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2022 – HC – DEM – CIV – FDA - 47

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

REGULAR JURISDICTION

BETWEEN:

GLENN LALL

Applicant

-and-

ATTORNEY GENERAL OF GUYANA

Respondent

-and-

ESSO EXPLORATION AND

PRODUCTION (GUYANA) LIMITED

Added Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANT TO

THE ADDED RESPONDENT

1.0 INTRODUCTION AND BACKGROUND

1.1 The matter before this Honourable Court is for declaratory relief in

respect of *ultra vires* acts done by the Minister of Natural Resources and

by the Minister of Finance on behalf of the Government of Guyana

(*hereinafter referred to as the "GoG"*), in signing to and thereby consenting to the terms contained in Article 15 of the Petroleum Agreement dated June 27, 2016 between the GOG and Esso Exploration and Production (Guyana) Limited, CNOOC/Nexen Petroleum Guyana Limited and Hess Guyana Exploration Limited) (*hereinafter referred to as "the Contractors"*). It is respectfully submitted by the Applicant that certain parts of the said Articles 15 of the said Agreement are *ultra vires*, discriminatory and in breach of **sections 10 and 51 of the Petroleum Exploration and Production Act, Cap 65:04** (*hereinafter referred to as the "PEPA"*) and **sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act, Cap 73:01** (*hereinafter referred to as the "FAAA"*) in their effect and purpose. The applicant filed this action claiming the following declarations:

- (a) A Declaration that Article 15.1 of the Petroleum Agreement between the Government of the Cooperative Republic of Guyana and Esso Exploration and Production Guyana Limited, CNOOC NEXEN Petroleum Guyana Limited and HESS Guyana Exploration Limited dated 27th day of June 2016, to the extent that it grants exemptions to persons other than licensees violates sections 10 and 51 of the Petroleum Exploration and Production Act Cap. 65:04, is unlawful, null and void and of no legal effect.

(b) A Declaration that Article 15.1 of the Petroleum Agreement violates sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01] and is unlawful, null and void and of no legal effect.

(c) A Declaration that Article 15.4 of the Petroleum Agreement violates sections 10 and 51 of the Petroleum (Exploration and Production) Act Cap. 65:04 and is ultra vires, unlawful, null, void and of no legal effect.

(d) A Declaration that Article 15.4 of the Petroleum Agreement violates sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01] and is ultra vires, unlawful, null, void and of no legal effect.

(e) A Declaration that section 49 of the Petroleum (Exploration and Production) Act Cap. 65:04 purporting to authorise the Minister to remit any royalty payable by a licensee or to defer the payment of such royalty, is violative of sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01] and is ultra vires, null and void and of no legal effect.

- (f) A Declaration that Article 15.7 of the Petroleum Agreement violates sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01], and is unlawful, null and void and of no legal effect.

- (g) A Declaration that Article 15.9 of the Petroleum Agreement violates sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01], and is unlawful, null and void and of no legal effect.

- (h) A Declaration that the second paragraph of Article 15.10 of the Petroleum Agreement violates sections 10 and 51 of the Petroleum (Exploration and Production) Act Cap. 65:04 to the extent that it grants exemptions to persons other than licensees is unlawful, null and void and of no legal effect.

- (i) A Declaration that Article 15.10 of the Petroleum Agreement violates sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01], and is unlawful, null and void and of no legal effect.

(j) A Declaration that Article 15.11 of the Petroleum Agreement violates sections 10 and 51 of the Petroleum (Exploration and Production) Act Cap. 65:04 to the extent that it grants exemptions to persons other than licensees and is unlawful, null and void and of no legal effect.

(k) A Declaration that Article 15.11 of the Petroleum Agreement violates sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01] and is unlawful, null and void and of no legal effect.

(l) A Declaration that Article 15.12 of the Petroleum Agreement violates Article 149 of the Constitution of the Co-operative Republic of Guyana and is unlawful, null and void and of no legal effect.

(m) A Declaration that Article 15.12 of the Petroleum Agreement dated violates section 5 of the Prevention of Discrimination Act Cap. 99:08, and is unlawful, null, void and of no legal effect.

(n) A Declaration that Article 15.12 of the Petroleum Agreement violates section 51 of the Petroleum (Exploration and Production)

Act Cap. 65:04, and is unlawful, null and void and of no legal effect.

(o) A Declaration that Article 15.13 of the Petroleum Agreement violates sections 10 and 51 of the Petroleum (Exploration and Production) Act Cap. 65:04, and is ultra vires, unlawful, null and void and of no legal effect.

(p) A Declaration that Orders No.10 of 2016 Petroleum (Exploration and Production) (Tax Laws) (Esso Exploration and Production Limited, CNOOC/Nexen Petroleum Guyana Limited and Hess Guyana Exploration Limited) made under the Petroleum (Exploration and Production) Act Cap. 65:04 is ultra vires, unlawful, null and void and of no legal effect.

(q) In the alternative, a Declaration that to the extent that Order No. 10 of 2016 Petroleum (Exploration and Production) (Tax Laws) (Esso Exploration and Production Limited, CNOOC/Nexen Petroleum Guyana Limited and Hess Guyana Exploration Limited) made under the Petroleum (Exploration and Production) Act Cap. 65:04 is valid, that validity applies only to the Licensees.

(r) Such further or other orders as the Court may deem just;

(s) Costs.

The Applicant is no longer pursuing Declarations (l) and (m) and sincerely apologises to the Honourable Court and the parties.

1.2 It is the Applicant's submission that by entry into the Petroleum Agreement or by granting the concessions under Article 15 of the Petroleum Agreement, the Minister has extended concessions, remissions and waivers in violation of the section 51 of the PEPA and the section 6 FAAA and further has discriminated in favour of expatriate employees in granting concessions not available to Guyanese.

1.3 The Added Respondent, Esso Exploration and Production Limited ("*Exxon Mobil*") represented herein by its President, Mr Alistair Routledge, argues that the statute cited should be construed in favour of them, their non-resident sub-contractors, expatriate employees and affiliated companies because of certain assumptions by the Added Respondent that a "purposive construction" of section 51 of the PEPA would result in a "logical and reasonable result" that justifies "Esso and its co-venturers" illegalities under the said Agreement because Exxon Mobil has expended sums of money.

