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Lot 225 South Street, Lacytown,
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Friday, 18th January 2019

The Permanent Secretary
Ministry of Public Infrastructure
Wights Lane
Kingston
Georgetown

Dear Mr. Jordan

Re: Legal Opinion on sale of (1) Mudlots 1 and 2, (2) Lot F, Mudlot 3 and (3) Lots A, B, D – North Cummingsburg to BK International Ltd.

I refer to the captioned matter.

At your request I met with officers of the Transport and Harbours Department with respect to the proposed sale of these properties to BK International and the possible legal implications thereof.

I rely on information supplied by the T&HD about the policy decisions of the Ministry of Public Infrastructure and T&HD and the documents supplied, including legal documents from proceedings between NICIL and BK International Limited- HCA No. 2013-HC-DEC-CIV-CD-431 and correspondence from BK International. I have no opinion on the authenticity of these documents or the completeness or accuracy of information supplied to me.

I am informed by the T&HD that the properties are of general importance as they abut property currently used by T&HD and the sale would impede the expansion of those properties. There is some issue about trespass by BK beyond the boundaries of the leased land, but this is not material to my opinion. I am further informed that the Ministry of Public Infrastructure and the T&HD is of the general view that the proposed terms of the sale would result in the transfer to property to private ownership at disproportionately low rates. The properties are considered to be of very high commercial value and the terms of sale offer no obvious public benefit. The State and the T&HD/Ministry of Public Infrastructure would be deprived of scarce Georgetown riverfront at below market rates.

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I am instructed that the property belongs to NICIL by virtue of orders made under the **Public Corporations Act 1988, as Order No. 42 and 43 of 2005**. By virtue of the said Act, these orders have the effect of a transport and all the rights accruing thereto under the **Deeds Registry Act**.

I am further instructed that NICIL entered an agreement with BK International Ltd on 4 December 2006 for the lease of these properties for 20 years at an annual rent of GY\$10,000,000 per annum with an option to purchase of \$110,000,000. It was a term of the lease that the lessee seeks M&CC approval for certain construction to be done and within 4 years of such approval complete same. If it failed to complete this construction, the option price to purchase should become null and void and the price subject to mutual agreement.

I am informed that the development plans of the lessee were altered from a hotel/wharf project to certain general wharf/industrial activities. The construction has not been carried out in the manner projected and part of the difficulty relates to the approval of the M&CC and the financing for the project, either as originally intended or as modified by the lessee. The lessee has sought permission to vary the terms of the lease but this was not granted.

In or around 2011 the lessee stopped paying rent and the lessor (NICIL) sued for rent in 2013. I have been unable to review the statement of claim to ascertain the exact reliefs sought. The matter has not yet been determined by the Commercial Court.

From the documents perused by me, it appears that BK international owes almost \$100,000,000 million in accrued rent. Interest is payable on unpaid rent at the rate of 12% per annum. It appears from a letter reviewed by me dated 31st March 2017, that BK international proposes to pay the original option price, 1 years' annual rent of \$10,000,000 and to receive transport. Similar terms have been rejected by NICIL in the past.

NICIL's position in the legal proceedings and correspondence appears to be that BK International has not complied with the terms of the lease and is not entitled to the option at the same rate as per the agreement. It is not clear whether NICIL seeks to terminate the lease and recover possession. If these are not reliefs sought in the current proceedings, new proceedings may have to be initiated to terminate the lease and recover possession of the land and arrears of rent.

I am informed that Cabinet has been asked to consider approving the settlement of the litigation and approval of the sale to BK International. This opinion is intended to guide the Ministry of Public Infrastructure and individual officers of

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the Ministry who may be required to participate in the decision-making process or join it its approval.

Generally, it is a matter of mainly commercial/policy considerations whether an agreement should be varied or litigation settled on terms similar to those proposed. In recent times, the sale of land by the Government of Guyana or its agencies such as NICIL has become the subject of criminal and public law litigation and the consideration of the completion of the sale to BK International requires careful review of the possible legal implications. As such the sale of land should not be regarded solely as a as commercial matter, but the possible criminal implications of generous commercial terms should be given appropriate consideration.

In the exercise of their joint or several discretions, public officers should be concerned about whether a decision to sell government land at overly generous prices can result in civil or criminal sanction to them personally. This is so particularly where the sale involves no obvious benefit to the public by facilitating important or valuable investment or as the result of a public tender. In the latter case, a public tender creates no obligation to sell and may not be an appropriate legal justification for entering generous commercial terms. This is an evolving area of law in Guyana and is unlikely to be settled any time soon.

