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IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

REGULAR JURISDICTION

2022-HC-DEM-CIV-FDA-47

BETWEEN:

GLENN LALL

Applicant

-and-

ATTORNEY GENERAL OF GUYANA

Respondent

-and-

**ESSO EXPLORATION AND PRODUCTION
GUYANA LIMITED**

Added Respondent

WRITTEN SUBMISSION ON BEHALF OF FIRST NAMED RESPONDENT

FACTUAL BACKGROUND

1. On the 12th day of January, 2022, the Applicant filed and served on the First Named Respondent a Fixed Date Application and Affidavit in Support of the said Fixed Date Application.

2. The Fixed Date Application seeks to challenge article 15 of the Petroleum Agreement dated the 27th day of June, 2016 entered into by the Minister responsible for petroleum (on behalf of the Government) and the Added Defendant, CNOOC Nexen Petroleum Guyana Limited and Hess Guyana Exploration Limited. The Applicant asserts that articles 15.1, 15.4, 15.7, 15.9, 15.10, 15.11, 15.12 and 15.13 of the Petroleum Agreement violate **sections 10 and 51 of the Petroleum (Exploration and Production) Act, Cap. 65:04** (herein after referred to as “the Petroleum Act”), **section 6 (1A) and (1B) of the Financial Administration and Audit Act, Cap. 73:01** (hereinafter referred to as “the Financial Administration Act”), **Article 149 of the Constitution**, and **section 5 of the Prevention of Discrimination Act, Cap. 99:08**, in that the said provisions are *ultra vires*, unlawful, null, void and of no legal effect.

3. In the said Fixed Date Application, the Applicant sought several declaratory reliefs of this Honourable Court, cost and any further orders as the Court may deem just. The declaratory reliefs sought are as follows -

(a) A Declaration that Article 15.1 of the Petroleum Agreement between the Government of the Cooperative Republic of Guyana and Esso Exploration and Productions 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 that Article 15.1 of the Petroleum Agreement dated 27th day of June 2016, 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 dated 27th day of June 2016, 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.
- (d) A Declaration that Article 15.4 of the Petroleum Agreement dated 27th day of June 2016, 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 and 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, unlawful, null and void and of no legal effect.
- (f) A Declaration that Article 15.7 of the Petroleum Agreement dated 27th day of June 2016, 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 dated 27th day of June 2016, 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 dated 27th day of June 2016, 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 dated 27th day of June 2016, 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 the second paragraph of Article 15.11 of the Petroleum Agreement dated 27th day of June 2016, 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 dated 27th day of June 2016, 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 dated 27th day of June 2016, 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 27th day of June 2016, violates section 5 of the Prevention of Discrimination Act, Cap. 99:08, and is unlawful, null and void and of no legal effect.*

- (n) *A Declaration that Article 15.12 of the Petroleum Agreement dated 27th day of June 2016, 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 dated 27th day of June 2016, 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.*

LAW

4. Before delving into the substance of our submissions, there are two preliminary matters of law that are raised in these proceedings, namely, *locus standi* and whether these proceedings are grounded in private or public law.

5. In relation to these two matters of law, we wish to rely upon the submissions advanced in relation thereto by the Added Respondent.

Whether the Minister had power to enter into the Petroleum Agreement dated the 27th day of June, 2016?

6. The Applicant appears to be contending or asserting that the Minister with responsibility for petroleum (natural resources) had no authority to enter into the Petroleum Agreement. We respectfully submit that the Minister has general ostensible authority to enter into agreements on behalf of the Government and people of Guyana. Authority for this proposition of law is found in the case of **BCB Holding Ltd and the Belize Bank Limited v. The Attorney General of Belize** [2013] CCJ 5 (AJ) (TAB A), where the Caribbean Court of Justice (hereinafter referred to as “the CCJ”), Guyana’s final and apex court, has crystalised the position as to whether a Minister can enter into an agreement on behalf of the State in relation to that Minister’s prerogative powers. At paragraph 38 of the judgment, the Court pronounced:

“We agree that the Minister does indeed possess wide prerogative powers to enter into agreements. The Executive may do so even when those agreements require legislative approval before they can become binding on the State. This was also the opinion of the Eastern Caribbean Court of Appeal in the Saint Lucian case of The Attorney-General v. Francois, an authority cited by the Tribunal.” (Emphasis Added).