1.4 It is the Applicant's submission that the said Petroleum Agreement that was signed by the said Minister and the Contractor contained clear violations of primary legislation that existed at the time, or even before the Petroleum Agreement was signed. Considering the principle, "ignorance of the law is no excuse", the Added Respondent ought to have been aware of the laws of Guyana before entering into costly transactions clearly in violation of the law.

2.0 ISSUES

2.1 The Applicant will address each of the contentions as set out in his applications through the following issues:

- a) Whether the Applicant has *locus standi* to initiate this action.
- b) Whether the matters can be converted under the Judicial Review Act, Cap 3:06.
- c) Whether the acts of the Minister and certain sub-articles of the said Petroleum Agreement between the Government of Guyana and the Added Respondent violate the Petroleum Exploration and Production Act, Cap 65:04 (hereinafter referred to as the "PEPA") and the

Financial Administration (and Audit) Act, Cap 73:01 (hereinafter referred to as the “FAAA”).

d) Whether the Petroleum Exploration and Production Act, Cap 65:04 is a Tax Act.

e) Whether the Applicant is barred from bringing this action due to delay.

3.0 THE LAW

A. ISSUE: Whether the Applicant has *locus standi* to initiate this action.

3.1 The Applicant asserts that the common law, legislation and the Constitution are key sources of law which prescribe the legal capacity and standing of individuals and entities who seek the court’s determination on key issues.

3.2 In particular, the court, as the guardian of the rights enshrined in the Constitution and upholder of the rule of law, has exclusive and inherent jurisdiction and power to determine standing of litigants and the issues raised by such persons before the court as a matter of law and context and judicial discretion: **AG v Dumas (2017) 90 WIR 507** at paras 98 and 102. Robinson,

Bulkan and Saunders in **Fundamentals of Caribbean Constitutional Law** at page 213, 5-004 posit that,

“...the broad power of judicial review of laws and state action is implied from the text [of the Constitution] and its commitment to the rule of law...”

3.3 In public interest litigation, both the Judicial Review Act and Civil Procedure Rules of Guyana 2016 set out the “who” that can seek redress before the court for public law wrongs. As such, **section 4** of the **Judicial Review Act, Cap 3:06** provides that,

“Section 4. (1) The Court may on an application for judicial review grant relief in accordance with this Act –

(a) to a person whose interests are adversely affected by an administrative act or omission;

(b) to a person or group of persons if the Court is satisfied that the application is justifiable in the public interest in the circumstances of the case (emphasis added).”

3.4 Therefore, public interest matters can be brought by persons not having to show any special loss or damage suffered over and above the public. In fact, there is no longer only public interest litigation like the present proceedings that are brought by persons whose interests are adversely affected. Instead, the law allows those persons or groups of persons who, in the circumstances,

satisfy the Court that the proceeding is in the public interest: **Section 4(b) of the Judicial Review Act.**

3.5 The Applicant is a citizen of Guyana and the publisher of the National Media and Publishing Company Limited – a newspaper of national circulation, he is also a businessman and a taxpayer. He has commenced these proceedings as a public-spirited citizen of Guyana. Although he is alleging an infringement of his fundamental rights and freedoms in Article 149 of the Constitution of Guyana, he is clear that his interest in these proceedings is not personal and that he will not likely be directly affected in his individual capacity by the actions of the Minister with responsibility for petroleum and the Petroleum Agreement dated June 27, 2016.

3.6 The Applicant submits that the present proceedings before the Court raise serious issues of socio-economic value to the Guyanese citizens generally and touch and concern the legality and vires of certain sub-articles of Article 15 of the Petroleum Agreement between the Minister of Natural Resources on behalf of the Government of Guyana and the Contractor. The Applicant further submits that over the past five years he has continuously published and questioned the legitimacy of the Agreement and exercise of the Minister's powers with respect to their far-reaching consequences on the ability of the

Applicant and Guyanese generally to benefit equally from the resources, systems and services as a result of Guyana's new oil and gas industry.

3.7 The Applicant contends that entry into the Agreement constituted the Minister's, and by extension, the Government's agreement with the whole Agreement including Article 15 of the said Petroleum Agreement which contain sub-articles contrary for primary legislation and the Constitution, all of which existed at the time of and before the signing of the Agreement.

3.8 The Applicant submits that a review of the sub-articles of Article 15 of the said Petroleum Agreement would show that the Minister exercised his powers to consent to:

(a) The grant of tax waivers and concessions to persons and entities other than the Contractor contrary to section 10 and 51 of the PEPA, namely Affiliated Companies (Articles 15.1, 15.10), Non-Resident Sub-Contractors (Article 15.10) and expatriate employees (Article 15.12(ii)).

(b) The payment of taxes by the Minister on behalf of the Contractor to the Commissioner General of the Guyana Revenue Authority (Article 15.4)

(c) The submission of the Contractor's income tax returns by the Minister to the Commissioner General of the Guyana Revenue Authority (Article 15.5).

3.9 Therefore, the declaratory relief sought concern serious issues of public importance which the Applicant submits that the Court should consider be examined as it affects the Guyanese public's ability to fairly benefits from the systems of taxes and employment in the oil and gas industry.

3.10 In keeping with the principle established in the case of **AG v Dumas [2017] 90 WIR 507**, this Honourable Court is entitled to entertain public interest litigation provided the litigation is *bona fide*, arguable with sufficient merit to have a real and not fanciful prospect of success, grounded in a legitimate and concrete public interest. At paragraph 133, the Court in the instant case held that,

"...barring any specific legislative prohibition, the court in the exercise of its supervisory jurisdiction and as guardian of the Constitution, is entitled to entertain public interest litigation for constitutional review of alleged non-Bill of Rights

unlawful constitutional action; provided the litigation is bona fide, arguable with sufficient merit to have a real and not fanciful prospect of success, grounded in a legitimate and concrete public interest, capable of being reasonably and effectively disposed of, and provided further that such actions are not frivolous, vexatious or otherwise an abuse of the court's process. The approach to be taken to this issue of standing is a flexible and generous approach, bearing in mind all of the circumstances of the case, including in particular the need to exclude busybody litigants and those who have no genuine interest in the issues raised and have not demonstrated credible engagement in relation to them. The public importance of the issues raised and of vindicating the rule of law are significant considerations."

