IN THE SUPREME COURT OF BELIZE, A.D. 2002

ACTION NO. 61

IN THE MATTER **of an application for leave to apply for Judicial Review**

AND

IN THE MATTER **of Decision of the National Environmental Appraisal Committee made on Friday, November 9th, 2001 to approve an Environmental Impact Assessment by Belize Electric Company Limited**

AND

IN THE MATTER **of a Decision of the Department of the Environment or of the National Environmental Appraisal Committee made on Friday, November 9th 2001 to grant environmental clearance to the Macal River Upstream Storage Facility Project**

AND

IN THE MATTER **of the Environmental Protection Act, Chapter 328 of the Laws of Belize, Revised Edition 2000, and the Regulations made thereunder**

THE QUEEN
and
THE DEPARTMENT OF THE ENVIRONMENT
BELIZE ELECTRIC COMPANY LIMITED **Respondents**

EX PARTE, BELIZE ALLIANCE OF CONSERVATION NON GOVERNMENTAL ORGANIZATIONS (BACONGO) **Applicant**

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Dean Barrow S.C., Ms. Lois Young Barrow S.C., with Mrs. Marilyn Williams, for Applicant.
Mr. Denys Barrow S.C., with Mr. Elson Kaseke, the Solicitor General, for First Respondent.
Mr. Michael Young S.C., with Mrs. Tanya Herwanger, for the Second Respondent.

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JUDGMENT

In these proceedings, brought pursuant to leave granted by this Court on 28th February 2002, the applicant is seeking the following reliefs:

(a) An Order of Certiorari to remove into this Court and quash the decision of 9th November 2001 of the National Environmental Appraisal Committee

(b) A Declaration that the said decision was unlawful

(c) An Order of Certiorari to quash the decision of the Department of Environment (DOE) evidenced by the letter from the DOE dated 5th April 2002 granting 'environmental clearance' to Belize Electric Company Limited for a hydroelectric project (MRUSF)

(d) A Declaration that the said decision evidenced by the letter from the DOE dated 5th April 2002 was unlawful.

2. The Applicant in these proceedings is the Belize Alliance of Conservation Non-Governmental Organizations (BACONGO for short, and hereafter referred to as such or the applicant) whose stated mission is: *"To support the efforts of (its) members and to advocate for natural resource conservation and sustainable development for the people of Belize."* (See respectively paragraphs 5 of Candy Gonzalez's affidavit and that of Jamillah Vasquez of 8th February 2002). The Applicant is incorporated under Chapter 206 (The Companies Act) of the Laws of Belize, 2000 Rev. Ed. I should say from the outset that the applicant has the requisite standing to bring these proceedings – see **R v H.M. Inspector of Pollution, ex parte Greenpeace Ltd. (No. 2), 1994 4 All E.R. 239**; and **R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd. (1995) 1 W.L.R. 386**. In any event, the standing of the applicant has not, rightly in my view, been contested in these proceedings. That much is common ground between the parties. And as the learned authors of De Smith, Woolf and Jewel on **Judicial Review of Administration Action 5th ed. (1995)** succinctly state at page 122:

> *". . . it can be said that today the court ought not to decline jurisdiction to hear an application for judicial review on the ground of lack of standing to any responsible person or group seeking on reasonable grounds, to challenge the validity of governmental action."*

3. The respondents on the other hand are, the Department of the Environment in the Ministry of Natural Resources, Environment, Commerce and Industry **and** the Belize Electricity Company Limited. I

shall refer to them as the respondents, unless where the context otherwise requires and, are referred to respectively, as the Department of the Environment (DOE for short) and BECOL respectively. I had in an earlier ruling in these proceedings on 22nd April 2002, at page 3 thereof, explained how BECOL became a respondent (as an intervener). BECOL the second respondent, is a Belizean company, the majority of whose shares are held by Fortis Incorporated, a Canadian company in Newfoundland, Canada. BECOL is the developer of the project whose environmental impact assessment has given rise to these proceedings.

4. BACKGROUND

The controversy between the parties centers around what is popularly known as the Chalillo Dam which is referred to as the project in this judgment.

5. THE PROJECT

BECOL is proposing to construct and operate the Macal River Upstream Storage Facility (MRUSF). The MRUSF will include a dam and associated infrastructure on the Macal River to produce electricity and provide upstream storage capacity for the existing Mollejon Power Plant. The project is said to consist of the following components –

a) A 49.5 high dam on the Macal River, 12 km downstream of the confluence of the Macal and Raspaculo Rivers. The resulting reservoir will have a total surface area of 9.53 km2 and will extend approximately 20 km up the Macal River and 10 km up the Raspaculo River

b) A 7.3 MW powerhouse at the toe of the dam

c) An 18 km long power transmission line from the proposed powerhouse to the existing Mollejon Power Plant downstream on the Macal River: (see p. ES1 Executive Summary Part 1 of the Main Report Macal River Upstream Storage Facility Environmental Impact Assessment).

6. The proposed Chalillo dam project is to be constructed on the Macal River in the Cayo District in Western Belize and is within the southern portion of the Mountain Pine Ridge Forest Reserve and the northern part of the

Chiquibul National Park. It is candidly admitted that "The Project has generated substantial controversy and international attention through publications and exposure in media and World Wide Web. It is conceivable that this negative attention surrounding the Project and the potential loss of habitat and resulting wildlife impacts could adversely affect the tourism industry in the Cayo District" (see p. 231 of the Main Report of the EIA for the Project). The project is estimated to cost US $28 m., that is, some BZ 56 odd million.

It is also common ground between the parties that the project in question is an undertaking for which an environmental impact assessment (the EIA hereafter) is required as a **Schedule 1** project of the Environmental Impact Assessment Regulations 1995 – **Statutory Instrument No. 107 of 1995** made pursuant to section 21 of the **Environmental Protection Act – Chapter 328 of the Laws of Belize Revised Edition 2000**. These two instruments are hereafter referred to as the Regulations and the Act or EPA respectively.

7. The EIA submitted by BECOL in respect of the project is in five volumes, each running to at least a couple of hundred of pages. It is stated in the Executive Summary at p. ES1 of Part 1, Main Report that:

> *"This EIA is prepared in accordance with the requirements of the Belize Environmental Protection Act (BEPA) and the Canadian Environmental Assessment Act, Projects Outside Canada Environmental Assessment Regulations."*

8. APPLICANT'S GROUNDS FOR SEEKING JUDICIAL REVIEW

In these proceedings, the applicant has assembled a battery of objections against the EIA of the project and its consideration by the National Environmental Appraisal Committee and has urged on the Court to hold that the decision of the Committee on 9th November 2001 was unlawful. This was achieved after the Court allowed a series of amendments of the grounds on which the applicant was seeking to move the Court for judicial review. As a result the applicant has urged a slew of grounds to impugn the Committee's consideration in respect of the EIA for the project. Ultimately, by an amendment sought and granted as late as 29th July 2002, when the hearing in these proceedings was well underway, the applicant has further adjusted its tackle to impugn the decision of the

Department of the Environment (DOE hereafter) of 5th April 2002, granting "environmental clearance" to BECOL in respect of the project, as unlawful, because in so doing, the applicant avers, the DOE acted on a decision of National Environmental Appraisal Committee that was itself unlawful.

9. Before stating the essence of the applicant's case, I think it is helpful to advert to the two institutions created by law in Belize for the superintendence of the protection of the environment.

THE DEPARTMENT OF THE ENVIRONMENTAL (DOE) AND THE NATIONAL ENVIRONMENTAL APPRAISAL COMMITTEE (NEAC)

The first is the Department of the Environment (DOE) which was established by section 3 of the Environmental Protection Act. The Department is charged with the responsibility of monitoring the implementation of the Act and regulations made under it and to take necessary action to enforce the provisions. The functions of the Department are manifold and these are spelt out in section 4 of the Act. Among other things, it is the function of the Department to –

> "*(m) examine and evaluate and if necessary carry out environmental impact assessments and risk analysis and to make suitable recommendation to mitigate against harmful effects of any proposed action on the environment*
>
> *(o) advise the Government on the formulation of policies relating to good management of natural resources and the environment*
>
> *(r) provide decision-making with the necessary information so as to achieve long-term sustainable development*
>
> *(u) conduct studies and make recommendations on standards relating to the improvement for the environment and the maintenance of a sound ecological system*
>
> *(w) advise on the effects of any sociological or economic development of the environment."*

Truly, the breadth or sweep of the functions of the Department in relation to the environment, is remarkable, spanning and even exhausting the letters of the alphabet! The DOE is headed by the Chief Environmental Officer.

10. The second institution is the National Environmental Appraisal Committee (hereinafter referred to as NEAC). NEAC is established by Regulation 25 consisting of eleven members in all, drawn from specialist sectors in the public administration and including two non-governmental representatives appointed by the Minister of the Environment on the recommendation of the DOE. The applicant in these proceedings is one such non-governmental representation on NEAC. The Chief Environmental Officer of the DOE is made the chairperson of NEAC.

