

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

HEARINGS: DAY 34

(THURSDAY 16 SEPTEMBER 2021)

International Arbitration Centre
3rd floor Ritter House
Wickhams Cay II
Road Town, Tortola

Before:

Commissioner Rt Hon Sir Gary Hickinbottom

Mr Hussein Haeri and Ms Lauren Peaty of Withers LLP (instructed by the Attorney General) appeared for various BVI Government Ministers and public officials.

Mr Richard Rowe of Silk Legal appeared for those members of the House of Assembly who are not members of the Government.

Counsel to the Commission Mr Bilal Rawat also appeared.

Hon Julian Fraser RA gave evidence.

Hon Andrew A Fahie gave evidence.

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Those present:

Session 1

Mr Hussein Haeri, Withers LLP (attending remotely)

Ms Lauren Peaty, Withers LLP (attending remotely)

Mr Bilal Rawat

Ms Juienna Tasaddiq, Assistant Secretary to the Commission

Ms Rhea Harrikissoon, Solicitor to the Commission

Mr Dame Peters, Audio-Visual Technician

Officer Junior Walker, Royal Virgin Islands Police Force

Session 2

Ms Lauren Peaty, Withers LLP (attending remotely)

Mr Richard Rowe, Silk Legal

Hon Julian Fraser RA

Mr Bilal Rawat

Mr Steven Chandler, Secretary to the Commission

Ms Juienna Tasaddiq, Assistant Secretary to the Commission

Ms Rhea Harrikissoon, Solicitor to the Commission

Mr Dame Peters, Audio-Visual Technician

Officer Junior Walker, Royal Virgin Islands Police Force

Session 3

Mr Hussein Haeri, Withers LLP

Ms Lauren Peaty, Withers LLP (attending remotely)

Mr Richard Rowe, Silk Legal (attending remotely)

Hon Andrew A Fahie

Mr Bilal Rawat

Mr Steven Chandler, Secretary to the Commission

Ms Juienna Tasaddiq, Assistant Secretary to the Commission

Mr Andrew King, Senior Solicitor to the Commission

Mr Dame Peters, Audio-Visual Technician

Officer Junior Walker, Royal Virgin Islands Police
Force

P R O C E E D I N G S

Session 1

COMMISSIONER HICKINBOTTOM: Good morning, everyone.

The only matter we have to deal with before we start the evidence, I think a matter for Mr Haeri, I think, is the elected Ministers' response to the Governor's Position Statement on governance. I'd hoped and expected to be able to publish this by putting it on our website with the other Position Statements and responses.

The first point, Mr Haeri, as I understand it, there is no application to redact any part of what perhaps can be called the "main paper"--not the annexes but the actual substantive paper; is that correct?

MR HAERI: Good morning, Commissioner.

Yes, that's correct.

COMMISSIONER HICKINBOTTOM: Okay. So, there is no problem in putting that on the website?

MR HAERI: That's correct.

COMMISSIONER HICKINBOTTOM: In respect of the annexes, there are three types of information in the annexes which you suggest should be redacted:

Firstly, personal data--no problem with that--personal data comes out.

Secondly, there are Cabinet Papers, parts of which are sought to be redacted. I'm not at the moment sure whether

1 confidentiality is still maintained over them.

2 But thirdly--and this is the thrust of your
3 application, there are NSC documents attached within the annexes
4 in relation to the radar barges which you say are covered by PII
5 on reasons of national security, and you've made that
6 application. I think this is the third go at an application,
7 and the last time that I rejected it as inadequate, it's been
8 remade with less redactions.

9 Mr Haeri, in my view, the application is still
10 patently inadequate, to the extent that I'm simply unable to
11 determine it. As you well know, the days when a government
12 could simply waive a national-security card and the courts and
13 in these circumstances, Mayor's Commissioner, run for the hills
14 have long gone. Now in an application for PII, the application
15 has to be justified with reference to specific information,
16 which it is said is covered; the need for nondisclosure, the
17 reasons for nondisclosure; and also the damage that would or
18 might be caused by any public disclosure in the form of
19 evidence. None of that appears in the application even now.

20 And the form of this sort of application again, as you
21 will be well-aware, in investigatory context which we are in,
22 the principles and the form are well-established, but the
23 principles and the form were helpfully set out by Mr. Justice
24 Hilliard, sitting as a coroner in the Coronial interest into the
25 fatal stabbing of Sudesh Amnan in Stratham. He gave that ruling

1 on the 27th of July, so that's a recent and helpful setting out
2 of the relevant principles and the relevant form.

3 Now, the application that has been made is deficient,
4 Mr Haeri, in a number of respects. It elides--perhaps a better
5 word is "muddles"--the issue of relevance and the issue of PII
6 privilege, which are conceptually and necessarily distinct. It
7 seeks to redact information which is already in the public
8 domain, some of which was discussed in detail in earlier COI
9 hearings, without demur any without any application by the
10 Attorney General on any grounds.

11 Some of the redactions sought are inconsistent because
12 information is sought to be redacted in one part and the same
13 information appears without any suggestion as to redaction in
14 another part. But as I say, fatally, it fails to set out the
15 necessary evidence as to precisely the national security
16 interest that would be undermined by publication and the damage
17 that would or might be called, if it were made public. And in
18 those circumstances it is simply impossible for me and would be
19 impossible for anyone else to do the necessary public interest
20 balancing exercise, which is necessary on an application like
21 this.

22 Can I tell you what I propose to do with regard to the
23 annexes? As I say, with regard to the main document, that can
24 go on to the Web now, although I should say that it contains
25 some information which is sought to be redacted in the annexes.

1 I don't propose to ask you to resubmit the
2 application, yet again, in a form in which I might determine it.
3 What I propose to do is simply this: I propose that we proceed
4 with the hearing bundles in the two forms that they have been
5 produced. That is with the suggested redactions in translucent
6 form and separately in opaque form. The version with the
7 suggested redactions blanked out will go to Silk Legal so that
8 they can follow matters. The translucent version will be used
9 by the COI and obviously by you and, I think, by all of the
10 Witnesses--I think by all of the Witnesses, but certainly those
11 Witnesses that the Attorney represents and, for example, the
12 Governor.

13 We will all proceed in using the annexes in that form
14 with proper care so that nothing which you suggest should be
15 redacted is referred to without that information being brought
16 to my attention, and we will then go into private session, and I
17 will deal with the application for redaction of that material,
18 of the specific material, there and then. That will mean that
19 the Attorney will need to field someone who will be able to deal
20 with at such applications, and I will deal with it, as I say,
21 there and then, and then proceed either in private, if
22 necessary, or in public if that is not necessary.

23 We, of course, have the three-minute delay in
24 live-streaming, which will give us some comfort that that will
25 work. That means that, at this stage, certainly, the Annex

1 cannot be published and will not be published. And if I
2 consider later that it should be published, then we can revisit
3 the application. But we simply do not have the time--I do not
4 have the time--to waste while a proper application is made.

5 What I would ask, Mr Haeri, in fact, what I will
6 direct, because a number of versions now of this annex have been
7 produced with different redactions, could you, please, let us
8 have, via Relativity, a single bundle with two versions of the
9 annex in it, one with the suggested redactions translucent, and
10 one with them opaque, so that we know exactly which version you
11 wish us to work from, and we will then work from that version.

12 Mr Haeri, any comments in relation to any of that?

13 MR HAERI: No, Commissioner. Thank you. I mean, safe
14 to say that the redactions that are being proposed, and which I
15 think you have accepted, are the unanimous position of the
16 National Security Council, including the input of all Members,
17 so I think nothing further to say on that.

18 COMMISSIONER HICKINBOTTOM: I understand that because
19 you've told us. What I'm lacking is any evidence and any proper
20 application. But as I say, I think that we can work around it
21 and we will work around it in the way that I've suggested.

22 Good. And Mr Haeri, could you please let us have
23 that--could that bundle, please, be put on Relativity today?
24 There should be no problem with that, should there?

25 MR HAERI: No problem at all.

1 COMMISSIONER HICKINBOTTOM: Ms Peaty is nodding which
2 I take as a "yes". Thank you.

3 Anything else on those issues, Mr Rawat?

4 MR RAWAT: Just some additional points, please,
5 Commissioner.

6 Firstly, you've highlighted the way we are going to
7 move forward on this issue. Can I emphasize this: That if, as
8 we go through the evidence, an objection is going to be raised,
9 then whoever is present needs to be able to set out the basis of
10 that, whether it is relevance or whether it is PII.

11 Secondly, if it is the latter, can I reiterate that it
12 is not enough to say damage will be caused or make a submission
13 that damage will be caused; you will need evidence as in a
14 statement of damage.

15 And third point is that what also needs to be
16 addressed or someone needs to be able to address this question,
17 and that is whether the information that is sought to be
18 redacted on whatever basis is already in the public domain.

19 In terms of Silk Legal getting a redacted version of
20 the bundle, that will work. I think I don't see--anticipate
21 that they will object to that. It is, of course, always open to
22 them to seek that material be unredacted on the basis that it's
23 in the public domain.

24 Now, can I, in relation to just the Order you will--

25 COMMISSIONER HICKINBOTTOM: Yes.

1 MR RAWAT: --make about having a bundle. It is
2 important because we want to avoid confusion. There are now a
3 number of versions of this bundle on which different redactions
4 have been sought. So, if we have one single bundle that is the
5 definitive and most recent position of the NSC, that will help.

6 Could I also ask, Commissioner, and invite you to
7 direct, that three hard copies of those, of the translucent
8 version, be delivered to the IAC? Because that would then allow
9 us all to have, as we go through, the Witness, myself, and
10 you--a copy, hard copy, of what it is the NSC says is
11 potentially sensitive.

12 COMMISSIONER HICKINBOTTOM: Yes, thank you.

13 MR RAWAT: But we will make that up into a proper
14 Order and issue it.

15 COMMISSIONER HICKINBOTTOM: Yes.

16 MR RAWAT: I think everybody knows we will make that.

17 COMMISSIONER HICKINBOTTOM: I will make that Direction
18 at 2:00 because we really now are very pushed for time on this.
19 I have nothing to add.

20 Anything to add, Mr Haeri?

21 MR HAERI: No, Commissioner. Thank you.

22 COMMISSIONER HICKINBOTTOM: Thank you very much.

23 What I will do now is I'll just rise for a minute and
24 then we can get the Witness in, reconstitute the Hearing and
25 then recommence.

1

Good. Thank you very much.

2

(Recess.)

1 Session 2

2 COMMISSIONER HICKINBOTTOM: We're ready to resume.

3 Good morning, Honourable Fraser.

4 Mr Haeri, you've had time to talk to Mr Fraser?

5 MR ROWE: Yes. ***

6 COMMISSIONER HICKINBOTTOM: Because obviously when
7 he's giving evidence, you won't be able to talk.

8 MR ROWE: Indeed. Indeed. I appreciate it.

9 COMMISSIONER HICKINBOTTOM: Mr Rawat, are we ready?

10 MR RAWAT: Yes, we are, Commissioner.

11 Can I before I do, say just for the record, put the
12 representation on record, and that is, firstly, we have
13 Ms Lauren Peaty here on behalf of the Attorney General and the
14 elected Ministers; Mr Richard Rowe appears--Ms Peaty appears
15 remotely and Mr Richard Rowe appears in person on behalf of a
16 number of Members of the House of Assembly, including the
17 Honourable Julian Fraser, who is our next witness.

18 BY MR RAWAT:

19 Q. Honourable Fraser, thank you very much for returning
20 to give further evidence to the Commission.

21 You took the oath on the 14th of June 2020 when you
22 first appeared before the Commissioner. You are still bound by
23 that. There is, I think, various documents in front of you that
24 you will see. If you look there, that's the bundle, the Hearing
25 Bundle that's already been provided to you. Under where you've

1 placed your mask, you'll see, if you look just to your left,
2 there are copies there of the various documents that you have
3 most recently provided to the Commissioner. As we go through,
4 if we need to look at those, I will take you to them, if I may.

5 Can I finally give you the reminder that I'm giving
6 all witnesses, and that is to ask you, please, to keep your
7 voice up and to speak slowly. The microphone doesn't amplify,
8 but it would assist the Stenographer who is taking a record of
9 your evidence, if you could just pull it a little closer to you.

10 And also one thing that you and I will both need to
11 avoid is just speaking over each other. So, if I do that, I
12 will stop, allow to you finish, and then I will put any question
13 again. Thank you.

14 Now, in terms of giving some background to the purpose
15 of today's session with you, as you'll know, the Commissioner
16 heard oral evidence from the Auditor General in relation to her
17 Report dated the 27th of August into the Sea Cows Bay Harbour
18 Development project, and that was on the 28th of June of this
19 year. You then attended on the 14th of June, having provided an
20 annotated version of the Report. As we established, that
21 annotated version was a slightly earlier version of the Report.
22 You commented on a draft report.

23 A. Three days, I think it was.

24 Q. Yes. 25th of August was the date of the report that
25 you provided and 27th of August was the final date.

1 A. Two days.

2 Q. But we went through that report with you to take into
3 account your comments on it, and we went through that in some
4 detail.

5 A. For which I was grateful.

6 Q. Thank you.

7 Now, some of the issues that we went through on that
8 day reappear in a Warning Letter that was sent to you on the
9 31st of August.

10 Now, can I explain the purpose of that letter. In
11 fairness to all witnesses where there are potential criticisms
12 that may be made of them, the Commissioner's approach is that
13 that witness should be given notice of those potential
14 criticisms and therefore an opportunity to respond to them.
15 They are, I must reiterate, just potential criticisms. They do
16 not form a final or concluded views of the Commission, but they
17 arise from the evidence and, therefore, that's why it's
18 important to hear from you on them. Now, you have helpfully
19 provided a written response to those criticisms in which you've
20 set out some details.

21 Can I, first, check with you, Honourable Fraser, that
22 you're content for your written response to form part of the
23 evidence before the Commissioner?

24 A. Absolutely.

25 Q. That's helpful because taking that written response in

1 the context of the evidence that you gave on the 14th of July,
2 it will allow, hopefully, for us to have a more focused hearing
3 this morning, because, as we've said, some of the issues
4 underpinning the potential criticisms were addressed in your
5 earlier evidence.

6 So, could I take you, just check that you've got with
7 you, if you look, please, at your written response--if you need
8 a copy, it's just to your left, unless you have a copy with you
9 of your own. And just for the record, in addition to that
10 written response, you've produced as additional evidence to the
11 Commissioner two letters addressed to the Ministry of
12 Communications and Works. One is dated November 11, 2008. Do
13 you need me to take you to that? Two letters from Systems
14 Engineering.

15 A. Yes.

16 Q. You've got it. And then you also--

17 A. It says addressed to whom?

18 Q. It's addressed to the Ministry of Communication and
19 Works, it's dated 11th of November 2008.

20 A. Good.

21 Q. And you also have with you the second letter that you
22 provided to the Commissioner, which is again like the first from
23 Systems Engineering, and it's 12th of February 2010.

24 A. I do.

25 Q. Thank you. Right.

1 Let's then just deal with the criticisms.

2 The first one that as a potential criticism was put to
3 you was focused on the allocation of seven Petty Contracts
4 between December 2010 and January 2011.

5 Do you also have a copy of the Warning Letter?

6 A. Are you starting from criticism 1?

7 Q. Yes.

8 A. First paragraph?

9 Q. Yes.

10 A. Oakay. All right.

11 Q. So, if I summarise the background to that criticism,
12 it sets out that at the relevant time, you were the Minister for
13 Communication and Works, and you were also the District
14 Representative for the Third District, as you remain. And you
15 were involved in selecting/recommending contractors from your
16 District for Petty Contracts.

17 Between 20th of December 2010 and 4th of January,
18 seven Petty Contracts were issued, and--and you confirmed this
19 when you gave evidence on the 14th of June--it's the Public
20 Works Department that actually drafts the contracts; is that
21 right?

22 A. Right.

23 Q. It was to supply concrete sheet piles for bulkhead in
24 Sea Cows Bay Harbour. That was the purpose of those contracts,
25 wasn't it?

1 A. Yes, Sea Harbour.

2 Q. And then what's noted is that all seven contractors
3 were paid an initial 10 percent but only two of them completed
4 the work and were paid in full--

5 A. You're now at paragraph 3?

6 Q. Yes.

7 I'm just summarizing it for you because, and for the
8 record, before getting on to the criticism itself.

9 A. Can we--can we look at the word "10 percent deposit"
10 and make sure that is the esoterics of the trade instead of
11 "10 percent mobilization"?

12 Q. Well, shall I take you to the Auditor General's Report
13 where it says this?

14 A. I know it does say that in the Auditor General's
15 Report, but it's not the esoterics of the trade. It's not a
16 deposit. It's mobilization.

17 Q. All right. Then can you, just for the Commissioner,
18 explain the difference between deposit and mobilization.

19 A. All right. A deposit seems to be a means of packing
20 up your account. Mobilization means that you use this money to
21 purchase in advance materials that you may need for the Project.

22 COMMISSIONER HICKINBOTTOM: I understand that that
23 distinction may be drawn, but this was an advanced payment from
24 the contract sum.

25 THE WITNESS: Right. But that's what the mobilization

1 does.

2 COMMISSIONER HICKINBOTTOM: Yes.

3 THE WITNESS: You get an advance payment from the
4 contract sum so that you can go out and purchase material
5 because if you are talking about \$100,000's worth of work,
6 somehow or another you have to put the money up front, and what
7 the Government did was give them what you call the
8 mobilization--some mobilization money, which is common, but the
9 word "deposit" has a different connotation.

10 BY MR RAWAT:

11 Q. And what do you say the different connotation is,
12 Honourable Fraser?

13 A. No, I said the connotation deposit means that you get
14 some money to top off the account just to have it. This money
15 actually goes towards the Project. I don't know what you do in
16 deposit. Deposit money could be used for anything.

17 Q. I see. All right, thank you.

18 And what's said in the potential criticisms in the
19 manner in which contractors were selected or recommended
20 were--was essentially not open and transparent because there was
21 a failure to identify or select contractors on the basis of any
22 specific competency criteria or to assess or adequately assess
23 their suitability for the work to be undertaken and therefore to
24 secure the best value for the public purse.

25 Now, if I could try and just summarise, one point that

1 arises from the Auditor General's Report and you don't dispute
2 this, is that of the seven contractors, two were your brothers,
3 Kenneth Fraser; and Fraser Incorporated, which is Earl Fraser.

4 And your position is, if I've understood--

5 A. Can I actually--just give me a minute, please, your
6 criticism 1, paragraph 2.

7 (Pause.)

8 A. Okay. Can I--can I make my comments regarding these
9 paragraphs that you've read which I've submitted?

10 Q. What I would like to do is just summarise your
11 response to the criticism first, and then if there is detail you
12 want to add--

13 A. You haven't mentioned my criticism yet. I made a
14 criticism on paragraph 3, I made a criticism.

15 Q. You made a criticism of paragraph 3?

16 A. Of paragraph 3.

17 Q. That is exactly what I'm just about to do.

18 A. Okay.

19 Q. So, let me summarise your position. Firstly, it is
20 that, in relation to your brothers--and this is something you've
21 said on the 14th of July when you gave evidence--you say that
22 they went to the Premier directly to secure contracts.

23 A. Excuse me, yes.

24 Q. That's right, isn't it?

25 A. Right.

1 Q. Yes. The second point you make in your response is
2 that the method of recommending and selecting contractors in
3 relation to this job was the method that is used for all the
4 hundreds of other Petty Contracts issued within the same year,
5 the years before and the years which followed. It was, as you
6 say, the accepted norm; is that right?

7 A. That is correct, except that you didn't mention my
8 testimony on the 26th regarding that same issue.

9 Q. The reason I'm not going too much into the detail,
10 Honourable Fraser, is because, firstly, the Commissioner will
11 have the entirety of your written response to consider; and
12 secondly, he already has the Transcript of what you said on the
13 14th of July.

14 A. Commissioner, that's where my problem lies. My
15 problem lies in the fact that you have a general public out
16 there listening to what's taking place here today, and they're
17 not getting the full picture. The only way they can get the
18 full picture is me reading my response into the record.

19 COMMISSIONER HICKINBOTTOM: The whole of your
20 response?

21 THE WITNESS: Excuse me?

22 COMMISSIONER HICKINBOTTOM: The whole of the response?

23 THE WITNESS: I would imagine. You gave me 20 pages.
24 I took them.

25 COMMISSIONER HICKINBOTTOM: What's the best way of

1 dealing with this? Most--the position we're at--and I
2 understand the point that you make, Honourable Fraser, the point
3 we're at though is, we've got the Transcript of your previous
4 evidence, and I've got that, and I've read that. We've got your
5 previous response to the Auditor General's Report, and we've got
6 this response, and this response sets out part of the
7 Transcript, helpfully, for me.

8 THE WITNESS: Yes.

9 COMMISSIONER HICKINBOTTOM: What's the best way of
10 dealing with a point that the Witness makes, and that is that
11 the flavor his response, if he needs to be put into the public
12 arena?

13 MR RAWAT: Well, what I'd suggest, the course I intend
14 to take is to summarise Honourable Fraser's response to each
15 criticism.

16 COMMISSIONER HICKINBOTTOM: I mean, for example,
17 Honourable Fraser, in relation to this point you make about
18 paragraph 3 and your brothers, Mr Rawat has said that it's your
19 evidence that your brothers were selected and recommended as
20 contractors on the Project by the Premier himself. That's what
21 you said in your response--your written response to the
22 criticisms. That's what you said in the Transcript of Day 26.

23 THE WITNESS: Yes, yes, Commissioner, but the
24 impression I've gotten, based on the criticism that I've
25 received, is that my response on the 26th was not taken into

1 consideration, and that is something that the general public
2 never see nor hear. They probably see it if they read the
3 Transcript, which I'm sure they don't, they go by what they
4 hear, and they need to know exactly what took place, and the
5 only way they're going to know it is by hearing it.

6 And I think in all fairness, when I read the
7 criticisms, it gave me the impression that you didn't listen to
8 my 26th testimony because I said all of this before. If I said
9 this before, why is it showing up now in your criticism.

10 COMMISSIONER HICKINBOTTOM: Because I--

11 THE WITNESS: I did not select the contractors, they
12 were selected by the Premier, who they propositioned themselves.

13 COMMISSIONER HICKINBOTTOM: It's because it's
14 evidence, Honourable Fraser, that supports those criticisms. It
15 doesn't mean, as Mr Rawat says, that I haven't taken into
16 account your previous testimony or that I've come to any
17 pre-judgment in relation to the issues, but we have to put these
18 as specific criticisms to you, even if you say to us, I've dealt
19 with that, look at the Transcript.

20 But what I'd hoped is that, you having dealt with some
21 of these points in your previous evidence, that we could take
22 that as read, and then you could add any further evidence that
23 you want to add. Otherwise, we're going to simply repeat the
24 evidence that you gave a couple of months ago.

25 THE WITNESS: I also, in paragraph--in paragraph 2, I

1 made a comment, full stop. The first comment I made at
2 paragraph 2 it says--referred to the west side of the Sea Cows
3 Bay Harbour bulkhead against the west side of the Sea Cows Bay
4 Harbour.

5 My first point was that, for the record, bulkheading
6 is not -- for the record, bulkhead is on the north side.

7 COMMISSIONER HICKINBOTTOM: But the important point is
8 that I understand where the bulkheading was supposed to be. We
9 can call it the north side or the west side, but I understand
10 precisely where it was.

11 THE WITNESS: Commissioner, yes, you understand, but
12 this document that goes out to the public is a criticism.

13 COMMISSIONER HICKINBOTTOM: No, no. No, it's not.
14 Let's stop you there. The criticism has not been published, and
15 indeed, it's a confidential document, so there is no problem
16 there. What I want to hear is any additional evidence that you
17 have over and above that which you have given us on Day 26.

18 THE WITNESS: 26.

19 COMMISSIONER HICKINBOTTOM: And also in your helpful
20 written response because it was helpful.

21 THE WITNESS: Okay. Okay.

22 COMMISSIONER HICKINBOTTOM: But let me say this,
23 Honourable Fraser, Mr Rawat proposes to--and I think this is a
24 good idea--is to summarise your evidence, for example, in
25 relation to your brothers, your evidence is that they were

1 selected/recommended by the Premier himself. That's your
2 evidence. But if at any stage you think that his summary is not
3 a fair reflection of your evidence as set out in your testimony,
4 your oral testimony, and this document, then tell us because
5 we'll make sure that it's a fair reflection.

6 THE WITNESS: That sounds reasonable, yes.

7 COMMISSIONER HICKINBOTTOM: Thank you, Mr Rawat.

8 MR RAWAT: I will try, Honourable Fraser, to take it a
9 little more slowly. That may help you and I to be on the same
10 page.

11 THE WITNESS: Well, if you hear the same thing two
12 times it confirms a little better that you understand.

13 BY MR RAWAT:

14 Q. And the other point of note, of course, is that the
15 recording of the evidence you gave on the 14th of July, which
16 was Day 26, is on the Commission's YouTube channel. So, if
17 people--the public wishes to understand the full context of what
18 you said on that day, it is available for them to watch again.

19 A. Okay.

20 Q. Let's go back. I'm going to give criticism 1 heading
21 which is about the manner in which those seven petty contractors
22 were recommended/selected, and I will deal first with the first
23 point you make at your paragraph one in your response which is
24 that the bulkheading is on the north side of the harbour and not
25 the west side.

1 A. Yes.

2 Q. And what I will do is on the record--this is something
3 that we did go through on the 14th of July--but if you turn to
4 page 59 in the Hearing Bundle, you will see there a marked map
5 that you provided.

6 A. It doesn't want to come up.

7 Q. There it is. That's the marked map. It's in black
8 and white.

9 But there are two arrows marked on there by yourself--

10 A. Yes.

11 Q. --which shows the bulkheading.

12 COMMISSIONER HICKINBOTTOM: I'm sorry to interrupt,
13 Mr Rawat, but the substantive point you make and I understand
14 it, is that this bulkheading was not a short strip. It was a
15 long strip.

16 THE WITNESS: Yes.

17 COMMISSIONER HICKINBOTTOM: That's the point you make
18 and that's why you refer to the north side because it covers
19 the--

20 THE WITNESS: Yes, and the west side give the
21 impression you're talking about a corner.

22 COMMISSIONER HICKINBOTTOM: Yes, and it's not.

23 THE WITNESS: It's not.

24 COMMISSIONER HICKINBOTTOM: Correct.

25

1 BY MR RAWAT

2 Q. And you've put a, helpfully, a compass point on the
3 guide. And the point you make--you made in your evidence on
4 Day 26, Honourable Fraser, was that it is 1,520 feet of
5 bulkheading that was intended, and you made the point in
6 relation to your brother Earl Fraser, that it's only about
7 200 feet.

8 A. Right.

9 Q. If we look then at the points, in terms of your
10 position in relation to criticism one, they are, firstly, that
11 your brothers, as you've said, went to the Premier directly in
12 relation to securing contracts, and that was--you say that at
13 Day 26 on the Transcript. The internal page reference of that
14 Transcript is page 80, and for the Hearing bundle, it's
15 page 318.

16 Secondly, you make the point that the method that was
17 used was the accepted norm, both in that year, in the years that
18 preceded it, and in the years that followed.

19 A. Right.

20 Q. It hasn't changed.

21 A. For hundreds of contracts each year.

22 Q. And as you explained when you previously gave
23 evidence, there is a role, you described it as a "privilege",
24 that is extended to District Representatives to recommend
25 individuals for contracts?

1 A. Petty Contracts.

2 Q. For Petty Contracts?

3 A. Petty Contracts.

4 Q. Thank you. Thirdly--and this is an additional piece
5 of evidence that you didn't give on the last occasion--you say
6 that--and I'm going to read out your response: "The Ministry
7 had engaged the services of Systems Engineering Ltd to provide
8 visiting, Quality Assurance inspections during the course of
9 construction to make sure that the works were constructed in
10 accordance with the drawings and also to assess the contractor's
11 methods to minimize danger to contractors' workmen".

12 And then fourthly, you also add: "The Public Works
13 Department assigns a management team to inspect construction,
14 give contractors directions including making a site appearance
15 with contractor to initiate the start of their project, verify
16 progress, report deficiencies, and sign off on completed works".

17 Now, just to ask you to add some detail to that
18 position, why was it that your brothers went to the Premier?

19 A. They knew that works were going to happen on the
20 Project, and they couldn't get any from me. On the street, they
21 would learn that the work was happening, was about to happen,
22 and they were not involved. They couldn't get it from me. They
23 were advised by somebody to go up to the Premier.

24 Q. Why do you say they couldn't get it from you?

25 A. They weren't going to get it.

1 Q. Just elaborate a little bit more. Why wouldn't they
2 get it from you?

3 A. For the same reason you have me here now.

4 Q. Because of the potential conflict?

5 A. Well, that's what's going to happen, talk would
6 happen.

7 Q. I see.

8 So, public perception would be that you had acted
9 improperly?

10 A. I don't know what the public perception would be, but
11 they know that they didn't get any work through me, from me, and
12 this is what happened.

13 I've heard since, that that talk was happening on the
14 street. You've got work given out, you don't give your brother
15 any or anything--something to that effect, so they were advised
16 what to do.

17 And I'm not sure--they're not the first people that do
18 things like that. In my own Ministry, there were times when
19 other things were happening in the Ministry because other people
20 went to the Premier.

21 Q. Can you give us an example of that?

22 A. No, I'm not going there.

23 Q. Why are you not going there?

24 A. Because it would become a part of this whole exercise,
25 and I don't want to get into that.

1 Q. But what you can say is that, whilst you were
2 Minister, things happened within your Ministry where you, as
3 Minister, were bypassed?

4 A. Yes.

5 Q. And so, someone could go to the Premier who would
6 stand as Chief Minister and who could then direct that your
7 Ministry take certain steps?

8 A. Yes.

9 And if you recall when I gave evidence regarding
10 the--what was that questionnaire that you sent out?--and I spoke
11 about legal dictator.

12 Q. This is your position response where you spoke about
13 the influential position of the Premier.

14 A. Right.

15 When I spoke about legal dictatorship and all that
16 stuff. The Premier, in any administration is basically
17 omnipotent. I'm not getting involved in all the different
18 things that happened to me while I was Minister. I'm not
19 getting involved in that. Do your research, and you will find
20 out.

21 Q. But things did happen to you when you were a Minister?

22 A. And not just me. It happens to all Ministers.

23 Q. And so what you're saying, if we keep it general, is
24 that, under the system that exists at the moment--and has
25 existed certainly since 2007--because the Premier is omnipotent,

1 the Premier can override the decision of a Minister?

2 A. It's not since 2007. I can speak to 1999 because I
3 was a Minister in 1999, from 1999 to 2003. Nothing has changed.
4 It's the same.

5 If I knew--if I knew that anything I send out
6 regarding those kind of activities supposed to be off-the-record
7 and no chance of it being included, and what's going on, I can
8 speak freely, but I'm not getting involved in those things right
9 now.

10 Q. So, there are things you know which you considered to
11 be improper?

12 A. I don't think that--I'm not saying they're improper.
13 There is nothing improper about what the Premier has done. The
14 Premier acted within his rights, I believe. If I am your boss
15 and you are telling your staff to do something, I suppose that
16 you have to walk in the room and tell the staff differently.

17 COMMISSIONER HICKINBOTTOM: In terms of a ministry,
18 who is responsibility for the Ministry?

19 THE WITNESS: The Minister gets the portfolio for his
20 Ministry. That's how it works. That's how it is. The Minister
21 gets his portfolio for his Ministry, and he's supposed to be in
22 charge of his Ministry. However--however--there are times when
23 dictates come from above.

24 COMMISSIONER HICKINBOTTOM: Okay.

25 THE WITNESS: There is nobody for a Minister to

1 complaint to between himself and the Premier. However, in the
2 case of a Minister and a Permanent Secretary, there is somebody
3 for the Permanent Secretary to complain to, which is her boss,
4 the Deputy Governor, and the Deputy Governor will tell the
5 Governor who will tell the Premier.

6 But when it comes to a Minister and his Premier, you
7 are literally at his mercy or her mercy. And I'm not suggesting
8 in any way, shape, or form that these people are abused as
9 Ministers. I'm just saying if the Premier passed by you today
10 and tell you that I don't think so-and-so should be the case,
11 well, you had better fix it or change it; else, you would no
12 longer be the Minister. And I'm not suggesting in any way,
13 shape or form that this was the case in this instance. But I'm
14 letting you know that these things happen.

15 BY MR RAWAT:

16 Q. And so, you might not agree with the decision as the
17 Minister, but, under your analysis of the Constitution, the
18 Premier has a right in law to tell you what to do?

19 (Overlapping speakers.)

20 COMMISSIONER HICKINBOTTOM: Sorry, I was just about to
21 say to Mr Rawat, you didn't say in law.

22 MR ROWE: Exactly.

23 COMMISSIONER HICKINBOTTOM: And correct me if I'm
24 wrong, what you started to say was to this effect. You said, in
25 practice, that's what happens.

1 THE WITNESS: That's what happened in practice. I
2 will talk to my colleagues long after the fact, and they
3 just--these are things that just you said. You know what
4 happened to me such-and-such a time. This is long after the
5 fact you would say these things. You don't say it at the moment
6 because it might get back and all that stuff. But along after
7 the fact you go in, you hear all the stories from each Minister.

8 COMMISSIONER HICKINBOTTOM: Because, as a matter of
9 law, the Minister is responsible under the Constitution, the
10 Minister is responsible for the Ministry and everything that
11 goes on within it.

12 THE WITNESS: Exactly. Under the Constitution. Not
13 everything that goes on within it. Not everything. There are
14 certain things that are exclusively outside of the gamuts of the
15 Minister's control. Finance. You don't go near finance. You
16 have nothing to do with budgeting--not budgeting but the
17 expenditures. That's the exclusive purview of the Accounting
18 Officer.

19 I could not meet Tom on the street and hire him
20 because the Permanent Secretary may not pay him. However, the
21 Permanent Secretary can meet Tom on the street and hire Tom and
22 pay Tom because they control the pen.

23 BY MR RAWAT:

24 Q. Well, if we take that back to what you said on Day 26
25 because what you explained--and taking it back to Sea Cows Bay,

1 that contracts were--well, as a District Representative, and I
2 think you said as a Minister you can make recommendations as to
3 who should be awarded a contract.

4 A. Right.

5 Q. Contracts themselves are drawn up by the Public Works
6 Department?

7 A. Right.

8 Q. They weren't drawn up by your own Ministry?

9 A. Excuse me?

10 Q. They were not drawn up by your own Ministry?

11 A. Well, the Public Works Department is a department of
12 the Ministry. It's the executed arm, technical arm.

13 Q. Fair point.

14 Once the contract is drawn up with the name of the
15 person on it, it then goes to the Minister of Finance to sign,
16 and that's the Premier?

17 A. Right.

18 Contracts that I have never seen. I do not, as
19 Minister, do not see contracts. They don't come to me, I don't
20 see them.

21 Q. Right.

22 But if you have as a Minister recommended someone as
23 suitable for a contract, and that person doesn't get the
24 contract, presumably you can query why.

25 A. I can. The only reason that person would not get a

1 contract is if--if the Premier refused to sign it.

2 Q. As a District Representative, you have the privilege
3 of being able to recommend people for contracts.

4 A. Right.

5 Q. Again, if they don't get contracts, do you have an
6 opportunity to query that?

7 A. Well, usually, it would be either the Minister himself
8 or the Premier. Well, under the--in my administration, all
9 Premiers sign the contract. Under the other administrations,
10 the Ministers sign the contract.

11 Q. Is that after 2011?

12 A. That--that had been happening before 2011, I think. I
13 think that that was their practice, as two different parties,
14 they have different practices. And when the VIP, which I was a
15 part of, was in office, the Premier signs the contracts, when
16 the NDP is in office, the individual Ministers sign their
17 contracts.

18 Q. I see.

19 When you say "Premier" because, as I understand it--

20 A. Minister of Finance.

21 Q. So the Premier in his guise or her guise as Minister
22 of Finance, in a VIP administration would sign?

23 A. It's two different Ministries, however, the Premier is
24 the Minister for both.

25 Q. Yes.

1 A. So, I said Premier, take it as Minister of Finance
2 when it comes to signing the contract.

3 COMMISSIONER HICKINBOTTOM: Again, I think I've got
4 this, could you just confirm this. That means that in the
5 Administration in which you served, the Premier signed all Petty
6 Contracts.

7 THE WITNESS: All contracts. All Petty Contracts.

8 COMMISSIONER HICKINBOTTOM: All Petty Contracts.

9 THE WITNESS: And Major Contracts.

10 COMMISSIONER HICKINBOTTOM: So, all Contracts over
11 \$10,000, the Premier signed?

12 THE WITNESS: Yes.

13 COMMISSIONER HICKINBOTTOM: There must have been a
14 lot.

15 THE WITNESS: Yes. He signed. That's the practice.

16 COMMISSIONER HICKINBOTTOM: Yes.

17 THE WITNESS: I think that's happening now, too, under
18 this administration.

19 BY MR RAWAT:

20 Q. Now, as I've said, the additional detail you gave is
21 about the role of Systems Engineering Ltd to provide visiting
22 Quality Assurance inspections.

23 A. Yes.

24 Q. And that comes, correct us if I'm wrong--but it comes
25 from your--the letter that you've provided of 11th of

1 November 2008; yes?

2 A. Yes.

3 Q. But we know from other evidence--and in fact, it's
4 dealt with later on in your response--that Systems Engineering
5 were issued contracts in December 2009.

6 So, in 2008, what they are doing, it looks like from
7 this letter, is making a proposal of what work going forward is
8 necessary and what services they can provide.

9 A. Yes.

10 Q. I have read that right?

11 A. Yes.

12 Q. And if we go to the last part of the letter which is
13 on the page, internal page 3 of the letter.

14 A. Yes.

15 Q. What it says there is "we would also strongly
16 recommend that Systems Engineering Ltd provide visiting Quality
17 Assurance inspections during the course of construction to make
18 sure that the works are constructed in accordance with the
19 drawings and also to assess the contractor's method to minimise
20 danger to contractors' workmen." And you've taken that and put
21 it in your response?

22 A. Yes.

23 Q. Now, at what stage of the works would Systems
24 Engineering Ltd need to provide visiting Quality Assurance
25 inspections?

1 A. During the construction. While the panels are being
2 fabricated, from the moment the contractor build the formwork
3 until he pours the concrete.

4 Q. So, at the stage with which these Petty Contracts,
5 these seven Petty Contracts were concerned, that's when you
6 would expect Systems Engineering Ltd to be doing these assurance
7 inspections?

8 A. Yes.

9 Q. Do you know, as a matter of fact, whether or not they
10 did?

11 A. I haven't seen their reports. I can say with some
12 degree of certainty that they did perform their duties. I
13 wasn't ever on the site to see them do it, but there were--they
14 did perform their duties.

15 Q. But why do you say you can say that with some degree
16 of certainty?

17 A. I would have heard that during the period that they
18 were inspecting the work.

19 Q. You would have heard from whom?

20 A. Anybody on the street. It wasn't a secret.

21 Q. And what is it that you would have heard exactly?

22 A. That System Engineers has been engaged to inspect the
23 work.

24 Q. And did you, in fact, hear that from the street?

25 A. I don't know where exactly--where it came from, but it

1 wasn't a secret that they were engaged.

2 Q. When you gave evidence on Day 26, you said that you
3 only really had contact with the Public Works Department in
4 relation to this project, but that you said you would see
5 Systems Engineering documents. Can you remember what documents
6 you saw?

7 A. I saw all the documents that they submitted for the
8 bulkheads and the docks.

9 Q. And in terms of the Public Works Department, you say
10 they assigned--you say--assigns a management team inspect
11 construction.