7. What can be gleaned from the above extract is that **section 10 of the Petroleum Act** accords with, and codifies the general prerogative powers of the Minister responsible for petroleum to enter into the Petroleum Agreement dated the 27th day of June, 2016, on behalf of the Government which include the granting of tax concessions and waivers even before any legislative approval is given.

8. **Section 10 of the Petroleum Act** clearly expresses that –

“10. The Minister [responsible for Petroleum] may enter into an agreement (not inconsistent with the 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 any body 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.”

9. It is clear from the foregoing therefore, that the Minister had a power both at common law and in statute to enter into the Petroleum Agreement.

Whether tax concessions and tax waivers grantable under section 51 of the Petroleum Act apply to persons other than Licensees?

10. The next contention of the Applicant in his written submissions is that Articles 15.1, 15.11, and 15.12 are *ultra vires* sections 10 and 51 of the Petroleum Act as they purport to disapply the written laws set out in section 51 (2) to persons other than licensees “namely *Affiliated Companies, Expatriate Employee of Contractors and Non-Resident Sub-Contractors.*” [See para. 5.9 of the Applicant’s submissions].

11. We have already submitted that section 10 of the Petroleum Act authorises the Minister to enter into the Petroleum Agreement. We do not need to restate that here.

12. **Section 51(1) of the Petroleum Act**, which marginal note reads “*Order to modify tax laws in respect of licensee*” provides that –

“51. (1) The Minister assigned responsibility for finance may, by order, which shall be subject to affirmative resolution of the National Assembly, direct that any and 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.” (Emphasis added)

13. Apposite to note is that **section 51(1) of the Petroleum Act** was amended by **Bill No. 4 of 1992** specifically, to limit the discretion of the Minister responsible for finance to modify, by Order, subject to parliamentary approval, certain tax laws in respect of a

licensee only where there is a production sharing agreement between the licensee and the Government of Guyana: Explanatory Memorandum of Bill No. 4 of 1992.

14. It is submitted that by the 1992 amendment Parliament clearly intended that a production sharing agreement is to benefit from the regime of tax concessions. In other words, the true and real intent was to insulate the petroleum operations which are the subject of a production sharing agreement from taxation.
15. We are fortified in this view by the use of the phrase "*shall apply to, or in relation to, a licensee where the licensee has entered into a production sharing agreement with the Government of Guyana.*" The term "*in relation to*" was deliberately used by the draftsman to extend to petroleum operations carried out by the licensee to operations that may be carried out [by others] but connecting with or in relation to petroleum operations of the licensee.
16. This provision must be read in context and subjected to a textual analysis. This requires attention to be paid to the nature and characteristics of petroleum operations, in particular, its various components. For example, exploration, appraisal, development, and production. These are highly specialised and complex activities and, by industry practice, are not performed by one entity. So, a licensee is simply the holder of the licence and may play a very indirect role in the exploration, appraisal, development, and production of petroleum. The reality of the industry practice is

that each of these stages in the petroleum life cycle are carried out by various, different, and disparate operators.

17. Unless section 51 of the Petroleum Act, therefore is read contextually, then the entire purpose of the regime of tax concessions would render illusory and would not achieve its intended purpose.

18. In the case of **R (on the application of Quintavalle) v. Secretary of State for Health, [2003] UKHL 13 (TAB B)**, Lord Bingham said-

“The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach.... may... (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.” (Emphasis added)

19. Further, **Bennion on Statutory Interpretation 7th Edition (TAB C)** at page 549- 550

states:

*“a word or phrase must always be construed in light of the surrounding text. A Lord Simmonds said in **AG v HRH Prince Ernest Augustus of Hanover**, ‘words, and particularly general words, cannot be read in isolation; their colour and context are derived from their context’. Or as Stamp J put it in **Bourne (Inspector of Taxes) v Norwich Crematorium Ltd.**: ‘English words derived colour from those which surround them. Sentences are not mere collection of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases and then put back into the sentence with the meaning which you have assigned to them as separate words...”*

20. There is another principle at play which specifically applies to construing exemption from taxation. Where an exemption is conferred by a statute by an exemption clause, that clause has to be interpreted liberally and in favour of the assessee but must always be without any violence to the language used. If the tax payer is within the plain terms of the exemption, it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority: **Hansraj Gordhandas v H.H. Dave, Assistant Collector 1970 AIR 755, 1969 SCR (2) 343 (TAB D)**. In **Tata Oil Mills Company v Collector of Central Excise 1989 SCR (3) 839 (TAB E)**, there was an exempted imposition of excise duty on “such soap as is made from indigenous rice bran oil”. Rice bran oil can be used in making soap only after it is converted to fatty acid.