11. The functions of NEAC are stated in Regulation 25(1) to be as follows, to –

> *"(a) review all environmental impact assessments;*
>
> *(b) advise the Department of the adequacy or otherwise of environmental impact assessment;*
>
> *(c) advise the Department of circumstances where a public hearing is desirable or necessary."*

12. In carrying out its assessment of any EIA, the factors NEAC should take into consideration are set out in Regulation 26(1); and additionally, sub Regulation (2) of Regulation 26, spells out some more factors NEAC should include in its consideration.

13. In these proceedings, the essence of the applicant's case can be stated as follows:

> *1. That DOE failed to enforce Regulation 20(2) in relation to the requirement that BECOL's EIA for the project should have included a copy of the newspaper notice in accordance with the requirement of Regulation 20(1); and that this failure was contrary to the statutory duty imposed on DOE by section 3(3) of the Act and therefore unlawful.*

2. *That the DOE failed upon receipt of the EIA to examine it to determine whether it complied with the previously agreed terms of reference, contrary to Regulations 21(b).*

3. *That the EIA for the project considered by NEAC failed to comply with sections of the Act such as section 20(3), (4) and (5); and that it was contrary to the Regulations, such as Regulations 19(h); (i); (j); (k); (l) and (m) and was in fact an incomplete EIA; consequently the applicant avers, the decision of NEAC was ultra vires section 3(3) of the Act. The applicant also seeks to impugn the decision of NEAC as unreasonable and irrational.*

4. *That NEAC and DOE failed to recommend or require a public hearing on the project contrary to Regulation 24, therefore the DOE acted on a decision of NEAC that was itself unlawful.*

5. *The applicant has also alleged bias on the part of the Chairperson of NEAC and all government representatives thereon.*

14. **THE DECISIONS COMPLAINED AGAINST**

The arguments before me identifying these became almost like a game of moving targets. The learned attorney for the first respondent, Mr. Denys Barrow S.C., at first said that NEAC did not make a decision as it was only an advisory body.

However, the ire and first complaint of the applicant is, as stated in paragraph 3.0 of its material facts in its statement for judicial review, as follows:

"3.0 The Applicant complains that the decision of NEAC on the 9th November 2001, to approve (conditionally) an Environmental Impact Assessment submitted to the DOE by Belize Electric Company and related to the Becol project known as the Macal River Upstream Facility, was unreasonable and failed to take into account relevant considerations while taking into account irrelevant considerations."

The second decision which has agitated the applicant to launch these proceedings is, as stated this time in its submissions on grounds of judicial review at paragraph 6.0 –

> *"6.0. The decision of the Department of the Environment (DOE) evidenced by the letter from the DOE dated April 5, 2002 granting 'environmental clearance' to BECOL was unlawful in that in so doing, the DOE acted on a decision of the National Environmental Appraisal Committee which was itself unlawful."*

15. Both decisions emanated from letters addressed to Mr. Lynn Young, a Director of BECOL the developer of the project. These letters are exhibited to Mr. Young's affidavit of 24th July 2002. These letters, I think, speak for themselves, and I reproduce them here.

The first, which evidently concerned the "decision" of NEAC on 9th November 2001, reads:

"BELIZE
Please Quote
Telephone Numbers: 08-22542/22816
Fax Number: 08-22862
E-mail: envirodept@btl.net

Ministry of Natural Resources,
Environment and Industry
Belmopan, Belize, C.A.

10th December, 2001

Mr. Lynn Young
Chief Executive Officer
Belize Electricity Limited
Mile 2 Northern Highway
Belize City
Belize

Dear Mr. Young,

The Department of the Environment in the Ministry of Natural Resources, Environment, Industry & Commerce, hereby informs you that after several sessions by the National Environmental Appraisal Committee (NEAC) to review the Environmental Impact Assessment for the proposed Macal River Upstream Storage Facility, Environmental Clearance has been recommended. At a meeting on November 9, 2001, the NEAC voted 11 to 1 in favour of granting Environmental Clearance for implementation of this hydroelectric project, upon the signing of an Environmental Compliance Plan (ECP) by the Belize Electric Company Limited (BECOL).

The ECP is currently under preparation and will include mitigation measures recommended in the EIA, other measures proposed by the NEAC and also items discussed with you. Upon completion, the ECP will be forwarded for your review, and if in agreement, for signing. After signing the ECP, the Environmental Clearance letter will be issued by the Department of the Environment to Belize Electric Company Limited (BECOL).

Thank you for your assistance and cooperation.

Sincerely,

Sgd: M Alegria

For Ismael Fabro
Chief Environmental Officer
Department of the Environment" (emphasis added)

The second letter dated 5th April 2002 concerns the "decision" of the DOE and it reads:

"BELIZE *Attn: J. Suknandan*
Please Quote: PRO/DEV/02/34 (02)
Telephone Numbers: 08-22542/22816 *Department of the Environment*
Fax No.: 08-22862 *10/12 Ambergris Avenue*
E-mail: envirodept@btl.net *Belmopan*
Belize, C.A.

April 5, 2002

Mr. Lynn Young
Director
Belize Electric Company Limited
Belize City
Belize

Dear Mr. Young:

Please be informed that ***Environmental Clearance*** *is hereby granted to* ***Belize Electric Company Limited*** *for a hydroelectric project (Macal River Upstream Storage Facility). This* ***Environmental Clearance*** *is granted subsequent to the signing of the Environmental Compliance Plan (ECP) prepared by the Department of the Environment (DOE) on April 5, 2002.*

Kindly be informed that ***Belize Electric Company Limited*** *is required to comply with all the terms and conditions incorporated in the Environmental Compliance Plan. Disregard of any of the terms and conditions stipulated in the compliance plan will result in the revocation of Environmental Clearance and/or legal actions being taken against* ***Belize Electric Company Limited****.*

No changes or alterations to what has been agreed to in the ECP will be permitted without the written permission of the Department of the Environment.

Thank you for your kind consideration and cooperation in addressing these issues of mutual concern.

Sincerely,

Sgd: Ismael Fabro

Ismael Fabro
Chief Environmental Officer
Department of the Environment"

16. In relation to this second decision, again Mr. Denys Barrow S.C. for the respondent denied that the DOE ever made a decision in respect of the EIA. Presumably, he was not fully instructed and I am prepared to accept that he was not aware of the DOE's letter of 5th April 2002 to BECOL. This letter surfaced as a result of the fourth affidavit of Mr. Lynn Young exhibiting the letter. As a consequence, the applicant, as I have recounted already, adjusted its tackle and took aim at DOE's decision in the said letter.

17. I have reproduced the texts of these two letters to put in context the applicant's complaints. In so far as the "decision" of NEAC of 9th November 2001 is concerned, it is apparent that it was not a grant of approval or permission to the developer; nor was it a disapproval. All the letter is saying is that NEAC had recommended environmental clearance for the project. This recommendation created no legal right or obligation, whether final or conditional. There is no power under the Act or the Regulations for NEAC to approve an EIA. By both the Act and the Regulations only the DOE can approve an EIA, and even then, as provided in section 20(7) of the Act:

> *"A decision by the Department to approve an environmental impact assessment may be subject to conditions which are reasonably required for environmental purposes."*

18. NEAC's role in relation to an EIA conformable with the Regulations, is, as I have mentioned above, at paragraph 10, to review all environmental impact assessment, and advise the DOE on the adequacy or otherwise of such an EIA, and also to advise the Department of circumstances where a public hearing is desirable. (Regulation 25(1)).

19. I therefore find that the decision of NEAC of 9th November was at most inchoate, as it was neither an approval nor a disapproval. Of course, it would be wrong to assume that the environmental compliance plan it advised at its meeting of the same date, was only a mere formality. However, the conclusion or "decision" of NEAC was not a juristic act giving rise to rights and obligations: there was nothing inevitable or intrinsic about it that it would ripen into an actual approval of the EIA by the DOE.

20. Moreover, as far as the decision of the DOE itself of 5th April 2002 is concerned, it is not exactly an approval of the EIA supplied by BECOL in respect of the project. It is, as the letter says, an **environmental clearance**. Quite what this means is not clear, as I can find no reference to this concept in either the Act or the Regulations. But, if it is regarded as a "decision" by the DOE to approve the EIA of BECOL in respect of the project, then this decision is clearly within the ambit of the powers of the DOE as stated in section 20(7) of the Act, which states:

> *"A decision by the department to approve an environmental impact assessment may be subject to conditions which are reasonably required for environmental purposes."*

The letter (decision) clearly states –

> *"This Environmental Clearance is granted subsequent to the signing of the Environmental Clearance Plan (ECP) prepared by the Department of the Environment (DOE) on 5th April."*

The letter goes on to state that BECOL is required to comply with all the terms and conditions incorporated in the ECP, and disregard of any of the terms and conditions stipulated in the plan would result in the revocation of the clearance and or legal action against BECOL, the developer.

21. Perhaps, not felicitously worded, but it is clear that this decision of the DOE was contingent on the developer keeping to the terms and conditions on which its EIA for the project was approved as contained in what is called the "Environmental Compliance Plan": This I find would be a decision that would be **intra vires** the Act for the DOE to do. But this does not however, dispose of the applicant's challenge, as it alleges

several breaches of both the Act and Regulations. For a proper appreciation of these, I will give an outline of the Act and Regulations.

