions, one of  
13 which was from TPP as they are referred to here.

14 But what the criticism that the Public Accounts  
15 Committee makes is this: "The project requirements that  
16 were put to public tender and subsequently amended by the  
17 Financial Secretary, closely reassembled the project  
18 details that were previously submitted by TPP and accepted  
19 by the Government. Striking similarities were noted in the  
20 required design, the exit provisions and training  
21 requirements. The Committee found this to be suspect as it  
22 would put other potential tenders who entered the process  
23 at an immediate and severe disadvantage."

24 So, there are two things that are going on:  
25 Firstly, a short time window, and secondly, that the

1 requirements matched ones that had previously been put to  
2 Government by a single company.

3 Now, that's the criticism that I've outlined to  
4 you of the Public Accounts Committee. Was that a criticism  
5 that you accepted at the time as Minister of Finance?

6 A. The Ministry responsible for the operation of the  
7 ports, that was the kind of response that they wanted  
8 because they had a view of what they wanted to see the  
9 development look like.

10 Q. When you say the Ministry responsible, Dr Smith,  
11 which Ministry did you have in mind?

12 A. That was the Ministry of Communications. They  
13 had a view of what they wanted to see the development look  
14 like, and of course, there were in conversation and  
15 discussion with the ports as well. So he wanted to know  
16 what the seat looked like, and that would have been  
17 represented in the Expression of Interests which were then  
18 put out.

19 Q. The conclusion that one draws from those two  
20 criticisms is that this wasn't a fair tendering process  
21 because there was one company, TPP, that had an immediate  
22 advantage in making a submission under that tendering  
23 process.

24 Would you accept that criticism?

25 A. If it is--if it is so, that--no. Like I said,

1 the Ministry--the Ministry, the ports, they had a view of  
2 what they wanted to see. If Tortola--

3 Q. I think it's Tortola Port Partners?

4 A. Tortola Port Partners had put out something  
5 similar before. This does not deny the Minister and the  
6 Ministry and the ports what they wanted to see. They  
7 didn't have to say okay, because that company had put out  
8 this, it doesn't mean that we had to divert them because  
9 this is what we wanted.

10 Q. The last point that's made is that the team--if  
11 I, perhaps to give you some context, please, Dr Smith.  
12 What had happened at this stage by the time the Ministry of  
13 Finance got involved is firstly that this was the  
14 responsibility for the Port Authority, but it had been  
15 taken over by the Ministry of Communication and Works, and  
16 they had taken it to a point where they had accepted a  
17 proposal from TPP. That then stopped, the Ministry of  
18 Finance took over, and this is the stage at which we're  
19 talking of.

20 A. Yes.

21 Q. And so, if you look at (c), what had happened is  
22 that when the Ministry of Communication and Works were  
23 involved, they had used a consultant, and by the time we  
24 get to (c) and the Ministry of Finance being involved, that  
25 consultant is now the Managing Director of the BVI Ports

1 Authority, and what the Public Accounts Committee says at  
2 (c) is this: "The team assessing the tenders included the  
3 former consultant, now Managing Director, Mr Claude Skelton  
4 Cline, who had by that time already established a  
5 relationship with TPP and its principals, having been  
6 involved with this team and participated in the selection,  
7 promotion and facilitation of their submittal in the prior  
8 process. This created a prima facie conflict of interest  
9 with the individuals, whose motivation and decision-making  
10 could be compromised by the ongoing relationship."

11 So, you have three issues that arise when the  
12 Ministry of Finance take over and decide to put it out for  
13 Expressions of Interests. Firstly, too short a time  
14 window; secondly, requirements that give an advantage, an  
15 apparent advantage, to TPP; and third, a conflict of  
16 interest because one of those now involved in considering  
17 the proposals is a person who had previously had a  
18 relationship with TPP.

19 Now, those are three criticisms that I've  
20 summarised for you. You were Minister of Finance at the  
21 time. I suppose bringing it down to one thing: Were they  
22 criticisms that you accepted at the time as Minister of  
23 Finance?

24 A. When the matter was presented by the Ministry to  
25 the--and the Ministry of Finance put out the tenders and

1 received the tenders, what would have come back to myself  
2 and other Members of the Cabinet to make a decision, was  
3 the results of those tenders and the analysis of them by  
4 the Committee in the Ministry of Finance, and this is what  
5 we would have looked at.

6 MR RAWAT: Commissioner, may I have just a quick  
7 moment, please?

8 COMMISSIONER HICKINBOTTOM: Certainly.

9 MR RAWAT: Commissioner, I have no further  
10 questions for Dr Smith. Can I conclude by thanking him for  
11 returning to give evidence and also thanking him for the  
12 evidence that he's given today.

13 COMMISSIONER HICKINBOTTOM: Again, Dr Smith,  
14 thank you very much for coming. Thank you very much for  
15 your evidence.

16 THE WITNESS: Thank you.

17 COMMISSIONER HICKINBOTTOM: It's much  
18 appreciated.

19 (Witness steps down.)

20 MR RAWAT: If we could quickly rise for five  
21 minutes and then we'll get ready for the next witness.

22 COMMISSIONER HICKINBOTTOM: Certainly. Thank  
23 you.

24 (Recess.)

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Session 3

NEIL SMITH, COMMISSION WITNESS, CALLED

COMMISSIONER HICKINBOTTOM: Yes, Mr Rawat.

MR RAWAT: Thank you, Commissioner. Our next witness is Mr Neil Smith. Could I ask that Mr Smith be invited to take the oath or affirm.

COMMISSIONER HICKINBOTTOM: Thank you.

COMMISSION SECRETARY: Would you like to swear an oath or make an affirmation?

THE WITNESS: Affirm, please.

I do solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth, and nothing but the truth.

COMMISSION SECRETARY: Thank you.

COMMISSIONER HICKINBOTTOM: Thank you.

BY MR RAWAT:

Q. Mr Smith, thank you for coming to give evidence.

A. Sure.

Q. I'm sorry we had to keep you waiting a little longer than we would have wanted.

Can we start by--can I start by asking you to give the Commissioner your full name, please.

A. My name is Neil Maynard Smith.

Q. Thank you. I try to keep my questions short and simple, but if at any time I ask you a question that you

1 have difficulty understanding, please do ask me to repeat  
2 or rephrase it.

3           You will see that there are a number of pieces of  
4 paper and also some bundles in front of you. We may not  
5 need to go to all of them, but when we do, I will take you  
6 to the documents.

7           A.     Sure.

8           Q.     The last thing to ask you is just to remember to  
9 keep your voice up and speak slowly, please.

10          A.     Yes.

11          Q.     You will see that there is a microphone in front  
12 of you. It doesn't amplify. It records. But if you could  
13 direct your voice towards that microphone, that will be  
14 helpful.

15                 Could I just confirm that you were the Financial  
16 Secretary at the time of the BVI Airways project; is that  
17 right?

18          A.     Yes, I was.

19          Q.     Could you just give the Commissioner a short  
20 outline of your professional background before you became  
21 or you were appointed Financial Secretary.

22          A.     Before I became Financial Secretary?

23          Q.     Yes, please.

24          A.     Okay. So, I was a professional engineer,  
25 electrical engineer, registered with the Institute of

1 Engineering and Technology in the UK.

2 I was--left BVI Electricity Corporation, I think,  
3 around about 2003. I was generation engineer, was  
4 generation engineer at the time.

5 Before I left the BVI Electricity Corporation, I  
6 had already obtained due to the fact that I had to manage  
7 and do a lot of financial forecasting and stuff as part of  
8 my duties, I had by the time I got through the Ministry of  
9 Finance the graduate degree in business and finance, so  
10 that was before I got to the Ministry of Finance, yes.

11 Q. And then did you go into the Ministry of Finance  
12 and work your way up?

13 A. Yes.

14 I was Deputy Financial Secretary first. While I  
15 was Deputy Financial Secretary, I spent some time in New  
16 Zealand Treasury and came back, but a lot of the work I did  
17 as Deputy Financial Secretary was mostly responsible for  
18 the operations--and, you know, responsible to the Financial  
19 Secretary at the time.

20 Q. And when were you appointed Financial Secretary?

21 A. I believe it's 2006.

22 Q. And when did you leave the post?

23 A. 2017, I believe, yes.

24 Q. And was that at the time you also left the Public  
25 Service, or were you still--



1           A.    I developed--well, I left the Public Service  
2 would be, I guess, 2019, and--well, I left the Civil  
3 Service, not Public Service. I'm working with IRD now  
4 doing work there.

5                   COMMISSIONER HICKINBOTTOM: All right. Thank  
6 you.

7                   BY MR RAWAT:

8           Q.    Thank you.

9                   Now, in terms of BVI Airways, it will be  
10 something that you're familiar with, and the Commissioner  
11 has taken quite a about of evidence on it, so hopefully I  
12 will be able try and focus my question.

13                   If you--you should see a bundle in front of you  
14 that's labeled "Part 2," one of the bigger lever-arch  
15 files. If you could go to that and go, please, to  
16 page 817, that is the first page of the Auditor General's  
17 Report into Government's financing of BVI Airways' direct  
18 flights to Miami.

19                   If I could take you through, please, to page  
20 827--

21           A.    Okay.

22           Q.    --the evidence that the Commissioner has received  
23 is to the effect that there was an initial approach in 2013  
24 to the Premier that led to a Memorandum of Understanding  
25 and reports being taken, so the reports that were taken

1 were a jointly commissioned consulting report from Sixel  
2 consulting and also the Government ultimately taking a--or  
3 having BDO prepare a report in January 2015.

4 A. Yes.

5 Q. And that as about that time, December 2014, the  
6 Government decided not to go ahead with the proposal.

7 There were then further discussions. If you look  
8 at page 827 at paragraph 36, by the 26th of August 2015,  
9 the--there had been a meeting at which the Government and  
10 the operator parties--and by "operator parties," the  
11 Auditor General is referring to the various individuals who  
12 were behind BVI Airways, whose names will be familiar to  
13 you--you'd arrived at a basic position for agreement.

14 A. Um-hmm.

15 Q. Now, the first question is: At that time, were  
16 you involved in negotiations to get to that August 2015  
17 Agreement?

18 A. Yes, I was.

19 Q. And who else was involved in it?

20 A. We had August Harrigan (phonetic) was  
21 Director--Chairman of the Board, and we had Cline Smith,  
22 who was an Operations Manager, I believe, at--

23 Q. Sorry, I didn't catch--your voice dropped a  
24 little.

25 A. Clyde Smith, who was Operations--in Operations

1 and Duty Manager at the BVI Airport Authority.

2 Q. And yourself, the three of you--

3 A. Yes.

4 Q. --were the team from the BVI Government side, so  
5 to speak?

6 A. Yes, yes.

7 Q. And what that resulted in was a decision paper  
8 being submitted to Cabinet. Who prepared that decision  
9 paper?

10 A. I would have prepared that decision paper.

11 Q. So, does it follow that essentially the issue  
12 with all the matter was being taken to Cabinet by the  
13 Ministry of Finance?

14 A. Yes.

15 Hold on. It might have been the Premier's  
16 Office. We were working so close together at that time,  
17 might have been one of the two, but I remember being the  
18 one that wrote that paper, though.