12 What, in fact, happened on this occasion, what was the
13 role of the Public Works Department in reality?

14 A. Like I said, Public Works Department is involved in
15 hundreds of Petty Contracts each year up to this day.

16 And based on my knowledge of their duties when it
17 comes to Petty Contracts, not only to they prepare the Petty
18 Contracts, but they issue the Petty Contract to the contractor,
19 and the contractor does not start that project until their team,
20 the Public Works team, engages him with a date for starting the
21 Project. I guess at that time they go out to the field and do
22 an orientation and the contractor is allowed to go and start his
23 job. I guess there are certain things that has to be verified
24 before they do the Project, such as did they get the proper
25 insurances, the required insurances for the Project. And once

1 Public Works is satisfied that these things are in place and
2 they have an available date, they will set the date for the
3 contractor to proceed with the Project. And periodically they
4 would do their inspections, whether it's weekly, on a daily
5 basis, whatever is necessary. That's my knowledge of how Public
6 Works executes Petty Contracts. I see it happening all the
7 time.

8 Q. But is that answer based on your general knowledge of
9 how the Public Works Department has operated--

10 A. Yes. That's based on my general knowledge.

11 Q. If I stick with that, then, you say that is how they
12 have always worked.

13 A. Yes.

14 Q. How long have they done that?

15 A. What do you mean?

16 Q. Well, were they working like that when you were
17 Minister of Communication and Works in 2002?

18 A. Yes.

19 Q. Through to--I mean--

20 A. Through to today.

21 Q. Right. And that has never changed.

22 A. Not to my knowledge. I've seen it happen then and I'm
23 seeing it happening now.

24 Q. And looking at it now, Honourable Fraser, you say you
25 see it happening. Can you give the Commissioner of the context

1 in which you're seeing it happening?

2 A. Petty Contracts that are taking place now today.
3 Public Works does that.

4 Q. And do you--I mean, is your knowledge of what Public
5 Works are doing with Petty Contracts today just based on what
6 you're hearing on the street, or do you have more in-depth
7 knowledge?

8 A. What I told you is what I know.

9 Q. Right.

10 A. That's what I know.

11 Q. The system hasn't changed, as far as you're aware?

12 A. As far as I'm aware.

13 Q. If it had changed, would you have expected to have
14 been told about it?

15 A. No. No. That is not something that comes to the
16 Minister as one of their internal operational mechanisms.
17 That's done there.

18 Q. Well, I was focusing on today, and today you're a
19 District Representative. As a District Representative, if there
20 was a change in the way the Public Works Department was
21 operating, would you learn about that?

22 A. Well, yes.

23 Now, the internal mechanisms, what would happen today
24 is if a project is supposed to get started and it's supposed to
25 take place in my District and I call the Ministry and ask, well,

1 what's going on? They will said to me, well, let me check or
2 they will have a ready answer and says well, Public Works is
3 supposed to go out to the field and get a project started on a
4 certain date.

5 Q. And so, is your knowledge of how Public Works
6 Department operates now dependent on you making inquiries of the
7 relevant Ministry?

8 A. They are still doing it. That's what happens now. A
9 project is going to take place and Public Works issues a
10 contract to a contractor. That Contractor cannot start--I mean,
11 he can start, but he will get in trouble. He cannot start until
12 Public Works go there and ensure that the conditions are
13 acceptable. The contractor has all his marbles lined up and
14 issuing the instructions to go ahead and start.

15 Q. One of the points--and it's--

16 A. And one other thing. Let's deal with if you have
17 reinforcing steel, if you're going to pour concrete--if you're
18 going to do a concrete job, you cannot start the job when Public
19 Works came and call them after you pour the concrete because
20 they did not inspect to see if you actually put the steel in
21 there that you're supposed to put in; is it properly placed.
22 You just wouldn't get paid for that because you did not follow
23 the procedures. That's their job.

24 And that I presume was doubly assured by having
25 Systems Engineering involved, Engineers involved.

1 Q. I see. So, your point is that there were two levels
2 of checks here, Systems Engineer and the Public Works?

3 A. Right, and Public Works.

4 Q. Before we leave the Systems Engineering
5 correspondence, can you just turn up the 12th of February 2010
6 letter.

7 Now, this is after Systems Engineering have themselves
8 received their Petty Contracts, and letter begins like this:
9 "Dear sir, we attach hearings for the Sea Cows Bay bulkhead and
10 Sea Cows Bay docks, including drainage, utilities and navigation
11 drawings. We also attach specifications for the construction of
12 the docks and the bulkhead as well as the utility trenching.
13 Finally, we attach our costing sheets for Petty Contracts for
14 the bulkhead slabs and tiles".

15 Now, when you gave evidence on Day 26, you said that
16 the Public Works Department were responsible for costings,
17 producing Bills of Quantities.

18 A. Right. Correct.

19 Q. Now, given the reference to costing sheets for Petty
20 Contract for bulkhead slabs and piles, doesn't it follow from
21 that that Systems Engineering had an involvement in costing and
22 producing Bills of Quantities?

23 A. No, no, that's not what that means. If they had done
24 any preliminary costings--costs on the Project, those are not
25 costs that were used for the Petty Contracts. I presume that

1 what he's talking about here is his billing, what his billings
2 would be. I presume that's what that is. I can't speak
3 intelligently to what that means.

4 Q. All right. So, it's an assumption on your part that
5 it may relate more to billing by Systems Engineering?

6 A. Right.

7 Q. Rather than the costings of the work?

8 A. Because I know for a fact that Public Works produced a
9 Bill of Quantities that were used for the contracts.

10 Q. For these seven Petty Contracts--

11 A. Yes.

12 Q. --you say?

13 A. I know for a fact that Public Works produced those.

14 Q. Thank you.

15 COMMISSIONER HICKINBOTTOM: The Systems Engineering,
16 this refers to Petty Contracts. Systems Engineering wouldn't
17 have more than one contract for that work.

18 THE WITNESS: They have--they have two Petty
19 Contracts--

20 COMMISSIONER HICKINBOTTOM: Yes.

21 THE WITNESS: --but this work that he's talking about,
22 the inspection work, that was done--I believe they were done by
23 Purchase Orders, not Petty Contracts.

24 COMMISSIONER HICKINBOTTOM: But here it says "we
25 attach our costing sheets for the Petty Contracts for the

1 bulkheads, slabs and piles." That doesn't seem to be, on the
2 face of it, a reference to costing sheets for Systems
3 Engineering works because it refers to Petty Contracts.

4 THE WITNESS: They're also--

5 COMMISSIONER HICKINBOTTOM: It may simply be a mystery
6 but it doesn't seem to be--

7 THE WITNESS: Yes, it does.

8 COMMISSIONER HICKINBOTTOM: --answered by that being a
9 reference to their contracts because they had one contract for
10 this part of the works.

11 THE WITNESS: Which paragraph are they looking at?

12 MR ROWE: The first.

13 COMMISSIONER HICKINBOTTOM: It's the last sentence in
14 the first paragraph of the letter.

15 THE WITNESS: We attach all costing sheets for Petty
16 Contracts for the bulkheading--yes, it's for those seven Petty
17 Contracts they're talking about.

18 COMMISSIONER HICKINBOTTOM: Yes.

19 THE WITNESS: Because--because he--he would have
20 known--but he couldn't have known by now how many Petty
21 Contracts there were. This is February 12, 2010.

22 COMMISSIONER HICKINBOTTOM: I think Mr Rawat's point
23 was, that you said the PWD did the costings, but this is a
24 reference to Systems Engineering saying that they have done some
25 costings?

1 THE WITNESS: We also--we attach our costing sheets
2 for Petty Contracts for--

3 I don't know if they were thinking that they would
4 prepare Petty Contracts. I don't know if that's what they were
5 thinking because this is before any of this thing happened.
6 Maybe they were submitting a cost to do Petty Contracts--the
7 cost to do Petty Contracts--making up Petty Contracts. Maybe
8 that's what they're saying here but they did not do Petty
9 Contracts for the Project.

10 BY MR RAWAT:

11 Q. Well--

12 A. You understand what I'm saying?

13 At the time when they submitted the drawings, they may
14 have anticipated that the drawings--the work would be done by X
15 amount of Petty Contracts, and they were prepared--they were
16 preparing to maybe provide that service.

17 Q. Of actually drafting a contract?

18 A. No, for actually preparing the Petty Contracts.

19 Q. Which involved drafting the contract?

20 A. Yeah--well, if that will satisfy you.

21 Q. But the point--I mean, I don't think there is any
22 dispute that the Public Works Department provided the contracts
23 because that is page 17 in the Hearing Bundle, paragraph 70, is
24 what the Auditor General said, and it's also what you, yourself,
25 said--

1 A. Yeah.

2 Q. --on the last occasion.

3 All I was suggesting was that one could read that last
4 sentence to say that Systems Engineering provided costing sheets
5 for the Petty Contracts.

6 A. Meaning what?

7 Q. Well, meaning that you might not be right in your
8 recollection that the costings were produced by the Public Works
9 Department.

10 A. Well, let me reiterate--let me say what I really
11 believe here. What I believe here is that the costing sheets
12 that they submitted for the Petty Contracts were probably
13 submitted as costs to do--to prepare Petty Contracts.

14 Q. I see.

15 A. Costs to prepare Petty Contracts.

16 Q. So, it was a proposal by them?

17 A. I believe that's what that is. To my belief, that's
18 what that is.

19 Q. All right. Could we--

20 A. Further proposal, further proposal.

21 Q. Can we move to the second criticism, please,
22 Honourable Fraser.

23 A. Second page?

24 Q. Second criticism, your page 5 in your written
25 response.

1 A. Before you go to the second criticism page, I want to
2 make sure that you have--your conclusion and my response to it.
3 It is two paragraphs.

4 I simply said to your conclusion on criticism 1, I
5 said this was inconsistent with the principles of good
6 governance and we followed in paragraph 1 of COI Terms of
7 Reference. And I said--this is what I said: "This might very
8 well be inconsistent with the principles of good governance, but
9 it is a standard practice within the current government system".

10 That's what I said.

11 Q. Yes.

12 A. Okay.

13 Q. Okay.

14 A. I just wanted to--

15 COMMISSIONER HICKINBOTTOM: Yes, thank you.

16 BY MR RAWAT:

17 Q. If we move on to the second criticism, this was
18 focused on a failure to secure approval--in effect, planning
19 approval--for the Project.

20 Now, the first point you make and it's a point of
21 wording, and that's in your paragraph one.

22 A. Yes.

23 Q. If I take you, please, to page 11 in the bundle.

24 COMMISSIONER HICKINBOTTOM: We will go there,
25 Mr Rawat.

1 Just as an overarching point, my understanding of your
2 evidence that you have given at the previous Oral Hearing and in
3 this document in relation to planning it, that you accept that
4 planning permission wasn't obtained, but you say it wasn't
5 needed because all you were doing is fabricating a bulkheading
6 and not, as it were, installing the bulkheads.

7 THE WITNESS: Right.

8 And the word "needed" needed some further
9 clarification at the time.

10 COMMISSIONER HICKINBOTTOM: Yes, you don't--

11 THE WITNESS: You said it wasn't needed, but I'm
12 saying, just adding to that, needing at the time.

13 COMMISSIONER HICKINBOTTOM: And you're right. Because
14 that is your evidence.

15 THE WITNESS: Yes.

16 COMMISSIONER HICKINBOTTOM: Page 11?

17 MR RAWAT: Yes.

18 BY MR RAWAT:

19 Q. If we look at paragraph 43, please. Paragraph 43, of
20 the Auditor General's Report says: "In addition to the seven
21 Petty Contracts above, dayworkers (heavy equipment
22 operators/truckers) were also engaged to prepare the staging
23 area. This included fencing the reclaimed area owned/leased by
24 Earl Fraser and James Fraser in Hannah's where the bulkhead
25 slabs were fabricated".

1 Now, you take issue with that statement because you
2 say that it gives the impression that the area that is fenced
3 and the staging area are two separate areas.

4 A. Yes.

5 Q. And you say a more accurate rephrasing of that
6 paragraph should be as follows: "In addition to the costs as
7 set out above in relation to the Petty Contracts, dayworkers
8 (heavy equipment operators/truckers) were also engaged to
9 prepare and fence the staging area which is owned or leased by
10 Earl Fraser and James Fraser in Hannah's where the bulkhead
11 slabs were fabricated".

12 A. Right.

13 Q. So, it is not the staging area was in one place,
14 fencing was placed in another, it is, in fact, that the staging
15 area was--

16 A. It was all in the same place.

17 Q. And again to summarise the points you make under this
18 criticism, they would be as follows, and this is your response,
19 firstly, the point you've addressed just a moment ago with the
20 Commissioner that planning approval wasn't required at this
21 stage.

22 Secondly, you point out that no Notice of Violation
23 was received from the Planning Authority.

24 Thirdly, you say--and this is a bit that was--that
25 arises in the 2010 letter from Systems Engineering. You say the

1 issue of planning was raised and an individual was tasked to
2 deal with it.

3 Fourth, you say that this as a criticism the issue of
4 planning--or any failure to obtain planning approval at the
5 right moment is outside the role of the Minister. It's more
6 properly a matter that falls within a Permanent Secretary's
7 role.

8 And finally, you say that the steps that are involved
9 could be properly taken in a different sequence in any event.

10 A. Correct.

11 Q. Can I just break that down, if we go back to the 12th
12 of February 2010 letter from Systems Engineering to the Ministry
13 of Communications and Works--

14 A. Yes.

15 Q. --internal page 1. At the bottom of internal page 1,
16 Systems Engineering write that: "Finally we need to resolve the
17 alignment of the road and the large dock at the harbour entrance
18 so that drawings can be submitted to planning if this has not
19 been done".

20 Is that what you're referring to when you say that the
21 Systems Engineering Ltd were aware of the issue?

22 A. Yes.

23 Q. And who was the individual who was assigned to deal
24 with this issue, then?

25 A. Those--those are the things that I witness that I

1 asked to come before you can address because they were the
2 Permanent Secretary at the time.

3 Q. I see.

4 But do you know--you don't know the name of the
5 individual assigned to deal with this?

6 A. Well--

7 Q. Don't guess if you can't remember.

8 A. That, to my knowledge, was our charge that they spoke
9 of.

10 I think I have it in here somewhere as well.

11 Q. One of the points that's made also is that there was a
12 failure to engage a Project Manager to oversee implementation of
13 the Project. You say that isn't a matter for a Minister. It's
14 not what Ministers do because it's about money. And Ministers,
15 as you pointed out, have nothing to do with the budget.

16 A. Exactly. We don't hire people.

17 Q. Right.

18 A. Assigning them, we don't--and from my understanding,
19 that is a process that was being addressed.

20 Q. That was a process that was being addressed?

21 A. A matter that was being addressed.

22 Q. Right.

23 A. In the Ministry, there are parallels, things that are
24 happening on the operational side and things that are basically
25 happening on the management side. The Minister doesn't

1 necessarily get involved in operation as much as dealing with
2 policy once the Executive Council or the Cabinet has made a
3 policy, the Minister tries to see that that policy is executed.
4 As far as the execution itself is concerned, the Minister
5 doesn't execute the policy. I, as Minister, can't tell you that
6 I know all the different facets of executing--that's required to
7 execute a project. Keeping track of all that stuff is not
8 something that I can do. There are several things that happen
9 in the Ministry that doesn't come forward in a manner that you
10 will see or know. There were several things that were happening
11 in the Ministry at that time that the Minister was involved in
12 projects, programmes. It doesn't even sometimes filter down
13 below the Minister, as yet, before you get to that point.

14 Q. So, when it goes down to the operational level, is it
15 your position that that then falls to Public Officers within the
16 Ministry to take that forward.

17 A. And yes, but the Ministry and its Department to take
18 that forward. It doesn't mean that the Minister would inquire
19 sometimes about where are we with this list and as you would
20 notice, there was on the one, the Permanent Secretary had a
21 weekly briefing that the Minister would step into sometimes and
22 see what's going on. Not on this project only but on every
23 project in the Ministry.

24 Q. On the last occasion, I asked you whether--or I asked
25 you this: "Did you have a Government appointed Project Manager

1 in place?" And you answered: "Not that I know of".

2 A. Right.

3 Q. Is that an example of the difference between a
4 Minister and--or an example of a Minister getting involved in
5 operations, it would not be for the Minister to know who exactly
6 the Government-appointed Project Manager was?

7 A. The Minister would eventually know who this person is
8 because when the Project evolves to that stage, he has to know,
9 everybody would know because the person moves and talks.

10 Q. Is the person here the Project Manager or the Minister
11 who is moving it?

12 A. The Manager. You would hear through the Ministry that
13 this is the person running the Project. But this particular
14 project, which everyone else seemed to believe was at a stage
15 where it was sold or controlled, seven Petty Contracts--seven
16 Petty Contracts issued over the course of the Project started,
17 as you can see the first proposal came in in 2008, and the Petty
18 Contracts weren't signed until 2011, seven Petty Contracts--and
19 like I said, the Public Works Department handles hundreds of
20 Petty Contracts in a year, and these seven Petty Contracts, the
21 project was--the scope of the work was very small.

22 COMMISSIONER HICKINBOTTOM: But the seven Petty
23 Contracts which, you know, you said the scope was small, seven
24 Petty Contracts were just under a hundred thousand dollars each.

25 THE WITNESS: Right.

1 COMMISSIONER HICKINBOTTOM: So, that's--it's about
2 \$700,000, the best part of. But that was simply for
3 manufacturing what would eventually be the bulkheads.

4 THE WITNESS: Right.

5 COMMISSIONER HICKINBOTTOM: And that's obviously part
6 of a much bigger project.

7 THE WITNESS: Very bigger, very much bigger project.

8 COMMISSIONER HICKINBOTTOM: And the project was worth
9 \$6- or \$7-million; I mean it was a big project on any view.

10 So that the seven Petty Contracts can't just be seen
11 in isolation.

12 THE WITNESS: They're not in isolation, but the whole
13 idea is seven Petty Contracts, and in the scheme of things,
14 dealing with hundreds of Petty Contracts, this is small.

15 COMMISSIONER HICKINBOTTOM: But the contract was--the
16 contract as a whole was for \$6.5 million.

17 THE WITNESS: The Project, not the contract.

18 COMMISSIONER HICKINBOTTOM: The Project.

19 THE WITNESS: The project.

20 COMMISSIONER HICKINBOTTOM: Yes.

21 THE WITNESS: Not the contract.

22 COMMISSIONER HICKINBOTTOM: But there's not much point
23 in manufacturing \$700,000 of bulkheads if you're not going to
24 use them on the project, if the Project is not going to go ahead
25 because that would be wasteful of public money.

1 THE WITNESS: I don't understand why you say it's not
2 going to go ahead. Why are you saying that?

3 COMMISSIONER HICKINBOTTOM: Well, no planning
4 permission. \$700,000 was spent on buying bulkheads, and I
5 appreciate that they weren't installed. But you haven't got
6 planning permission for the project into which they would be
7 installed; I mean permission would be required as soon as
8 somebody puts spade into earth.

9 THE WITNESS: Right. And they would be used when that
10 happens.

11 COMMISSIONER HICKINBOTTOM: Well, if planning
12 permission was given.

13 THE WITNESS: If it was given?

14 COMMISSIONER HICKINBOTTOM: Yes.

15 You haven't got planning permission.

16 THE WITNESS: I don't understand what you mean by--

17 COMMISSIONER HICKINBOTTOM: To spend \$700,000 on a
18 project for which you have not got planning permission, was that
19 a wise cause?

20 THE WITNESS: I don't understand why you say if it
21 would be given. The application hadn't been made yet. You
22 don't see--and throughout the Territory--throughout the
23 Territory, permission is given for this kind of work all the
24 time. Why would this one be different?

25 COMMISSIONER HICKINBOTTOM: So, are you saying

1 planning permission was a foregone conclusion?

2 THE WITNESS: Not a foregone conclusion as long as you
3 do the right things. Nothing is foregone. There was absolutely
4 no anticipation of rejection of any sort as far as that is
5 concerned.

6 COMMISSIONER HICKINBOTTOM: Well, no. No, I
7 understand that. But if it was not a foregone conclusion, why
8 was \$700,000 spent with the risk that planning permission might
9 not be given or might be given for a project into which these
10 particular bulkheading slabs could not be used?

11 THE WITNESS: You realize that--and with those
12 bulkhead--those panels would not be used--could not be used?

13 COMMISSIONER HICKINBOTTOM: Yes.

14 THE WITNESS: Who foresee that? How do you anticipate
15 that?

16 COMMISSIONER HICKINBOTTOM: Well, you said that the
17 planning permission was not a foregone conclusion. It may have
18 been rejected. It may have been varied. We don't know because
19 it wasn't sought.

20 THE WITNESS: Well, that's a lot of ifs. It's a lot
21 of ifs.

22 COMMISSIONER HICKINBOTTOM: But all the ifs can be
23 swept away by obtaining planning permission first and then
24 getting supplies to fit with the planning permission that you
25 obtained.

1 THE WITNESS: Well, that is a view that you took--you
2 taken, and there's another view, which is the one that was taken
3 by the people who are running the project at the time based on--

4 COMMISSIONER HICKINBOTTOM: Now, I understand your
5 point--

6 THE WITNESS: Based on experience. This is how--this
7 is how effective project management is carried out. You don't
8 sit--and you don't sit there waiting for all the ducks to be
9 lined up in order to start making your move.

10 You know how many times you're doing a project and you
11 are procuring before you get all the ducks lined up? If
12 something changed, you change with it.

13 You know, the west side of this project--the north
14 side of the project that we're looking at right now is one
15 section of the project. Then there was a south side. There's a
16 south side on the project that doesn't involve some bulkheading
17 as well.

18 COMMISSIONER HICKINBOTTOM: Thank you.

19 THE WITNESS: I don't see it the way you see it, and I
20 think that the way you're looking at it is from the textbook.

21 COMMISSIONER HICKINBOTTOM: No, it's not. It's
22 certainly looking at risk in a different way because the--by
23 purchasing these slabs at a time when you had not got planning
24 permission run the risk of the money being wasted.

25 THE WITNESS: You see, sometimes that probably is is a

1 positive to go out there, get ahead. And instead of the
2 Authorities dragging their feet and providing you with the
3 things that you need, they realize that they're costing you
4 money.

5 COMMISSIONER HICKINBOTTOM: I'm sorry, I see that
6 point, but in terms of governance, what that suggests is that by
7 making these purchases, that will put pressure on the Planning
8 Authority to grant planning permission.

9 THE WITNESS: I wouldn't call it "pressure". It just
10 be making them accountable, making people accountable, instead
11 of saying, okay, we look at it, and on the 31st you start
12 looking at the 15th.

13 COMMISSIONER HICKINBOTTOM: Okay. Thank you very
14 much.

15 THE WITNESS: Yes.

16 I mean, it's one Government. I don't know why one
17 government agency would try to disenfranchise another when, in
18 fact, that, if you look around here where we are right now,
19 there's bulkheading, either on Nanny Cay in the same area, a
20 couple of yards down the road there's bulkheading. Why are you
21 going to stop this bulkheading for something that is being done
22 all over the Territory: Virgin Gorda, Tortola, Scrub Island.

23 So it's--the risk that you're talking about is not a
24 risk in isolation. This is something that is happening
25 throughout the Territory all the time, and the people who are

1 engaged to do this work must--I give them credit for knowing
2 what they're doing. So, I'm not going to sit here and
3 second-guess them.

4 I notice part of the premise taken by the report and
5 the way the Hearing is going as well is that they're talking
6 about--and I'm not trying to get ahead of you, Mr Rawat--is
7 taking a view that there is this notion that there's a
8 value-for-money issue, and by hiring a consultant, it doesn't
9 ensure value for money. And I would submit to you that any
10 plant that hires a consultant hires him for advice, and if you
11 can't trust your consultant, then you're in trouble.

12 So, when we--when the Government hires this consultant
13 to do the valuation on-site and do the field inspection and a
14 report is submitted, the Accounting Officer is obligated, I
15 would imagine, based on the fact that you hired a person to
16 accept whatever recommendations are given.

17 So, we'll get there at a later stage, but the point
18 I'm making is that the consultants that had been involved in
19 this project had no difficulties with what was happening, we're
20 gonna fabricate the panels. The executive council has given the
21 Authority upfront at a first instance to start fabricating the
22 panels, and the panels are being fabricated.

23 So--and by the way, Commissioner, those are the same
24 panels, I think, that are being used throughout the Territory,
25 from one job to the other, that could--those same panels. So,

1 if the Government had fell short, there would have been no
2 difficulties getting compensated for them from someone else.

3 BY MR RAWAT:

4 Q. Can I return to a point you made a moment ago, and
5 that is sequence because your position is that it is the norm to
6 engage in Petty Contracts of this sort even before you go and
7 seek planning approval, and that is--that happens in--with other
8 projects, so this project wasn't unique in that sense. Have I
9 understood you right?

10 A. No. When I said "this project", you're looking at a
11 government project. I'm talking about in general. That's
12 private-public--in the industry, I should say.

13 Q. So, you're saying it's an industry norm, whether
14 government-funded or private-funded, for contract works of this
15 sort to begin even before you have planning approval.

16 A. I don't want you to get involved in construction now.
17 Let's take a building. If you're doing a building like this,
18 maybe, the owner might go out and procure the elevators. What
19 are you going to tell me? I can't use elevators in my building,
20 or something to that effect, when it is required?

21 Q. Well, if someone tells you you can't then build the
22 building, you will have an empty piece of wasteland with some
23 brand-new elevator sitting on it, let's bring it back to this
24 one, Honourable Fraser?

25 A. You're right. Let's bring it back to this one.

1 Q. What you have here is, as I understand, and this is
2 the totality of your written response, firstly, for a Ministry
3 to engage in Petty Contracts, you have to have the budget. So,
4 these Petty Contracts, as the Commissioner says, come to around
5 \$700,000. Your Ministry would have had to have \$700,000 in its
6 budget.

7 A. Right.

8 Q. But what you're saying is that it's not unusual--and
9 let's keep it to a government project--for the Ministry to go
10 ahead with work of this sort even before seeking planning
11 approval. It wasn't a requirement for you before you engaged in
12 these Petty Contracts or started fabricating bulkheads to go to
13 the Planning Authority. That's your point, isn't it?

14 A. It wasn't a requirement to have approval before I did
15 the panels--

16 Q. And--

17 A. --before we did the panels.

18 Q. And it didn't even happen.

19 A. What didn't happen?

20 Q. You didn't get planning approval.

21 A. No, no. So, panels could be built without planning
22 approval.

23 Q. Let's--and I think--

24 A. And that's why I'm asking you to present a stop notice
25 from the Planning Authority, indicating that violation had taken

1 place.

2 Q. There is no evidence that there was a stop notice--

3 A. And I find it difficult why we spending a lot of time
4 on this particular issue except for, I take the point that the
5 Commissioner made, somehow you could be stuck with all these
6 panels and no project, so I take that point, but we will get rid
7 of the idea that we have done something on this project
8 illegally.

9 Q. Could we just, before we continue, just remind
10 ourselves, if you go to page 7 in the Hearing Bundle--this is
11 something we went through on day 26, but at paragraph 18, we see
12 the four points that the Executive Council agreed to.

13 A. Yes.

14 Q. And one and two, perhaps, if we just highlight those.
15 One was "the tendering process was to be waived to allow the
16 Ministry of Communication and Works to engage contractors to
17 procure material for bulkheading the harbour at Sea Cows Bay".

18 Two, "The Ministry of Communications and Works proceed
19 to carry out further dredging and to bulkhead the harbour
20 through a series of Petty Contracts, and if necessary by Major
21 Contract provided that the Executive Council's approval be
22 sought before any Major Contract is awarded".

23 Now, that's, you say, if you like, the framework that
24 you were working to as a Minister in this project, what you said
25 on the last occasion because the--

1 A. Where do I say that?

2 Q. Where did you say it.

3 A. Yeah, working towards the framework of one.

4 Q. Well, I think, in general, if you go to page 246,
5 please, in the bundle, that's where if we start I took you
6 through--at the bottom at 246, line 18, I took you through the
7 four points of the Exec--agreed by the Executive Council in
8 2002. If you go to 247 on the next page, I said at 18: Do you
9 agree those were four points that the Executive Council did
10 adopt? You answered: Agree.

11 And then?

12 A. Four points, okay, yeah.

13 Q. Yeah.

14 A. Four points.

15 Q. And then at 249, at page 9--line 9, sorry--you say:
16 "Up until the date when I left the Ministry, the funds that were
17 used were executed on the works that were approved by Executive
18 Council and nothing else, and that's why put to you now that
19 that's your evidence has been--in particular on day 26 was
20 that's--that--those four points were essentially the basis on
21 which this project or you, as Minister, were pursuing this
22 project.

23 A. The four points I was pursuing it?

24 I just want to make clear that the fabricating of the
25 panels was under point 1.

1 Q. I don't dispute that.

2 A. Nothing had been done for point 2, which is the
3 Ministry of Communication and Work proceed to carry out further
4 dredging and to bulkhead the harbour through a series of Petty
5 Contracts. Nothing was done there. No dredging, bulkheading,
6 work to commence on this project immediately by use of funds;
7 yes, that was done. Further development of the harbour to be
8 done through--well, that was necessary at this time.
9 Further--point 4, further development; there was no further
10 development.

11 Q. Yes, but I mean it's a small point, Honourable Fraser.
12 It is that, as Minister, it was what the Executive Council in
13 2002 said that was what guided the project.

14 A. Yes.

15 Q. And the reason for saying that is because if you look
16 at page 12...

17 A. 12.

18 Q. Sorry, if you go to page 8.

19 A. Page 8.

20 Q. Paragraph 25.

21 A. 2006.

22 You're going to those eight points?

23 Q. No, but I'll summarise them. The point is that what
24 paragraph 25 speaks to is a meeting of the Permanent Secretary
25 in the Ministry of Communication and Works in July 2006, so that

1 was when you were in Opposition, not in the Ministry.

2 A. Yes.

3 Q. With the Director of Public Works, so that's--and the
4 Chief Planning Officer, so I assume they're both--also officials
5 within the Ministry.

6 A. Not the planning--not planning.

7 Q. No the Planning Officer. Of course, he would be--he
8 or she would be with the Planning Authority, but it sets out
9 eight steps, and your evidence, when we took you through that on
10 day 26, was that you agreed with that as a plan, but you said
11 that it would not necessarily--you said it was appropriate for a
12 major work, though not necessarily in the order that's set out
13 there.

14 A. Sure.

15 Q. Just to summarise, though, your response on--and this
16 is at your page 8 of your written response. In relation to
17 criticism 2, you conclude as follows: "The matter has been
18 criticized in this section are not taking the real scenario into
19 account, yes, according to a textbook away from practical
20 application it might very well be the ideal way to go, but when
21 dealing on the ground, as long as you're not breaking any laws,
22 which we haven't, all these steps that have been taken thus far
23 can be taken simultaneously or precede others which are yet to
24 be taken".

25 A. Criticism 2?

1 Q. Page 8, yeah.

2 A. Page 8.

3 Q. If you look at page 8 of your--

4 A. Page 8.

5 Q. --of your written response. I just wanted to read
6 into the record, as we did with criticism 1, your concluding
7 remark.

8 A. Page 8?

9 Q. Yes.

10 A. The matter--

11 COMMISSIONER HICKINBOTTOM: In the middle below the
12 box.

13 THE WITNESS: Middle of the page? That's two?

14 BY MR RAWAT:

15 Q. Yes.

16 A. My page 8, right?

17 Q. Yes, your internal page 8, numbering at the very
18 bottom right-hand corner.

19 The paragraph is just above criticism 3.

20 A. Above criticism 3. This sounded the same as
21 (unclear)--in any event, this whole issue of securing planning
22 approval is a procedural matter dealt with by the Department of
23 Public Works (unclear) constructing.

24 (Witness reviewing document.)

25 A. Read that paragraph again for me?

1 Q. Um--

2 A. Mine.

3 Q. Yeah. Do you see--if you look at the numbering in the
4 bottom right-hand corner, Honourable Fraser, do you see there's
5 a number eight?

6 A. Yeah, but I might have had some--

7 Q. I see, your printing might--

8 A. Yeah.

9 Q. --do it differently.

10 A. So, just read the paragraph.

11 Q. It begins: "The matters being criticised in this
12 section"...

13 COMMISSIONER HICKINBOTTOM: If you find the heading
14 "Your Criticism", that's your paragraph three, Your Criticism,
15 this paragraph is immediately above it.

16 THE WITNESS: You're criticism 3?

17 COMMISSIONER HICKINBOTTOM: Yes.

18 BY MR RAWAT:

19 Q. Yes. If you read--I've just read into the record the
20 paragraph immediately above that, which begins "The matters
21 being criticised in this connection", and that's your concluding
22 remark or criticism to--

23 (Overlapping speakers.)

24 A. Okay. The page--the page numbering got a little
25 thrown off.

1 Q. I see. Fair enough.

2 A. Okay.

3 Q. So, I've done that. I've read that just now.

4 A. (Reviews document reading aloud) The matters being
5 criticised in this section are not taking the real scenario into
6 account.

7 COMMISSIONER HICKINBOTTOM: Yes.

8 (Witness reviews document, continues but unclear.)

9 THE WITNESS: Yes, what about that?

10 BY MR RAWAT:

11 Q. No. No question.

12 A. (Unclear).

13 Q. No question. But I wanted to put it in the record for
14 you.

15 A. Okay.

16 Q. All right. Let's go on to criticism 3.

17 COMMISSIONER HICKINBOTTOM: Mr Rawat, I know that
18 criticism 3 actually reflects criticism 2 to an extent.

19 MR RAWAT: Yes, it does.

20 COMMISSIONER HICKINBOTTOM: But we'll need to give the
21 Stenographer a break at some point. Is now or after criticism 3
22 the best time?

23 MR RAWAT: We can do it now. I mean, but I can deal
24 with criticism, hopefully, 3 very shortly because--we've
25 actually covered some of it.

1 COMMISSIONER HICKINBOTTOM: We covered most of it, I
2 think, yes.

3 BY MR RAWAT:

4 Q. Criticism 3, Honourable Fraser, arises out of the
5 implementation that we've looked at, the Executive Council's
6 2002 decision for the Government to bulkhead the harbour using
7 Petty Contracts, and it says in effect that it was done in the
8 absence of required approval, in the absence of adequate budget
9 and in the absence of a government-appointed Project Manager.
10 And your response is, firstly, that what was being done was not
11 bulkheading but you were actually at point 1 in the Executive
12 Council four point agreement which is the procurement of
13 material for bulkheading, so no approval required.

14 Secondly, Petty Contracts require a budget.

15 And, thirdly, you make the point, it's not for a
16 Minister to appoint a Project Manager, but also that the Public
17 Works Department had a project manager scheme, and there are
18 tried and tested methods within the Ministry to verify that work
19 has been done properly.

20 And if you--you conclude that "I do not share your
21 views on the sequence of events which unfolded on this project,
22 and I have given my account of said events".

23 I just read out the summary of the point you make at
24 just above your paragraph four, which is...

25 A. You're still on criticism 3?

1 Q. Yes. It's just the concluding line on criticism 3
2 that I've again read into the record.

3 A. And it says?

4 Q. "I do not share your views on the sequence of events
5 which unfolded on this project. I have given my account of said
6 events".

7 A. Okay.

8 MR ROWE: Of your statement.

9 THE WITNESS: I got that. I do not share your views.
10 Yes?

11 BY MR RAWAT:

12 Q. Yes. Okay--

13 (Overlapping speakers.)

14 Q. Again, that is just to put that concluding remark into
15 the record.

16 MR RAWAT: Commissioner, I think if we have our break
17 now, that will be helpful.

18 COMMISSIONER HICKINBOTTOM: Yes, thank you, Mr Rawat.

19 Mr Fraser, we'll have a five-minute break for the
20 Stenographer; he just needs a break, only of five minutes.

21 During the break, because you're giving your evidence, you

22 cannot, I'm afraid, speak with Mr Rowe. That's a joy that

23 you'll have to forego over the next five minutes. But if we

24 come back in five minutes, we'll then conclude your evidence.

25 THE WITNESS: I'll be here.

1 COMMISSIONER HICKINBOTTOM: Yes, thank you very much.

2 (Recess.)

3 COMMISSIONER HICKINBOTTOM: Thank you, Mr Rawat.

4 We're ready to proceed.

5 MR RAWAT: Thank you.

6 BY MR RAWAT:

7 Q. Honourable Fraser, could we turn to page 10 in your
8 written response, please.

9 A. Yes.

10 Criticism 4?

11 Q. Yes, please.

12 That criticism, if I summarise the salient aspects
13 potential purchase goes to an absence of transparency in the
14 management and execution of the Project, and then particularly
15 during the period when you were Minister of Communication and
16 Works.

17 What is said is that what is--what was reported by
18 Ministry staff to the Auditor General was that you handled the
19 Project directly.

20 The second point that's made is that there is little
21 information available regarding the project in terms of files
22 held by the Ministry.

23 The third point was that there was a failure to
24 complete involve the Accounting Officer, and that's the
25 Permanent Secretary, and as Accounting Officer, the Permanent

1 Secretary would have ultimate responsibility for accounting for
2 public expenditure.

3 Now, your response to this is one, that you did not
4 control the Project, although you don't necessarily set this out
5 in your written response. What I can put on the record and we
6 ought to put again, is that we went through this with you on
7 Day 26 and particularly the degree of involvement that you had
8 in the Project, and you made the point on Day 26 that you were
9 no more involved in this project than you were in any other
10 project as Minister.

11 The second aspect of your response is that when one
12 looks at the facts, and you've set those out, it shows that, in
13 fact, the Permanent Secretary was involved, or Permanent
14 Secretaries were involved. And those facts are, to set them out
15 again in summary, firstly, you produce to the Commissioner the
16 letter of 11th of November 2008 in which--that's the proposal
17 from Systems Engineering Ltd in which they set out the work that
18 they could do, and they produced a cost estimate.

19 Secondly, you point to the fact that two Petty
20 Contracts were issued to Systems Engineering Ltd, and that would
21 have been by the Permanent Secretary, and you add that they were
22 further engaged to visiting Quality Assurance.

23 A. Those two Petty Contracts were based on a proposal.

24 Q. Right. I see.

25 A. Let the record show that.

1 Q. All right. So, the proposal that we just looked at
2 then led to the two Petty Contracts?

3 A. Yes.

4 Q. And when one adds those two Petty Contracts together,
5 they--

6 A. 95,600.

7 Q. They come to 95,600. What the Auditor General noted
8 was that the total of 123,000 was paid to Systems Engineering,
9 and you say that this would have been for visiting Quality
10 Assurance.

11 A. Right.

12 Q. The third point you make is that drawings would have
13 been distributed by the Permanent Secretary to Public Works for
14 the productions of the Bills of Quantities in the seven Petty
15 Contracts. Then you say that those seven Petty Contracts would
16 have to be signed off by the Permanent Secretary as Accounting
17 Officer and also by the Premier, as we've discussed.

18 And you pull those together to make the point
19 that--and I quote from your written response--"it's very
20 difficult to accept the premise that the Accounting Officer or
21 their surrogate was not very much involved."

22 A. Not only did they have to sign off the Petty Contract
23 itself, they had to generate this Audit.

24 Q. Quality Assurance?

25 A. No, no, no, they had to generate Purchase Orders for

1 the Petty Contracts. Petty Contracts cannot move forward to
2 signature by the Finance Minister unless the Purchase Orders are
3 there.

4 Q. Would the Purchase Order be for the full contract
5 value?

6 A. Yes.

7 Q. I see.

8 So part of the process is not only to have a Petty
9 Contract that is signed but your Ministry must produce--

10 A. Purchase Order for the full contract's value.

11 Q. Now, one of the points you make--and I would just like
12 your assistance to clarify this, please--is that, during your
13 time as a Minister of Communication and Works, you had a total
14 of, to your recollection, four Permanent Secretaries and five
15 Accounting Officers. As we've understood it, the Permanent
16 Secretary is the Accounting Officer?

