

WEDNESDAY, 18TH NOVEMBER 2020

COMMISSION OF INQUIRY HLL PLANNING HEARING

held at

Hours of Hearing are from 1:00 am to 3:00 pm

HEADED BY (CHAIRWOMAN)

JUSTICE MRS. NORMA WADE MILLER, OBE JP

with

MISS MARVA-JEAN O'BRIEN, CLERK TO THE COI

and MRS ALBERTA DYER-TUCKER

COI SENIOR COUNSEL:

Mr. Ivan Whitehall, QC

COI JUNIOR COUNSEL:

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Mrs. Frederica Forth

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The Hon. Wayne Perinchief, JP

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CONCLUSION OF DAY OF HEARING

REV. WHALEN (WITNESS)

SPEAKER 1 No, sir, okay, so if you go to the next slide, so accordingly, accepting the recommendation of the ground penetrating windows survey, to remove a false religion, the false Socratic eye tops false grave types, the trustees of the church decided to restore the graveyard to its original state as it existed, circa 1920 was in line with the testimony of Mr. Craig. So, next slide. So, to the knowledge of the trustees, none of the grades themselves had been violated by the restoration work, certainly in the past, and the trustees, consented to that facts have many of the members out there. If I could interject something at this point. And had a question, because the evidence that Mr. Eugene Stoneham presented with regards to pictures that he had taken, I think in the 80s. In fact, I could be corrected, but he showed pictures that we did not have a showing or that there were some remnants of on top of the ancient gray, we did not have information. But at the time when the ground penetrating survey was done, and the trustees consented to the work, the trustees were under the were given the assurance that nothing of the original graves word was going to be destroyed or violated. and so

WITNESS – REVERAND WHALEN

SPEAKER 1 Just a moment. Earlier we had our earlier we had spoken about exhibits 2 & exhibit 3, exhibit '2JF2' was a letter that you had written to Tuckers Point, in 2007. Exhibit 'JFW3' was a 2009 letter you wrote to, well that was written back, read to you from Tuckers Point Club. So, my question is from making reference to exhibit 'JF3', the letter dated April 14th 2009. This letter from the Senior Vice President Mark Orchard between that time and July 2011, did you have any correspondence or any word from Tuckers Point, Tuckers Point Club members, did you hear from them at all?

SPEAKER 1 With regards to what?

SPEAKER 3 With regards to the cemetery and the maintenance of it. Let me pause, what I've tried to address the events of the slide that's projected on the screen. In the last paragraph, you refer to neither the past or the trustees or any member of the church participates in in a manner with intended modifications of the cemetery. I've tried to get from you a timeline because I think yourself on the trustees had been taken by surprise, that weren't that stuff. So, I'm really trying to find out when was the last time before you are aware that some modifications took place, they do have discussions with Dr. Harris or anyone?

WITNESS – REVERAND WHALEN Okay. Well, the reference that you're making to April 14 2009. That really is sort of like outside of the scope, I mean, it comes very much before the decision, the consent was given for the work to be done was done. The consent I think was given.

SPEAKER 3 Consent. I think you might say that you did consent, can you speak the consent? Because the church is consent?

WITNESS – REVERAND WHALENT Trustees consented as was to talk the restoration. Right.

SPEAKER 3 So, so what I'm trying to get to you mentioned that the trustees or the pastor, participated with the modification. So, what I'm getting at is, you're taken by surprise that modification work had started. I'm trying to ask you to address your mind even utilizing now Exhibit 4, which is a July 13th 2011 letter that you wrote to two members of the government, I'll ask you even to use that, is that the last time you had any sort of communication with anyone about the cemetery? Or is it some other time?

SPEAKER 3 That would be a good...It was shortly after this letter was received by the individuals at Tuckers Point that they gave consent. At the date of this letter, Ed Harris, as in number four of the letter says, Ed Harris the Director informed us in June, that Tuckers Point had refused to give him access. So, it was shortly thereafter they received this letter, one letter that was sent to them that they consented to it. And then the ground penetrating stuff that was done in September of 2011, or August. I'm sorry, August 30 and 31st. That's when the ground penetrating survey was actually done. So, it was after the ground penetrating survey was done and the report was done. The report is dated September 2011. That the trustees were given this recommendation about the force by Dr. Harris

SPEAKER 3 Let us jump forward a bit, you are aware that some time thereafter, it had been brought to your attention that there was some disturbance at the cemetery? And yourself, you attended the cemetery when you had heard that there was some disturbance at the cemetery, Is that correct?

