IN THE MATTER OF the Constitution of The Virgin Islands Constitution Order 2007

AND

IN THE MATTER OF the motion moved in the Council of Assembly by Julian Fraser to have Governor Augustus Jaspert reprimanded for violating the Audit Act 2003.

OPINION

❖ **Background:**

1. The previous National Democratic Party (NDP) government gave British Virgin Islands Airways $7.2 million to commence non-stop flights from the British Virgin Islands to Miami in the United States. Since receiving the funds, BVI Airways has missed all its promised dates to commence the flights. It then laid off its staff claiming it needed more money to fly.

2. In light of the above issues, the Auditor General commenced preparation of a report pursuant to section 20(1) of the Audit Act, 2003 which provides as follows:

Auditor General may submit special report	*20. (1) The Auditor General may at any time prepare and submit a special report to the Governor if he is satisfied that there is a matter that should be brought to the attention of the Governor.*

3. In a media interview on 1st November, 2019, the Governor stated:

> *"The Auditor General has been working very hard on her report into the BVI Airways. That report is now concluding and it will be given to me. And after that point**, I believe up to a period of three months it will become public**. So that will be coming forward shortly."*[1]

[1] https://bvinews.com/report-on-bvi-airways-audit-to-be-made-public-shortly-says-governor/

4. Section 20(2) of the Audit Act 2003 (the Act) provides that the Governor shall lay the report before the Legislative Council within three (3) months of receipt.

5. While the Premier received the report on 27th January 2020 (presumably pursuant to section 20(3) of the Act which stipulates that the Auditor General must submit a copy to the Minister and Financial Secretary at the same he submits it to the Governor General) the Governor General claims to have received it on 7th February 2020.

6. The report did not reach the Council of Assembly until Thursday 28th May, 2020, a full month and one day past the statutory deadline (if indeed he did receive same on 27th January 2020).

7. The Premier called out the Governor on the alleged delay by writing to the Foreign and Commonwealth Office, in order for the Governor to comply with the 7th February who wrote the Premier, demanding that a meeting of the Council of Assembly be held on the 7th May, 2020 in order to meet the statuary deadline.

8. By letter dated 28th April, 2020 the Honourable Speaker replied to the Governor, pointing out that he had no power to demand that the House meet.

9. Notwithstanding the dispute as to when each of them received the Auditor General's Report on the Government's Financing of BVI Airways' direct flights to Miami, the report has been belatedly laid by the Governor General by approximately 1 month.

10. Accordingly, opposition member Julian Fraser has moved a motion in the Council of Assembly to have Governor Augustus Jaspert reprimanded for violating the Audit Act in the following terms:

> *"Be it resolve that this Honourable Council reprimand the Governor for violating Section 20(2) of the Audit Act 2003, and obstructing the duties of the Council of Assembly under Section 47, 3, of the Virgin Islands Constitution Order 2007…..The Audit Act in no uncertain terms describes that the report shall be laid on the table in this Honourable*

Council within three months of receipt from the date of the report. It is now four months and one day since that report was submitted and received on the 27th of January,"

❖ **Legal Issues:**

11. Whether the requirement under section 20 (2) of the Audit Act is a mandatory or discretionary duty on the Governor General duty to lay the report in the Council of Assembly (the Council) within three months.

12. What if anything can be done by the Legislative Council in respect of the breach?

❖ **Issue 1: Mandatory or discretionary?**

The Constitutional role and function of the Governor

13. Sir Paul Hasluck, *The Office of Governor-General*, Melbourne University Press, Carlton, 1979, p. 10. commented :

> ***The duties of the Governor-General are of various kinds. Some** are laid on him by the Constitution, some by the Letters Patent and his Commission**. Others are placed on him by Acts of the Commonwealth Parliament**. Others come to him by conventions established in past centuries in Great Britain or by practices and customs that have developed in Australia.[33]*
>
> ***All of these duties have a common characteristic. The Governor-General is not placed in a position where he can run the Parliament, run the Courts or run any of the instrumentalities of government; but he occupies a position where he can help ensure that those who conduct the affairs of the nation do so strictly in accordance with the Constitution and the laws of the Commonwealth and with due regard to the public interest.** So long as the Crown has the powers which our Constitution now gives to it, and so long as the Governor-General exercises them, Parliament will work in the way the Constitution requires, the Executive will remain responsible to Parliament, the Courts will be independent, the public service will serve the nation within the limits of the law and the armed services will be subject to civil authority*

