

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: GC <sup>198</sup> OF 2019

BETWEEN:



NATIONAL TRUST FOR THE CAYMAN ISLANDS

APPLICANT

AND



THE CAYMAN ISLANDS GOVERNMENT




RESPONDENT

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

To the Clerk of the Court, Law Courts, George Town, Grand Cayman	
Name, address and description of applicant	The Applicant is:  The National Trust of the Cayman Islands 558A South Church Street PO Box 31116 Grand Cayman KY1-1205
Name, address and description of the respondent	The Respondent is:  The Cayman Islands Government General Administration Building 133 Elgin Avenue PO Box 907 Grand Cayman KY1-1103

<p>Judgment, order, decision or other proceeding in respect of which relief is sought</p>	<p>Relief is sought in respect of the making of the <i>Referendum (People-Initiated Referendum Regarding the Port) (Referendum Day) Notice, 2019</i> (the "<b>Notice</b>") issued 31 October 2019.</p>
<p><b>Relief sought</b></p> <ul style="list-style-type: none"> <li>(i) Orders of certiorari quashing the decision of the Respondent to hold the People-Initiated Referendum Regarding the Port (the "<b>Referendum</b>") on 19 December 2019 and quashing the Notice fixing that date issued on 31 October 2019.</li> <li>(ii) An order of prohibition restraining the Respondent from scheduling the Referendum before having: <ul style="list-style-type: none"> <li>(a) fully informed itself of the risk to the protected reefs and endangered species of coral and fish inhabiting Soto's Reef and neighbouring reefs in George Town from the proposed development of the Port and/or</li> <li>(b) explained to the public the risk to the protected reefs and endangered species of coral and fish inhabiting Soto's Reef and neighbouring reefs from the proposed development of the Port</li> <li>(b) fairly consulted with members of the public by providing information promptly and in the form of an updated Environmental Statement based on a new Impact Assessment and/or</li> </ul> </li> <li>(iii) Declarations that the Respondent has acted unlawfully contrary to Section 41 of the National Conservation Law 2013.</li> <li>(iv) An abridgment of time between service of the notice of motion and the first hearing, to the first available date 1 day after service of the notice of motion or such other time period that the Court considers fit;</li> <li>(v) An order that the hearing of the application for Judicial Review shall be expedited to allow determination prior to 19 December 2019.</li> </ul>	

Name and address of applicant's attorneys, or, if not attorneys acting, the address for service of the applicant	The Applicant is represented by Nelson & Company, 31 The Strand, PO Box 2075, Grand Cayman KY1-1105.  Ref: 7618-55
Signed: 	Dated 25 November 2019

## GROUND ON WHICH RELIEF IS SOUGHT

### A. INTRODUCTION

- 1 The Applicant is a body corporate, established by section 3 of the National Trust Law (2010 Revision) (the "**National Trust Law**") and brings this application in the public interests for the statutory purposes for which it was established<sup>1</sup>, which purposes include (i) the preservation of the historic, natural and maritime heritage of the Islands (ii) the protection of native flora and fauna.
  
- 2 The Respondent ("**CIG**") is the Cabinet as defined by Section 44 of the Constitution of the Cayman Islands, as set out in Schedule 2 of the Cayman Islands Constitution Orders 2009 to 2016 ("**the Constitution**"). CIG is responsible for the management of seabed in George Town Harbour which represents sovereign submerged land.
  
- 3 The Applicant challenges the legality of the Referendum Notice (dated 31 October 2019). A declaration is also sought as to the legality of decisions and actions of the CIG inconsistent with the conservation and preservation of protected marine parks in the George Town harbour area and the protected species of fish and coral and their critical habitats in that area.
  
- 4 The First Ground of Challenge is made on the basis that CIG is acting in breach of Section 41(1) of the National Conservation Law 2013 by promoting a development

<sup>1</sup> See Section 4 of the National Trust Law

which will “jeopardise the protection and conservation of the protected marine parks in the George Town harbour area and the protected species” of fish and coral and their critical habitats in that area.

- 5 The Second Ground of Challenge is that CIG is acting contrary to legitimate expectations in holding a referendum before such time as CIG has sufficiently investigated the risks to the reefs, marine life, endangered species and historic shipwrecks in George Town Harbour and/or informed the public of those risks and ensured fair and proper consultation with voters about the environmental costs and risk of the proposed development.