The Supreme Court of India held that the exemption applied to both rice bran oil and rice bran fatty acid.

21. Similarly, in *Swadeshi Polytex Ltd. v Collector of Central Excise 1990 SCC (2) 358 (TAB F)* the Supreme Court of India held that *“It is true that when in a fiscal provision, [in which a] benefit of exemption is to be considered, this should be strictly [construed]. But the strictness of the construction of [the] exemption notification does not mean that the full effect to the exemption notification should not be given by any circuitous process of interpretation. After all, exemption notifications are meant to be implemented...”*

22. Applying these principles to **section 51 of the Petroleum Act**, it is respectfully submitted that the tax concessions thereby contemplated apply beyond the term licensee and is intended to capture petroleum operations conducted by the licensee or those contracted by the licensee to support their petroleum operations. If not, why then did the draftsman used *“in relation to”*? It is our respectful submission that any other interpretation would lead to an absurdity and render the operations of the licensee otiose.

Parliamentary Sanction

23. Interwoven in the Applicant’s submission is the contention that the Minister with responsibility for Finance did not have the sanction of Parliament in granting tax concessions under the **Petroleum Act, the Petroleum (Exploration and Production)**

(Tax Laws) (Esso Exploration and Production Limited, CNOOC Nexen Petroleum Guyana Limited and Hess Guyana Exploration Limited) Order, No. 10 of 2016, and the Petroleum Agreement.

24. It is our respectful submission that the Minister with responsibility for Finance has the general power and remit under section 51 of the Petroleum Act to, by order subject to the affirmative resolution of the National Assembly, grant tax concessions and waivers. Under the general scheme of the Petroleum Act, the Minister obtains parliamentary sanction by the making of the Order to grant tax concessions and waivers.

25. It is a trite principle of law that parliamentary approval is required for the grant of tax waivers. It is by virtue of the aforementioned provisions that parliamentary sanction is given and as such the Minister's action is intra vires the law. The **BCB case**, which concerned a commercial agreement referred to as an 'accommodation agreement' for the waiver of taxes that never got the approval of parliament. The CCJ ruled that without parliamentary sanction, the agreement was illegal and contrary to the constitution. The Court opined:

"Governments in the region are authorised to make promises to public or private bodies that the latter may enjoy derogations from the revenue laws of the State, but whenever this occurs the promises must be sanctioned by the legislature or a body specifically authorised by the Constitution or the legislature, before they can be implemented...

There is and must continue to be a healthy relationship among the arms of government. The State certainly cannot function effectively with its three mighty branches strictly compartmentalised and sealed off one from the other. Indeed, to facilitate the efficient operation of government, the Constitution permits some overlap in the functions carried out by each Branch. But the judiciary has an obligation to uphold and promote the constitutional mandate that one Branch must not directly impinge upon the essential functions of the other. The principle that only Parliament should impose, alter, repeal, regulate or remit taxes is paramount. The National Assembly may in particular instances delegate aspects of its taxing powers but, absent such delegation, which in all cases must be strictly construed, the Executive branch is forbidden from engaging in such activity. To hold that pure prerogative power could entitle the Minister to implement the promises recorded in the Deed without the cover of parliamentary sanction is to disregard the Constitution and attempt to set back, over 300 years, the system of governance Belize has inherited and adopted...

26. Having regard to the aforementioned extract from the CCJ, it is readily apparent that the Minister received the requisite parliamentary sanction and in all the circumstances, he would've acted within the parameters of the law when entering the Petroleum Agreement and granting tax concessions and waivers sanctioned or to be sanctioned by Parliament.

Whether Article 15.12 of the Petroleum Agreement violates Article 149 of the Constitution and section 5 of the Prevention of Discrimination Act, Cap. 99:08, and is unlawful, null, void and of no legal effect?

27. In paragraph 1.1 of the Applicant's submission, the Applicant proffers to this Honourable Court that he is no longer pursuing **Declarations (l) and (m)** of his Fixed Date Application. However, at paragraph 1.2, the Applicant expresses that he wishes to submit that the mere entering into the Petroleum Agreement and the granting of concessions under Article 15 of the Petroleum Agreement "*has discriminated in favour of expatriate employees in granting concessions not available to Guyanese*".