22. **THE SCHEME OF THE ACT AND REGULATIONS ON EIA**

Part V of the Act (sections 20 to 23) has imported into the laws of Belize the need to consider and take into account information about the effects of any project, programme or activity on the environment. This requirement is now a mandatory component of the decision making process in relation to certain scheduled projects: Section 20(1) of the Act and Regulation 7 specifies a Schedule I list of projects for which an EIA is mandatory although it leaves the scope and extent of the EIA to be determined by the DOE. Regulation 8 permits the DOE to determine whether undertakings, projects or activities specified in Schedule II would require an EIA and in that case Regulation 6 applies. Regulation 12 reinforces the point that the DOE shall not consider or decide upon projects in Schedule I unless an EIA has been prepared in respect of such projects. Paras. (a) to (l) of subsection (2) of section 20 of the Act states that an EIA shall identify and evaluate the effects of the particular developments on human beings; flora and fauna; soil; water, air and climatic factors; material assets, including the cultural heritage and the landscape; natural resources; the ecological balance; and any other environmental factor which need to be taken into account.

Subsection (3) states that an EIA shall include measures which a proposed developer intends to take to mitigate any adverse environmental effects and a statement of reasonable alternative sites (if any) and reasons for rejecting them.

Subsection (4) states that every project, programme or activity shall be assessed with a view to the need to protect and improve human health and living conditions and the need to preserve the reproductive capacity of the ecosystems as well as the diversity of the species. This, no doubt, is an **evaluative** exercise which the DOE will undertake with a view to rendering the appropriate advice to the relevant decision-maker. Regulation 26 however, speaks to the factors NEAC shall take into consideration in the assessment exercise.

23. From the scheme of Part V of the Act on EIA and the provisions of the Regulations, an environmental impact assessment is therefore to be seen as an information-gathering exercise carried out by the developer and

others (and the DOE may make its own EIA synthesizing the views of the public and interested bodies) concerning the effects of the impact of a particular development on the environment. This information (technically called the EIA) is to be submitted to the DOE which in turn is advised by NEAC. This body, NEAC as I have mentioned in paragraph 10 above, is created by Regulation 25(1) with stated functions. I find that although the term "Environmental Impact Assessment" is not defined in either the Act or Regulations, Regulation 5 however, states its minimum contents.

24. There is however, I find, no explicit provision in either the Act or Regulations, that the decision whether a project or activity can or cannot proceed, is to be determined by the **adequacy or otherwise of the EIA** in respect of that project or activity; although NEAC is specifically mandated to advise the DOE on this (Regulation 25(1)(b).

25. Regulation 27 however, provides for the situation where the DOE decides than an undertaking, project or activity shall not proceed. It does not however, say how or on what grounds such a decision is to be made. Presumably, it may well be for the inadequacy or inappropriateness of the EIA for that particular project or undertaking. But this is not made clear. Although in that case, the developer is given a right of appeal to the Minister.

26. Also, although subsection (7) of section 20 gives the DOE the power to make a decision to approve an EIA, and empowers it to subject its approval to conditions, it does not require it to state the reasons for its approval or disapproval for that matter.

27. This position in the Belizean provisions on an EIA, is I find, markedly different, for example, from that in the United Kingdom and the European Union. There under Directive 85/337 as amended under Directive 97/11, (which has been transposed into U.K. legislation), there is a duty on a decision-maker to give the main reasons for granting or refusing permission for development following an EIA. In Belize, there is no such duty, although I suspect that most of the inspiration for the provisions of Belize's Environmental Protection Act and the Regulations on the EIA is derived from the U.K. with the influence of the European Union Directives. This absence of requirement to state reason for approving or disapproving has, in my view, a practical effect as it materially inhibits potential objectors to the grant of approval to a particular EIA, for there would be practically no reason or ground to found a legally viable objection. This

may be a gap that needs to be looked at, for given the public interest in the environment, it should know why an EIA for a project has been approved. For now there is no such provision.

28. This point is tellingly illustrated in the challenges that have been mounted in these proceedings against both the consideration of the EIA for the project and ultimately the decision of the DOE thereon on 5th April 2002. But for the fateful presence or, to some, fortuitous, of Ms. Candy Gonzalez, the applicant's representative on the NEAC during this body's consideration of and deliberations on the EIA for the project, most, if not all of the objections now put forward in these proceedings, might not have seen the light of day. Because under Belize's law at the moment, neither the Act nor its Regulations require that the grant of permission be based on a statement that an EIA in respect of the project to which it relates, has been taken into account and to state that this was in fact done. This is in contrast to the situation in the U.K. and the European Union. In the U.K. for example, by the Town and County Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, it is provided in Regulation 3(2) that:

> *"The relevant planning authority . . . shall not grant planning permission pursuant to an application to which this Regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decisions that they have done so."*

Also, in the United Kingdom, the competent authorities must give their reasons for granting the development consent, as well as for its refusal. Furthermore, in England, Regulation 21(1)(c) of the Regulations provides that where an EIA application is determined by a local planning authority, the authority shall make available for public inspection at the place where the appropriate register is kept, a statement containing: I) the content of the decision and any condition attached thereto; II) the main reasons and considerations on which the decision is based, and III) a description, where necessary, of the main measures to avoid, reduce and if possible, offset the major adverse effects of the development. Furthermore, Regulation 30 of the U.K. Regulations provides that a grant of planning permission by the Secretary of State for the Environment in contravention of Regulation 3 is to be taken as not being within the powers of the Town and Country Planning Act 1990. Also, section 288 of this Act provides that a person aggrieved by an Order to which the section applies (including a grant of planning permission) who wishes to question its validity on the

grounds that it is not within the powers of the Act, may apply to the High Court. By subsection 5(b) the High Court, if so satisfied, may quash the permission.

29. It was against this background that the cases of **R v Cornwall County Council ex parte Hardy** (decided on 22 September 2000 in the Queen's Bench Division by Harrison J.); and **Berkeley v The Secretary of State for the Environment (2001) A.C. 603**, were decided. In the first case, the court was able to quash a planning permission because it found that one of the conditions of the grant required the applicant to undertake **further** nature conservation surveys and prepare appropriate mitigation measures. Harrison J. held that the respondent County Council, having decided that surveys should be carried out, it was incumbent upon it to await the results of the surveys before deciding whether to grant planning permission so as to ensure that they had the full environmental information before them before deciding whether or not planing permission should be granted. He accordingly quashed the grant of permission.

In the **Berkeley case**, the House of Lords held that planning permission for the development of the Fulham Football Club site at Craven Cottage to provide new all-seated stands for the Club, together with riverside flats, should be quashed because the Secretary of State failed to take into account the "environmental information" necessary before the grant of permission under the Town and Country Planning (Assessment of Environmental Effects) Regulations. This case strictly concerned the absence of an EIA for the project and, as Lord Bingham of Cornhill said at p. 608 *". . . the grant of planning permission in contravention of regulation 4 (the need for an EIA) is to be treated for the purposes of section 288 of the Town and Country Planning Act as action which is not within the powers of the Act."*

30. Instructive as the issues and decisions of these two cases are, I do not think however, that given the scheme for the enforcement and fulfillment of environmental impact assessment provisions available in the U.K., they are of direct applicability or assistance to Belize. I have, nonetheless, adverted to them to show the differences available for the fulfillment and enforcement of the legal provisions on EIAs. There is therefore some kind of disconnection in terms of the enforcement of the provisions of the Act and the Regulations here in Belize, in so far as the EIA is concerned. Although section 20 of the Act stipulates the requirement of an EIA for any programme, project or activity which may significantly affect the

environment, and states that the EIA must identify and evaluate the effects of the development on among other things, human beings, flora and fauna, soil, water, air and climatic factors, etc. etc., there is no **explicit** provision that the EIA is a *sine qua non* for the grant of permission for the project to proceed. Regulation 22 (2) however provides that until a developer is advised within sixty days of the receipt of a completed EIA, he shall not commence or proceed with the undertaking (no doubt used interchangeably with project or activity). It is a criminal offence both under the Act and the Regulations not to provide an EIA before proceeding with a project which should have one, either as a Schedule I or II project. There is however no **express** provision that the consideration or approval of the EIA is tied to the grant of permission for the project to proceed. This is unlike the position in the United Kingdom or the European Union and other countries like Canada and U.S.A. In the United Kingdom, for example, it is expressly so provided, as I have pointed out above. This may therefore be a gap in the laws of Belize that needs to be plugged so as to make it clear that no planning permission or approval of a scheduled project will be given unless an EIA is presented in respect of it and approved. And preferably to state the reason for approval or disapproval.

31. It would, however, seem that under the laws of Belize at present, by the scheme and provisions of both the Act and the Regulations on EIA, the preferred route for the enforcement of compliance with the Act and the Regulations on EIA, is through the criminal law.