WITNESS – REVEREND WHALEN Do you mean after the work was done? Yes, sir.

SPEAKER 3 What date that?

WITNESS – REVEREND WHALEN I could not say, I know, you have the date of the article from The Royal Gazette

SPEAKER 3 What I'm just trying to, Were I'm trying to get is I'm trying to just ask for your assistance in respect of having been taken by surprise. I'd like to know when it had been brought to your attention that there was some disturbance. And before that, when was the last time you had any notion, especially social problem with Dr. Harris, had something may been done? I'm just trying to establish a timeline

WITNESS – REVEREND WHALEN Well to your first point, I believe, correct me if I'm wrong, but I believe we first found out in the from the newspaper. Well, the article and the around October 16 2012, was when this article came out in The Royal Gazette

SPEAKER 3 Before that, in respect of when that had been had with Dr. Harris, that content had been given for restoration. When was that? Are you following me?

WITNESS – REVEREND WHALEN It was it was after the September 2011.

SPEAKER 3 So, between September 2011 and August 2012. It is sometime between that that the disturbance took place, is that what you're saying?

WITNESS – REVEREND WHALEN The um, you're asking for a date when the actual

SPEAKER 3 Not the actual date but if you could give like a period, I just want some timeline because then because around the time

WITNESS – REVEREND WHALEN when the chops were removed,

SPEAKER 3 Or may not have been because I think there's some

WTNESS – REVEREND WHALEN I think the testimony from Mr. Stoneham and Mr. Dubois give an actual date that they were contacted. Because I think it was right at the time when it happened. They were contacted by taxi drivers.

SPEAKER 3 But I just want to I don't want the Chairman to swear me to give evidence but what I'm getting at is that nobody seems to know when it happened. So, we're looking at timelines when it was brought to their attention. So, I have this being specific in terms of the timelines, but, in respect of August 2011, between August 2011 and September 2012. It is within that time that it may have occurred based on what you have been told. Is that fair? Or is that not?

WITNESS – REVEREND WHALEN Okay, I don't know, I'm a little confused. As I was saying, to my best recollection, the testimony that was given by Mr. Stovell, Mr. Dubois

actually pinpoints like within a day or so when this occurred, they were contacted, that the work was actually in progress. And they were, so they, I think their testimony would cite an actual date. I wouldn't just screw up what they have given because you know, I don't have a date

Speaker 3 Okay. Just before we go any further, can you just take us back to the persons that you had written this letter to, who were the persons you wrote this letter to?

WITNESS – REVEREND WHALEN Okay, it was

COUNSEL The members of, the senior's person's involved, where did you write the letters to?

WITNESS – REVEREND WHALEN Derrick Burgess, Wayne Parenchief, I think a representative for our constituency was, I can get that

COUNSEL And Mr. Parenchief that you wrote to at that time, what, did he have a designation involved with at that time? He was minister. I think it was, I don't remember exactly. So, if you want to guess I think Derrick might have been Minister of Works & Engineering and Mr. Perienchief I'm not sure what his Ministry was, I think Commissioner is trying to alert you dear, Mr. Perinchief is trying to get your attention. But yes, just as a matter of record, and as a matter of information for the commission, for the purposes of record, I would have been the Minister of National Security at that time. And just for also, matter of information. My representatives from the secretary probably have fended that correspondence, and it wouldn't have come to me directly, just as a matter of information and the middle bracket of the receipt or not received, but personally, I would not have dealt with that. Thank you. Yes, please. Let us continue with the slides that have gone back to the question at a later time, could you continue

WITNESS – REVEREND WHALEN Certainly, so the trust is understood to Dr. Harris, who see the word doctor has, as we've mentioned, a church assurance that the integrity of the graves will not be violated. I would like to address grave error of former Ombudsman Brocks report had grave error. So, I ask Ms. Brock documents that are reported, Marsden trustees were not made aware of the historic protection designation for the cemetery. So, she actually states that in hdf report from her correspondence with planning. I think if I recall correctly, the explanation was

Speaker 3 Will you make reference to the former Ombudsman's report as most of you may continue?

