

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

HEARINGS: DAY 53
(FRIDAY 22 OCTOBER 2021)

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

Before:

Commissioner Rt Hon Sir Gary Hickinbottom

Sir Geoffrey Cox QC, Mr Edward Risso-Gill and Ms Sara-Jane Knock of Withers (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.

Court Reporter:

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Those present:

Session 1

Sir Geoffrey Cox QC, Withers LLP
Mr Edward Risso-Gill, Withers LLP
Ms Lauren Peaty, Withers LLP

Mr Richard Rowe, Silk Legal

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
Ms Rhea Harrikissoon, Solicitor to the Commission

Mr Dame Peters, Audio-Visual Technician

P R O C E E D I N G S

Session 1

COMMISSIONER HICKINBOTTOM: Good morning, everyone.

In June, I set out the topics upon which I proposed to hear oral evidence in open hearings, namely the interests held and declared by Members of the House of Assembly and Elected Ministers, procurement of contracts, leases, Statutory Boards, Crown Land, Belongership, and governance and the law-enforcement and justice systems, and I have now heard evidence on all of those topics, including oral evidence in relation to criticisms that arose from the evidence in relation to them.

And so the stage of evidence collection, which I began in January, is now concluded, and I'm going to proceed on the basis that the Elected Ministers, et cetera, as represented by the Attorney General and her IRU, have now disclosed all documents in relation to these matters that are potentially relevant to my Terms of Reference, and the same applies to Members of the House of Assembly who are represented by Silk Legal.

What I propose to do is to set some directions for the next stage of the Inquiry this morning, and what I'll do is I will go through the directions that I propose with dates, and

1 then go around, firstly asking Mr Rawat and then asking each of
2 the participants for any comment on the proposed directions,
3 including the dates I propose, any of the specific directions I
4 propose, and, of course, any further directions that might be
5 sought.

6 The evidence stage, as I say, is complete, but that's
7 subject to a number of caveats:

8 First, there are outstanding several requests for
9 disclosure, which we have made to the Attorney General, some
10 several weeks ago, and I propose directing that the Attorney
11 complies with each of those requests by 4:00 p.m. on Friday the
12 29th of October. The IRU have supplied us with a list, and a
13 full list will be included in a formal order.

14 Second, the Attorney General, on behalf of the Elected
15 Ministers, has indicated that she wishes to question His
16 Excellency The Governor directly by way of cross-examination,
17 and has reserved her position in relation to applying to
18 question to the former Governor Augustus Jaspert. I've already
19 indicated during the course of the hearings this week that I'm
20 willing, in principle, to grant the application to question the
21 Governor, and he has said that he's willing to be questioned,
22 but I have yet to determine the topics to which the questions

1 will be limited.

2 In relation to those applications, I propose to direct
3 firstly that, by 4:00 p.m. today, the Attorney notifies the COI
4 of dates of availability for counsel of her choice--I think that
5 is Sir Geoffrey--for the period the 15th to the 26th of
6 November. And whilst I can't guarantee it, I will do what I can
7 to accommodate counsel.

8 Second, by 4:00 p.m. on Tuesday the 26th of October,
9 the Attorney (a) notifies the COI of the areas in respect of
10 which she wishes to question the Governor; and (b) notifies the
11 COI if she wishes to question Mr Jaspert and, if so, the areas
12 upon which she wishes to question him; and thirdly, by 4:00 p.m.
13 on Wednesday the 3rd of November, she sends the COI in
14 electronic form a properly paginated and indexed hearing bundle
15 for that Hearing.

16 Third, the Attorney has indicated that the Elected
17 Ministers, et cetera, for whom she acts, wish to file further
18 evidence in relation to the training budget for the Public
19 Service, and I propose directing that that will be sent to the
20 COI Team in electronic form, again duly indexed, by 4:00 p.m. on
21 Friday the 29th of October. I understand the Attorney also
22 wishes to lodge an Affidavit to explain that budget, and I'm

1 content with that by the same time and date, but the Affidavit
2 should be restricted to that explanation.