Thus for example, section 22 of the Act provides:

> *"Every person who fails to carry out an environmental impact assessment as required under this Act or any regulations made thereunder, commits an offence and shall be liable . . ."*

And Regulation 28(2) provides:

> *"(2) Any person who contravenes the provisions of these Regulations commits an offence and shall be liable . . ."*

32. Of course, given the requirement for the leave of the DOE or the D.P.P. for the prosecution of infractions of the Act or the Regulations (see section 42(2) of the Act and Regulation 28(3)), it is extremely doubtful if the applicant would have secured any satisfaction along that route, even

though almost all the challenges of the applicant are alleging one infraction or the other of either the Act or the Regulations or both.

33. The applicant has, however, chosen to come to Court to seek judicial review of the decisions it is complaining about. I had earlier at the start of this judgment, stated that it has the requisite standing to bring these proceedings. It is perhaps, easy to dismiss the applicant as a meddlesome busy-body, a nosey-parker with no material interest to protect. I think, however, that the applicant must be commended for valiantly taking up the cudgel on behalf of the rest of the public to try to ensure by these proceedings, compliance and conformity of the project with the provisions of the Act and the Regulations. It is the view of the Court, that this action by the applicant is indicative of a public spiritedness that deserves commendation. There are, of course, others who would charge the applicant with an agenda of its own beyond concerns for the environment. It is however, the view of the Court that the applicant, an umbrella alliance of non-governmental organizations for conservation, is exceptionally suited and positioned with sufficient interest to launch these proceedings. That said, the applicant's challenge must be set for the purposes of this review, in the context of the Act and the Regulations. Indeed, it is the provisions of these instruments that the learned attorneys for the applicant, Mr. Dean Barrow S.C. and Ms. Lois Young-Barrow S.C., have invoked to impugn the decisions of the DOE in respect of the EIA for the project.

34. The substratum of the applicant's case, is in essence, I believe, that NEAC failed to apply or to adhere to some of the provisions of the Regulations in its considerations or assessment of the EIA in question and hence its decision of 9th November 2001 was flawed and unlawful, and that therefore the decision of the DOE on 5th April 2002 on the EIA, was itself unlawful and insupportable.

35. The primary obligation of NEAC and DOE in relation to an EIA, under Part V of the Act and the Regulations, would, it seems to me, to **require** and **assess** for the purposes of **evaluation** and **recommendations**, an EIA for any project, programme or activity which may significantly affect the environment. NEAC is to review all EIAs and advise the DOE of their adequacy or otherwise (Section 20(1), and Regulation 25(1)(a) and (b)). The DOE itself may make its own EIA synthesizing the views of the public and other interested bodies (section 25(5)). Regulation 26 provides for the factors every assessment of an EIA by NEAC should include without

giving any weight to any one of these factors. The EIA itself is to be carried out by "suitably qualified persons" (section 20(1)), without stating who a suitably qualified person is. Although, Regulation 28(1) makes it a criminal offence for any person who wilfully supplies false and misleading information on any prescribed form, there is no form prescribed by the Regulations. Failure to carry out an EIA required under the Act or Regulations is made a criminal offence (section 22), and Regulation 28(2) makes contravention of the Regulations a criminal offence as well. The DOE is given also enforcement powers by notice which may include orders for the immediate cessation of any activity in contravention of the Act or Regulations, or conditions of any licence, permit or conditions imposed under the Act or its Regulations – Part X of the Act.

36. From an analysis of the provisions of the Act and the Regulations on EIA, it appears to me that section 20 of the Act and Regulation 26, provide the whole purpose and rationale of the EIA regime. Together they constitute its **raison d'être**. As stated in **Environmental Law**, by David Woolley, John Pugh-Smith, Richard Langham and William Upton (published by Oxford University Press 2000) at p. 676:

> *"Environmental Impact Assessment is aimed at providing the competent authorities with the relevant information to enable them to take a decision on a specific project in full knowledge of the project's likely significant impact on the environment."*

There is therefore, no requirement that an EIA should provide or make the proposed project's impact on the environment fail-safe, fool-proof, neutral or even minimal. The EIA regime is to ensure that the decision-makers, with open eyes, are fully apprised of the possible impact of the proposed project on the environment. Hence, the stipulation in both the Act and the Regulation, that every scheduled project requires an EIA.

This point is, I think, succinctly put in **Environmental Law**, 5th Edition (Reprinted 2001) by Stuart Bell and Donald McGillivray at p. 348:

> *"Crucially, EIA is an inherently procedural mechanism. Although it is intended to be preventive (and, some would argue, also precautionary), there is nothing that requires the decision-maker to refuse a development project because negative environmental impacts are highlighted by the EIA, or even to impose conditions to mitigate any such impact. It should also begin as early as*

possible when projects are being planned. A further, and crucial point, is that EIA should be an iterative process, where information that comes to light is fed back into the decision-making process. Ideally, this would also involve some kind of post-project monitoring . . ."

THE EIA SUBMITTED FOR THE PROJECT

37. Before examining these complaints it is helpful to state, again, that the report of the EIA supplied by the developer in the instant case is contained in five volumes, each of several hundred pages with maps, sketches, diagrams, photographs and tables.

It is stated at page 1 of the Main Report of the EIA as follows:

"This document constitutes the Environmental Impact Assessment (EIA) of the Macal River Upstream Storage Facility (MRUSF). The objective of this document is to identify and assess the potential environmental and socio-economic impacts associated with the proposed development. The information contained in this report is to be used by decision makers, together with other information, in determining whether or not the Project is to proceed."

Regulation 19 however, states what a report on an EIA should include. I cannot help observing here that the EIA in question though detailed, does not however follow the scheme and contents of Regulation 19, certainly not in the order listed. For example, paragraph (a) of Regulation 19 speaks to the **Cover Page** of an EIA report as follows:

"(a) A Cover Page. A single page listing the title of the proposed project listing the title of the proposed project and its location; the name, address and telephone number of a contact person, a designation of the report as a draft or final and a one-paragraph abstract of the EIA report."

Paragraph (b) provides for a summary.

"(b) Summary. A summary of the proposed project, preferably not exceeding 15 pages in length, accurately and adequately describing the

contents of the EIA report. The summary should highlight the conclusions, areas of controversy and issues remaining to be resolved."

Paragraph (c) on the table of contents of the report states:

"(c) Table of Contents. A list and page number index of the chapters, sections and subsections in the EIA report, including a list of tables and a list of tables and a list of figures and appendices."

38. However, even a cursory look at the five volumes report of the EIA in this case, would readily show that it does not follow the schema of Regulation 19. One has to delve deep into the interstices, as it were, of all five volumes, to see if they contain the various matters listed in section 20 of the Act and Regulation 19 from paragraphs (a) to (o).

The EIA of this project is arguably somewhat cumbersome, prepared as it says at page ES 1 of its Executive Summary:

"The objective of the EIA for the MRUSF Project is to identify and assess the potential environmental and socio-economic impacts associated with the proposed development.

*This EIA is prepared in accordance with the requirements of the **Belize Environmental Protection Act (BEPA)** and the **Canadian Environmental Assessment Act, Projects Outside Canada Environmental Assessment Regulations**."*

This may perhaps explain its ungainly bulk. It is presented in five volumes format consisting of Part I – Main Report and the Volumes I – IV, which are referred to as Support Documents. It is admittedly, a massive, detailed and voluminous EIA report.

It also states among other things, that its assessment of the project's environmental impact was issue-driven and is derived from among others, an earlier 1992 EIA findings – see p. 26 of Part I, Main Report.

However, I must say that there is no prescribed format an EIA should take, although its **contents** are specified in both section 20(2) of the Act and Regulation 19.

39. The project's EIA goes on however, to state that:

> *"The EIA is concerned with the effects of the MRUSF Project on the physical, biological and socio-economic components of the environment. All environmental effects of the Project are considered during the assessment, including those identified in the earlier EIA (1992), recent consultations with the public and the scientific community, and the requirements of pertinent legislation.*
>
> *This assessment is issue-driven. The identification of issues and concerns (i.e. issues scooping) was derived from: the 1992 EIA findings; recent experiences with the comparable projects; consultation with the public, scientific community, and individuals knowledge about the study area; work undertaken by the Proponent (BECOL); and the technical and professional expertise of the environmental consultants team.*
>
> *The impact assessment focuses on the evaluation of potential interactions between Project components and activities, and Valued Environmental Component, (VECs) identified through the issues scoping process. Particular attention is devoted to the characterization of linkages and pathways between Project activities and the environment. For the purposes of impact assessment, the interactions (effects) between Project activities and VECs are described as either positive or negative (adverse). The significance of potential interactions and the likelihood of the interactions are also considered. Possible measures to mitigate impacts are identified, and programs will be implemented to monitor the predicted impacts and the effectiveness of mitigation. Where residual impacts are identified, measures to compensate have been considered."* – see page 26 of Main Report of the EIA.

The Project's EIA was prepared by AMEC E & C Services Ltd. of Montreal, Canada.

40. However, the applicant has taken issue in these proceedings with the EIA of the project and its consideration and "decisions" thereon by both NEAC and the DOE.

41. However, before I turn to the examination of the several complaints of the applicant, I must state that several affidavits together with exhibits were filed on behalf of the parties to these proceedings. These affidavits were copious and extensive.

