

Madam Chair members of the Commission

Before commencing my more substantive comments, please allow me to thank Madam Justice Wade Miller and the the members of the Commission for having retained me as Commission Counsel. I am very much aware that the subject of your Inquiry is the culmination of many years of angst and concern among Bermudians that many may have lost lands that rightfully belonged to them without appropriate record or remedy or compensation. Equally importantly, I am conscious of the fact that if this Commission is to meet the trust and expectations of the Community then it must examine the past with a view of looking forward and make recommendation to the Government of Bermuda that, if acted upon will ensure that past injustices this Commission may find will not occur again in the future.

For the purposes of this morning I wish to divide my comments into five parts.

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1. The legislative history leading to the Order in Council establishing the Commission;
2. Nature of Commissions of Inquiry;
3. The Scope of the Commission's mandate;
4. A brief 30,000 feet summary of the type of cases that may come to the Commission;
5. The work of the Commission to date and Next steps.

**The legislative history leading to the Order in Council establishing the Commission;**

In 2014 the late Hon Walton Brown proposed a motion (Hansard 2014 p. 2603 -2650) as follows:

*“THAT this Honourable House take note of the historic losses in Bermuda of citizens' property through theft of property, dis-possession of property and adverse possession claims;*

*“AND BE IT RESOLVED that this Honourable House calls on His Excellency the Governor to establish a Commission of Inquiry into all such known claims and to determine, where possible, the viability of any such claims and make recommendations for any victims of wrongful action to receive compensation and justice.”*

The Motion was adopted after considerable debate. What is important for the present purposes that it appears from the debate that while members were keenly aware of the concerns relating to the Tucker’s Town and St. David’s Island expropriations, the concern relating to injustices in dealings in land ran much broader.

To give but on example of the speeches,, the Hon. Derrick V. Burgess, sr, at page 2637:

*Mr. Speaker, the courts have made some blunders here taking people’s land. When a man has paid taxes on his property all*

*this time and the court says, Oh, I am going to give it to the squatter. How foolish is that?!*

*As has been said on the other side by the Attorney General, that has to be tested. But why? when people cannot afford to test it, to take it to other jurisdictions, like a Privy Council, and they lose out. You do not get any . . . poor people do not get any justice in this country, Mr. Speaker.*

The then Attorney General in reply made the point at p 2612:

*Hon. Trevor G. Moniz: That was probably . . . 1980s, I think . . . 1980s. Sharp practice is not something that is going to disappear, it is part of human nature.*

*So I think we need to separate those two lots of cases. The compulsory purchase ones are largely older ones. The most recent ones are, perhaps, the ones dealing with St. David's that were done during and before the Second World War when the airport was created in St. David's. Those were the most recent ones. And my own view on that is that there is nothing that we*

*can do about it. What was done there was not, in my view, unlawful. The laws permitted it. The Parliamentarians who made those decisions had their reasons for doing it.*

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*With respect to the individual cases of people that the Honourable Member said were taken advantage of—those really have to be dealt with on a case-by-case basis. Some of those [are] sort of apocryphal from the Member because he did not name names. I am trying to figure out...and I know of a lot of cases where allegations have been made, and in a lot of cases the allegations cannot be proved, they cannot be substantiated. They are not substantiated, and we get this...you know, as a lawyer I get this.*

Clearly the intent of the Motion was to explore taking s of land both relating to Tucker's Town and St. David's Island and beyond dealing with

other cases of perceived injustices. The Motion carried but the Governor of the day refused to issue an Order establishing the Commission of Inquiry. The matter stood there at least until the current Order was issued in 2019.

In 2019 the matter of a Commission into historical land losses was revisited. By this time the 2014 opposition formed the majority government. A resolution reciting the earlier motion before the Legislature was passed: ([www.gov.bm/theofficialgazette/notices/gn12172019](http://www.gov.bm/theofficialgazette/notices/gn12172019)):

*Having regard to the Motion of the Honourable House of Assembly of 4th July 2014 whereby the House of Assembly approved a Motion in these terms:(Italics added)*

*“THAT this Honourable House take note of historic losses in Bermuda of citizens’ property through theft of property, dispossession of property and adverse possession claims; AND BE IT RESOLVED that this Honourable House calls on His Excellency the Governor to establish a Commission of Inquiry into all such*

*known claims and to determine, where possible, the viability of any such claims and make recommendations for any victims of wrongful action to receive compensation and justice”, to:*

- 1. Inquire into historic losses of citizens' property in Bermuda through theft of property, dispossession of property, adverse possession claims, and/or such other unlawful or irregular means by which land was lost in Bermuda;*
- 2. Collect and collate any and all evidence and information available relating to the nature and extent of such historic losses of citizens' property;*
- 3. Prepare a list of all land to which such historic losses relate;*
- 4. Identify any persons, whether individuals or bodies corporate, responsible for such historic losses of citizens' property;*

## **Nature of Commissions of Inquiry:**

Before I discuss the mandate of this Commission, I would like to say a word about Commissions of Inquiry in general.

