

Rules of Procedure and Practice Commission of Inquiry into Historic Losses of Land in Bermuda

The following Rules will govern the operation of the Commission of Inquiry into Historic Losses of Land in Bermuda. The Commission reserves the right to amend, add or omit materials.

Rules of Procedure and Practice

1. Commission proceedings will be divided into two phases.

Part I will:

- (a) Collect and collate any and all evidence and information available relating to the nature and extent of such historic losses of citizens' land;
- (b) Prepare a list of all land to which such historic losses relate;
- (c) Identify any persons, whether individuals or bodies corporate, responsible for such historic losses of citizens' property.

Part II will set out the systemic reasons that allowed the facts found in Part I of the Inquiry to occur.

A. RULES-PART I

GENERAL

2. The Commission is established under the Commissions of Inquiry Act 1935 ("the Act") and has the powers and privileges provided for in the Act.
3. These Rules are made under section 8 of the Act.
4. Public hearings will be convened in the City of Hamilton and other such places as the Commission deems convenient to address issues related to Part I of the Inquiry.
5. All parties and their counsel shall be deemed to undertake to adhere to these Rules, which may be amended or dispensed with by the Commission as it sees fit to ensure fairness. Any party may raise any issue of non-compliance with the Chair of the Commission.
6. In the event a party may wish to raise non-compliance with these Rules, the party shall forthwith advise the party who is alleged to have breached the Rules and if no remedial step is taken, bring the matter to the attention of the Chair in writing. The Chair shall notify all parties and hold a hearing to determine whether the Rules have been breached and issue an appropriate Order.
7. Insofar as it needs to gather evidence, the Commission is committed to a process of public hearings. However, applications on some aspects of its mandate may be made to proceed

in camera. Such applications should be made in writing at the earliest possible opportunity and not later than three days prior to when such evidence is scheduled to be heard.

Item. The Commission may decide to hear oral submissions to deal with the application. If the Commission decides to have oral submissions, it may hear it in camera.

Item. *The Commission may on its own initiative or on the application of a party to its proceedings direct that:*

a. Evidence be taken or submissions received by video link or audio link from a person at a place, whether inside or outside of Bermuda, that is outside of the place where then Commission is sitting;

b. The person giving evidence or making submissions shall for the purposes of the hearing of the Commission be deemed to be located in Bermuda.

Amendment approved by COI June 2020

8. Decisions required to be taken by the Commission will be taken by majority vote, and once announced by the Chair of the Commission will bind the Commission and members of the Commission.
9. For the purpose of the deliberations, the Commission may meet in person or by such convenient electronic manner as may be available, including telephone, Skype and Facetime.
10. The Chair will have a vote in the deliberations but in the event of a tie vote, the Chair will have a second deciding vote. For the purpose of any meeting, the quorum shall be four members of the Commission but shall always include the Chair.

STANDING

- 11a. Commission Counsel, who will assist the Commission throughout the Inquiry and is to ensure the orderly conduct of the Inquiry, will have standing throughout the Inquiry. Commission Counsel has the primary responsibility for representing the public interest at the Inquiry, including the responsibility to ensure that all interests that bear on the public interest brought to the Commission's attention.

Item. Commission Counsel may be assisted by another lawyer, and Commission Counsel with the consent of the Chair of the Commission (hereafter “the Chair”) may delegate administrative tasks to the Solicitor.

- 11b. Persons may be granted standing by the Commission if the Commissioners are satisfied that they have an interest in the proceedings. More specifically:
- a) the person’s interest may be affected by the findings of the Commission;
 - b) the person’s participation would further the conduct of the Inquiry;
 - c) the person’s participation would contribute to the openness and fairness of the Inquiry.

Any person who has relevant evidence or relevant documents should so advise Commission Counsel, who will decide whether or not that person should be called to give evidence.

Item. “Person” or “Persons” in these Rules have the meaning as defined in section 7 of the Interpretation Act 1951.

Item. The term “relevant” is intended to have a broad meaning and includes anything that touches or concerns the subject matter of the Inquiry or that may directly or indirectly lead to other information that touches or concerns the subject matter of the Inquiry.

Item. The terms “documents” and “records” are intended to have a broad meaning, and include the following mediums: written, electronic, audiotape, videotape, digital reproductions, photographs, films, slides, maps, graphs, microfiche and any data and information recorded or stored by means of any device.

In order to avoid duplication, and thereby promote time and cost efficiencies, persons or groups of joint or similar interest are encouraged to seek joint standing.