19 Q. So, whilst it might have been presented by the  
20 Premier's Office--

21 A. Yes.

22 Q. --the work behind it was from the Ministry of  
23 Finance and yourself--

24 A. Yes.

25 Q. --as the Financial Secretary?

1 A. Yes.

2 Q. Now, if you look overleaf at 828--

3 A. Um-hmm.

4 Q. And this the--the Auditor General has set out  
5 various conditions that the Cabinet approved following  
6 receipt of the decision paper, but she makes the point at  
7 39 that what was not included amongst the papers sent to  
8 Cabinet was BDO's Financial Assessment Report.

9 Do you know why that Report wasn't put before  
10 Cabinet?

11 A. No, but I doubt that it was anything deliberate.  
12 We had made the changes, made changes according to what BDO  
13 had presented before.

14 So, what Cabinet was seeing was amendment--well,  
15 let me put it this way: The agreement that we arrived to  
16 was based on the concerns that BDO had and also some  
17 financial projections and stuff that I did, and so what  
18 Cabinet was seeing was as a result of the BDO Report, the  
19 concerns that they had and also some concerns that I had.

20 Q. What concerns particularly did you have at that  
21 time?

22 A. Okay, my concerns were traffic, so--by the time  
23 it got to this point, we're looking to get, I think we  
24 calculated three-and-a-half flights a day. What I mean, I  
25 guess, is two flights in one direction and one in another;

1 right? And my concern was whether or not we could keep  
2 the--we would have the passenger numbers and the ticket  
3 sales from what we anticipated would be the operational  
4 costs of the airline.

5 So, after some questioning and prodding and  
6 looking at independent data, we done--we had a study done  
7 by Falco--I don't recall if I see admission here--that give  
8 us some basically what operation costs of the "RG100"  
9 (phonetic) would be; and based on that, we used that  
10 information to come to the decisions--well, give me the  
11 comfort and rest of the members on the negotiation team the  
12 comfort that this could work.

13 Q. The Falco Report that you just mentioned,  
14 Mr Smith, is at paragraph 20, which is at 825. It's the  
15 Pavement Condition Study.

16 A. It was a little more extensive than that,  
17 actually. That's part of this.

18 Yes, okay.

19 Q. The Auditor General's conclusion--and I could  
20 take you to it, if you need it, but one of her conclusions  
21 is that one of the frailties of this arrangement was that  
22 there was a failure to adopt BDO's advice for a more  
23 balance financial arrangement?

24 A. Um-hmm.

25 Q. You said that there were changes made because of

1 the BDO advice.

2 A. Yes.

3 Q. But stepping back now, do you accept that that's  
4 a valid criticism, that there was a failure to accept?

5 A. No, I don't. I don't. I think--basically, it's  
6 incorrect. I mean, I have to explain too much, I guess,  
7 but that claim in the Auditor General's Report is not  
8 correct.

9 Q. Why isn't it correct?

10 A. Because the work that was done by BDO was the  
11 reasons why the changes are made in the original proposal  
12 that allowed us to accept the second proposal.

13 Q. I see. Okay. If we go to 828--

14 A. 828.

15 Q. --one of the points that was made--and Dr Smith,  
16 I think, has accepted this. If you look at 37, amongst the  
17 information that was provided for Cabinet, was that  
18 Castleton, which was a company owned by Bruce Bradley, so  
19 one--I think, effectively one of the entities behind BVI  
20 Airways--

21 A. That's correct.

22 Q. --would be investing in excess of \$6 million into  
23 the venture. The point that's made in the Auditor  
24 General's Report is that the Framework Agreement didn't  
25 refer to that investment, and that's right, isn't it?

1 A. Yes.

2 Q. Why was that--why was that not written into the  
3 Framework Agreement? Can you remember?

4 A. I have a faint recollection of why, but I don't  
5 want to say specifically, but it would have had something  
6 to do with risk. But I don't want to say specifically why  
7 that concession was made because I don't recall exactly why  
8 we didn't include--didn't compel it, an arrangement to do  
9 so.

10 Q. And the reason is because your memory may be  
11 inaccurate?

12 A. Yes. I don't want to misrepresent.

13 Q. What Cabinet also asked was that the Attorney  
14 General's Chambers would vet the agreement--

15 A. Yes.

16 Q. --prior to it being signed, and one of the points  
17 that the Auditor General makes is that her conclusion is  
18 that amendments that were sought by the Attorney General,  
19 she says there were periodic objections from the Attorney  
20 when vetting the legal documents, all of which originated  
21 from the operating parties, and objections from the  
22 Accountant General who was tasked with making the payments.  
23 And what she says is: "Several of the amendments made to  
24 the draft agreements by the Attorney General intended to  
25 protect Government's interests and import balance and

1 certainty into the agreements were reversed by the operator  
2 parties and not adopted."

3           Is that a criticism that you would accept, that  
4 significant amendments that would have better protected  
5 Government's position were not--did not end up in the  
6 agreement?

7           A.    What I would say is--well, first of all, I'm  
8 not--I don't recall periodic representations. I remember a  
9 cluster of representations are around at the time. When we  
10 presented the draft to the AG, he did have comments which  
11 we both of us had extensive discussions on. Primarily, he  
12 was explaining to me what his concerns were and why. I  
13 expect to make sure that I had some understanding of what  
14 his concerns was as a lawyer. And the bar was set, as that  
15 is the agreement that we should get. The amendments that  
16 he made, that was a matter that we needed to get to. But I  
17 accept the AG's duties are law, and I listen, and the  
18 Minister listened as well, I'm pretty sure.

19           And I remember specifically concern around--the  
20 major concern he had was around the issue about  
21 commercially reasonable efforts. I remember that  
22 specifically because he kind of give me education, so to  
23 speak, of what it meant, what the differences were between  
24 what was expected as being commercially reasonable and what  
25 was expected as being reasonable, with his view being that



1 "reasonable" was a stronger--a stronger provision than  
2 "commercially reasonable."

3           However, I also had discussions with Mr Hyman,  
4 who was our Legal Counsel--well, not apparently, that's the  
5 way we use him. He was in Government before I got there,  
6 and I worked with him before on intergovernmental  
7 agreements with Falco and US Treasury and IRD, and he had  
8 an opinion as well. And I think that, on balance, even  
9 though I would have preferred, you know, that's the AG tend  
10 to want to listen to them if you're working for Government.  
11 I think on balance it came down--it was decided after a lot  
12 of discussions, the AG--he insisted on it, on that  
13 provision, not to be "commercially reasonable" but to be  
14 "reasonable," or because it was a business venture, that we  
15 would accept on balance with the other risk mitigation  
16 measures that we had or will accept "commercially  
17 reasonable," yes.

18           Q.    So, simply put, was the advice of Mr Hyman more  
19 persuasive than the advice of the AG?

20           A.    I don't know. I wouldn't say that, no.

21           Q.    So, it was irrespective of Mr Hyman that you  
22 decided to go, as we see with 828, because that's where the  
23 Framework Agreement is set out?

24           A.    Yes.

25           Q.    You see the point 2 of 828 there is the reference

1 to "commercially reasonable efforts"?

2 A. The--what I--what I would say is--it became a  
3 legal argument; right? It became a legal argument. And  
4 listening to the Attorney General and not just to Mr Hyman,  
5 but listening to other legal opinions, other discussions  
6 with other practitioners around the place.

7 It was a distinction that eventually we felt that  
8 we could live with.

9 COMMISSIONER HICKINBOTTOM: That's right. I  
10 understand that there are legal arguments as to what these  
11 phrases mean, but at the end of the day, it was a  
12 commercial risk--

13 THE WITNESS: Yes.

14 COMMISSIONER HICKINBOTTOM: --whether to use this  
15 or this?

16 THE WITNESS: Yes.

17 COMMISSIONER HICKINBOTTOM: As I understand your  
18 evidence, in context of your risk assessment--by "your" I  
19 mean the Minister's risk assessment--

20 THE WITNESS: Yes.

21 COMMISSIONER HICKINBOTTOM: --he regard the risk  
22 overall as acceptable.

23 THE WITNESS: As acceptable, yes.

24 COMMISSIONER HICKINBOTTOM: I see that. Thank  
25 you.

1 BY MR RAWAT:

2 Q. If you could stick to page 828, can you see at  
3 the top you've got the phrase "The terms included".

4 A. Yeah.

5 Q. Have you got that?

6 A. Um-hmm.

7 Q. If you go down to (vi), these are terms that were  
8 approved by Cabinet, and that paved the way for the  
9 Framework Agreement.

10 Now, one of the conditions imposed by Cabinet was  
11 the agreement would be contingent upon the completion of  
12 Interline Agreements with major air carriers operating via  
13 Miami International Airport. Now, the Auditor General's  
14 understanding was that these were going to be in  
15 place--they had to be in place for the agreement to  
16 proceed. Is that your understanding as well?

17 A. That was our understanding. Unfortunately, when  
18 we actually tried, the airlines indicated that even though  
19 they were not--they didn't object to having an Interline  
20 Agreement with BVI Airways especially because American  
21 Airlines was very interested in that route, and BVI was a  
22 place that most of the airlines--well, a lot of the  
23 airlines wanted to do deals with Jet Blue, separate things,  
24 even though they were not against having an Interline  
25 Agreement, generally, they only actually inked these

1 agreements after you had airport flying or airline in  
2 operations, so they wouldn't have an Interline Agreement  
3 with something that wasn't there yet, so to speak, so they  
4 had to see the airline operating, I guess they had to see,  
5 you know, the manner of operating, the standards--that it  
6 met operational policies, those separate things before it  
7 actually entered into the Interline Agreement.

8           So, even though that was the intent, we realized  
9 after the Cabinet Decision was made essentially and after  
10 the agreement was signed, that essentially wouldn't be the  
11 case. It couldn't be the case. It was a chicken-and-egg  
12 situation, where you wouldn't get an Interline Agreement if  
13 you wouldn't operate, and you couldn't operate if you  
14 didn't have Interline Agreement, so it was based on  
15 Cabinet's decision.

16           COMMISSIONER HICKINBOTTOM: That again increased  
17 the risk, didn't it, because you moved from a position  
18 where the agreement would only be concluded if you had  
19 Interline Agreements in place, the position where you would  
20 have to--you would have to go ahead with this agreement  
21 without knowing whether or what Interline Agreements you  
22 would do.

23           THE WITNESS: True, but we were pretty confident  
24 that we would have Interline Agreements. That wasn't--I  
25 mean, I can't--you obviously can't--there were verbal

1 contracts, let me put it that way, that were actually  
2 engaged in these Interline Agreements, you know, for the  
3 purposes--for purposes of this having a verbal agreement  
4 isn't--it was just trust between parties, I guess.

5 COMMISSIONER HICKINBOTTOM: Yes. Thank you.

6 BY MR RAWAT:

7 Q. What Cabinet also asked was that the financial  
8 model would be further vigorously scrutinized by the  
9 Ministry of Finance and consultants to verify the  
10 anticipated payouts by the Government. So, I take that  
11 reference to payouts to be the 7 million that you were  
12 going to pay in installments?

13 A. Yes.

14 Q. Now, by this stage, you'd used BDO, you'd used  
15 Sixel. You were heading toward the Framework Agreement.  
16 What other consultants, if any, did you bring in to assist?

17 A. I didn't bring in any other at that point. I had  
18 quite a bit of confidence in my ability to assess these  
19 things because of my background, because--"background"  
20 meaning not just the financial acumen that I had, academic  
21 training, experience in the Ministry of Finance with these  
22 things before.