42. In support of the applicant several affidavits were filed:

Affidavits on behalf of the Applicant with exhibits:

1) **Candy Gonzalez** (2) -
   i) 8th February 2002 (165 paragraphs) and ii) 22nd May 2002

2) **Jamillah Vasquez** (3) –
   i) 8th February 2002 (77 paragraphs), ii) 25th February 2002 and iii) 20th May 2002

3) **Brian Holland** - dated 11th April 2002 and 14th May 2002

4) **Sharon Matola** - dated 28th February 2002

5) **Guairne Ryder** - dated 21st May 2002

6) **Ambrose Tillett** (4) dated 14th February 2002; 11th April 2002, 17th May 2002 and 10th July 2002

7) **Elgorio Sho** - dated 8th February 2002

8) **Mick Fleming** - dated 8th February 2002 and 11th July 2002

9) **Phyllis Dart** - dated 14th February 2002

10) **Stephanie Garel** – dated 8th February 2002.

43. **Affidavits for Respondents with exhibits**

1) **Ismael Fabro**, Chief Environmental Officer in the DOE and Chairman of NEAC dated i) 26th February 2002, ii) of same date as first affidavit, iii) dated 3rd April 2002 (44 paragraphs) and iv) dated 18th July 2002

2) **Icilda Humes**, Secretary of NEAC and responsible for taking notes and preparing minutes of NEAC during its consideration of the EIA in question, dated 12th April 2002

3) **George Thompson**, Acting Archeological Commissioner in Department of Archeology in Ministry of Tourism and Culture, a member of NEAC who attended all its sessions at which the EIA was considered and as he avers ultimately approved, dated 17th April 2002

4) **Valdemar Andrade**, Executive Director of Belize Audubon Society, a member Association of National Development Agencies (ANDA) a member of NEAC as representative of ANDA, who attended all meetings of NEAC relating to the EIA, dated 30 April 2002

5) **Ramon Frutos**, head of Hydrology Unit in the Meteorology Department, member of NEAC since1988 and attended meeting of NEAC on EIA, of 8th November 2001, dated 30th April 2002

6) **Beverly Wade**, Fisheries Administrator in Ministry of Agriculture and Fisheries, a member of NEAC attended its meetings during its consideration of the EIA, dated 30th April 2002

7) **Lynn Young**, Director of BECOL, 2nd Respondent dated – i) 20th February 2002, ii) 27th February 2002, iii) 30th April 2002 and iv) 24th July 2002

8) **Joseph Sukhnandan,** Vice President of Planning and Engineering of Belize Electricity Ltd., assigned responsibility to manage the project (MRUSF) for 2nd Respondent dated 30th April 2002 and 17th July 2002

9) **Dawn Sampson**, public relations officer of Belize Electricity Limited who performs public relations work for 2nd Respondent in particular with its Chalillo Unit (that is, for the project in respect of which EIA in question was prepared) dated 24th April 2002

10) **James Code**, professional engineer who worked for AMEC on the project as geo technical engineer and responsible for engineering

geology and geo technical engineering relating to Chalillo, the project, of 30th April 2002

11) **Jeremy Gilbert Green** of Energy Division of AMEC dated 18th April 2002.

44. It is to be observed that of all the affiants, a total of seven were members of NEAC involved directly during its consideration and deliberations on the EIA in question including, **Icilda Humes**, who acted as secretary and prepared minutes of its meetings of 24th October 2001, 8th November 2001 and 9th November 2001. Only Candy Gonzalez, who became a member of NEAC only on 15th August 2001, as a representative of the applicant, gave affidavit evidence as such for the applicant. The rest of the affiants, that is to say, **Fabro, Thompson, Andrade, Frutos** and **Wade**, were at all materials times, substantive members of NEAC.

I have mentioned this, because, of the respective affidavits the parties to these proceedings and the evident divergences in them, as they touch and concern the issues agitated by the applicant's request for judicial review and the reliefs it is seeking.

45. This case is perhaps unique, because not than an EIA was not submitted by the developer in respect of the project, but because the EIA submitted, it has been vigorously contended, by both Mr. Dean Barrow S.C. and Ms. Lois Young-Barrow S.C. on behalf of the applicant, was, they have argued and submitted, deficient and unsatisfactory in some particulars, and that NEAC's consideration of the EIA and its "decision" on it were irregular and unlawful. This, I believe, is the gravamen of the applicant's case; hence, it has been submitted on the applicant's behalf, the "decision" of the DOE on 5th April 2002 to "approve" the EIA, was itself therefore flawed as ultra vires, improper and unreasonable.

46. **The First Complaint** of the applicant relates to Regulation 20(2) and this is that the DOE failed to enforce this by requiring that the developer's EIA for the project should have included a copy of the newspaper notice in accordance with the requirements of Regulation 20.

Regulation 20(1) provides:

"20(1) A person who has submitted an environmental impact assessment shall, as soon as may be, publish in one or more newspaper circulating in Belize a notice . . ."

and the sub-regulation goes on to specify the matters, from paragraphs (a) to (i), the notice should contain, such as a) the name of the applicant; b) the location of the land or address in respect of which the EIA relates; c) the location and nature of the proposal; d) stating that an EIA has been prepared in respect of the proposal; and naming a place where a copy of the EIA, and specifying the times and period during which the EIA may be inspected free of charge ((d) and (f)); g) stating that any person may during the prescribed period make objections and representation to the DOE in relation to the effects of the proposed project on the environment; h) stating the date on which the EIA shall be available to the public, and i) the deadline and address for filing comments on the conclusions and recommendations of the EIA.

Sub-regulation (2) goes on to provide that an EIA submitted by a developer (no doubt to the DOE) shall be accompanied by a copy of a newspaper in which the notice required by sub-regulation (1) has been published.

47. Ms. Young-Barrow S.C. for the applicant, contended that the EIA for the project submitted by the developer was not, contrary to Regulation 20, accompanied by a copy of the newspaper on its submission to the DOE and informing the public and inviting them to inspect it and make comments if they desired. She however, did not refer to any evidence of this statutory lapse. On the other hand, however, I find in the affidavits for the respondent that copies of the requisite newspaper notice were furnished to the DOE. Mr. Ismael Fabro, the Chief Environmental Officer in the DOE deposes in his affidavit of 30th April 2002 at paragraph 16 as follows:

"16. BECOL consulted with the DOE on the Notice required to be published by Regulation 20(1) of the Environmental Impact Assessment Regulations and provided the DOE with copies of the newspapers in which the Notice was published."

Also, Ms. Dawn Sampson who works for the developer, the second respondent, in public relations for the project, deposes at paragraph 7 of

her affidavit of 29th April 2002 as to the publication of the requisite notice in four newspapers having wide circulation in Belize and that copies were also sent to television stations. She also exhibits as items 37 and 44 of the table of contents to her affidavit, copies of the newspaper notices.

Moreover, Mr. Joseph Sukhandan, the Vice President of Planing and Engineering of Belize Electricity Ltd., and assigned the responsibility to manage the project on behalf of BECOL, the developer and second respondent, deposes at paragraph 26 of his affidavit of 30th April 2002 as follows:

> *"26. **Subsequent** to delivering the EIA to the DOE in August 2001 I had consulted with the DOE and received approval of a draft of a newspaper advertisement to notify the public that the EIA had been filed and to indicate when copies of the EIA were available for review. This newspaper notice was in compliance with Regulation 20(1) of the Environmental Impact Assessment Regulations and was run in four newspapers having wide circulation in Belize."* (my emphasis)

48. It would seen, from the evidence, that it is not quite clear whether the requisite newspaper notice was given to the DOE together with the EIA at the same time. This is what, however, Regulation 20(2) seems literally to require, that is, the EIA on its submission should "be accompanied by a copy of a newspaper in which has been published" the requisite notice.

49. Therefore, I think there is some merit in the submission of Mr. Michael Young S.C. the learned attorney for the second respondent that there is some inconsistency or irreconcilability between the subsections of Regulation 20. That is to say, there cannot be publication of the requisite newspaper notice until after the submission of the EIA to the DOE, and yet sub-regulation (2) is saying that a copy of the newspaper containing the notice should accompany the EIA! The sequencing between the submission of the EIA and, the requirement to have a copy of the newspaper accompany it, is not doable at the same time. I believe, however, that teleologically, what Regulation 20 requires and means and intends as a whole, is the publication of the fact of submission of an EIA and notice of such submission to the public, with the necessary information. And this, I am satisfied, on the evidence, was done by the developer, the second respondent, in this case.

50. Therefore, I am prepared to hold and do hold that, even if, as is contended for the applicant, that it was an irregularity or non-compliance with Regulation 20(2), that the submission of the EIA to the DOE was not accompanied by a copy of the newspaper with the requisite notice, this was an irregularity or non-compliance that could without any prejudice to the applicant, be overlooked.