Speaker 1 Okay. So, in my recollection, Tucker's Point had been notified, but at the time, the explanation that was given to Ms. Brock was that planning was not aware of the role of the church with regards to the cemetery. And that's why we have not been made aware of historic protection designation for the cemetery. So, there are numerous interviews of individuals. Ms. Brock recorded no one alleging that graves were dug up, and our bodies were removed. And she

notes on page three on her report, I quote, "Note, the graves underground, at Tucker's Point we're not disturbed by the activity of mid-October 2012. It is the tombstones above ground that were demolished. So, with regards to Marsden acceptance of the recommendation from the ground penetrating radar survey by Dr. Harris, Ms. Brock says, and this is on page eight, she says "There is no reason to disbelieve Marsden and Rosewood Tucker's Point, had they had any indication at all from the department prior to mid-October that the department was taking steps to list the cemetery in accordance with an Ombudsman recommendation. They would not have proceeded with the demolition." I'm not totally up on it, but I believe that there were two phases. I believe that there had been, because there was some back and forth between the Ombudsman and the plan. There was a rebuttal that then Minister Faye, made with regards to what the Ombudsman had stated that she was asking for additional protection on top of what had already been granted, I believe in 2008. And eventually, this other additional protection came in 2014. At that particular point in time the church was notified. We were given all of the specifications as to what that historic protection entailed. We sent letter and communication saying we were totally in favor of that protection, those protections being in place on the cemetery, and participated in seeing that done, but this is sort of like I think, in between, she was speaking about the forthcoming protection, which came, I think, in fruition in 2014. That, at the time when the restoration work was done, had it been known that she's saying that the work would not be proceeding. So as Brock actually goes on to document that, the concrete tops were in the added to actually read. This is on page nine and ten. She is referring to Older Valarie, who and this is and on page nine of her report, was the host of popular radio show, called the Living Memories, was alerting to the existence of a cemetery by calling marine, intrigued she organized a visit accompanied by the late Bishop Chauncey Smith, and a videographer escorted by two Castle harbor employees, one of whom became aware of returning sim after being hired and 1963. Fortunately, Miss Mallory made an audio recording of the visit. And then she goes on to get the content of that audio recording. She says the group can clearly be heard identifying and describing 15 visible terms. Nine will recognizably terms and others run in stone. They were low to the ground. And this is on the PowerPoint. They were low to the ground, made in the old-style commuter grades. Only one or two had partial covers, and all had a tall bush and even trees growing out of them. The stones were all gray Bermuda Limestone. The visitors related stories about why the tops were missing and speculated storms may have fell trees that in turn crushed several of the stone tomb walls. There was also a perimeter wall on the South and West sides of the cemetery. Castle-Harbor employees noted that from time to time the grass around the tombstones were mowed, so that golfers could retrieve stray golf balls However, they never interfered with the tombstones. Groundman joke that Aunt Dianas curse would befall anyone who did not maintain the graveyard. On Castle-Harbors map on the property the area's marked as a preserved open space, but not identified as a cemetery. Ms. Mallory suggested that the tombs should be covered and that the perimeter wall should be rebuilt with a nice wrought iron gate. Employees echoed an interest in repairing the cemetery and adding an accurate plaque. Two years later the employees were responsible for rebuilding the cemetery wall with a wrought iron

gate. Critically the presentation growing out of the open tombs was cut concrete slabs were placed on top. Now retired groundman is adamant that and putting the concrete slabs on he and the other workers patched up rather than shaved off in order to level the walls of the tombs. They were careful not to cut down or otherwise damage existing limestone. The evidence from this visit, that the ancient limestone tombs existed, that the repairs were done in 1991 were merely to cover them with cod was cement trucks is pervasive. Pardon persuasive Yes.

WITNESS – REVEREND WHALEN So, um, so this is the crux of the matter, the tops. Now, from our point of view, the Ombudsman, her report is called The Grave Error, there's a couple of errors. One error is designating the restoration attempts as desecration.