23 Mathematics is something that we like, engineers  
24 like, and the finance acumen on top of that helps, so I had  
25 a pretty good understanding of how the model is created and

1 how to apply sensitivity testing--you know, to stress-test  
2 the models. You know, I had done them before or in  
3 electricity I had done things like this, not with airplanes  
4 but with models that you use to make financial projections  
5 and also in that case in the BVI Electricity to make  
6 projections on load and share and stuff like that, so I was  
7 pretty confident in the mathematics.

8           The technical parts of it I had--I could consult  
9 and did with members of the BVI Port Authority who, for  
10 lack of better term, exports in the way that airplanes  
11 operate, what they need in order to operate after the  
12 runway we had at TB Lettsome International Airport, so I  
13 was pretty confident with the BDO results over there using  
14 information from--like I said, Falco had some more  
15 information besides just the runway information, using the  
16 resources ahead of me to the Port Authority that my  
17 assessment of the model was sufficiently rigorous. And I  
18 did not anticipate at the time that it would be necessary  
19 to incur additional costs or to tell--tell me something  
20 that they had already figured out. And that is the reason  
21 why we didn't get extra consultants.

22           Q. One of the--sorry--

23           A. That's enough, I would think.

24           Q. One of the pieces of evidence that Dr Smith has  
25 just given was that you, as Financial Secretary, carried

1 out due diligence on the individuals behind BVI  
2 Airways--Mr Bradley, Mr Weisman, Mr. Willoughby--and that  
3 you assured yourself and assured Dr Smith that they were  
4 appropriate individuals to undertake this venture. Did you  
5 undertake that exercise?

6 A. Yes, I did, sir.

7 Q. And you do that at the very beginning of the  
8 process?

9 A. At the very beginning, even before we met in the  
10 United States--in Washington, D.C., actually--I did that,  
11 we had access to something that we used regularly called  
12 "world check."

13 Q. Say that again?

14 A. World check, from financial resources--well, in  
15 the financial services sector. I should say financial  
16 investigation system, so we did--I did a search with those  
17 and didn't see any concerns against them--you know, going  
18 concerns. I investigated via the internet, I should say,  
19 on the workings of Mr Bradley, was aware of his strong  
20 business acumen, the concerns that he had, and concerns  
21 enterprises that he had engaged in. As a matter of fact,  
22 at the time of the negotiations, he actually had bought and  
23 renovated a hotel in Washington, D.C., which he  
24 subsequently sold, it seemed to me, like 400 percent  
25 profit.

1 I also looked at Mr Weisman, who at the time was  
2 member of the Bar Association I believe in New York or  
3 somewhere where he's current, and he actually had some  
4 strong business acumen as an investment banker, I believe  
5 it was.

6 So, I felt that those--the fact that there were  
7 no existing concerns on these two main individuals, the  
8 fact that they had demonstration of having strong business  
9 acumen; in Mr Weisman's case, it appeared he was still a  
10 current member of the Bar in the United States. And  
11 coupled with the fact that for legal counsel in the United  
12 States, Mr Hyman--Heisman--Hyman had actually made a  
13 representation in their favor, him also being a member of  
14 the Bar, so I know he had to make sure that he did things  
15 properly as well.

16 All of those things concerned convinced me they  
17 were decent people to work with. Mostly, it had to do with  
18 there were no concerns based on my investigations so I will  
19 check; and number two because of demonstrated business  
20 acumen that he had.

21 Q. What none of them had--I mean, Mr. Willoughby was  
22 an aviation practitioner and had various roles in aviation,  
23 but none of them had experience of actually running a  
24 commercial airline, did they?

25 A. Yes.



1 Q. Is that right?

2 A. Agreed, yes.

3 Q. Were you not at all concerned by the fact that  
4 Mr Hyman was the middleman? Didn't it occur to you that he  
5 had a conflict of interest?

6 A. No, that didn't occur to me he had a conflict of  
7 interest because we had been involved with him, as I  
8 indicated before, very sensitive work before. We had no  
9 reason believe that he would not have been exhibiting the  
10 same level of professionalism.

11 And yes, I agree that neither Scott, Mr Weisman  
12 or Brad--what is his last name?

13 Q. Bruce Bradley?

14 A. Bruce Bradley.

15 Q. Or Jerry Willoughby?

16 A. He came in--he was there, and we knew he had  
17 extensive airline experience because he was a training  
18 captain in Delta for a long time. He was retired Air Force  
19 General, US Air Force--not retired but had retired, meaning  
20 he had retired in good standing--and, you know, nothing  
21 funny about those things.

22 And also I knew enough about airlines based on my  
23 research again and using the advice of the individuals at  
24 BVI Airport Authority; that the issue with running an  
25 airline is not necessarily--the airplane is the last bit of

1 it. The major part of the airline is running the business.  
2 So, if you're a good businessman or you have a proven track  
3 record of dealing with businesses and making investments,  
4 then you have the skills to make--to have a successful  
5 venture.

6 The issue of the airline business, that's another  
7 issue where you need specialized skills which  
8 Mr. Willoughby had on the concerns you need to address in  
9 respect for an airline business, so I know that the  
10 business acumen was there because that was a primary  
11 concern, and specialized knowledge--Mr. Willoughby had  
12 enough experience and training that where he had--he might  
13 have had deficiencies, I was confident that he knew enough  
14 to request consultation where he did not have specific  
15 knowledge. Yes, I know I didn't have airline experience,  
16 but I knew that they were astute businessmen, capable  
17 businessmen, and that Mr. Willoughby had the wherewithal to  
18 know what he didn't know and to get that when he needed to  
19 get it.

20 Q. Did it not concern you that these astute  
21 businessmen were not willing to sign up to a Framework  
22 Agreement that incorporated in writing their indication  
23 that they would put \$6 million into this venture?

24 A. That was the concern.

25 Q. But it wasn't a sufficient concern for the

1 Government, yourself as the Financial Secretary to the  
2 Government, for the Government to insist that there was  
3 incorporated into the Framework Agreement?

4 A. Well, it's all about managing risk; right? And  
5 the risk that doesn't come out in the Report, the Auditor  
6 General's Report too much is--and maybe I should explain,  
7 Commissioner, a little--is that before the considerations  
8 for the BVI Airways, I call it an "intervention," came in,  
9 you understand when I say it's an "intervention," in the  
10 Ministry of Finance we had been developing and had gone  
11 quite a ways with developing like a macro fiscal model for  
12 the Government of the Virgin Islands, meaning that we were  
13 able to make fairly accurate projections.

14 Eventually, I think by the time I left the  
15 Ministry of Finance, these projections were within 1 or  
16 2 percent of what actually happened, in terms of the funds  
17 we collected and the income, and the expenditure side of  
18 the Government as well.

19 And what we had recognized, even after--we always  
20 stress-test these models, that within a decade and possibly  
21 within five years that the Government of the Virgin Islands  
22 would not have been able to meet its financial obligations  
23 to its stakeholders. The Government of the Virgin Islands  
24 had back on the national health insurance programme,  
25 which--we thought that was a good idea in terms of the

1 economics of it.

2           They had made commitments to improve the social  
3 protection/social development work that had a value, of  
4 course, attached to it.

5           They had made some commitments to improve  
6 infrastructure. Roads especially were concern.

7           They had made commitments to improving education  
8 which was expensive at the time on the budget, around  
9 \$11 million, which is about--about 5--around \$11 million,  
10 if I recall--I don't want to say the percentage, and what  
11 the budget was, what the total budget.

12           And in order to meet these commitments or  
13 projected commitments--right?--they would definitely have  
14 to be a reduction in expenditure or--and/or an increase in  
15 income coming in to Government. A number of options were  
16 considered by the Ministry of Finance, including but--this  
17 is not extensive--the need to control expenditure within  
18 Government. One of the options that someone threw out was  
19 shrink the size of the Civil Service, for example, and also  
20 the services that adversely affected stakeholders--that  
21 wasn't acceptable--so we decided to do what we have we call  
22 an Expenditure Efficiency Initiative, so you control  
23 expenditure but you try to just be more efficient in how we  
24 spend money.

25           We also considered raising taxes, which would

1 have had opposite effect, we believe, to what we were  
2 trying to achieve.

3           And we did make proposals to the Government of  
4 the day to adjust some fees, you know, for example, the  
5 Government of the Virgin Islands, I think even now, cannot  
6 cover the costs of its services--some the services for the  
7 fees that this charges, so those suggestions that were made  
8 only some were agreed to.

9           We supported, and I, myself, was quite actively  
10 involved in financial services commitments. Strong efforts  
11 were being made to increase the market share and protect  
12 market share. We spent quite a bit of time doing that, so  
13 we did that.

14           And the most--well, in conjunction with that, the  
15 most significant thing that we believe we had to do was to  
16 get some economic growth, so grow the economy so you could  
17 tax more, so you might need to change the rate of taxation,  
18 the tax burden on the stakeholders, but if you have  
19 economic growth and a bigger economy, you get more tax  
20 intake. So the middle of the income deficiency that we  
21 projected was to have economic growth. That's context of  
22 how I'm going to answer this.

23           This intervention was part of a two-pronged  
24 strategy. This was a short-term intervention and extension  
25 of the runway in order to get the direct flights from the

1 Eastern seaboard of the United States was medium- to  
2 long-term solution; right? This was a fourth part of that  
3 because we knew they would not be able to grow the economy  
4 from work that had been done by the Tourist Board and  
5 ourselves in the past; we would not be able to get the  
6 hotel plan the we were looking for. We were looking to  
7 increase the number of beds. And also the Financial  
8 Services itself would not be able to expand in what we had  
9 to deal with later on, economics, some deeper work in the  
10 Financial Services.

11 So, we knew that unless we facilitated economic  
12 growth using both this intervention that we face a problem  
13 that would lead the Government of the Virgin Islands not  
14 being able to meet its commitments later on.

15 So, in that context--in that context, the  
16 decisions--the issue that you pointed out, which we had  
17 deal with ourselves, we said, on balance, if we supervise  
18 this matter properly and if we continued to believe or  
19 continued to have confidence in the advice of Mr Hyman was  
20 giving, that we believe on balance that was the risk that  
21 we probably could take.

22 COMMISSIONER HICKINBOTTOM: But it was only  
23 short-term solution.

24 THE WITNESS: Yes.

25 COMMISSIONER HICKINBOTTOM: Because the long-term

1 solution was extending the runway.

2 THE WITNESS: Right, which we were in the process  
3 of doing.

4 COMMISSIONER HICKINBOTTOM: And that was, I  
5 think, at one stage thought to be a three-five year--

6 THE WITNESS: Yes.

7 COMMISSIONER HICKINBOTTOM: Relatively  
8 short-term--

9 THE WITNESS: Right.

10 Actually get to the point where we could at least  
11 start construction, we anticipated it would take at a  
12 minimum of 18 months.

13 COMMISSIONER HICKINBOTTOM: No, quite, but that  
14 meant that BVI Airways was a short-term solution.

15 THE WITNESS: Yes.

16 COMMISSIONER HICKINBOTTOM: So, had  
17 short--probably short-term commercial value for the  
18 operator because once--

19 THE WITNESS: Yeah, yeah, yes.

20 COMMISSIONER HICKINBOTTOM: Once the planes start  
21 to come in, Miami fades out of the picture.

22 THE WITNESS: Yes, they attempted to--that's  
23 correct. Yes.

24 COMMISSIONER HICKINBOTTOM: Thank you.

25 BY MR RAWAT:

1 Q. But picking up on the context that you've given,  
2 Mr Smith, the next question that arises, though, is that it  
3 still involves a substantial sum of public money.