17 A. Yes.

18 Q. You said you've had four Permanent Secretaries and
19 five Accounting Officers. Can you just explain the discrepancy?

20 A. During the time--between Permanent Secretaries,
21 someone sat in, someone sits in, whether it's a Deputy Permanent
22 Secretary or someone acting in their role, and that's what I'm
23 talking about. During that period, that person becomes the
24 Accounting Officer.

25 Q. I see.

1 So, there was a period in effect where, at least one
2 period, where there was no Permanent Secretary in place, and so
3 somebody else had to act up as Accounting Officer?

4 A. There were several periods where there were no
5 Permanent Secretaries. Between Permanent Secretaries, the first
6 one to the second one, I think there was a seamless transition.
7 Second to third, there was someone in between. Third to fourth,
8 there was someone in between.

9 And I'm not sure if the title of "Accounting Officer"
10 was transferred or who acted as the Accounting Officer during
11 that period, but, I don't know, it's probably that someone in
12 the Ministry besides the Permanent Secretary is authorized to
13 sign documents, I believe--I'm not sure; I can't speak
14 intelligently to that--but I'm just saying, that's where these
15 figures came from.

16 Q. I see.

17 The other point to reiterate on the record, but it is
18 a point that you made on Day 26, and that is--and I will
19 summarise what you said on Day 26: In the Auditor General's
20 Report, the Auditor General noted the lack of information, the
21 lack of documents held by the Ministry.

22 A. Before you get to that, Mr Rawat, Mr Commissioner, I
23 want to ask the question for the record. It says there was an
24 absence of transparency in the management and execution of the
25 Sea Cows Bay Harbour Project and in particular during the

1 period. There was also a failure to significantly involve the
2 Accounting Officer from the Secretary.

3 Are you there yet?

4 Q. Yes.

5 A. Are you there?

6 Q. Yes.

7 A. Okay. My question to you is: Are there any reports
8 that were made to the Deputy Governor to substantiate this
9 claim?

10 Q. Reports--who would make a report to the Deputy
11 Governor?

12 A. Well, this statement says there was also a failure to
13 significantly involve the Accounting Officer. The Accounting
14 Officer would be the one to make that report. That they were
15 being left out of the loop.

16 You see where I'm at?

17 Q. Just clarify for us, so--are you suggesting that the
18 Accounting--the Permanent Secretary as Accounting Officer, could
19 make a complaint to the Deputy Governor?

20 A. That's the fourth--your fourth paragraph in your claim
21 four.

22 Q. Um-hmm.

23 A. Where it says they significantly involve the
24 Accounting Officer and Permanent Secretary in the course of
25 executing the Project. If the Permanent Secretary was the

1 Accounting Officer has a role to play. And if at some point
2 they feel that they have been pushed out their role, their duty
3 is to make a complaint. I would imagine they would make a
4 complaint.

5 Q. Pushed out by who?

6 A. Excuse me?

7 Q. Pushed out by who?

8 A. Well, according to this--according to this claim, it's
9 saying that I significantly--I failed to significantly involve
10 the Accounting Officer. The Minister failed to significantly
11 involve the Accounting Officer. And I'm saying to you that the
12 Accounting Officer has a role, as a Permanent Secretary,
13 constitutionally, to execute. And if they feel that the
14 Minister has failed to allow them--has prevented them from
15 executing their duties, they would have to report that matter to
16 their boss, who is the Deputy Governor, who would then turn and
17 take it to the Governor, then would tell my boss, who is the
18 Premier, and that's how it would happen.

19 If, in the absence of all this, then this claim don't
20 hold any water.

21 COMMISSIONER HICKINBOTTOM: That's not quite true,
22 Honourable Fraser.

23 THE WITNESS: Why?

24 COMMISSIONER HICKINBOTTOM: Because there is certainly
25 evidence in other places whereby the--in which the Accounting

1 Officer has been put out and did not make a complaint.

2 And I think this is true--Mr Rawat, correct me if I'm
3 wrong--we have no evidence that a complaint was made to the
4 Deputy Governor. That has to be seen obviously in the context
5 that you had--I don't know how many Permanent Secretaries over
6 the entire period of four years--well, four Permanent
7 Secretaries plus people in between--

8 THE WITNESS: Yes.

9 COMMISSIONER HICKINBOTTOM: --short periods, so that
10 just has to be looked at in context, but I think it's right that
11 we have no evidence from the DG, from the Deputy Governor, that
12 any complaint was made.

13 THE WITNESS: Well, Commissioner, the context, yes.
14 You just made the point, I had four Permanent Secretaries and
15 five Accounting Officers, that need to be looked at in context.
16 The context could very well be that there was no transition from
17 one Permanent Secretary to the other. Don't blame it on the
18 Minister. This is how the process works.

19 When you came, I didn't meet you. When Mr Rawat came,
20 he didn't meet you. So, he couldn't have--there was no
21 transition. The Minister is not the one who makes the
22 transition to Permanent Secretaries, so there was--the follow-up
23 that needed to take place didn't take place.

24 COMMISSIONER HICKINBOTTOM: So, there is no continuity
25 in the public officials?

1 THE WITNESS: Yes, because that's a point that I want
2 to make when I said I want my witness to come before you to
3 explain to you what took place on this project with--during the
4 initial stages, what was happening. And those transitions did
5 not take place from that level within itself.

6 I, as Minister, or any Minister, cannot sit and say
7 well, when John came in, Mary wasn't there, so let me take John
8 through the process.

9 BY MR RAWAT:

10 Q. And by transition, Honourable Fraser, you mean
11 handover?

12 A. Handover, yes.

13 Q. So, successor, there was no passing of information or
14 updating between different Permanent Secretaries as they went
15 through the Ministry?

16 A. That would--that would not--that is what happened on
17 this project because I can show you--I can show you or the
18 Witness will show you where when they were running the Project,
19 when they were setting in place, the processes that were in
20 place at the time. And when the person came after, there was no
21 handover.

22 So, the process, things got lost, seemingly. I
23 wouldn't say--well, things got lost.

24 (Overlapping speakers.)

25 Q. And is the period that you are particularly focusing

1 on when you say that, that period around late 2010 into 2011
2 when the seven Petty Contracts were being set up?

3 A. Right.

4 Q. I see.

5 A. Because what happened is--I think when the documents
6 came in in February 2010, the process started then because the
7 documents are in place, what are we going to do with these
8 documents? Okay, the Permanent Secretary will then lay out the
9 process going forward. The process was supposed to be going
10 forward, by the time the next Permanent Secretary came, that
11 level of management, that particular layer of management, got
12 lost.

13 Q. But to some extent it must have worked because we've
14 seen from your February 2010 letter that that's the point at
15 which Systems Engineering had produced drawings, that comes into
16 the Ministry.

17 A. Right.

18 Q. We know that by December 2010 the Public Works
19 Department has drawn up the contracts and they have been signed.

20 A. Right.

21 Q. And we know they've been signed because seven people
22 get contracts?

23 A. Yeah, but the whole thing about December 2010 is
24 following on instructions that took place from the time
25 documents came in in February 2010.

1 Q. Yes.

2 A. So what happened after the documents were signed?

3 Q. After the contract was signed?

4 A. Yeah.

5 What was supposed to take place after that? The
6 process did not follow.

7 Q. I see.

8 So--

9 A. The structure was in place, and it didn't follow
10 through.

11 Q. And in what way do you say it didn't follow through?

12 A. Well, all the stuff that you're saying here about
13 failure to involve and all that stuff. At some point, if this
14 is true, if this is true what you're saying, it had to happened
15 at some point. It certainly didn't happen when the Project was
16 moving along in the early stages.

17 Q. I see.

18 So, once we get beyond December 2010, that's where you
19 raised the question as to what was going on at that time?

20 A. I don't know if it's December 2010 or it was
21 August 2010, but the instructions that were given up until
22 July-August 2010, carried the Project through to December 2010.
23 But after that, what kind of followed through after the
24 contracts were signed, what takes--what's next? What happens
25 after this?

1 Q. Who does what and who--

2 A. Who is supposed to do what, or is it running on air or
3 whatever the case might be? And that is not something you can
4 pin on a Minister. A Minister doesn't get involved in that
5 stuff.

6 Q. Because the Minister doesn't get involved in
7 operational details, and a Minister doesn't get involved in the
8 minutiae of money?

9 A. And the Minister doesn't get involved in project's
10 constructions, they don't get involved with contractors.

11 Q. The--just to return to the point about the complaint
12 to the Deputy Governor. That's the start of the process. The
13 end of the process is the Premier, your boss has a word with
14 you. In this case, so that we can get it on the record, the
15 Premier did not have a word with you?

16 A. Never heard about it.

17 Q. So, no--none of the four Permanent Secretaries or five
18 Accounting Officers, as far as you're aware, raised an issue?

19 A. Exactly.

20 Q. About your crossing the line and intervening into this
21 project?

22 A. Not further than that, excluding them from the
23 process. I have a job to do, they would say, and I'm not being
24 allowed to do it because the Minister, this, that and the other.
25 And you can say what you want about Permanent Secretaries and

1 Ministers and all the rest of it, but there is a relationship
2 between a Permanent Secretary and a Minister. Usually, it's a
3 very good relationship. I'm not aware of any sour relationship
4 I had with my Permanent Secretaries, ever. Ever.

5 Q. But you say that the Permanent Secretary has an
6 independent role which allows them to refuse to sign off
7 something?

8 A. Yes. The Permanent Secretary can--I've seen it
9 before--refuse to sign off on something that the Minister
10 wanted. And if they don't sign off on it, it's a no--it's a
11 no-go, can't do anything about it.

12 Any Minister can go out there and promise the moon to
13 anyone, but it has to come before the Permanent Secretary. And
14 if a Permanent Secretary said "no", it's no.

15 Q. You don't end criticism 4 with a summary point. What
16 you do say is, please refer to my views on this matter in
17 paragraphs 1 through to 4, and that's the sort of overall
18 question of whether a lack of transparency and failure to
19 involve an Accounting Officer is consistent or inconsistent with
20 the principles of good governance.

21 Can we move on to criticism 5, please.

22 COMMISSIONER HICKINBOTTOM: Just before we do, just to
23 go back very briefly on criticism 4. And you've dealt with
24 these in the response, but there were criticisms in the Auditor
25 General's Report that she said, according to Ministry

1 staff--that's the phrase she used--that the Project was handled
2 by you who liaised directly with the consultants, contractors
3 and Publics Works Department on plans and contracts and
4 progress. And secondly, that there are no sort of records about
5 this project at all.

6 THE WITNESS: Yes.

7 COMMISSIONER HICKINBOTTOM: My understanding of your
8 response to that is, you say that all of those matters were
9 matters for the public officials, not you?

10 THE WITNESS: Exactly.

11 Let's deal with the one about according to Ministry
12 staff first, and then we do the other one. It says: According
13 to the Ministry staff, the Project was handled by The Honourable
14 Julian Fraser, who liaised directly with the consultant,
15 contractors and Public Works Department on plans, contracts and
16 projects--and progress." My response is I have a difficulty
17 with terms like "Ministry staff" as it comes across as
18 malicious. "During the time this project was being executed and
19 like all projects in the Ministry, the only people with detailed
20 exposure will be the Finance Officer, which is the de facto
21 Accounting Officer, and the Permanent Secretary who gives
22 directions. Information coming from other staff is gossip."

23 Now, I've said before and I'm saying it now, I had no
24 dealing with contractors. I had no dealings with contractors.
25 Potential contractors, yes, when I had a public meeting and I

1 put it out there that there will be work taking place in the
2 District and what the works were. Anyone interested, make their
3 interest known. Potential contractors, yes. Once they
4 became--once they signed the contract and they became
5 contractors, absolutely no contact with them. I want to make
6 that clear. Liaising with the Consultant, the Consultant is
7 there to advise the Government. So, if I, as Minister, ever had
8 a conversation with a consultant, maybe. I see nothing wrong
9 with that, if I had conversation with a consultant. So, Public
10 Works Department is a Department under my Ministry.

11 Now, the other one for the period 2007-2011, "the
12 Ministry of Communication and Works files reflect little to no
13 information regarding the development." As you can see, the
14 documents came in to the office on February--in February of
15 2010. Those documents came into the office. The documents were
16 used by Ministry, staff, and Public Works Department, so, you
17 tell me what happened to the documents. They were there. They
18 were used by Ministry staff. They produced Petty Contracts from
19 them. And I'm saying to you here in my response, it is
20 unfortunate that this was the case, and I'm sure it wasn't the
21 first nor would it be the last. What I'm puzzled about is the
22 fact that blame seems to be mine and I don't see how. It would
23 be interesting to see how many cases are like this. However,
24 given my detailed response to your criticism 4, paragraph 1, I
25 find it hard to see how this statement can be true.

1 I find it hard--and my statement regarding all those
2 things that happened from November 2008 to
3 February 4th--February of 2010, which is from the time the
4 proposal came into the Ministry to the time the documents came
5 in, prepared based on the proposal and the contracts that were
6 issued. I find it difficult to find out how this could be true.
7 Where are the files?

8 COMMISSIONER HICKINBOTTOM: I'm sorry to interrupt,
9 The Honourable Fraser.

10 I understand that point, you don't know where the
11 files are and you've referred to things like the contracts and
12 stuff like that, but there doesn't seem to be any progress
13 reports or anything like that. And that is obviously a concern.
14 And as you say, something may have happened to some the
15 documents, but in response to your rhetorical question that
16 why--why are you being, your word, "blamed", isn't that because
17 you're the Minister and under section 56 of the Constitution,
18 you were responsible for the Ministry?

19 THE WITNESS: No, you
20 can't--Commissioner--Commissioner, you really can't have it both
21 ways. The Minister doesn't file documents, the Minister doesn't
22 control the staff in the Ministry, so on one hand you're telling
23 me that I'm going too far, getting involved in the Project and
24 leaving out the Accounting Officer, and then you tell him that
25 I'm responsible for the firing.

1 COMMISSIONER HICKINBOTTOM: No, no, no. No, no, no.
2 Sorry, I'm not. But what I'm saying is that under section 56,
3 you're responsible for making sure that this project runs well
4 and runs with good governance. Isn't that a Minister's
5 responsibility?

6 THE WITNESS: Minister is responsible for the
7 Administration of his Ministry in his Departments.

8 COMMISSIONER HICKINBOTTOM: This was a \$6.5 million
9 project. Doesn't the Minister have an obligation to bring that
10 project home? It's policy. You're pursuing a policy to make
11 this project happen. I'm not saying you should get involved
12 with operational matters--that's a different question--but
13 haven't you got an obligation to make sure that this is brought
14 home as a project?

15 THE WITNESS: But the Project--the Project is coming
16 home, what you are having difficulties is with the files. The
17 files didn't stop--the absence of the files that you can't find,
18 which is the responsibility of someone else, isn't stopping the
19 Project from coming home because evidently what you're saying to
20 me is that--or what I'm saying to you is that the Project is
21 being executed. The driver used to produce the work, their Bill
22 of Quantities and contracts. That's what's going to bring the
23 Project home, the contracts. What happens to the documents that
24 were used to produce these Petty Contracts? It's a question:
25 What happened to those documents? And I'm saying to you, you

1 cannot blame me for their absence or where they are.

2 COMMISSIONER HICKINBOTTOM: What about progress
3 reports?

4 THE WITNESS: That's another thing, how do you make
5 payments without a progress report?

6 COMMISSIONER HICKINBOTTOM: Yes.

7 THE WITNESS: Somebody had to have those progress
8 reports in order to make a payment.

9 COMMISSIONER HICKINBOTTOM: But there aren't any
10 progress reports.

11 THE WITNESS: Well, the Systems Engineering whose
12 responsibility it was to make the progress reports, must have
13 made them, why payments were made.

14 COMMISSIONER HICKINBOTTOM: So, you said these
15 documents have been lost?

16 THE WITNESS: I'm not saying anything. Somebody told
17 me they can't find them, and now I'm saying to you I can't
18 believe it.

19 COMMISSIONER HICKINBOTTOM: Okay.

20 THE WITNESS: I can't believe it.

21 COMMISSIONER HICKINBOTTOM: Yes. Thank you.

22 BY MR RAWAT:

23 Q. Can I just clarify one detail. If you go to page 309
24 in the Hearing Bundle, please.

25 A. 309?

1 Q. Yes, please. If you go to line 14, please, Honourable
2 Fraser.

3 A. Line 14?

4 Q. Yes.

5 A. Yes.

6 Q. I asked: "Between 2007 and 2009 when Systems
7 Engineering Ltd became more engaged, and that's late 2009, what
8 were your Ministry doing in relation to the Sea Cows Bay Harbour
9 Project." And you answered "nothing." And I asked: "Was it
10 the Ministry that was doing nothing or was it the Minister that
11 was doing nothing?" And you say "I can't recall the Minister
12 doing any work on the harbour until that time."

13 So I think as I understood your evidence on Day 26 is
14 that you didn't get actively involved at all in this project
15 until December 2009 when the Petty Contracts were given to
16 Systems Engineering, and it was after that, that date, that you
17 had any involvement in the Project really, and this is in your
18 second Ministry, as Minister. I'm not asking you to confirm
19 whether that's right because that was the evidence you gave, so
20 it must be right?

21 A. I want you to go back over this. It says between 2007
22 and 2009, when Systems Engineering Ltd became or were engaged
23 between 2007 and 2009, and that's late 2009, what was your
24 Ministry doing in relation to the Sea Cows Bay Harbour project?

25 Nothing. Was it the Ministry that was doing nothing

1 or was it the Minister that was doing nothing?

2 I can't recall the Ministry itself doing any work on
3 the harbour until the time--well, is that as far as you're
4 going?

5 Q. Yes. And I can assist you. If you go to 308.

6 A. 2007-2009, I don't--

7 Q. Yeah.

8 A. I don't know--I don't know what the Ministry was
9 doing. I don't think I was doing anything.

10 Q. The reason I drew your attention to it is because just
11 a few moments ago you referred to November 2008.

12 A. Right.

13 Q. And if you look over at page 308, at line 22, the very
14 bottom there, you say: "I only became active on this project
15 since the time Systems Engineering was commissioned, and it
16 wasn't 2007," and that was the trigger for the further questions
17 that we've looked at, the point being that your evidence on
18 Day 26 was that, in fact, we know Systems Engineering come on
19 board in December 2009. That's when the Petty Contracts go out
20 to them.

21 A. No--okay, December 2009.

22 Q. And your evidence on the last schedule is that that's
23 when you became active in the Project.

24 A. That doesn't--that doesn't contradict the question
25 that you asked about--what page was that again? 30--

1 Q. 309. 308 is the start of that particular--

2 A. 308 is when you asked the question--no, no, the first
3 one about the dates.

4 Q. 309. If you go to 309, Honourable Fraser, and
5 line 14.

6 A. Okay. 309. Okay. So, that doesn't contradict 308.

7 Q. No, it doesn't. I'm just putting it into context
8 because your evidence was that in terms of your engagement in
9 this project as Minister.

10 A. Right.

11 Q. At least in terms of the second time you were a
12 Minister of Communications and Works, it was from 2009 onwards?

13 A. When the Petty Contracts--

14 Q. To Systems Engineering were awarded?

15 A. Because I don't even know if I remember the details
16 because in November--November 2008 is when the proposal came in,
17 and I'm not sure that I remember--I might have seen a proposal,
18 of course. I might have seen a proposal, so that is a detail
19 that I may not have remembered, the proposal itself, which came
20 in in November, in November 2008.

21 Q. All right. Thank you.

22 A. So, are we're talking here about--

23 Q. Okay. I think we don't need to drill into it any
24 further.

25 Let's go to criticism 5.

1 A. I'm not sure if I'm ready for criticism 5 yet because
2 I think for the period 2007-2011, the Ministry of Communications
3 and Works' files--okay, we did the files.

4 (Unclear, witness reading document) Involves, we did
5 that. The lack of transparency and updating to involve the
6 Accounting Officer is inconsistent--okay, that's your concluding
7 paragraph on criticism 4, the lack of transparency?

8 Q. Yes.

9 A. And a failure to involve the Accounting Officer are
10 inconsistent with the principles of good governance, and, da da
11 da. And I said, please refer to my views on this matter in
12 paragraphs 1 through 4. Yes, we did that before.

13 Q. Yes.

14 A. And again, I'm asking the question, are there any
15 reports that were made to the Deputy Governor to substantiate
16 this claim?

17 Let's go to 5 and 6.

18 Q. Let's go to 5, and I think we can, I hope, take 5--

19 A. When you go to 5, I have a question for you on 5
20 before we go into 5 in depth. Or maybe you need to do your
21 summary first then I will--

22 Q. Let's do that.

23 Criticism 5, Honourable Fraser, arises out of points
24 made in the Attorney--the Auditor General's Report at page 18
25 paragraph 74, and that gives context to that criticism because

1 what, in summary, the Auditor General could not establish from
2 the Cabinet Extract was whether you declared an interest when
3 Hannah Reclamation Ltd, which is a company in which one of your
4 brothers is involved, made an application to lease the seabeds,
5 the jetties and moorings in 2011, and when that came up before
6 Cabinet, couldn't be established whether you declared an
7 interest. What the Auditor General's Report does refers to is
8 there being evidence that in 2008 you had declared such an
9 interest. We see all of that at paragraph 78.

10 And so what potential criticism that arises is that
11 there was a failure to declare an interest in 2011. And we
12 canvassed that when you gave evidence on the 14th of July. We
13 went through that detail. What you said then was that you did
14 not know what had happened on that occasion on the 18th of
15 May 2011, could not be sure, and that's still from my reading of
16 your response, still seems to be your position, but what you add
17 further--and we put this on the record--is that on the evidence
18 you point out to that it is possible when one looks at the
19 requirements of the Cabinet Handbook, when one looks at the fact
20 that in 2008 you had declared an interest. It is possible that
21 you did, in fact, in 2011 declare such an interest. And that's
22 the summary of your response.

23 A. Okay. This particular paragraph--Commissioner, I'm
24 asking that this particular paragraph be removed from this
25 particular hearing that we're doing because it has nothing to do

1 with the Sea Cows Bay Harbour Project proper. But what happened
2 in Cabinet regarding this application, the mandate that was
3 given by the Executive Council through its Decision in 2002,
4 described that the Ministry of Communications and Works develop
5 the Sea Cows Bay Harbour based on use of the land that is shown
6 on the map, and it did not stipulate the type of possession the
7 individual would have of the land, whether it's by--as a
8 reclaimer, a leasee, or a freeholder. So, this project was to
9 be developed no matter what type of ownership the individual
10 held.

11 Going to get a lease of any sort for the seabed does
12 not change the composition of the Project, it does not change
13 the benefit to any individual of the project. And I don't see
14 why it has a relevance to the Sea Cows Bay Harbour Project
15 development. What happened that day in Cabinet or that
16 particular submission, I don't see the relevance in this
17 project, in this Hearing that we're having on this project.

18 COMMISSIONER HICKINBOTTOM: Honourable Fraser,
19 relevance is a matter for me, but this is a lease of the seabed
20 in the area, for jettings and moorings, in 2011.

21 THE WITNESS: Yes.

22 COMMISSIONER HICKINBOTTOM: How is that not relevant?

23 THE WITNESS: Because the Cabinet--the
24 Cabinet--Executive Council decision does not deal with leased
25 property, it does not deal with--I mean, it doesn't distinguish

1 between leased properties, reclaimant properties or freehold
2 properties. There are other leases in the area.

3 COMMISSIONER HICKINBOTTOM: No, no, I'm sure that's
4 right.

5 So, this particular point is not covered by the
6 Cabinet Decision in 2002, but why does that make this
7 irrelevant?

8 THE WITNESS: Because--why is it relevant? What's the
9 relevance of all this?

10 COMMISSIONER HICKINBOTTOM: Well, this is land within
11 the developing area, isn't it?

12 THE WITNESS: Yes, but the land within the development
13 area, the status of the land has nothing to do with the area
14 being developed by the Executive Council decision. The
15 Executive Council decision does not draw any distinction between
16 land that is leased, land that is freehold, or land that is just
17 people occupying because they reclaimed it. There is no
18 additional benefits to be derived by lease--by obtaining a lease
19 for the seabed over not having a lease for the seabed, as far as
20 a government project is concerned.

21 COMMISSIONER HICKINBOTTOM: But there is to the people
22 who are granted the lease.

23 THE WITNESS: There is what?

24 COMMISSIONER HICKINBOTTOM: There is a benefit to the
25 people who are granted the lease.

1 THE WITNESS: Who got the lease?

2 COMMISSIONER HICKINBOTTOM: Yes.

3 THE WITNESS: What's the benefit?

4 COMMISSIONER HICKINBOTTOM: Well, they have a lease in
5 a development area.

6 THE WITNESS: Yes. Just like it doesn't change what
7 the Government was obligated to do.

8 COMMISSIONER HICKINBOTTOM: No, but the beneficiaries
9 now include--the beneficiaries include the leaseholders.

10 THE WITNESS: Let's get it straight. The leaseholder
11 was always the person who owned the property, they owned it
12 through--by reclamation, they owned the property. They just
13 change the status from just being--possessing it through
14 reclamation to possessing it through a lease. It's not somebody
15 who came from outside somewhere and decided to lease the seabed
16 in this area. They were always there.

17 COMMISSIONER HICKINBOTTOM: But the leaseholder has
18 better rights than a claimant?

19 THE WITNESS: But it doesn't change the relationship
20 with the Government. The Government was going to bulkhead the
21 property anyway whether it was just a claimant, a leaseholder
22 or freeholder.

23 COMMISSIONER HICKINBOTTOM: But this company, which
24 went from a claimant to a leaseholder--

25 THE WITNESS: Yes.

1 COMMISSIONER HICKINBOTTOM: That increased its rights
2 over the land because to be a leaseholder--

3 THE WITNESS: But no one was questioning that. The
4 Government didn't questioning that. The Government was going
5 to--was, is and will continue to bulkhead, whatever properties
6 are there. It does not enhance any benefit the individual will
7 be getting. It's not as if somebody just heard that Government
8 is going to bulkhead the whole property, the whole of Sea Cows
9 Bay Harbour, why don't you run down there and try to get a lease
10 for the seabed. That's not the case. And this is the
11 impression that is being--

12 COMMISSIONER HICKINBOTTOM: So you say that this
13 company had gained no benefit from its lease?

14 THE WITNESS: Absolutely none.

15 COMMISSIONER HICKINBOTTOM: Well, that's your response
16 to the point.

17 THE WITNESS: There is absolutely none.

18 And for the longest time, no one was trying to tell me
19 why are they dragging this issue into the Sea Cows Bay Harbour
20 Development report?

21 BY MR RAWAT:

22 Q. When you say "they", Honourable Fraser, you are
23 referring to the Auditor General?

24 A. Well, you too, because I'm here before you regarding
25 the matter.

1 Q. I know, but I put to you--and I hope I do it fairly,
2 Honourable Fraser--questions that arise out of evidence--

3 A. I'm sorry, but I just couldn't wrap my head, for the
4 longest time I'm trying to figure out--

5 Q. Doesn't it arise in these ways?

6 A. What is it?

7 Q. Doesn't it arise in these ways, Honourable Fraser,
8 there is a general way in that the application that came before
9 Cabinet was an application being made by Hannah Reclamation
10 Limited?

11 A. Yes.

12 Q. In which your brother is involved?

13 A. Yes.

14 Q. So, that's the general way. You are sitting in
15 Cabinet determining an application which a family member is
16 involved, and there is no evidence that you declared an
17 interest.

18 A. But that's a separate issue.

19 Q. Well--

20 A. I would come here and sit before you to discuss that
21 in another forum, but nothing to do with the project.

22 Q. Honourable Fraser, that still arises from the
23 evidence, and so that's the first answer.

24 Now, your answer to this issue when you gave evidence
25 on Day 26 was that you did not see a conflict. Your answer also

1 was--and it is an answer that you have reiterated in your
2 written response--was notwithstanding that there is an absence
3 of any Cabinet record of you declaring interest, you may have
4 done. The second specific way in which it arises, Honourable
5 Fraser, is this: That parallel--may I finish the point because
6 it arises again from the evidence.

7 A. Um-hmm.

8 Q. The application under Reclamation Limited, was going
9 through the process and ending up in Cabinet in
10 September 2011--well, it came before Cabinet in May 2011, and
11 your brother Earl Fraser was notified of the outcome in
12 September 2011. But it was going through in parallel with the
13 awarding of the seven Petty Contracts, and the seven Petty
14 Contracts included one to Fraser Incorporated, which also
15 involves your brother Earl Fraser, so that's where it arises
16 more specifically out of the evidence.

17 At the same time as Earl Fraser is getting a Petty
18 Contract, at about the same time, his application is also going
19 through the process and ending up--so, he's getting a contract,
20 a Petty Contract signed off, yes, by the Ministry of Finance,
21 but emerging from the Ministry of Communications and Works where
22 you are the Minister, and it's happening at about the same time
23 as his application is arriving before the Cabinet of which you
24 are a part, and that's the circumstances in which--a second set
25 of circumstances in which the potential conflict arises?

1 A. You see, that's how you read it. That's exactly how
2 it was written for you to read it that way.

3 Q. With respect, Honourable Fraser, that is not how I
4 made it.

5 A. Okay.

6 Q. And nobody has written it for me. I'm summarizing the
7 evidence for you that gives rise to a potential criticism so
8 that you can answer it.

9 A. So let me answer.

10 Q. Please.

11 A. And I'm going to answer it the same way I just told
12 the Commissioner. The connection that is being made between
13 these two incidents is made to give the impression that there is
14 some connection and some benefit, and I'm saying to you that the
15 application for lease of the seabed has absolutely nothing to do
16 with the Sea Cows Bay Harbour Development project. The
17 individual reclaimed the land, had all the rights to it that
18 anyone who reclaimed land would have. The next step in his
19 process would be to seek a license--to seek a lease for the
20 seabed. Could have happened any time. It could happen--it
21 could never happen--up to this point it could never have happen.
22 That there were no benefits to be derived from this project that
23 we're doing, the Sea Cows Bay Harbour Development project,
24 through the change from one type of ownership to the other,
25 whether it's ownership through--via claimant, ownership of the

1 leasee, or ownership as a freeholder. The Government isn't
2 going to do anything different from what they were going to do
3 when they first started the Project. One thing has nothing to
4 do with the other. The Minister in Communications and Works,
5 the Ministry of Communications and Works has absolutely nothing
6 to do with this application that was made for the lease of the
7 seabed. The Ministry of Natural Resources and Labour is the one
8 who issued that, they're the ones who issued it and took it to
9 Cabinet.

10 The Ministry of Communications and Works has a
11 mandate. To mandate is the bulkhead harbour of Sea Cows Bay,
12 and it didn't say to you, to us, the Ministry of Communications
13 and Works, if someone has a lease, they be treated this way; if
14 they have freeholder, they be treated that way; and if they're
15 just a reclaimant, they be treated this way.

16 So, that's my point. My point is that it should not
17 be here under this heading of the Sea Cows Bay Harbour
18 Development. If you want to bring it back as far as this thing
19 about going to Cabinet and I was a Member of Cabinet and all
20 that, if you want to bring me back here to discuss that, I would
21 welcome it, but I'm saying to you that these two things should
22 not be lumped together.

23 COMMISSIONER HICKINBOTTOM: Did Hannah Reclamation
24 Limited, by having its application for lease granted by Cabinet,
25 benefit?

1 THE WITNESS: No.

2 COMMISSIONER HICKINBOTTOM: But why did they make the
3 application?

4 THE WITNESS: Why they make the application? Well,
5 the whole thing is when you reclaim land you're supposed to get
6 a lease.

7 COMMISSIONER HICKINBOTTOM: Yes.

8 THE WITNESS: That's what you're supposed to do. You
9 can't just sit on it forever.

10 So, whether they made the application in 2007--as a
11 matter of fact, the application for--the application for the
12 fill itself was made in 2008, I think it was '06 was the first
13 time they applied for it, and they got it in 2008, that's the
14 one that said that I recused myself.

15 So what's the purpose in reclaiming the land? It must
16 have development prospects in mind. If you're going to touch
17 the seabed at any point, you have to get a lease for the seabed.
18 That's their baby. The fact that they did it in 2011, they
19 could have done it in 2015 or whatever, they did it in 2011.
20 Those Petty Contracts I have already stated what the Petty
21 Contracts were for, you know what they were for, they were for
22 1520 linear foot of bulkhead, of which the portion of land
23 that's owned by Hannah Reclamation is 200 feet. It's something
24 that was approved, it was agreed in 1992, that the Government
25 would bulkhead the harbour. It included that portion of land,

1 and it was always there. Nothing has changed. The mandate that
2 was given to the Ministry of Communications and Works, had never
3 changed. And the Minister of Communications and Works couldn't
4 care less if Hannah Reclamation sold that property to John
5 Smith. All mandate was still the same: To bulkhead it.

6 And I think that this whole thing about this family
7 relationship and all the rest of it, it's a red herring. It's
8 meant for one thing and one thing only: To generate this kind
9 of hype that is being--and no disrespect, Commissioner, but if I
10 was reading the Report, I would feel the same way, too, we're
11 looking at the report, but I'm telling you that this report is
12 not born in facts.

13 COMMISSIONER HICKINBOTTOM: But that's why you're
14 here, Honourable Fraser, to respond to the evidence, including
15 the evidence arising out of the Auditor General's Report.

16 THE WITNESS: Well, I'm glad I'm given the opportunity
17 because I'm telling you that no one could rest quietly and
18 easily looking at this report, and knowing that it's--I welcome
19 my day to give you my evidence. As I said to you before, the
20 day when I did my evidence and you allowed me to go through my
21 report, I was grateful because there were so many things that I
22 wanted to say regarding the Report, and I think that this
23 particular point--this particular point has been bothering me
24 all the time, and it just sank in my mind before I came here,
25 after I submitted this written response to your criticism, it

1 sank in my mind, where's it going, where did it come from? And
2 I'm going to get into the whole area about recusal in Cabinet.
3 I'm going to get into that further than where you are, Mr Rawat.

4 COMMISSIONER HICKINBOTTOM: Yes.

5 BY MR RAWAT:

6 Q. But it comes down to this, then, does it, Honourable
7 Fraser, that the--there are two processes. One is, as we've
8 discussed, the award in--between 20th of December 2010 and
9 4th of January 2011 to--of 7 Petty Contracts, including to
10 Fraser Incorporated, which is Earl Fraser.

11 A. Yeah.

12 Q. That's one process related to Sea Cows Bay. And then
13 there's a separate process set out--

14 MR RAWAT: And this is, Commissioner, for your note at
15 page 9, paragraph 34--

16 BY MR RAWAT:

17 Q. --the application from Hannah Reclamation Limited in
18 December 2010 to the Ministry of Natural Resources and Labour in
19 relation to application to construct jetties and install
20 commercial moorings. And your point is those are two entirely
21 separate processes, and it's erroneous to try and link them in
22 the way that has been done.

23 A. Absolutely.

24 Q. And in terms of the recusal--

25 A. Yes.

1 Q. --in 2011, I think the position that we've reached,
2 looking at what you said in your written response on what you
3 said in--on day 26 is that--you know, and you've fairly pointed
4 to the passage of time. We're talking about events in 2011.

5 But the point you made on the last occasion was that,
6 in fact, you didn't see that there was a conflict of interest
7 but on the evidence you make the point, as I've said, that it's
8 possible that when one steps back from it all, in 2011 you did
9 declare an interest.

10 A. No, no, no. Say exactly what I said back when I gave
11 my evidence. You say--you said that I said that--

12 Q. Go to 351 in the bundle.

13 A. You said that I said that there was no conflict of
14 interest? No, I didn't have a conflict of interest because
15 Executive Council make a clear distinction between a personal
16 interest and a family member interest.

17 What number was that?

18 Q. 351, please.

19 A. 351. Yes.

20 Q. Now, this is the culmination of a set of questions
21 that we were asking you about conflict arising out of the part
22 in the Auditor General's Report where it raises this issue and
23 the matter coming before Cabinet, and I put it to you this way.
24 It comes down to this, I suggest, Honourable Fraser, and this is
25 that when you became involved in this project--and we'll take it

1 from 2009, the Data Systems Engineering, Limited, became
2 involved, were you aware of the potential for conflict of
3 interest? And you answered "no, I saw no--I saw no conflict of
4 interest as far as this is concerned on this project".

5 And I then continued.

6 A. This is not a Cabinet Decision you're talking about.

7 Q. Yes.

8 A. No.

9 Q. No.

10 If you turn over, please, and we'll start earlier at
11 350.

12 A. Yeah, but the part about conflict of interest is
13 talking about the contracts.

14 Q. Well, it's--I put it more widely.

15 A. No, no, no. What you're reading right here on
16 page 351 pertains to the contracts, those Petty Contracts, and a
17 conflict of interests. The one in Cabinet is a different one.

18 Q. All right. Well, let's take them--take the two
19 together; right? In relation to the award of contracts.

20 A. If you're going to take the two together, we're going
21 to have to--that's a long story on that one because I have my
22 response to that first one with the contracts.

23 COMMISSIONER HICKINBOTTOM: Sorry, in relation to the
24 leasing, you say it wasn't covered. This is on page 351 at
25 lines 15 to 19, when Mr Rawat said, "the fact that your brother,

1 you explained a shareholder in Hannah Reclamation Ltd was
2 leasing a lot in Sea Cows Bay that would be part of the project
3 didn't give rise in your mind to a potential conflict of
4 interest". Your answer was "no conflict of interest". That's
5 clearly the lease.

6 THE WITNESS: He's--yeah, but he's talking about
7 contracts regarding the lease of the land. This is another one.
8 This is one from 2011. I'm sorry, no, not 2011. The first
9 submission to Cabinet was 2008 when I recused myself.

10 BY MR RAWAT:

11 Q. You--on the Auditor General's Report in June 2008, you
12 recused yourself--

13 A. Yes, and that's what this says--

14 Q. --in relation to an application that was made.

15 A. This is the one you're talking about, the lease for
16 the reclaimed land.

17 Q. No.

18 A. Here, here on 15 on two--351, though the fact that
19 your brother, you explained a shareholder in Hannah Reclamation
20 Ltd leased a lot in Sea Cows Bay.

21 COMMISSIONER HICKINBOTTOM: Yes, so that's a--

22 A. --leased a lot in Sea Cows Bay. That's what you're
23 talking about here on page 251, the leased lot. And this is
24 pertaining to the contracts that were issued, and I'm saying
25 that the fact that they leased the lot, the same lot, it

1 doesn't--I don't see a conflict of interest with the contracts
2 that were issued.

3 Q. I see.

4 So, the fact that your brother--you say now and the
5 fact that your brother had an existing lease did not raise a
6 conflict in relation to the awarding of contracts to your
7 brother.

8 A. Right.

9 And those contracts go back to what I discussed
10 be--what we discussed--

11 Q. With the Premier.

12 A. --before how we got the contracts.

13 Q. All right. And then in relation to the application
14 that came before Cabinet in May 2011--

15 A. Eleven, yes.

16 Q. --your evidence is that, as we've said, that's totally
17 separate--

18 A. Exactly.

19 Q. --from Sea Cows Bay as a project.

20 A. Yes.

21 Q. And the--and I said it several times now, but in
22 effect it's quite memorable--

23 A. I hope you remember because it's important.

24 Q. Well, I hope I've summarised both. We've got it both
25 in your day 26 evidence, and we've got it in your written

1 response, but it really comes down to you may have recused
2 yourself in May 2011.