Professor Le Dain (later a judge of the Supreme Court of Canada) had this to say about Commissions of Inquiry (Gerald E. Le Dain, "The Role of the Public Inquiry in our Constitutional System", in Jacob S. Ziegel, ed., *Law and Social Change* (1973), 79, at p. 85.)

*. . . a commission . . . has certain things to say to government but it also has an effect on perceptions, attitudes and behaviour. Its general way of looking at things is probably more important in the long run than its specific recommendations. It is the general approach towards a social problem that determines the way in which a society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitudes and responses of individuals at the various places at which they effect the problem are of profound importance.*



*What gives an inquiry of this kind its social function is that it becomes, whether it likes it or not, part of this ongoing social process. There is action and interaction. . . . Thus this instrument, supposedly merely an extension of Parliament, may have a dimension which passes beyond the political process into the social sphere. The phenomenon is changing even while the inquiry is in progress. The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.*

There are also good policy reasons for this iCommissions of Inquiry not assuming the role of a surrogate court. First, its decisions are not enforceable at the hands of any single person or corporation. Indeed to suggest that a party has a good case against another would raise unreasonable expectations without the clout of enforceability. Further, civil litigation is circumscribed by procedural rules, rules of evidence and centuries of built in protections all to ensure that to the extent possible justice is done between the parties. None of those procedural or evidentiary protections are available before this or any Commission

of Inquiry. Indeed, the very fact that the Commission must submit by a certain time all but ensures that the the case cannot be investigated to its fullest. Third, and importantly, the conclusions of the Inquiry cannot be appealed. The recommendations of the Commission can be accepted by the government or rejected. Such is not the case if a court issues a judgement. It is enforceable until set aside by a higher Court.

Finally, to accept a role akin to the role of the Courts would undermine the legitimacy of the Bermuda Courts and possibly lead to results the are inconsistent with the judicial decisions. As said By Binnie J in Consortium Developments (Clearwater) Ltd. v. Sarnia (City), 1998 CanLII 762 (SCC), [1998] 3 SCR 3 speaking for all members of the Supreme Court of Canada:

*A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events.*

*The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.*

### **Fairness**

One of the guiding principles of this Commission is that it will ensure fairness to those who may be affected by its findings and recommendations. The principle which is a cornerstone of our common law, well summarised by the Supreme Court of Canada in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, 1997 CanLII 323 (SCC), [1997] 3 SCR 440 Mr Justice Cory

31                                    *The inquiry's roles of investigation and education of the public are of great importance. Yet those roles should not be fulfilled at the expense of the denial of the rights of those being investigated. The need for the careful balancing was recognized by Décarý J.A. when he stated at para. 32 "[t]he search for truth does not excuse the violation of the rights of the individuals being investigated". This means that no matter how important the work of an inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly.*

56                                    *A commission is required to give parties a notice warning of potential findings of misconduct which may be made against them in the final report. As long as the notices are issued in confidence to the party receiving them, they should not be subject to as strict a degree of scrutiny as the formal findings. This is because the purpose of issuing notices is to allow parties to prepare for or respond to any possible findings of misconduct which may be made against them. The more detail included in*

*the notice, the greater the assistance it will be to the party. In addition, the only harm which could be caused by the issuing of detailed notices would be to a party's reputation. But so long as notices are released only to the party against whom the finding may be made, this cannot be an issue. The only way the public could find out about the alleged misconduct is if the party receiving the notice chose to make it public, and thus any harm to reputation would be of its own doing. Therefore, in fairness to witnesses or parties who may be the subject of findings of misconduct, the notices should be as detailed as possible. Even if the content of the notice appears to amount to a finding that would exceed the jurisdiction of the commissioner, that does not mean that the final, publicized findings will do so. It must be assumed, unless the final report demonstrates otherwise, that commissioners will not exceed their jurisdiction.*

The Bermuda Commission of Inquiry Act 1935 does not set out the standard to be applied when determining when or whether a

notice ought to be issued. In my view keeping in mind the common law fairness obligation of the Commission and having regard to the mandate of the Commission, if there is likely to be evidence which in the absence of an explanation may lead to a conclusion that as a result of governmental misconduct citizens of Bermuda were individually or collectively harmed then an opportunity must be provided in order to afford the government an opportunity to be heard.