3.11 As Jamadar, JA at page 511, paragraph h in the *AG v Dumas (supra)*, quoting Baroness Hale, said that

"...too close a concentration on the particular interest which the claimant may be pursuing risks losing sight of what this is all about – fundamentally, as Mark Elliott has said, the issue is not about individual rights but about public wrongs. There

are better ways of nipping unmeritorious claims in the bud than too restrictive an approach to standing.”

3.12 In the case of **R. v Felixstowe Justices Ex. p. Leigh [1987] Q.B. 582, per Watkin LJ at 598**, the press has been described as the guardians and watch-dogs of the public interest in the proper administration of justice, and allowed to seek review of decisions of magistrates' courts and examining justices. Lord Justice Watkins held that,

"How then is the sufficiency of the applicant's interest in the matter of each of the applications to be judged?... The appropriate approach in this case, it seems to me, is for the court, in using what I regard as its undoubted discretion, to decide the question of sufficient interest on each application primarily within its factual context..."

"...I have already emphasised the importance to the community at large of open justice and the role of the press as guardian and watchdog of the public interest in this matter, especially in magistrates' courts. Within the context of the administration of justice as a whole, the policy of routine non-disclosure adopted by the Felixstowe bench and their clerk,

shared in one form or another by a growing number of justices elsewhere, raises a matter of national importance... ”

3.13 Citing Lord Diplock in *Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self Employed and Small Businesses Ltd.* [1982] A.C. 617, at 644, Watkins LJ in **R v Felixstowe (supra)** agreed that seeking declarations is the appropriate remedy when matters are brought by public-spirited citizens having a sufficient interest in the matter:

"It would, in my view, be a grave lacuna in our system of public law if ... even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

3.14 Further, in the case of **R. v HM Treasury Ex p. Smedley [1985] Q.B. 657** a public-spirited taxpayer who raised a serious issue as to the powers to make an order in council, that would automatically lead to substantial expenditure by the government, was held to have standing.

3.15 In **R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. Rees Mogg [1994] Q.B. 552**, a citizen who had a "*sincere concern for constitutional issues*" was allowed to challenge the lawfulness of the ratification of the Treaty on the EU.

3.16 In the case of **R. (Miller) v Prime Minister [2020] A.C. 373**, an individual citizen brought successful claims challenging the decision to prorogue Parliament, and on whether the giving of notice of the intention of the UK to leave the EU required an Act of Parliament.

3.17 In the case of **R. (Evans) v Secretary of State for Defence [2010] EWHC 1445 (Admin)**, no objection was taken to the standing of an activist opposed to the use of troops in Afghanistan in a challenge to the policy and practice governing the transfer of suspected insurgents to the Afghan authorities. Richards LJ in **R. (Evans) v Secretary of State for Defence (supra)** at para 2 held that,

“The claimant is a peace activist who is opposed to the presence of UK and US armed forces in Afghanistan. The fact that she may have a wider objective in bringing her claim is, however, an irrelevance. The claim itself is brought in the public interest, with the benefit of public funding. It raises issues of real substance concerning the risk to transferees and, although the claimant’s standing to bring it was at one time in issue, the point has not been pursued by the Secretary of State.”

3.18 In **Quincy McEwan et al v AG [2018] CCJ 30 (AJ)**, in objection to the Guyana Court of Appeal's striking out of SASOD as a party to those proceedings, the Caribbean Court of Justice held at para 88 that,

"In constitutional proceedings, courts should adopt a liberal approach in affording standing to individuals and entities. It is in the public's interest to ensure that the Constitution is properly interpreted and applied, and the rule of law vindicated."

3.19 The Applicant submits that in addition to the Judicial Review Act's recognition of rights of members of the general public to pursue public interest litigation, the Applicant is a public-spirited citizen, taxpayer and newspaper publisher, who has from first becoming transactionally aware of the unfair tax and employment terms for accessing the oil and gas industry decided to pursue this action so that the principles of fairness and natural justices imbued in the Constitution and legislation in Guyana would have a real rather than artificial effect on the lives of Guyanese: **Section 19 of the Judicial Review Act** provides that,

"Any person or body in the exercise of an administrative act, to which this Act applied, shall perform that act in accordance with the principles of natural justice or fairness."

3.20 In light of the foregoing, the Applicant submits that reasons and issues raised by the Applicant in the present proceedings entitle him to standing before the Court as a legitimately interested party and asks the Court to exercise its jurisdiction in favour of the Applicant.

B. ISSUE: Whether the matters can be converted under the Judicial Review Act, Cap 3:06.

3.21 Further, **Section 12 of the Judicial Review Act, Cap 3: 06** provides that,

“Section 12. Where the Court is of the opinion that an action commenced by way of writ of summons should be by the way of application for judicial review, the Court may give such directions and make such orders as it considers just to allow the proceedings to continue as proceedings governed by this Act (emphasis added).”

3.22 The Applicant submits that the Judicial Review Act allows him to make an application to the court for the review of acts and decisions of public authorities if the Court is satisfied that the application is justifiable in the public interest in the circumstances of the case. The Act also allows for applications to be made for the grant of declaratory relief: **Section 2, 4 and 8(2) of the Judicial Review Act**. Further, the Judicial Review Act allows

these present proceedings to a judicial review matter should the Court exercise its discretion to give such directions.

3.23 Though the present proceedings were made by way of a private claim under a Fixed Date Application, the Judicial Review Act enables the court to exercise its jurisdiction by directing that the matter be converted to a judicial review application.

3.24 The Applicant submits that should this Honourable Court direct thus, the Applicant submits that he is able to abide by such directions to convert the matter to one for Judicial Review.