## **B. STATEMENT OF MATERIAL FACTS**

### **(1) The 2015 Proposal and George Town Harbour**

- 6 On 28 October 2015<sup>2</sup> the Respondent announced its decision to construct a Cruise Berthing Facility in Cayman in accordance with a design scheme (the “**2015 Design**”). The 2015 Design involved the dredging of then estimated 820,000 cubic yards from George Town harbour to a depth of 36 ft<sup>3</sup> and construction of berths to accommodate 4 large cruise ships.

- 7 The George Town harbour currently has a depth of between 5 to 25ft.<sup>4</sup> A number of unique coral reef structures including “Soto’s Reef” are situated in and around the George Town harbour area:

- (1) The reefs are in area which is designated as protected under the National Conservation Law 2013 (the “**NCL**”).
- (2) The reefs include coral colonies of Elkhorn and Staghorn coral which are designated under Part 1 of Schedule 1 of the NCL as endangered species.

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<sup>2</sup> Remarks by premier Alden McLaughlin on 29 July 2019.

<sup>3</sup> See Terms of Reference for Environmental Impact Assessment (“**TOR**”) dated 12 December 2013 p28

<sup>4</sup> See TOR p4

- (3) The reefs are home to marine life including fish such as tilefish, jewfish and angelfish which are themselves designated under Part 1 of Schedule 1 of the NCL as endangered species.
- (4) Soto's reef is widely regarded as one of the world's great diving sites and the reef structure is unique in the Cayman Islands.
- (5) There are a number of nearby reefs with world renowned dive sites such as Eden Rock.
- (6) In addition, two historic shipwrecks, the Balboa and the Cali, are situated in their original resting place in George Town harbour.

8 Substantial reef structures and most of the coral colonies (including those nearby the proposed development) would be destroyed or severely damaged or undermined or their survival put in jeopardy or at risk by the dredging required for the then proposed Port development.

- (1) The area to be dredged included Soto's Reef and other reefs in the George Town Harbour which accordingly have to be destroyed. The area is home of millions of coral polyps which form colonies on the reefs. The reefs themselves would be destroyed as would most of coral colonies on the reefs.
- (2) Nearby reefs would be at risk from suspended sediment created by dredging would have significant effects on the clarity and quality of water within George Town Harbour creating sediment plumes which could stay in suspension over a prolonged periods and spread over large areas with the action of current wind and waves, nearby causing significant light reduction.<sup>5</sup>
- (3) The Balboa shipwreck is located within the footprint of the then proposed project and will be lost unless it is relocated.

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<sup>5</sup> EAB Review of Consultation Draft Environmental Statement dated 11 August 2015 ("EAB Review) 2015 p9

(2) **Consultation by CIG on the original Port Development Proposal 2013 to 2015**

9 Prior to announcing its decision to construct a Cruise Berthing Facility in Cayman, the proposal had been submitted by CIG for an Environmental Impact Assessment (an "EIA") as follows<sup>6</sup>.

(1) CIG convened an Environmental Assessment Board ("EAB") which undertook certain functions of the National Conservation Council ("NCC").<sup>7</sup>

(2) The Terms of Reference (the "TOR") for the EIA were prepared in December 2013. There was consultation with the EAB, key stakeholders and the public on these.<sup>8</sup> A public meeting took place in around late November 2013.<sup>9</sup>

(3) The TOR which were published on the Department of Environment's website contained the following statements with respect to consultation:

(i) *The stakeholder engagement, consultation and disclosure guidelines of the Equator Principles and the International Finance Corporation (IFC) of the World Bank (WB) Group, are being used to inform best practice guidance for this project. This approach considers stakeholder engagement as an on-going process with requirements for information disclosure, consultation and engagement throughout all project phases, from the EIA through to construction and operation. Meaningful consultation should be undertaken about a project's environmental and socio-economic aspects with relevant stakeholders in order to take their views into account. The extent and degree of engagement required by the consultation process should be commensurate with the project's risks and adverse impacts, and with concerns raised by stakeholders. In accordance with this approach and to promote compliance with best practice, it is recommended that a Stakeholder Engagement Plan (SEP) is developed at the outset of the EIA process.*