As Commission Counsel I am committed to these principles and our process ensures that the Commission's proceedings will be fair. If it becomes evident during the evidentiary phase that the evidence may affect the fiscal or reputational interest of any person or entity in Bermuda then they will be served with a Notice and invited to participate in person or through counsel in that phase of the hearings of the Commission. This is arduous work and my co counsel Mr Bruce Swan will review the proposed evidence and issue Notices prior to the evidence being heard;

In the event adverse evidence emerges and there was not opportunity to provide an Adverse Notice the Commission's Rules (which can be found on its website [www. historiclandlosscoi.bm](http://www.historiclandlosscoi.bm)) the Commission, prior to filing its Report with the Premier, will make a draft of the relevant portion available to the person or entity that may be affected and invite that person or entity to make submission relevant to that portion of the Report.

### **The Scope of this Commission's Mandate**

The work of the Commission must be governed by the Order of Council creating the Commission, It will frame the scope and nature of the final Report. As I noted earlier there are some significant differences between the motion adopted in 2014 and the motion adopted in 2019. As they heavily impact on the scope of the recommendations open to the Commission they bear examining in detail

Although, the preamble to the “Scope of Inquiry” recites the motion passed in the 2014 legislature which ultimately did not result in the establishment of a Commission of Inquiry by the then Government, it is significant that while the scope of the historic land losses that are to be examined remained the same the the remedies available changed. Whereas the earlier motion contemplated that the Commission may “make recommendations for any victims of wrongful action to receive compensation and justice.” that is not repeated in the directions given to this Commission Council in the 2019 Order.

Reviewing the mandate of this Commission it becomes apparent the the Government followed the classical purposes of a public inquiry and instead of attempting to set up a system that runs parallel to the court system it asked the Commission to examine in the context of particular cases systemic issues that lead to the wrings identified in paragraph of of the Scope of the Inquiry. The legislature did not set this Commission up as an arbiter of civil liability. It only has the power to make recommendations to the Government and they are very specific and limited. In my opinion, when examined in that light it be-



comes clear that the purpose of this inquiry is to examine through the lens of particular cases and particular acts of illegality or irregularity systemic issues that can be addressed by the Government through legislation so as to ensure that those wrongs or irregularities will not occur in the future.

To repeat the Commission is required to:

1. Inquire into historic losses of citizens' property in Bermuda through theft of property, dispossession of property, adverse possession claims, and/or such other unlawful or irregular means by which land was lost in Bermuda; AND

*a. Prepare a list of all land to which such historic losses relate;*

*b. Identify any persons, whether individuals or bodies corporate, responsible for such historic losses of citizens' property;*

*c. Refer, as appropriate, matters to the Director of Public Prosecutions for such further action as may be determined necessary by that Office ; and*

*d. “.....submit findings and recommendations to the Premier...”*

I note that paragraph (a) of the Order refers to listing of the lands that were subject to the historic losses without however a requirement to specifying whether any person dead or alive suffered by reason of such losses. On the other hand paragraph (b) requires the Commission to list the individuals or bodies corporate that were responsible for such historical losses. Pursuant to paragraph (b) the Commission may make a recommendation to the DPP. Therefore the legislature clearly had in mind that recommendations regarding individuals may

be made. However, the Order in Council is silent on the question of compensation. Clearly had the legislation intended that the recommendations include some compensation to the victims it could have said so. It did not. rather it requires listing of the lands that were subject to the historic losses.

Given the context in which the words are found historic signifies both a temporal inquiry as well as a systemic inquiry and I would submit that this Commission should determine through the lens of the cases filed before the Commission and based on the evidence it is about to hear whether the evidence taken as a whole demonstrates a historical structural problem or systemic failure and identify the lands where where lands were historically lost by reason of theft, unlawful or irregular dispossession, unlawful or irregular adverse possession or other unlawful or irregular means whereby property was lost in Bermuda.