Speaker 3 Let's just pause there. Now stated earlier, you had indicated that you had indicated that you would adopt and you would wish to rely on parts of the Ombudsman report. In terms of the statement that was brought in designating the restoration in terms of desecration you're not adopting that. You are rejecting that?

CHAIRWOMAN Most definitely

Speaker 3 Okay. Okay. Continue

WITNESS – REVEREND WHALEN On page three of her report, she gives some definitions. And under the definition for desecration. She says to damage treat with disrespect or violate the sanctity of a Holy place or object, in addition to the removal damage, or destruction of human remains, common law and the US and UK deemed the removal of vandalism and injury of burial grounds and tombstones to constitute desecration.

Speaker 3 Do you have that on this slide that it can assist us and the Commissioner, do you have that as a slide, what you're reading from?

WITNESS – REVEREND WHALEN It's in the Bible. I do not have it on the slide. It's on page three of the report and hold is not in the Bible, but there are parts that we are making reference to that's in the Bible.

Speaker 3 Sure, but proceed. I just wanted to assist the Commissioners to be able to follow but you may continue me just make that note, could you just remind us of the page.

WITNESS – REVEREND WHALEN Page three

Speaker 3 Of the Grave Error? Grave Error, that's Marsden 008 that select pages that are pertinent to for the Grave Error I just asked the I think the Commission can take judicial notice of the Ombudsman report, I think it's a public document. The Reverend would like to rely on portions of it extract. So, I just asked that the document which is in your folder, which is marked Marsden 008 and last that was exhibit JFKJFW6

30:51

I should mention council that the Secretary to the Parliament, Ms. what's their designation?

31:06

She came in and she presented that document to us as well. So that's an exhibit

Speaker 3 I just wanted that abundance of caution. So, the witnesses less rely on that exhibit to give us evidence

31:24

Do I need to enter it?

Speaker 3 No, no, no thank you I just I will them with the assistance of the plan and on another day indicate what exhibit it is? But the witness would like to make reference to it. Right, sure

31:39

Because it was presented by the clerk to the legislation and so certainly go ahead

WITNESS – REVEREND WHALEN Thank you that the Ombudsman hear and only given one particular aspect. Yes, sir. Because she did not take several things into consideration. First of all, criminality around what you assigning the desecration ignores a whole element of criminal intent that ignores the whole element of ownership and ignores the whole element of the freedom churches exercise with regards to management of their own cemeteries in Bermuda, UK and abroad. So that's why I made the simple submissions there with regards to this particular case, which was something that was settled on appeals which the descender binder. I don't want to go into all of it, but just the intent in that case, is that honest belief whether justifiable or not that property is the defendant's own negatives or refutes the element of man's right, which I understand is criminal intent. So, it is not possible to exclude the words belonging to another, and this is at the end of that case. This is a quote of the judgment where the appeals in that case, someone was convicted of doing damage to property where they were living, because they were under the notion that the property belonged to them. They had done some work and some renovations, so they believe that what they had added to the house belong to them. And so, they were convicted of it, but the on appeal, the conviction was overturned. Based on this to say, it is not possible to exclude the words belonging to another, which describe property applying the ordinary principles of mentions the intention and recklessness and the absence of lawful excuse requires, required to constitute the offense, have reference to property belonging to another. Now I'm not a lawyer or anything but to me is just simple as this. Someone cannot be accused of breaking and entering into their own home. You know, how can the church which owns the cemetery, the custodial ownership, be accused of desecration when there's no ill intent to be

done, we're not talking about property that belongs to another and the laws both here in Bermuda and in the UK, which I have printed and submitted as evidence against damaging property has to do with property that does not belong to you, as property, not your own. And certainly, the intended cosmetic changes to the graves by the custodial owner so the signature can only be called desecration.