The Commission will determine those parts of the Inquiry in which a party granted standing may participate.

12. The term “party” is used to convey the grant of standing and is not intended to convey notions of an adversarial proceeding.
13. Counsel representing witnesses called to testify before the Commission may participate during the hearing of such evidence as provided in these Rules.

FUNDING

- 14a. The Commission may make recommendations to the Government of Bermuda regarding funding for counsel and other expenses of parties who have been granted standing.
- 14b. Applications for funding shall be made in writing via facsimile, email or regular mail addressed to the Commission and shall contain the following:
- (a) an affidavit stating whether an applicant would be able to participate without such funding, supported by relevant documentation, which may include financial information and, for organizations, financial statements, operating budgets, the number of members and membership fee structure. Applicants should also indicate whether they have contacted other groups or individuals with a view to forming an amalgamated group for the purpose of seeking standing and/or funding, and the results of any such contacts;
 - (b) a description of the purposes for which the funds are required, how the funds will be disbursed, and how they will be accounted for;
 - (c) a statement of the extent to which the applicant will contribute its own funds and personnel to participate in the Inquiry; and
 - (d) the name, address, telephone number and position of the individual who would be responsible for administering the funds, and a description of the financial controls that would be put into place to ensure that any funding provided is disbursed for the purposes of the Inquiry.
 - (e) In the event that funding is granted to a party to retain and be represented by counsel on such terms as the Government may require, invoices shall be submitted to the Government of Bermuda directly at the invitation of the Government. The Government may ask for the recommendation of the Chair whether the invoice should be paid in whole or in part.

EVIDENCE

15. In the ordinary course of events, Commission Counsel will call and question all witnesses who will testify at the Inquiry. Counsel for a party may apply to the Commission to lead a

particular witness's evidence in-chief. If counsel is granted the right to do so, examination shall be confined to the normal rules governing the examination of one's own witness.

16. Commission Counsel may apply to the Chair for a subpoena to be issued to any person required to give evidence.
17. The Commission is entitled to receive any relevant evidence which might otherwise be inadmissible in a court of law. The strict rules of evidence will not apply to determine the admissibility of evidence.
18. Although in the ordinary course of events evidence will be oral at the hearing, in exceptional cases in the event that a witness is infirm and unable to attend, evidence may be tendered in writing or through such other means as are provided in the Rules of the Supreme Court of Bermuda.
19. Parties are encouraged to provide to Commission Counsel the names and addresses of all witnesses they feel ought to be heard, and to provide Commission counsel copies of all relevant documentation, including statements of anticipated evidence, at the earliest opportunity.
20. Commission Counsel shall have a discretion to refuse to call or present evidence. When Commission counsel indicates that he has called all the witnesses whom he intends to call in relation to a particular issue, a party may then apply to the Chair of the Commission for leave to call one or more additional witnesses whom the party believes has evidence relevant to that issue. If the Chair of the Commission is satisfied that the evidence of the witness is needed, Commission Counsel shall call the witness.

WITNESSES

21. Anyone interviewed by or behalf of Commission counsel is entitled, but not required, to have one personal counsel present for the interview to represent his or her interests.
22. Witnesses will give their evidence at a hearing under oath or affirmation.

Item. Witnesses may request that the Commission hear evidence pursuant to a subpoena in which case a subpoena shall be issued.

23. Witnesses who are not represented by counsel for parties with standing are entitled to have their own counsel present while they testify. Counsel for a witness will have standing for the purposes of that witness's testimony to make any appropriate objection.

24. Witnesses may be called more than once.

Item. Order of Examination. The order of examination will be as follows:

- a) Commission Counsel will adduce the evidence from the witness. Except as otherwise directed by the Chair, Commission Counsel is entitled to adduce evidence by way of both leading and non-leading questions;
- b) Parties granted standing to do so will then have an opportunity to cross-examine the witness to the extent of their interest.
- c) The order of cross-examination will be determined by the parties having standing and if they are unable to reach agreement, by the Chair of the Commission;
- d) Counsel for a witness, regardless of whether or not counsel is also representing a party, will examine last, unless her or she has adduced the evidence of that witness in-chief, in which case there will be a right to re-examine the witness; and
- e) Commission Counsel has the right to re-examine the witness.

25. Except with the permission of the Chair of the Commission no counsel other than Commission Counsel may speak to a witness about the evidence that he or she has given until the evidence of such witness is complete. Commission Counsel may not speak to any witness about his or her evidence while the witness is being cross-examined by other counsel.