4 A. I agree.

5 Q. And in this case, what appears to have happened  
6 is that the Government responded to essentially a sort of  
7 unsolicited approach at the beginning from Mr Hyman. But  
8 what the Government, once it embarked on this course from  
9 2013 onwards, yes, there was a stop perhaps when the  
10 proposal was rejected after the BDO Report, et cetera, but  
11 then it carried on again with the same parties on the other  
12 side.

13 A. Um-hmm.

14 Q. At no point did anyone on the Government's side  
15 consider alternatives. At no point was there consideration  
16 given to a tender process, at no point was there  
17 consideration given to approaching anybody else who could  
18 provide the same service. You were, whilst the terms may  
19 have changed, right from the beginning you were locked into  
20 a relationship with these four individuals, weren't you?

21 A. I don't agree with that, unfortunately.

22 I take your point. I take your point. I think  
23 I've got it. But I didn't consider my--ourselves, the  
24 Government of the Virgin Islands to be locked into anything  
25 with these individuals until we'd signed the Framework



1 Agreement, so that's one.

2 Two, it is also not accurate that we didn't  
3 consider other alternatives. The other alternative, for  
4 example, was they're on extension. Another alternative was  
5 to try to get better arrangements with individuals coming  
6 through or competitors which would have been US Virgin  
7 Islands, St. Maarten and Antigua and Barbuda, and to some  
8 degree a very small extension in case we need it.

9 We had also been solicited by a local airline,  
10 one that was established before, to give them a loan of, I  
11 think, some \$10 million to do that.

12 So, I don't know, and it's not accurate from my  
13 point of view to say we didn't consider other alternatives.  
14 I think--I do take your point, though, that we were having  
15 negotiations with--

16 COMMISSIONER HICKINBOTTOM: You focused on these?

17 THE WITNESS: Yes.

18 BY MR RAWAT:

19 Q. If you look at the Framework Agreement, can I  
20 just deal with two points. It's signed--

21 A. What page?

22 Q. Go to page 828. That's where it's set out, or  
23 begins to be set out.

24 But the Framework Agreement is 7th of December  
25 2015. If you keep your thumb at 828 but go, please, to

1 839.

2 A. Okay.

3 Q. 839 is, under the heading "Financial Assessment",  
4 the Auditor General's Report, refers to the BDO Report, so  
5 that's the Report that exists before you enter into the  
6 Framework Agreement.

7 A. Yes.

8 Q. And the BDO Report is talking about the  
9 Memorandum of Understanding that was set out in 2014.

10 A. Um-hmm.

11 Q. And it says a 20 percent interest rate  
12 contemplated under the MOU is far too aggressive given the  
13 lack of risk being borne by Castleton, Castleton being a  
14 company owned by Bruce Bradley?

15 A. Yes.

16 Q. So that's the position in January 2015.

17 A. Yes.

18 Q. The warning you got from BDO was 20 percent is  
19 too much.

20 If you go back to 829, please.

21 A. 829. Okay.

22 Q. And you go to the bottom where you're got  
23 "Financing Provisions"?

24 A. Um-hmm.

25 Q. What's written there at the very bottom is "The

1 Government to be repaid for operating profits after the  
2 company's reserves are established, operating deficit  
3 reduced and the operating parties are paid 20 percent  
4 return on investment."

5           So, it seems to be that what was carried over  
6 from the MOU, even after BDO, was this figure of  
7 20 percent, and that gets embedded into the Framework  
8 Agreement.

9           Have I understood that right?

10          A. It is what it is. I mean, it explains what we  
11 agreed here. Is that what you mean?

12          Q. Yes.

13          A. Yeah, so--

14          Q. The point is that one of the things that the BDO  
15 cautioned specifically against which was avoid 20 percent--

16          A. Um-hmm.

17          Q. --still ends up in the Framework Agreement.

18          A. Not really, in a way.

19          Q. 20 percent is 20 percent, as it's written there.

20          A. Agreed. So--agreed.

21                 What--the way that this was interpreted by us is  
22 that, unless there was a 20 percent return on the  
23 arrangement with the operating parties that the Government  
24 would not receive any paybacks, that was our full  
25 interpretation of what was here. So, in other words,

1 unless guaranteeing the--let me start with \$7 million was  
2 ceiling, okay? We pay no more than \$7 million. That was  
3 the ceiling. If in the--this enterprise--I can't term a  
4 better way--we did not receive--the operating parties did  
5 not receive 20 percent, then Government would not receive  
6 any paybacks.

7           If they received over 20 percent, then the  
8 Government of the Virgin Islands would receive paybacks.  
9 That's the way we interpret that.

10           Q. Well, it's a bit more than that, isn't it?

11           A. Right.

12           Q. You put in 7 million.

13           A. Um-hmm.

14           Q. You will get your 7 million back after three  
15 things have happened.

16           A. Um-hmm.

17           Q. Firstly, that the company's reserves are  
18 established.

19           A. Right.

20           Q. And that's not defined.

21           A. Yes, yes.

22           Q. Secondly, that their operating deficit has been  
23 reduced, and that's not defined.

24           A. Um-hmm.

25           Q. But thirdly, that they are paid 20 percent return

1 on investment?

2 A. Yeah, okay. So--

3 Q. So, before--the Government is fourth in line. If  
4 you don't get your 7 million back until those three things  
5 have happened, so until things have happened that benefit  
6 the operating parties, you don't start to get your 7  
7 million back. That seems to be what that aspect of the  
8 Framework Agreement is saying.

9 So, once again, Government is bearing the risk  
10 whilst the operating parties are enjoying the profit.

11 A. Yeah.

12 And like I said, only I don't disagree with you,  
13 but the reason why I explained the context in which this  
14 decision was made was so that you could understand that  
15 there were risks that we were managing.

16 Q. And you were prepared to take?

17 A. And we were prepared to take this; right? The  
18 risk that--the risk that we--the limited risk that we said  
19 financially--directly financially were \$7 million. We  
20 recognized in my discussions with the Attorney General at  
21 the time is that if you're not careful it might have some  
22 legal risk; right? You might be exposed to some legal  
23 things, then it cost you additional funds as well. But in  
24 terms of the direct risks that we had here, yes, we  
25 understand that there was \$7 million there, and we realized

1 that we were, as you say, fourth in line.

2 But the salient point was that the Government of  
3 the Virgin Islands, in consideration of the other serious  
4 issues that it had "continued solvency" of the Government  
5 of the Virgin Islands in face of the commitments that they  
6 had, that that was a risk present. We knew it was present,  
7 but that was felt that it was--was acceptable in  
8 consideration of other things. Not by any figment of  
9 imagination, any conversations with the Minister of Finance  
10 did I get the impression that it was a little bit of money,  
11 but he also expressed to me at the time and I agreed, that  
12 in light of the other things that needed to be done; right?  
13 That we had to--it was something that we were--it was a  
14 risk on balance in consideration of the other issues that  
15 we were willing to take.

16 Q. Now, under the Framework Agreement, there was--I  
17 think it's called an official liaison from the BVI  
18 Government.

19 A. Yes.

20 Q. And you became the official liaison, didn't you?

21 A. Yes, sir.

22 Q. If you go, please, to 97, at page 837.

23 A. 837?

24 Q. Yes, please. Something I want in fairness to  
25 give you an opportunity to respond to.

1           A.     Sure.

2           Q.     In the Auditor's Report, the Auditor points to  
3 your taking on the role as the Government's contact, and  
4 that that gave the operator parties ongoing high-level  
5 access and support from within the Government, but what the  
6 report says is created foreseeable issues, and the issue  
7 boils down to this, Mr Smith: Essentially, it puts you in  
8 a position of a conflict of interest.

9           A.     Um-hmm.

10          Q.     Because on one side, as the Government's contact,  
11 you had an interest in ensuring the success of the venture  
12 because 7 million had been put in, but that then jarred  
13 with your public duty as Financial Secretary to be the  
14 primary custodian of the Government's finances.

15                    Would you accept that the position you were  
16 placed in, official contact with financial security did  
17 give rise to a conflict of interest?

18          A.     I agree with that, but again I also say that that  
19 is a conflict that Financial Secretaries and Treasury  
20 Secretaries around the world deal with all the time. It  
21 certainly is a conflict that my colleagues in the Caribbean  
22 deal with continuously.

23                    So, it is--it is--it is something that, as a  
24 Financial Secretary, you're aware of, and as a Financial  
25 Secretary, you have to be very careful to manage. So, in

1 other words, you have to be prepared to hold yourself  
2 accountable for your own action, if that makes sense.

3           So, I agree it is a difficult position to be in,  
4 but it is a position that Financial Secretaries in  
5 execution of the duties have almost on daily basis. So,  
6 this wasn't anything new, and I knew that it existed; and  
7 because I knew it existed, I had to make sure that I manage  
8 it properly because that is the duty that is expected of  
9 me--was expected of me as a Financial Secretary to act in  
10 the best interest of the Government of the Virgin Islands  
11 and the stakeholders.

12           And in taking on that job, it is something--it is  
13 a responsibility that I accepted, and is a responsibility  
14 that I was duty-bound to manage not just in this instance  
15 but regularly. I had to do it all the time. This was no  
16 different.

17           Q.    As either Financial Secretary or the Government's  
18 official liaison for the project, were you able to inspect  
19 BVI Airways's financial records?

20           A.    No.

21           Q.    And what was the reason that you didn't inspect  
22 the financial records?

23           A.    They claimed that they were not able to send or  
24 did not feel comfortable in sending financial records to  
25 the Government of the Virgin Islands because they were



1 concerned about the confidentiality within it. They  
2 had--unfortunately, we had around about the time, the time  
3 was, you know--and it was especially bad after our  
4 conversations with them and we entered into an agreement  
5 with them, side agreement with them, that there was some  
6 unfortunate leaks in the Government of the Virgin Islands,  
7 and they claimed that because of that, they were  
8 uncomfortable in sending what they considered to be  
9 financially sensitive records to the Government of the  
10 Virgin Islands because they felt that those financial  
11 records would end up in the public domain.

12           And if I recall correctly, there are provisions  
13 in the Framework Agreement that insist that those records  
14 would remain confidential.

15           I don't--in my position--I want to put this  
16 gently--I did not feel that it was a good enough reason not  
17 to send them.

18           Q.    What the--

19           A.    What they did for us to--when my angst, I guess,  
20 was unbearable for them, they did offer to allow us to view  
21 those records in their offices in Fort Lauderdale.

22           Q.    And you should have on the table it's loose-leaf  
23 probably under the--under the notebook that you brought  
24 with you. There should be a copy of the Arbitration Award.

25           A.    Yes.

1 Q. Do you have it?

2 A. Yes.

3 Q. If you go to page 84, please, of that. If you  
4 could pick it up at 83 of the Award, 32.10?

5 A. 32.10.

6 Q. Yes.

7 So, this is Mr Weisman testifying, and saying he  
8 frequently invited Mr Neil Smith to look at anything he  
9 want any time he wanted.

10 And if you go over, I'm going to just summarise,  
11 but what Mr Weisman said was most of the major books and  
12 records were in Fort Lauderdale. We did maintain some  
13 books and records in Tortola. And you were offered the  
14 opportunity to look any time you wanted.