14. Section 35 provides for the office of the Governor. Section 35(2) specifically mentions that the Governor shall have such powers and duties as prescribed within the Constitution, as her Majesty may confer or impose upon him or as conferred or imposed by other law. The facts above relate to duties conferred or imposed by such 'other law' being the Audit Act 2003.

15. It is worth noting that the Audit Act predates the Virgin Islands Constitution Order 2007. However, per section 115 of the Order, such is saved and continues to have effect.

16. Having determined that the laying of the Auditor General's report in the Legislative Council was a duty conferred/imposed by law, the effect of section 40 of the Constitution must be noted. Section 40 provides that:

> *"……..**the Governor shall consult with the Cabinet in the exercise of all functions conferred on him or her by this Constitution or <u>any other law</u> for the time being in force in the Virgin Islands, except—***
>
> *(a) when acting under instructions given to him or her by Her Majesty through a Secretary of State;*
>
> *(b) when exercising any function conferred on him or her by this Constitution or any such other law which is expressed to be exercisable by the Governor in his or her discretion, or in accordance with the advice of, or after consultation with, any person or authority other than the Cabinet; or*
>
> *(c) in any case which, in his or her opinion, involves a matter for which he or she is responsible under section 60;*
>
> *but in exercising his or her powers in relation to matters to which paragraph (c) applies, the Governor shall consult with the Premier."*

❖ **<u>A literal interpretation:</u>**

17. In interpreting acts of parliament or statute, it is useful to apply the cannons of interpretation, which favor a literal construction. The prima facie intention of a statute is presumed to be that which corresponds to its literal meaning (see S 85 of Bennion on Statutory Interpretation

(6th ed.) (at p 275). The literal meaning is the starting point in construing the law. It is put this way at p 781 of Bennion:

> *"The literal meaning, at least of a modern Act, is to be treated as pre-eminent when considering the enactments contained in the Act. In general, the weight to be attached to the literal meaning is far greater than applies to any other interpretative criterion. The literal meaning may occasionally be overborne by other factors but they must be powerful indeed to achieve this."*

18. The literal meaning is that which corresponds to ordinary and common usage and the grammatical meaning of the text of the law. *Bennion (6 th ed) noted (at pp 780-81):*

> *"The term "literal meaning" corresponds to the grammatical meaning where this is straightforward. If, however, the grammatical meaning, when applied to the facts of the instant case, is ambiguous, then any of the possible grammatical meanings may be described as the literal meaning. If the grammatical meaning is semantically obscure, then the grammatical meaning likely to have been intended (or anyone of them in the case of ambiguity) is taken as the literal meaning. The point here is that the literal meaning is one arrived at from the wording of the enactment alone, without consideration of other interpretative criterion."*

19. The literal and purposive interpretation of the above allows the conclusion that save for the occasion itemized at subsections a to c, the Governor is mandated to consult with the Cabinet on laying the Auditor General's report in the Legislative Council. The language of section 20(2) of the Act is mandatory as opposed to discretionary, the text is now produced:

> *"(2) The Governor **shall**, within three months of the receipt of the special report, cause the report to be laid before the Legislative Council."*

20. The literal interpretation of the word "shall" gives rise to a mandatory obligation on the Governor General to (a) lay the report in parliament within 3 months of receipt and (b)

consult with Cabinet in doing so. A literal interpretation of Section 20(2) of the Act together with Section 40(2) is favored in these circumstances because:-

a. The nature and function of the special audit report is such that it is meant to deal with an ad hoc matter with a sense of urgency. Cabinet and the Council must be alerted in a quick timeframe to ensure immediate attention to pressing issues. Time is therefore of the essence;

b. The democratic principles of transparency and accountability that underpin the constitutional democracy favours a literal interpretation lest the Governor be allowed to frustrate the provisions of the Act which were clearly designed to trigger prompt review and action if appropriate by the highest organs of the state.