C. Whether the acts of the Minister and certain sub-articles of the said Petroleum Agreement between the Government of Guyana and the Added Respondent violate the Petroleum Exploration and Production Act, Cap 65:04 (hereinafter referred to as the “PEPA”) and the Financial Administration (and Audit) Act, Cap 73:01 (hereinafter referred to as the “FAAA”)

3.25 The Applicant contends that the Agreement between the Government of Guyana violates the **PEPA and FAAA** and that the sub-articles of Article 15 of the Petroleum Agreement complained of and exercise of the Minister’s powers in agreeing to the said sub-articles are *ultra vires*.

3.26 The essence of the Minister's powers is created under administrative law; a branch of public law which deals with the actions, omissions and decisions of public authority or decision-making body. The general principle is that a public decision-making body or person, particularly those exercising statutory powers or otherwise carrying out public functions, will not be said to be acting lawfully if it acts *ultra vires* or outside the limits of its jurisdiction. Further, such a person or body may lack jurisdiction if it has "no power in the narrow sense to take a particular course of action or make a decision but takes it or commits any other error of law": **Halsbury's Laws of England** (Volume 61A (2018))/2; *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 at 701.

3.27 The doctrine of *ultra vires* is regarded as the "juristic basis" for court's review of the actions, omissions and decisions of public authority, bodies and persons, and its underlying principle for public bodies or officers exercising statutory powers is that the powers are exercised in the way in which Parliament intended. Further, there is a presumption that Parliament intended for the powers to be exercised lawfully: *Halsbury's Laws of England* (Volume 61A (2018))/2;

3.28 Therefore, any instrument, legislation, act or decision will be regarded as *ultra vires* if it is incompatible with the limits imposed by a superior element of the law in its effect or purpose. As such, a Minister's ratification of a contractual document that has the effect of giving concessions to persons not named, defined, stated or referred to in the primary legislation governing it nor entitling that class or group of persons to receive such concessions is *ultra vires* the said primary legislation: *R (on the application of the Public Law Project) v Lord Chancellor and Secretary of State for Justice* [2016] UKSC 39 at [23], [2016] AC 1531, [2017] 2 All ER 423, per Lord Neuberger P; *R v Lord President of the Privy Council, ex p Page* (supra); *O'Reilly v Mackman* [1983] 2 AC 237 at 278, [1982] 3 All ER 1124 at 1128.

3.29 Section 5 of the Judicial Review Act provides that,

“(1) *The grounds upon which the Court may grant relief by way of the remedies mentioned in this Act include the following –*

- (a) *that an administrative act or omission was in any way unauthorised or contrary to law;*
- (b) *excess of jurisdiction;*
- (c) *failure to satisfy or observe conditions or procedures required by law;*
- (d) *breach of the principles of natural justice;*
- (e) *unreasonable, irregular or improper exercise of discretion;*

- (f) abuse of power;*
- (g) fraud;*
- (h) bad faith, improper purposes or irrelevant consideration;*
- (i) acting on instructions from an unauthorised person;*
- (j) conflict with the policy of an Act;*
- (k) error of law, whether or not apparent on the face of the record;***
- (l) absence of evidence on which a finding or inference of fact could reasonably be based;*
- (m) breach of or omission to perform a duty;*
- (n) failure to satisfy or observe conditions or procedures required by the Constitution;*
- (o) breach of the principle of proportionality;*
- (p) error of fact;*
- (q) deprivation of legitimate expectation; and***
- (r) misfeasance in public office”*

3.30 The Act also sets out definitions for administrative acts or omissions and decisions under **Section 2** as:

“Administrative act or omission” means an act or omission of a Minister, public body, public authority, tribunal, board, committee, or any person or body, exercising, purporting to

exercise or failing to exercise any public power or duty conferred or imposed by the Constitution, any written law, instrument of incorporation, rules or bylaws of any corporate or incorporate body or under a non-statutory scheme that is funded out of monies appropriated by Parliament;”

“decision” includes any commercial or contractual decision made in accordance with any power or duty conferred or imposed by the Constitution, any written law, any instrument of incorporation, rules or bylaws of any corporate or incorporate body or under a non-statutory scheme that is funded out of monies appropriated by Parliament.”

3.31 In the present case, the Applicant submits that in applying the definitions contained in **Section 2 of the Judicial Review Act**, the Minister responsible for petroleum’s conduct in the exercise of his powers amounted to both an administrative act and decision warranting the court’s review considering that it involved the Minister’s entry into contractual relations allowed under PEPA on behalf of the Government of Guyana.

3.32 The Applicant further submits that the Minister’s administrative act and decision of agreeing to certain sub-articles of Article 15 of the said

Petroleum Agreement were *ultra vires* the PEPA, FAAA, PDA and the Constitution and are addressed below:

(i) **Ultra Vires sections 10 and 51 of the Petroleum Exploration and Production Act, Cap 65:05** (hereinafter referred to as the “PEPA”)

(a) **Sections 10 and 51 of the Petroleum Exploration and Production Act Cap. 65:04** provides as follows:

“The Minister may enter into an agreement (not inconsistent with this Act) with any person with respect to all or any of the following matters, namely –

(a) The grant to that person or to any other person (including anybody corporate to be formed), identified in the agreement, of a licence;

(b) The conditions to be included in the licence as granted or renewed;

(c) The procedure to be followed by the Minister while exercising any discretion conferred upon him by or under this Act and the manner in which the discretion shall be exercised;

(d) Any matter incidental to or connected with the foregoing.”

(b) **Section 51 of the Petroleum Exploration and Production**

Act Cap. 65:04 provides that:

“(1) The Minister assigned responsibility for finance may, by Order, which shall be subject to affirmative resolution of the National Assembly, direct that any or all of the written laws mentioned in subsection (2) shall not apply to, or in relation to, a licensee where the licensee has entered into a production sharing agreement with the Government of Guyana.

(2) The written laws referred to in subsection (1) are -

(a) the Income Tax Act;

(b) the Income Tax (In Aid of Industry) Act;

(c) the Corporation Tax Act; and

(d) the Property Tax Act.”