Item. A witness may apply to the Commission for measures aimed at protecting his or her identity for a compelling reason as determined in the sole discretion of the Chair. Upon a successful application to the Commission the witness may be granted the status of “Confidentiality”.

Item. For the purposes of the Inquiry, Confidentiality may include the right to have his or her identity disclosed only by way of non-identifying initials, and, if the individual so wishes, the right to testify before the Commission in private, together with any other privacy measures that the party may request and the Chair, in her discretion, grants.

Item. Unless the Chair otherwise directs, only members of the Commission, Commission staff, Commission Counsel and counsel for a party who has a direct interest in the issue in

question and counsel for the witness who was granted confidentiality may be present at any confidential hearing, or have access to confidential documents.

Item. Bermuda media representatives who are subject to the Confidentiality Order may be present during testimony being heard in private.

Item. Media reports relating to the evidence of a witness granted Confidentiality shall avoid references that might reveal the identity of the witness. No photographic, audio, visual, or other reproduction of the witness shall be made either during the witness's testimony or upon his or her entering and leaving the site of the Inquiry.

Item. All parties, their counsel, Commission staff and contracted service providers, and media representatives shall be deemed to undertake to adhere to the rules respecting Confidentiality.

Item. If special arrangements are desired by a witness in order to facilitate the comfort of the witness in testifying, a request for accommodation shall be made to the Commission sufficiently in advance of the scheduled appearance of the witness to reasonably facilitate such a request. While the Commission will make reasonable efforts to accommodate such requests, the Commission retains the ultimate discretion as to whether, and to what extent, such requests will be accommodated.

DOCUMENTS

Access to Evidence

26. The Chair shall designate the Clerk or some other competent person to collect, mark, organize and keep all documents filed at the hearings of the Commission as well as all transcriptions of the hearing.
27. In the event an interpreter is required to assist any witness, such interpreter shall be provided by the Commission.
28. All evidence shall be categorized and marked **P** for public sittings and, if necessary, **C** for sittings in camera.
29. Electronic copies of the **P** transcript of evidence will be provided to parties by the Secretary or her delegate and will be published as soon as is possible on the Commission website. Hard copies of the transcript may be ordered by anyone prepared to pay the cost. One copy

of the **P** transcript and the **P** exhibits of the public hearings will be made available for public review.

30. Another copy of the **P** transcript of the public hearings and a copy of **P** exhibits will be available to be shared by the media.
31. Only those persons authorized by the Commission, in writing, shall have access to **C** transcripts and exhibits.
32. The Commission expects all relevant documents to be produced to the Commission by any party with standing.
33. Originals of relevant documents are to be provided to Commission counsel upon request.
34. Counsel to parties and witnesses will be provided with documents and information, including statements of anticipated evidence, only upon giving an undertaking that all such documents or information will be used solely for the purpose of the Inquiry and, where the Commission considers it appropriate, that its disclosure will be further restricted.
Item. The Commission may require that documents provided, and copies made, be returned to the Commission if not tendered in evidence.
Item. Counsel are entitled to provide such documents or information to their respective clients only on terms consistent with the undertakings given, and upon the clients entering into written undertakings to the same effect.
Item. These undertakings will be of no force regarding any document or information once it has become part of the public record. The Commission may, upon application, release any party in whole or in part from the provisions of the undertaking in respect of any particular document or other information.
35. Documents received from a party, or any other organization or individual, shall be treated as confidential by the Commission unless and until they are made part of the public record or the Chair otherwise declares. This does not preclude the Commission from producing a document to a proposed witness prior to the witness giving her or her testimony, as part of the investigation being conducted, or pursuant to Rule 25.
36. Subject to Rule 25 and to the greatest extent possible, Commission Counsel will endeavour to provide in advance to both the witness and the parties with standing relating to issues with respect to which the witness is expected to testify, documents that will likely be referred to during the course of that witness's testimony, and a statement of anticipated evidence.

37. Parties shall at the earliest opportunity provide Commission Counsel with any documents that they intend to file as exhibits or otherwise refer to during the hearings, and in any event shall provide such documents no later than the day before the document will be referred to or filed.
38. A party who believes that Commission Counsel has not provided copies of relevant documents must bring this to the attention of Commission Counsel at the earliest opportunity.

Item. The object of this rule is to prevent witnesses from being surprised with a relevant document that they have not have an opportunity to examine prior to their testimony.

Item. If Commission Counsel decides the document is not relevant, it shall not be produced as a relevant document. This does not preclude the document from being used in cross-examination by any of the parties.