3 A. Just--just--I just don't want to us, first, to just
4 gloss over that point that I made regarding the recusal. I want
5 to go through that because it's written here, and I want to
6 mention it. But Commissioner, on that point that you brought us
7 back to with the reclaimed land and the conflict of interest
8 with the contract--

9 COMMISSIONER HICKINBOTTOM: Please.

10 THE WITNESS: --I want to expound on that because that
11 is in my evidence, the written evidence, as well, when I said--

12 BY MR RAWAT:

13 Q. In your response.

14 A. Pardon me?

15 Q. It's in your written response.

16 A. Yes--

17 Q. I see.

18 A. --where I say that extenuating circumstances would
19 show that there's no conflict.

20 Q. Which page specifically are you referring to,
21 Honourable Fraser?

22 A. If you go to paragraph 2. You go to your page. One
23 paragraph.

24 Q. Page 17.

25 A. 17 for you, 17 for me.

1 Q. All right.

2 A. Yeah.

3 Q. And your Roman numeral three.

4 A. Yes.

5 Q. Which begins: On the matter of conflict of interest.

6 A. Right.

7 Q. And these are the extenuating circumstances.

8 A. Yes. And it says on the matter of conflict of
9 interest, extenuating circumstances will show that this is not
10 the case, one, Earl Fraser got permission to reclaim the seabed,
11 the property in question, in the 1970s and he did reclaim it.

12 Two: The Sea Cow as a community had a meeting with
13 the Government in 1992, and they agreed Government will bulkhead
14 the harbour, which included the property of Earl Fraser.

15 Three: In 1999, I was elected and appointed Minister
16 with a portfolio for the seabed which deals with reclamation and
17 was therefore to do the harbour development.

18 Four: In 2002, the Executive Council granted the
19 Ministry approval to execute the Project with me as the
20 Minister.

21 Five: In 2011, the Premier issued Earl Fraser and
22 Kenneth Fraser and five other contractors Petty Contracts to do
23 some work on the project, none of which has to be the property
24 leased by Mr Fraser.

25 Four--and that's where on four, to this day, I'm yet

1 to see why I've had dealings with--where I've had dealings with
2 these individuals as it relates to the project.

3 Five: In my evidence of day 26, the Commissioner--

4 COMMISSIONER HICKINBOTTOM: Yes, that's the Premier--

5 THE WITNESS: I explained--I explained to the
6 Commissioner how the individuals got contracts, and I will
7 reference the section there, Transcript day 26,
8 page eighty--318, page 920, and all that stuff I put in there.

9 COMMISSIONER HICKINBOTTOM: Yes.

10 THE WITNESS: So, that's why I'm saying--

11 BY MR RAWAT:

12 Q. That's your--that's you giving further context--

13 A. Further context--

14 (Overlapping speakers.)

15 A. --to my statement that I made that I see no conflict
16 of interest here on page 351, line 13.

17 Q. So, when the--for the Commissioner's note, when he
18 revisits your written response at page 17, Roman numeral three,
19 it needs to be cross-referred to the hearing bundle at 351 and
20 352, so that--

21 A. Right.

22 Q. --to give full context to your answer on that date.

23 A. And you have to be careful to make the distinction
24 between the lease for the property, the land, and the lease of
25 the seabed.

1 Q. Yes.

2 A. That's two different things.

3 Q. Can I just take you back to page 59, please,
4 Honourable Fraser.

5 A. Which 59 is that?

6 Q. The 59 in the Hearing bundle.

7 A. 459.

8 Q. Your written response does not extend to 59 pages.

9 A. I'm sorry, I didn't. I would have given you 59 pages
10 if I could. There's a lot to be said.

11 Yes.

12 Q. We've looked at this. It's your drawing showing the
13 area that's going to be bulkheaded, which is between the two
14 arrow points.

15 A. Yes.

16 Q. But just again, just to--sorry if we're going over
17 something we've already got on the record, but the area leased
18 by Hannah Reclamation Ltd--

19 A. Yes.

20 Q. --does fall betw--within the area to be bulkheaded.

21 A. Right.

22 Q. But it's just, as you said, only 200 feet of the 1,520
23 that was going to be bulkheaded.

24 A. Right.

25 Q. Thank you.

1 So, if we include on paragraph 5, if you go to--it's
2 criticism 5, if you go to 19, please.

3 A. I didn't--we were--we started the whole thing about
4 the Cabinet recusal, whether I did or did not recuse myself in
5 Cabinet. We started that. We never finished it.

6 Q. The reason I didn't delve into it further is because I
7 think when one reads your written response, Honourable Fraser,
8 we do--for the reasons you've set out there, we have got the
9 point you make.

10 A. Okay.

11 Q. Which I summarised.

12 A. Okay.

13 Q. Which is essentially that it's quite possible that you
14 did. That's your point, isn't it?

15 A. Well, can I--

16 COMMISSIONER HICKINBOTTOM: I'm sorry. My
17 understanding of your answer is there's no record that you did
18 declare an interest. You had no obligation to declare an
19 interest, and you may have declared an interest. Those are the
20 three points.

21 THE WITNESS: No, I had no obligation to declare. As
22 Cabinet states, it says the interests--or says the Cabinet rules
23 on Declaration--I'm reading from page 19--on Declaration
24 provides as follows (reading): "Ministers and Members of
25 Cabinet attending meetings in relation to matters in which they

1 have an interest, must declare their interests or Members of
2 their family's interests. Must declare their interests". I
3 said to you that I, as a Cabinet Member, doesn't have an
4 interest. However, the family member interests, I would be
5 declaring a family member interest.

6 And I'm saying to you that the passage of the Report
7 that you quoted did not say that I didn't declare my interest.
8 It says the record doesn't show. So whether I did--what I did,
9 I didn't, but you jump to the conclusion that I didn't.

10 COMMISSIONER HICKINBOTTOM: Well, that's because a
11 Cabinet would not normally record that somebody did not have a
12 conflict of interest. It would be a very odd thing to say.

13 THE WITNESS: Yes.

14 And is it possible that they may not have recorded it?

15 COMMISSIONER HICKINBOTTOM: (unclear.)

16 THE WITNESS: That a person didn't leave? And it's
17 talking about extract, and I would imagine that that kind of
18 information replacing the minutes and not on the
19 extract--extracts are decisions only.

20 But further than that is look at what the Cabinet
21 says. The Cabinet rules on Declaration further goes on to state
22 once a Declaration is made on a particular matter, it is not
23 necessary for the Minister or Member to declare his interests in
24 subsequent discussions on that particular matter. However, if
25 the colleagues of the Minister are Members of--are not aware of

1 the interests of--are not aware of the interests due to passage
2 of time, the Minister or Member is advised to reiterate its
3 previously declared interest.

4 In this case, it's important to note that the
5 particular matter here is a company. If I declared my interest
6 in a particular company, my brother's interest in a particular
7 company already and that company comes back up, my interests had
8 already been declared according to the Cabinet, in the company.

9 COMMISSIONER HICKINBOTTOM: I mean that is not a good
10 construction of this.

11 When it says once a Declaration has been made on a
12 particular matter--

13 THE WITNESS: In--

14 COMMISSIONER HICKINBOTTOM: --you've already made
15 clear that the matter that the Cabinet had to consider was a
16 different matter. You've made that clear, because I had
17 misunderstood. What you're saying is that can be construed as
18 once a Declaration is made by a Minister of a particular
19 interest in relation to something, he never ever has to declare
20 that interest again.

21 THE WITNESS: Right.

22 COMMISSIONER HICKINBOTTOM: I'm not quite sure that
23 the--

24 THE WITNESS: That's the point.

25 COMMISSIONER HICKINBOTTOM: Yes, I'm not quite sure

1 that the Cabinet rules say that but--

2 THE WITNESS: What I'm reading it here.

3 COMMISSIONER HICKINBOTTOM: Once a Declaration is made
4 on a particular matter, not of a particular interest.

5 The matter here--we know what the matter here was.
6 The matter here was the lease of the seabed.

7 THE WITNESS: Yeah, but we're not declaring interest
8 our interest in the lease of the seabed, declaring our interest
9 in the company that's before the Cabinet.

10 COMMISSIONER HICKINBOTTOM: But, well, I mean it's a
11 semantic exercise but the--

12 THE WITNESS: Yes.

13 COMMISSIONER HICKINBOTTOM: But the matter is the
14 lease of the seabed. It does--what it does not say, once a
15 Declaration is made of a particular interest.

16 THE WITNESS: You know, you said it correctly. You
17 said it's semantics. Semantics can be taken one way by you and
18 taken another by another person. If somebody declared an
19 interest in a company and the company shows up five different
20 places, how does the interest change? You still have an
21 interest in the company. I'm declaring--the person has declared
22 an interest in the company.

23 COMMISSIONER HICKINBOTTOM: I understand the point.

24 THE WITNESS: The company came to buy a car. I had an
25 interest in the company. The company went to sell a car, I

1 still have an interest in the company. Well, why repeat
2 yourself?

3 BY MR RAWAT:

4 Q. So, once you've declared an interest once in Hannah
5 Reclamation Ltd--

6 A. Wherever Hannah Reclamation Ltd--
7 (Overlapping speakers.)

8 Q. Whatever application it makes and comes up in front of
9 Cabinet, your part of this, your position is there's no
10 obligation anymore to declare an interest.

11 A. That's what it says.

12 Q. Okay.

13 A. You want to make the person declare an interest each
14 time it shows up? Well, what are you--we know that you have an
15 interest, you've declared it already. Has your interest failed?
16 Why are you declaring it again? Well--

17 COMMISSIONER HICKINBOTTOM: I mean, I understand the
18 point, Honourable Fraser.

19 MR RAWAT: Commissioner, I have reached the end of my
20 questions.

21 COMMISSIONER HICKINBOTTOM: Yes.

22 MR RAWAT: Can I conclude, firstly, by thanking
23 Honourable Fraser for returning to give further evidence on this
24 aspect of the Commission's investigation; but secondly, and
25 finally, thank him for the way in which he has given his

1 evidence today.

2 COMMISSIONER HICKINBOTTOM: Yes, thank you, Honourable
3 Fraser. It's been very helpful, as it was last time. Thank
4 you.

5 THE WITNESS: You're welcome.

6 (Witness steps down.)

7 COMMISSIONER HICKINBOTTOM: All right. The next
8 witness, Mr Rawat--

9 MR RAWAT: Is at 3:00.

10 COMMISSIONER HICKINBOTTOM: Thank you very much.

11 MR RAWAT: Thank you.

12 (Pause.)

13 COMMISSIONER HICKINBOTTOM: Yes, Honourable Fraser.

14 THE WITNESS: Commissioner, under your--the invitation
15 that I got to be here today--

16 COMMISSIONER HICKINBOTTOM: Yes.

17 THE WITNESS: --under your section--consider it
18 necessary, consider--if you consider it necessary, this section
19 would be under for witnesses, initially title--the Commissioner
20 notes that you consider--okay, let me find the other one.

21 Yes. Commissioner, you said to me that--you consider
22 that it is necessary for the Commissioner to call a witness or
23 otherwise obtain written evidence from them in relation to the
24 potential criticisms, then you should identify those individuals
25 in your written response and provide their contact details. For

1 each individual, you should also provide details of what
2 relevant evidence you consider, then, they would be able to give
3 to the Commissioner.

4 It says here, if you consider that it is necessary for
5 the Commissioner to call any witness--

6 COMMISSIONER HICKINBOTTOM: Yes.

7 If you consider it necessary, you should let me know.

8 THE WITNESS: Okay.

9 COMMISSIONER HICKINBOTTOM: Who is actually called
10 depends on who I think is necessary.

11 THE WITNESS: Okay.

12 Well, I did. I did submitted--I did submit my
13 response to that, requesting that a witness be called, and the
14 response that I got was not a response, but in your request for
15 additional information, one paragraph states that the
16 Commissioner notes that you consider he might wish to call
17 Honourable Julian Willock as a witness in relation to the
18 matter. The Commissioner will consider whether it is necessary
19 to do so once you have provided your evidence to the COI on
20 Thursday.

21 COMMISSIONER HICKINBOTTOM: Yes. And I will.

22 I mean Mr Rawat may be able to help, but Mr. Willock
23 was your Permanent Secretary in 2010 for about three or four
24 months, I think.

25 THE WITNESS: More than that.

1 COMMISSIONER HICKINBOTTOM: And before you were
2 suspended.

3 Mr Rawat, do you have the dates?

4 (Overlapping speakers.)

5 THE WITNESS: Six months.

6 MR RAWAT: 22nd March 2010 was when Mr. Willock was
7 appointed Permanent Secretary, 28th of July 2010 was when he
8 went on paid leave.

9 COMMISSIONER HICKINBOTTOM: So, it was four months.

10 THE WITNESS: No, that's Permanent Secretary. What
11 about the period before that appointment?

12 MR RAWAT: Before that, he was the Director of the
13 auto and sewage department.

14 THE WITNESS: No, no, no, no, no. Didn't he take
15 office in January 2010?

16 COMMISSIONER HICKINBOTTOM: No. I mean, to be fair to
17 you, Honourable Fraser, you had a lot--you had a number of
18 Permanent Secretaries and Acting Permanent Secretaries. I think
19 over the time four Permanent Secretaries, with an Acting
20 Permanent Secretary between '08 or '09, but he was your
21 Permanent Secretary for four months before he was suspended, and
22 that was a period in sort of the spring to July of 2010,
23 whereas--and again I will think about this, but on the basis of
24 your evidence, the focus of the expenditure was really later
25 than that.

1 THE WITNESS: Yeah, but the whole idea is the issue of
2 involvement and me not being--you're trying to say that I'm the
3 one who excluded them, and I'm saying to you that that is not a
4 history of me and the project. The Permanent Secretaries were
5 involved.

6 BY MR RAWAT:

7 Q. But I think the point--the criticism, the potential
8 criticism, that was put to you, Honourable Fraser, about
9 excluding a Permanent Secretary as an Accounting Officer arises
10 out of the Petty Contracts of December 2010 because that was
11 where the spending in 2011 occurred because the point that's
12 made is that--and this is made in the Auditor General's
13 Report--is that notwithstanding that exclusion, staff still went
14 on and paid out monies. And given that it relates to December
15 2010 into 2011, those are not matters which appear would have
16 crossed at the same time that Mr. Willock was Permanent
17 Secretary.

18 A. It's not the fact that whether he was the Permanent
19 Secretary at that time or he wasn't, the fact is the pattern of
20 dealing with Permanent Secretaries on the project does not fit
21 the description of what I see here in the Auditor General's
22 Report. The pattern is different. The Permanent Secretaries
23 did run the project.

24 Q. But, I mean, the position we've reached, which the
25 Commissioner will have to consider, is that the potential

1 criticism arises from the Auditor General's Report, that has
2 been put to you, and you have responded.

3 A. It says from 2007 to 2011.

4 Q. Well, it's criticism 2--

5 A. They have been excluded.

6 Q. --is 2010 to January 2011.

7 Criticism 4, yes, you're right, it covers a period.

8 A. Mm-hum.

9 Q. But the point that you take it back to was about the
10 exclusion of Permanent Secretaries, and the point the
11 Commissioner will have to consider is whether Mr. Willock assist
12 with those issues, given the short period of time in which he
13 was in post.

14 COMMISSIONER HICKINBOTTOM: Or, indeed, any of the
15 Permanent Secretaries because other Permanent Secretaries were
16 in post for longer and at more pertinent times; and if that's
17 right, then if it's right--and I'm not saying one way or the
18 other but I will think about it--if that's right, I may want to
19 hear from a Permanent Secretary, but it may not be him. And if
20 I do think that's necessary, then the first step would be, of
21 course, to ask for a statement from them. But I will certainly
22 bear those in mind once we have your Transcript, and I'll
23 consider it, but at the moment that doesn't seem to me to be a
24 key witness.

25 THE WITNESS: I want you to--the dates that you have,

1 the May date, it doesn't seem--doesn't seem to be correct
2 because I thought he was there from in January all year. He
3 spent more time in the Ministry. It could be that he was just
4 Acting before he got his appointment.

5 COMMISSIONER HICKINBOTTOM: Well, two things,
6 Honourable Fraser. First, we can certainly check that, and we--

7 THE WITNESS: Yeah.

8 COMMISSIONER HICKINBOTTOM: --and we can check the
9 source of the May date, and also whether he was Acting before
10 that date, but even that would not detract from the point that
11 the focus of this, as Mr Rawat said, is later when the Petty
12 Contracts were issued, which was certainly after his time.

13 But I'll take the matter away, and if it's necessary
14 to call any of your Permanent Secretaries to give evidence, then
15 I will contact them and get evidence from them.

16 THE WITNESS: After the Petty Contracts were issued,
17 payments were made; right? And those payments were made on the
18 evidence that the projects were completed satisfactorily,
19 satisfactorily. Whether that evidence can be found is a
20 different story. They had to pay them--they had to make those
21 payments based on something.

22 MR ROWE: Exactly.

23 COMMISSIONER HICKINBOTTOM: I understand that point.

24 THE WITNESS: Systems Engineers were hired to produce
25 the reports, and they must have made the payments. Whatever

1 happened to those documents after--you know, not a single soul
2 that worked on that project that I recall stayed on in those
3 capacities after the Government changed.

4 COMMISSIONER HICKINBOTTOM: I understood all those
5 points because you spoke at--you spoke about the change of
6 government to 2011, when you gave evidence last time.

7 THE WITNESS: Right.

8 COMMISSIONER HICKINBOTTOM: But this witness will not
9 help on any of those matters because he definitely was not there
10 then.

11 THE WITNESS: So, you're not concerned about a
12 pattern? And I spoke to you regarding the fact that the
13 transition between Permanent Secretaries would have caused this
14 whole issue of management to get lost because there was no
15 transition.

16 COMMISSIONER HICKINBOTTOM: But if there is a pattern,
17 then the better witness to call would be the Permanent Secretary
18 who was in place at the relevant time.

19 THE WITNESS: No.

20 COMMISSIONER HICKINBOTTOM: Not a Permanent Secretary
21 who was there at an irrelevant time.

22 THE WITNESS: You have to start when the project
23 started. The project started. We received a proposal that took
24 place in 2008, late 2008. Contracts were signed to execute the
25 proposal in early 2009.

1 COMMISSIONER HICKINBOTTOM: But that--but if that's
2 right--if that's right--you're suggesting that I call at least
3 four Permanent Secretaries.

4 THE WITNESS: I'm not suggesting you call four
5 Permanent Secretaries. You need to ascertain where this
6 information came from. This information says "Ministry staff".
7 I don't know who the Ministry staff is that says that I liaise
8 with contractors, I liaise--well, how would they know that I am
9 liaising with the contractors? How would some Ministry staff
10 know who I'm liaising with? It sounds to me like it's gossip.

11 COMMISSIONER HICKINBOTTOM: But you've made that
12 point. That's a separate point.

13 THE WITNESS: Okay.

14 COMMISSIONER HICKINBOTTOM: But you've made it.
15 Anything else, Mr Rawat?

16 MR RAWAT: No. Thank you, Commissioner.

17 COMMISSIONER HICKINBOTTOM: Good. Thank you.
18 And thank you again, Honourable Fraser.

19 (Recess.)

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Session 3

COMMISSIONER HICKINBOTTOM: Good afternoon, Premier.

THE WITNESS: Good afternoon.

COMMISSIONER HICKINBOTTOM: Are you ready to start, Premier?

THE WITNESS: Yes, I was ready. I thank you. The Holy Spirit have thy way today. Thank you for being here and also all being safe and that your will be done today in Jesus' name for this Territory and our lives, Amen.

I'm ready.

COMMISSIONER HICKINBOTTOM: Thank you, Premier. Thank you, Mr Rawat.

MR RAWAT: Thank you, Commissioner.

Before we continue with the Honourable Premier's evidence, can I just introduce the representation for this afternoon's session. Present in the hearing room is Mr Hussein Haeri, here on behalf of the Attorney General and the elected Ministers. He's joined by Ms Lauren Peaty, who is present remotely. A number of Members of the House of Assembly are represented by Mr Richard Rowe, who also joins remotely.

BY MR RAWAT:

Q. Premier, thank you for returning. I know you had a busy morning and we are grateful that you've made the time this afternoon for the Commission.

Commissioner, before I continue with my questions, can

1 I just recap where we've reached?

2 COMMISSIONER HICKINBOTTOM: Yes.

3 MR RAWAT: We were going through two written responses
4 with the Premier on Wednesday, and that was a written response
5 prepared on behalf of Cabinet and a written response prepared on
6 behalf of the Premier.

7 COMMISSIONER HICKINBOTTOM: Yes.

8 MR RAWAT: The potential criticisms that remain in
9 relation to Cabinet also appear in the written response from the
10 Premier, and the responses to those criticisms are essentially
11 the same, and so I would not propose to revisit the Cabinet
12 letter on those issues.

13 There are just two exceptions to point out and that is
14 if you turn to the Cabinet written response at page 22.

15 COMMISSIONER HICKINBOTTOM: Yes.

16 MR RAWAT: You will see, Commissioner, there is a set
17 of potential criticisms relating to the Social Security Board.
18 Those were matters that we dealt with with Honourable Wheatley
19 when he came, so again I won't revisit them with the Premier.

20 The only matter to draw to your attention is the
21 response to criticism 1 on page 22 where there is reference to
22 the Attorney General's earlier response, but the Premier on the
23 last occasion gave us the context for that.

24 COMMISSIONER HICKINBOTTOM: Yes.

25 MR RAWAT: The second exception arises at paragraph 24

1 of the same letter, and that is in relation to Health Services
2 Authority Board. We went through those criticisms with The
3 Honourable Malone, and so I won't go through them with the
4 Premier, but again, if I draw your attention to page 29,
5 Commissioner, you will see there that is a difference from the
6 written response provided by Honourable Malone as referenced to
7 the Attorney General's earlier response. Again, we have the
8 Premier's evidence on that and why it appears in the Cabinet
9 letter.

10 COMMISSIONER HICKINBOTTOM: Yes.

11 MR RAWAT: From Wednesday.

12 BY MR RAWAT:

13 Q. Premier, can I turn to your letter, please, and if I
14 ask you to turn up page 16.

15 The criticism there is in relation to the BVI Ports
16 Authority. Hopefully you got a page headed "BVI Ports
17 Authority."

18 A. Yes, sir, I do.

19 Q. And as a criticism, it mirrors the one that we went
20 through in relation to the BVI Tourist Board because the
21 decision to revoke the membership of the--the entire membership
22 of the BVI Ports Authority save for ex officio Members, with
23 immediate effect, was done at the same time as the BVI Tourist
24 Board, but let's just look quickly at the law in relation to the
25 Ports Authority. If you could take up your Part 2 bundle,

1 please, Premier, and turn to page 1285. You should have the BVI
2 Ports Authority Act 1990.

3 MR RAWAT: Commissioner, this statute is part of the
4 exhibits to Dr Carolyn O'Neal-Morton's Second Affidavit. What
5 isn't exhibited is an amending act that was promulgated in 2017
6 which has the effect of changing references in this statute to
7 Governor in counsel to Cabinet and references to the Legislative
8 Council become references to the House of Assembly. You will
9 see that amending statute of 2017 in the Law and Constitution
10 bundle Volume 2, 586.

11 COMMISSIONER HICKINBOTTOM: And for our purposes, is
12 that all that Act does?

13 MR RAWAT: Yes.

14 COMMISSIONER HICKINBOTTOM: Thank you.

15 BY MR RAWAT:

16 Q. Premier, if I could just ask you to turn to page 1293,
17 please. You will see that section 3(1) establishes the British
18 Virgin Islands Ports Authority, which by section 3(2) will be a
19 Body corporate. Second 3(3) then refers to the provisions of
20 the First Schedule, which will have effect with respect to the
21 Constitution authority. We will look at the Third Schedule--the
22 First Schedule in a moment, but what we see is that section 4 on
23 that page sets out the functions of the Ports Authority, and
24 section 5 which starts at the very bottom of the page, sets out
25 the powers of the Authority.

1 If you turn to page 1341, please, Premier. 1314,
2 please, Premier. And this tell us the Constitution of the Ports
3 Authority. So, firstly, there is to be a Chairman appointed by
4 Cabinet on the recommendation of the Minister, so obviously the
5 Minister in question is yourself because this came under your
6 Ministry.

7 Secondly, we see that it will comprise not more than
8 six Members appointed again or six Members who shall not be
9 Public Officers, and such Members shall be appointed by Cabinet
10 having taken into account the desirability of such interests as
11 are affected by the authority's activities being represented.
12 And then the remaining membership there is ex officio Members.

13 We see that at the bottom at 2 there is a provision,
14 which one can also find in the BVI Tourist Board Ordinance and
15 other Ordinances, but the Chairman or any appointed Member of
16 the Authority may resign his office by notice in writing
17 addressed to the Cabinet and may be removed from office by the
18 Cabinet in his discretion at any time.

19 Paragraph 3 of that Schedule at page 1342 establishes
20 that an appointed Member other than a Chairman or an ex officio
21 Member can hold office for a period--such period not exceeding
22 three years as may be specified by the notice appointing him,
23 and then can become eligible for reappointment. What's said is
24 that, in the case of appointed Members, the Cabinet shall
25 specify such periods of appointment so that the periods of

1 appointment of not more than one-third of the Members shall
2 expire in any one year.

3 3(2) establishes that the Chairman can hold office as
4 Chairman for a period of three years.

5 And then at subparagraph (3), we have that the
6 Authority elects from among its appointed Members a Deputy Chair
7 who holds Office of Deputy Chair for a period of one year.

8 So, if we look at back--there is no express provision
9 in relation to the circumstances in which the Cabinet can remove
10 a Member of this Board, but what is said is that it is at the
11 Cabinet's discretion at any time to remove a Member.

12 So, if we go now back to the criticism letter and go
13 to your written response, and if I may, and hopefully making
14 sure that we're fair to you, Premier, I'm going to summarise
15 this, and the reason I'm going to do that is because it's the
16 same terms as the BVI Tourist Board, and we went through that in
17 some detail.

18 But in effect, what's said is that that decision to
19 revoke the entire membership of the BVI Ports Authority in
20 relation to it that it appears that the reasons given were
21 insufficient, and there was insufficient regard to the
22 application of the First Schedule of the Ports Authority and the
23 advice of the Attorney General in relation to its application,
24 and the revocation failed to adequately provide for independent
25 expertise and oversight. Then the policy of revoking membership

1 of Statutory Boards with every new administration fails to
2 adequately provide for independent expertise and oversight of
3 such Boards. And finally the decision to replace all of the
4 Members of the Board failed adequately to take into account
5 legal advice indicating that the policy of replacing the
6 membership of Statutory Boards with every new administration may
7 be unconstitutional.

8 Now, your response is as follows: Reference is made
9 to earlier responses on these matters. The policy was lawful
10 and within the legitimate scope of the political Government to
11 decide. First Schedule was not relevant to the revocation, and
12 as far as the Premier is aware, the Attorney General did not
13 advise it was. The Attorney General certainly did not advise
14 the Cabinet that there was no respectable argument that its
15 policy was a lawful basis for the Cabinet's decision or even
16 that in his opinion the decision was likely to be held unlawful.

17 Now, we need, Premier, to put that response now in the
18 context of evidence that you've given, and hopefully we won't
19 need to go over it, but the evidence that you've given on
20 Wednesday comes to this, does it not? This decision made at the
21 same time as the BVI Tourist Board revocation was on the same
22 basis, wasn't it? Applying the policy that you've explained to
23 the Commissioner?

24 A. Applying the same condition, yes, in that if the
25 Attorney General, as I said on--earlier this week, the legal

1 opinion that guides Ministers never said specifically that it
2 was unlawful. So, it would follow suit as what I said earlier.

3 COMMISSIONER HICKINBOTTOM: Yes.

4 BY MR RAWAT:

5 Q. Leave aside what--and you went into this in some
6 detail about the discussions that you had with the Attorney
7 General, and you have given evidence on that--what you say on
8 page 17 is the policy was lawful, and within the legitimate
9 scope of the political Government to decide, so leave aside what
10 the Attorney General at the time did or did not do. Why in
11 itself do you say that policy, which we went through--do you
12 remember we went through the three aspects of it--why do you say
13 it's lawful and within the legitimate scope of the political
14 Government to decide?

15 A. Commissioner, with due respect, I cannot leave aside
16 the Attorney General because the Attorney General is the litmus
17 test for any government to decide if they're moving lawful or
18 unlawful so that they can register the risk that Government is
19 about to take and make them aware of the level of the risk that
20 they're taking and try to see gather not from taking it because
21 this was done in the public's interest of trying to re-energise
22 or re-innovate--invigorate the Board. So, it is difficult for
23 me at any time to put aside the Attorney General's comments.

24 And Commissioner, if I may, I need to state clearly
25 that the processes that's involved in getting a Cabinet Paper is

1 one in which you cannot divorce the paper nor your decisions
2 from the Attorney General's because it goes through a process.
3 The Minister is the conduit at the end of the day that guides
4 the paper into the Cabinet, but there is a lot of processes that
5 it goes through.

6 So, when the Minister gets it to ExcoTrack, and
7 there's a button that says "published"--"publish", not
8 "published"--but when he pressed it, he pressed it as published,
9 he or she pressed it and it says "publish," it is then saying
10 that it has passed through all the parameters that it had to
11 pass through, and whatever needs to be flagged whether by
12 Financial Secretary or the relevant Ministers or the Attorney
13 General has been flagged.

14 So, on that foundation is which you move forward to go
15 to Cabinet. And again the Attorney General's comments were one
16 that says that it was unlawful.

17 COMMISSIONER HICKINBOTTOM: But that wasn't Mr Rawat's
18 question. There is a difference between the Attorney General
19 not saying positively this is unlawful, and your statement which
20 says the policy was lawful.

21 THE WITNESS: Right, because Commissioner--

22 COMMISSIONER HICKINBOTTOM: No, no, that's a statement
23 of fact.

24 THE WITNESS: I state that it is lawful because the
25 Attorney General did not state it was unlawful.

1 So, as far as we were concerned in the Cabinet, we did
2 not do anything unlawful because we would have been told by the
3 Attorney General that was unlawful. So, if we did it, that
4 means it was lawful because it was either lawful or not.

5 COMMISSIONER HICKINBOTTOM: Well, I understand what
6 you said about the Attorney General, but there is a difference
7 between you saying the Attorney General did not tell us it was
8 unlawful, because that was the Attorney General's view, and a
9 positive assertion, which you make here, that the policy was
10 lawful.

11 THE WITNESS: Right, because for me to say anything
12 else would be saying that I did something unlawful, and we did
13 not do something unlawful because the advice from the Attorney
14 General never confirmed that it was unlawful.

15 So, again, we have decisions to make. So, if we get
16 the advice and the advice doesn't say unequivocally that it is
17 unlawful, then at that time the Attorney General can stop us and
18 say in Cabinet it is unlawful, so guide your actions
19 accordingly, but that was never said.

20 So, when we made the decisions, it was under the
21 auspices that it is lawful.

22 COMMISSIONER HICKINBOTTOM: But you thought it was
23 lawful.

24 THE WITNESS: But what evidence is there,
25 Commissioner, with due respect, to be sure that it isn't. We

1 have to go by the Attorney General. Even now we're guided by
2 the Attorney General. And your lawyer, as I said before, I
3 didn't--business or what--is hired to guide you.

4 COMMISSIONER HICKINBOTTOM: So--I'm sorry, Mr Rawat,
5 but when you say the policy was lawful within the legitimate
6 scope of the political Government to decide--

7 THE WITNESS: Right.

8 COMMISSIONER HICKINBOTTOM: --do you mean that the
9 Attorney General did not positively tell you that it was
10 unlawful.

11 THE WITNESS: Exactly. He did not tell us it was
12 unlawful.

13 COMMISSIONER HICKINBOTTOM: Right.

14 Yes?

15 BY MR RAWAT:

16 Q. And when you say, Premier, that the Attorney General
17 certainly did not advise the Cabinet that there was no
18 respectable argument, leaving aside the Attorney General, you're
19 saying the Attorney General--and you're saying it's a matter of
20 fact that the Attorney General did not do this--what is the
21 respectable argument that the policy was a lawful basis for the
22 Cabinet's decision?

23 A. Well, Commissioner, I would be more along the line of
24 what is the basis that it is unlawful, and there was none
25 because we, with great respect, I must state that a Minister in

1 any government, present or past, Schedule is so busy. So
2 these--when you put these through the systems of the Public
3 Service, and you get the paper to move forward and you look and
4 you read every aspect of what is done inside of the paper from
5 the financial implications to the financial comments to the
6 legal comments to other Ministries, probably Permanent
7 Secretaries, and you see nothing there to say that it is
8 unequivocally lawful or unlawful--in this case he didn't say it
9 was unlawful--well then, you as Minister move ahead, and under
10 the basis that it is.

11 Because if a risk is taken, which you do in Cabinet
12 every day for every Minister everywhere in the world, the only
13 person that's going to defend you is the same Attorney General,
14 so you would expect any Attorney General to reduce their volume
15 of work from up front by telling you this is unlawful, this is
16 lawful. That's the only clear indication that we can get. And
17 then if the Government even makes a decision and decides to
18 implement it to carry it out, you have taken on the risk on your
19 own.

20 COMMISSIONER HICKINBOTTOM: So, you aren't here making
21 a positive assertion that there was a respectable argument, but
22 merely, as you say, to be fair to you, Premier, that the
23 Attorney General simply did not happen to advise that there was
24 no reasonable respectable argument?

25 THE WITNESS: Didn't advise any that it was unlawful.

1 COMMISSIONER HICKINBOTTOM: Okay.

2 BY MR RAWAT:

3 Q. If we move on then, Premier, to criticism 2 which is
4 on page 18. Now, this is where we've moved on in time. We're
5 now in May 2019, and there is a process by which Members--and we
6 have spoken already about one of those, Mr Isaac, in the context
7 of him then being able to sit on the Airports Authority Board,
8 but respective Members of the Port Authority Board are contacted
9 and informed that they have been nominated for membership on the
10 Board. And what's then set out is again the same potential
11 criticisms that you've seen already, Premier, which is broken
12 down that the process adopted is not the most--didn't identify
13 and select the most suitable and qualified candidates, and
14 secondly that, in relation to by reference to the Cabinet
15 Handbook, no conflict checks were carried out in the procedures
16 in paragraph 6.8 of the Handbook were not followed, and the
17 response that is given is reference is made to the earlier
18 responses on this matter. So, I think we discussed this at some
19 length on Wednesday, and that is the informal process that you
20 outlined for the Commissioner.

21 Could I just, though, just try and look at this in a
22 little more detail as an example of the process, please. Would
23 you pick up your Part 3 bundle. Thank you. If you turn up page
24 3064.

25 This is an e-mail into which you are copied on the 6th

1 of May 2019 from your then Permanent Secretary Elvia
2 Smith-Maduro. And it is addressed to Mr Nathaniel Isaac, and it
3 says: "The Honourable Premier has nominated you to be a Member
4 of the BVI Ports Authority Board."

5 He continues, "the function of the Board is to set
6 policy direction for the effective functioning and management of
7 the daily operations and maintenance of all port and harbour
8 services and facilities specified in Schedule 2 of The Ports
9 Authority Act." A copy of the Act is attached for your
10 information.

11 Other persons invited to serve as Members include the
12 following persons: Mrs Patsy Lake, Mr Keith Flax, Ms Roxane
13 Sylvester, Mr Egar Wattley, Ms Tamarie Wheatley-Hodge, and
14 Mr Damien Lettsome.

15 And it concludes: "Please indicate your acceptance of
16 this invitation to serve as Chairman of the BVI Ports Authority
17 Board, and provide us with a copy of your résumé so that we can
18 complete the approval process.

19 "I look forward to receiving your acceptance shortly."

20 So, that's on the 6th of May. If we look at the top,
21 Premier, you will see that there is a date of the 8th of May
22 where Mr Isaac replies, and confirms that he will be delivering
23 the requested document to the Premier's Office and into the care
24 of, in fact, your private secretary.

25 If we turn to 3080, Premier. On the same day--in

1 fact, a little bit earlier in time, Mrs Smith-Maduro, your
2 Permanent Secretary, has e-mailed Ms Patsy Lake in exactly the
3 same term, the only difference being, of course, that when she
4 lists the Members, she inserts Mr Isaac's name and also this
5 invitation to Mrs Lake is become a Member of the Board. But we
6 see at the top Mrs Lake responds on the 7th of May and says "I
7 will send my CV shortly."

8 Still, we are on the 6th of May. If you go to 3058,
9 please.

10 This is now the Cabinet Paper headed "Appointment of
11 new Board Members to the BVI Ports Authority Board," dated the
12 6th of May 2019 from your office. It's memo number 154/2019,
13 and it's being prepared by Mrs Smith-Maduro.

14 We're pausing there, and again, Premier, correct me if
15 I've misunderstood this, but this is ExcoTrack, so what we can
16 say is that on the 6th of May, Mrs Smith-Maduro puts the paper
17 on to ExcoTrack; is that right, Premier?

18 A. On the 6th of May?

19 Q. Yes.

20 A. Yes.

21 Q. And then, as we've seen, if we look at this, you see
22 at paragraph 2 of 3058, there's reference as follows: "This
23 Administration's desire to reshuffle the composition of each
24 Board to include youth representation of the Boards. As such,
25 the membership of the current Board was revoked in keeping with

1 the Administration's policy for inclusions and the new policy
2 regarding appointment of Board membership not extending beyond
3 the sitting of the Government's tenure. Due to the critical
4 role the Board plays for setting the policy direction for the
5 operations of the Port Authority, it is important the
6 appointment of new Board Members be approved as a matter of
7 urgency. The Ports is scheduled for an audit by the
8 international regulatory authority in November 2019 and will
9 undergo a pre-audit in August. It is therefore critically
10 important for the Board to be reinstated to provide oversight of
11 the daily operations of the Ports and so that the Audit results
12 in a favorable outcome for the facility.

13 "Cabinet is, therefore, asked to approve the
14 appointment of the following persons to serve as Board Members
15 of the Ports Authority for a period of three years."

16 And we then list the membership: Nathaniel Isaac as
17 Chairman, Keith Flax, Roxane Sylvester, Egar Wattley, Patsy
18 Lake, Tamarie Wheatley-Hodge, Damien Lettsome and then three ex
19 officio Members.

20 What's said is all the nominees have been contacted
21 and invited to serve, all have responded agreeing to serve,
22 résumés have been submitted for Mr Isaac, Ms Sylvester, Mr
23 Wattley, Mrs. Wheatley-Hodge, Mr Lettsome, and Mr Flax and those
24 are attached to the paper. And it notes that Mrs Lakes has
25 accepted serving on the Board but indicated she will provide her

1 résumé shortly.

2 You then have, once we get on to--and we will come
3 back to this in more detail, but once it's on ExcoTrack, that's
4 when other departments can input to onto ExcoTrack.

5 A. Not necessarily.

6 Q. Well, let me pause there.

7 So, the reason I'm recapping this is the evidence
8 that's been given by others, and I thought it would be evidence
9 that we canvass with you on Wednesday, but cross-Ministry
10 consultation, if it's necessary, and in memos we're looking at,
11 it's not necessary. That's a point when another Ministry can
12 input. But for the purposes that we're looking at, the two key
13 things to bear in mind are, firstly, that, under financial
14 implications, you will have input from the Ministry of Finance,
15 and then under legal implications it's the Attorney General's
16 Chambers.

17 A. Yes.

18 Q. So, that's where we put in.

19 And then if we look at 3062, Premier, it's dated the
20 14th of May, so is that the date at which the Minister who is
21 going to take the paper to Cabinet presses "publish"?

22 A. Yes.

23 Q. Right.

24 So, let's continue with our chronology because we've
25 got the paper now on ExcoTrack. If you go to 3080, if we go

1 back to 3080, and we've got then on the 7th of May that Mrs Lake
2 accepts and says she will send her résumé. If you go to 3070,
3 you've got on that day that another letter--forgive me, from
4 Ms Smith-Maduro, this time to Roxane Sylvester on 7th of May,
5 inviting her in the same terms as we've seen to join the Board
6 and asking for a copy of the résumé. And the following day
7 Mr Sylvester responds, sending her résumé and thanking you for
8 nominating her to be part of the Board.