(c) Further, the interpretation section of the **PEPA** defines licensee and holder in **Section 2(1) (p) and (k)** respectively as:

(p) licensee, “...the holder of a licence”

(k) “holder”, in relation to a licence, means the person to whom the licence is granted and, where a licence is granted to a person jointly with others, means everyone one of the persons to whom the licence is jointly granted, and includes every person to whom the licence is jointly granted, and includes every person to whom the licence or an interest therein is lawfully transferred;”

(d) Notwithstanding the above provisions, Article 15.1 and paragraph 2 of Article 15.10 of the Petroleum Agreement provide that, “***...no tax, value-added tax, excise tax, duty, fee, charge or other impost shall be levied at the date hereof or from time to time thereafter on the Contractor or Affiliated Companies, in respect of income derived from Petroleum Operations or in respect of any property held, transactions, undertaken or activities performed for any purpose authorised or contemplated hereunder other than...***”, and “***...that Affiliated Companies or Non-Resident Sub-Contractors shall not be subject to the provisions of the Income Tax Act (Cap 81:01) and Corporation Tax Act of Guyana (Cap 81:03) during the expiration period on income***

earned in Guyana for any given tax year if the Affiliated Company or Non-Resident Sub-Contractors has conducted business for one hundred eighty-three (183) days or less on a cumulative basis in the tax year of assessment,” respectively.

- (e) Similarly, Articles 15.11 and 15.12 (ii) of the Agreement purport to on the one hand, allow that there be “...*no tax, duty, fee, withholding, charge or other impost applicable on interest payment, dividends, deemed dividends, transfer of profit or deemed remittance of profits for Contractor’s, Affiliated Companies’ or Non-Resident Sub-Contractors’ branch in Guyana to its foreign or head office or to Affiliated Companies”* and on the other hand, provides that, “*expatriate employees of Contractor, Affiliated Companies or Non-Resident Sub-Contractors shall not be subject to the provisions of the Income Tax Act of Guyana (Cap. 81.01) and shall not be liable for personal income tax in Guyana on income earned in Guyana for any given tax year if the expatriate is physically present in Guyana for one hundred eighty-three (183) days or less on a cumulative basis in the tax year of assessment.”*

(f) It is our respectful submission that Articles 15.1, 15.11 and 15.12 are ultra vires sections 10 and 51 of the PEPA as they purport to disapply the written laws set out in section 51 (2) to persons other than licensees, namely to Affiliated Companies, expatriate employees of Contractors and non-resident sub-contractors.

(g) It is our respectful submission that by the use of the word “licensee”, Parliament intended that any concessions and waivers could not be extended to non-resident subcontractors, affiliated companies or associated companies.

(ii) Ultra Vires sub-sections 1A and 1B of section 6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01] (hereinafter referred to as the “FAAA”)

3.33 Section 6 of the FAAA provides that,

“(1) Save as maybe expressly provided by any law for the time being in force, no expenditure involving a charge on the revenue shall be incurred; nor shall any sum due to the revenue be remitted, unless the Minister is empowered by

the specific provisions of the relevant tax Act to permit the remission or by Order or other subsidiary legislation made under such Act.

(1A) Except as provided in subsections (1C) and (1CC), no remission, concession, or waiver is valid unless the remission is expressly provided for in a tax Act or subsidiary legislation.

(1B) No remission, concession, or waiver of tax by Order or other subsidiary legislation is valid unless the Act under which the subsidiary legislation is made expressly permits the Minister to provide such a remission, concession, or waiver.

(1C) The Minister may make regulations or other subsidiary legislation to release the taxpayer under the procedure and conditions specified therein in whole or in part from the liability to pay tax otherwise due in cases where the taxpayer's ability to pay tax due has been affected by natural disaster, disability, mental incapacity, or death, or if the taxpayer has been rendered homeless or destitute.

(1CC) The Minister may by order which shall be subject to negative resolution of the National Assembly exempt

Diplomatic, Consular, International, Charitable and Non-Profit Organisations, semi-autonomous agencies, Government departments, and public corporations from the payment of want-of-entry charges, stamp duty and environmental tax.

(1D) The Minister has the power to issue a notice making an adjustment in the tax rate so as to take into account fluctuations in the price of essential imported goods (for example, fuel); provided, however, that the effect of the change is at least revenue neutral.

(1E) Nothing in this section shall be construed to limit or restrain the Minister in the exercise of his duty to enforce the law and to exercise oversight in respect of the operations of the Ministry.”

3.34 However, in addition to the Articles examined above, that is Articles 15.1, 15.10, 15.11 and 15.12, further Articles of the Petroleum Agreement that violated the FAAA are Articles 15.4, 15.5, 15.7 and 15.9. These latter Articles provide as follows:

(Article 15.4) “The Minister hereby agrees:

(a) that a sum equivalent to the tax assessed pursuant to Article 15.2 and 15.3 will be paid by the Minister to the Commissioner General, Guyana Revenue Authority on behalf of the Contractor and that the amount of such sum will be considered income of the Contractor; and

(b) that the appropriate portion of the Government's share of Profit Oil delivered in accordance with the provisions of this Agreement shall be accepted by the Minister as payment in full by the Contractor of Contractor's share of each of the following levies, whatsoever the applicable rate of such levies may be, which the Minister shall then pay on behalf of the Contractor under Article 15.4 (a) to the Commissioner General, Guyana Revenue Authority or such successor authority:

(i) the Contractor's share of the income taxes imposed by the laws of Guyana, including, but not limited to, income tax imposed by the Income Tax Act and corporation tax imposed by the Corporation Tax Act and payable at the date hereof, or from time to time thereafter, and any other levy or charge on income or

profits which may become payable from time to time under any laws, acts, statutes, regulations or orders by the Government; and

(ii) any other similar charge imposed and payable in respect of Petroleum Operations at the date hereof, or from time-to-time hereafter, except charges of the type specified in Article 15.1 (a-b).”