I derived great assistance for this conclusion from the analysis and reasoning of Lord Woolf MR (as he then was), in the case of **R v Secretary of State for the Home Department, ex parte Jeyeanthan (2000) 1 W.L.R. 345,** on the dichotomy between and effects of mandatory and directory requirements in the provisions of statutes and regulations. After referring to what he called the "wise words" of Lord Hailsham of St. Marylebone L.C. in **London and Clydeside Estates Ltd. v Aberdeen District Council (1980) 1 W.L.R. 182**, at 188 – 190, Lord Woolf continued at page 362:

> *"Bearing in mind Lord Hailsham L.C's helpful guidance I suggest that the best approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows:*
>
> 1. *Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance?* (The substantial compliance question)"

I need not refer to the discretionary question and the consequences question, which the learned MR went on to outline as a more helpful approach than the one that is solely dependent on dividing requirements into mandatory or directory.

51. In any event, apart from the inherent antimony between the two halves of Regulation 20, there is no bad faith in the respondent on this issue; and there was, on the evidence, substantial and material compliance with the primary objective of Regulation 20. That is to say, there was publication in

more than one newspaper in circulation in Belize, of the fact of the submission of the EIA to the DOE by the second respondent, with the requisite notice to the public (see items 37 and 44 of Dawn Sampson's affidavit).

52. I now turn to the **second** ground of complaint by the applicant in these proceedings. This relates to the Term of Reference of the EIA for the project. The applicant complains that the DOE failed, on the receipt of the EIA, to examine it or cause it to be examined to determine whether it complied with previously agreed Terms of Reference, and that this was contrary to Regulation 21(b). The requirement of Terms of Reference for an EIA is, I believe, as was correctly submitted by Ms. Young Barrow S.C. for the applicant, to provide a kind of road map for the preparation of the EIA, to ensure that it addresses the pertinent issues that would be contained in the EIA itself. Thus, Regulations 15, 16 and 17 address the issue of the Terms of Reference for an EIA.

Regulation 15 provides that the developer shall submit draft terms of reference in writing and the draft shall contain such information as may be required the DOE. Regulation 16 provides that the DOE shall examine the draft term of reference **or** cause them to be examined as to whether they are adequate to form the terms of reference for the EIA. It also provides that the DOE shall advise the developer whether the draft terms are satisfactory, and where they are not satisfactory, it shall direct the developer to modify the draft in such manner as the DOE deems necessary.

Regulation 17 provides where the draft terms of reference have been agreed between the developer and the DOE and approved in writing by the DOE, the developer shall then commence on the EIA exercise and submit the EIA to the DOE by the specified date.

Regulation 21 then provides for the actions after the receipt of the EIA by the DOE. It is provided in paragraph (b) that the DOE

> *"shall examine the environmental impact assessment or cause the same to be examined to determine whether it complies with the previously agreed terms of reference."*

53. It is this requirement, that is at the heart of the applicant's complaint here: it charges that the DOE failed to examine or cause the developer's EIA for

the project to be examined to ascertain whether it tallied with the previously agreed terms of reference agreed between the developer and the DOE.

Regulation 21(b), I must state, provides for the EIA to be examined by either a) the DOE itself to determine whether it complies with previously agreed terms of reference **or** b) cause it to be examined whether it does so comply. The latter presumably by NEAC. Clearly therefore, if the examination and determination has been done by the DOE itself this would leave precious little room, if any, for further examination and determination, whether by NEAC or any other body. What is clear from the Regulation is that the DOE itself may do this **or** cause it to be done.

54. The complaint by the applicant on this issue is, however, put into sharp relief by the divergences in the evidence of the respective parties as disclosed by their various affidavits. Ms. Candy Gonzalez, in her affidavit of 8th February 2002, at paragraphs 78 to 85 avers in effect, that NEAC had no agreed terms of reference for the EIA to compare, and that despite her request, she did not receive a copy of the terms of reference from the DOE.

On behalf of the respondent on the other hand, Mr. Fabro, in his affidavit of 26th February 2002 at paragraph 9, and in his affidavit of 30th April 2002, at paragraphs 2, 20 and 21, deposes that the terms of reference for the EIA for the project were agreed between the developer and DOE. He deposes to this again in a further correcting affidavit of 18th July 2002.

55. Also, Mr. Joseph Sukhnandan, who is assigned the responsibility to manage the project on behalf of BECOL, deposes in his affidavit of 30th April 2002 at paragraphs 10, 11 and 12 about the terms of reference for the EIA for the project and their acceptance with modifications, and he exhibits JS 1 and JS 2, the letters exchanged between the respondents on the terms of reference.

Moreover, there is the affidavit of Valdemar Andrade of 30th April 2002 on behalf of the respondents. Mr. Andrade is the Executive Director of Belize Audubon Society which is also a member of the Association of National Development Agencies (ANDA), which is in turn a member of NEAC and represented thereon by Mr. Andrade. He deposes in paragraphs 9, 10, 11 and 12 as to the terms of reference and states in particular, at paragraph 12 as follows:

> *"12. NEAC concluded that the EIA had addressed all of the areas required by the Terms of Reference. However, some members felt that some general information was still required and there were some instances in the EIA where information had been provided but the analysis was not extensive enough."*

56. Having carefully perused the affidavit evidence filed in this matter, and carefully analyzed the submissions, both oral and written by the learned attorneys, Mr. Dean Barrow S.C. and Ms. Lois Young Barrow S.C. for the applicant, and Mr. Denys Barrow S.C. and Mr. Michael Young S.C. for the respondents, I am not persuaded that, on the evidence, the complaint of the applicant is made out on this issue. I do not find that there was a failure by the DOE to examine or cause to be examined the terms of reference for the project, in breach of Regulation 21(b).

57. I turn to consider the **third** of the applicant's complaint in these proceedings. This relates to the EIA of the project which was considered by NEAC. The applicant complains that this EIA failed to comply with various sections of the Act and the Regulations, and that in fact it was an incomplete EIA. Therefore, it is contended for the applicant, the decision of NEAC on this EIA was ultra vires and unreasonable. The substance of the applicant's complaint on this score is that the EIA in particular was contrary to section 20(3) of the Act, Regulations 19(h); (i); (j); (k); (l) and (m). I had earlier stated that these provisions that is section 20 of the Act, and Regulation 26, represent, in my view, the heart of the EIA process.

58. Ms. Lois Young Barrow S.C. deployed the minutes of NEAC as produced by Ms. Icilda Humes, to buttress her assertion that the EIA did not contain mitigation measures for the consequences of the construction of the project. She submitted that the EIA itself stated that it was incomplete and that it required further studies and mitigation measures. The applicant's attorneys laid much store on the decision in **R v Cornwall County Council, ex parte Hardy (2001) Env. L.R. 473**. I had earlier stated that this decision is helpful and instructive, but I find it of little assistance given the different regimes for the enforcement of compliance with EIA requirements that are to be found between the U.K. instruments, under the aegis of European Union Directives on EIAs, and those that are available in Belize. In the former, the grant of planning permission is contingent on the relevant authority stating its approval and reasons for its approval for an EIA. The ratio of **ex parte Hardy supra**, I think, is that the information

contained in the environmental statement should be both comprehensive and systematic so that a decision to grant planning permission is taken in full knowledge of the project's likely significant effects on the environment.

59. On the evidence in this case, it is common ground that on the conclusion of NEAC's consideration of the EIA in question, eleven of its twelve members voted in favour of, and only Ms. Gonzalez, representing the applicant, voted against. Mr. Ramon Frutos, head of the Hydrology Unit in the Meteorology Department and a member of NEAC since 1988, deposes in his affidavit of 30 April 2002, at paragraph 10:

> *"10. I considered the EIA to be very comprehensive and adequate. It is certainly well above average in standard compared to other EIAs which I have seen since I have been a member of NEAC."*

Ms. Beverly Wade, the Fisheries Administrator in the Ministry of Agriculture & Fisheries, and member of NEAC, deposes in her affidavit of 30th April 2002, at paragraph 16, as follows:

> *"16. It is my opinion that the EIA was well done. I think that the developer made every effort to address areas of concern. I was impressed with the level of participation by NEAC members and also their professionalism and competence. It reflected the level of examination of the documents by the members. The recommendation made in relation to for instance mitigation measures also reflect the level of examination."*

Also, Mr. George Thompson, the Acting Archeological Commissioner in the Department of Archeology in the Ministry of Tourism and Culture, and a member of NEAC deposes in his own affidavit of 17th April 2002 at paragraphs 4 and 7 that he attended all the sessions of NEAC in which the project's EIA was discussed, and he felt that the concerns of his department were fully aired and were satisfactorily addressed.

60. I am satisfied on the evidence on this issue, that the applicant's complaint cannot be sustained. It is to be remembered these are judicial review proceedings, and I am not as the judge entitled to substitute my own judgment in place of the decision taken. The Court's role is to ensure that the decision complained against was not taken in breach of the requirement of the law. Here, the weight of the evidence of the members

of NEAC, the body charged by law to review and advise on all EIAs is that they reviewed the EIA in question, and after some deliberation decided to recommend it, with the condition stated to the DOE.

61. The EIA may or may not be the perfect EIA, this is not a matter for this Court to decide. The body charged with that responsibility has come to its own deliberate conclusion on this issue. However, a perusal of the five volumes of the EIA in question here would show that it address the requirements of Regulation 19 as well as the pertinent provisions of section 20 of the Act on EIA.