9 If you go to 3076, we see there on the 9th of
10 May 2019, Mr Flax responds. We don't have the initial e-mail to
11 him, but I think we can assume it's in the same terms as
12 Ms Elvia Smith-Maduro had sent to others, but he attaches his
13 résumé, and again thanks you for the offer of membership of the
14 Board, and that's him acknowledging that he will do that.

15 Now, if you go now to--

16 A. Just, if I may, Commissioner, important to state,
17 though, that you did say but he said thank you for the Premier's
18 offer of membership on the BVI Ports Authority, and he did state
19 in his letter "I just found this letter, the delay of which was
20 compounded by my absence from the Territory." So just noting
21 that clearly some kind of letter would have had to be written to
22 him for him to have said that.

23 Q. Yes. I'm not suggesting that Mr Flax did not get a
24 letter.

25 A. No, no, I didn't say that. I'm just pointing out.

1 Q. What I'm going to suggest is he got a letter in
2 exactly the same term as we've seen sent to Ms. Lake, Mr Isaac,
3 and Mr Sylvester.

4 A. Right. Right.

5 Q. If we go now to 3063. Because under the Cabinet memo
6 under legal implications it simple says the Attorney General's
7 comments are attached at Appendix H, and that's what we find at
8 3063, and what it says is "I refer to the Cabinet Paper dated
9 6th of May in regards to the captioned subject. I have reviewed
10 the Cabinet Paper with respect to the appointment of new Members
11 of the Board of the BVI Ports Authority Board. I note that it
12 is a requirement under the First Schedule to the BVI Ports
13 Authority Act that six Members of the Board should not be Public
14 Officers. There is a further requirement that in appointing the
15 Members of the Board, Cabinet should take into account 'the
16 desirability of such interests that are affected by the
17 authority's activities being represented.'"

18 The Attorney General continues: "My understanding of
19 the words quoted above is that Cabinet, in appointing Board
20 Members should consider the competence and capability of
21 potential Members against the backdrop of the objectives of the
22 British Virgin Islands Ports Authority and in particular its
23 functions under section 4 of the Act. The paper does not
24 indicate in the background how the qualifications of the
25 proposed Members have a bearing on the objectives of the Board.

1 My view is that it is necessary for the paper to do so."

2 It continues: "I note that the Cabinet Paper has put
3 forward 'youth presentation' as a basis for the proposed
4 composition of the Board. This is, however, not required under
5 the First Schedule. It would seem to me from decision-making
6 and administrative law context, having regard to the First
7 Schedule, an irrelevant consideration."

8 If we then take ourselves to 2794, please. Now we saw
9 from the Cabinet memo that the date on which you pressed
10 "publish" for ExcoTrack purposes was the 14th of May. The
11 following day, as we see from this page, there is a Cabinet
12 meeting on the 15th of May chaired by the Governor, you are
13 present and other Ministers.

14 If you go, please, Premier, at 2800, that's where we
15 have the memorandum appearing on the Minutes, and under
16 "deliberations" you presented the paper, and then it continues
17 as follows: "Regarding the captioned paper, the AG referenced
18 his comments at Appendix H stating that in appointing Board
19 Members, the Cabinet should consider that competencies and
20 capabilities against the objectives of the British Virgin
21 Islands Ports Authority and in particular its functions under
22 section 4 of the Act. He mentioned that there was no reference
23 of the skill set of the nominees in the Cabinet Paper. The
24 Chairman also asked about the skill set of the proposed Board
25 membership. The Premier responded that all proposed Members,

1 with the exception of one, manage and operate related
2 businesses. The Chairman said it was important that Board
3 Members possess the skill set and knowledge relevant to
4 international security, maritime skills, and other related areas
5 to ensure the required response to any threat of shutdown of the
6 Territory's ports or other factors. He added that the related
7 skill sets are justifiable reasons to be a Member on a
8 respective Board. The Premier stated that he was confident in
9 the ability and skills of the proposed membership to be
10 appointed to the BVI Ports Authority."

11 And then what followed is that Cabinet approved the
12 appointments of all the people that we've named, and then at
13 2803 we see that there was a decision to have an expedited
14 extract, which I think we've heard evidence of. The expedited
15 extract gets issued before the Minutes are finalised.

16 The first point that arises from this is that none of
17 the e-mails--and these are pretty much the only e-mails we've
18 got emanating from your office offering--none of them show, do
19 they, these individuals being asked about conflicts of interest?

20 A. Again, from the evidence a few days ago, you would
21 make sure while they're speaking that that is how we do it. As
22 I stated, some of the requests that I saw come in for proposed
23 criticism, with due respect, are areas that we are evolving
24 towards. But the informal process is one which we try to make
25 sure that these things are done because it was never written for

1 the 71-year history of the Territory as one of the areas that
2 you would make sure that you will write and state.

3 So, most persons in the Territory know each other, and
4 while we continue evolving in terms of the number of population,
5 we have to move how we're moving now and improve in certain
6 areas or further improve in certain areas, the criteria as
7 stated, you would know that they were no conflicts of interest,
8 none of them are Public Officers. That's known. The other
9 areas that were known, offhand, those are things that would have
10 been known. To have them written? Yes. But having known that
11 these things would not be an issue, the answer also was yes
12 because you know who are Public Officers, you know certain
13 things, so the more formal process is where we're moving towards
14 to make sure as you're writing.

15 But it was clearly--clearly, clearly--from the
16 officers' research and also from all knowledge in the Cabinet,
17 those of us who knew them knew that they weren't violating those
18 areas.

19 Q. Just simplifying it a little, Premier, except what you
20 said about the changes that are going to be made, we're now
21 looking at May 2019. That's what we're focusing on. My--the
22 evidence which I summarised for you on Wednesday about the
23 informal process and which you agreed--

24 A. Um-hmm.

25 Q. --is that what is asked of a nominee is firstly, are

1 they willing to serve because if they say "no", they won't make
2 it to the Cabinet Paper.

3 Secondly, can you give us a CV or a résumé.

4 And thirdly, do you, nominee, consider that there is
5 any conflict of interest. So, conflict of interest has two
6 aspects, it seems. It's very unclear on the evidence. One is
7 asking the person themselves, do you see a conflict of interest?
8 And secondly, internally considering conflicts of interest.

9 My question is simply this: If you look at 3080, for
10 example, nominee, in this case it's Mrs Lake, is asked, will you
11 accept the invitation to serve, is asked, can you have a résumé,
12 it simply not asked, even that question, do you think that there
13 is any conflict that arises.

14 Now, this is about the informal process because it
15 shows that even the informal process doesn't work properly.

16 A. Well, that's your view, and I respect it, but I would
17 state very clearly that the informal process takes into account,
18 Commissioner, that when you write and ask those two, that in the
19 CV, when it comes forward, if any other questions come up that
20 they would ask.

21 And also, if that is not captured by the Cabinet and
22 any conflict arise, there's still laws in place for you to have
23 those persons removed. So, yes, more of the formal writing has
24 to come, and that's what we're working on now, and it has to be
25 taken in consideration that we are working on it because the

1 dates that have been spoken about are just a couple of weeks
2 after we were elected, and we're now two years and a little bit
3 into the Administration.

4 So, if we did not evolve towards improving systems and
5 I was here sitting, I would have stated that the criticisms
6 could have been levied in a different way, but in any
7 profession, as you get more into the profession with experience,
8 even some of your incoming policies will shift because you
9 recognise that it has to be amenable to the current situation.

10 So, those are some things that would have been taken
11 into consideration in the letter, although, it didn't
12 specifically say that. When the CV comes back, persons would
13 have been able to see and state, well, all right, from this we
14 will deduce this because of our informal list in the community.

15 If you look at me, Commissioner, through the lens of
16 this truly big country like the UK, you don't know who is
17 applying, you don't know the person if you see them in the
18 supermarket. Here, the culture is different, so you would know
19 most of the times where the conflicts would be, or you will ask
20 them what about this. I know that you're involved in this.

21 So, those informal processes are still worked very
22 well over the 71 years' history of the Territory. That's the
23 point I'm trying to make all the time.

24 COMMISSIONER HICKINBOTTOM: But Mr Rawat's question
25 was very small. And that was that the evidence is that, in the

1 informal process, it's informal because nothing's recorded and
2 it's entirely internal.

3 THE WITNESS: Um-hmm.

4 COMMISSIONER HICKINBOTTOM: But in the informal
5 process, the candidate is, amongst other things, asked whether
6 they have any conflicts of interest. What your evidence is now
7 that that's not right, in these cases they weren't asked, but
8 you say somebody who would be looking at it internally,
9 including the Minister and possibly the Cabinet, would probably
10 know whether there was a conflict by virtue of knowing them and
11 looking at their CV.

12 THE WITNESS: That's what the informal process has
13 been doing for the last 71 years.

14 COMMISSIONER HICKINBOTTOM: But that not the evidence.
15 The evidence is that they are asked, and I think your evidence
16 is no, they're not asked or not necessarily asked.

17 THE WITNESS: Not documented, but when the officers go
18 to them, those are some of the questions that they know they
19 have to pose to them because they are the ones who are going to
20 communicate with them either by e-mail or by phone.

21 COMMISSIONER HICKINBOTTOM: But these e-mails are the
22 communication.

23 THE WITNESS: Well--

24 COMMISSIONER HICKINBOTTOM: This e-mail of the 6th of
25 May on page 3080 is the communication?

1 THE WITNESS: And I do agree it's a communication in
2 terms of the e-mail, but remember also there will be further
3 communication with the officers and the persons that may not
4 always be captured in the e-mail.

5 Yes, and moving forward, it will be best to capture
6 them given what we have learned. We have learned a lot over the
7 two years, and even some listening to certain things with the
8 COI, but that doesn't mean that it was not discussed. It just
9 wasn't captured in the e-mail.

10 COMMISSIONER HICKINBOTTOM: Okay. Thank you.

11 BY MR RAWAT:

12 Q. Premier, and this informal process you have spoken
13 about 71 years several times, so this informal process that
14 you're talking about has had 71 years to germinate, so it's
15 not--it's not a new process.

16 And the point about it is that there is absolutely no
17 evidence--there is no note of a phone record; and when we look
18 at the memorandum that we were looking at--there is no reference
19 to conflicts of interest. There is no evidence across any of
20 the Boards that we've been looking at under your umbrella
21 pointing to any others of nominees being asked these questions,
22 the questions that, you know, your own Permanent Secretaries
23 themselves and your own Ministers say are asked. There's not
24 one shred of evidence at all, and this--the reason this e-mail
25 is important is because that is the opportunity. You're raising

1 everything else, but that is the opportunity to raise conflicts
2 of interest, and it's not done.

3 A. Well, Mr Rawat, I would state that I don't think our
4 71-year history plus with the Legislative Council lightly. We
5 were left here to develop ourselves. We don't have a wide
6 history like other countries, even like the UK, who have a 400
7 history where they take care of a lot of these gaps and would
8 have solved them long ago. And all of these didn't exist at the
9 time.

10 When I speak of the history, I did not speak of Ports
11 Authority being part of the history from the time it started.
12 What I'm speaking about, over the 71 years of our history from
13 the time we had the Legislative Council being restored in the
14 Virgin Islands, most of our processes were informal processes.
15 It's not specifically stating that the Ports Authority alone
16 was.

17 But as they came and the time evolved and legislation
18 came and there still existed a segment of the informal process
19 that continues to have certain gaps that needed to be filled
20 with amendments to the Legislation, with also further things
21 that needed to be done, and now is no different.

22 So, with the Ports Authority and other Boards, there
23 are many things that are going to be discussed, Commissioner,
24 that necessarily wouldn't have been in the e-mail. It should
25 have been in the e-mail, my answer is yes, but given how the

1 culture of operating has been, some things that we recognize as
2 we mature would need to be more documented than before. But the
3 officers, Public Officers do a good job of vetting.

4 COMMISSIONER HICKINBOTTOM: So, who would have
5 telephoned, in this case, Mrs Lake, and said are there any
6 conflicts? Did anybody do it between 1:56 p.m. on the 6th of
7 May and 7:31 p.m. on the 7th of May when she said "I accept with
8 thanks"?

9 THE WITNESS: Commissioner, what I'm trying to say
10 here is even if they use the words, are you having conflicts of
11 interest? To what? And they will try to look and see the Act,
12 based on the CV--this is what is used most of the time--some
13 were laxed. Some would say based on the CV, I can see from
14 their history that there is no conflict of interest. But at the
15 same time, too, if those are missed--if those are missed--at the
16 Cabinet level we try to capture them. And if it is missed and
17 they happened to get on to any board, not just in this
18 Government but any other Government, as it's detected, then the
19 Act has provisions to deal with it. That's all I'm saying.

20 COMMISSIONER HICKINBOTTOM: Thank you.

21 BY MR RAWAT:

22 Q. But it's not something that's really your area, isn't
23 it, Premier, because this is what falls into the ambit of what
24 you've described as the technical people?

25 A. Well, that and the Minister because remember at the

1 end of the day the Minister has to carry the paper, so they come
2 forward and converge with him.

3 Q. So, where do we see in the memorandum, you as the
4 Minister, addressing conflict of interest?

5 A. I was not at the Cabinet level because obviously they
6 didn't bring that to my attention then. So at the Cabinet
7 level, when we're discussing the Members, we will have a
8 discussion of conflict of interest, the Chair whether he felt
9 about the skill sets, we would have a conversation about that.
10 All of that won't be captured inside it, but there will be
11 discussions.

12 Q. And again, this is discussion that is just simply not
13 recorded in the Minute?

14 A. For the most part, no. No meeting, everything is
15 recorded in Minutes.

16 Q. But--so, a critical part of your informal process
17 doesn't end up being recorded either in your memorandum that you
18 take to Cabinet or in the Cabinet Minute?

19 A. Well, in any section because you seem to be sticking
20 on the conflict of interest. You have to explain to me what
21 is--what it is that you were trying to get at with that because
22 we tried our best to do it in the best legal way possible.

23 Q. But the evidence, Premier, from three Permanent
24 Secretaries--

25 A. Um-hmm.

1 Q. --two of your own Ministers--

2 A. Um-hmm.

3 Q. --is that, before someone even gets to Cabinet three
4 things are asked. Do you want to serve?

5 A. Yes.

6 Q. Can we see your CV/résumé? Is there any conflict of
7 interest?

8 A. Right.

9 Q. And in this case without going round and round it
10 again, when we look at those e-mails, those e-mails are the
11 opportunity to ask that question about conflict, and it's not
12 asked, which means that even with this informal process, which
13 has evolved--never mind 71 years--we can at least take it from
14 2007 has been in operation. Your own response speaks about
15 successive governments applying this informal process. That's
16 what you rely on, Premier.

17 A. Right, but you're taking it out of context.

18 Q. No--

19 A. Yes, you are. And if I may, Commissioner, it's being
20 taken out of context.

21 COMMISSIONER HICKINBOTTOM: Let him finish, and
22 then--and then you will have an opportunity to respond.

23 BY MR RAWAT:

24 Q. The point is even with the informal process that it
25 is, this is an example of variability in that process?

1 A. Um-hmm.

2 Q. And that's the point I'm trying to ask you about.

3 A. Well, I do not want to marry in the BVI Ports
4 Authority with the 71-year history. It is the concept that I
5 want to marry to, and the procedures and processes is what I
6 want to marry to the 21-year history. There were times when
7 there were no Act at all when they were starting certain things
8 and they were just looking at community and find persons. There
9 were times when--we're now evolving when there were Constables
10 and there were not enough Police Officers and they just used to
11 go through the village and know that this person was a good man
12 in the church, et cetera, and a respectable person, and make him
13 a Constable. That is true, after a while evolved when we
14 started to put some them into legislation.

15 But the informal section of it still played a heavy
16 role. Now, that is what I mean when I say coming forward with a
17 71-year history, knowing the era of the Ports Authority and
18 dealing with all these matters since 2007, which would have been
19 the new--when the new Constitution came in. There are a lot of
20 things in the new Constitution that up to now has not being
21 implemented, and we're still struggling to get them implemented,
22 but we're working on them, the human rights chapter, and the
23 different chapters of it. And even existing legislation that we
24 are working on, getting regulations and different things on, but
25 we have done all of this on our own.

1 So, with the manpower and the capacity that we do have
2 in the Public Service.

3 And we cannot say that our officer didn't ask that.
4 Yes, it should be or could have been part of the e-mail, but
5 those are conversations that they would have with them, they
6 would speak with them and they would ask more than conflict of
7 interest. They would ask to speak with them about many things
8 and then come and tell you, Premier, this is the case. So if
9 the officer left out the one word, is there any conflict of
10 interest, I cannot say that our officer wasn't thorough, but can
11 I say that should be part of all as discussed, the part of the
12 e-mail as a question? In hindsight, yes, but hindsight is
13 always 20/20, but that does not mean that our officer has not
14 been put on the check.

15 COMMISSIONER HICKINBOTTOM: But we don't know because
16 it's not recorded. We don't know because there is no--because
17 it's an informal process.

18 THE WITNESS: Um-hmm.

19 COMMISSIONER HICKINBOTTOM: There is no process set
20 out that the officer has to go through.

21 THE WITNESS: Yeah.

22 COMMISSIONER HICKINBOTTOM: There is no evidence in
23 any of the documents, even it accidentally appearing.

24 You, being a Minister, are not involved in this aspect
25 of the appointments process. This is down to the public

1 officials?

2 THE WITNESS: Right.

3 COMMISSIONER HICKINBOTTOM: And that's where we are,
4 isn't it?

5 THE WITNESS: That's where we are, but the Public
6 Officers, from my experience with them, usually are thorough.
7 At this point what has been listed in the e-mails I cannot say
8 anything negative to the Public Officers at all.

9 COMMISSIONER HICKINBOTTOM: Thank you very much.

10 BY MR RAWAT:

11 Q. If we move on, Premier, the other elements of this
12 appointment is the Attorney General's advice, and the Attorney
13 General put you on notice that the information in your paper
14 which included CVs of a number of prospective appointees didn't
15 address how the background of those being appointed bore on the
16 objectives of the Board, which was a statutory requirement.

17 Now, in your paper, it's right, isn't it, that you
18 don't actually address the Attorney General's concerns, do you,
19 in your memorandum?

20 A. In the paper?

21 Q. Yes.

22 A. In the Cabinet Paper?

23 Q. In your memorandum.

24 A. No, he doesn't address what his opinion was in terms
25 of their background.

1 Q. We know what his opinion was, but there is no response
2 to the Attorney General's concerns, is there, in the paper?

3 A. Well, when they brought the background to us, given
4 what we want on the Board, we didn't see any way where that they
5 would not have satisfied what's there. Let's just go to him.
6 Let's go through each one of them that they need to satisfy.

7 Q. Well, let's look at what you said at the time.

8 You said that all proposed Members with the exception
9 of one manage and operate related businesses.

10 A. Um-hmm.

11 Q. So who is the one who didn't manage and operate a
12 related business?

13 A. I have to see the names to refresh my memory. Because
14 that's two years and change.

15 Q. You see them listed in your paper, 3058.

16 COMMISSIONER HICKINBOTTOM: The list of new Members is
17 on 3059. Yes, I think Premier, you've got it.

18 THE WITNESS: I have to read this because it was two
19 and change ago. Which paragraph are you referring to where I
20 said that two years and a half ago?

21 BY MR RAWAT:

22 Q. In your response on the Minutes when you were asked
23 about the skill sets, the two points that are being raised as
24 the Attorney General raising the concern in Cabinet, that there
25 was no reference to the skill sets of the nominees in the

1 Cabinet Paper and the importance of in regard, as we've looked
2 at, to the interests of the Ports Authority, in particular as he
3 says his functions under section 4, that's the first point, and
4 then the Chairman says the skill set of the proposed Board
5 Membership you responded, all proposed Members, with the
6 exception of one, manage and operate related businesses.

7 All I want to know is just who is the one that doesn't
8 manage and operate a related business?

9 A. I can't remember right now. I would have to research.
10 I can't remember that because I could remember saying it and at
11 the time based on information with me. I'm trying to remember
12 exactly, so I don't give you the wrong answer.

13 Q. And what you are required to do under the Act is to
14 take into account the desirability of such interests as are
15 affected by the authority's activities being represented.

16 So, where in your paper do you record the interests
17 that are affected by the authority's activities being
18 represented?

19 A. I'm not clear on that question. Could you clarify it
20 for me and I may be clear what you're asking me?

21 Q. What the Attorney General told you--and you can look
22 at that at 3063--

23 A. Yeah.

24 Q. Two things, what your paper had focused on is youth
25 inclusion?

1 A. Yes.

2 Q. And the important of tenure.

3 A. Yes.

4 Q. And he told you in relation to that that's an
5 irrelevant consideration.

6 A. Right.

7 Q. That was his clear advice?

8 A. Exactly.

9 Q. His other advice was that--by this time he's seen the
10 paper which says youth inclusion is important. These are the
11 people we want to nominate, and he then responds and says youth
12 is an irrelevant consideration. But what he does draw your
13 attention to is it is a requirement under the First Schedule
14 that you should have six people who are not Public Officers, and
15 that in appointing Members of the Board, Cabinet should take
16 into account the desirability of such interests as are affected
17 by the Authorities activities being represented.

18 Now, the Attorney General doesn't see that in the
19 paper. He says there is nothing in there that helps him to say
20 how the qualifications of those you are putting forward have a
21 bearing on the objectives of the Board.

22 A. Right.

23 Q. Do you agree with that?

24 A. No, I can't answer saying whether I agree or disagree.

25 I will tell you what happened. The Attorney General,

1 first of all, in this letter supports my evidence given a few
2 days ago, our goal to have youth representatives, sister island
3 representatives and others, and I bring it up because clearly
4 we--putting that in would have been put in for a reason, and the
5 reason that we had difficulty getting a youth representative on
6 these Boards and sister islands by a matter of name along with
7 other areas that we wanted to create a diverse Board and all
8 Boards was the Attorney General keep telling us that the laws,
9 as written, or the Acts do not allow for them, and that is why
10 he was writing that, and he's telling us it is irrelevant.

11 The discussion that ensued with the Attorney General
12 was how do you help us to make it relevant. Because if we need
13 to make amendments, let's make amendments. This is what the
14 Government wants. We need a youth representative on every
15 Board. We need our young people to be part of it. But the
16 Attorney General keep telling us the law doesn't allow, and we
17 keep saying for every Board paper how do we get you to write a
18 paper or what do we need to instruct you to do to allow us to
19 amend the Boards to reflect these? And that was a loggerhead
20 that we were at for quite a while, which you will see come up in
21 nearly all the correspondences or whenever we brought up the
22 Boards, has been the question from the time we started.

23 Now, in terms of that area, we categorically disagreed
24 that the Attorney General should be telling us this rather than
25 telling us how to get it done. There are a lot of young people

1 asking us up to now how come they're not on Boards, and we
2 promised that, but the Legislation did not allow it.

3 And the legal mind that's supposed to advise
4 Government is telling you it's not allowed, but then the legal
5 mind is not telling how to get it done. And if we do it without
6 a legal mind, Commissioner, may I might add, the same legal mind
7 that was going to told us that we have done something unlawful,
8 which is what he's stating here. That is irrelevant because the
9 Act does not provide for that, so you cannot come saying that
10 you're putting on a youth, et cetera, et cetera. The Act does
11 not provide for it.

12 So we get more correspondence telling us what we can't
13 do than the help that we can get telling us what we can do.

14 In terms of the skill sets, I would agree, Attorney,
15 that as time passed, more and more, even the CAPS SEC has done
16 some seminars with our Public Officers with a writing of Cabinet
17 Papers to make sure more information is in there so that when
18 persons like now in the COI come and take up the Cabinet Paper,
19 all that were on file or all that was being discussed to get the
20 paper there is captured in the background of the paper and
21 thereby subsequently supported by the decisions sought.

22 So, that is something that also is evolving with our
23 Public Officers.

24 So, with this now, what the Attorney General really
25 was saying is that I'm not against--because this was a

1 conversation--I'm not against who you're bringing. I'm not
2 saying that they're not capable. But that should have been
3 captured in the paper, not saying that they cannot do the job.
4 That was a discussion I was having and for that we all agreed
5 that we have to continue to improve the skills of our Public
6 Officers with the writing of Cabinet Papers so that they can
7 speak for themselves when persons, a Commissioner, like your
8 fine self, come and take them up and do not have to call someone
9 in and explain the process. That is evolving. And if you look
10 at Cabinet Papers since that time--this is two years and a
11 little bit ago--they have improved by leaps and bounds with
12 having more information fleshed out. So that anyone that comes
13 to it and wants to drill down on it, would not have to call in a
14 Minister or anyone unless they have to, that it is so. So that
15 is an area that was evolving.

16 COMMISSIONER HICKINBOTTOM: But looking at this
17 particular example, which we are, in the memo of the 13th of
18 May, the Attorney makes it quite clear that the Cabinet Paper,
19 as it's presented, would be unlawful for two reasons. One is
20 youth presentation, that's an irrelevant consideration, taking
21 into account an irrelevant consideration, it's unlawful.
22 Secondly, his view was that it's necessary--that is
23 mandatory--for the paper to set out how the qualifications he
24 said of the proposed Members have a bearing on the objectives of
25 the Board.

1 And in the Cabinet Minutes this is discussed.

2 THE WITNESS: Right.

3 COMMISSIONER HICKINBOTTOM: The discussion is there.
4 The Attorney restates his concerns, the Governor echoes them,
5 and you have--you respond in two ways. You say, firstly that
6 all the proposed Members, with the exception of one, manage and
7 operate related businesses; and secondly, you had confidence
8 that the ability and skills of the proposed membership to be
9 appointed to the Board, full stop. That was the discussion.

10 THE WITNESS: That's what's captured. You know
11 Cabinet was longer than that.

12 We only have how much paragraphs here for this? We
13 only have about four or five paragraphs with this paper, and
14 Cabinet would have had a way more in-depth conversation than
15 those four or five paragraphs.

16 COMMISSIONER HICKINBOTTOM: But I think we must assume
17 that the person who took these notes, the Cabinet Secretary,
18 took these notes and typed them up, caught the main points.
19 That's her job.

20 THE WITNESS: What would be considered to be the main
21 points.

22 COMMISSIONER HICKINBOTTOM: Yes, what she considered
23 to be the main points.

24 THE WITNESS: Um-hmm.

25 COMMISSIONER HICKINBOTTOM: So, if there was any

1 substantive discussion on, for example, the skills of any
2 individual, you would have expected at least that to have been
3 referred to here, but what is--what is referred to is simply
4 your confidence.

5 In relation to the first point that Mr Rawat made is
6 to manage and operate related businesses. You say that you
7 would need time to thinking about that, but just the first one
8 because we looked at this before in the context of a different
9 Committee, one would imagine that Mr Isaac, who puts himself
10 forward as a landscaping and pool maintenance professional, that
11 is not a related business.

12 THE WITNESS: I'll put it this way for you,
13 Commissioner.

14 COMMISSIONER HICKINBOTTOM: I'm sorry, it should have
15 been an open question.

16 Or would you have considered that a related business?

17 THE WITNESS: Okay. Well, that one is a much better
18 way for me to be able to digest it.

19 First of all, Commissioner, the Attorney General
20 stated to us that, in his words because he never said it's
21 unlawful, but clearly he said it's irrelevant. That's what he
22 said, so we took that to mean unlawful, so we had to define it
23 ourselves because, even in conversations in there, we didn't
24 hear that it was unlawful. We were just told it's irrelevant
25 because it was not covered by the Act, so we concluded that its

1 meaning is not in the Act. So, we were told trying to put a
2 youth on any Board based on how the Act is written is unlawful,
3 and we cannot do it. That's a hard thing for us to tell our
4 people.

5 But the Attorney General never did anything to help us
6 to change the law or speed it up.

7 Now, in terms of Mr Isaac or anyone--Hodge, Mrs Hodge,
8 or anyone on the Board, any name that you can pick--all of them
9 do businesses where is they do businesses through having to deal
10 with imports of goods. They also deal with--in terms of
11 managing their own business.

12 And one of the areas that I'm seeing coming out as of
13 late, especially with the last Chair, was unless you had a
14 Master's or Ph.D., it seemed like they weren't fit to be on a
15 board, where our culture has seen Boards made up of persons with
16 perfect common sense and business experience over the years that
17 brought us to where we are, and it doesn't mean because you
18 don't have an accounting degree or a law degree don't mean that
19 you cannot bring expertise to any board or any situation because
20 all cultures, one way, all people only went up the fifth
21 standard, seventh standard, but nobody could beat them now in
22 the public with any business that they have because they have
23 most--more common sense and business sense than anyone else.
24 But they did something for us after a while. They sent us all
25 to school, and now most of us have Bachelor's as a result of

1 those same persons who this former Chair, which I told, see as
2 persons without skill sets, and now we send our children on to
3 get Masters and Ph.D.'s. We are a growing country. We are
4 still young compared to the 400 years' history of the UK or
5 America. We're still growing.

6 So, when persons tell us that because you enter the
7 country business or you have--you're selected to be into the
8 pool and maintenance business or you enter to other
9 entrepreneurship that you don't have skill sets to help run a
10 board that's mainly, purely going to be dealing with business
11 decisions and some other ports decisions.

12 And may I add why I respectfully disagree sometimes
13 with some of the mindset of it, a board's job is not to run the
14 entity. They are the ones to sit and listen to the technical
15 expertise that is brought to them and make an executive decision
16 to help guide the board.

17 So, do you not need someone on every Board that would
18 know about electrical, about ports, about this, about the other,
19 but they must have that basic entrepreneurship skill and
20 experience to help any board to make it, that, Commissioner, may
21 I add, is how this country has developed.

22 Now, we had a lot of issues with the former Chair who
23 do not regard most of our people as having the skill set to be
24 on any Board unless they came forward with a CV that was waxed
25 with snow and shined with Armor All, with a Master's and a Ph.D.

1 Nothing wrong with that. We promote that now. We want our
2 people to have it.

3 But we cannot shun those people in our community who
4 have that business experience, who has that entrepreneurship
5 skills no matter what business they're in, and have been
6 successful in it over the years. They add a lot to our
7 community, and those persons also bring the skill set.

8 So, for me, Chair, I'm still one of those who tried to
9 create a balance and a bridge between those who have gotten us
10 here with the experience and knowledge that they have and those
11 who have the Ph.D. because we also say common sense without book
12 sense is nonsense.

13 So, we do not agree most of the times--we did not
14 agree most of the times with the then-Chair because there was a
15 lot said that is not in these minutes, and their view of our
16 people in terms of who have skill sets and who doesn't.

17 COMMISSIONER HICKINBOTTOM: But one just--one does not
18 have a skill set. You have to look at what the function and
19 objectives are, and then ascertain what skills are needed and
20 whether a person has got it. That was the Attorney's point.

21 THE WITNESS: Exactly.

22 COMMISSIONER HICKINBOTTOM: You've got to assess these
23 against the objectives of the Act, so you've got to look at the
24 objectives, work out what the skill sets are.

25 THE WITNESS: Commissioner, you strengthened my point.

1 Look at the objectives and work out the skill sets. That is a
2 gap in writing that was missing that we are now evolving and
3 taking care of.

4 COMMISSIONER HICKINBOTTOM: But that, on the
5 Attorney's advice, was essential.

6 THE WITNESS: The Attorney was stating that he wanted
7 to make it in the paper in writing. That is what the Attorney
8 was saying, and he was correct. He was not saying--because I
9 was in the meeting--he was not saying that he needed it there
10 because they do not have it.

11 COMMISSIONER HICKINBOTTOM: But the assessment must be
12 made.

13 THE WITNESS: But what he's saying is put it in the
14 paper.

15 COMMISSIONER HICKINBOTTOM: He was saying put it in
16 the paper, but to put it in the paper, to put an assessment in
17 the paper, the assessment has to be made.

18 THE WITNESS: Exactly.

19 COMMISSIONER HICKINBOTTOM: When was it made?

20 THE WITNESS: But the assessment is already made by
21 the persons in the--the technical people handle it, even the
22 Ministers. All they have to do is put it in writing. That is
23 what I mean that over time, the improvement of how we write
24 Cabinet Papers has been evolving and it has been getting better.

25 Look, Chair, at something that happened the last time

1 I was here, and I recognize it, and since then I went and
2 reflect and saw Cabinet Papers since. My good friend Attorney
3 Rawat told me that in the paper it says removal of--revocation
4 of Members. If that same officer writes that paper now, even
5 without a CEO/CV with how much they have evolved, that paper
6 would reflect the full policy, not just revocation.

7 So it is not that these things didn't exist, but
8 capturing them in writing, in the way that they would be seen
9 now in the light of someone like you coming in and others, that
10 is now where they are moving towards, and some of them are
11 already there.

12 So, we're a young government. We just reached there.
13 That--this here, what we are talking about, is only a couple of
14 weeks old. I inherited a Ministry without a Permanent
15 Secretary. Please note that the people that will help me or who
16 are there as make-shifts until we got a Permanent Secretary, so
17 there's a lot of factors that have to go into this, that the
18 Public Officers were doing their best. They were never put in a
19 position to do some of these things before, but I couldn't start
20 running the country until the Public Service was able to give me
21 the institutional capacity needed to run the Premier's Office,
22 so that has to be captured.

23 COMMISSIONER HICKINBOTTOM: But are you saying in
24 respect to these individuals who were put forward for the Ports
25 Authority Board and were appointed that an assessment of their

1 skills and experience compared with the objective and functions
2 in the Act was done by the public servants within the Ministry
3 but simply was not recorded?

4 THE WITNESS: Yes. They would have looked at them,
5 and then look at them, look at the CV, and also knowing the
6 person, and they would have been able to make that call. And
7 then with the discussions, they would have had with the
8 Minister, me, myself, was one that we agree.

9 BY MR RAWAT:

10 Q. As a Minister with access to ExcoTrack, are you
11 allowed to amend memoranda?

12 A. Not me. I never--I don't amend.

13 Q. But are you allowed to?

14 A. You can amend them.

15 Q. And you press the "publish" button.

16 A. I press the "publish" button.

17 Q. So, if there's a word in there like "remove" or
18 "revocation"--

19 A. Mm-hum.

20 Q. --and you'd prefer to use "reconstitute", there's
21 nothing to stop you asking a Public Officer to edit it--

22 A. Or--

23 Q. --or indeed edit it yourself.

24 A. Yes, but usually, the practice is when we go to
25 Cabinet, we make the adjustments.

1 Q. And you talked about the fact that the Cabinet
2 Secretary is giving training to Public Officers as how to--in
3 how to write better a memorandum; is that right?

4 A. Well, it's something that is evolving.

5 Q. And this is the same Cabinet Secretary that you
6 criticise for not recording conversations that you remember
7 happened and involved key aspects of decisions.

8 A. What you are trying to put me against the Cabinet
9 Secretary? That has nothing to do with this part.

10 (Overlapping speakers.)

11 A. No, no, sir.

12 (Overlapping speakers.)

13 A. Attorney Rawat, no, no, no, no.

14 Q. With respect--

15 A. --we can't go there.

16 Q. With respect--

17 A. No, no, no, we're not going there.

18 Q. With respect, you've put yourself--

19 A. You can go there, but I'm not going there because
20 that's all the context.

21 Q. You have criticised the Cabinet Secretary for not
22 recording key decisions.

23 A. Well, if that is the case, which you said that I put
24 down, but that was specifically because you wanted all the
25 minutes. You were asking for all the minutes.

1 Q. No, no, Premier--

2 MR HAERI: I'm sorry, Honourable Fraser.

3 I didn't understand the criticism, Commissioner. I
4 don't believe that the Premier was intending to criticise the
5 Cabinet Secretary in that context.

6 BY MR RAWAT:

7 Q. As we've gone through, both today and on Wednesday,
8 when we've looked at Cabinet Minutes, you have reiterated the
9 point that there are--when I've asked you questions--

10 A. MM-hum.

11 Q. --you've said, Oh, well, that's not been recorded but
12 it happened.

13 A. So, where in that do I criticise the Cabinet
14 Secretary?

15 Q. You're now identifying the conversation that isn't
16 recorded as a key aspect of the decision-making process that
17 occurred.

18 A. Of--

19 Q. That's a failing on the part of whoever recorded the
20 minutes, isn't it?

21 A. But not necessarily. Some of what you may look at as
22 key we may not have looked as key. Some of what you have
23 highlighted since I'm the COI, I too have long going forward in
24 the future what to look at and how to deal with some of these
25 matters. Some of them I never thought before would have been

1 key because they were not things that, on a general basis, that
2 we would have to go through. I would never think on them and
3 even probably the Cabinet Sec.

4 So, it is--the COI, as I said, we welcome a
5 transparency to a just outcome, but it has been a plus because
6 it helps you to realize there are some areas of improvement we
7 need to make, but then there were areas of improvement we're
8 working on all the time.

9 I--the Cabinet Secretary is a very hard-working lady,
10 and in nowhere what I'm saying can be concluded that I'm
11 criticising the Cabinet Secretary. That's an unfair criticism.

12 COMMISSIONER HICKINBOTTOM: I understand that, and
13 particularly as these are Cabinet Minutes that have been
14 approved. But the substantive point is this, isn't it, that the
15 Attorney General said that you've got to have this assessment.
16 You've got to identify the objectives and functions in the Act
17 and you've got assess a person's skill sets and experience
18 against those objectives and functions, and that was really
19 important because the Cabinet--the Attorney General said it was
20 a requirement, and there's nothing in the Cabinet Minutes about
21 that. All there is in the Cabinet Minutes is that you were
22 confident that the ability and skills of the proposed membership
23 to be appointed to the Board--full stop. You didn't say that,
24 well, of course an assessment's been done by the public
25 servants.

1 THE WITNESS: Yes.

2 COMMISSIONER HICKINBOTTOM: That's the obvious point.

3 THE WITNESS: Right. Yes, Commissioner, but
4 Commissioner, I was--I happened to be in the meeting, and being
5 present in the meeting, I can state clearly that I was clear
6 what the Attorney General was saying, that the papers need to be
7 written containing this information. He was not questioning the
8 skill set of the individuals. He was not questioning even the
9 individuals should be there or not be there. What the Attorney
10 General was clearly telling us--and I know that any other
11 Minister can verify this--is that the paper should contain these
12 in it so that no one has to ask about it. That is what he was
13 stating, just like how he was clear telling us that we cannot
14 put our youth on, and we cannot do certain things in the paper
15 to bring our people along until the law is changed. He was
16 clear about that. That is what he was saying. That's the
17 essence of what he was saying.

18 COMMISSIONER HICKINBOTTOM: But that is not--I mean
19 that is not reflected in the Cabinet Minutes for one reason or
20 another--

21 THE WITNESS: Mm-hum.

22 COMMISSIONER HICKINBOTTOM: --because the obvious--the
23 obvious answer to the concerns expressed by--because the
24 Attorney expressed those concerns in the Cabinet Meeting.

25 THE WITNESS: Yes.

1 COMMISSIONER HICKINBOTTOM: And the Governor did. The
2 obvious answer would be, Well, of course, that assessment's been
3 done. I'm sorry it wasn't not in the paper, but it's been done,
4 and that is why I'm confident that these people have got skills
5 and the experience necessary.

6 THE WITNESS: In hindsight, 2020, Chair, from a legal
7 perspective of your polished English, and I'm only in the
8 science, that would have been the one beautiful answer to have
9 recorded, but that was a spirit of what we were discussing,
10 exactly the spirit of what we were discussing.

11 BY MR RAWAT:

12 Q. Premier, what the Attorney General asked you to do, in
13 his paper dated the 13th of May, was that you were required, as
14 a Cabinet--not as Public Officers; it wasn't something that fell
15 to a Permanent Secretary or a Deputy Permanent Secretary; the
16 Cabinet--are required under the Act, which is BVI law, has been
17 BVI law since 1990, to take into account the desirability of
18 such interests as are affected by the Authority's activities
19 being represented. What he went on to do was to say that you,
20 as Cabinet, then in appointing the Board Members--and you've
21 already got your nominees in your paper--have to consider their
22 competence and capabilities against the objectives of the
23 Authority and its functions under the Act.