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<sup>6</sup> Press Release: "Preferred Bidder Selected for Cruise Berthing Facility" dated 29 July 2019 p3

<sup>7</sup> See EAB Review p3

<sup>8</sup> See EAB Review p3

<sup>9</sup> Terms of Reference p9 and Appendix C and D

(ii) There should be disclosure and consultation meeting to disclose prior to finalising the methodology of the EIA and then later when a "Draft EIA" was ready there should be disclosure and consultation of the findings of the draft EIA and address stakeholder concerns prior to finalisation of the EIA (p7)

(iii) *"An EIA is a process through which any environmental or socio- economic impacts of a project are identified. An ES is the subsequent document prepared to inform stakeholders and the public about the project detailing the process and results of the EIA. It should not be an overly technical document. The description of the project needs to provide detail about the project during construction and operational phases, sufficient for the environmental and socio-economic impacts to be identified and mitigation measures developed. The issues discussed in this section have been developed around the ToR provided by the CIG". (p14)*

(4) Baird & Associates were appointed to carry out the EIA in April 2014 as a result of a tendering process in accordance with the TOR and the Department of Environments *"Guidelines on the Preparation of an Environmental Statement"*<sup>10</sup>.

10 The first consultation draft of the Environmental Statement ("ES") was produced by Baird & Associates in or about June 2015.

11 A public consultation period of 28 days for the draft environmental statement, technical appendices and non-technical summary<sup>11</sup>

(1) The public consultation commences on 5 June and ended on 3 July 2015.

(2) All documents were made available on the website of the Department of the Environment and in hard copy form from government offices.

(3) 473 written submissions were received and approximately 73% indicated their opposition.

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<sup>10</sup> EAB Review p4

<sup>11</sup> EAB Review p5

- 12 At least one public meeting took place on 9 June 2015 to discuss and debate the then proposed development of the Cruise Berthing Facility.
- 13 The Draft ES was reviewed by EAB between early June and 11 August 2015 and relevant stakeholders were consulted. On 11 August 2015 the EAB produced a "Review of Consultation draft Environmental Statement" with technical appendices and a non-technical summary (the "**EAB Review**").
- 14 The final Environmental Statement ("**ES**") was produced on or about 15 September 2015 (the "**2015 ES**"). It confirmed that the proposed development would destroy the George Town Reefs (including Soto's Reef) over its footprint (see Appendix J).
- 15 The TOR, EAB Review and 2015 ES and various annexes and associated materials were published by the Respondent on the website of the Department of Environment and remained available to the public thereafter.
- 16 It was necessary for CIG to commission an EIA or to have the same reviewed by a panel of qualified persons and/or to consult with the public on drafts of the ES to be produced notwithstanding the absence of statutory or regulatory requirement for it so to do in order to comply with best practice.

#### **2015 EIA Substantially Incomplete and Deficient**

- 17 It was clear from the published EAB Review and 2015 ES that further investigation and work needed to be undertaken to complete the EIA. In particular:
  - (1) Additional site-specific subsurface investigations had yet to be undertaken, including a geophysical and geotechnical investigation.
  - (2) Without this it could not be known what dredging equipment was needed, whether blasting will take place and turbidity and sedimentation could not be modelled<sup>12</sup>.

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<sup>12</sup> EAB Review p7

- (3) There had not been a comprehensive subsurface investigation with respect to the size and type of dredge required<sup>13</sup>.
  - (4) The information was insufficiently detailed so that the extent of sedimentation could not be assessed.
  - (5) The EAB noted that the specific objectives, scope and cost of "relocating" coral from the area surrounding the new port had not been defined.
  - (6) Further study was recommended by the 2015 Environmental Statement to map the Balboa and assess its structural integrity in order to identify the best method for its relocation<sup>14</sup>.
  - (7) The 2015 EIA also recommend further communication with stakeholders and the general public on cultural heritage assets, and the specific mitigation measures to be taken<sup>15</sup>.
  - (8) The outline business case produced by PWC needed to be updated to reflect the socio-economic impacts identified in the 2015 EIA<sup>16</sup>.
  - (9) A comprehensive master plan was required to define the facilities and infrastructure necessary to support progressive growth in cruise and cargo-traffic and operations at the new facility. If such a document was produced it has never been published<sup>17</sup>.
- 18 The EAB also made it clear that given the cultural and socio-economic significance of the sea to the Cayman Islands and the potential for negative impacts, it was critical that alternative scenarios (with, without, alternate locations, etc.) be clearly presented to the public and stakeholders (i.e. in layman's terms). Justification for the preferred option and mitigation strategies should also be presented.<sup>18</sup>