15 And then at 32.11, there is--your evidence is  
16 referred to.

17 And it comes down to you confirmed that  
18 Mr Weisman had invited you for an "open book" experience.  
19 You described how puzzled you were that the BVI Government  
20 would not permit you to accept that invitation.

21 And what the Award then or the Transcript of the  
22 decision then says, it then sets out in the Transcript and  
23 says it reflects how dismayed Mr Neil Smith is still at  
24 that Government decision.

25 And so, does it come to this--I won't read it

1 out, but there was an open invitation to you to come and  
2 inspect the books.

3 A. Yes, there was.

4 Q. And a decision was made that you should not go  
5 and inspect the books.

6 A. Um-hmm.

7 Q. You might need to speak up, Mr Smith.

8 A. Yes, that's correct.

9 Q. And you were asked was it your decision or their  
10 decision, and you say "that wasn't my decision. It was  
11 Government--well, Cabinet, Minister decision."

12 So, the Cabinet decided that you should not go to  
13 the US to inspect the books of BVI Airways; is that right?

14 A. Okay, not Cabinet, and I think that probably came  
15 off wrong.

16 And I was specific when I say Cabinet Minister.  
17 I didn't say Cabinet.

18 Q. Which Cabinet Minister?

19 A. It wasn't Cabinet.

20 Q. Right.

21 A. So, in the Government of the Virgin Islands, we  
22 can't travel unless we get permission, even Financial  
23 Secretary can't travel without--on government business  
24 without permission.

25 And that--I had raised that with the Minister and

1 the Premier--with both of them, actually, and I think--

2 Q. Sorry to interrupt, which Minister did you raise  
3 it with?

4 A. I said Minister of Finance and the Premier. I  
5 was making a joke a little; right?

6 Q. Right.

7 A. So, when I discussed it with them, the impression  
8 I got was, look, the Framework Agreement said it was some  
9 information here that we're not prepared to give them that  
10 concession by going to Miami; right? I think that was--was  
11 just tactics, so that is the reason why we didn't--why I  
12 didn't go.

13 And incidentally, I was prepared to actually send  
14 someone besides myself, so there would be another pair of  
15 eyes supervising this matter.

16 COMMISSIONER HICKINBOTTOM: But in any event,  
17 nobody looked at them?

18 THE WITNESS: Nobody looked at them.

19 COMMISSIONER HICKINBOTTOM: Thank you.

20 BY MR RAWAT:

21 Q. And also you didn't receive any statements? They  
22 were supposed to provide quarterly statements under the  
23 Framework Agreement, and they didn't do that, did they?

24 A. Yeah, so that is the reason why there was some I  
25 describe it as "angst" between myself and Mr Weisman who I

1   chatted with. He was admittedly--he was quite open to  
2   answering questions that I asked, but that was not good  
3   enough. You need paper records; right?

4                But I did get some financials which were, you  
5   know, they weren't good enough.

6                Q.   They were--according to the Auditor General, they  
7   were unaudited and unsupported, and it was one set of--

8                       (Overlapping speakers.)

9                Q.   Financial Statements?

10               A.   It wasn't a lot of--it weren't here--

11               Q.   Sorry to interrupt you. Is there something that  
12   you wanted to say?

13               COMMISSIONER HICKINBOTTOM: It wasn't acceptable.

14               BY MR RAWAT:

15               Q.   If you go, please, to 831 in the main bundle that  
16   we have been looking at. I'm going to summarise this, but  
17   tell me if I've misunderstood it. But under the Framework  
18   Agreement, the Government of the BVI was going to pay  
19   7 million in fixed installments?

20               A.   Yes.

21               Q.   And if we look at 47 on that page, the Auditor  
22   General has set out the scheduled payment date for that  
23   7 million. What happened was that, under the Framework  
24   Agreement, the Government was required to get a Letter of  
25   Credit. That couldn't--wasn't possible, and so to deal

1 with that issue a number of steps were taken. The first  
2 was that sums of money were paid early.

3 A. Yes.

4 Q. And again, you can see that the Auditor General  
5 has set out on that page when the actual payments were  
6 made.

7 A. Yes, sir.

8 Q. The second thing that was done was an escrow  
9 account was set up.

10 A. Yes.

11 Q. So that the remaining 2 million--you paid  
12 5 million, but the--and the remaining 2 million was going  
13 to be put in that escrow account for the benefit of BVI  
14 Airways.

15 And the third thing that happened was that the  
16 Government essentially went above the 7 million and paid an  
17 extra \$200,000 to BVI Airways. That's what it comes down  
18 to, isn't it?

19 A. Yes, yes, yes.

20 Q. Now, what happened to the escrow funds was  
21 that--and this is on the next page, if you want to look at  
22 it, was that you, as Financial Secretary, terminated the  
23 escrow arrangement, authorized release of the funds to the  
24 operator parties on the 11th of January 2017, and this  
25 occurred before the stipulated payment dates even under the

1 escrow arrangement.

2 A. That's right.

3 Q. It occurred before the airline had received any  
4 authorization to fly from the US or UK authorities.

5 A. I think it was before authorization from the US  
6 authorities but not from the British guys, if I recall  
7 correctly.

8 Q. What the Auditor General notes is that no  
9 authorization from Cabinet was obtained for this early  
10 release.

11 A. Is that correct.

12 Q. That's correct?

13 A. Yes, sir.

14 Q. Did you obtain authorization from anyone?

15 A. Yes.

16 The Minister of Finance has a constitutional and  
17 legal--has the constitutional and legal authority to make  
18 advances, advance payment. If I recall in Section 21 of  
19 the Public Financial Management Act or it speaks to the  
20 Minister of Finance being able to make advances, and one of  
21 the conditions on which he could make an advance--advance  
22 payments is what is in relation to an existing agreement;  
23 right?

24 Throughout this entire saga, the Minister of  
25 Finance obviously I would advise him of what he can do or

1 can't do under the Act, made or authorized after we  
2 consulted, after approval's given and give instructions, he  
3 authorized these payments in advance of the schedule using  
4 that provision, with the understanding as the Act requires  
5 that in an opportune time, he would go back to--well, via  
6 the Cabinet obviously but to the House to ratify payments  
7 that were made under that part of the Act; right? Under  
8 that constitutional responsibility, so to speak, that he  
9 had.

10           So yes, he did authorize these payments. Yes, I  
11 did consult with him, sometimes wide and very difficult  
12 conversations we had as to the merits of paying only and  
13 not paying only. But that is the authority that he used  
14 actually to authorize these payments. The fact that we  
15 weren't able to get a Letter of Credit, we didn't realize  
16 we would not get the Letter of Credit in the beginning, but  
17 after the agreement was signed--and it has to be public  
18 obviously--we heard some noises. It's not my business to  
19 worry about the noises, but the banks indicated to me that  
20 the compliance departments were having some issues with  
21 that, in addition to the general de-risking concerns that  
22 was prevalent in the region at the time.

23           So, essentially what a lot of banks were doing  
24 was pulling out a lot of sovereign debt and that gave rise  
25 to serious concerns in the financial sector at the time.



1           They also indicated to me because one of the  
2 banks did indicate to me that despite that, because of the  
3 long relationship that we had the risk concerns we had,  
4 because of the long relationship we had, and track record  
5 of meeting obligations, we would be prepared to do that, to  
6 give us a Letter of Credit. But after consulted by our  
7 Compliance Department they felt they would be a lot more  
8 difficult.

9           We did continue with the terms that they were  
10 giving me--I shouldn't say--given us were definitely  
11 not--in my opinion, wouldn't serve us in the best interest.  
12 For example, if I recall what the request for us is that we  
13 deposit the entire \$7 million into an account and then  
14 proceed from there, which negates the idea of a Letter of  
15 Credit. Really, the Letter of Credit, the funds that are  
16 transferred to the third party, the third party guarantees  
17 that these payments will be made essentially.

18           So when that happened, that essentially to my  
19 mind was an escrow account, which had some heavy--we  
20 eventually decided we would part ways to cover the costs  
21 that they had concern in getting it. They would do it but  
22 it would be extremely expensive.

23           So, we were in a position where we are, I guess,  
24 in material breach of the agreement that we had, so I  
25 encouraged the operating parties as well to see if they

1 could find something that I would find acceptable and the  
2 BVI Government could find acceptable. Putting in a Letter  
3 of Credit either eventually came to an escrow account, but  
4 that happened several months after.

5           So, in order to remedy the breach, what we did is  
6 we decided that we actually make the payments not according  
7 to the schedule but in the manner that would allow the  
8 operating parties to have the cash flows that they  
9 anticipated had the Letter of Credit been done because the  
10 Letter of Credit would have been a financial instrument on  
11 which they could have borrowed again or get commitments of  
12 something like it. Because we weren't able to get the  
13 Letter of Credit, we actually had to come up with the cash;  
14 right?

15           Essentially, if we put \$7 million in a bank, we  
16 would have been--the Ministry of Finance would not have  
17 been able to utilize \$7 million, in other words, without  
18 front-loaded \$7 million from the beginning and would not  
19 have been able to use funds for something else in the  
20 meanwhile before the other commitment came up. So, that is  
21 the reason why that happened.

22           The escrow in 20--the escrow came up later only  
23 in--would have been in January 2017--

24           Q.    11th of January 2017.

25           A.    Right.

1           And that again was a very painful discussion with  
2 the Minister of Finance, and I think what we recognize is  
3 that, based on our assessment of where the airlines  
4 were--the airline at the time with operating parties and in  
5 were progress of the venture, we knew that they were--they  
6 had planes that were being serviced, and one of them might  
7 have been in some sea check.

8           We had the ASI, we had progress that we were  
9 making with ASI, which would be later, and we knew the next  
10 step that was needed was just a matter of getting  
11 certifications that we are convinced at the time that they  
12 were making progress; right? Adequate progress. Based on  
13 the statement, cash-flow statements that I have seen from  
14 Sixel before. The progress that it made were making seemed  
15 to be adequate, and so that was some very difficult  
16 discussions. The Minister of Finance decided that it would  
17 be in the best interests of getting the approvals to  
18 terminate the escrow account.

19           Q.    And so he gave you authority to take these steps?

20           A.    Yes.

21           Q.    And decided that there was no need to take it to  
22 Cabinet?

23           A.    I don't know if I would say that he didn't decide  
24 there was no need to take it to Cabinet. I think what he  
25 was doing, number one--well, he was using the authority

1 that he had as Minister of Finance to make advance  
2 payments; and number two, based on my conversations with  
3 him, I knew that his Cabinet colleagues were aware; and  
4 number three--of what was happening--and number three, I  
5 would have expected based on the tenor of the conversations  
6 that we had, that I recall that those things would have  
7 been ratified eventually, but he did have the authority to  
8 do it. I didn't get the impression that he had made these  
9 decisions on his own.

10 Q. The upshot is that all the 7 million plus 200,000  
11 is paid by July 2016 on the Auditor General's Report,  
12 to--well, I'm sorry. With the exception of two  
13 payments--no, they're all--yes, so all of--all of the sums  
14 all went into the escrow account to pay across, and the  
15 escrow accounts are then paid in on the 15th of July and  
16 signed over to the parties on the 11th of January.

17 A. Hm-umm.

18 Q. Now, that is all before you have on the  
19 27th--before you received any Financial Statements at all,  
20 so the 7 million all goes across to BVI Airways without you  
21 having received any documents that you, as Financial  
22 Secretary, would consider necessary to assess their  
23 financial health.