Speaker 3 Madam Chairman, as we know, Reverend Whalen has started. He is asking that the authority of David Raymond Smith, which is of course, the decision from the Criminal Division, it's labeled Marsden 011. In your, David Raymond Smith, Court of Appeal, Criminal Division, it's the 9th of November 1973, labeled Marsden 011, I would just assist him he would like it to be tender written as Exhibit G

36:32

So, this David Raymond Smith, the 9th of

Speaker 3 November 1973. Chairman, in your bungle it has it as

36:44

Marsden 11

SPEAKER 3 I could have been tenant and a next, exhibit, JFW6 would like The Commissioners to consider it when you're marking your numerations

WITNESS – REVEREND WHALEN Yes, I'm not, in speaking with here locally. Those who church authorities who have management of cemeteries. It's clear that the churches with cemeteries exercise some freedom in regards to their own internal decisions as far as how they care for, manage restore their own cemeteries. As has been alluded to before laws are in place with regards to the handling of the remains themselves. And this quote here comes from something that was taken online with regards to it says replacing a headstone law says only the registered grave owner is legally entitled. And this is and that this was part of Marsden, this is Marsden in 012, which is just simply copied from the internet. With regards to management of the cemetery. Particularly, I'm making reference to what they on the on the back page replacing a headstone law says only the registered grave owner is legally entitled to replace a headstone. If anyone else erects a Memorial without their support, it can be removed and compliance with laws supporting the removal of any authorized items from the grave site. So, it's basically these three points that we're making with regards to what I attribute the Ombudsman drive Then nail that was crooked, okay? Meaning I understand where her concerns were, but by labeling what The Royal Gazette, I think possibly called restoration work as desecration, she really did a disservice, because it implies some kind of ill intent and implied that there was some abuse or criminality and damaging these graves. And also, it ignored the fact that the church, which is, as Mr. Tucker mentioned, was concerned about, as it felt what was the best for the graveyard, this

graveyard, which was to restore it back to its original state. Now, in hindsight, we did not have photos, Mr. Eugene Stoneham had and of course the Ombudsman did uncover some information that we were not privy to. And we did not, or we're not on site in terms of the work actually being done but the church in no way shape or form participated or we're complicit in the desecration of the cemetery, I just want to just cite that for the record, you know, when you deal in the NATO, if you name when something is going in crooked, it's going to come out, and it's going to snag, it's going to cause some disruption. And, unfortunately, by her stating that, it became a great deal of ainks, for a lot of individuals in the community, asking why in the world, would a church, you know, be party to such a thing.

SPEAKER 3 And, but by saying that, you wish it to be made abundantly clear that the church did not intend to, in any way destroy the tools, which in fact, you mentioned something else, is that what you're saying?

WITNESS – REVEREND WHALEN And it will become a clear, because subsequently, what transpired after that was an effort going through planning, with the assistance of Dr. Harris to get planning approval for a Memorial from a nice Memorial there and caring for the wall for the whole cemetery restoration. It was a process this was requested, that we were engaged in, which was to, as the church of the time felt properly, honor that site and an appropriate kind of way. And so that's why you see submissions. There. We had a meeting afterwards, requesting input in 2012, October 9th, from the community in terms of how the grave site should best be memorialized. And November 6th 2012, Pastor, Trustees, Chairman, members of the Tucker Town Historical Society, and Dr. Harris, had a meeting to discuss the submission that we were making, to the planning department.

SPEAKER 3 Thank you, I'm just going to ask you to have a look at this document, this document based on your evidence of how it proceeds 20 years as you have been there. I'm just going to ask the Chairman and Commissioners just to have a look at just before I show it to you. You just have a look at that document.

WITNESS – REVEREND WHALEN Yes sir.

SPEAKER 3 Have you ever seen that document before?

WITNESS – REVEREND WHALEN Can't say that I have, this was my predecessor.

SPEAKER 3 Probably Mr. Tucker was or Madam Chairman I advise that you're still on for assistance, can you remove your mask? Have you ever seen that document before? The picture looks familiar to me only because Ms. Powell is in there, I remember her she used to attend Marsden and I think I recall seeing that before. Could you see this is Ms. Powell in the picture? One of your congregation members? That document, could you say what that is? Go ahead Mr. Tucker What is that document?

WITNESS – MR. TUCKER Bermuda Sun, November 29th 1996 Tuckers Town Graveyard Restored. A newspaper clipping, is that what you want?