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<sup>13</sup> Page 12 of the Non-Technical Summary

<sup>14</sup> Page 36, Ibid

<sup>15</sup> Page 37 of the Non-Technical Summary

<sup>16</sup> Page 45, Ibid

<sup>17</sup> Page 42, Ibid

<sup>18</sup> Page 48, Ibid

### (3) The 2019 Altered Proposal

- 19 In about September 2018 the Respondent appointed a procurement team to identify and find partners to participate in the development of the Cruise Berthing Facility. On 29 July 2019 Cabinet announced that Verdant Isle Port Partners ("**VIPP**")<sup>19</sup>, was selected as the preferred bidder.
- 20 In fact, prior to being appointed at a time and in circumstances unknown to the Applicant, VIPP had submitted a new outline design for the Cruise Berthing Facility which was also to include an expanded or enhanced cargo port (the "**2019 Port Development Project**").
- 21 To date, the Respondent has published outline drawings of the Port Development Project but provided no precise detail on the varied plans. The 2015 EIA has not been completed. No new EIA has been carried out on the revised proposal. The process of consultation undertaken between 2013 and 2015 has not been repeated.
- 22 The Respondent has acknowledged that the EIA needs to be updated in any event and stated that this will be carried out after the Referendum.

### (4) The Referendum

- 23 Cruise Port Referendum Cayman ("**CPR Cayman**") is a non-profit organization established for the purpose of promoting and partnering with organisations concerned with community awareness and constitutional rights. CPR Cayman began a petition to start a people-initiated referendum on whether the Cayman Islands should move forward with the proposed Cruise Berthing Facility (the "**Petition**").
- 24 Section 70 of The Cayman Islands Constitution states that a referendum shall be held on a matter of national importance if a petition signed by not less than 25% of persons registered as electors is presented to Cabinet. If such a petition is presented Cabinet must then settle the wording of the referendum question within a reasonable time period and determine the date of the referendum.

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<sup>19</sup> a consortium consisting of McAlpine Ltd, Carnival Corporation, Royal Caribbean Cruises Ltd and Orion Marine Construction Inc

- 25 On 12 June 2019 CPR Cayman presented the Petition to Cabinet, signed by over 25% of persons registered as electors. The Respondent directed a verification process of the signatures must take place which was concluded by 3 October 2019. On 3 October 2019, the Premier *inter alia* announced that the Referendum would be held on 19 December 2019.<sup>20</sup>
- 26 On 4 October the Respondent laid and Gazetted a bill to enable a Referendum to be held in accordance with Section 70 of the Constitution. The Referendum (People Initiated Referendum Regarding the Port Law) 2019 ("**the Referendum Law**") was enacted on 31 October 2019.
- 27 On 31 October 2019 Cabinet issued the Referendum (People Initiated Referendum Regarding the Port) Regulations 2019 ("**the Referendum Regulations**"). In Regulation 2 the Referendum Question as being "*Should the Cayman Islands continue to move forward with building the cruise berthing and enhanced cargo port facility?*" (the "**Referendum Question**"). The ballot paper required the question to be answered with a "yes" or "no".
- 28 Pursuant to section 70(3) of the Constitution the outcome of the referendum shall be binding on the Government and the Legislature if assented to by more than 50% of persons registered as voters. By section 4(6) of the Referendum Law, however, provides that the outcome of the referendum shall be binding on the government and the legislature if more than 50% of registered voters phase in favour of or against the referendum question.
- 29 CIG has announced that in the event of an affirmative vote being made it will consider itself entitled to "*move forward with the cruise berthing and enhanced cargo port facility*" thereby implying that such an outcome to the Referendum will dictate its policies, exercise of powers and decisions thereafter. The Legislature would be bound to legislate to implement the "*cruise berthing and enhanced cargo port facility*".