Accordingly, therefore, I do not think that the charge by the applicant that NEAC's decision and therefore, that of the DOE on the EIA, was unreasonable or irrational, is made out. Certainly it falls a long way short of **Wednesbury's** sense of unreasonable.

62. I find support for this conclusion from two decisions of the Courts of two Commonwealth countries, Australia and Canada, countries whose laws admittedly, have a particular solicitude for the environment. The first is the decision of the Land and Environmental Court of New South Wales, Australia of 31st October (1990) in the case of **Warren v Electricity Commission of New South Wales (1990) NSWLEC 131**. In this case the applicant sought to impugn an Environmental Impact Statement (EIS), because she alleged it was inadequate and misleading because it did not adequately deal with the effects of extremely low frequency electric and magnetic fields on human health; she also alleged that the EIS was inadequate because it failed adequately to consider in general, the effect of the proposed transmission line or Aboriginal sites located along the route and that it failed to comply with requirements with respect to archaeological sites. The applicant therefore claimed that the decision taken on the EIS was flawed. The Court dismissed the application after an analysis of the purposes of the EIS (which is the equivalent of the EIA here in Belize) and quoted with approval the observations of an earlier decision in **Prineas v Forestry Commission of New South Wales 49 LGRA 402** to the following effect:

> *"An obvious purpose of the environmental impact statement is to bring matters to the attention of the public, the Department of the Environment and Planning and to the determining authority in order that the environmental consequences of a proposed activity can be properly understood. In order to*

secure these objectives, the environmental impact statement must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible or potential environmental consequences of the carrying out or not carrying our of the activity. It should be written in understandable language and should contain material that would alert lay persons and specialists to problems inherent in the carrying out of the activity . . . Clearly enough, the legislature wished to eliminate the possibility of a superficial, subjective or non-informative environmental impact statement and any statement meeting that description would not comply with the provisions of the Act with the result that any final decision would be a nullity. But . . . provided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision-maker and members of the public and the Department of the Environment and Planning to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations. The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations. In matters of scientific assessment, it must be doubtful whether an environmental impact statement, as a matter of practical reality, would ever address every aspect of the problem. There will be always some expert prepared to deny the adequacy of treatment to it and to point to its shortcoming or deficiencies.

An environmental impact statement is not a decision-making end in itself – it is a means to a decision-making. Its purpose is to assist the decision-maker."

The other decision is that of the Canadian Federal Court of Appeal in **Bow Valley Naturalist Society and BANF Environmental Action and Research Society v Minister of Canadian Heritage, John Allard Acting Superintendent for Kootenay, Yoho, and Lake Louise Field Unit of Parks Canada and Canadian Pacific Hotel Incp. (2001) FCA 642-99,** decided on 10th January 2001, upholding the trial court's decision to dismiss an application for judicial review of a decision by Parks Canada with respect to an environmental assessment of a proposal submitted to it by Canadian Pacific Hotels to develop a meeting facility at

the Chateau Lake Louise in Bany National Park. After an analysis of the Canadian Environmental Assessment Act and the decision the appellant sought to impugn, the Court upheld the dismissal of the application and stated:

> *"The Canadian Environmental Assessment Act was not intended to eliminate any and all development in the national parks. One of its stated purposes is to ensure sustainable development. Neither was the Act intended to provide a rigid structure for conducting environmental assessments, as each set of circumstances requires a different assessment, different scoping and different factors to be taken into consideration. While the dictates of the law must be followed, the process is a flexible and sometimes confusing one.*
>
> *The environmental assessment of CP's proposed meeting facility resulted in the production of numerous volumes of documents. Voluminous studies were undertaken by experts who considered a large number of different factors including cumulative effects. Public consultation was done. While the wording of the decision of the responsible authority is not tidy, precise and lucid as one might wish it to be, (the court) is not persuaded that, in the light of all the evidence, it was so unreasonable that it must be quashed. The court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to the scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of the mitigating factors proposed. It is not for the judges to decide what projects are to be authorized, but as long as they follow the statutory process, it is for the responsible authorities."*

I entirely adopt, with respect, these observations in these two judgments regarding the Court's role in the EIA process.

63. The applicant has also raised the issue of **bias** to attack the decision. It alleges that because the Government of Belize has an arrangement, A Third Master Agreement with BECOL, the developer, and that NEAC's membership includes nine persons who are governmental officials, and the fact that the Prime Minister had on three occasions made public statements supporting the project; this would therefore unduly bias the nine members of NEAC who are public officials. Therefore, Ms. Young Barrow S.C. for the applicant, has urged on this Court that there was a

real danger that these nine NEAC members would be biased in favour of the project.

64. I certainly do not think there is any substance in this allegation, as I am confident the applicant's learned attorney did not intend any personal aspersion against these members.

65. This allegation I find, is misplaced in the circumstances of this case and, the applicable principles when an allegation of bias is raised. It is unnecessary to repeat the obvious that the proceedings of NEAC, when it reviews EIAs, are not adversarial as between opposing sides. NEAC is a multidisciplinary body with a statutorily designated composition in terms of membership.

An analysis of the minutes of the meetings of NEAC during its consideration of the EIA (exhibited to Ms. Icilda Humes' affidavit of 12th April 2002), shows that these NEAC members were not suborned functionaries nor was the process itself so chaotic and freewheeling that it degenerated into the unmanageable. Rather, to my mind, it discloses a structured and purposive exercise that even displayed some democratic elements. The NEAC members had a vote on the EIA at the end of their deliberations. I fail to see how the charge of bias can hold.

66. Accordingly, I hold that the allegation of bias, whether of the pecuniary interest or non-pecuniary kind, that would disentitle a person from adjudicating on a particular matter, cannot even plausibly, be made out here. I find no merit in this allegation.

67. I now turn to the **last** of the complaints of the applicant: that because NEAC and DOE failed to recommend or require a public hearing on the project, this was contrary to Regulation 24. Therefore, the DOE acted on a decision that was unlawful.

68. The public interest element in an EIA is evident in both the Act and the Regulations. Thus, section 20(5) provides that:

> *"(5) When making an environmental impact assessment, a proposed developer shall consult with the public and other interested bodies or organizations."*

Regulation 18 recognizes the need for the public to participate during the course of an EIA by requiring the developer to provide an opportunity for meeting between it and interested members of the public, especially with those members of the public within or adjacent to the geographical location of the proposed project. Such meetings are intended to provide information about the project to the people whose environment would be affected by it, and to record their concerns regarding its environmental impact. This Regulation also provides that the DOE may invite written comments from interested persons concerning the EIA, which it may forward to the developer who is required to answer any pertinent questions raised in such written comments.

And to underscore the public interest element in projects, undertakings or activities that have significant consequences for the environment, Regulation 24 provides for **public hearings** on them.

69. So in all, there are three specific provisions in the Act and the Regulations intended to express the public's interest in EIAs and projects, undertakings or activities impacting on the environment. But there are differences in intent and focus of these provisions vis-à-vis the public. An analysis shows that they may be grouped into two sets: first, **public consultation and participation** on, and in the EIA process itself. Section 25 of the Act and Regulation 18 address this set. The second set, is **public hearing**, and this is the subject of Regulation 24.

70. The intent and focus of Regulation 24 is not the EIA itself but on any **undertaking, project or activity** in respect of which an EIA is required. That is to say on the project, undertaking or activity itself.

71. I am satisfied, from the evidence, that there was material and substantial compliance with the public participation and consultation requirements of section 20(5) of the Act and Regulation 18. Ms. Dawn Sampson's affidavit and, in particular, the attachments exhibited thereto as "DS 1" furnish ample evidence of this compliance.

The EIA report itself in Volume 1 – the Main Report, at pages 27 – 28 states as follows:

> *"An extensive and targeted Public Consultation Programme was undertaken by the Proponent during the Spring of 2001 to promote the involvement of*

local people and potentially affected parties. Meetings and interviews with interested and potentially affected individuals and organizations were held at locations throughout the Project area, including information meetings conducted at Cristo Rey, San Ignacio and at the Casa Maya Resort. The objectives of the consultation/information sessions were to:

- *identify local issues and concerns for the environmental and socio-economic impact assessment*

- *identify and explain the potential impacts and benefits of the Project to those individuals that may be affected*

- *provide information to stakeholders so that they can develop a greater awareness and understanding of the project; and*

- *establish a two-way communication with the public*

The Proponent commits to continue this consultation with key stakeholders throughout the EIA process, the ***public hearings (if any)*** *and Project development.*

Numerous environmental and/or activist groups, both inside and outside of Belize, have voiced their opposition to MRUSF Project. Their comments, information and opinion have helped to identify additional issues that are addressed in this Report." (my emphasis)

72. Indeed, Volume IV in Part 2 of the Support Documents tendered together with the Main Report of the EIA, on the Consultation Programme, convincingly illustrates that the developer satisfied the requirements of section 20(5) of the Act and Regulation 18 on public consultation and participation in relation to the EIA for the project.