(Article 15.5) “The Contractor shall provide the Minister with the Contractor’s income tax returns to be submitted by the Minister to the Commissioner General, Guyana Revenue Authority so the Minister can pay income tax on behalf of the Contractor as provided under Article 15.4 (a). On such returns, the Minister shall note that he is paying the income taxes on behalf of the Contractor, so that the Commissioner General, Guyana Revenue Authority can properly prepare the receipts required under this Article 15.5. Within one hundred and eight (180) days following the end of each year of assessment, the Minister shall furnish to the Contractor proper tax certificates in the Contractor’s name from the

Commissioner General, Guyana Revenue Authority evidencing the payment of the Contractor's income tax under the Income Tax Act and corporation tax under the Corporation Tax Act. Such certificates shall state the amount of tax paid individually on behalf of the Contractor or parties comprising the Contractor and other particulars customary for such certificates."

(Article 15.7) "Subject to the conditions of section 49 of the Act, the Minister may remit in whole or in part, or defer payment of, any royalties payable by Contractor."

(Article 15.4) "The Minister hereby agrees that the Contractor shall be exempted from the Property Tax Act pursuant to section 51 of the Act and any other act which amends or replaces in part or in whole the Property Tax Act."

3.35 Notwithstanding the provisions of **section 6 of the FAAA**, Articles 15.1, 15.4, 15.5, 15.7, 15.9, 15.10, 15.11 and 15.12 of the Petroleum Agreement granting tax concessions to affiliate companies, non-resident sub-contractors, and expatriate employees alter tax laws which affect these entities

or persons but were not provided for in a tax act. It is our submissions that these provisions of Article 15 of the said Agreement are *ultra vires* the FAAA and are clearly discriminatory to Guyanese businesses, taxpayers and Guyanese employed in the petroleum industry.

3.36 The **Financial Administration and Audit Act, Cap 73:01**, arose out of Act 39 of 1961, to regulate the receipt control and disbursement of public monies, to provide for the audit of the accounts in relation thereto and to provide for other matters connected with or incidental to the purposes aforesaid. Section 6 reproduced above has at all times remained part of the Act. It is submitted that this section predates the PEPA and that in any case the PEPA is not a tax act and any law purporting to remit any sum due to the revenue would therefore violate **section 6 (1)**. To impose a tax as defined in the case *Matthews v Chicory Marketing Board (Vict) 5 (1938) 60 CLR 263 at 276* per Latham CJ as “a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered.”

3.37 Additionally, attention is drawn to **section 6 (1) (c)** which specifies the conditions under which a tax payer is released in whole or in part from the liability to pay tax where the tax payers’ ability to pay tax due has been affected by natural disaster, disability, mental incapacity, or death, or if the

tax payer has been rendered homeless or destitute. It is obvious that none of these circumstances applies to the added respondent or its fellow contractors HESS and CNOOC. Moreover, it is unknown to our tax laws for the government to pay the taxes of a taxpayer as Article 15.4 purports to do.

3.38 Section 6 of the Financial Administration (and Audit) Act [formerly Cap. 73:01] (“FAAA”) only allows tax exemption, remissions and concessions to be granted under tax legislation. The Applicant submits that Articles 15.1, 15.4, 15.5, 15.7, 15.9, 15.10, 15.11 and 15.12 in fact do the opposite in that these Articles ratified by the Minister seek to extend and make legitimate tax concessions and waivers to persons other than those legitimately protected and provided for in section 51 of the PEPA to receive such concessions.

3.39 First, the FAAA would require that the Minister follow all of the procedures set out in the PEPA for the appropriate waiver to licensee as defined in the said PEPA. Second, the FAAA would require the enactment of tax legislation to give effect to the said licensee(s) exemptions, remissions and concessions.

3.40 In as much as the Petroleum Agreement has been described as a simple constitutional issue it is the Applicant’s submission that no contractual obligation can violate statute or any other law. Accordingly, whether it is a

contractual obligation or subsidiary legislation no contractual arrangement can violate the PEPA.

3.41 The short title of the PEPA describes the PEPA as,

“applying to the exploration, exploitation, conservation and management of petroleum existing in its natural condition in land in Guyana, including the territorial sea, continental shelf and exclusive economic zone of Guyana.”

3.42 Order No. 10 of 2016 which is made under section 51 (1) of the PEPA however, describes itself as the *“Petroleum (Exploration and Production) (Tax Laws) (Esso Exploration and Production Limited, CNOOC/Nexen Petroleum Guyana Limited and Hess Guyana Exploration Limited) Order 2016.”*

3.43 The Order being subsidiary legislation cannot be construed as a tax law nor can it convert the PEPA into a tax act and is therefore invalid as it has not been made under a tax law. As delegated legislation the Order is invalid on the grounds that it is inconsistent with the Act under which it is made; **Powell v May [1946] KB 330**. Accordingly, Order No. 10 of 2016 is contrary to section 51 (2) of the PEPA.

3.44 The crude and procrustean attempt to bring Order No. 10 of 2016 as a tax law violates the maxim of colourable legislation which states that you cannot do indirectly what you cannot do directly as stated in the case **The Supreme Court Report SK.C. Gajapati Narayan Deo and another v The State of Orissa 1953 AIR 375.**

3.45 That the tax provisions relating to petroleum operations are set out in section 33 A of the **Income Tax Act Cap 81.01**, passed in the same year of the PEPA as Act 4 of 1986 which states,

“Notwithstanding anything to the contrary contained in this Act-

(a) in ascertaining the chargeable income, from petroleum operations, of any person engaged in the business of carrying on such operations, sections 16(1)(c) and 17 shall not apply; and

(b) for the purpose of carrying forward, and allowing set-off, of loss incurred in petroleum operations by any person engaged in the business of carrying on such operations under section 19, paragraph (c) of the proviso thereto shall not apply.