3 Fourth, I was informed yesterday that the Attorney
4 General had received a file from the Auditor General on Blunder
5 Bay, which she was reviewing, and I directed that a copy of that
6 file be lodged electronically with the COI by 4:00 p.m. on
7 Friday the 29th of October.

8 Fifth, although I'm proceeding on the basis that all
9 relevant documents have now been disclosed to the COI by the
10 Attorney General in respect of those whom she represents, if I
11 have any specific disclosure requests or queries, then those
12 will be made to the Attorney General as and when they arise.

13 Subject to all of those caveats, evidence is complete.
14 If anyone wants to lodge any further evidence, then they will
15 have to make an application to me, setting out what evidence
16 they now want to disclose and why the evidence was not made
17 available to the COI sooner.

18 In addition to those matters of evidence, a properly
19 formulated application on PII, and I understand other grounds,
20 in respect of the bundle of documents which the COI prepared in
21 connection with the Government's leasing of radar barges remains
22 outstanding. Earlier this week, the IRU indicated that the NSC

1 was still considering that request.

2 In addition, we were told yesterday evening that the
3 NSC wished to consider whether any parts of the Transcripts from
4 days 50 and 52 this week, which concerned radar barges, might be
5 subject to a PII application. That at the moment is holding up
6 publication of those Transcripts. So, I propose directing that,
7 if PII or any other ground for non-disclosure is maintained over
8 either the bundle or the Transcripts, then a properly formulated
9 application with evidenced reasons for each suggested redaction
10 be made to the COI by 4:00 p.m. on Friday the 29th of October,
11 failing which I will proceed on the basis that all of that
12 material can be publicly disclosed.

13 A similar situation arises in relation to those
14 documents annexed to the response of the Elected Ministers to
15 the Position Statement submitted by the Governor. That Response
16 itself has been published on the Inquiry's website. I was
17 unable to publish the accompanying documents as I would have
18 wished until the submission of a properly formulated PII
19 application. So again, I direct that if PII or any other ground
20 for nondisclosure is maintained over documents annexed to that
21 Response, then a properly formulated application with evidenced
22 reasons for each suggested redaction be made by the Attorney

1 General to the COI by 4:00 p.m. on Friday the 29th of October,
2 failing which again I will proceed on the basis that all of that
3 material can be publicly disclosed.

4 Many documents have been disclosed to the COI in
5 respect of which the Attorney has reserved her position in
6 relation to an application that they are not disclosed or used
7 either at all or further, for example, in my Report; that was
8 contrary to the COI Protocols, but I have respected that
9 position. However, it does mean that the Attorney will have
10 considerable work to do in the near future, and she will have to
11 work at some speed if the Report is not to be delayed.

12 As I prepare my Report, I shall identify documents to
13 which I propose to refer in the Report, and send--identify those
14 to the Attorney with a request that any application in respect
15 of PII or any other ground that the document or relevant part
16 not be disclosed be made within a week. That is, I consider, a
17 generous time, but it is intended to give the Attorney more than
18 sufficient time to make any application that she wishes to make.
19 It is for her to put in place a mechanism to ensure that any
20 application by those whom she represents wish to make is made in
21 that time. Any application must be properly made, of course,
22 with reasons for each suggested redaction, and I will deal with

1 each application on paper. If no proper application is made
2 within that time, then again I propose to proceed to refer to
3 the document or part of the document in the Report, and will
4 proceed on the basis there is no objection to it being made
5 public. At that stage, it will be too late to make an
6 application that the document or any part of it should not be
7 disclosed to the public.

8 In respect of further submissions, first, I have asked
9 the attorney to make written submissions in relation to the
10 scope of Section 13 of the Register of Interests Act which it is
11 said on behalf of the Elected Ministers that the Registrar
12 breached and the then-Governor encouraged her to breach. The
13 submissions will focus on the scope of the word "information" in
14 that Section.