❖ **Alternative argument for non-discretionary interpretation?**

21. Notwithstanding the literal and purposive interpretation, there is room for viable argument in support of an interpretation that the duty to lay the report is non mandatory or discretionary in nature. If the three-month period was not mandatory as suggested above, the Governor General is duty bound to act within a reasonable period of time or "as soon as practicable".

22. In **CA No. 29 of 2006 Chandresh Sharma v Dr. Lenny Saith** the Trinidad & Tobago Court of Appeal in Trinidad & Tobago at para 24 discussed the relevant consideration when determining the extent of an obligation to act "*soon as practicable":*

With respect to this submission it is necessary to consider what is the obligation created by the section. ***The obligation is to prepare a report on the operation of the Act for each year and cause it to be laid in Parliament as it is practicable to do so after the end of that year****. The word "practicable" is defined in the* ***Oxford Dictionary of English (2nd Edition)*** *as meaning "able to be done or put into practice successfully". In* ***Black's Law Dictionary (5th Edition)*** *the word is defined as "that which may be done, practiced or accomplished, that which is performable, feasible or possible". In* ***Lee v Nursery Furnishing Limited*** *[1945] 1 ALL E.R.387 Lord Goddard accepted as the definition of*

"practicable", "capable of being carried out in action" or "feasible". In ***the light of those definitions I think that section 40(1) of the Act requires the Minister to prepare an annual report and lay it in Parliament as soon as it is capable of being done after the end of each year. In assessing whether it is capable of being done regard must be had to all the relevant circumstances. Such circumstances would include financial considerations and the available resources****. So far as the question of resources is concerned I agree with the approach in* ***R v Secretary of State for the Home Department, ex parte Rofathullah*** *[1989] QB 219 that the adequacy of the resources allocated to the task is to be determined on* ***Wednesbury principles*** *(see* ***Associated Provincial Picture Councils Ltd v Wednesbury Corporation*** *[1948] 1 K.B.223.* ***However in this matter no contention was raised relating to the adequacy of the resources allocated to the task of the preparation of the report. Another relevant circumstance is that the preparation of the report by the Respondent is in turn dependent on information provided to him by Ministers responsible for the public authorities that are subject to the Act (which from the evidence number 117). This is not to say that the Respondent may sit by and wait indefinitely for the information that he requires. He is expected in the discharge of his duties under section 40 (1), to take such steps reasonably open to him to have the information supplied to him****. It should be noted that section 40(2) envisages that the Respondent may make regulations prescribing the requirements relating to the furnishing of information and the keeping of records for the purpose of section 40.*

23. Therefore, even if the Governor General is not obligated to lay the Report within a strict three month timeline, he is bound to act reasonably to discharge his duties, taking such steps as are reasonably open to him, having regard to the relevant circumstances.

24. The suggestion that the laying of a document in Parliament is discretionary as opposed to mandatory is supported by a ruling of the Speaker of the House in a Parliamentary debate in New Zealand in 1905,:

"Before calling on the orders of the day, I wish to state the opinion I have formed upon the question raised by the honourable member for Bruce, as to whether the report of the

Royal Commission on the land question was a document that had been ordered to be laid on the table of the Council. In the first place, I want to draw the attention of honourable members to the fact that the resolution dealing with this question, passed by the Council on the 7th September last, simply provides that an inquiry is to be made. It does not state how. It concludes by saying, "The result of such inquiry to be laid on the table of the Council not later than fourteen days after the opening of the next session of Parliament." I hold that the resolution does not amount to an order for a return or the production of any document then in existence. In May's "Parliamentary Practice" ***it is laid down that when an order of the Council has been made for a document or a return to be laid on the table, if it is not produced within a reasonable time or within the time stated in the resolution, the practice is for any honourable member to call the attention of the Council to that resolution, ask to have it read, and move that the return or document be ordered to be laid on the table forth with ; and then, if that resolution is not complied with, the person who is guilty of neglect can be summoned to the bar of the Council and punished as the Council may think fit. I notice that in one of the precedents referred to he was ordered into custody and confined in the Tower****. With regard to the reports of Royal Commissions, I find it laid down in Blackmore's "Practice of the Councils of Assembly"—a colonial work—that—*