24 A. Okay, can I start now?

25 Q. Yes, please.

1           A.    I don't agree with the statement that the \$7  
2 million was in BVI Airways's hands by July 20--well, in  
3 2016, 25 million was. \$2 million was in escrow. Neither  
4 of us had custody of it.

5           Q.    That's a fair point.

6           A.    I also agreed that we had transferred over the  
7 amount of to the tune of \$5 million by about July; right?

8           Q.    Yep, by July 2016 you transferred 5 million.

9           A.    Exactly.

10                    Without having seen any Financial Statements.  
11 That's absolutely correct.

12                    And I think we get back to my point--we go back  
13 to my point about my angst about not having seen these  
14 Financial Statements and the representations might vary so  
15 not doing it, and they offer for us to see them.

16                    However, again get back to the issue of risk, and  
17 we were convinced that, even though we weren't seeing these  
18 financial records based on the progress and very intimately  
19 aware of what was occurring with the regulator the work  
20 that we were doing, we knew and could verify what they were  
21 doing to the aircraft. We were reasonably assured by those  
22 needs that based on the financial projections for cash flow  
23 that was done before that there were, in fact, doing what  
24 they were supposed to do albeit a little bit late or they  
25 were actually meeting our expectations what they should

1 have been producing.

2           So, yes, I agree we didn't have the Financial  
3 Statements. We were concerned, there were representations  
4 made, but we were convinced that, based on what we were  
5 seeing happening at the time that there were doing what  
6 they were supposed to do.

7           COMMISSIONER HICKINBOTTOM: But by January 2017,  
8 \$7.2 million were paid.

9           THE WITNESS: Yes.

10          COMMISSIONER HICKINBOTTOM: The Government were  
11 determined not to pay anymore.

12          THE WITNESS: Yes.

13          COMMISSIONER HICKINBOTTOM: By February 2017, the  
14 operator started asking for more money.

15          THE WITNESS: Yes.

16          COMMISSIONER HICKINBOTTOM: Not a bit.  
17 10 million they asked for in February 2017.

18           You hadn't, by that stage, as I understand it,  
19 received no account. The accounts you received were up to  
20 March 2017. Those were incomplete. But unless there was  
21 money from somewhere, this was not going to go anywhere,  
22 and it collapsed by June.

23          THE WITNESS: Um-hmm.

24           Respond; right? Okay. So--I address each of  
25 those individually.

1           The terms that the--the terms that the operating  
2 parties presented to us was unacceptable, plain and simple.

3           COMMISSIONER HICKINBOTTOM: But the fact of the  
4 matter is you were not going to put any more funds into  
5 this.

6           THE WITNESS: Yes.

7           COMMISSIONER HICKINBOTTOM: You didn't know what  
8 the state of the BVI Airways was in financial terms.

9           THE WITNESS: Um-hmm.

10          COMMISSIONER HICKINBOTTOM: And they made it  
11 pretty clear that they wanted money from you.

12          THE WITNESS: Yes.

13          COMMISSIONER HICKINBOTTOM: Which suggests they  
14 hadn't got any. So it had just run into the sun, didn't  
15 it?

16          THE WITNESS: But we know they had the money;  
17 right? Because we done our work before, and we knew at  
18 least Castleton was good for that. We knew that.

19          COMMISSIONER HICKINBOTTOM: But there was  
20 obligation for them to pay any money in.

21          THE WITNESS: But that was another issue; right?  
22 It's not that weren't able to pay. That wasn't the issue.  
23 So we knew that they were able to pay. Whether or not they  
24 were honourable enough, I guess, we need to talk business,  
25 I don't know if that has anything to do with it, but we

1 knew they were able, we knew that financially they could  
2 put funds into it, the funds are required to make it fly.  
3 We knew that. There was no doubt in our minds at all,  
4 based on the work we had done before.

5           So, we knew that they decided that they had power  
6 and wouldn't put any more funds into it. What the  
7 Government by that time had more than fulfilled its  
8 obligations. It had also demonstrated to the operating  
9 parties they were serious about the venture.

10           COMMISSIONER HICKINBOTTOM: But the operating  
11 parties had complied with their obligation, too. They had  
12 no obligations to put any money in.

13           THE WITNESS: Well, I don't know I necessarily  
14 disagree that point, if you feel so. I don't know if I  
15 disagree with that, but to say that--they didn't make that  
16 point. We knew they were able to make--we knew they would  
17 go for it. And if they really wanted to and were convinced  
18 about the investment--goodness of the investment, so to  
19 speak, that did himself have the possibility. So I don't  
20 know if I disagree also.

21           COMMISSIONER HICKINBOTTOM: Yes, thank you.

22           Yes.

23           MR RAWAT: Commissioner, could I move on to a  
24 different topic.

25           COMMISSIONER HICKINBOTTOM: Yes.



1 BY MR RAWAT:

2 Q. You can put the Award to one side and the bundle  
3 to one side, Mr Smith, but you should find both separately  
4 again this is the loose-leaf document, and it will be just  
5 under the Award, I hope, another document which is the  
6 Public Accounts--

7 A. Yes.

8 Q. Now, this is the Public Account Committee's Final  
9 Report on the Cruise Ship Port Development Project.

10 A. Yes, sir.

11 Q. If you go, please, to page 9.

12 A. Page 9.

13 Q. Yeah. Now the report is dated the 13th of  
14 June 2014.

15 A. There is--I think there is more than one page 9.  
16 Yeah, there is more than one page 9, so "Conclusions"?

17 Q. Do have you paragraph 40, which is headed  
18 "Tendering by the Ministry of Finance"--

19 (Overlapping speakers.)

20 Q. That's it.

21 A. That's the first page 9.

22 Q. Right.

23 Now, the first question is: Were you in post as  
24 Financial Secretary in August 2012, after August 2012?

25 A. Yes, I think so, yes.

1 Q. That means I can ask you these questions.

2 A. I think I was, yes.

3 Q. Just to give you some context, what--the  
4 Commissioner has had heard evidence from the Auditor  
5 General about this, and there was then a Public Accounts  
6 Committee Report on the same issue, and to try and  
7 summarise it, the process had been that although the  
8 development of Wickham's Cay was a matter for the Ports  
9 Authority, it had been taken forward by the Ministry of  
10 Communication and Works, who had got it to a point as a  
11 development where there was an agreement with the Tortola  
12 Ports Partners and the proposal had been accepted by the  
13 Ministry of Communication and Works.

14 But if we then go to page 9, what then happened  
15 was that if you look at 40, that project as return by the  
16 Ministry of Communication and Works was brought to a halt  
17 in August 2012, and there was non-binding agreement with  
18 the Tortola Port Partners (TPP) which was terminated, and  
19 the Ministry of Finance then stepped in, and the Ministry  
20 of Finance initiated a tendering process. And hopefully,  
21 fairly, I will try and summarise what then happened.

22 A. Um-hmm.

23 Q. Because the--in terms of the tendering process,  
24 there was a sort of request for Expressions of Interest,  
25 and what the Public Accounts Committee found and that these

1 points found by the record but recorded by the Auditor  
2 General was that firstly that the length of time provided  
3 to tenderers to respond to what was a complex matter, a  
4 multi-million-dollar development, that the time provided  
5 for that was too short because initially it was a two-week  
6 period; it was extended for a total of six weeks. But in  
7 the Committee's view the time frame still fell short of  
8 that required for a project of this magnitude, so that was  
9 the first criticism, length of time.

10           The second criticism, which is also a criticism  
11 made by the Auditor General, was that the project  
12 requirements that were put out to tender, and what it  
13 says--can you see at (b) subsequently amended by the  
14 Financial Secretary, closely resembled the project details  
15 that were previously submitted by TPP and accepted by the  
16 Government. Striking similarities were noted in the  
17 required design, the exit provisions and training  
18 requirements. The Committee found this to be suspect as it  
19 would put other potential tenderers who entered the process  
20 at an immediate and severe disadvantage.

21           So, in effect, the argument is there was sort of  
22 acceptance of what TPP had put in before, which therefore  
23 gave TPP an advantage.

24           The last criticism that is made--and it's not one  
25 that features in the Auditor General's Report--is that the

1 team assessing the tenders included the former consultant.  
2 That was a consultant we have been engaged by the  
3 Committee--the Ministry of Communication and Works, but had  
4 now become the Managing Director of the BVI Ports  
5 Authority, and that's Claude Skelton Cline. He was on the  
6 team assessing the tenders, but he had already established  
7 a relationship with TPP and its principals. And the point  
8 that the Public Accounts Committee made was that there was  
9 a prima facie conflict of interest for Mr Skelton Cline.

10           And I draw your attention to paragraph 41,  
11 Mr Smith, where they cite evidence given to them by the  
12 former Acting Permanent Secretary, and that's in the  
13 Ministry of Communication and Works, expressing concern  
14 that Mr Skelton Cline being on the Tender Board because he  
15 was dealing with some of the same entities that he had been  
16 negotiating with earlier.

17           If I take you to the conclusion, which is on  
18 page 11, what the Committee concluded was that the  
19 procurement process engaged by the Ministry of Finance for  
20 the development of the Cruise Pier Project was flawed as it  
21 created an unfair bias towards TPP submittal and rendered  
22 other prospective tenderers at an immediate and severe  
23 disadvantage. And secondly, excluded the Port Authority  
24 Board which was largely kept out of the process,  
25 notwithstanding the presence of its Managing Director on

1 the Tender Assessment Committee.

2 On that last point, perhaps the issue with this:  
3 The criticism that is made is that the Board has the  
4 statutory responsibility for that pier, and Ministries  
5 shouldn't be stepping in.

6 So there are two criticisms that are directed at  
7 the Ministry of Finance and, therefore, directed at you as  
8 the Financial Secretary. One was that the tender process  
9 was flawed, and two was that you were usurping the role of  
10 the Ports Authority.

11 I hope I've summarized that fairly, but those  
12 were findings made in 2014. Did you accept those findings  
13 at that time?

14 A. The way to answer this, and I guess you could  
15 accept this as Minister of Finance or not when I answer it,  
16 is that the Ministry of Finance did have concerns in the  
17 way that the process began, indeed, and that is the reason  
18 why it ended up in the Ministry of Finance's hands  
19 because--because it was my responsibility to make sure that  
20 these processes occurred in a fair manner.

21 When my concerns were expressed--and I recall the  
22 Government might have been involved at the time--we took it  
23 over with a view to making the process fit.

24 There was another constraint which I had to fight  
25 against or we had to fight against, which was that there

1 was a timeline on the backend, meaning that the cruise  
2 lines themselves were asking for things that be done by a  
3 specific date or else there would be repercussions for the  
4 industry and the BVI. They wouldn't call, for example;  
5 right?

6           So, when we made initial expression--when we did  
7 Expressions of Interest, the idea was to create a situation  
8 where the rigor that would be required to submit a tender  
9 wouldn't immediately be required because just an Expression  
10 for Interests, this is what we want completed, can you do  
11 it or not do it, do you have the requisite document to  
12 actually complete this; right? That was therefore the  
13 Expression of Interests because from there then you could  
14 go into a second phase where you could have a more rigorous  
15 process.

16           So, it was expected that people--it would level  
17 the playing field, so to speak; right? Because there would  
18 be less to prove, you just need to say based on you had  
19 experience before and you have the type of people you need  
20 to do it, something around that; right?