15 And I will make a direction now that the Attorney
16 lodges those submissions with the COI by 4:00 p.m. on Friday the
17 29th of October, and that if Silk Legal wish to make submissions
18 on that same point, they too do so by that same time and date.

19 Second, I understand that the Attorney would like to
20 put in further submissions on her own account on governance
21 following the Hearings on Governance that we have had this week.
22 Given that in and early and possibly the first Hearing that I

1 held, she submitted with some force that she was in some ways
2 responsible for governance. I understand her wish to make those
3 submissions, and I would be happy to receive them by 4:00 p.m.
4 on the 29th of October. I will limit those submissions to 15
5 pages.

6 Third, in respect of Closing Submissions, I propose
7 directing that the Attorney and Silk Legal, on behalf of the
8 Members of the House of Assembly who are not Ministers, shall by
9 4:00 p.m. by Friday the 29th of October lodge with the COI a
10 list of matters upon which they would wish to make Closing
11 Submissions. I will then make further directions as to the
12 topics upon which I would find it helpful to receive Closing
13 Submissions. The opportunity to make Closing Submissions, such
14 as I give it, should not be taken as a mechanism to adduce fresh
15 evidence. Any such written submissions, insofar as they're
16 allowed, will have to be lodged by 4:00 p.m. on Friday the 12th
17 of November. I will then make further directions as to any oral
18 submissions, but if they are needed, then they will be heard, I
19 propose, on the same day as the further questioning of the
20 Governor later in November.

21 Those are the proposed directions. First, I think it
22 would be sensible if Mr Rawat has anything to add or say about

1 those directions before I turn to Sir Geoffrey and Mr Rowe.

2 MR RAWAT: Commissioner, nothing further from me in
3 terms of the directions.

4 COMMISSIONER HICKINBOTTOM: Good. Thank you,
5 Mr Rawat.

6 Sir Geoffrey.

7 SIR GEOFFREY: Yes. Good morning, Commissioner.
8 Thank you for that.

9 I think our initial reaction is that most of those
10 directions seem perfectly achievable. There are one or two
11 where I would like to request your indulgence for a little extra
12 time.

13 There is quite a lot for us to do by the 29th of
14 October. Looking at the list, the first is the Affidavit
15 relating to training budget. As I indicated to counsel to the
16 Inquiry, it's a little wider than that--not much, but a
17 little--in that it deals with public servicing budgeting
18 generally, and specifically addresses certain initiatives which
19 the Governor indicated in his evidence. You may recall he read
20 out a list of initiatives which had been taken in the recent
21 past in connection with reform of the Public Service.

22 So, what we propose is simply to address factually

1 those particular initiatives and the Budgets for them, and that
2 will include the Budget for training that he mentioned, so it
3 will be a factual presentation, because otherwise I will be
4 asking questions but have no evidential basis upon which to do
5 so, so I'm hoping that will be helpful.

6 COMMISSIONER HICKINBOTTOM: Well, it may be helpful,
7 Sir Geoffrey. I mean, it's not what I had understood, which was
8 purely why the training budget, if the training budget was
9 \$25,000, which I understand--

10 SIR GEOFFREY: Yeah.

11 (Overlapping speakers.)

12 SIR GEOFFREY: I did, I think, widen it a little bit
13 in my discussions with counsel, but it's quite understandable
14 given the time that you've had before coming in, but it is--my
15 application is for a little wider than that to address the
16 initiatives of which His Excellency The Governor spoke in his
17 evidence the day before yesterday, as well as the budgeting for
18 the Public Service and Public Service reform, that includes
19 training. So, that's the first point.

20 No, sir--

21 COMMISSIONER HICKINBOTTOM: Sir Geoffrey, can we deal
22 with that? Can we deal with that?

1 SIR GEOFFREY: Of course, yes.

2 COMMISSIONER HICKINBOTTOM: I think, in
3 substance--we'll come on to timing, too, but in substance, what
4 you'll have to do is you'll have to submit the Affidavit that
5 you would like to rely on, and then I will consider it. To say
6 this--and I don't say this in any way by way of criticism, to
7 say that it is slightly wider than the explanation--than the
8 confirmation that the training budget is or is not \$25,000 is
9 somewhat of an understatement, but I would like to see what you
10 would like to say in an Affidavit, and then I can consider it.