3.46 The alternative argument is that even if the exemption, remissions and concessions to licensees under PEPA would be legitimate by Order to that effect, such an Order would only be applicable to licensees only. Further, any exemption, remissions and concessions to non-licensees (properly so-called) would only be legitimate if made under the FAAA and subsequent enactment similar to Bill No. 2 of 1986 [Now Bill No. 4 of 1986]. Therefore, the Applicant submits that not only is the effect of the Agreement in respect of non-Guyanese, non-licensees discriminatory but it is unauthorised and contrary to the law and as such the Minister's actions of signing the Petroleum Agreement containing *ultra vires*, null and void and unlawful provisions: **Section 51 of the PEPA, Section 5 of the Judicial Review Act of Guyana.**

3.47 The intention of Parliament in in enacting section 51 of the PEPA was not to modify the Acts identified in subsection (2) thereof, but to allow for their disapplication.

3.48 Alternatively, even if Order No. 10 of 2016 disappplies section 51(2) it did not disapply section 10 which requires persons intended to benefit from remission, concession and waiver to be identified. As would be seen from the Petroleum Agreement, the only persons identified are Esso Exploration and Production (Guyana) Limited, CNOOC/Nexen Petroleum Guyana Limited

and Hess Guyana Exploration Limited, collectively referred to as the Contractor.

3.49 It is submitted that the Order cannot change a non-tax act into a tax act by the simple device of describing it as a tax law and accordingly Order No. 10 of 2016 is null, void and of no legal effect.

D. ISSUE: Whether the Petroleum Exploration and Production Agreement is a Tax Act

3.50 Section 6 of the FAAA provides that,

“(1) Save as maybe expressly provided by any law for the time being in force, no expenditure involving a charge on the revenue shall be incurred; nor shall any sum due to the revenue be remitted, unless the Minister is empowered by the specific provisions of the relevant tax Act to permit the remission or by Order or other subsidiary legislation made under such Act.

3.51 *Littman v. Barron (Inspector of Taxes, [1951] 2 A.E.R. 393*, a decision of the Court of Appeal where Cohen, LJ. said: "the principle that in

case of ambiguity a taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section clearly imposing liability".

3.52 The choice between a strict and a liberal construction arises only in case of doubt in regard to the intention of the legislature manifest on the statutory language. Indeed, the need to resort to any interpretative process arises only where the meaning is not manifest on the plain words of the statute. If the words are plain and clear and directly convey the meaning, there is no need for any interpretation. It appears to us the true rule of construction of a provision as to exemption is the one stated by this Court in *Union of India v. Wood Papers Ltd.*, [1990] 4 SCC 256:

"..... Truly speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction...."

3.53 In the case *Novopan India Ltd. v. Collector of Central Excise and Customs* the principle that in the case of ambiguity, a taxing statute should be construed in favour of the assessee- assuming that the said principle is good and sound does not apply to the construction of an exemption or an exempting provision, they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision.

3.54 The authorities on the application of exemption provisions in tax statutes are simply summed up in the recent case *Commissioner of Customs (Imports), Mumbai v M/S. Dilip Kumar and Company and Ors 2018* is summed up as follows. The reference holding as under Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification. When there is ambiguity in exemption notification which is subject to strict interpretation, **the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.**

3.55 It is therefore submitted that, in applying the principles of strict interpretation, that since the PEPA did not expressly exempt affiliated companies, sub-contractors and their expatriate employees then such

exemptions cannot be applied and since the only other provision of a tax act, i.e. section 33 A of the Income Tax Act.

3.56 It is further submitted that even if the exemption could apply in relation to sub-Articles 15.1, 15.4, 15.7, 15.9, 15.10, 15.11, 15.12 (ii) and 15.13, it would be tantamount to turning taxation on its head that the State is required to pay the taxes of the Contractor as provided for in Article 15.4 having regard to section 51 (2) of PEPA and section 6 of the FAAA.

3.57 Further, the Applicant submits that based on the argument of the Minister in the National Assembly, the PEPA is clearly not a Tax Act. In its long title, the Act states,

“AN ACT to make provision with respect to prospecting for and production of petroleum, and for matters connected therewith”

3.58 It is the duty of the court to further and advance the aim of the legislator of providing a remedy for the mischief against which the enactment is directed. In **Heydon’s Case (1584) 3 Co Rep 7a, 76 ER 637**, the Court held at 638 thus,

“And it was resolved by them, that for the sure and true (a) interpretation of all statutes in general (be they

penal or beneficial, restrictive or enlarging of the common law,)... the office of all the Judges is always to make such (d) construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and p̄v̄ primto commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.”

3.59 The plain language of section (2)(1)(p) in the interpretation section of the PEPA, defines licensee as a holder of a Petroleum licence and the Applicant submits that the licensees of the Petroleum Agreement are Esso Exploration and Production Guyana Limited, CNOOC NEXEN Petroleum Guyana Limited and HESS Guyana Exploration Limited who are collectively identified in the Petroleum Agreement as the Contractor. Therefore, the Applicant submits that the plain interpretation of the PEPA did not contemplate that the licensee/contractor would also include sub-licensee/sub-contractors or affiliated companies.

3.60 For all intents and purposes, the Applicant contends that “licensee” as defined by section (2)(1)(p) of the Petroleum Exploration and Production Act

Cap. 65:04 do not apply to sub-contractors or affiliated companies or expatriate employees. Therefore, these persons should not benefit from the tax concessions provided in the PEPA for the licensees/contractors. As such, the Contractor, according to **section 10 of the PEPA** is “*identified in the agreement, of a licence*” and this section further prohibits the Minister from entering into any Agreement inconsistent with the Act.

3.61 The Applicant submits that “in relation to” as stated in section 51 should be read in the context of the empowering and interpretation sections of PEPA. The Applicant also refers to Parliamentary debates held in relation to the legislature’s true intention behind the drafting of PEPA: **AG v Carlton Bank [1899] 2 QB 158**. As such, we submit that the Agreement is therefore *ultra vires* the PEPA as it attempts to extend the Legislature’s definition and treatment of licensee under the PEPA to other classes of persons contrary to section 10 of the PEPA which requires the beneficiaries of remissions, concessions and waivers to be identified.