21           I agree with the fact that the time frame was too  
22 short and that was why it was extended, and I might have  
23 been one of the individuals that were representing that we  
24 should make it longer because the final decision of what  
25 the time frame was, if I recall, was in mind.

1 Q. Who was it? Who made the final--

2 A. It would have been a discussion between the  
3 Minister for the subject and the Minister of Finance, and  
4 also Mr Cline, Claude Skelton Cline at the time; right? He  
5 would have been saying this is what the industry was  
6 looking for, the ruling was plain, and the Minister was  
7 saying, uhh, and then the Minister of Finance, and I say  
8 the Minister is a little short, and we say okay, but then  
9 it became immediately apparent that that was too short, so  
10 that was extended, I think, once or twice. I don't recall  
11 how much times.

12 I also agree with your point that the terms not  
13 only reflected the conditions that TPP had put up. They  
14 were taken from me, so that was not--there was no--I'm not  
15 trying to, as it were, avoid. That is true. That is true,  
16 and I think I agree with you that it could appear to  
17 constitute, and materially, I think, on balance I think it  
18 actually did provide unfair advantage with TPP. But in  
19 addition, I'm not sure the Public Accounts Committee Report  
20 addressed. Eventually, we scrapped the entire process, and  
21 it was because of those concerns.

22 So, in my view, the system worked, but I don't  
23 know that I disagree with what you say. What I am happy  
24 about is that the system worked in the end, and in the end  
25 we did not finish the process. We stopped the process, if

1 I recall it correct. If I recall, the BVI Port Authority  
2 actually moved the process forward, eventually. I could be  
3 wrong on that, but that's my recollection.

4 The issue about the Ministry taking the project  
5 from the BVI Port Authority, I think again that's--yeah, I  
6 mean, but I don't know if the--it would be preferable,  
7 obviously, for the BVI Port Authority to handle that  
8 process, but as the Ministry responsible for the BVI Port  
9 Authority, I'm not so sure that is wrong. I wouldn't  
10 recommend it, but I'm not so sure that that was untowards.  
11 I would not have recommended that approach, but I don't  
12 know if the Ministry had been ultimately responsible to  
13 overstepping. That's something I would have to look at.

14 Q. What about the point (c) on page 10 that the  
15 Public Accounts Committee drew attention to the conflict of  
16 interest?

17 A. This is (c)?

18 Q. Yes.

19 A. On 10?

20 Q. Yes.

21 So, you've dealt with the short time length.  
22 You've dealt with the TPP details being used, and that that  
23 creates an advantage, but an element of the advantage was  
24 the fact that Claude Skelton Cline had a conflict of  
25 interest. Was that something that was a factor at the time



1 that anybody was aware of?

2 A. It was something that I know we are--I was  
3 concerned with it as Financial Secretary, but I was--I  
4 think by the time the discussions had finished, some  
5 reliance was placed on me to ensure that this individual  
6 did not unduly influence anything.

7 Q. How did--

8 A. Not directly.

9 Q. How did you discharge that duty? That there was  
10 reliance on you to make sure that there wasn't undue  
11 influence? How did you manage that?

12 A. Right.

13 So, he was on the Tender Committee, and I would  
14 seek to control his opinion, so to speak, make sure that,  
15 in my view, I did not unduly influence the other members.  
16 That was what I would, but--well, I don't disagree and I  
17 agree with you that that was uncomfortable position, that's  
18 something we should avoid.

19 Q. But at that time, was there any mechanism in  
20 operation by which someone who had a conflict or someone  
21 who others thought had a conflict could be removed from a  
22 committee or asked to step down from a Board?

23 A. Yes, definitely.

24 Q. Did that happen in this situation?

25 A. I don't think it did.

1           And my understanding was that--and this is why I  
2 think it's obviously true, is that this individual had  
3 worked with TPP to come up with the proposal but was not  
4 part of TPP. In other words, he was an agent of government  
5 to negotiate an initial agreement with TPP that was in the  
6 best interest of TPP, and I think that is the thing that is  
7 unbalanced. So, in other words, he wasn't an agent for  
8 TPP, he was an agent for the Government of the Virgin  
9 Islands. So, he was involved in the process and in the  
10 negotiations with TPP from the beginning. So, yes, he had  
11 intimate knowledge, but he was not--in all of that, he was  
12 actually working for the Government of the Virgin Islands  
13 as opposed to working for TPP.

14           So, his intimate knowledge of this particular  
15 subject would have been an opportunity for us to  
16 have--intimate knowledge of what TPP was proposing; right?  
17 So I think, if I recall, that was what allowed us to go  
18 through with him actually being on the tender. In other  
19 words, he was like an expert. It's as if you--if a  
20 government sends me to negotiate at a particular party on a  
21 topic, he would believe that I would expect that I would  
22 end up with more than--more information and more intimate  
23 knowledge on that enterprise than other Members in  
24 Government. So it is on that premise I think why he was  
25 there, but there would have been, in my view, better, would

1 have been at least in terms of how it looked if he wasn't  
2 there.

3 Q. Thank you.

4 MR RAWAT: Commissioner, I finished with my  
5 questions. Can I conclude by thanking Mr Smith for his  
6 patience today, but also for coming to give evidence and  
7 also finally for the way that he has given his evidence.

8 COMMISSIONER HICKINBOTTOM: Can I echo that,  
9 Mr Smith. Thank you very much for your time.

10 THE WITNESS: Sure.

11 COMMISSIONER HICKINBOTTOM: Your patience and the  
12 clear way in which you have given your evidence. Very much  
13 appreciate it. Thank you.

14 (Witness steps down.)

15 MR RAWAT: There is one final matter.

16 Mr Smith is free to go.

17 Just one final matter if I could deal with that  
18 quickly, and that's the question of responding to the  
19 Solicitor General's earlier submissions in terms of the  
20 publication of the draft Auditor General's Report in  
21 relation to COVID-19 stimulus grants.

22 The Solicitor General makes two points. The  
23 first is a concern over personal data, and the second is  
24 that the fact that these reports have yet to be laid before  
25 the House.

1 COMMISSIONER HICKINBOTTOM: Yes.

2 MR RAWAT: In relation to the first, I would say  
3 that that as a concern is easily resolved by any personal  
4 data being redacted. We were careful during the course of  
5 the Hearing not to refer to any. And so, in terms of any  
6 members of the public who want to look at our documents,  
7 they will still get a sense of and an understanding of the  
8 Auditor General's conclusions and findings.

9 COMMISSIONER HICKINBOTTOM: Yes.

10 MR RAWAT: And so that, in my submission, is not  
11 an argument against publication.

12 The second is that--is the argument that they  
13 have yet to be laid before the House.

14 In effect, Commissioner, you are being asked to  
15 balance two competing interests. The first is that a  
16 procedural step has yet to be taken. You will have or you  
17 will recall the evidence that was given by the Auditor  
18 General in response to questions from yourself, which was  
19 the effect that once she submits her Report to the  
20 Governor, it is final. If any changes need to be made,  
21 they would need to be made by way of addendum. But these  
22 are the final reports. It's just a procedural matter that  
23 they now need to go before the House.

24 On the other side of that, in my submission, are  
25 the following points:

1           Firstly, that these reports were included in the  
2 hearings bundles, which were sent to all participants in  
3 advance of the Hearing, and so all participants had an  
4 opportunity to consider the hearing bundle and to raise any  
5 concerns that they may have had about the content of that  
6 bundle. But it would have been obvious from the fact that  
7 the Commission included it in the bundle that there was an  
8 intention to use it at a public hearing.

9           The second is that, the reports have, indeed.  
10 been used at a public hearing. They have been referred to  
11 extensively, albeit carefully in order not to refer to  
12 personal data, but the public reading the Transcripts will  
13 be well-aware now of the content of the reports.

14           But the third is that it is important that the  
15 public understand the work of the Inquiry. There is--I'm  
16 not arguing that the Inquiry should be publishing every  
17 single document that it receives, but there is an argument  
18 that it should publish documents that assist the public,  
19 and we are here acting in the public interest, having  
20 regard to the Terms of Reference, but to assist the public  
21 in understanding the evidence that is being called at these  
22 hearings, and publishing these documents will do that.

23           And in my submission, when one takes those  
24 factors together, they outweigh the procedural--or the  
25 argument that a particular procedural step has yet to be

1 taken.

2 I would also mention in relation to that  
3 procedural step that you will have in mind, Commissioner,  
4 that once it is before the House of Assembly, it will be  
5 debated at a public hearing, and it will then become a  
6 public document, and so the step that you are taking, if  
7 you agree with my submissions, is one that would occur in  
8 any event.

9 Other than that, I have nothing further to say.

10 COMMISSIONER HICKINBOTTOM: Yes, thank you very  
11 much.

12 Anything in response, Solicitor General?

13 SOLICITOR GENERAL: Yes, Commissioner. Thank you  
14 for the opportunity.

15 COMMISSIONER HICKINBOTTOM: Yes.

16 SOLICITOR GENERAL: First of all, My Lord--first  
17 of all, Commissioner, I think that what you should be drawn  
18 to is Section 20 of the Audit Act. It is not a procedural  
19 step but it is a statutory requirement that this procedure  
20 is done. So, it is not right, Commissioner, for you to be  
21 encouraged to brush over Section 20 of the Audit Act.  
22 Section 20 of the Audit Act sets out a procedure that makes  
23 these documents parliamentary-privileged documents, and it  
24 becomes, Commissioner, it becomes, to say it lightly,  
25 Commissioner, a discourtesy to simply, not only breach the

1 Act, but to interfere with the procedure, the parliamentary  
2 procedure laid out by Section 20.

3 Commissioner, I can only in my best advice guide  
4 this Commission of Inquiry not to breach Section 20 of the  
5 Audit Act by continuing to disclose the documents that  
6 should be given that privilege, that parliamentary  
7 privilege, by putting the documents that are before this  
8 Commission in this Inquiry on the website of the Commission  
9 of Inquiry because I say that this would not only be a  
10 discourtesy to the parliamentary privilege that was  
11 intended by the Legislators of this country but it would be  
12 a breach of Section 20.

13 By Section 20, Commissioner, these are special  
14 reports of the Auditor. They must be submitted to the  
15 Governor, and then they must be submitted to the Minister,  
16 and then they must be submitted to the Financial Secretary.

17 It is my humble submission, My Lord,  
18 Commissioner, that in the drafter and the framers of the  
19 Act took in mind that there was a procedure, there was some  
20 value, in giving those steps. And if we publish these  
21 documents primarily on the website, we will be running over  
22 these steps. Maybe, and I think it was the evidence of the  
23 Auditor General, that having gone through these steps, she  
24 may wish to issue an addendum. Having gone through these  
25 steps, the privacy of persons may be considered, a security

1 of persons listed may be considered, but the point is that  
2 the Governor has up to three months, up to and he doesn't  
3 have to use the three months, but he has three months to  
4 continue these steps.

5 I humbly guide and submit that the Commission of  
6 Inquiry should not summarily put the documents up and allow  
7 this procedure to continue, not only because it's a  
8 parliamentary privilege, but also that the Commissioner  
9 would not--the Commissioner would not want to be in breach  
10 of the very Section of the Audit Act that the Auditor  
11 General spoke of today so eloquently.

12 COMMISSIONER HICKINBOTTOM: Section 20?

13 SOLICITOR GENERAL: Section 20, Commissioner.

14 COMMISSIONER HICKINBOTTOM: And why would it be  
15 in breach of Section 20?

16 SOLICITOR GENERAL: Section 22 envisions that the  
17 Governor shall within three months of the receipt of the  
18 special reports that are being considered, cause them to be  
19 laid before the House of Assembly.