11 But how long would you like to make that Affidavit?

12 SIR GEOFFREY: That's my point. I would be grateful
13 for a week longer than that.

14 COMMISSIONER HICKINBOTTOM: Fine. Stop there, Sir
15 Geoffrey. You can have that week unless somebody tells me that
16 it would be impossibly inconvenient in some way, but that is
17 fine. I have no problems with that.

18 Except to say this, and I know that there has been a
19 great deal of communication/correspondence about this and
20 references in hearings, but these are dates which it is really
21 important--really important--they are met because they are on
22 the critical path for the preparation of the Report, and the

1 time to prepare the Report is really very tight. But subject to
2 that, let me see what you would like to say in the Affidavit by
3 Friday the 5th of October? I think.

4 MR RAWAT: Sorry--

5 SIR GEOFFREY: 5th of November.

6 COMMISSIONER HICKINBOTTOM: 5th of November. Okay.
7 Good.

8 SIR GEOFFREY: So much, then, sir, for that.

9 I'm going just, if I may, through the list which I
10 took hurriedly while you were speaking.

11 Then there's Blunder Bay, I don't think there's a
12 difficulty with that one, sir, I think we can get to you that.

13 PII, sir, is a difficulty for us because I think you
14 had a communication from the Attorney. At the moment, the
15 mechanism is that the PSC has to be consulted--

16 COMMISSIONER HICKINBOTTOM: The NSC?

17 SIR GEOFFREY: I beg your pardon, the NSC.

18 The NSC has to be consulted and a meeting awaited.

19 Now, the Attorney, I hope--we will see if we can put
20 in place arrangements to make that a more streamlined procedure,
21 but I am concerned about the Friday the 29th deadline for that
22 because it will depend on the NSC agreeing to meet, which is

1 currently the procedure that is being adopted. And until it
2 meets, it won't be able to consider putting any other mechanism
3 in place. And I'm afraid I'm just not sure when the Secretary
4 and when that will be able to be convened. I'll speak to the
5 Attorney today with a view to accelerating whatever can be done
6 to expedite it, but I wonder whether you would just permit us to
7 come back on that date subject to the NSC's decision; in other
8 words, when it's meeting.

9 COMMISSIONER HICKINBOTTOM: Well, a couple of things,
10 Sir Geoffrey. Firstly, this in respect to the Radar Barges
11 Bundle, is long-outstanding. It's certainly--I think from the
12 end of August, I think probably from the beginning of September,
13 but it's been outstanding for a couple of months. The NSC, I
14 think, has been considering this, and has considered it twice
15 and come up with different answers, and I'm afraid--and I say
16 this with no disrespect to the NSC at all, but to be told that
17 the Attorney simply doesn't know when a response can be given
18 because she doesn't know that the NSC--when the NSC will meet
19 is--is a sufficient response for me.

20 The current position with regard to these documents is
21 that there is no application--there is no proper
22 application--for PII. Until there is a proper application,

1 there is no PII in existence, and certainly it seems to me that
2 I have given the NSC more than sufficient opportunity to respond
3 to this.

4 What I propose to do, Sir Geoffrey, in the light of
5 your submission--and again subject to anybody telling me that
6 this is impossible, which I don't think it is--is to extend the
7 date by a week to the 5th of November, but that, I'm afraid,
8 will be the date. And if it's necessary for the NSC to meet
9 extraordinarily to deal with this important matter, then I'm
10 afraid so be it, but that's the date I'm going to put in the
11 direction.

12 SIR GEOFFREY: So be it, sir, and we will do our best
13 to encourage expedition. What I'm going to ask the Attorney is
14 if we can put before the NSC a streamlined procedure for this so
15 that matters can be dealt with in future, as you warned us they
16 will have to be.