Criminal law

The criminal law offence of misconduct in public office is committed where:

1. A public officer acting as such;
2. Willfully neglecting to perform his or her duty and/or willfully misconducting himself or herself
3. To such a degree as to amount to an abuse of the public's trust in the office holder; and
4. Without reasonable excuse or justification

See **Williams v R (1986) 39 WIR 129**.

In **Walter v R, 1980 27 WIR 386** it was established that a public officer for the purpose of the offence is one who discharges any duty in which the public is interests, and more particularly if he receives payments from public money.

In pending High Court litigation, **Brassington v Persaud HCA No. 2018-HC-DEM-CIV-FDA-757**, the Chief Justice has been asked to consider whether to grant a stay of proceedings or quash the charges against the former CEO and Chairman of NICIL/Minister of Finance. The Minister of Finance signed the order transferring property of NICIL. The transactions for which the applicants were

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charged relate to the sale of property to MultiCinemas Inc. for a theatre/shopping complex, National Hardware Limited for a residential property development scheme and Scady Business Corporation for personal/residential use.

The same defendants are charged for the office of misconduct in public office in relation to the sale of the Sanata Textile mill complex to Queens Atlantic Investments Inc., in completion of a lease agreement which contained an option to purchase somewhat similar to that contained herein. This matter is also subject to a similar administrative law challenge. The Chief Justice has not yet given her decision. Even if the reliefs sought are granted on the particular facts of those matters, that the Director of Public Prosecutions has sanctioned such charges is a radical development in the law and may remain in use for a long time to come.

In these matters, it is contended by the applicants that a public officer is defined by the Interpretation and General Clauses Act in the same terms as **Article 232 of the Constitution**. **Article 232** defines public service, public office and public officer, but excludes from those definitions various categories of persons such as Ministers and members of Boards. The State has contended that the constitutional definition is irrelevant for the purpose of the common law offence. Whether these persons are by definition are excluded from consideration for the purpose of the offence in question has not yet been determined by the Court.

In all cases it was contended that the sale was made at prices below market value and/or without a valuation. The parties contended that they were carrying out the mandates of their board and cabinet. It is not clear why the prosecution has not been preferred against the Board and/or Cabinet as the decisions were made by the Board and approved by Cabinet.

It is entirely reasonable that similar justification will be used to contend that the completion of the sale to BK International in circumstances where NICIL is of the view that the existing option is not binding, makes the decision-makers open to allegations of misconduct.

There is no formal information available to me about the market value of property. In the Brassington matters, the State's contention was that the parties failed to obtain a valuation or sold below market value or sold knowing the market value was higher. In the Sanata Textile Mills sale, an elaborate option to purchase was written into the lease agreement. This option created a mechanism which led to the determination of the selling price.

The sale of waterfront property in and around Georgetown for \$110,000,000 seems particularly generous in the current economic climate.

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A decision to revert to the 2006 rate where the intended tourism development has been abandoned may be difficult to justify on economic or public interest terms. Ministers or other public officers who consent to these terms will be exposed to criminal prosecution. This applies to officers of NICIL and members of Cabinet, (save the President who is immune from prosecution). Where a decision is taken by Board of NICIL and/or Cabinet to proceed with the sale, it would be prudent for any dissent to be recorded in writing.

I should disclose that I appear for the Defendants in the extant criminal and public law litigation. The propositions of law referenced below are made by the State and are a matter of public record which can be independently verified.

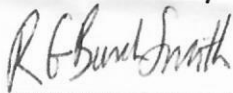
Civil proceedings

In the case of **Marin and Coye v AG of Belize, 2011 CCJ 9(AJ)** the Caribbean Court of Justice (CCJ) considered preliminary issues in relation to a civil claim by the state against former ministers by the State which claimed against them personally \$924,056.60, plus damages and interest, for the sale of 59 parcels of land. The State alleged that the lands were purchased from the government \$4,000 each but the lands were resold for significantly higher prices.

The CCJ affirmed the right of the Attorney-General to bring an action for the civil tort misfeasance in public office, notwithstanding the authority of the State to pursue redress by other means.

The sale to BK International on what appears to be very favourable terms (where there is no compulsion to do so, or no compelling public interest motivation) may also give rise to civil claims against the decision makers. The important distinction between these facts and Marin's case above, is that in that case the sale was to the Ministers themselves.

Yours sincerely



Ronald G. Burch-Smith