24 So, what he was asking you to do was not in isolation
25 to write out in the paper skills and competencies that

1 individuals have, but to look at their capabilities against the
2 demands of the Act. That's the first thing he asked you to do.

3 Secondly, he asked you to do, what he advised was
4 there is nothing to stop you appointing a youth representative
5 as long as they meet the objectives of the Act. To appoint a
6 youth alone, somebody just because they are of a certain age and
7 fall within a definition of "youth", that would be an irrelevant
8 consideration. That's what the Attorney General told you on the
9 13th of May. You published the paper on the 14th of May without
10 addressing it further in the paper.

11 And in the Cabinet meeting on the 15th of May, the one
12 area where we have this appearing to be considered is where you
13 say that they all manage and operate related businesses.

14 And, by that, correct me if I'm wrong, what I
15 understand you to have been saying is that the nominees, the six
16 people being put to Cabinet and who Cabinet accepted, all
17 operate, with one exception, all operate businesses related to
18 the Port Authority.

19 A. No. Businesses that involved having to deal with the
20 Port Authority.

21 But, Mr--Attorney Rawat, Commissioner, I must state, I
22 don't know how to say this other than to say it in a very
23 respectful manner. The Attorney is telling me what the Attorney
24 General stated in the letter as his understanding, and it may
25 very well be yours, too, Commissioner. But--and my

1 interpretation of the same letter is being rejected. So, what
2 makes your interpretation what the Attorney General is saying
3 stronger than the one that I have based on that--the
4 conversations that ensued in the Cabinet was along the lines
5 where the Attorney General--and also discussing--he was speaking
6 clearly that when he said that these persons, no matter what is
7 the Authority or whatever, what the Act says--these persons
8 should be able to mirror what it is we are trying to achieve in
9 the Act, and it needs to be captured in the paper.

10 So, my interpretation of the Attorney General is not
11 just what he wrote but during the meetings what he said.

12 So, with that in mind, the Attorney General was
13 stated, yes, I think it was even stated--I don't want to say
14 because I wouldn't want to recall wrongfully, but in the vein
15 that, well, in the future we'll have to improve the Cabinet
16 Papers to reflect these.

17 Q. So--

18 A. So I don't know what else to say.

19 Q. --your interpretation of the paper that we've seen
20 from the Attorney General and his comments in the Cabinet
21 Minute--

22 A. Are there.

23 Q. --they were directed to improving the quality of
24 papers in the future.

25 A. That was the thrust of the discussion.

1 Q. And then, if we reference back to the obligation on
2 Cabinet--

3 A. Mm-hum.

4 Q. --that we've looked at under the Act--

5 A. Yes.

6 Q. --and not an obligation on Public Officers, an
7 obligation on you and your colleagues--you say that that was
8 considered by you and your colleagues in Cabinet.

9 A. Um-hmm.

10 Q. The obligations you have under the Act, and it's
11 encapsulated in the phrase that the Premier responded that all
12 proposed Member with the exception of one manage and operate
13 related businesses.

14 COMMISSIONER HICKINBOTTOM: And I think, to be fair to
15 the Premier, paragraph 25.

16 BY MR RAWAT:

17 Q. That you were confident in the ability and skills of
18 the proposed membership to be appointed to the BVI Ports
19 Authority Board.

20 A. Yes.

21 Q. And that's the consideration of the requirements under
22 the Act.

23 A. But, Attorney, how does Cabinet get these things done?
24 Let's--because we are saying Cabinet and the access Cabinet make
25 sure this, Cabinet make sure that--but a Minister is not going

1 to go and write those things, so we have to put it in the right
2 context.

3 The Cabinet know, when the Minister brings it forward,
4 the paper is his, yes; but all those work come from inside the
5 engine of the institutional capacity of the Public Service. So,
6 when it comes forward, you try as much as possible to make sure
7 those things are in.

8 Now, if I would flip it for the Attorney. If those
9 were in the paper and they came to Cabinet, there would be no
10 question about this. So, that is why the Attorney General was
11 saying if you have--must make sure you improve the paper with
12 the information because if it came to Cabinet, it would have
13 gone down as the access Cabinet did it, but it wasn't Cabinet
14 did it outright. We did it because it came from the bowels of
15 the institutional capacity of the Technical Officers writing the
16 paper to make sure all of that is in, and it comes forward.

17 Q. Premier, the reason I've mentioned Cabinet so much is
18 because when we went through the Act as to the obligations,
19 those obligations rest on Cabinet's shoulders.

20 A. Yes.

21 Q. There's nowhere in the Act that says a Public Officer
22 can nominate somebody or a Public Officer can appoint a Chair.

23 A. But we're not talking nominations.

24 Q. Yes--no, but that is what we are talking about
25 because--

1 (Overlapping speakers.)

2 A. No, we are talking about the skill sets, if they match
3 what the Act says. That is what you were speaking about.

4 Q. And that's an obligation on Cabinet.

5 A. But the obligation of Cabinet has to be fulfilled
6 before you reach Cabinet?

7 Q. How can it be fulfilled if Cabinet has got to meet and
8 discuss together?

9 A. Because Cabinet just going to meet to discuss and
10 approve. Cabinet cannot meet to discuss to do a paper.

11 Q. But when Cabinet meets, Premier, Cabinet has to make a
12 decision.

13 A. Exactly.

14 Q. And when Cabinet makes a decision, it looks at the
15 information it has, and it looks at its powers under were the
16 law.

17 A. Right.

18 Q. And then it makes the decision.

19 A. Right.

20 Q. And that's not--it doesn't matter at that point what
21 the Public Officers have or have not done. The obligation just
22 lands firmly and squarely on the shoulders of Cabinet.

23 A. But, if you put it that way in terms of its absolute
24 sense, yes, but it doesn't work that way. I've never seen it
25 work that way since Cabinet has been involved.

1 The Cabinet--this, you see, this is why I'm saying
2 that, as we evolve and continue to improve or follow our
3 strength and a good governance, especially just the two years
4 we've had now. First, we are a young government. We are a
5 young country. That is why we have put in our Position Papers
6 strengthen the Cabinet office because the Cabinet Office when
7 it's strengthened, which we were walking on, to include the
8 Ethics Unit, the Conflict-of-Interests Unit with the Ethics
9 Unit, will capture those, just like it does in the UK, and let
10 them to know that this paper does not pass the full litmus test,
11 so you have to make sure that it passes it before it comes into
12 Cabinet, so that when Ministers sit to deliberate, they have all
13 the areas of the Act versus the skill sets been captured in the
14 paper? Yes, have all the CVs been captured in the paper? Yes.

15 So, there should be a full checklist before Cabinet
16 meets, and it's unfair for just the Cabinet Secretary to do
17 this. There needs to be a unit on it. That is a gap that is
18 missing that you're asking me to answer for now, that we intend
19 to work on and are now working on it to improve it, as well as
20 legal help in each Ministry, because the gap that I'm seeing is,
21 due respect, Commissioner, being Premier for the last two years,
22 they're asking someone who is not a lawyer to do legal work and,
23 may I add, even if you're a lawyer, your schedule does not allow
24 you to sit and watch all these things.

25 So, the institution has to improve. That's why we're

1 working on the transformation of the Public Service to get some
2 of these institutional capacity in place so that when persons
3 like you, Mr Rawat, come to ask me, I can say, Well, yes, all
4 these things were stressed out. The system made sure they were
5 stressed out, and when they reach us, the answer was "yes" or
6 "no". We want to make sure that these institutions are
7 strengthened. That's why we continue to pass the Whistleblower
8 legislation, the Integrity in Public Life, the Contractor
9 General legislation, and even the Ministers' Code of Conduct
10 that we have passed. We're a growing Territory.

11 These areas that you are asking me about cannot be
12 done inside of a Cabinet. That will be wasting Cabinet's time.
13 Cabinets, when it says "Cabinet", yes, it will go down I passed
14 it as a Member of Cabinet, but the work has to be done before.
15 It has to be prepared before.

16 COMMISSIONER HICKINBOTTOM: With respect, I understand
17 and--I fully understand that.

18 I mean, subject to any other questions, Mr Rawat, I
19 think we've probably come to an end of this. We've got the
20 Attorney's advice in his memorandum of the 13th of May. We have
21 got the Cabinet Paper. We've got the deliberations, and I will
22 have to make of that what--sorry--and your evidence, and I'll
23 have to make of that what I can.

24 I would just point out this, though, in case--I think
25 I know what your response will be, but paragraph 22 of the

1 Cabinet Minutes is the--immediately after you presented your
2 paper, regarding the captioned paper, the Attorney General
3 referenced his comments--

4 THE WITNESS: Sorry, Chair--Commissioner, sorry. What
5 page?

6 COMMISSIONER HICKINBOTTOM: Two-eight-double 0.

7 MR RAWAT: Two-eight-zero.

8 THE WITNESS: Two-eight--

9 COMMISSIONER HICKINBOTTOM: Double 0.

10 THE WITNESS: Thank you. Thank you.

11 COMMISSIONER HICKINBOTTOM: I'll just let you find
12 that.

13 THE WITNESS: Well, we know--you had been prepared
14 before we got here, so you're ahead of me. You highlighted it,
15 so I have to get there now. Okay, thank you.

16 COMMISSIONER HICKINBOTTOM: Regarding the captioned
17 paper, the Attorney General referenced his comments in the
18 memorandum we've just looked at, stating that in appointing
19 Board Members, the Cabinet should consider their competencies
20 and their capabilities against the objectives of the BVI Ports
21 Authority and in particular its functions under section 4 of the
22 Act.

23 That's a substantive point, nothing to do with whether
24 it's on paper or whatever. He mentioned that there was no
25 reference of the skill set of the nominees in the Cabinet Paper.

1 So, on the basis of that, his focus was not on--I
2 understand it's been done but it's not in the paper. It was a
3 substantive point.

4 THE WITNESS: Well, Chair, may I add?

5 COMMISSIONER HICKINBOTTOM: Yes.

6 THE WITNESS: That while he brought that up, the end
7 sentence confirms what I'm saying, that was in discussion and
8 the impetus on what he was saying. The end sentence says he
9 mentioned that there was no reference of the skill set of the
10 nominees in the Cabinet Paper.

11 COMMISSIONER HICKINBOTTOM: Yes.

12 THE WITNESS: May I tell you, Commissioner, that that
13 is the crux of what I was saying. The Attorney General was
14 stating that these need to be in the paper.

15 COMMISSIONER HICKINBOTTOM: I'm sorry--I understand
16 that point, but the thrust of the paragraph read, as a whole, is
17 not they should be in the paper. It's the exercise needs to be
18 done.

19 THE WITNESS: Exactly. But done and put in the paper.

20 COMMISSIONER HICKINBOTTOM: Yes.

21 THE WITNESS: So, that is why he is saying that it
22 needs to be done and put in the paper so that in any future
23 reference such as this there will be no question. So, there was
24 a voluminous discussion the evolved, talking about making sure
25 that we improve how Cabinet Papers are written. And there was a

1 recitation, I must say, and a good one by the Attorney General
2 and only part of our Government, which is what prompted to make
3 sure that we start the help with some training of writing up
4 Cabinet Papers.

5 COMMISSIONER HICKINBOTTOM: But, as I understand your
6 evidence, there was also discussion about these candidates and
7 their skill sets.

8 THE WITNESS: Not necessarily by the Attorney General.
9 That was done at the moment by the Chairman.

10 COMMISSIONER HICKINBOTTOM: Well, I'm sorry, not
11 necessarily by anybody, but there was a discussion in Cabinet.

12 THE WITNESS: But ensued by the Chairman.

13 COMMISSIONER HICKINBOTTOM: Right, okay.

14 Well, we have the evidence, Mr Rawat.

15 MR RAWAT: Commissioner, I wonder if we could have a
16 short break now for the Stenographer.

17 COMMISSIONER HICKINBOTTOM: Yes, certainly, because
18 it's time.

19 Is that the end of Ports Authority?

20 MR RAWAT: No, I've got two more criticisms to go
21 through, but I'll try and take them shortly.

22 COMMISSIONER HICKINBOTTOM: Right. Five minutes,
23 Premier. Thank you very much.

24 THE WITNESS: Okay.

25 MR RAWAT: Thank you.

1 (Recess.)

2 COMMISSIONER HICKINBOTTOM: Thank you.

3 We're ready to resume.

4 Mr Rawat.

5 MR RAWAT: Thank you.

6 BY MR RAWAT:

7 Q. Premier, if you go to page 19 of your written
8 response, please.

9 MR RAWAT: Commissioner, before I turn to the next
10 criticism, and so that I don't forget, perhaps I would invite
11 you just to ask Mr Haeri if perhaps by tomorrow the IRU could,
12 with the assistance of the Premier, identify the exception that
13 was set out at paragraph 23 at page 2801 in the bundle. That's
14 the person who was the exception to the other nominees, those
15 others being people who managed and operate related businesses.

16 COMMISSIONER HICKINBOTTOM: That's a good idea. That
17 will save time today, Premier. Thank you very much.

18 THE WITNESS: No problem.

19 BY MR RAWAT:

20 Q. Premier, we're at criticism 3, which is a criticism I
21 think we've dealt with before, and that is a Declaration of
22 Interest point. You have--and do you rely on earlier responses,
23 and this is something that you have discussed, but I think we
24 went through it in some detail on Wednesday, and so the
25 Commissioner has those circumstances. So, I don't propose to

1 ask you any questions about that.

2 Can I turn to criticism 4, please, on the same page.

3 MR RAWAT: Commissioner, just again for your notes--

4 COMMISSIONER HICKINBOTTOM: Yes.

5 MR RAWAT: --this, I think this criticism appears in
6 the Cabinet letter at page 15. The response there is slightly
7 different, but it doesn't add to what the Premier says, so I
8 don't propose to go back to that, if we look at the
9 circumstances of this.

10 BY MR RAWAT:

11 Q. The criticism, Premier, is that at a Cabinet Meeting
12 on the 6th of May 2020, resignation of Mr Isaac as Chairman of
13 the Ports Authority was discussed, and said that Minutes record
14 that the Chairman was of the view that there should be a shift
15 to a more transparent process for the appointment of critical
16 leadership positions, such as Chairman of the Board--of Boards,
17 and that the required skill set should be advertised, and you
18 responded that the captioned--you respond, I'm sorry, taking it
19 too fast. You respond that "a captioned appointment was being
20 made in accordance with the requisite legislation, hence it was
21 in keeping with transparency and good governance."

22 The criticism that's advanced is that the failure to
23 advertise positions is neither fair nor transparent and is
24 inconsistent with the principles of good governance.

25 Before we turn to your response, should we look at

1 actually the Cabinet Minutes itself. If you go to 3082, please,
2 Premier. It's a Cabinet Meeting No. 38/2020, 6th of May 2020,
3 and if we turn to the next page, we see the context, so at 3083,
4 what is being put before Cabinet is a paper from your office,
5 presented by yourself, Memorandum No. 129/2020, and it's the
6 resignation of Mr Isaac as Chair of the BVI Ports Authority and,
7 therefore, the appointment of a new Chairman, Mr Kelvin Hodge.
8 And the deliberations record as follows:

9 One, the Premier presented this paper.

10 Two, the Chairman asked why did Mr Isaac resign from
11 the BVIPA? The Premier responded that he was unaware of the
12 reason.

13 Three, the Chairman suggested that the required skill
14 set should be advertised for critical positions of Chairman of
15 the Respective Boards. The Premier responded that he would be
16 in agreement subject to the same being done for the Public
17 Service Commission (PSC). The Chairman confirmed that the skill
18 set for the Chairman of the PSC was advertised. The Chairman
19 was of the view that there shall be a shift to a more
20 transparent process of the appointment of critical leadership
21 positions such as Chairman of Boards, therefore the required
22 skill sets should be advertised in this regard.

23 The Premier noted that the captioned appointment was
24 being made in accordance with the requisite legislation; hence,
25 it was in keeping with transparency and good governance.

1 Further discussion ensued on the matter, and it concluded
2 Cabinet was content to agree to this decision.

3 And in effect, Cabinet accepted Mr Isaac's
4 resignation, and decided to appoint Mr Hodge as the new Chairman
5 effective from the 13th of May 2020.

6 Now, that's the document that gives rise to the
7 potential criticism. Look now at the response that you
8 provided, Premier, which is at page 20 of your Warning Letter.
9 We have it as follows:

10 The Premier's statement made in discussion in Cabinet
11 simply sought to point out that the appointment complied with
12 the law since no observation to the contrary had been made by
13 the Attorney General. Chairman's remarks, broached for the
14 first time in Cabinet, had been made without notice to the
15 Premier. A single comment made during confidential Cabinet
16 discussions and debate often incompletely recorded is not a
17 judicial pronouncement and is, in principle, not an appropriate
18 or fair basis for criticism by the Inquiry. Indeed, the Minute
19 shows the quoted response to have been taken out of context and
20 that the above summary fails to reflect the Premier's true
21 position in those discussions, which was readily to agree that
22 all such appointments should be advertised, including the
23 Chairman of the PSC.

24 In addition, immediately after the quoted comment, the
25 Minutes record further discussion ensued. It is clear that the

1 Premier agreed with the Chairman's suggestion and that his
2 remark was not intended to imply that improvements were
3 unnecessary. The Premier has explained in evidence to the
4 Inquiry that the Government supported the need for a change in
5 the practice of the Government which it has begun to implement.

6 So, just to understand, is it your position that the
7 Minute is inaccurate in what's recorded?

8 A. Incomplete.

9 Q. So, what is actually recorded is accurate, but there
10 was other discussion that wasn't recorded?

11 A. There was plenty of other discussion. That was--that
12 was quite extensive one.

13 And Commissioner, if I may, one thing I've learned
14 from being through the COI for Cabinet that we're going to look
15 at is how to make sure that we get a Stenographer because I find
16 it to be an unfair position to come and speak to just what has
17 been highlighted knowing full well that there were--there was a
18 very extensive conversation in this regard.

19 Now, hindsight is 20/20. Had you known where these
20 Minutes would end up, we would have ensured and even at times
21 where we tried to expand the Minutes, we were told it's just
22 essential points will come out.

23 Now, even the Chair told us so many times because we
24 wanted certain things captured. Now I feel like we were set up,
25 but nonetheless, with due respect to that, I would say that

1 there was--there was a heavy, heavy conversation with that
2 because one of the areas that concerned me is that the Chair was
3 concerned with everyone that we brought--that Chair--with their
4 skill set, and also in terms of he was concerned even in terms
5 of associations that we never knew anything about. He seemed to
6 have had information contrary to us.

7 And why do I say that? We brought that the Public
8 Service Commission Chair because that is a very crucial section
9 of the Public Service. That person reigns over decisions of who
10 will be in the--who will sit as Public Officers and defend
11 different positions, and what we're saying to the Governor then
12 and in past, that was never advertised.

13 So, they don't explain to us well, the law didn't
14 allow for them to advertise but they will also do certain
15 things.

16 So, if the goose and gander are on two different
17 tables, then you're always going to have a problem.

18 So, in the act of the BVI Ports Authority never did it
19 say about advertising. That is not to say whether one's
20 preference now should be that or not. So, one time we want to
21 hold fast to what the Act says, and then another time we want to
22 say what the Act should say.

23 So, this is what I was trying to tell the Chairman at
24 the time. Your Act doesn't say that you have to advertise the
25 PSC Chair, and you didn't advertise the PSC Chair to any

1 significant magnitude over the years in terms of the post. So,
2 if the Act here doesn't talk about the Chair being advertised,
3 why are we being hold to one standard for the partnership and
4 another partnership is being held to another standard.

5 And that is the thrust behind what this conversation
6 was depicting. And at the end of the day, the Chairman should,
7 even if you talk about conflicts or whatever, the Chairman
8 selected a PSC Chair, that's my first cousin, but no talks came
9 up of conflict of interest, no thoughts came up of they would be
10 doing things towards myself, and there was no law to stop that
11 from happening. Likewise, over here there was nothing that
12 stopped this from happening and guaranteed because it's a first
13 cousin--I have over 75 of them--and would have been influenced
14 in anything that happened in the Ports. Likewise, the Governor
15 didn't think any first cousin of mine would influence anything
16 on my behalf my respect for anything happen to the Public
17 Service, so we cannot have two separate thoughts about the same
18 situation and two different actions, and one side trying to hold
19 the other more accountable while they do this very same thing on
20 the other end. This, Commissioner, was the thrust behind what
21 was being discussed in the Cabinet.

22 COMMISSIONER HICKINBOTTOM: But Mr Rawat suggested
23 that the Minutes might be misleading, and they are misleading,
24 because what you say in your answer is it's clear, it's clear
25 from the Minutes that the Premier agreed with the Governor's

1 suggestion, that the Minutes don't say the Chairman suggested
2 required skill set should be advertised for critical positions
3 of Chairman of the Respective Boards, the Premier agreed, or
4 even after a discussion, the Premier agreed.

5 THE WITNESS: We agreed that the Chair said that the
6 Chair--the Chair of Cabinet--let me get the Chairs correct. The
7 Chair of Cabinet stated that the Chair of Boards should be
8 advertised.

9 COMMISSIONER HICKINBOTTOM: Yes.

10 THE WITNESS: That we agree. But we also took it a
11 step forward and let them know that this was already something
12 that we are going to start to consider after having all the
13 Members of the Board advertised.

14 COMMISSIONER HICKINBOTTOM: But, if that was agreed,
15 that's important, very important.

16 THE WITNESS: It was agreed.

17 COMMISSIONER HICKINBOTTOM: And far from being
18 recorded in the Minutes--

19 THE WITNESS: Exactly.

20 COMMISSIONER HICKINBOTTOM: --something entirely
21 different is recorded.

22 THE WITNESS: Exactly.

23 COMMISSIONER HICKINBOTTOM: And these Minutes have
24 been approved, I think?

25 THE WITNESS: Those Minutes were approved, but

1 remember you're talking about young Government a couple of weeks
2 old. And had we known--

3 BY MR RAWAT:

4 Q. Premier, this is 2020.

5 A. The time frame I head into 2020 when we're dealing
6 with--mid-2020, from February 2019, Mr Rawat, to May 2020,
7 that's just a year and a little bit, and in the middle of that,
8 most of that at the end of the day had started to deal with
9 COVID. It has to account for something.

10 So, when we were saying all those things, we're still
11 relatively a young government, a year and a month or two old, so
12 as we mature, we realised, well, all right, let's start to look
13 about this, and we had discussions with the Chair one-on-one
14 before we went into the Cabinet where I was stating that this is
15 something that we need to look at.

16 So, when the Chair came and said that about the Chair
17 of our Boards, there was nothing that we would have disagreed.
18 We knew we had to evolve more, so that is why now we even moved
19 towards having all the Board's Members as a pilot to get it
20 done.

21 But what wasn't captured in there is again that the
22 Attorney General stated that we will also have to change the
23 Act, to reflect and make sure--and that wasn't captured in
24 there, but that was discussed. That's what I mean, again.

25 COMMISSIONER HICKINBOTTOM: You don't have to change

1 the Act to advertise?

2 THE WITNESS: No, if one of the criteria is to
3 advertise, then it should be in the Act. Because, if not, you
4 have to stipulate how the advertisement would be, or else it
5 would be vague. Whether you're going to do an open vote,
6 whether you're going to do a limited advert, how it's going to
7 be should be stipulated as you're leaving it up again, going in
8 the right direction but still allowing the wind to blow you in
9 another area.

10 So, when I said that, I mean to be specific of how
11 we're going to go about it.

12 COMMISSIONER HICKINBOTTOM: But did the Attorney
13 General say that you're forbidden from advertising unless it was
14 in the Act?

15 THE WITNESS: He didn't say that we were forbidden
16 from doing it unless it was in the Act. He said whatever we're
17 going to do that's not in the Act will need to be considered to
18 be placed in it.

19 COMMISSIONER HICKINBOTTOM: I'm sorry?

20 THE WITNESS: Would need to be considered to be placed
21 in the Act, to allow--so that, if a government changes, a next
22 one wouldn't come in and say, I wonder if you should advertise.

23 COMMISSIONER HICKINBOTTOM: If advertisement is
24 mandated in the Act, you've got to do it.

25 THE WITNESS: Exactly.

1 COMMISSIONER HICKINBOTTOM: But the evidence of all of
2 the Witnesses so far is that no one was prohibited from
3 advertising. They weren't bound to advertise under the Act.

4 THE WITNESS: Right.

5 COMMISSIONER HICKINBOTTOM: But they weren't
6 prohibited from advertising.

7 My point is this, and I appreciate that all sorts of
8 things may have been going on in May 2020, but these Minutes
9 have been approved, and you're saying that they are
10 fundamentally wrong. Because there's a fundamental difference
11 between the Chairman suggesting that there should be
12 advertisements, and you saying you're absolutely right,
13 Governor, there should, and you saying no.

14 THE WITNESS: No--whether he said--in terms of when
15 we're talking and discussing, the Chairman was saying for the
16 Chair, for the Head alone.

17 COMMISSIONER HICKINBOTTOM: Yes.

18 THE WITNESS: So, that is where he was going. But now
19 for us, moving forward--

20 COMMISSIONER HICKINBOTTOM: I understand what you may
21 be doing going forward, but looking at these Minutes are
22 fundamentally wrong.

23 THE WITNESS: It doesn't capture everything.

24 COMMISSIONER HICKINBOTTOM: No, no, fundamentally
25 wrong. There is a difference between the Governor saying, I

1 suggest we advertise for Chairs, and you saying I agree, which
2 is your response to the Warning Letter, and the Governor saying
3 I think we should--I suggest that Chairs are advertised, and you
4 saying effectively no.

5 THE WITNESS: I must say, Chair, that that had to be
6 our side because we did agree in conforming the Minutes. It had
7 to be our side.

8 COMMISSIONER HICKINBOTTOM: Thank you very much.

9 THE WITNESS: Because I did agree with the Governor
10 that the Chairman should have been advertised, so it must have
11 been our side when we were--what do you call it again--conform
12 in the Minutes so that had to be our side, because I did agree
13 with that.

14 BY MR RAWAT:

15 Q. And you mentioned, Premier that--about this need to
16 change the Act, if you wanted to advertise. As we discussed on
17 Wednesday, The Honourable Natalio Wheatley, when acting Premier,
18 issued that policy decision to advertise vacancies. On the 1st
19 of June 2021.

20 MR RAWAT: And that's at page 3555 in Part 4,
21 Commissioner.

22 BY MR RAWAT

23 Q. But one of the advertisements, one of the vacancies
24 that was sought was Board Members for the Ports Authority, and
25 you haven't changed The Ports Authority Act in order to allow

1 you to advertise for Board Members, have you?

2 A. No, we haven't changed the Act as yet at all, and
3 that's very observant, and I thank you for doing so. But
4 remember now, the paper--let us go back to the paper in Cabinet,
5 there was an Information Paper on the 6th of April 2021, the
6 Deputy Premier announced that in June 2021, but what he did not
7 do, and no fault of his, is going in depth of what the content
8 of the paper stated, in that this was going to be a pilot
9 project by the Premier's Office, and upon doing the pilot
10 project, there are areas that are going to have to be adjusted.

11 And since then, I think that the Permanent Secretary
12 has sent forth some other draft of what has been done with some
13 of the adverts that have gone out. Of course, in anything
14 that's in embryonic stage is going to require some adjustments
15 and have some teething pains, but at the same time one of the
16 areas we recognize that we have to do so that it does not be
17 ambiguous to any government that comes forward, is to put it
18 inside of the Act.

19 COMMISSIONER HICKINBOTTOM: Got it. Thank you very
20 much.

21 BY MR RAWAT:

22 Q. This was about the appointment of the Chair to the
23 Ports Authority, and that appointment was made without the
24 position being advertised?

25 A. It was not a requirement.

1 Q. If you look at page 5 of your response, this is in
2 response to a criticism that arose in relation to the
3 Electricity Corporation. At the bottom say it was only in
4 May 2020 that the Governor who was well-aware of the existing
5 practice--and this is about the informal process--suggested a
6 shift to a more transparent process for critical leadership
7 posts such as the Chairman of Boards, and you continue, it's
8 notable that even then the Governor did not extend his
9 recommendation to the appointment of ordinary Board Members.

10 A. Exactly.

11 Q. Now, the genesis of that point, which could be taken
12 as a criticism of the former Governor, is the Cabinet Paper that
13 we are looking at at 3084 because that's the May 2020 paper.
14 But given that you have today, with the Commissioner, queried
15 the accuracy, and in your response you query the accuracy of
16 this Minute in fundamental ways. What reliance can be placed on
17 what's attributed by you to the Governor?

18 A. Which section specifically do you want me to respond
19 to? In that their response, that you're saying is of concern?

20 Q. My point, Premier, is that in May 2020, as we've
21 looked at in this Cabinet Minute, there is a discussion.

22 A. Right.

23 Q. And if one looks at the Cabinet Minute in itself.
24 What appears the outcome should be is that the Chairman suggests
25 that required skill sets should be advertised for critical

1 positions Chair of Boards, and you say no. You say--

2 (Overlapping speakers.)

3 Q. --that will only happen in the Minute.

4 A. In the minute.

5 Q. That will only happen if you advertise the Public
6 Service Commission. So you impose--let me finish.

7 A. I didn't say anything.

8 Q. And you're then told that that is, in fact,
9 advertised. And you effectively say no need to advertise.
10 That's what the Minutes look like.

11 Now, you've explained to the Commissioner--

12 A. It should have been yes.

13 Q. --that there's more to it. It should have been yes?

14 A. Yes. And I did say the other part, too.

15 Q. Therefore, this Minute is inaccurate?

16 A. That section of it should have been saying yes. I
17 remember saying yes, and the other part I did say with the PSC,
18 yes, but you would have to advertise with the PSC.

19 Q. You are relying, it seems in other parts of your
20 written response to the Commissioner, on this very same Minute
21 which you say is inaccurate?

22 A. Which I said in no part, but we discussed the other
23 part.

24 Q. I see. So, it comes down to the Minute when it's
25 recording what you said--

1 A. Right.

2 Q. --is inaccurate, but when it's recording what the
3 Governor said it's accurate?

4 A. I can't explain for the Governor. He's not here. You
5 will have to bring him in and question him.

6 Q. But you did, I'm afraid?

7 A. Yes.

8 Q. At page 5--

9 A. Right.

10 Q. --you do rely on what the Governor said?

11 A. Exactly, in terms of what I said as a Premier has
12 explained as evidence--

13 Q. If you look at the paragraph above, please, Premier?

14 A. It was only in mid-2020 the Governor who was
15 well-aware of the existing practice suggested a shift to a more
16 transparent process, and I put it in quotation, that that was
17 his quote, for critical leadership Boards such as the Chairman
18 of Boards. It is notable that even then the Governor did not
19 extend his recommendation of appointment of ordinary Board
20 Members. So, what is wrong there? He did not extend it to
21 Board Members?

22 Q. You're saying that part of the Minute is accurate and
23 reliable?

24 A. He did not extend it to Board Members. He
25 specifically spoke about the Chair.

1 Q. Yes, but if you look, Premier, at 3084, it's paragraph
2 4.

3 A. Right.

4 Q. That's what you rely on?

5 A. 3084, number what?

6 Q. Number paragraph 4.

7 A. Paragraph 4.

8 Q. That's where it comes from?

9 A. The Chairman was of the view that there should be a
10 shift to a more transparent process for the appointment of
11 critical leadership positions such as Chairman of Boards.
12 Therefore, the required skill set should be advertised in this
13 regard. The Premier noted the captioned appointment was being
14 made in accordance with the requisite legislation, hence it was
15 in keeping with transparency and good governance. Further
16 discussion ensued on the matter.

17 What I was saying is that the decision was made
18 because the Act does not require advertisement. That's all I'm
19 saying.

20 Q. That's not my question, Premier. My question is--

21 A. You have to make it clearer to me because--

22 (Overlapping speakers.)

23 Q. My question is you appear--I just want you to confirm
24 that this is the case. You rely on paragraph 4 at page 5 of
25 your response.

1 A. Relied on it in terms of my response here?

2 Q. Yes.

3 A. Stating what--

4 Q. The Governor said?

5 A. What the Governor said, that it is notable that even
6 the Governor did not extend his recommendation to the
7 appointment of ordinary Board Members.

8 Q. Yes.

9 A. That is what he said.

10 Q. So, that part of the Minute is accurate?

11 A. That is what he--that is what I recall, yes.

12 Q. Yes. But the part of the Minute that relates to you
13 because the rest of the Minute gives the impression actually
14 that you were against advertisement, that's inaccurate?

15 A. No. We were against him stating that, and he was not
16 doing it. But not the spirit of advertising, not only share
17 with the entire body.

18 The point we were making to him is that the Boards
19 under you are not advertised, you do not advertise.

20 Q. He said it was.

21 A. If you look at the history--if I may.

22 Q. Premier, I would like to try and take this shortly
23 because there's quite a lot more--

24 A. Your shortness is going to give you the answer that
25 you want.

1 Q. I just want you confirm whether there are parts of
2 this Minute that you say are inaccurate as they relate to you,
3 and accurate as they relate to the Governor.

4 A. I cannot answer that in that vein because that's
5 entrapment. The only thing that I cited is that when I said no,
6 I really should have seen that when I was doing the revision of
7 Minutes. We didn't say "yes". You don't mind the Chair being
8 advertised. But at the same time you do not advertise your
9 Boards. That was the point that was being made, so the only
10 thing I signed that was the "no" that missed me until I'm here
11 now should have been yes. But the rest of the thrust of it
12 remains the same. So, I cannot come to you saying a "yes" or
13 "no".

14 This is what I was saying the last, you drew,
15 Commissioner, wants a "yes" or "no," the Attorney wants a "yes"
16 or "no." And when I tell him I cannot get a "yes" or "no," that
17 the Attorney General for the other papers, he becomes frustrated
18 and I can see why. Because that's is what Cabinet Ministers
19 were going through when we could get a "yes" or "no", but it is
20 not as simple as a "yes" or "no". With respect.

21 COMMISSIONER HICKINBOTTOM: Premier, I understand what
22 you say about this Cabinet Meeting and the Minute. I understand
23 your evidence.

24 BY MR RAWAT:

25 Q. Can I move on, then?

1 COMMISSIONER HICKINBOTTOM: Yes.

2 BY MR RAWAT:

3 Q. If we go now, please, Premier, just to the Part 4
4 bundle, please.

5 A. At 4?

6 Q. Yes.

7 A. 4 of the bundle?

8 Q. I can't promise you, but if you look at Part 3 and
9 Part 4 at hand.

10 A. Which bundle?

11 Q. Part 4.

12 A. Part 4.

13 Q. If we go to 3514 of that bundle.

14 A. Three?

15 Q. 514.

16 A. 514.

17 Q. Right. This is the Virgin Islands Climate Change
18 Trust Fund Act of 2015. If I could ask you just to turn up
19 3519, please, Premier. I just want to give you the legal
20 framework for our--before we go through the potential
21 criticisms.

22 A. Thank you.

23 Q. Now. Section 4 establishes the Virgin Islands Climate
24 Change Trust Fund, and section 5 sets out its objectives. And
25 that includes receiving direct finance from any external source.

1 Section 6 tells us the functions of the Trust, which
2 if we then go through to Section 7, that sets out the powers
3 that the Trust has, which includes at B, being able to invest
4 money that it receives and, indeed, to be able under this
5 section to borrow.

6 If you go to section 8, Premier, which is at
7 page 3523, the Trust under that provision is allowed to accept
8 donations from lawful sources subject to such conditions as may
9 be imposed by the donor, provided those conditions don't cause
10 the Trust to violate the Act or impair its ability to achieve
11 its purpose.

12 If you note section 9, that has the marginal that the
13 trust must be dedicated to non-political purposes.

14 A. Right.

15 Q. If you look at section 10, what it makes clear is
16 that, in its status, the Trust is not a government fund of the
17 Territory. Its capital and revenue is not public money, and
18 it's not subject to control and accounting except as provided by
19 the Act itself.

20 A. Right.

21 Q. Note as well, if you go through to the bottom of that
22 page, that the Trust is not entitled to any immunity or
23 privilege. If you go over to the next page, the BVIG
24 Government, the Government of the Virgin Islands, is not liable
25 for any debts or liabilities or obligations the Trust may incur,

1 and it's not a public authority.

2 If you look at Section 12 on page 3524, that
3 establishes the membership of the Board of Trustees, or the
4 Trust. So, there are, as we see with other Boards, ex officio
5 Members would be typically the Permanent Secretary, the
6 Financial Secretary, and the Chief Executive, in this case it's
7 the Chief Executive Officer of this Trust. And then there are
8 to be six other Members appointed with the approval of Cabinet
9 by the Minister, and the requirements of those Members are
10 firstly, that there be a private sector representative of the
11 tourism industry, private sector representative of the Financial
12 Services sector; a private sector representative of any sector
13 responsible for making contributions to the Fund; a
14 representative from an academic or research organization; a
15 representative from a non-governmental or community-based
16 organisation; and an individual ordinarily resident in the
17 Territory, who possesses relevant knowledge, expertise or
18 experience.

19 At three, subsection 3, the Minister when appointing
20 persons under this section has to have regard to specific
21 attributes that the prospective appointee must have.

22 If you go to section 13, that specifies the
23 appointment process, and so this is an example of a statute that
24 requires public advertisement, not just of the post but of the
25 qualifications and other criteria required for eligibility, and

1 if we go through to 1304, page 3526, you will see that the
2 process involves an element of public consultation because a
3 Minister after the closure of the application process has to
4 disclose to the public the names of all applicants and the
5 public can submit written comments.

6 If go through to section 15, that says that a Member
7 shall hold office for a period not exceeding three years, but is
8 eligible for reappointment.

9 And it also requires the appointment to be staggered,
10 so as to ensure that no more than two non-Government
11 representatives are re-appointed in any calendar year, so you're
12 not able under the Act to remove everyone or for everyone to
13 have exactly the same appointment expiry date.

14 Section 16 deals firstly with resignation, and then at
15 2 says as follows: The Minister may with the approval of
16 Cabinet revoke the appointment of Member of a Board, other than
17 a Government Member, if the Minister is satisfied that the
18 Member is (a) guilty of misconduct; (b) has failed to attend a
19 specific number of consecutive meetings of the Board of which
20 that Member had notice; (c) knowingly failed to notify the
21 Member of a conflict of interest; (d) no longer fulfilling the
22 requirements under Section 12--and that is the requirements in
23 relation to the qualities or attributes or sectors that people
24 are supposed to represent--and then (e) acts in a way that is
25 detrimental to the Trust.

1 So, that Act can be compared to the Ports Authority
2 Act that we looked at which gives a discretion to remove,
3 whereas here there are specific bases on which you can remove
4 someone.

5 Against that background, could we go back, please, to
6 your written response to the Commissioner, and let's turn up
7 page 26, please.

8 MR RAWAT: Commissioner, if I could have just one
9 moment.

10 (Pause.)

11 BY MR RAWAT:

12 Q. Now, the first potential criticism, Premier, arises
13 from the decision to revoke the entire membership of the Climate
14 Change Trust Fund Board. And if we go, please, to 3140 in Part
15 3 of the bundle.

16 A. 3?

17 Q. 3140. You have Part 4 open, but if you turn--it will
18 be in a different bundle, Premier. Part 3 bundle.

19 A. And we go to page what?

20 Q. 3140.

21 A. Okay.

22 Q. That's a Premier's Office paper prepared by your then
23 Permanent Secretary Mrs Elvia Smith-Maduro. Memorandum No.
24 122/2019, headed "Revocation of the appointments of the
25 membership of the Virgin Islands Climate Change Trust Fund

1 Board."

2 Paragraph one sets out the background to the Board and
3 its purpose, referring to section 12. It then lists the current
4 membership of the Board.