> *"It is customary to lay the reports of Royal Commissions on the table immediately after they have been received from the Governor. Prior to this it is contrary to usage to ask questions or to communicate information touching them. But no objection is offered to questions as to the probable date when the report will be furnished."*

I further find it laid down in Todd, on the same point, that when a Royal Commission has been set up to inquire into and report, "That as soon as the Commissioners present their report to the Crown, through the Secretary of State for the Home Department, this report is usually transmitted to Parliament to be commented on by members." ***These are the precedents that I have found in the matter, and I can see no precedent laying it down that the order of the Council setting up the inquiry requires that any document which is not then in existence has to be laid on the table of the Council within the specified***

time. <u>The resolution that the result of the inquiry has to be laid on the table of the Council within fourteen days is simply directory, and not mandatory,</u> *in my opinion; and the Commission has, according to the authority quoted, to report to His Excellency the Governor, and when he commands that that report be laid before the Council it will, no doubt, be produced.* ***<u>If the report is not laid on the table within a reasonable time, it will be open to any member of the Council to move an address asking His Excellency to have the report laid upon the table.</u>*** *I may add that it is the usual practice to lay a copy and not the original report on the table."*

25. The practice espoused by the Speaker in New Zealand, which is equally applicable in the BVI, is two-fold. Firstly, there being no sanction is prescribed in the Audit Act 2003 for the failure to lay the Auditor General's (section 20[1]) report within three months of receipt the duty to lay the report may be interpreted as being ***<u>directory, and not mandatory.</u>***

26. This is because, when considering that there is no sanction for failure to comply with the time period stipulated by section 20(2) of the Audit Act 2003, the section can be interpreted as affording guidance to the Governor General as opposed to imposing restriction

27. Secondly, where the report is not laid, a motion can be moved by a member of the Council to have the report laid forthwith. If the report is not produced, the defaulting party may be made to account for his failure and punished, if necessary.

❖ **<u>Conclusion to issue one</u>**:

28. On a balance, a mandatory interpretation is preferred and barring exceptional circumstances, the law must be obeyed. Had the legislature intended this duty to be non-mandatory, the use of the word "may" could have been used to connote a discretionary power. This however is clearly not the case. It must have been intended that the Governor General act with expediency and transparency in receiving, considering and laying reports from the Auditor General before the Council. Indeed, no less than 3 months was prescribed for him to do so.

29. However, the failure of the Governor General to lay the report within the three-month period and almost a month late must be considered. In challenging such a failure by the Governor General one must anticipate that the Council will be met with a response that there were exceptional circumstances which reasonably justify the delay.

30. Reasonability is subjective. A delay is only unreasonable if there is no good or acceptable reason for it. See **Amherst v Walker 9 [1983] 2AER 1067 and Cooper and Balbosa v DPP**. The answer as to whether good reason exists must turn on the factual matrix and consequences of failure to comply in each case. Indeed, where rights and expectations to substantive relief are at stake administrative delay may be a poor excuse, however this is not such a case.

31. In the facts at hand, the delay amounts to just over one month in excess of the three-month period within which the Governor had to act. The fact that this three-month period took place during an ongoing worldwide COVID-19 Pandemic which (possibly) affected the operations of the Governor General. Furthermore, a delay of month is arguably reasonable in the sphere of civil litigation.

32. The present international circumstances with respect to COVID-19 must be factored in when assessing the reasonability of the period of delay. The Governor General is likely to use the exceptional COVID-19 pandemic as the justification for his tardiness. Whilst this is likely to generate some sympathy, the Covid-19 restrictions did not last 4 months and hence cannot provide a complete justification for the inordinate delay. Furthermore, the House was actively sitting during this period and he could have easily laid the report.