### **Systemic Issues**

The Commissioners have asked in the past what is meant by a systemic failure and it is difficult to define but some examples may elucidate the point:

a. [Gay et al. v. Regional Health Authority 7 and Dr. Menon, 2014](#)

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*The claims advanced on behalf of all members of the proposed Class, whether in tort, breach of contract or breach of fiduciary duties are founded, at least in part, on allegations that Dr. Menon, as Chief of Pathology, Director of Clinical Laboratory Services and on-site pathologist, and the Regional Hospital allowed the pathology department and laboratory to function for many years without the systems necessary for their safe operation (see *Legal Liabilities of Doctors and Hospitals in Canada*, at p. 367, which is quoted with approval in *Comeau*, at para. 56). These systems would have included appropriate quality assurance*

*and quality control programs. It is alleged that systemic failures allowed Dr. Menon's substandard work to go undetected and unremedied for years;*

b. Cavaliere v BMO Nesbitt Burns Inc., 2015 ONSC 2078

*While the proposed amendments will increase the scope and complexity of the discovery process and the trial, the additional facts are relevant and are potentially probative of negligence in relation to Rao as part of an alleged systemic failure of supervisory and compliance systems*

c. R. v. Jackson, 2014 ONCJ 74

*It may be that a stay of the charges against this respondent is an appropriate price for society to pay in order to correct a serious systemic failure in the bail system in York Region. ... We observe in passing that the trial judge's order appears to have caused the authorities in York Region to take*

*some steps to address the problem. Counsel for the Crown in the court below conceded during the costs hearing that since the trial judge had ordered the stay of proceedings "we have now been running a second bail court here five days a week, which will obviously have significant benefit to other accused going forward."*

Based on these cases I suggest that systemic issues arise if it can be demonstrated that the cause of the loss transcends the individual case and demonstrates a legal, political or ethical culture that allows the named

**A brief 30,000 feet summary of the type of cases that the Commission has jurisdiction to consider;**

**Loss of property by reason of Theft**

## Basic definition of theft s 331 Criminal Code 1905

A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and “thief” and “steal” shall be construed accordingly. (2) It is immaterial whether the appropriation is made with a view to gain or is made for the thief’s own benefit

“Dishonestly” 332 (1) A person’s appropriation of property belonging to another is not to be regarded as dishonest—

(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or

(b) if he appropriates the property in the belief that he would have the other’s consent if the other knew of the appropriation and the circumstances of it; or 1

(c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

(2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.

**Loss of Property by Dispossession of property by unlawful or irregular means.**

Much will depend on the context of the particular cases however as a preamble it is difficult to conjure a dispossession of property by unlawful means that would not also amount to a theft of property. However, the mandate is broader and includes dispossession of property



through irregular means. Again much will depend on the context of particular cases and further analysis will have to wait until the cases are fully analysed

### Loss of property by Adverse Possession

Generally adverse possession refers to the right of a squatter to acquire title as against a the title holder. To establish such right certain conditions must be met:

*. Lord Advocate v. Lord Lovat (1880), 5 App. Cas. 273.*

*In Des Barres v. Shey (1873), 29 L.T. 592, Sir Montague Smith, delivering the judgment of the Judicial Committee, said, p. 595:*

*'The result appears to be that possession is adverse for the purpose of limitation, when an actual possession is*

*found to exist under circumstances which evince its incompatibility with a freehold in the claimant.*

*Newfoundland v. Collingwood*, 1996 CanLII 11066 (NL CA) per  
Cameron JA

*...one of the principles underlying the law relating to the limitation of actions in respect of realty is that the "squatter claiming "adverse possession" must prove open, exclusive, notorious and continuous possession" ...:"The law is that the nature of the possession must be considered in light of the circumstances of each case.*

*Fletcher v. Storoschuk* 1981 35 O.R. (2d) 722 at 724, per Wilson  
J.A.

*... acts relied on to constitute adverse possession must be considered relative to the nature of the land and in particular the use*

*and enjoyment of it intended to be made by the owner: see Lord Advocate v. Lord Lovat (1880), 5 App. Cas. 273 at 288; Kirby v. Cowderoy, 1912 CanLII 366 (UK JCPC), [1912] A.C. 599 at 603. The mere fact that the defendants did various things on the strip of land is not enough to show adverse possession. The things they did must be inconsistent with the form of use and enjoyment the plaintiff intended to make of it: see Leigh v. Jack (1879) 5 Ex. D. 264; St. Clair Beach Estates Ltd. v. MacDonald et al. (1974), 1974 CanLII 564 (ON SC), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650; Keefer v. Arillotta (1976), 1976 CanLII 571 (ON CA), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182. Only then can such acts be relied upon as evidencing the necessary "animus possidendi" vis-a-vis the owner.*

In our submission however, this Commission is not required to resolve title issues. That is for the Courts , Rather, it is to be noted that the Order in Council modifies “adverse possession” by “other unlawful or irregular means by which land was lost in Bermuda. On the face of it this seems inconsistent with the concept of adverse possession since

the very purpose of the right is to protect certain possessory interests ie. squatters rights provided the squatter could demonstrate the requirements of an adverse possession as explained above. In those instances the title owner could get no remedies in the Courts.