28. It is out of an abundance of caution that we respectfully submit that there can be no violation of **article 149 of the Constitution and section 5 of the Prevention of Discrimination Act**, by the words of Article 15.2 of the Petroleum Agreement which the Applicant asserts discriminates against Guyanese in favour of expatriates.

29. The Article in fact affirms that expatriates will be subject to the same tax obligations as a Guyanese which accords with the provisions of the **Income Tax Act, Cap 81:01** and the **Corporation Tax Act, Cap. 81:03**. Article 15.12 of the Petroleum Agreement.

It provides that -

"15.12 The Expatriate employee of the Contractor, Affiliated companies and the Subcontractor shall be liable to pay personal income tax in Guyana on income earned in Guyana...."

- (i) *If an expatriate employee is liable to pay income tax in Guyana on income earned in Guyana, such expatriate employee shall pay such income tax at a rate equal to the current income tax rate of Guyana;*
- (ii) *Notwithstanding any provision to the contrary in this Article, 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."*

30. **Article 149(2) of the Constitution** defines "discriminatory" as -

"...affording different treatment to different persons attributable wholly or mainly to their or their parents' or guardians' respective descriptions by race, place of origin, political opinion, colour, creed, age, disability, marital status, sex, gender, language, birth, social class, pregnancy, religion, conscience, belief or culture whereby persons of one such description are subjected to disabilities or restrictions to which other persons of the same or another such description are not made subject or are accorded privileges or advantages which are not afforded to other persons of the same or another such description."

The grounds in section 4 (2) of the **Prevention of Discrimination Act** in relation to discrimination in employment under section 5 of that Act are similarly defined.

31. It is our respectful submission that the Applicant has not alleged in his Fixed Date Application any of the grounds set out in the Constitution or the Prevention of Discrimination Act to establish that Article 15.12 of the Petroleum Agreement is discriminatory to Guyanese employees.

32. In the case of **Baldwin Spencer v. The Attorney General of Antigua and Barbuda and Others (1997) CIV. APP. NO. 20A (TAB G)**, in which the leader of the opposition challenged a Development Agreement the Government entered into, on the ground, *inter alia*, that the Agreement was discriminatory against the people of Antigua and Barbuda in that it treats the development and persons concerned with it, as a separate class and community by committing the government to grant special exemptions from laws regulating taxation and good governance and profit thereby discriminating against the people of Antigua and Barbuda contrary to section 14 of the Constitution, **Byron, C.J. [AG]**, held that there was no category of discrimination disclosed to give rise to any cause of action. After, setting out the meaning of discrimination in the Antigua and Barbuda Constitution, the learned Judge expressed that in his view –
“The words are clear and unequivocal and there is no difficulty in giving them their plain and ordinary meaning. The idea was well expressed in Neilson v Barker (1982) 32 WIR by 254 Massiah J.A at 280:

“What I am endeavouring to develop is the notion that it is a misconception to think that the Constitution is panacean in character, capacitated for the eventual solution of

all legal problems. This process of magnification has led to attempts being made to fit a variety of rights into the framework of fundamental rights and freedoms, although the former often lacked the attributes essential for such categorisation...The word "discriminatory" in article 149 does not bear the wide meaning assigned to it in a dictionary. It has a precise and limited connotation. Although it contains the elemental constituent of favoritism, or differentiation in treatment, its application is confined only to favouritism or differentiation based on "race, place of origin, political opinions, colour or creed". No other kind of favouritism or differentiation is "discriminatory" within the narrow constitutional definition of that word in article 149(2). It is to be profoundly in error to think that there has been a contravention of a person's fundamental rights under article 149 where the alleged discrimination is based on some ground other than those referred to above, no matter how reprehensible such grounds may appear to be. Such a situation clearly does not come within the purview of the constitutional guarantee, although there may well be other means for its investigation and for securing redress."

33. It stands to reason that the Applicant has failed to categorise exactly under what ground the discrimination he alleges is based, consequently, his claim must fail in these circumstances. The Applicant cannot seek to implant into the constitution a ground of discrimination that simply does not exist.