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<sup>20</sup> Press Release: "Referendum Bill Gazetted" dated 4 October 2019

30 By Notice dated 31 October 2019 (the “**Referendum Notice**”) issued pursuant to the Referendum Law, Cabinet set the date for the holding of the Referendum as 19 December 2019 (“**the Referendum Date**”).

## **B RESPONDENT’S DUTIES**

### **(1) The National Conservation Law**

31 Section 41(1) of the NCL requires, the Respondents, amongst others, to ensure that its “*decisions, actions and undertakings are consistent with and do not jeopardise the protection and conservation of a protected area or any protected species or its critical habitat as established pursuant to [the NCL]*”.

32 *Acropora Palmata* or “Elkhorn coral” and *Acropora Cervicornis* or “Staghorn coral” are designated as and are “protected species” designated under Section 16 of the NCL and the area in George Town Harbour where such coral is located including Soto’s Reef is a “protected area” and a critical habitat for such coral.

33 “Elkhorn coral” and “Staghorn cora~~l~~” are internationally recognized as critically endangered. They are identified as category “red”: or critically endangered species by the International Union for Conservation of Nature, designated on the UN endangered Species List.

34 Soto’s reef and surrounding area were designated as protected areas by CIG pursuant to Section 7 of the NCL.

### **(2) The Constitution**

35 In accordance with section 18(1) of Part 1 of the Constitution Cabinet and the Legislature must in all their decisions, have due regard to the need to foster and protect an environment that is not harmful to the health or well-being of present and future generations, while promoting justifiable economic and social development.

36 In accordance with section 18(2) the Respondent should, to this end, adopt reasonable legislative and other measures for the purposes of protecting the heritage and wildlife and the land and sea biodiversity of the Cayman Islands and aimed at (a) limiting

pollution and ecological degradation (b) promoting conservation and biodiversity; and (c) securing ecologically sustainable development and use of natural resources.

37 In the premises, the Respondents duties to have due regard in all its decisions to the need to foster and protect the environment and to take treasonable measures to promote conservation and secure ecologically sustainable development applied to the decisions to issue the Notice and set the Referendum Date.

**(3) Environment Charter**

38 In the Environment Charter agreed by the Respondent and the United Kingdom (“**the Environment Charter**”) on behalf of the Cayman Islands, and the UK Minister for the Overseas Territories, Ms Valerie Amos, on behalf of the United Kingdom and dated 26 September 2001 the Respondent undertook:

- (1) “to ensure that environmental impact assessments are undertaken before approving major projects and while developing our growth management strategy<sup>21</sup>;
- (2) to commit to open and consultative decision-making on development and plans which may affect the environment;
- (3) ensure that environmental impact assessments include consultation with stakeholders<sup>22</sup>;
- (4) to abide by the principles set out in the Rio Declaration on Environment and Development and work towards meeting International Development Targets on the Environment<sup>23</sup>; and
- (5) to bring together government departments representatives of local industry and commerce, environment and heritage organisations, the Governor’s office, individual environmental champions and other community representatives in a forum to formulate a detailed strategy for action (see Annex 1)<sup>24</sup>.”

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<sup>21</sup> Commitment 4 of the Environment Charter

<sup>22</sup> Commitment 5 of the Environment Charter

<sup>23</sup> Commitment 11 of the Environment Charter and Annex 2 and Annex 3

<sup>24</sup> Commitment 1 of the Environment Charter

39 The basis of the undertaking set out in the Environment Charter is to be found in the 1999 White Paper "Partnership for Progress and Prosperity" which set out the rationale for the UK's negotiations of matters concerning the environment with each of the UK Overseas Territories and in which the UK stated that it was an objective "to protect fragile ecosystems such as coral reefs from further degradation.

40 Principle 10 of the Rio Declaration provides that governments shall ensure consultation on environmental issues by providing members of the public with "*appropriate access to information concerning the environment that is held by public authorities, ... and the opportunity to participate in decision-making processes*". States are required to "*facilitate and encourage public awareness and participation by making information widely available*".

**C. GROUND 1. BREACH OF DUTY TO PREVENT PORT FROM BEING DEVELOPED**

41 In order to ensure that CIG's decisions with respect to the Referendum are consistent with its duties under Section 41(1) of the NCL and that it complies with Section 18(1) of the Constitution, CIG was required to satisfy itself of the presence or otherwise of endangered species in the reefs the conservation and protection of which would be jeopardised if CIG and/or the Legislature moved forward with the *cruise berthing and enhanced cargo port facility*." (see Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014).