❖ **Issue Two: What can be done?**

33. Parliament is master of its own proceedings and Parliament can censure someone for breaching duty to lay.

34. The Legislative Council has its own rules and regulations, which is deeply rooted in tradition and influenced by precedence across the Commonwealth. Within these guidelines are procedures for curing defects in parliamentary practice. In this instance, the failure to act does not impose a sanction upon the individual in breach. Given the precedent of conduct of the New Zealand Council of Commons and the generally accepted notion that the Parliament is the court of its own affairs, it is highly likely the Court will decline the invitation to enquire into whether the Governor acted negligently in failing to lay the Auditor General's report within the stipulated three month period as provided for by section 20(2) of the Audit Act, 2003. It is left to the Parliament to remedy this issue. Any legal challenge will now be academic as the report has been laid.

35. Not only did the Governor General fail to lay the report within 3 months, he also failed in performing the duty required by section 40(1) of the Constitution to consult the Cabinet. The Governor was well aware on 1st November, 2019 that he has three months upon receipt of the report to lay same before the Legislative Council. It was open at all times to him to comply with Section 40(1) of the Constitution and consult with the Cabinet and advise them in the event that he was unable to lay the report (which is obviously very controversial and important given the monies spent). He however chose not to do so, fully aware of the impeding three-month deadline. In those circumstances, this omission must be seen as should be seen as an intentional default on his part and in keeping with his previous trend of attempting to isolate himself from the Government.

36. As noted above by the previous Speaker of the House in New Zealand, the parliamentary practice of countries with British legislature traditions, to which the BVI subscribes by virtue of its dependency status, dictates that on the failure of an event happening within a directed timeframe, any member may announce the failure and call for rectification.

37. This is the first step in parliamentary control where there is "*the requirement that a document be laid before Parliament, though, if its contents are of minor significance only,* the *enabling Act may not impose such a requirement, or may require nothing more in the way of*

*parliamentary contro*l" [para 31.11 of Erskine May's treatise on the law, privileges, proceedings and usage of Parliament (25th edition, 2019]

38. The members of the Council itself can cure the breach by the Governor by moving a motion to have the report (which already exists) laid forthwith and in default, moving a motion of censure and/or admonish him.[2]

39. The motion to censure is a main motion expressing a strong opinion of disapproval that could be debated by the assembly and adopted by a majority vote. According to ***Robert's Rules of Order*** (*Newly Revised*) (RONR), it is an exception to the general rule that "a motion must not use language that reflects on a member's conduct or character, or is discourteous, unnecessarily harsh, or not allowed in debate."[2] ***Demeter's Manual*** notes, "It is a reprimand, aimed at reformation of the person and prevention of further offending acts."

40. Despite being sustainable, the motion cannot give rise to the unseating of the Governor as the officeholder is *"appointed by Her Majesty by Commission under Her Sign Manual and Signet and shall hold office during Her Majesty's pleasure."* The debate on the motion however will express the displeasure of the House with the manner in which the Governor has discharged his duties. This in turn may affect Her Majesty's view of his continued tenure

❖ **Conclusion to issue two:**

41. The members of the Council can debate the motion of censure and once successful, the offender has to be directed to be reprimanded or admonished formally by the Speaker. The Governor General need not be required to attend. Instead, the Council can agree to a

[2] At para 11.28 of Erskine May's treatise on the law, privileges, proceedings and usage of Parliament (25th edition, 2019:
Although the powers to commit and to fine have not been used in modern times, the power to reprimand and admonish has been. Traditionally, the offender has been directed to be reprimanded or admonished formally by the Speaker or Lord speaker. However, in recent years the Council of Commons has not required the attendance of the culprit. Instead, the Council has agreed to a resolution setting out the reprimand, which is subsequently recorded in the Journal and in Hansard. The text of the resolution was communicated to the culprits by the Clerk of the Council.
For details of the procedure used in earlier times, see Erskine May (24th edn, 2011), pp 196–97

resolution setting out the reprimand, which is subsequently recorded in the Journal and in Hansard. The text of the resolution can then be communicated to the Governor by the Clerk of the Council. The motion of censure is a more practical approach which will highlight the Governor's breach of statutory duty for the court of public opinion. It is of immense political and democratic symbolic value and can form a strong foundation for a formal request to Her Majesty to recall the Governor's appointment. It must be noted that there will be no legal obligation to do so by the UK and the request will be heavily dependent on moral suasion.

And we so advise.

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