Item. Before such a document may be used for the purposes of cross-examination, a copy must be made available to all parties by counsel intending to use it not later than the day prior to the testimony of that witness, subject to the discretion of the Chair.

MEDIA

39. The media may be present in a place designated for the media during the hearings and may utilize either still or television cameras.
40. The media shall not approach any witness either in the hearing room or outside the hearing room until the witness has completed his or her evidence and has been released by the Commission.
41. The media shall comply with the rules relating to confidentiality.

CONFIDENTIALTY

42. If the proceedings are televised, applications may be made for an order that the evidence of a witness not be televised or broadcast.
43. A witness who is granted Confidentiality will not be identified in the public records and transcripts of the hearing except by non-identifying initials. Any reports of the Commission

using the evidence of witnesses who have been granted Confidentiality will use non-identifying initials only.

44. Media reports relating to the evidence of a witness granted Confidentiality shall avoid references that might reveal the identity of the witness. No photographic or other reproduction of the witness shall be made either during the witness's testimony or upon his or her entering and leaving the site of the Inquiry.
45. Any witness who is granted Confidentiality will reveal his or her name to the Commission and counsel participating in the Inquiry in order that the Commission and counsel can prepare to question the witness. The Commission and counsel shall maintain confidentiality of the names revealed to them. No such information shall be used for any other purpose either during or after the completion of the Commission's mandate.
46. Any witness who is granted Confidentiality may either swear an oath of affirm to tell the truth using the non-identifying initials given for the purpose of the witness's testimony.
47. All parties, their counsel and media representatives shall be deemed to undertake to adhere to the rules respecting Confidentiality. A breach of these rules by a party, counsel to a party or a media representative shall be dealt with by the Chair of the Commission as she sees fit.

Part II Systemic Recommendations

GENERAL

- ~~48. In order to organise its work, the Commission will hold a series of planning meetings at which time all applications for standing will be considered based on the written materials filed.~~
 - ~~49. Upon concluding the planning hearings and prior to the evidentiary hearing, if the Chair of the Commission and Commission Counsel are of the view that there are allegations of wrongdoing or misconduct in respect of any person or, that as part of the Commission's Report there may be findings adverse to the interest of any person, that person or his counsel shall be given a Notice setting out particulars of the alleged wrongdoing or misconduct or the nature of the adverse finding that may be made against him.~~
- ~~Item. The Notice referred to in paragraph 49 shall be remain confidential but may be referred to in the Report of the Commission.~~

~~Item No report shall be made against any person until reasonable notice has been given under this section and until the person referred to in the Notice has been given full opportunity to be heard in person or by counsel.~~

- ~~50. Any person who receives a Notice pursuant to paragraph 49 may participate in the Evidentiary hearings and may make submissions in writing to the Commission.~~
- ~~51. Any interested person who may be affected by the findings of fact and/or recommendations of the Commission may make a public submission in writing to the Commission dealing with any matter related to Part II of the Inquiry, and in doing so may include a response to any matter raised in the Draft Recommendations.~~
- ~~52. With leave of the Commission such person may lead further evidence and/or make submissions that address the Draft Recommendations. The purpose of such evidence is limited to new matters that arise from the Draft Recommendations and to address any new relevant facts and issues that could not have been anticipated at the time the Inquiry commenced its hearings.~~

Amendment approved by COI 14th August 2020

FINAL REPORT

53. Prior to submitting its final Report, if it is anticipated that the Commission will make an adverse finding or recommend a submission to the Director of Public Prosecutions, the Commission shall give to the affected person (including corporations-hereafter referred to as “affected person”) a summary of its findings.

Amendment approved by COI 14th August 2020

54. The affected person shall have the right to make further submissions to the Commission limited to the proposed findings of the Commission, and will provide Commission counsel and the Commission 5 days notice together with a summary of the submissions that it intends to make.

55. Upon receiving the notice referred to in Rule 54 52, with the Commission will set the time, place and duration for the further submission by the affected person.

Amendment approved by COI 14th August 2020

56. Upon hearing all relevant submissions, the Commission will provide its Report to the Premier. For the sake of convenience, the Commission may divide its Report into a Public and a Confidential Report.

57. In the event any member of the Commission dissents from the majority view, he or she may provide his or her Report to the Premier, again dividing it into a Public and Confidential Part.

Signed

A handwritten signature in cursive script, appearing to read 'Norma Wade-Miller', enclosed within a thin, hand-drawn oval border.

Justice Mrs. Norma Wade-Miller OBE JP
Commission Chair