SPEAKER 3 Yes. I'm just going to accept that Sir, that the main exhibit.

46:19

And, and, and can you just repeat what it's called for me Mr. Tucker. It's dated November 29 19

SPEAKER 3 199, Tuckers Town Graveyard restored I don't wish for it to be. I wish for it to be made an exhibit not through Not, the clipping, not given the initials o this is already an exhibit. Please, thank you. Thank you know, that extract. As you can see, it's a previous exhibit, that it had been put in through Mr. Stovell, it refers to restoration work, but I show it you at this stage, because you were at pains are it up to mention on your earlier slide. That which you wish to correct something that had been stated by the honorable Ombudsman. And you were indicating that, in fact, what the church meant to do was restoration. And I just wanted to know, when I've asked you directly, if in fact, there is some disturbance to include the cover the concrete slab that is on it, it does not do anything, john, you said to destroy the desecrate it goes along the lines of restoration. And that's what you sought to do.

WITNESS – REVEREND WHALEN Yes, sir. Of course, language is very important as a big difference between construction and restoration.

Speaker 3 We can just, we can continue

48:28

Council remember we're breaking at three o'clock

SPEAKER 3 I have the last

WITNESS – REVEREND WHALEN If I can just show the just this session with the planning. So, this was the formal application to planning that was submitted. The architectural form of fellow wood was, you know, was serving Dr. Harris I believe at the time they were soaking gratis. And this was part of the plan, submission plan. And, and the and the

SPEAKER 3 Who submitted that document, can you see it?

WITNESS – REVEREND WHALEN This was, I signed the application, but it was submitted by Bethurum Wood Architects

SPEAKER 3 Just go back as you wrap up, the document that you refer to, in your slide presentation, would you just take us back to the slide please. You, on behalf of the church made an application for development of what?

WITNESS – REVEREND WHALEN Well, actually it was. Dr. Harris

SPEAKER 3 But you signed it?

WITNESS – REVEREND WHALEN Yes.

SPEAKER 3 And what you seeking to the development of what?

WITNESS – REVEREND WHALEN It has several aspects to it. And I believe there's a letter,

SPEAKER 3 Before we get to the letter, what was the date on the document?

WITNESS – REVEREND WHALEN which document?

SPEAKER 3 The one that is projected, the one you signed that is displayed on the screen

WITNESS – REVEREND WHALEN The date that I signed, it was December 19th 2012.

SPEAKER 3 And this is after it had been brought to your attention at church, that there had been some disruption at the old Marsden Cemetery, correct? December would be after based on your current evidence

WITNESS – REVERAND WHALEN Right. As was stated, there was a process after that had occurred. We try to move expeditiously to restore the site

SPEAKER 3 I'm just trying to understand. Madam Chair, I don't believe this is an exhibit, Is this an exhibit also?

CHAIRWOMAN I don't believe it was placed before us on any of the document. Commissioners, kindly remind me

SPEAKER 3 Exhibit GFW7

CHAIRWOMAN Exhibit 7, and this is the planning application?

SPEAKER 3 Planning Application Development. Six, corrected Madam Chairman GFW6, Planning Application for Development. And I just asked, it may be a convenient time now

CHAIRWOMAN Now let me ask Reverend, how much longer do you think you're going to be? I'm not putting you on any pressure but it's just the schedule tomorrow

WITNESS – REVERAND WHALEN I just want to just tie this up with one reference to the supporting letter taht I'm putting through

CHAIRWOMAN But there will be cross examination and questions from Commissioner so we will put it over. We're going to adjourn until 11 o'clock tomorrow you can pick up anything that you left out, you'll be given an opportunity to speak to it. And then you'll be cross examined by counsel and by Commissioner. So, we'll put this will adjourn until 11 o'clock tomorrow morning, please.

SPEAKER 3 Just for the record, Madam Chair. Both witnesses would be

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(HEARING ADJOURNED UNTIL 19TH NOVEMBER)

**This is to certify that this transcription has been duly transcribed by local transcribers,
The Curvy Executive, Devonshire, Bermuda (Tel: 441 732-3141).**

Chrystal-Lynn El

Dated: *4th Day of January 2021*