5 If we go through to the next paragraph, at paragraph 3
6 and 4, what's said is that: "With each new government
7 administration, it is common practice that some or all
8 membership of Boards are revoked, and new Members appointed to
9 the respective Boards. The manifesto of the new government
10 administration calls for innovative, and forward and progressive
11 ideas, initiatives and action from each Government Ministry,
12 Department and agency during this recovery period. For those
13 initiatives that must be implemented through a statutory body,
14 the same principles for innovative, forward and progressive
15 initiatives and action will be required. In keeping with the
16 new government policy for inclusions, the desire is also to
17 reshuffle the membership of each Statutory Board to include the
18 appointment of a youth to each Board. In addition, the new
19 policy of the new government administration is for the terms of
20 each Board should not extend beyond the tenure of the Government
21 administration that appointed them. As such, Cabinet's approval
22 is being sought to revoke the appointment of each Board Member
23 of the Virgin Islands Climate Change Trust Fund Board, with the
24 exception of the ex officio Members to allow for the right mix
25 of new, innovative and progressive-minded Members to be

1 appointed that would include representation of youth on the
2 Board," and then there's a reference to the list.

3 What is said at four is that the purpose of this paper
4 is to seek the approval of Members to revoke the appointments of
5 the current Climate Change Trust Fund Board to make way for the
6 appointment of new Members at a later stage.

7 If we go, please, to 3142. There is the section on
8 legal implications. And what is said is what the Attorney
9 General's Chambers has done is to set out section 16(2) to
10 conclude at (8). Therefore, it appears from this section that
11 justifiable reasons have to be provided for the removal of
12 Members of that Board.

13 If you go to 3138, we now have the record of a
14 meeting, Cabinet Meeting, where this paper was discussed. And
15 that was, I think, on the 23rd of April 2019. And what's
16 recorded there is that you presented the paper, and then it
17 continues. "Referencing the captioned paper, the Attorney
18 General cautioned the Cabinet that the reasons for the removal
19 of Members from the Virgin Islands Climate Change Trust Fund
20 Board are clearly stated in the respective law. The Premier
21 reiterated this administration's new policy that Board
22 memberships would not extend beyond the term of this
23 administration. The Premier informed Cabinet that he'd asked
24 the Membership to resign from the Board. The Attorney General
25 expressed his concern that in revoking the appointments of

1 Members of the Virgin Islands Climate Change Trust Fund Board,
2 that the conditions for the removal listed in section 16.2 of
3 that legislation has not been demonstrated to exist."

4 And then overleaf you say that--records that the
5 Cabinet decided that all of the Members, six of them, the
6 non-Government Members, should have their appointments revoked
7 as from the 24th of April 2019.

8 Now, that's the background, Premier, to the first
9 criticism that is raised as a potential criticism. Because
10 what's set out--and I will summarize, but firstly that this
11 decision occurred on the 23rd of April 2019. We've seen that.
12 It was following a paper presented by yourself. The
13 justification that can be seen from the documents is that the
14 new policy that Board memberships would not extend beyond the
15 term of this administration. And we also see in the paper that
16 we've read out that there's reference to the length of policy
17 that we have discussed on Wednesday. And I say blanket policy
18 because that was, in fact, your phrase, Premier.

19 What's said is that there is nothing in the
20 information that is provided to COI to show that you, as Premier
21 and as the person representing this, and, indeed Cabinet, turned
22 minds to section 16 to satisfy yourself that the requirements of
23 that provision had been met, and that was despite the advice of
24 the Attorney General. And the criticisms that followed,
25 firstly, that the reasons you gave were therefore, insufficient.

1 You went outside the Act because you didn't satisfy the
2 conditions in section 16.2. By taking the step of removing all
3 Members of the Board, you failed adequately to provide for
4 independent expertise and oversight of the Board. That that
5 policy of revoking Statutory Boards with every new
6 administration also fails to provide for independent expertise
7 and oversight. And that the decision to replace all of the
8 Members failed to take legal advice indicating that the policy
9 was unconstitutional.

10 COMMISSIONER HICKINBOTTOM: I'm sorry to break in,
11 Mr Rawat. Could you just help me or I'm sure the Premier can,
12 I'm just trying to get the chronology right on this.

13 Mr Rawat has taken us to 122 of 2019 which is the
14 revocation paper, which is dated the 23rd of April. You
15 approved it on the 23rd of April, but it was signed by the
16 Deputy Chair that day as well. And he's right that the extract
17 from the Minutes at 3138 refers to that paper.

18 THE WITNESS: I just want to add final--inquire on one
19 thing. Was it 23rd of April or 24th?

20 COMMISSIONER HICKINBOTTOM: The paper was the 23rd of
21 April. The meeting No. 5/2019, my version is undated. That's
22 the Cabinet Minute. And I just wanted to inquire whether we
23 knew the date of that Cabinet paper.

24 THE WITNESS: I may stand corrected but I think I know
25 it was on the 24th, when it was passed, when it was discussed.

1 BY MR RAWAT:

2 Q. We have received the Minutes in two forms. One is
3 where they do carry the date and the other one is as this one
4 where they don't carry the date.

5 COMMISSIONER HICKINBOTTOM: But is this meeting
6 definitely the 23rd of April?

7 Can I tell you why, why I put the query, and that is,
8 on the 3rd of May, which is about a week later, at 3178 in the
9 bundle, there is another paper from you seeking to amend the Act
10 who insert discretionary powers with a paper from the Attorney
11 General strongly advising against that as being possibly
12 unlawful.

13 THE WITNESS: Right. Was that paper passed?

14 COMMISSIONER HICKINBOTTOM: That paper was not passed.

15 THE WITNESS: Okay, good.

16 COMMISSIONER HICKINBOTTOM: And as far as I can see
17 that paper was not passed. But I just wondered whether the
18 Minute on 3138 was, in fact, after possibly the wise decision
19 not to make the amendment to the Act that was proposed on the
20 3rd of May.

21 THE WITNESS: I can respond?

22 BY MR RAWAT:

23 Q. If you want to assist the Commissioner on that point,
24 please do.

25 A. You're finished with yours also? I want to assist the

1 Commissioner with the chronology.

2 Q. Just assist on that point and I will do some checking
3 whilst you're assisting, Premier.

4 COMMISSIONER HICKINBOTTOM: Thank you.

5 THE WITNESS: So, Commissioner, you wanted to know if
6 it was passed. Let me make sure I'm specifically clear on what
7 you want to--of me so I can help you.

8 COMMISSIONER HICKINBOTTOM: The order in which things
9 happened. We know--firstly, we know that it was 103 of 2019, it
10 should be original paper which covered the principle, and it
11 also covered the BVI Tourist Board and the BVI Ports Authority,
12 both of which, for one reason or another, there was a discretion
13 in the Cabinet to remove Members. So, this is after that, so
14 that was in March. This is dated the 23rd of April, 2019, 122
15 of 2019, and this for revocation of the appointments. The
16 Attorney General advice is that that would be unlawful.

17 Then, just leaving aside the Cabinet Minutes--

18 THE WITNESS: That one was on the 3rd of May, when the
19 Attorney General advised it would be unlawful.

20 MR RAWAT: 13th.

21 THE WITNESS: 13, I mean.

22 COMMISSIONER HICKINBOTTOM: Yes, 13th of May.

23 THE WITNESS: Right.

24 COMMISSIONER HICKINBOTTOM: But that's right.

25 THE WITNESS: In 2019, might I just, for the record

1 say, for that year.

2 COMMISSIONER HICKINBOTTOM: It's all 2019, yes.

3 THE WITNESS: Thank you.

4 COMMISSIONER HICKINBOTTOM: And then we have a
5 minute--the minute of meeting number five of 2019, which version
6 in the bundle is undated, and I just wondered whether that
7 wasn't after the 13th of May because if--I don't--it's difficult
8 to understand what the paper was brought forward on the 13th of
9 May was for, if you had passed the decision on the 23rd of
10 April.

11 THE WITNESS: Well, first of all, Commissioner, if I
12 may--

13 COMMISSIONER HICKINBOTTOM: Yes, certainly.

14 THE WITNESS: --just see if I can help you, in my
15 recollection, given it's two years and change over what I can
16 remember well, a little on the two, we did go to the--to seek an
17 amendment a few weeks later--to the Cabinet, but that was not
18 because we felt we had broken the law, and we're trying to
19 remediate, so I think I need to make that point abundantly
20 clear.

21 We sensed that there may have been some gray areas and
22 that we felt the best thing to do was to ensure that there was
23 clarity going forward, and remove any doubt going forward.

24 Proof we did not try to cover up any mistake or
25 wrongdoing for sure. We did not try to make the amendment

1 retroactive neither. That is an important point I need to put
2 for the record. The amendment would only have had effect from
3 the day it came into effect and forward. And after the letter
4 asking the Members to voluntarily resign, Cabinet did not
5 continue forward to implement any termination or revocation of
6 the Board Members, even when it was approved inside of Cabinet,
7 and I need to put a caveat in there because I want to stick a
8 pin and then I'm going to come back.

9 COMMISSIONER HICKINBOTTOM: We'll need to come back to
10 some of this, Premier, but is the minute on page 3138 a minute
11 of the 23rd of April, or is it a minute after the 13th of May?

12 THE WITNESS: 3138, that's dealing with the Cabinet
13 Minutes?

14 COMMISSIONER HICKINBOTTOM: Before.

15 MR RAWAT: If you look at 3.39--

16 COMMISSIONER HICKINBOTTOM: Yes.

17 THE WITNESS: Yeah.

18 MR RAWAT: --that tells us the effective date.

19 COMMISSIONER HICKINBOTTOM: I'm with you.

20 THE WITNESS: Right.

21 MR RAWAT: And so to just summarize the--

22 COMMISSIONER HICKINBOTTOM: That's helpful.

23 THE WITNESS: Yeah, that had been before.

24 MR RAWAT: We obviously--Commissioner, you'll remember
25 hearing from Mr Edward Childs; and so the sequence of--and we've

1 put the correspondence that he had with the Premier into the
2 records. So, on the 5th of April 2019, the Premier wrote to the
3 Board, asking them to resign.

4 COMMISSIONER HICKINBOTTOM: Yes.

5 MR RAWAT: On the 17th of April 2019, Mr Childs
6 responded on behalf of the Board, inviting the Premier to a
7 meeting, and his evidence was that he had no response to that.

8 On the 23rd of April 2019, we see the paper that we
9 were looking at, which is at 3140.

10 COMMISSIONER HICKINBOTTOM: Yes.

11 MR RAWAT: The date of that, both the time that it
12 gets uploaded and the date at the end where it's published by
13 the Premier, is 23rd of April 2019.

14 Cabinet makes it effective as from the 24th of April.

15 THE WITNESS: Yes.

16 MR RAWAT: And so I'd say that the inference one draws
17 from that is that that decision, in terms of the revocation
18 decision, preceded the decision to consider amending the Act.

19 COMMISSIONER HICKINBOTTOM: So, it was--that meeting
20 appears to have occurred on the 23rd or the 24th of April.

21 MR RAWAT: Yes.

22 COMMISSIONER HICKINBOTTOM: But I think the Premier
23 thinks it's the 23rd of April. That's very helpful. Thank you
24 very much.

25 BY MR RAWAT:

1 Q. Premier, can I set out your response. I've summarised
2 the criticism which relates to the 23rd of April. I think we
3 will have to come back to the change in the law so we can put
4 that in context, but as you may have gathered, I like to work
5 with the chronology.

6 A. I recognize that. I love that.

7 Q. If we put into the record your response, please.

8 A. Um-hmm.

9 Q. What you say is: Reference is made to earlier
10 responses about the matters repeated in respect of each Board.
11 And then you continue: "The Attorney General advised the
12 Cabinet that it must consider the effect of section 16 of the
13 Act in which the reasons for the removal of Members of the
14 Boards were clearly stated. There is no basis for the assertion
15 that the Cabinet did not do so. The Attorney General advised
16 the Cabinet of his 'concern' that the conditions for removal
17 were not fulfilled. The Cabinet considered his is advice and
18 decided it was nevertheless in the interests of consistent
19 application of its policy to accept the risk, to which the
20 Cabinet Paper referred, that judicial-review proceedings will be
21 taken against the decision. The Cabinet was entitled to make
22 this decision. Ministers frequently make decisions to which a
23 high or very high legal risk is attached. In such
24 circumstances, it is for the Court to determine whether their
25 actions are unlawful".

1 So, just to try and break that down a little, please,
2 Premier there is nothing in the documents that have been
3 disclosed to the COI to show that the Cabinet applied its mind
4 to section 16(2) when considering the revocation of six
5 individual Members of the Climate Change Trust Fund Board. Are
6 you aware of any other such documentary evidence which has not
7 been disclosed to the COI?

8 A. The--may I now, because you said you did a summary of
9 what I was listening for about seven minutes, I counted, so can
10 I respond--

11 Q. But be--

12 A. --with my chronological order because.

13 Q. --before you do--

14 (Overlapping speakers.)

15 A. --it's important--

16 Q. --would you mind answering my question?

17 A. Well, your question was going to be answered in the
18 same breadth and length that you give me the question.

19 Q. Well, premier, just tell me, is there any other
20 evidence relating to this decision that you have not disclosed
21 to the COI?

22 A. I don't know if it's a disclosure, but I think it
23 would speak in them. It would allow me to bring the context.

24 Q. I appreciate you want to give it context.

25 A. Yes.

1 Q. But can the Commissioner conclude that there is no
2 other evidence in relation to this decision that has not been
3 disclosed to the COI?

4 A. I will not--I will pray, Commissioner, to go through
5 the chronological order so that that answer could be answered
6 beyond a shadow of a doubt for both you and me, because I was
7 writing a few areas here, and I just wanted to make sure that
8 we're all are together with the dates. That's why I was asking
9 was the Cabinet on the 23rd or the 24th of April.

10 But if I may, it is very important for me to help you,
11 Commissioner, to get the full gamut of this side of the evidence
12 by explaining some of those chronological orders that was just
13 mentioned.

14 And when I say so, Commissioner, and I thank you for
15 this brief moment, the chronological order that was put to me
16 says that on, and if I could remember, on March 19, first of
17 all, there was a paper that went--and I want to state--to have
18 the revocation of all Members of all Boards, but that was
19 deferred. It wasn't discussed on March 19. That's why I was
20 saying I would like to say the chronological order because I
21 remember some of it, although it was a little while and--

22 COMMISSIONER HICKINBOTTOM: Is that--I'm sorry. Is
23 that 103 of 2019?

24 MR RAWAT: I think--

25 THE WITNESS: That's the same paper because on

1 March 27 now, because the paper did went--from in the March 19,
2 this is the overall blanket paper that I was talking about the
3 revocation of Board Members.

4 COMMISSIONER HICKINBOTTOM: 103 of 2019.

5 THE WITNESS: Inside of that. Yes.

6 But where only the Tourist Board and the BVI--only the
7 Tourist Board, and I think it was the BVI--

8 MR RAWAT: Ports Authority.

9 THE WITNESS: --Ports Authority who were addressed at
10 that time.

11 COMMISSIONER HICKINBOTTOM: Well, address two things.
12 One is the principle.

13 THE WITNESS: Right.

14 COMMISSIONER HICKINBOTTOM: And the principle was they
15 were all going to agree to vote.

16 THE WITNESS: Exactly. That was the principle.

17 COMMISSIONER HICKINBOTTOM: But that paper also
18 addressed two specific Boards where there was a discretion to--

19 THE WITNESS: Where the statute didn't have like this
20 one.

21 COMMISSIONER HICKINBOTTOM: Because you wanted
22 decisions on those two Boards.

23 THE WITNESS: On those two Boards first.

24 COMMISSIONER HICKINBOTTOM: And then--

25 (Overlapping speakers.)

1 THE WITNESS: Yes, sir. Yes, Commissioner, you're
2 correct. But I want--

3 BY MR RAWAT:

4 Q. I'm sorry to interrupt. It's at 2928.

5 A. 2928.

6 Q. That's memorandum 103 of 2019.

7 A. Right, right. Well, I just want you reference them
8 for use and so you can cross-reference what I'm saying because I
9 just jot the dates while you were speaking because some of them
10 I remember.

11 Q. For your chronology, that's your starting point.

12 A. That's my starting point, March 19. The paper was
13 deferred, and then the same paper was discussed and passed on
14 March 27, and that is the paper that you just referenced. That
15 is the one not dealing so much just with one Board but the
16 overall umbrella mindset that we spoke about before, that I want
17 to go back into but only the Tourist Board and the Ports
18 Authority were dealt with there.

19 But then when we went on, we wrote to all the Members
20 of the Climate Change Trust Fund Board, Commissioner, and I know
21 that there's a letter in there, but allow me to do my prelude
22 here to help with this, and this was written to Dr Katherine
23 Smith as an example of one of the Board Members who were on the
24 Board and it was written on April 5th, which would be the next
25 chronological order, but this was still written to all the

1 Members, although I had--I just took a mind that says
2 Dr Katherine Smith, and it says: I write with regard to the
3 above caption which is Climate Change Trust Fund Board. As you
4 are aware, this administration has just taken office a little
5 over five weeks ago. Since taking office, I have been assessing
6 the functions and composition of the Statutory Boards across
7 Government and more so to those Boards--more so that those
8 Boards that fall under the portfolio of the Premier's Office.
9 Further, you may be aware that a number of portfolios had been
10 shifted around. Therefore, and in this regard, the Climate
11 Change portfolio has been moved to the Premier's Office. Thus
12 in keeping with our mandate, it is this Government's intention
13 to restructure the composition of membership of each Board,
14 inclusive of youth involvement--there is it again--on each
15 Board. A new policy attaching term limits on Board membership
16 to coincide with the term of the sitting Government is now being
17 implemented.

18 Hence in view of the foregoing, we are seeking your
19 cooperation in voluntarily tendering your resignation from the
20 Climate Change Trust Fund's Board by Thursday April 11, 2019.
21 The Government thanks you for your service and renders--and
22 wishes you success in your future endeavor.

23 Now, that was on the 5th of April. Can I proceed now
24 to the 17th of April, where that the Chairman of the Board
25 stated that he wrote to the Premier. May I state that the--a

1 response never went back to Mr Childs not being out of place but
2 wanted to make sure that we were doing the assessments correctly
3 before we had a meeting with anyone, not only him but anyone
4 that was writing us at that time.

5 So, we need to move now to the 23rd of April. On the
6 23rd, now, of April, we are seeing that the Cabinet paper came
7 in to remove persons from the Board. Now, Cabinet rightfully
8 received the advice now of the Attorney General and proceeded to
9 decide at that time to take the risk.

10 COMMISSIONER HICKINBOTTOM: I'm sorry--

11 THE WITNESS: The risk of removing them from the
12 Board, given the Attorney General's recommendation in this case.

13 However, may I add, Commissioner, that On that day,
14 with that revocation paper that's in the bundle, and it was
15 approved on that day, on 23rd or 24th, whichever date it was,
16 but subsequent to then--and I might add that the policy at that
17 time--sorry, Commissioner you had a question?

18 COMMISSIONER HICKINBOTTOM: Only to go back--

19 THE WITNESS: Yeah.

20 COMMISSIONER HICKINBOTTOM: --because--

21 THE WITNESS: Yes.

22 COMMISSIONER HICKINBOTTOM: --you were doing it
23 chronologically, which is very helpful.

24 THE WITNESS: Yes.

25 COMMISSIONER HICKINBOTTOM: But when you said the

1 risk, what you're say in your--and I assume that the response to
2 the one--this is you?

3 THE WITNESS: Right.

4 COMMISSIONER HICKINBOTTOM: These are your words.

5 THE WITNESS: Yes.

6 COMMISSIONER HICKINBOTTOM: What you say, the risk, is
7 not unlawfulness because the Attorney had made it quite clear it
8 was unlawful.

9 THE WITNESS: Right.

10 COMMISSIONER HICKINBOTTOM: The risk was that
11 judicial-review proceedings would be taken against the decision.
12 So, you appreciated the decision was unlawful, but you were
13 keeping your fingers crossed that nobody judicially reviewed it.
14 That was the risk.

15 THE WITNESS: Well, given from the Attorney General
16 for this one, but as I proceed you'll see what Cabinet--what
17 transpired after.

18 COMMISSIONER HICKINBOTTOM: I'm sorry, but this is
19 your answer now.

20 THE WITNESS: Yes.

21 COMMISSIONER HICKINBOTTOM: Yes.

22 THE WITNESS: I agree.

23 COMMISSIONER HICKINBOTTOM: Yes.

24 THE WITNESS: But in terms of the chronological order,
25 I still agree, and that is my answer. It's clear that the

1 cabinet considered his advice and decided it was nevertheless in
2 the interest of the consistent application of this policy to
3 accept the risk, "the risk" meaning to make a decision contrary
4 to some of the advice received by Attorney General in this case
5 because this was one of the only cases that you will find that
6 we--it was unequivocally clear that the Attorney General was
7 saying this is the case, unless the--that's why I was saying the
8 other ones were not unequivocally clear. This one was.

9 COMMISSIONER HICKINBOTTOM: This was unequivocally
10 clear that it was unlawful, but the risk that you took was that
11 you might be judicially reviewed and that the decision would be
12 set aside.

13 THE WITNESS: Exactly. To which Cabinet before the
14 judiciary review proceeding would be taken against the--of this
15 policy to accept the risk to which the Cabinet Paper referred.
16 The judicial-review proceedings would be taken against the
17 decision. The Cabinet was entitled to make the decision, which
18 may add whether it be in the United Kingdom or every time you
19 make a decision, there is risk involved. The level of the risk
20 is something else, but this one was high.

21 COMMISSIONER HICKINBOTTOM: The risk, well, there was
22 no risk here as to unlawfulness.

23 THE WITNESS: Yeah.

24 COMMISSIONER HICKINBOTTOM: Because it was unlawful.
25 We know it's unlawful. The Attorney General said it was, and

1 you accept it was. So, sometimes, as where you're exercising
2 the discretion, in those circumstances, there was a risk that it
3 was unlawful.

4 THE WITNESS: Right.

5 COMMISSIONER HICKINBOTTOM: Here, no risk. It was
6 unlawful. The risk was that somebody might try to do something
7 about it.

8 THE WITNESS: Well, I respect your analysis, but it's
9 still, in Cabinet's view, is no matter what it is it's a risk.
10 That's how it was looked at in Cabinet.

11 COMMISSIONER HICKINBOTTOM: But do you see that
12 there's a difference between a risk, perhaps a high risk--

13 THE WITNESS: Yes.

14 COMMISSIONER HICKINBOTTOM: --something is unlawful,
15 and knowledge that it's unlawful but nevertheless plowing on and
16 hoping that nobody will take action to stop it.

17 THE WITNESS: And we'll get to that because that is
18 exactly now where the Attorney General has been clear.

19 And you, Commissioner, you are a hundred percent right
20 to point out where the Attorney General was clear there. Had
21 the Attorney General been clear in all those other areas, if you
22 remember in my evidence I said for most of the Boards the
23 Attorney General was not clear. I knew this would come up.
24 That's why I keep saying the word "most" of them, he was not
25 clear, and neither "yes" or "no". Here now, if you may, I could

1 add something to help you.

2 COMMISSIONER HICKINBOTTOM: Certainly, yes.

3 THE WITNESS: Ministers frequently make decisions to
4 which are high or very high legal risk is attached. In such
5 circumstances, it is for the courts to determine whether the
6 actions are unlawful.

7 Now, you would appreciate that the Attorney General
8 also can say that and you go to court and you hear something
9 else. You never know. You never know when you go to court, but
10 that's not the point I want to make now.

11 This was on the 23rd.

12 COMMISSIONER HICKINBOTTOM: Yes.

13 THE WITNESS: Now, after that, we saw that the paper
14 came in on May 13th for the revocation, and it was not asking
15 for--

16 COMMISSIONER HICKINBOTTOM: I'm sorry, to amend the
17 Act.

18 THE WITNESS: To amend the Act--

19 COMMISSIONER HICKINBOTTOM: Yes.

20 THE WITNESS: --but not try to be retroactive in any
21 way. The positions have not--had not yet been filled. There
22 was nothing done because we were reconsidering the existing
23 policy and trying to identify the best way forward, and
24 discussions were ongoing, including with the AG.

25 So, I want to point that out because, in other matters

1 such as COVID-19 that would have delayed us, but we never
2 enacted and implemented and moved forward with the Cabinet's
3 decision.

4 COMMISSIONER HICKINBOTTOM: I'm sorry, with--

5 THE WITNESS: With the--

6 COMMISSIONER HICKINBOTTOM: You didn't amend the Act.

7 THE WITNESS: We didn't--we didn't amend the Act, nor
8 did we move forward to write and say that this was Cabinet's
9 decision to--to--that--write Members of the Board to be clear
10 climate change, that Cabinet have decided--

11 COMMISSIONER HICKINBOTTOM: You didn't write to tell
12 them that their--

13 THE WITNESS: We never wrote them.

14 COMMISSIONER HICKINBOTTOM: --that their appointments
15 had been revoked.

16 THE WITNESS: We never wrote them because we were
17 doing some reconsidering of how to deal with this matter.

18 And when COVID came in, of course, that took our focus
19 off of that and many other things, because this now you will
20 appreciate is inside of me, and the 11th of March when COVID was
21 named the--a pandemic, probably the worst pandemic known in the
22 last 100 years.

23 So, we never wrote to any Member of the Climate Change
24 Trust Fund Board saying, in this case, that your positions have
25 been revoked.

1 COMMISSIONER HICKINBOTTOM: They learnt that from the
2 papers, from the media.

3 (Overlapping speakers.)

4 THE WITNESS: But the Government never moved forward
5 with that. And with not moving forward with that, legally now
6 we were saying we are going to go back and reconsider this
7 because we never wrote a letter saying that you--you've been
8 revoked.

9 COMMISSIONER HICKINBOTTOM: But they were revoked. On
10 the 23rd of April they wake up and they were revoked--

11 THE WITNESS: By Cabinet.

12 COMMISSIONER HICKINBOTTOM: By Cabinet--

13 THE WITNESS: Right.

14 COMMISSIONER HICKINBOTTOM: --it was a Cabinet
15 Decision, and that went into the media, and Mr Childs at least,
16 saw it; no doubt all of the Members saw it, but they didn't have
17 any response to their letter.

18 THE WITNESS: Right. Well, we never wrote because we
19 were reconsidering.

20 COMMISSIONER HICKINBOTTOM: But are there any
21 documents that you know of concerning the reconsideration?

22 THE WITNESS: No. It is something that we, even to
23 now, have not, to this date, reconstituted a Board, to this
24 date.

25 COMMISSIONER HICKINBOTTOM: Well, I mean, I'm sure

1 we'll come back to that. But could I just check one thing and
2 just on this small part of the story.

3 THE WITNESS: Um-hmm.

4 COMMISSIONER HICKINBOTTOM: In your answer, you
5 say--you accept that this decision was unlawful, and then you
6 said the Cabinet was entitled to make this decision. Is the
7 Cabinet entitled to make an unlawful decision?

8 THE WITNESS: Cabinet can take any risk--any Cabinet
9 in the world, but if you--but given how Cabinet proceeded with
10 this, after we made the decision, there were the need to
11 reconsider and reassess what it is we are doing and the policy.
12 Therefore, we never moved on the decision of Cabinet. We never
13 implemented it by moving ahead.

14 COMMISSIONER HICKINBOTTOM: Well, they're revoked.
15 The Board hasn't met. It's gone.

16 THE WITNESS: Well, they were still constituted until
17 we write them.

18 COMMISSIONER HICKINBOTTOM: No, no, no, no. The
19 revocation was by the Cabinet Decision--full stop.

20 THE WITNESS: Yes, but you can--you have to get a
21 letter saying that you've been revoked. We wrote actually--we
22 wrote the paper on--the emphasis on why we wrote the paper in
23 the first place is that 5th of April, and the paper came on the
24 23rd of April, we were saying that the public would have most
25 likely accepted a voluntary resignation, so we were going to

1 preempt it, but we won't move on it until we receive them.

2 And at the same time we now received, saying that they
3 voluntarily would resign and their time expired. So, we--in all
4 of that, we were still going over the policy, reconsidering the
5 policy and trying to identify the best way forward.

6 Now we have sat and gone through that for the most
7 part, and now we are going to get the criterias, which is easier
8 under this Act, because all the Members' time had expired, and
9 maybe that some of these same members were very well--

10 COMMISSIONER HICKINBOTTOM: I'm sorry to interrupt.

11 THE WITNESS: Um-hmm.

12 COMMISSIONER HICKINBOTTOM: They didn't expire.

13 THE WITNESS: The time frame for these?

14 COMMISSIONER HICKINBOTTOM: No, they didn't. Their
15 appointments were revoked. That's the end of the story.

16 THE WITNESS: Until you are written to, you're not
17 revoked.

18 COMMISSIONER HICKINBOTTOM: And who said?

19 THE WITNESS: Well, I would put it this way, the--

20 COMMISSIONER HICKINBOTTOM: Did the Attorney give that
21 advice?

22 THE WITNESS: The Attorney told to us bring back a
23 paper to have it reconsidered. That was one of the
24 conversation, so we want to move towards that, but then we got
25 bogged down with COVID.

1 COMMISSIONER HICKINBOTTOM: I understand that. But
2 perhaps the Attorney was concerned that the Cabinet had passed a
3 measure, a decision, made a decision, that it knew it was
4 unlawful.

5 But when you say the Cabinet was entitled to make this
6 decision--

7 THE WITNESS: Um-hmm.

8 COMMISSIONER HICKINBOTTOM: --as a proposition, you
9 say that the Cabinet is entitled to make a decision they know is
10 unlawful, contrary to the will of the Legislature, they're
11 entitled to do that as long as they can get away with it.

12 THE WITNESS: I'm not saying that at all. The
13 Attorney General was more clear than before that this one most
14 likely is unlawful.

15 COMMISSIONER HICKINBOTTOM: No, no, no, you accepted
16 it was unlawful--full stop.

17 THE WITNESS: No. I wouldn't say we accepted it full
18 stop because it sound like we did unlawful.

19 COMMISSIONER HICKINBOTTOM: But you said that--

20 THE WITNESS: What I would say is--

21 COMMISSIONER HICKINBOTTOM: You said this was clear
22 beyond doubt.

23 THE WITNESS: Is his concern were so heightened that
24 it caused us to reconsider. He had--this is one way he was,
25 even after the paper where he was saying I really think that you

1 should rethink this because the risk is too high to go to court
2 in case of judicial review, I think you should rethink this,
3 that is why we didn't act it, and we said, all right, we do
4 agree and let us move forward, and coming back with a paper to
5 rescind Cabinet's decision, and then, after that, let us move
6 forward.

7 And also the revocation paper amendment had nothing to
8 do with that. We just needed to change certain things in the
9 law. The reason we gathered against that also is that it was
10 going to take up a little too much time. So, when that was not
11 passed by Cabinet--by all of us because I'm in Cabinet--we voted
12 it down, and we decided as now a government we would bring back
13 a paper to rescind the decision of Cabinet and allow the Board
14 to perform, and then at the time of when their time expires,
15 then we see would see if we could put in those new policies, but
16 that something now that time didn't permit us to get back, given
17 what all we had to deal with COVID, even to this date. But now
18 we are moving towards.

19 COMMISSIONER HICKINBOTTOM: But none of that's
20 recorded anywhere.

21 THE WITNESS: No, no, that was recorded in Cabinet.
22 No, that part wasn't discussed in Cabinet at all. That was
23 discussed outside of Cabinet.

24 MR RAWAT: And, commissioner, can I, just in terms of
25 dates for the chronology?

1 COMMISSIONER HICKINBOTTOM: Yes, please.

2 MR RAWAT: We have been able to check against other
3 documents that we have. We do have a copy of the minute where
4 the decision is made, and it is the 24th of April.

5 COMMISSIONER HICKINBOTTOM: 24th of April.

6 THE WITNESS: Yeah.

7 MR RAWAT: The paper is 23rd Minutes of--

8 THE WITNESS: The decision on 24th.

9 (Overlapping speakers.)

10 COMMISSIONER HICKINBOTTOM: No, thank you very much.

11 THE WITNESS: Commissioner, I'm going to be as--

12 MR RAWAT: May I just--

13 THE WITNESS: --brutally honest as I can with you and
14 I'll be--

15 (Overlapping speakers.)

16 BY MR RAWAT:

17 Q. Can I just take you back to 3139.

18 A. Yes.

19 Q. The first thing that we see there, and that's
20 the--firstly is that that's the decision that Cabinet made, so
21 effective on the day that it met--

22 A. Um-hmm.

23 Q. --six people, its memberships were going to be
24 revoked. Second decision that is recorded is Cabinet making is
25 that an expedited extract would be issued to allow the decision

1 to be acted upon, even before the minutes were confirmed.

2 A. Which is a norm.

3 Q. Which is the norm.

4 A. Yes.

5 Q. But the third bit of information is that, and it goes
6 to the point that--as to this decisions being acted upon. The
7 Cabinet Decision is published--

8 COMMISSIONER HICKINBOTTOM: Just one moment.

9 (Technical difficulty.)

10 BY MR RAWAT:

11 Q. The final point to make, Premier, is that, Cabinet
12 Decision, which was to revoke, was published, it was made public
13 because Mr Childs's evidence to the Commission was that's how he
14 learnt that his--he was no longer a Board Member, and all six
15 people have, since the 23rd of April, 2019, acted on that basis.

16 And, I mean, you've read out the letter to
17 Dr Katherine Smith. That correspondence hasn't been disclosed
18 by your office to the COI. We have a copy of the letter to
19 Mr Childs because Mr Childs provided it, but the point--and I've
20 checked because Climate Change Trust Fund Board is addressed by
21 Dr O'Neal-Morton in her Affidavit, her most recent one--there
22 isn't, although I can't find on a very quick review, any
23 correspondence with the Climate Change Trust Fund Board Members.
24 The effect of your decision was as of the 24th of April, the
25 Climate Change Trust Fund Board ceased to exist.

1 A. Yes, but to the Chair, the correspondence, as I said,
2 as I read, those can be furnished to you, as I would--you will
3 seek to get your office to get them furnished to you because at
4 the end of the day, that was written to them; each Member
5 received on April 5th.

6 COMMISSIONER HICKINBOTTOM: Mr Childs--I think this is
7 right, Mr Rawat will correct me if I'm wrong--Mr Childs said
8 that he thought that each of the Board Members had received a
9 similar letter, hence the one response from all of them.

10 Mr Rawat's point is that we didn't get this correspondence from
11 your office.

12 THE WITNESS: Well, I'm giving evidence now about it,
13 and if we need to bring it into evidence--

14 COMMISSIONER HICKINBOTTOM: What we did get from your
15 office is an Affidavit from the Permanent Secretary to say that
16 these posts had expired by the influxion of time--

17 THE WITNESS: Right.

18 COMMISSIONER HICKINBOTTOM: --whereas they had, in
19 fact, revoked on the 24th of April.

20 THE WITNESS: Well, if you look at it from that angle,
21 we didn't act on them and it expired and we--our time, attention
22 on it drifted due to COVID, and at the same time now we're
23 trying to look at it even now we haven't--it can't be said it
24 was political because we haven't reconstituted the Board.
25 We--so we are now in the process of trying to get that done, and

1 also adhering to whatever we have to adhere to the Act. It was
2 the only one of the Boards under us that we felt that we had to
3 reconsider some of the way forward with it, based on when we
4 re-read it and, in hindsight, we decided to look it over. We
5 never got back the paper to rescind Cabinet's decision. But
6 even so, some of the policies are wrong in it, has been
7 discussions and ongoing discussions of how we move forward with
8 it because a very important Board.

9 COMMISSIONER HICKINBOTTOM: It's a very important
10 Board. Its independence is crucial.

11 THE WITNESS: Right.

12 COMMISSIONER HICKINBOTTOM: Because it's a goose which
13 may lay a golden egg in this sense; it may get funds from things
14 like the Green Climate Fund.

15 THE WITNESS: Exactly.

16 COMMISSIONER HICKINBOTTOM: To assist with climate
17 change in the BVI, and what's essential as the Act makes clear
18 is independence--

19 THE WITNESS: For sure.

20 COMMISSIONER HICKINBOTTOM: --from the Executive.

21 Can I just go back, while we're dealing with the
22 chronology, to the paper on the 3rd of May. So, this is about a
23 week later, after the post had been revoked, so by this stage
24 there was no Board, and you brought forward a paper to amend--

25 THE WITNESS: 13th of May.

1 COMMISSIONER HICKINBOTTOM: The--sorry. The--you
2 signed it on the 13th of May.

3 THE WITNESS: Um-hmm.

4 COMMISSIONER HICKINBOTTOM: It was put on to ExcoTrack
5 by your Deputy Permanent Secretary on the 3rd of May.

6 THE WITNESS: Okay.

7 COMMISSIONER HICKINBOTTOM: So, about a week or so
8 later, this paper was produced. We know because you've told us
9 that the Attorney was expressing concerns about the decision of
10 the 24th of April, and this sought an amendment to bring in an
11 additional subclause which gave the Cabinet broad discretionary
12 power to revoke the appointment of any Member. Why was that
13 paper produced?

14 THE WITNESS: Well, the paper was produced not insight
15 of what we wanted to do before, but in sight of certain other
16 changes we want to bring to the Trust Fund Board to keep its
17 independence but also to make sure that if there are clear
18 indications of anytime it needs to be re-energised or
19 reinvigorated, that there is some way, extra layer that persons,
20 whoever is on the Board--I'm not saying that those who were or
21 whoever is on the Board don't get comfortable and don't perform
22 the task--because, as we get going in this, we recognise more
23 and more the importance of this Board, and that's why we're
24 working furiously to get a criterias out that--as of now.

25 COMMISSIONER HICKINBOTTOM: But the--and I think the

1 Attorney's memo make this clear. Bringing in a subclause,
2 bringing in a clause that the Cabinet has discretionary power to
3 revoke the appointment, that sort of political in--that sort of
4 political power would, as I understand it, have sunk any
5 possibility of your obtaining funds from most of the recognised
6 international funds, which insist on independence and good
7 governance.

8 THE WITNESS: Well, I won't say that the--we weren't
9 looking for good governance. I would say that it just give
10 investors a safety layer that any government is not using their
11 money and not hitting the target that it's supposed to hit. I
12 will say that much.

13 But you would see that the Attorney General was
14 forthright on that paper and clear, and we did not pass it.

15 COMMISSIONER HICKINBOTTOM: I mean it seems to me that
16 it would have been a disaster.

17 THE WITNESS: Yes.

18 COMMISSIONER HICKINBOTTOM: For the Act.

19 THE WITNESS: Right, for the Act.

20 COMMISSIONER HICKINBOTTOM: But, as you say, you
21 didn't pass it.

22 THE WITNESS: We didn't pass it because we--he was
23 able to be as clear as he could be on that one, and the reasons
24 why, and we told him in hindsight you are correct, and that
25 paper stood down.

1 I mean, we were working on getting the paper in for
2 rescinding, but it's one of those many tasks--or few tasks that
3 got away with us dealing with COVID after having about close to
4 95 or 94 or 50--I don't know how much meetings of Cabinet.
5 After that, it just got--

6 COMMISSIONER HICKINBOTTOM: I understand that, but the
7 practical effect is that there has been no Board since the 24th
8 of April 2019.

9 THE WITNESS: Right.

10 COMMISSIONER HICKINBOTTOM: The last two-and-a-half
11 years.

12 THE WITNESS: I wouldn't say two-and-a-half, but
13 roughly about two, yes. And--but working on getting it in place
14 now.