3.62 At the first the second and third readings of **Petroleum (Exploration and Production) Bill No. 1 of 1986 of Guyana**, the then Deputy Prime Minister for Planning and Development, Comrade W.A.L.H Parris, M.P (as he then was) stated that,

*“The Bill...makes provision for the grant, **in appropriate cases of tax concessions or exemptions to holders of petroleum prospecting or production licences** (emphasis added) and it makes provision for the remission of royalties in certain cases and, where applicable, the deferment of the payment of royalty.*

*The assessment of a Bill such as this...would be incomplete if I did not give some idea of the economic objectives which...**fall into three main categories which the petroleum agreements are supposed to adhere to in terms of what occurs under this legislation.***

*...**Firstly**, the objectives are that we should be able to have terms in those agreements which will encourage that development of all commercial finds including even the most marginal ones...**The second** is that the terms we would attempt to put in place must benefit from some experience that we have had and a lot of people have had. Put very simply...If in a negotiation between two people either of them arranges to abuse the strength in relation in the other one in such a way that you lock a man into an agreement or you force an agreement that is simply untenable in terms of the pressure*

*which you bring to bear on that person, then you can bet your bottom dollar that that agreement is going to blow up in your face sooner or later and it will be a non-agreement by virtue of the inequity inherent in the agreement. Therefore, we have a concern to derive terms that will help to ensure that the agreement reached reflects the relationship between both sides which will ensure, which will not come under pressure of inequity born simply on inadequate negotiating strength and **thirdly**, having derived stability of the life of the agreement given the first two objectives... ” : The **Parliamentary Debates Official Reports [Volume 11] Proceedings and Debates of the First Session (1986) of the National Assembly of the Fifth Parliament of Guyana Under the Constitution of the Co-operative Republic of Guyana, 10th Sitting dated Monday, 14 April 1986**, also referred to as the Hansard.*

3.63 It bears noting that at the date of this Agreement, i.e., 27th. June 2016, a significant discovery of petroleum (the Liza 1 Well) had already been announced by the Contractors (May 2015) and another discovery was underway (Payara Well), announced in January 2017). The Applicant submits that by the date of the Agreement there was no longer as great a risk warranting concessions as evidenced by the discoveries. It is therefore

submitted this was not an appropriate case for the scale and range of tax concessions under PEPA should be granted.

3.64 As submitted above, it was Parliaments clear intent that any benefits accrued under this act would be primarily to holders of petroleum licences and not to any other persons or groups of persons as suggested by the Added Respondent, to maintain the system of fairness and equity in major national economic activity in Guyana with regard to the petroleum industry.

E. ISSUE: Whether the Applicant is barred from bringing this action due to delay.

3.65 Due to the following reasons:

- 1) Despite repeated calls by members of civil society, both the then Government which signed the Petroleum Agreement and the Contractor adamantly refused to make the Agreement available until 15 months after when the Government bowed to pressure to release the Agreement.
- 2) The Applicant relied on the public statements by leading members of the then Opposition, PPP/C, that it would

renegotiate the contract once in Government following the schedule 2020 elections. The Applicant honestly believed that the then Opposition would renegotiate the contract and this belief was reinforced by the commitment made by the PPP/C in their manifesto during the 2020 elections.

- 3) As a result of the failure and renegeing of the pre-election promised, the Applicant was forced to bring these proceedings to this Honourable Court at his earliest opportunity.

3.68 The Applicant submits that any delay caused in bringing these proceedings were unintentional and reasonable in the circumstances.

4.0 CONCLUSION

4.1 In conclusion, and relying heavily on the above-mentioned submissions and cases I urge the Honourable Court to dismiss the Added Respondent's Defence and to grant the declarations and costs sought by the Applicant.

Mohamed R. Ali
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MOHAMED R. ALI

ATTORNEY-AT-LAW

DATED this ^{second} 5 day of June, 2022

LIST OF STATUTES

1. Petroleum Exploration and Production Act, Cap 65:04
2. Financial Administration (and Audit) Act, Cap 73:01
3. Judicial Review Act, Cap 3:06
4. Income Tax Act, Cap 81:01

LIST OF AUTHORITIES

1. AG v Dumas [2017] 90 WIR 507
2. R. v Felixstowe Justices Ex. p. Leigh [1987] Q.B. 582
3. R. v HM Treasury Ex p. Smedley [1985] Q.B. 657
4. R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. Rees Mogg [1994] Q.B. 552
5. R. (Miller) v Prime Minister [2020] A.C. 37
6. R. (Evans) v Secretary of State for Defence [2010] EWHC 1445 (Admin)
7. Quincy McEwan et al v AG [2018] CCJ 30 (AJ)
8. Halsbury's Laws of England (Volume 61A (2018))/2

9. R (on the application of the Public Law Project) v Lord Chancellor and Secretary of State for Justice [2016] UKSC 39 at [23], [2016] AC 1531, [2017] 2 All ER 423
10. O'Reilly v Mackman [1983] 2 AC 237 at 278, [1982] 3 All ER 1124 at 1128
11. Matthews v Chicory Marketing Board (Vict) 5 (1938) 60 CLR 263 at 276
12. Powell and May [1946] KB 330
13. The Supreme Court Report SK.C. Gajpati Narayan Deo and another v the State of Orissa 1953 AIR 375.
14. Littman v. Barron (Inspector of Taxes, [1951] 2 A.E.R. 393
15. Union of India v. Wood Papers Ltd., [1990] 4 SCC 256
16. Novopan India Ltd. v. Collector of Central Excise and Customs
17. Commissioner of Customs (Imports), Mumbai v M/S. Dilip Kumar and Company and Ors 2018
18. Heydon's Case (1584) 3 Co Rep 7a, 76 ER 637
19. AG v Carlton Bank [1899] 2 QB 158.

Mohamed R. Ali

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Dated at Georgetown, Demerara

This ^{3rd} day of June, 2022.

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IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE
REGULAR JURISDICTION

BETWEEN:

GLENN LALL

Applicant

-and-

ATTORNEY GENERAL OF GUYANA

Respondent

-and-

ESSO EXPLORATION AND

PRODUCTION (GUYANA) LIMITED

Added Respondent

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**WRITTEN SUBMISSIONS ON BEHALF OF THE
APPLICANT TO THE ADDED RESPONDENT**
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