34. In the case of **Republic v Fast Track High Court [2009] 1 LRC 44, Wood C.J (TAB HI)**, sitting in the Supreme Court of Ghana, expressed the following salutary cautionary sentiments at **page 63**:

“We need to remind ourselves that there is great danger in reading or importing unnecessary words in a document such as a written Constitution. This does not only amount to judicial legislation, but a clear assumption of the functions of the body clothed with jurisdiction to do so. This principle has been forcefully brought home in a number of local cases including AG V Tsatsn Tsibata (No. 2) [2001-2002] SCGLR 620 where Acquah JSC 9 as he then was) observed:

“The majority’s insistence on putting words in Article 39 (3) of the 1992 Constitution [which] are not in the Article, with a view of imposing restrictions on the exercise of the Chief Justice’s discretion is not a permissible function of the judicial function.”

35. The Applicant has also failed to provide a scintilla of evidence of any comparator to establish the gravamen of his claim for discrimination. In the case of **Mohanlal Bhagwabdeen v. the Attorney General (2004) 64 WIR 402 (TAB JK)**, the Privy Council in advising that the Appeal be dismissed, noted that the Court of Appeal of Trinidad and Tobago correctly dismissed the appeal on the ground that the interval of time was the only point of real similarity between the case of the police sergeant and that of the appellant and in view of other material before

the court setting out differences, the police sergeant was not a true comparator for these purposes; in the absence of any true comparator, the appellant was left without any foundation for a claim of unequal treatment.

36. Chief Justice Ian Chang, as he then was, in the case of **Bharrat Jagdeo v. Frederick Kissoon, Adam Harris and National Media and Publishing Company Limited** Claim No. 307 W of 2010 (TAB L) observed:

“But it must be noted that where discrimination is alleged on the prescribed ground of race, an inference of discrimination cannot be drawn unless there is a true comparator i.e. where the circumstances are equal and the only difference is that of race... an examination of the pleadings of the defendant does not reveal any true comparator or comparators on the basis it can reasonably be concluded that any discrimination on the part of the plaintiff's governmental administration is attributable to the practice of ideological racism...the burden rests on the defendant to satisfy the court that the defence contains sufficient material to enable a finding that the plaintiff has institutionalised ideological racial discrimination as a facet or policy of its system of government. Without a true comparator or comparators, it is clear that the truth of the allegation of ideological racial discrimination cannot be sustained...” (Emphasis added)

37. In the case at bar, the insertion of a true comparator or comparators is evidently absent. We urge this Honourable Court to find that the claim must fail as a

consequence of absence of such a critical aspect of the claim. The Applicant was also required to plead and prove bad faith or mala fides.

38. In the case of **Benjamin and others v. The Minister of Information and Broadcasting 1997 (unreported)** Justice Adrian Saunders, as he then was, had this to say about bad faith [mala fides]:

“I was asked to find that the Minister had acted in bad faith when he suspended the programme. That the reason given for suspension of the programme was a cover for effecting some other purpose. There are indeed facts established that might raise such an inference. It is however a serious thing to allege that the decision of the Minister and his colleagues was made in bad faith in the sense that it was taken dishonestly or intentionally to spite the applicants. I make no such finding. Mala fides on the part of a Minister has to be grounded in more concrete evidence than the evidence presented here. See Attorney-General v. K. C. Confectionery Ltd. (1985) 34 W.I.R. 387 and Smith v. L. J. Williams (1980) 32 W.I.R. 395. The courts will not be quick to find bad faith on the part of a Minister. Moreover, mala fides have not been specifically pleaded and I believe that the applicants ought not to rely thereon unless they have particularly pleaded it. The Minister would then have had an opportunity to respond to that allegation.” (Emphasis added)

39. There is simply no evidence of mala fides outline by the Applicant to support the assertion of mala fides.

Delay

40. If this Honourable Court is to find that these proceedings are grounded in public law allowing the Applicant to proceed by way of judicial review for declaratory orders, it is our respectful submission that declaratory orders are generally discretionary and a court can exercise its discretion not to grant the remedy, especially in circumstances where there has been delay. According to the learned author **Lazar Sarna in the work: 'The Law of Declaratory Judgments 4th Edition** at page 21: "...The relief is discretionary in the sense that a court may refuse to grant it even if the case for it has been made out..."