42 Had CIG made adequate and/or sufficient enquiries it would have established that the proposed development of the George Town Port was inconsistent with and jeopardised the protection and conservation of the protected area notably Soto's Reef and Eden Rock and the endangered species of coral and fish which use those reefs as their habitat.

43 In breach of Section 41(1) of the NCL the CIG has:

- (1) failed to make decisions and actions and undertakings to discourage and prevent the further development of the Port in George Town or take other steps consistent with the protection and conservation of Soto's Reef and the endangered and protected species which inhabit the area which it is proposed is to be developed.

- (2) decided to hold a Referendum on 19 December 2019 seeking an affirmative answer without first and in good time fairly informing the general public that the proposed development of the Port was inconsistent with and jeopardised the protection and conservation of the protected area in that area notably Soto's Reef and Eden Rock and the endangered species of coral and fish which use those reefs as their habitat.

**D. GROUND 2 FAILURE TO ENSURE FAIR CONSULTATION IN BREACH OF LEGITIMATE EXPECTATION**

44 The purpose of section 70 of the Constitution is to ensure that once a petition is been presented voters are afforded a free, fair and an informed opportunity to make a decision finding on government and the legislature. Voters have a legitimate expectation that they are provided with fair and balanced information.

45 CIG has had public consultation by holding meetings throughout November 2019. Further meetings are scheduled to be held until mid-December 2019. By consulting between 2013 and 2015 and in the context of the Referendum CIG had voluntarily assumed an obligation to consult with members of the public on a fair and meaningful basis (see R (Moseley) v LB Haringay [2014] 1 WLR 3947).

46 However, the consultation with members of the public is not being conducted fairly and on a meaningful basis and/or adhering to international best practice.

- (1) Fairness in the circumstances required that CIG provides updated information to members of the public and/or would obtain a complete EIA and/or provide information on the same to members of the public as it had done before between 2013 and August 2015 (see R v Association of Metropolitan Authorities [1986] 1 WLR 1) (which CIG did not provide).

- (2) Fairness required CIG to consult with members of the public in good time so as to allow the residents to express their views prior to requiring those residents to make a decision in the Referendum to move forward with the Port Development Project (see R v NE and Devon HA ex p Coughlan [2001] QB) (which CIG did not do).

- (3) Fairness also required the CIG to correct public statements made by or on behalf of VIPP that there is no or only little coral left in George Town Harbour (which CIG did not do) and to state the proposed Port cannot be developed without destroying a protected area and endangered internationally protected the endangered coral species and that pursuant to Section 41 of the NCL it is CIG's duty to prevent )which CIG also did not do).

47 In support of its case as to what was required in fairness before the Referendum is held the Applicant will rely on the following:

- (1) The commitments made by CIG in the Environment Charter with respect to open and consultative decision-making on development and environmental assessments;
- (2) The public statements set out above made by CIG and published on the website of the Department of Environment since 2013 promising consultation in relation to the development of the Port;
- (3) The extensive public consultation that previously took place with respect to the Terms of Reference, the 2015 ES;
- (4) The 2015 EIA was substantially incomplete because insufficient detail was known about the dredging and sedimentation; and
- (5) A new EIA from independent consultants was in any event necessary since the 2019 proposals for the Development of the Port include a cargo facility and are substantially different.

#### **E. RELIEF SOUGHT**

48 For the reasons set out above, the Applicant seeks leave to apply for judicial review on an *ex-parte* basis (on the papers or, if it would assist the Court, through the attendance of its attorneys):

49 On the substantive application, relief is sought in the terms set out in the Application above.

50 If leave is granted the Plaintiff will seek orders:

- (1) Pursuant to Order 53, rule 5(5) of the Grand Court Rules, an abridgment of time between service of the notice of motion and the first hearing, to the first available date 1 day after service of the notice of motion or such other time period that the Court considers fit; and
- (2) For an expedited hearing of the substantive matter so as to allow determination prior to 19 December 2019.

*Nelson & Co*

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**Nelson & Company**  
Attorneys-at-Law for the Applicant