17 COMMISSIONER HICKINBOTTOM: And that will have to be
18 quick. I'm not sure--

19 SIR GEOFFREY: I get that. I get that.

20 COMMISSIONER HICKINBOTTOM: I'm not sure--I'm sorry to
21 interrupt--I'm sorry to speak over you, Sir Geoffrey.

22 I'm not sure that many of the matters outside the

1 radar barges will bear upon security. I think most of them will
2 be Cabinet matters.

3 SIR GEOFFREY: Very well.

4 COMMISSIONER HICKINBOTTOM: I think a streamlined
5 procedure will need to be put in place. Thank you.

6 SIR GEOFFREY: But one of the things I will ask the
7 Attorney, sir, is if possibly the NSC could be asked to be
8 considered that at the meeting--asked to consider that.

9 So, sir, moving on from that, I'm just going through,
10 if I may quickly, submissions on Section 13, yes, I have no
11 submission on that, but on the Attorney's own submissions, I
12 have been asked by the Attorney whether you would be kind enough
13 to grant a further week, and she--

14 COMMISSIONER HICKINBOTTOM: Again, unless anybody
15 starts shouting at me now, yes, I will. Those are, of course,
16 her own views.

17 SIR GEOFFREY: Exactly.

18 COMMISSIONER HICKINBOTTOM: The 5th of November, Sir
19 Geoffrey, yes.

20 SIR GEOFFREY: Yes, I'm most grateful. Thank you.

21 As to the rest, I think the next one you addressed was
22 Closing Submissions, and by Friday on the 29th you simply want a

1 list of those matters. I see no difficulty--well, I see
2 difficulty but I see no insurmountable difficulty by doing that.

3 And then I think you said by Friday the 12th you want
4 the written submissions. Am I right about that, sir? I think
5 that's right.

6 COMMISSIONER HICKINBOTTOM: Yes.

7 SIR GEOFFREY: And then you will consider oral.

8 Again, I see no significant--well, again, I see difficulty, but
9 nothing that should be unachievable, so those are my submissions
10 on your dates.

11 COMMISSIONER HICKINBOTTOM: Sir Geoffrey, thank you
12 very much.

13 Mr Rowe, any submissions in relation to--I think there
14 are one or two matters where Silk Legal are given, as it were,
15 the directions in relation to any submissions they would wish to
16 make? That's all, I think.

17 MR ROWE: Good morning, Commissioner. Good morning,
18 everybody.

19 Commissioner, the dates are satisfactory to us. We
20 would, however, wish to give one brief legal submission, which
21 we could do by Tuesday next week.

22 COMMISSIONER HICKINBOTTOM: On what--

1 MR ROWE: I will tell you what it's about. It is
2 regarding the Sea Cows Bay Project, and it is simply to point
3 out that the physical Planning Act of 2002 was not in effect
4 when the Project was approved; that it was the Land Development
5 and Control Act of 1991. But we will give those in a very short
6 submission to you.

7 COMMISSIONER HICKINBOTTOM: Mr Rowe, I will let those
8 into the directions, no problem at all, by 4:00 p.m. on Tuesday.
9 Thank you very much, Mr Rowe.

10 MR ROWE: Thank you very much.

11 COMMISSIONER HICKINBOTTOM: Mr Rawat, any--

12 MR RAWAT: Just some brief observations.

13 The Affidavit that is expected on training budgets, I
14 think the observation I'm making is it's important that the date
15 of the 5th of November not need to be extended further, and the
16 reason I say that is because, if it's going to be put to the
17 Governor, he will need--and any legal representative he
18 appoints, will need time to consider it, and they may wish to
19 put in other evidence.

20 COMMISSIONER HICKINBOTTOM: Yes.

21 SIR GEOFFREY: If I may say so, that is precisely why
22 I wanted the Affidavit so the Governor could have it in advance

1 of my examination.