41. In the case of **Gook Country Estates Ltd v Quesnel (City) 2008, 261 B.C.A.C. 68 (TAB M)** it was said at paragraph 10:

"When an action is brought by a plaintiff seeking a declaration, the court may deny relief on several discretionary grounds, including standing, delay, mootness, the availability of more appropriate procedures, the absence of affected parties, the theoretical or hypothetical nature of the issue, then inadequacy of the arguments presented, or the fact that the declaration sought is of merely academic importance and has no utility. I do not suggest that this list is exhaustive." (Emphasis added).

42. In the case at Bar, there has been a delay of six years in bringing these proceedings.

The Petroleum Agreement was entered into in June of 2016 and the Applicant has only now moved to the Courts to challenge it. Even the CCJ, Guyana's final and apex court, has acknowledged the necessity to limit the period in which a claim should be brought for a constitutional violation by a citizen holding that five years without cogent explanation is inordinate or undue delay.

43. It has now been established by the CCJ in the case of **Somrah v The Attorney General of Guyana and The Police Service Commission [2009] CCJ 5 (AJ) (TAB N)** that delay may defeat a constitutional motion.

44. Further, in the case of **Sealey v. Attorney General of Guyana CV No. 4 of 2007 (TAB O)**, the CJJ opined:

"While no specific limitation period applies to claims under Article 153 [section 20], a claimant cannot wait for as long as he likes before bringing a claim. Kissoon JA held the Appellant's "undue delay without any explanation ... rendered the proceedings an abuse of the Court's process", while Roy J held such delay to be "a misuse of the court's constitutional jurisdiction". The Appellant's counsel could only speculate as to what excuse, if any, there might have been for the undue delay. We fully agree with Kissoon JA and Roy J in the light of the inordinate delay of over sixteen years from the time of the Appellant's dismissal and of over thirteen years from the petition to the President. We note that in Durity v Attorney General of Trinidad and Tobago the Privy Council considered that undue delay without a

cogent explanation in taking legal proceedings for redress for contravention of Constitutional fundamental rights and freedoms could amount to an abuse of the court's constitutional jurisdiction. It then considered that the lapse of five years in seeking such redress amounted to inordinate delay in the absence of any cogent explanation. It is in the public interest that claims do not become stale...

45. The Applicant has provided no reason for the six years hiatus in bringing these proceedings before the Courts. The Court has an inherent jurisdiction as to the matters that come before it and in cases of abuse, it can strike out matters. The case of **Abdool Salim Yaseen and Thomas v. The Attorney General and Another (No. 2) (1999) 65 WIR 173 (TAB PQ)**, supports this view and Chief Justice Desiree Bernard, as she then was, sitting in the Full Court, opined:

"Let me state at the outset that there is no doubt that a judge sitting in the High Court has unlimited jurisdiction and an inherent jurisdiction in relation to matters which come before that court for determination. The statutes and legal authorities support this contention. More specifically the inherent jurisdiction extends to striking out, staying or dismissing an action." (Emphasis added)

Policy and Rule of law

46. It is further submitted that third parties, who are not before the court and have not been given any opportunity to be heard in this regard, entered into contracts of varying value with the Added Respondent, CNOOC Nexen Petroleum Guyana Limited and Hess Guyana Exploration Limited for the purposes of the Petroleum Agreement. Any declaratory orders made by this court will substantially affect the interest of those third parties who, at minimum, would have a legitimate expectation

requiring protection of the law. These third parties would have already been granted certain tax concession by the Guyana Revenue Authority which would now be estopped from denying them those concession.

47. It is further submitted that given the exigencies of the situation and the tremendous investment already made in the oil and gas sector, specifically under the Petroleum Agreement, the Court if not satisfied, may preserve the status quo and give the legislature a period to remedy the situation: **Re Manitoba Language Rights [1985] SC (TAB R)**.

48. We however maintain that the Applicant's case is flawed in law and is an abuse of the process of the Court.

49. All of the above are most respectfully submitted.


Deborah Kumar
Deputy Solicitor General


Ronetta Sargent
Principal Legal Adviser

Dated this 2nd day of August, 2022.

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

2022-HC-DEM-CIV-FDA-47

BETWEEN:

GLENN LALL

Applicant

-and-

ATTORNEY GENERAL OF GUYANA

Respondent

-and-

**ESSO EXPLORATION AND PRODUCTION
GUYANA LIMITED**

Added Respondent

WRITTEN SUBMISSION ON BEHALF OF FIRST NAMED RESPONDENT