20 COMMISSIONER HICKINBOTTOM: But that--

21 SOLICITOR GENERAL: In between there,  
22 Commissioner, the Minister of Finance and the Financial  
23 Secretary have also a duty to receive these reports.

24 So, it is tradition that once a document--once  
25 these documents are by statute to be laid before the House,



1 they should not be made public before that procedure is  
2 continued, and I want to mention what the Auditor General  
3 said this afternoon, when she spoke about the--when she  
4 spoke about the press conference that was called upon the  
5 Report on the wall, she eloquently, in her own words, said  
6 that that is not something that should be--should have been  
7 allowed.

8           And I think that if we do the very same thing  
9 that the Auditor General recommends us not to do, we would  
10 not be, you know--we would not be in sync with what she's  
11 saying that the purpose of the rules are. The rules are  
12 that this is what should happen. And when that--when that  
13 press conference was given, she clearly said she did not  
14 respond until the document was publicly laid.

15           COMMISSIONER HICKINBOTTOM: But the Minister  
16 wasn't acting in the public interest.

17           SOLICITOR GENERAL: The point is, Commissioner,  
18 she did not respond until that document--

19           COMMISSIONER HICKINBOTTOM: But in those  
20 circumstances, the Minister, when he--

21           SOLICITOR GENERAL: Breached the rules or so to  
22 speak?

23           COMMISSIONER HICKINBOTTOM: When the Minister  
24 published the Report, he was not acting in the public  
25 interest.

1 SOLICITOR GENERAL: Indeed, Commissioner.

2 COMMISSIONER HICKINBOTTOM: I'm bound to act in  
3 the public interest, and in the current circumstances,  
4 nobody has objected to these two reports being referred to  
5 at great length in the course of an open hearing.

6 SOLICITOR GENERAL: Yes, Commissioner, but when  
7 you put the question to me--

8 COMMISSIONER HICKINBOTTOM: Which has been  
9 live-streamed.

10 SOLICITOR GENERAL: Yes, Commissioner. And I  
11 think that--

12 COMMISSIONER HICKINBOTTOM: It would have been  
13 open to Mr Rawat to have read out the whole of the two  
14 reports, he read out substantial parts, it would have been  
15 open to him to have read out that. And nobody objected to  
16 that.

17 SOLICITOR GENERAL: Yes, but we're objecting now.

18 COMMISSIONER HICKINBOTTOM: And they had every  
19 opportunity.

20 SOLICITOR GENERAL: Yes, I have the opportunity  
21 now, and I'm gracious and I'm grateful for the opportunity  
22 you have given me. You have asked my opinion, and I have  
23 given it.

24 COMMISSIONER HICKINBOTTOM: But isn't the horse  
25 bolted long since?

1           SOLICITOR GENERAL: Well, Commissioner, if the  
2 horse has already left the gate, I believe this is an  
3 opportune time to check. I believe that in the interest of  
4 the Commission and having these proceedings continue, the  
5 Commission was correct in terms of not giving out private  
6 information during these hearings. The Commission was  
7 correct in terms of getting on its work.

8           But when it comes to actually treating a document  
9 of parliamentary privilege that was so made by the Act, I  
10 believe there is a line, and I believe the line is now, and  
11 I believe that we ought to, in respect of Section 20 of the  
12 Audit Act, and in respect of all of the submissions made by  
13 the Auditor General today with regard to a culture of  
14 respecting the law and respecting rules, I believe that all  
15 the things she so eloquently said about the Report and  
16 rules that we ought to stop at this point and allow the  
17 parliamentary procedure to work, and it was envisioned by  
18 the framework of Section 20 of the Audit Act.

19           COMMISSIONER HICKINBOTTOM: Just one final point,  
20 Solicitor General. In terms of the stimulus grants report,  
21 I'm not sure that there are any personal data in it. There  
22 are obviously personal data in the Farmers and Fisherfolk  
23 Report. There are names of individuals, for example, but  
24 no names of individuals in the religious institutions and  
25 community groups report, just the name of applicants and

1 non-applications which are as the title of the Report  
2 suggests, religious institutions, civic groups, private  
3 schools, and daycares.

4 SOLICITOR GENERAL: Yes, and even, Commissioner,  
5 for the interests of the reputation of those institutions,  
6 I believe preempting of the House's publication is  
7 significant, particularly to the liability of the  
8 Government, who would wish to ensure that if information  
9 about public persons, public institutions, especially some  
10 as social and/or schools and/or churches, it would be my  
11 best advice that the proper procedure is gone through to  
12 protect the liability of the Government such that if and  
13 when those names and institutions are given to the public,  
14 it's in complete corners of the law.

15 As it stands right now, I don't believe  
16 publishing them would be in the complete--the four corners  
17 of the Act.

18 I believe there are some places which I cannot  
19 identify at the moment, but there are some places where  
20 names are called like on page 287, I believe, in the  
21 Report. In the Report, names would be mentioned. And if  
22 not only names are mentioned because of the size of the  
23 Territory, you could redact the name but the information  
24 surrounding the name would allow persons to know exactly  
25 who or which institution you're speaking about.

1           So, if redactions are going to be done, and I do  
2 not say that (unclear) I would suggest that they are  
3 carefully done and not just a summarily redaction by names  
4 alone given the Territory and its size. Some proper care  
5 should be done to do that.

6           But I do see that it is not the only concern we  
7 have. I think redacting the names and institutions in a  
8 situation where the proper procedure hasn't gone through to  
9 make the names and the Report public, would not be correct.  
10 And I so humbly advise.

11           COMMISSIONER HICKINBOTTOM: Thank you, Solicitor  
12 General.

13           A number of reports of the Auditor General have  
14 been considered in open hearings yesterday and today.  
15 Prior to those Hearings, all of the reports which were  
16 intended to be referred to were sent to all of the  
17 participants, including the elected Ministers represented  
18 by the Attorney General, and the other Members of the House  
19 of Assembly, including The Honourable Speaker represented  
20 by Silk Legal. Those Reports included two reports on  
21 COVID-19 stimulus grants to farmers and fisherfolk on the  
22 one hand and religious institutions, civic groups, private  
23 schools, and daycares on the other.

24           The usual procedure in respect of Auditor  
25 General's Reports is that once she has produced a draft

1 report, there is an opportunity for relevant Ministers to  
2 have input, and once she has produced the Final Report,  
3 then that Report is presented either to the relevant  
4 Minister under Section 12 of the Audit Act of 2003 or to  
5 the Governor under Section 20 of that same Act.

6 Under Section 20--and both of the COVID-19  
7 reports were under that Section, the Governor shall, within  
8 three months of receipt of the Report, cause the Report to  
9 be laid before the House of Assembly. That has not yet  
10 been done in respect of either of those Reports. The House  
11 of Assembly discuss and debate any report that is so laid.  
12 The evidence of the Auditor General today is that the Final  
13 Report cannot be altered, but it is possible for her to  
14 insert an addendum, if appropriate, although that, in her  
15 recollection, has never been done in the 25 or 30 years in  
16 which she has been involved with Auditor General's work.

17 No one suggested when these reports were sent  
18 round to the participants, and no one has suggested since  
19 that any of the reports, including the COVID Reports,  
20 should be considered in evidence in private. Consequently,  
21 they have been considered in public hearings, and both of  
22 those reports have been referred to very extensively.

23 As I indicated at the outset of these hearings, I  
24 wish all of the Auditor General's Reports to be--all of her  
25 Reports that have been considered in an open hearing to be

1 put on the COI website to enable the BVI public better to  
2 follow the COI's work, and in pursuance of the openness  
3 with which the COI is pursuing its work.

4 The Solicitor General, on behalf of the elected  
5 Ministers, objects to the COVID Reports being put on the  
6 COI website for two reasons:

7 Firstly, she submits with some force that the two  
8 reports contain personal data. In particular, the Farmers  
9 and Fisherfolk Report includes all of the names of the  
10 applicants. There is clearly force in that, and that those  
11 personal data must be redacted from the Report before any  
12 publication.

13 Furthermore, in relation to the other COVID  
14 Report concerning religious institutions, et cetera,  
15 although I'm not convinced that the names of the  
16 institutions are personal data, I do not see that it is  
17 necessary for those to be published. Of course, all of the  
18 figures can be published, but the names of the applicants  
19 and indeed the non-applicants who received grants need to  
20 be published, and those too can be redacted. Consequently,  
21 redaction is not a reason for not putting these reports on  
22 to our website.

23 The second reason the Solicitor General relies  
24 upon is, she says, that neither report has yet been laid  
25 before the House of Assembly. And she put it in a number

1 of ways. She said that it is the tradition that reports  
2 are not disclosed before they are so laid. It would be  
3 discourtesy to the House of Assembly, she submits, if the  
4 COI was now to publish these reports on its website. She,  
5 in my view rightly, does not rely upon Section 16 of the  
6 Audit Act. She relies only upon Section 20 to which I have  
7 already referred. She submits that there would be a breach  
8 of that Section if the reports are now put onto the Web.

9 I have to balance the public interest in--and  
10 other interests that might exist in either putting the  
11 reports onto the website or alternatively not doing so.  
12 The only reason for not publishing them in full is that the  
13 procedural step under Section 20, subsection 2 of the Act  
14 has not yet taken place. I do not agree with the Solicitor  
15 General that it will be a breach of Section 22 by  
16 publishing the reports or any information in the reports  
17 now. But in any event, insofar as there is a tradition or  
18 even possibly a privilege, a Parliamentary privilege, in  
19 these reports before they are debated in Parliament,  
20 that--that is a matter which has already been given away  
21 because the--because no one, as I've explained, has  
22 objected to these reports being fully discussed in an open  
23 hearing as they have yesterday and today.

24 Any publication would not, in my view, show any  
25 discourtesy to any of the institutions in the BVI, either



1 to the Governor nor to the House of Assembly. As I've  
2 indicated, no one in the House of Assembly, including the  
3 Speaker, has sought to constrain any form of publication of  
4 the Reports or any information in the Reports.

5 On the other side of the balance, however, is the  
6 importance of the public being able to understand the work  
7 of the Inquiry, not to publish the--not to put the Reports  
8 on the website now, will leave the public with an  
9 incomplete picture. The complete picture can be given--a  
10 complete picture of the evidence given by the Auditor  
11 General can only be given if these two Reports are made  
12 available to them. Because they have already been referred  
13 to extensively in public, it seems to me that they should  
14 now be put on to the website, and I will direct that they  
15 are published on the COI website with appropriate  
16 redactions, both in respect of all personal data and also  
17 the names of the religious institutions, et cetera, in the  
18 other report.

19 Good. Anything else, Mr Rawat?

20 MR RAWAT: That's our business for today. We  
21 start again tomorrow.

22 COMMISSIONER HICKINBOTTOM: At?

23 MR RAWAT: I think it's 9:30.

24 COMMISSIONER HICKINBOTTOM: 9:30. Good. Thank  
25 you very much.

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Thank you, Solicitor General.

SOLICITOR GENERAL: Thank you, sir.

(Whereupon at 6:50 p.m., the Hearing was  
adjourned.)

## CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

A handwritten signature in cursive script, appearing to read "David A. Kasdan", is written above a solid horizontal line.

DAVID A. KASDAN