15 COMMISSIONER HICKINBOTTOM: I'm sorry, Mr Rawat.

16 MR RAWAT: Commissioner, just to complete the record,
17 I'm grateful to those who sit behind me for checking this, but
18 at present you can still find on the--

19 COMMISSIONER HICKINBOTTOM: I know. I thought--

20 MR RAWAT: --Virgin Islands Government's website a
21 record of the Cabinet Decision which says that Cabinet decided
22 that the following membership of the Virgin Islands Climate
23 Change Trust Fund Board be revoked effective 24th of April 2019.

24 THE WITNESS: It won't be like that.

25 BY MR RAWAT:

1 Q. Let's move on to criticism no. 2, Premier, which is
2 page 27. It says you've confirmed that no new Members have been
3 appointed to the Board since 23rd of April 2019, rendering the
4 Board defunct. In allowing the Board to become defunct, you
5 prevented it from carrying out the functions for which it was
6 originally set up. You were asked by the Commission of Inquiry
7 to explain reasons for dissolving the Board. Your response is
8 as follows:

9 It is common practice that some or all membership of
10 the Boards are revoked and new members appointed to the
11 respective Board. The desire is also to reshuffle the
12 membership of each Statutory Board to include the appointment of
13 a youth to each Board. (3), the new policy of the new
14 government administration is for the terms of each Board should
15 not extend beyond the tenure of the Government administration
16 that appointed them. And the above says the criticism fails to
17 explain why a new Board has not been appointed from the 23rd of
18 April 2019 to present.

19 Your response was as follows: "The Board has not been
20 reconstituted partly because the Government has faced
21 unprecedented challenges since the date of its revocation, which
22 have placed acute strain on its capacity to maintain and service
23 the growing complexity and number of its statutory and other
24 functions. The Ministers have, in their position statements on
25 Governance, set out those strains to which considerable burden

1 imposed by the Inquiry must be added. Further, the Government
2 is considering what its policy should be in connection with the
3 Virgin Islands Climate Change Trust Fund Act and whether it
4 should be amended, and it has not completed those discussions.

5 Just to delve into that a little, you will find your
6 response at 3176.

7 Now, this is the response. It was a response that was
8 made to a letter from the Commission dated the 9th of the
9 3rd--the 9th of March 2021, and I will just summarise it because
10 you've set out the membership there.

11 You say at 1 that the Board is not in operation. You
12 were asked if the Board is no longer in operation, please can
13 you confirm who dissolved the Board and what powers used to
14 dissolve the Board, and you say--and this is just after
15 March 2021--you say that the Board was dissolved through the
16 powers of the Cabinet memo, so you don't seem to be saying there
17 that because you had written to people they were still, in fact,
18 technically in office.

19 And you point to that people were invited to
20 voluntarily resign. You say the membership of this Board was
21 not reestablished to date. The use of the word "reestablished"
22 in itself, doesn't it, Premier, suggest that you did, in fact,
23 as Cabinet--as the Cabinet minute records, revoke this Board?
24 And that was your intention, and that intention never changed,
25 did it?

1 A. To--

2 Q. To revoke this Board. There is not--there is
3 no--there is no record at all--there is no reference in this
4 answer, and there is no record in the documents disclosed by
5 your office and the IRU that Cabinet considered rescinding that
6 decision.

7 A. Cabinet--it was not Cabinet discussion. I
8 said--clearly I said as a government outside of Cabinet, the
9 Commissioner asked me that. I was clear.

10 Q. The five of you?

11 A. So, as a government, we decided we were going to make
12 sure we work on certain change of policies and have the Board
13 re-established in all--I don't know about legal language, but
14 whether we see re-establish, get it going again, so it may well
15 have some of the same Members or may not.

16 Q. Let's pause there. That's not legal language. It's
17 your language.

18 A. But you have told me how have you interpret
19 "reestablished".

20 Q. No, Premier. What I've suggested is I used two words
21 that you used.

22 A. Yes.

23 Q. One is "rescind".

24 A. Rescind.

25 Q. And one is "reestablished", which is in this document.

1 A. Right. Exactly.

2 Q. Now I'm suggesting to you two things: Firstly, there
3 is absolutely no evidence that you have produced of any
4 discussions of government--and by that I take it to mean the
5 Cabinet sitting outside Cabinet and having a discussion--there
6 is no evidence that you ever considered rescinding the
7 appointments that you revoked on the 24th of April.

8 And second point is that the use of the word
9 "reestablish" in a response that you did not date but is after
10 March 2021 itself shows that there was no discussion about
11 rescission but, in fact, you were clear that the decision to
12 revoke in April 2019 stood and had occurred.

13 A. Well, I can answer it in the way you answered it. You
14 answered it how you want to conclude. I can only state what I
15 was stating to the Commissioner already, and I hold forward to
16 that. And yes, there are certain things not written because we
17 have not brought it forward yet for the technical persons to do
18 their work. But as a government we have discussions, and we
19 decided how we want to go about this, but we got side-tracked.

20 So, I answered it in that vein, the wording how it's
21 interpreted may seem otherwise, but that is our intention. That
22 is clearly our intention.

23 And one time you are criticizing me, a potential
24 criticism, of removing them for political reasons and then
25 certain Boards may have political reasons, but then here now

1 that drop off because we never--up to now reconstituted the
2 Board, so it clearly would support what I was saying in my other
3 answers. Our intention was never to have these things
4 political, keep in the public interest of the people as a young
5 government trying to make moves to re-energise Boards.

6 Yes, this one is the one the AG flagged the
7 heaviest--well, the flag that clearest to us. The others were
8 vague, so we decided to reconsider how we're going to deal with
9 this Board, and that is something that we're still working on
10 and is going to be on the way. I'm answering you as honest as I
11 can.

12 COMMISSIONER HICKINBOTTOM: You had a policy to revoke
13 the Boards and re-establish them, or whatever word you want to
14 use. That was your policy. That was set out in 103/2019. What
15 happened here was that there was a board shortly afterwards
16 where, to revoke the Board, the Attorney General made clear--as
17 you've accepted, unequivocally clear--that it was unlawful, and
18 you went ahead and revoked the membership.

19 So, doesn't this show what you would have done? You
20 say that the Attorney General was not clear in respect of the
21 other Boards, but don't we know what would have happened had he
22 been clear? Had he been clear and said this is definitely
23 unlawful. The result would have been the same, wouldn't it?

24 THE WITNESS: Well, if you analyze it in that vein
25 because now we have found one where he's clear, so you could say

1 that for the rest.

2 But with due respect, Commissioner, just like how we
3 drilled down on this even after Cabinet and the Attorney General
4 came forward and told us even more outside of Cabinet is the
5 same way we did with the others. But this one here the Attorney
6 General was more clear. When that was clear--I wouldn't say
7 "more clear", he was clear on his position.

8 COMMISSIONER HICKINBOTTOM: Year, yes.

9 THE WITNESS: And that's all we're asking for the
10 other Boards.

11 COMMISSIONER HICKINBOTTOM: Exactly.

12 When he was clear, this was a board where he was clear
13 this is unlawful, you still went ahead and revoked it.

14 THE WITNESS: The Cabinet took the risk.

15 COMMISSIONER HICKINBOTTOM: On the other Board.

16 You took the risk, not of it being unlawful but being
17 judicially review. But with respect to the other Boards, had he
18 said at the time this is definitely unlawful, this is what would
19 have happened?

20 THE WITNESS: Not necessarily. We would have moved
21 differently because this wasn't one of the first Boards we were
22 dealing with. The other Boards were ahead, so had he
23 decided--had he stated from a time we started the Boards from
24 the March 19 or March 27 papers that this is the position
25 stating clearly that this is unlawful, that will have changed

1 the whole nomenclature of what we were doing and sit down and
2 come with a different strategy and a different way forward.

3 So, the other Boards will be coming in one by one, and
4 this one was on the--what date? This was the 24th of April.

5 COMMISSIONER HICKINBOTTOM: 23rd of April. The paper.

6 THE WITNESS: Right. The paper was 23rd of April,
7 and--but there were papers before that.

8 So, we're saying if that was put up front to us that
9 was the case, and may I add they were both in situations with
10 Boards after that, and it was not as clear as he was with this
11 one.

12 So, if it was clear in his opinion, legal opinion, on
13 this as he was with all the others, the reaction would have been
14 different because to bear me out that what I'm saying has
15 weight, there were actions before, and there were actions after.
16 But the opinion was never as heavy or direct for the Attorney
17 General as it was for this Board.

18 COMMISSIONER HICKINBOTTOM: Thank you.

19 BY MR RAWAT:

20 Q. Premier, can I just move on to the third criticism,
21 please.

22 A. Um-hmm.

23 Q. We've actually touched upon it already because the
24 Commissioner took you to this, but just to give it context. It
25 refers, as a criticism, to the response that you were--we were

1 looking at earlier, which was your response to request for
2 information at 3176, but let's go back to the core documents.

3 Would you go to 3178, Premier. This is a document
4 that the Commissioner took you too. This is the paper of the
5 3rd of May 2019. Do you have the first of it?

6 A. 3178?

7 Q. Yeah.

8 And if you look at 3179, at paragraph 9 is the key
9 amendment found this criticism, and that is it was a proposal,
10 and it's signed off on the 14th of May, proposal to amend
11 section 16(2) of the Climate Change Trust Fund Act to give
12 Cabinet discretionary powers to revoke any Member of the Board
13 of Trustees, and we see the Attorney General's response to that
14 at 3183. Turn that up. I'm just going to read some parts of
15 it. There is the section headed "Advice", and this the Attorney
16 General's advice dated 9th of May 2019, and it says as follows:

17 "I would strongly advise against the amendment of the
18 Climate Change Trust Fund Act (the Act) by way of substituting
19 the removal of Members for the trust corporation at the
20 discretion of the Minister and cabinet, for the elaborate basis
21 for removing of members contained in section 16 of the Act. No
22 reason had been advanced for the proposed amendment". That was
23 another point.

24 And then he says: "The proposal to add another ex
25 officio member, namely the Permanent Secretary, in the Premier's

1 Office may on its face be unobjectionable. However, with that
2 addition, the total membership of the Board becomes an even
3 number and may produce a deadlock. There also has been no
4 reason advanced for adding additional ex officio Member to this
5 Trust".

6 There were other changes you were seeking.

7 But what the Attorney General says is--he then sets
8 out in his discussion the fact that he's drawn on previous
9 occasions drawn attention to the fact even where discretionary
10 power is granted for removal of Members of any statutory
11 corporation, such discretion must be exercised in accordance
12 with the well-established principles of the exercise of
13 discretionary power. This involves exercising power in good
14 faith reasonable and for purpose of the Act which establishes
15 statutory corporation.

16 He then refers to the principles of the rule of law,
17 which we have seen that, when we were looking at the 27th of
18 March 2019 paper, where the Attorney General referred to that.
19 He says he's undertaken a careful review of the Act and points
20 out the following:

21 First, it's an act that creates a trust corporation,
22 which puts the--a corporation that fits into a special category
23 distinct and apart from other statutory corporations established
24 by the Legislature. Because of that, any amendment must be
25 handled with care.

1 Secondly, he points out that it's not--the Trust is
2 not a government fund of the Territory. Its capital and
3 revenues are not public money of the Virgin Islands. And he
4 sets out there parts of section 10, section 12, and section 13.

5 Then turns to this: Perhaps it's important at this
6 point to note in having regard to the scheme of the Act, the
7 Minister and the Cabinet are constituted agents since the fund
8 is not a government fund to appoint and remove the board, and as
9 such have fiduciary responsibility. The court may just as a
10 trustee has power to enable him to better perform his duties and
11 to exercise duty for benefit of the Trust, so too must the
12 Minister and the Cabinet as appointers and as fiduciaries of the
13 Trust Corporation. When exercising the power to appoint to
14 remove the Members, bear in mind that the powers granted with
15 the ultimate purpose of taking part of administration of the
16 Trust for the interest of the Trust and no other.

17 In my considered view, and against the backdrop of the
18 foregoing, the appointments and removal process enshrined in the
19 Act is more in harmony with the objectives and purposes if was
20 the Act than the proposed removal of the Members at the
21 discretion of Cabinet. By providing sunlight in the current
22 removal process, the Minister and Cabinet secure the requisite
23 protection for any allegations of breaches or abuse of fiduciary
24 responsibility that may bedevil removal at their discretion.

25 And then he sets out some further law, but concludes

1 in this way: In the light of all the above, particularly the
2 emphasis that (1) the Trust is not a government property; (2)
3 the Government is not liable for the Trust; and (3) the
4 elaborate scheme and the appointment of the Board Members as
5 well as the basis for their removal that the Government must
6 consider its proposal to amend the Act, particularly the
7 proposed amendment to remove Members for ascertained justifiable
8 reasons.

9 So, it's quite clear that the Attorney General's
10 advice in May 2019 was that when one looks at the whole
11 architecture of the Act and your responsibility as a Minister
12 and as a Cabinet, you had to have justifiable reasons, and you
13 could not amend the Act to give yourselves an open discretion to
14 remove Members when you thought it necessary.

15 And the result of that is, firstly, that you didn't
16 take it forward; is that right?

17 A. Well, you don't have to take my word for it. This is
18 sought. The Cabinet Paper was deferred for two weeks because I
19 realize it didn't get to this part. The captioned paper--sorry,
20 not Cabinet paper--

21 Q. 3181.

22 A. 3181 in your bundle is capped in the decision sought,
23 the captioned paper was deferred for two weeks to give the
24 Premier and the Attorney General time to have further
25 discussions on the proposed amendments. If I may, Commissioner,

1 that's says it all.

2 This now when we received this--I think it was
3 three- or four-page legal opinion from the Attorney General,
4 this now is what I call giving the client a sound advice. So,
5 no matter what we in our young political mind wanted to go
6 through, when you are finished reading what he said in this
7 advice for the amendment, we--before the paper and the paper
8 never came back to Cabinet.

9 COMMISSIONER HICKINBOTTOM: I understand that.

10 BY MR RAWAT:

11 Q. Let me put onto the record the criticism that's made
12 because the criticisms are made that this memo--not the AG's
13 advice, but this memo--to seek approval to amend that Act so
14 that you could, as we see, effectively give Cabinet
15 discretionary power to revoke the appointment of any Member of
16 the Board of Trustees, what the potential criticisms arises--and
17 it's the ones the Commissioner has canvassed with you--is that
18 it suggests you may have attempted to amend the Act in order to
19 legitimize your earlier ultra vires--outside the law--removal of
20 the Board Members, and your response is this:

21 "The suggested potential criticism is farfetched. No
22 judicial-review proceedings were brought against the decision of
23 the Cabinet and no court had determined it to be ultra vires.
24 Further, the proposed amendment could not have legitimized the
25 revocation of the Board since it would not have had a

1 retroactive effect. The Premier did not attempt to amend the
2 Act. He proposed to the Cabinet such an amendment, and the
3 addition of a Permanent Secretary as an ex officio member, but
4 he agreed after discussion to consult further with the Attorney
5 General".

6 And then you continue: "In fact, Ministers have been
7 considering whether to bring these amendments to the House
8 before reconstituting the Board to put beyond doubt the power to
9 revoke appointments in the interests of the policy pursued by
10 the Government. They have also been considering more generally
11 the policy towards the revocation of statutory boards. These
12 matters lie perfectly properly within the scope of the political
13 government. The Attorney General's views on the desirability of
14 the amendment, of course, carry weight, and have prompted the
15 Government to further reflection, but they are not decisive".

16 Now, to break that down, the general policy towards
17 the revocation of Statutory Boards is one that I think you have
18 already canvassed with the Commissioner because it's about--I
19 think you referred to as a sort of overarching statute. But
20 just to be clear, you are advised in May by the Attorney General
21 in plain terms that the proposed amendment would be unlawful.
22 That's what it comes down to.

23 Are you still considering that, before you
24 "reconstitute" this Board, to use the term that you--that
25 appears in your response, you want to amend the Act to give

1 yourselves, as a Cabinet, that discretionary power?

2 A. Commissioner, I have to answer like this: One time I
3 am getting questions and statements telling me don't go to the
4 future, let's deal what happened in 2019, now I'm getting the
5 question to go to the future to give you an answer. That's how
6 I see these questions when I get them.

7 I would state to you very clearly that there were
8 other amendments we were looking at, and if you will turn to the
9 Act from your bundle, you would see clearly that most of the Act
10 was written in the vein of the Natural Resources and Labour.

11 So, to be able to have it transferred to the Premier
12 Office--Premier's Office required that some amendments in it for
13 it to function so we wouldn't be ultra vires in any way to the
14 Act, be it the PS in the Premier's Office or whatever entity it
15 is because there are entities in there that Act specifically
16 carries you to the Natural Resources and Labour.

17 COMMISSIONER HICKINBOTTOM: That's section 122--

18 THE WITNESS: Right.

19 COMMISSIONER HICKINBOTTOM: --which puts the Permanent
20 Secretary of the Ministry of Natural Resources and Labour on to
21 the Board, and you wanted that obviously--you wanted that
22 changed.

23 THE WITNESS: That is one of many.

24 COMMISSIONER HICKINBOTTOM: Yes.

25 THE WITNESS: That's one of many. I'm just going to

1 some of the reasoning behind some of the amendments.

2 Now, the other amendment in terms of the revocation of
3 Members, when we took office, it was aimed to make sure that no
4 one gets comfortable on these Boards. There has been some
5 Boards in our country, humbly in my opinion, that have got
6 comfortable and some shakeup needed to be made, and some are
7 comfortable that the Act covers them that there is no way the
8 Cabinet or executive section of the Government can do them
9 anything, so they will just stay there and don't perform.

10 So, what the discussion--which strains and acts with
11 the AG on the outside now, which was not recorded in Cabinet,
12 was there are more than one ways to put inside the Act to
13 achieve what you want to achieve, and I respected that. So, we
14 discussed some ideas of how to go about it, and how to get to
15 the amendments. But after, even to him and me, that takeaway
16 with COVID-19 so much so that we were calling the Attorney
17 General's Office, the Attorney General's Office for just the
18 Ministry of Health, compression orders in the 94 meetings, and
19 so never got back to it.

20 But it was clear he stated that all he had seen, he
21 would guard against moving in that direction. It is still your
22 call in Cabinet, but he says this is as clear as he can be with
23 this one, and he would advise in terms of another way to achieve
24 what you want to achieve, not for political power of the Board.
25 That was not the intent. The intent is always that the Board

1 know that you have to be tied to performance. That is what we
2 wanted to do. And even doing so, moving forward with this Board
3 and other Boards--because this is an independent board and
4 should be. This is a board that, Commissioner, that is going to
5 do wonders for this Territory, and I have no doubt. But at the
6 same time you don't want persons take up their mandate and don't
7 seek those funds--I'm not saying the persons that were before
8 would not have done that--that's not the point that I made about
9 it--would have done or would not have, but some caveat to make
10 sure they go out and look for those funds that are available and
11 be active.

12 So, we wanted to put that caveat in there to be an
13 energizer, to help stack anyone who thinks they just go on these
14 independent boards and do not produce. That was the impetus
15 behind the thinking process, not the political path.

16 COMMISSIONER HICKINBOTTOM: But the result was that
17 the Board--all the membership of the Board was revoked without
18 an inquiry as to how well or poorly--how it had functioned over
19 its lifespan, and for two years, four months, I think to be
20 accurate, there has been no fund at all--there has been no Board
21 at all. So, in terms of energizing this particular area, this
22 initiative has not worked, has it?

23 THE WITNESS: Well, if you state it however you state
24 it, yes, but there are some factors that must come in to be put
25 in the context.

1 In May 20--after April going to May, again we came
2 into COVID.

3 COMMISSIONER HICKINBOTTOM: No, I understand that.

4 THE WITNESS: If I may--I must, Commissioner, crave
5 the indulgence because in the mid-2019 to mid-2020 into
6 mid-2021, you're talking about two years and a few months, but
7 also that with 19 months of that has been intense--intensified
8 in government offices dealing with COVID. Now that we have
9 vaccines and all these things, we are trying to see how we can
10 jump-start many of these things that were inadvertently due to
11 COVID not dealt with as fast as we would have liked to.

12 And I see that some these very Members can still
13 likely end up on it. I see that some of the changes that are
14 being made given what the past Attorney General said and even
15 advice that we would have received in the current Attorney
16 General's Office, there are certain ways you could go about
17 making sure you do that while maintaining the independence of
18 the Board, while maintaining the integrity of the Board, while
19 maintaining the overall structures of good governances, which is
20 not our aim to violate. But at the same time put that caveat in
21 to make sure that it's tied to production in terms of not just
22 being done.

23 COMMISSIONER HICKINBOTTOM: I understand that,
24 but--and nobody would seek to reduce the impact of COVID because
25 COVID has been as devastating here as in many other places, but

1 these revocations are made a year before COVID. And my point
2 was that if the Board had been left in place, then they would
3 have made some progress. As there has been no Board, then
4 obviously no progress has been made at all.

5 THE WITNESS: Well, that's an easy assumption to make
6 because if you don't have something in place and you have
7 something in place, you probably would have done something, but
8 that is in hindsight 20/20, but that's not the impetus of why we
9 moved. All of this was done originally for a blanket policy at
10 that time.

11 COMMISSIONER HICKINBOTTOM: I understand that.

12 THE WITNESS: At that time. Hindsight is 20/20, and
13 there are certain things, even as Premier sitting in front of
14 you, that I would have done differently before, and I'm not
15 saying that it was wrong or unlawful, but experience teaches
16 wisdom. And even there are some things that I have learned
17 since the COI has started that we need to implement, and we
18 can't wait until it is over when things come to you to make you
19 better. You take them and you make yourself better. That's the
20 way you should live life, try every day to make yourself better.

21 So, in the areas where the COI has pointed out even
22 some gaps--not intentional gaps--we have sat as a government and
23 even with some of the technical officers and say, Well, we are
24 strong in this area because that's not the concern of the COI,
25 but in these areas where we need to improve, we recognize there

1 are some areas we have to improve and we have to get it done,
2 and they're working furiously to do it, so I tendency to that,
3 too.

4 COMMISSIONER HICKINBOTTOM: Mr Rawat.

5 BY MR RAWAT:

6 Q. Premier, the purpose of the question was just to
7 clarify where the Ministers are, and it was actually asking you
8 about the wording that you put in your response because in
9 response to the potential criticism that the attempt to amend
10 the Act was an attempt to cover up what you had done before.
11 I've read out your response, but what you referred to as
12 specifically that there was an intent to amend the Act to give
13 it discretionary power and then the need to appoint the
14 Permanent Secretary as an ex officio member.

15 But what it is this that I'm asking about. In fact,
16 Ministers have been considering whether to bring these
17 amendments to the House before reconstituting the Board to put
18 beyond doubt the power to revoke appointments in the interest of
19 the policy pursued by the Government.

20 Now, the policy pursued by the Government we just
21 talked about. You described to the Commissioner as to the
22 blanket policy. All I want to know is: Does it remain the
23 intent of your administration to bring, when the reference to
24 these amendments, does that include an amendment to this Act
25 that--to give Cabinet discretionary powers to revoke the

1 appointment of any Member of that Board?

2 A. We had discussions, Mr Rawat, some of our Members on
3 this as much as this week, and it remains--we remain resolute
4 that for any board, whether climate change or whatever, we need
5 a caveat to ensure no one gets comfortable on Boards and they
6 produce in the public's interest .

7 The advice that we're going to get with that is going
8 to take a little longer than we had anticipated because the
9 Attorney General's Office is far stretched with limited
10 resources to their liking or even our liking that over time
11 we're trying to see how to work that with the whole
12 transformation of the Public Service.

13 But there needs to be a firm leadership rule in the
14 organisation a caveat to make sure that Board Members carry out
15 their functions and do not become comfortable and do not
16 produce. That is going to hinder generations unborn if persons
17 are not productive, and experience teaches wisdom. So, all
18 present as of today, the 16th of September, even though I wrote
19 that, since our meetings, if it's not going to be Cabinet so we
20 can maintain the independence, how do we go about that? I must
21 say we have gotten some good ideas legally thus far, and those
22 we are going to move on, so it is evolving as we speak so we do
23 not be seen as politically interfering, so we do not seem like
24 we're trying to control the Climate Change Board--I have no
25 intention of my Government to do that--but to make sure that the

1 independence they have is not the one that is absolute where
2 they offer themselves to not to produce.

3 Q. The reference to these amendments shouldn't be linked
4 to the preceding paragraph in your response but actually to this
5 caveat that Boards should not get too comfortable?

6 A. As of right now today, after some meetings, that is my
7 thinking as of right now today. In addition to what I have
8 written, as of today based on other things because every day
9 dealing with matters, and we are resolute that that needs to be
10 in there to safeguard the Territory in the public's interest and
11 to make sure that any government that sits would not have to
12 worry about Boards becoming complacent and not producing because
13 it's very important for the economy.

14 Q. Let's move you on to page 31, please, and I will deal
15 with this very briefly, Premier. It is a criticism that arises
16 in relation to the Social Security Board?

17 COMMISSIONER HICKINBOTTOM: Could I ask one last
18 question?

19 THE WITNESS: You could ask as many questions you
20 want, Commissioner.

21 COMMISSIONER HICKINBOTTOM: It's a short question.
22 It arises out of page 3177.

23 THE WITNESS: Yes, sir.

24 COMMISSIONER HICKINBOTTOM: This is your response to
25 our Request for Information.

1 THE WITNESS: Yes.

2 COMMISSIONER HICKINBOTTOM: The question was what
3 happened to the fund/assets held by the Climate Change Trust?
4 The answer was the funds are held in an account with the
5 Treasury. The question is what are they doing there, given that
6 by section 10 of the Act they're not Government funds. What are
7 they doing in the Treasury?

8 THE WITNESS: Well, even the non-government funds can
9 be under the Financial Act, where Government and those funds do
10 not spend them, they cannot. It will be illegal, so there are
11 instances where that would be something that would be allowed.

12 So, that is something would not, how to say, create
13 the lack of independence in that certain accounts for the Trust
14 Fund Board were not all up to the level of where they all needed
15 to be at the time.

16 So, the new Board now will get that money, and it will
17 never come back into the Treasury, but somewhere, some entity
18 had to hold it until when the Board is fully functional.

19 COMMISSIONER HICKINBOTTOM: Because the Board has been
20 defunct?

21 THE WITNESS: Right now it's not constituted. So,
22 when that happens, those funds, which is not much, may I add, at
23 this time, no offense to anyone saying anything about the former
24 Board, but whatever funds it is will be given to them, and it
25 will remain independent of Government after that.

1 COMMISSIONER HICKINBOTTOM: Thank you.

2 Thank you, Mr Rawat.

3 BY MR RAWAT:

4 Q. Yes. It's just to page 31 of your response, please,
5 Premier, in relations to the Social Security Board.

6 A. 31?

7 Q. 31, sir.

8 A. Thank you, sir.

9 Q. It's again a conflict-of-interest point that's the
10 basis of the potential criticism in relation to the Social
11 Security Board.

12 MR RAWAT: Commissioner, unless you tell me otherwise,
13 all I will note is that the Premier, in this response because
14 it's a criticism made elsewhere refers back to his earlier
15 relevant response.

16 COMMISSIONER HICKINBOTTOM: Yes.

17 And the Premier has given evidence on that.

18 MR RAWAT: Yes, he has, and we have gone into the
19 detail.

20 Commissioner, could I just ask for a short five-minute
21 break? We're almost at the end, but there is just one matter I
22 need to deal with, and then we can hopefully resolve things very
23 quickly.

24 COMMISSIONER HICKINBOTTOM: Yes.

25 THE WITNESS: Thank you.

1 COMMISSIONER HICKINBOTTOM: Thank you very much.

2 Just five minutes.

3 MR RAWAT: Thank you, Premier.

4 THE WITNESS: No problem, sir.

5 (Recess.)

6 COMMISSIONER HICKINBOTTOM: Thank you.

7 Mr Rawat.

8 MR RAWAT: Commissioner, thank you for that time.

9 Can I just--I've checked across my notes. I think
10 I've covered all areas in both the Warning Letters to the
11 Premier and the Warning Letters to the Cabinet, as I explained
12 earlier, so I've reached the end of my questions.

13 Can I conclude, firstly, by thanking the Premier--

14 THE WITNESS: Before we conclude, one thing I would
15 like to get clarified, Commissioner, for your records. It's
16 very important. That was dealing with--and it's something that
17 you said that you were going to check, and I also did a check on
18 it because I noticed during the proceedings you were able to do
19 a fact-check and actually see I was correct with the date as the
20 24th of April, and also that the GIS Online has a--which I
21 appreciate, both things fact-checked were correct and not saying
22 things out of turn.

23 But there was one section earlier, and it came up in
24 terms of the appointment of the gentlemen Isaac, and the Board
25 had--the BVI Airports Authority had the authority to do it, and

1 I checked under are the BVI Airports Authority Act under
2 section 10.6 of the memorandum and Articles of Association of
3 the BVI Airports Authority Limited. It is a company, while few
4 companies on the--in the Government, limited meeting of
5 Directors is constituted at least three Directors. Based on
6 your note that I'm seeing here, a note that I requested, it
7 would satisfy how they wanted to appoint anyone.

8 So, under section 8.7 also of the memorandum and
9 Articles of Association the Directors may at any time appoint a
10 person to be a director either to fill a vacancy or as an
11 addition to the existing Directors, if therefore is also be
12 possible for the Assistant Directors to appoint persons to act
13 as temporary Directors if this is deemed necessary for the
14 meeting to take place.

15 That there was important to highlight as well there
16 was one section also that I would draw the attention to which
17 would be the conflict of interest for the section of the Act for
18 this company because there is a company set up long before our
19 tenure, which says a Director of the company shall forward with,
20 after being aware of the fact that he is interested in a
21 transaction--he or she--entered into or to be entered into by
22 the company, disclose the interests to all other Directors of
23 the company for the purpose of subregulation 13.1 a disclosure
24 to all other Directors to the effect that a director is a
25 Member, director or officer of another named entity or has a

1 fiduciary relationship with respect to the entity or named
2 individual, and it is to be regarded as interested in any
3 transaction which may, after the date of the entry of
4 disclosure, be entered into that entity or individual is a
5 sufficient disclosure of interest in relation to that
6 transaction.

7 And it says the Director of the company who is
8 interested in a transaction entered into or want to be entered
9 into by the company may (a) vote on a matter relating to the
10 transaction, and (b) attend a meeting of Directors at which a
11 matter relating to the transaction arises and be included among
12 the Directors present at the meeting for the purposes of a
13 quorum.

14 There are some other areas with it, but I will leave
15 that there.

16 And there is, Commissioner, one other area that I
17 saw--

18 BY MR RAWAT:

19 Q. Before you move on to the other area, can I just
20 confirm for you that I did check it.

21 A. Oh, you did check it?

22 Q. That's in the Articles of Association of the Airports
23 Authority. That is the document that the COI does have.

24 A. Okay.

25 Q. And as the Premier has indicated, it's the--section 13

1 deals with conflicts of interest; section 8, from which the
2 Premier read out earlier, deals with Directors, which includes
3 the possibility to appoint a director, that the Director--the
4 term of Office of a director is fixed by resolution of
5 Shareholders or resolution of Directors, and the Director can be
6 removed from office.

7 So, just to reassure you, Premier, the Commissioner
8 has the full document, and so--

9 A. I thank you because you were asking how did Mr Isaac
10 get on, and I was stating the Board did that until Government
11 was reiterated, so I wanted to make sure I furnish you with that
12 information, that it wasn't done haphazardly, and also the
13 powers of the company, which is rare, I might add, but they
14 exist.

15 Q. The point--the reason for my intervention, Premier,
16 was that now you've put that detail on the record, what I also
17 on the record in the Transcript is the whole document is
18 available to the Commissioner.

19 A. You mean for the--

20 Q. In terms of the Airports Authority.

21 A. The Act, yeah. The Act needs to be--I agree the Act
22 needs to be--is public, is an Act.

23 COMMISSIONER HICKINBOTTOM: And we've got the Articles
24 of the company.

25 THE WITNESS: Yes.

1 BY MR RAWAT:

2 Q. I will take you to your next point now that you wanted
3 to clarify.

4 A. I just wanted to clarify something that I wanted to
5 make sure. In the Act of the TRC, when I looked at the Act of
6 the TRC, and we were talking about the--it was question of the--

7 Q. Is that the resolution in relation to Ms Murraine--

8 A. Ms Murraine.

9 Q. --Mr Sylvester?

10 A. In the Act--and I must highlight in my research, when
11 I did my research on it, and it's solely my research, I came to
12 help the Commission to come to a just outcome, transparent
13 Commission of Inquiry to have a just outcome; but in the Act, it
14 is clear in the Act that the Chairman, the Minister shall--this
15 is 7, Section 7, subsection 3. The Minister shall, after
16 consultation with the Leader of the Opposition, recommend to the
17 Council the appointment of one of the Commissioners as Chairman
18 and the other as Deputy Chairman and the appointment of the
19 Chairman and Deputy Chairman by the Minister shall be subject to
20 that approval of the Legislative Council by resolution.

21 The reason I said it in my earlier evidence is that I
22 never remembered where any other individuals would have a
23 resolution other than the Chair and the Deputy, but I didn't--I
24 couldn't remember the section in the Act, so I had to look for
25 it because, you know, it's quite a while I read through the

1 entire Act, and that Act that shows that there in Section 4 and
2 5 goes on to say about how you appoint the others, but it never
3 says that you needed a resolution in the Act itself from the
4 other Members of those.

5 There is some crosschecking, of course, with the areas
6 that are done, whether informally or formally, how things are
7 done until they evolve, but I just wanted to bring--to add more
8 context and also to help you, Commissioner, when you're doing
9 your assessment of this information if you have it already,
10 please forgive me, but I just wanted to clear that out. Make
11 sure that's clear.

12 COMMISSIONER HICKINBOTTOM: We certainly got the Act.

13 MR RAWAT: The Act is at Part 4, 3337, which is where
14 we will find section 7.

15 THE WITNESS: Yes.

16 MR RAWAT: And as the Premier has pointed out--

17 COMMISSIONER HICKINBOTTOM: 3337?

18 MR RAWAT: Yes, 3337.

19 COMMISSIONER HICKINBOTTOM: Yes, thank you.

20 MR RAWAT: And that's where we have the section that
21 the Premier summarized which--

22 COMMISSIONER HICKINBOTTOM: Yes.

23 MR RAWAT: --if we take it back to the appointments we
24 were considering on Wednesday, Mr Lewis and Mr. Wattley, the
25 Chair and Deputy Chair, would have to be subject to resolution.

1 THE WITNESS: Right.

2 BY MR RAWAT:

3 Q. But Ms Murraine and Mr Sylvester, who were
4 subsequently appointed as Commissioners, would not have to do
5 that because they were ordinary Commission.

6 A. Exactly.

7 Q. Thank you.

8 A. I will close, Commissioner, and I respectfully say
9 before I leave here today I wanted to just make some
10 observations on the matters, some of the matters that are being
11 reviewed by the COI. Of course, I must say that, for this
12 matter that, like the others that I have been ahead and do
13 tender to the Commission for how they allow me to give my
14 evidence. I thank you, Commissioner, for your understanding,
15 and Attorney Rawat. I must put that on the record.

16 And I must also say that the Virgin Islands continues
17 to welcome the COI, and I need to put this on the record that we
18 do, contrary--contrary--to what others may say or some may say,
19 we do welcome a transparent Commission of Inquiry, that we need
20 a just outcome to help the Virgin Islands to continue to move to
21 the next level, and there is no doubt like that, in the UK there
22 are improvements that can be made to Public Service and
23 governance in the Virgin Islands, and there are gaps that will
24 need to be filling in, and we are going to work on them as a
25 people. But the majority of matters reviewed in this process

1 are historic and, as such, may not take into account the
2 appetite for reform by this Government.

3 So, I just want to make sure that the caveat that
4 we're doing reforms is taken into account. This Government was
5 elected on a manifesto outlining widespread legislative change,
6 and that is obvious from the legislative agenda and what has
7 been approved. And it will be interesting if you get a copy of
8 what all had been approved since we have been in office, our
9 first two years in office, and we have action on many of these
10 pledges bringing in new rules for those in public office
11 addressing issues, immigration, and making the Virgin Islands a
12 more transparent and attractive jurisdiction for the economy to
13 flourish.

14 And I want to say that in the vein that we have done
15 so, although we are very young country and we have done so by
16 further strengthening good governance where we have powers of
17 ministerial accord, the contractor general legislation,
18 whistleblower, and by next week should pass the Integrity in
19 Public Life. So, we continue to monitor valued processes and
20 procedures, even with making sure that we do independent audits
21 of our systems in the best interests of the development of the
22 Virgin Islands and the people.

23 And we might not be there yet where other countries
24 have been, and we're a young nation but it would be remiss of
25 this Commission not to take into account the changes already

1 brought, and in those we are working on, and I named some of
2 them before.

3 So, I wanted to express my sincere thanks to the
4 Public Officers in this forum who support this Inquiry while
5 maintaining day-to-day operations and Ministries in the most
6 trying of circumstances because of while dealing with worst
7 pandemic in the last 100 years and some of them have lost some
8 of their family members in the last few weeks, and I told while
9 I was in this public forum that I will do so.

10 And, Commissioner, I know you did not have to, so I do
11 thank you for allowing me to say those few closing words for
12 this, and I will continue to help this Commission in the best
13 way I can because I know the transparent Commission of Inquiry
14 will yield a just outcome, and once that just outcome is allowed
15 by the Holy Spirit, this country definitely will be better as a
16 result.

17 COMMISSIONER HICKINBOTTOM: Thank you very much,
18 Premier.

19 Certainly, I echo your thanks to the public officials.
20 I know the public officials have been working in difficult
21 circumstance, particularly over the last couple of months or so,
22 and I certainly recognize the enormous amount of work that they
23 have done both as it were in their jobs within their ministries
24 and departments but also in assisting the COI to progress, so
25 thank you very much, Premier.

1 And thank you very much for your time and patience
2 today and also the gracious way in which you have given your
3 evidence, and it's been very helpful. Thank you. Thank you for
4 coming.

5 MR RAWAT: Can I echo that, and offer my thanks as
6 well to the Premier. You came on Wednesday for one day.

7 THE WITNESS: Tuesday.

8 MR RAWAT: Tuesday. I'm losing track of time.

9 But he generously made himself available to return.
10 And I thank looking at the clock, you perhaps didn't expect to
11 still be here.

12 THE WITNESS: That's not a problem.

13 Thank you, my good friend, Attorney Rawat, and to you,
14 my good friend, Commissioner, I thank you all so much.

15 COMMISSIONER HICKINBOTTOM: Thank you.

16 (Witness steps down.)

17 COMMISSIONER HICKINBOTTOM: Could I raise one short
18 point, Mr Haeri. Sir Geoffrey Cox indicated that there may be
19 some areas in submissions on the topic of Statutory Boards may
20 assist me, and it seems to me that there are two pleas:

21 The first, which is limited because the Premier
22 accepts that the revocation of the Climate Change Trust Fund
23 Board was illegal, so there is no need to do any submissions on
24 that, but it would help--it would help to have submissions,
25 please, on whether the revocation of the Board of the BVI Ports

1 Authority is said to be legal, and if so why.

2 And secondly, if any public official--and that's
3 widely defined here, but I include Cabinet as well--knowingly or
4 recklessly acts contrary to legislation or with--and/or with a
5 view to undermining the will of the Legislature, can that--is
6 that capable of being in the public interest?

7 Some short submissions limited to, say, five pages
8 would help on that. But I do not want evidence, and I say that
9 because the IRU have launched very substantial amounts of
10 evidence with submissions. Legal submissions on those matters
11 would be of assistance, please, as I say, short, five pages.
12 And if those could be done, say, by the end of Monday, that
13 would be very helpful. Thank you.

14 Good. Anything else?

15 Good. Thank you all, and thank you again, Premier,
16 for your time.

17 THE WITNESS: Pleasure, sir.

18 COMMISSIONER HICKINBOTTOM: And thank you very much,
19 Mr Rawat.

20 (End at 6:59 p.m.)

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