2 COMMISSIONER HICKINBOTTOM: Yes. Thank you.

3 MR RAWAT: In terms of PII, again, one factor to bear
4 in mind is that, if it comes to a hearing, we will have to
5 schedule a PII hearing. But hopefully, as is routine, it may be
6 that once the application is submitted, then there can be
7 discussions between the COI and the Attorney as to a way forward
8 that will avoid a hearing, and I hope we can have productive
9 discussions of that sort.

10 You've allowed the Attorney to submit further thoughts
11 on governance. Obviously, you will want, as you have done with
12 other Position Statements, to publish that, and so it would be
13 helpful if thought is given to it being drafted in such a way
14 that it doesn't need to have redaction or any applications; I
15 think that will be helpful.

16 And I think in terms of the list of matters on which
17 the participants would want to make Closing Submissions, it
18 would be helpful if there is a distinction to be made between
19 factual matters and any legal matters that they wish to address
20 you on.

21 COMMISSIONER HICKINBOTTOM: Yes.

22 Very good. Well, all of those seem to be absolutely

1 fine observations to me. Thank you.

2 We will draw up a sort of formal order with all of
3 this in and let you have that, I mean hopefully later today but
4 certainly in the next day or so.

5 And in relation to the Hearing which looks as though
6 it's going to be in the second half of November, then I will
7 assess when we know precisely what the Hearing is going to cover
8 in terms of submissions and witnesses and evidence, the
9 best--the most practical way of accommodating that Hearing, and
10 I will let you have details of that in due course in November.

11 Anything else, Sir Geoffrey?

12 SIR GEOFFREY: I've had a number of discussions with
13 counsel--those are ongoing; I'm sure you will have been briefed
14 on them--but not for the moment, no.

15 COMMISSIONER HICKINBOTTOM: Thank you very much.

16 Mr Rowe?

17 MR ROWE: Commissioner, no, nothing further to add.

18 COMMISSIONER HICKINBOTTOM: Good. Thank you very
19 much.

20 Well, over the last six months, the COI has held over
21 50 days of hearings of gathering evidence, although because of
22 COVID, some participants in the Hearings--not using that term,

1 in the technical term that's used in the COI, but people who
2 have been involved in the Hearings--have attended remotely, but
3 all of the Hearings have been held here at the BVI International
4 Arbitration Centre. And before I close this Hearing and this
5 stage of the Inquiry, I would like to thank the CEO of the IAC,
6 Francis La Salle, and the Centre Manager Janette Brin, who have
7 given us tremendous administrative support here, and ensured
8 that we have been able to conduct our Hearings from here safely
9 during COVID and in compliance with the important restrictions
10 that the pandemic has resulted in.

11 And also vital to these hearings, as will be apparent
12 to anyone who has been watching them, have been Dame Peters, who
13 has been responsible for the audio-visual technology, which has
14 enabled the public to see and hear live most of our hearings;
15 and also David Kasdan and his team--it's a very, very small
16 team, but David and his team--for the live stenography, which
17 has enabled us to publish transcripts of hearings usually on the
18 same day, and the intensity of the Hearings has meant that his
19 efforts have at times been, frankly, heroic, and I'm very
20 grateful to him. It was determined that the COI proceedings
21 should be as open to the public as possible, and Dame and David
22 have enabled them to be so.

1 I would also like to thank both the Public Officers
2 who have borne the brunt of the work in responding to COI
3 requests for documents and other information. I understand and
4 very much appreciate the efforts to which they have gone, and
5 also thank the Witnesses from whom I've heard who have made
6 themselves available, in some instances repeatedly and often in
7 the midst of other important commitments.

8 And finally, I would like to thank the people of the
9 BVI for their support and their kindness. This COI was
10 established because of their public welfare, and it is being
11 conducted in their interests. But as I say, the support and the
12 kindness that I have received and the COI Team have received,
13 again very, very much appreciated. It has been vital.

14 Good. Thank you all very much, and now I will close
15 this hearing. Thank you.

16 (End at 10:09 a.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, reading "David A. Kasdan", is written above a solid horizontal line.

DAVID A. KASDAN