However, by requiring the Commission to identify adverse possession by unlawful or irregular means the legislature is asking this Commission to identify lands where the adverse possession was gained by some unlawful or irregular means, and in the event of possible criminality refer the cases to the Director of Public prosecutions. This of course would as I suggested leave the title issues to the Courts, but allow this Commission to determine whether the adverse possession itself was gained by some unlawful or irregular means and identify systemic reasons for such illegality or irregular means,

**Loss of property by other unlawful or irregular means by which land was lost in Bermuda;**

## **Expropriation Cases**

This heading of course can cover a wide variety of illegalities or irregularities, and the Order in Council does not specify the land losses that may have been lost through historically through unlawful or irregular means (much of this is to be discovered once you here specific allegations). However, there are two specific land losses that are expressly referred to in the Order in Council namely Tuckers Town and St David's Island.

The Commission will have to examine the context of these expropriations from two perspectives. Clearly, the owners of the property were dispossessed off their land but was that dispossession unlawful and even if lawful in the sense that they were done pursuant to an Act of the legislature were they irregular.

In *A.G. v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (H.L.), Lord Atkinson, at p. 542, put the rule in his own words and followed with a quotation from Lord Justice Bowen. This is what Lord Atkinson said:

*The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation. Bowen L.J. in London and North Western Ry. Co. v. Evans, [1893] 1 Ch, 16. 28. said: "The Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle ... if it sees fit to do so, but, it is not likely that it will be found disregarding it, without plain expression of such a purpose."*

In the same case, Lord Parmoor, at p. 579, put the rule this way:

*I think that there is no difficulty in applying the ordinary rules of construction, but, if there is room for ambiguity, the principle is established that, in the absence of words clearly indicating such an intention, the property of one subject shall not be taken without compensation for the benefit to others or to the public ...*

As part its recommendations this Commission will have to consider all of the circumstances of the two expropriations, their legalities and irregularities and make appropriate recommendations to the Government of Bermuda. For example if this Commission concludes that owners of property were not compensated adequately by reason of the system of compensation set up by the Government it may recommend to the Government that in the future a different regime should be set up in case of expropriations as well as recommend the by reason of the circumstances that led to the expropriation the Government should set up a regime to compensate the owners or the descendants of the owners of the expropriated property.

In doing so, may I quote Justice Binnie in the Supreme Court of Canada in *Clearwater*:

*It must be remembered that the report of the Commissioner to the City Council will represent only his views, and will not determine civil or criminal liability, if any.*

**The work of the Commission to date and next steps ;**

Initially the Commission was going to have a Planning Hearing in order to determine the nature of the cases it is likely to hear and the scope of the Inquiry. This was to take place on March 19. Unfortunately events beyond the control of the Commission intervened and almost precisely on the date the Commission was to start its hearing borders were closed and indeed continue to be closed in some countries. Extreme precaution continues as the pandemic continues to take its toll



with the number of cases on the rise again and deaths and injury continuing.

Given the uncertainty caused by the onset of the current health pandemic, the Commission delayed its initial hearing date of 19th March until such time as the Government of Bermuda deemed it safe for persons to assemble. The Commission also adjusted the date by which persons seeking standing, or who had anecdotal information but who did not wish to seek standing, could submit documentation. The initial deadline in March was tentatively shifted to 30th May 2020. The latter date was adjusted to 8th June 2020 but, in light of reported challenges encountered by members of the community who sought to access relevant documents, the Commission communicated that the deadline would be extended until 30th June 2020. Finally, in order to accommodate further requests for extensions, the Commission determined that the final deadline for submissions would be 23rd July 2020.

At the same time, the Commission determined that its public hearings of evidence will be held as follows. It was anticipated that the Expert/ independent witnesses would offer testimony at hearings commencing on Tuesday, 8th September 2020, possibly lasting until Friday, 11th September 2020. Unfortunately, the pandemic made the work of the experts more difficult than anticipated, and their evidence dealing with the Tuckers Town and St David's Island expropriations is now scheduled to be heard starting October 19.

As a result the evidentiary hearings for persons who sought standing with the Commission will take place following the experts' evidence through Friday, 13th November 2020. Such persons will be notified in writing by the Commission of the specific dates and times set aside to hear their evidence.