I must point out, however, that the public consultation and participation provided for by section 20(5) of the Act and Regulation 18, is not the same as the **public hearing** provision in Regulation 24. This point, I think, is recognized by the developer when the project's EIA says in the portion I have just quoted that "The Proponent commits to . . . the public hearings (if any) . . ."

73. Somehow, from the evidence, there seems to have been some confusion within NEAC about the provisions on public consultation and participation as distinct from **public hearing** on Chalillo dam, the project. This is apparent from Mr. Fabro's affidavit of 30 April 2002, at paragraphs 13, 14, 15 and 17, and so clearly, the "Third National Symposium on the State of the Environment", held at the Biltmore Plaza in Belize City on 14 January 2000, was not, and could not be properly regarded as the equivalent of a Regulation 24 – **public hearing**.

74. The confusion is manifest in paragraph 40 of Mr. Fabro's affidavit where he deposes that before "taking the decision in favour or against the grant of environmental approval for the MRUSF, NEAC voted on the question of whether ***additional public hearings"*** (my emphasis), would be required. The fact is there had not been **any** public hearing. What had taken place were extensive public debates and discussions, **not** a public hearing in terms of Regulation 24. I am sure that but for this confusion of previous public discussions, as public hearing, NEAC would have properly advised that one such **public hearing** was warranted by the Chalillo dam project, especially in the light of the considerations in paragraph (a) – (c) of Regulation 24, which are objectively present in the case of the project. This confusion persisted despite the strenuous efforts of the applicant's representative, Ms. Candy Gonzalez, on NEAC – see paragraphs 140 and 141 of her affidavit of 8th February 2002, and Exhibit 22 thereto.

In fact NEAC **did** vote in favour of public hearing during its deliberations on 9th November 2001 on the EIA – see the minutes of its meeting of 9th November 2001 at para. 2.0 and 2.01 (attached to Ms. Humes' affidavit), where the confusion becomes even more manifest between public consultation and **public hearing**. Somehow, however, DOE never held a **public hearing** on the project, at least not yet, so far, no doubt, perhaps due to this confusion.

75. What is clear from the evidence however, is that NEAC did vote for a public hearing on the project. But this vital point seems to have been submerged under the confusion between public consultation and debate **and** a public hearing proper. What was not sufficiently realized, was that the public hearing proper is not on the EIA of the project, but on the project itself. And one of the three principal functions of NEAC is to advise the DOE of circumstances where a public hearing is desirable. Evidently, the root of the confusion was when the public hearing should be held. From the minutes there is reference to "a decision". It is not clear whether

this refers to a decision of NEAC on the EIA or a decision on it by the DOE. There was a failure, I think, to appreciate that public consultation on the EIA is a duty on the proponent (developer) of the project, and the desirability of a public hearing, is a function of NEAC to advise on or not. This confusion or failure throttled the positive vote for a public hearing from coming through.

76. Although Regulation 24 says that the DOE "may" require a public hearing on a project, undertaking or activity, which clearly imports a discretion, subject of course, to the considerations on sub-regulation (2) which states:

> "(2) *In order to determine whether an undertaking, project or activity requires a public hearing, the Department shall take into account the following factors:*
>
> *(a) the magnitude and type of the environmental impact, the amount of investment, the nature of the geographical area, and the commitment of the natural resources involved in the proposed undertaking, project or activity;*
>
> *(b) the degree of interest in the proposed undertaking, project or activity by the public, the Department and or other government agencies, as evidenced by the public participation in the proposed undertaking, project or activity;*
>
> *(c) the complexity of the problem and the possibility that information presented at a public hearing may assist the developer to comply with its responsibilities regarding the proposed undertaking, project or activity."*

I, however, have grave doubts whether the DOE can, notwithstanding the seemingly directory tone of Regulation 24(1), consistent with its overarching obligation under subsection (4) of section 20 of the Act, refuse to require a public hearing on the Chalillo dam, the project. I think notwithstanding, its decision of 5th April 2002, the DOE can and should still call for a Regulation 24 public hearing as was voted for by NEAC in fact.

77. The project, Chalillo dam, undoubtedly meets by, any definition, all the requirements of Regulation 24(2) to warrant a public hearing. Regulation 24 is not so much concerned with the EIA of the project itself as such; but rather the factors it states that are tied with or flow from the project. Regulation 24 is silent on the procedure for the holding of a public hearing.

But, I think it would not be unreasonable for the DOE to announce and state the time and place for such a hearing on the Chalillo project. This, I believe, will not be outwith the provisions of either the Act or the Regulations but rather in conformity with them. Perhaps, there is need to supplement the current Regulations to provide for **EIA (Inquires Procedure) Rules**, to govern the conduct of public hearing on projects or activities which must have an EIA because of their effects on the environment. There are no rules at the moment. But this is no bar to holding a public inquiry as clearly the Chalillo dam project would warrant, given the considerations specified in Regulation 24(2)(a)-(c), which are all, unquestionably, present in the project.

78. A public hearing is not the same as public consultation on and participation in the EIA of a proposed project. It may well be that a public hearing may or may not affect the final outcome of the decision whether to proceed or not with the Chalillo dam project. But the public, I think, has a right to be heard, consonant with the provisions of Regulation 24(2), if the inclusive and democratic process is to mean anything, especially on such a project as the Chalillo dam, with its admittedly wide-ranging ramifications.

79. However, given the non-fulfillment of Regulation 24 by DOE, as properly contended for by the applicant, and the undoubted consideration that the project in question in these proceedings (the proposed Chalillo dam), is one that meets all the criteria of this Regulation, I think, in all the circumstances of this case, the relief that should be awarded the applicant is not **certiorari** to quash the decision that the applicant has sought to impugn. I think, given the discretionary powers on relief that are available to the Court in these proceedings, a mandatory order to the DOE to hold a public hearing in terms of Regulation 24, would, I believe, be appropriate and adequate.

80. In the event therefore, I hold that an order to quash the decision of the DOE is not the only inevitable and ineluctable response to the seeming failure of the NEAC to recommend a proper Regulation 24 public hearing on the project, despite its vote for one, and the positive failure of DOE, so far, to hold one, as I find, on the evidence. The decision of the DOE can be made conditional on such a public hearing. It is quite true there have been extensive public debates and discussions on the Chalillo dam project in different forums. The evidence bears this out conclusively, including the minutes of NEAC's meetings on the EIA for the project. But these are in no way, a substitute for a Regulation 24 public hearing, which is clearly

warranted in this case. The need for a Regulation 24 public hearing is not the same as that of section 20(5) of the Act or Regulation 18 on public consultation by the developer. The latter, are directed at the EIA of the project, whereas the former, that is, Regulation 24, is aimed at the **project**, undertaking or activity itself, and because of the considerations specified in Regulation 24(2). The outcome of the public hearing, as I have said, may or may not affect the decision of the DOE, but it will help; if the project were to proceed, the information presented at such a public hearing may assist the developer to comply with its responsibilities (Regulation 24(2)(c)). I therefore direct that the DOE should hold a public hearing on the Chalillo dam project in terms of Regulation 24, and as voted for by NEAC at its meeting of 9th November 2002..

In the circumstances of the present case, I realize, of course, that this order would, in effect, sound like putting the cart before the horse. in view of DOE's decision of 5th April 2002. But so be it. The cart must be stopped, this would not necessarily overturn or upset it. But stop it must, until a public hearing is held. The result may well be the same. But a salutary and beneficial outcome of such a hearing may well be that the developer could be assisted in complying with its obligation regarding the proposed Chalillo dam project by the information presented at such a public hearing – this is a Regulation 24 requirement. The developer itself, as I have mentioned earlier, expressly stated in its EIA of the project that it is committed to a public hearing.

CONCLUSION

81. I conclude therefore that though, in the round, I am not able to find in favour of the applicant, on all its complaints, the objections and challenges it has mounted however, against the decisions, whether that of NEAC of 9th November 2001, or that of 5th April 2002 of the DOE, in relation to the EIA in question in these proceedings, can not be regarded as **de minimis** or mere petty-fogging. They raised issues that touch and concern the responsibilities of NEAC and the DOE in relation to their consideration of the effects of a proposed development on the environment, and the application and implementation of the Environmental Protection Act and its regulations on the EIA submitted in relation to this project.

However, subject to what I have already said in this judgment in relation to Regulation 24 on public hearing, which I find was overlooked more by inadvertence and therefore pretermitted by the DOE, I am of the considered view that neither the Act nor the Regulation were disregarded or flouted in such a fashion, if at all, as to render these decisions so

flawed, tainted or unreasonable, as to warrant this Court to step in and quash the decision of 5th April 2002.

Let me conclude by recalling the salutary reminder of Professor John Alder of Keele University in the United Kingdom in his article in **the Journal of Environmental Law**, Vol. 5, No. 2 (1993), p. 203**: "The Environmental Impact Assessment – The Inadequacies of English Law"**, at p. 211 he reminds us that:

> *"Environmental impact assessment is not, as such, an environmental protection measure with positive goals. Environmental impact assessment is intended to enable decision-makers to make an informed choice between environmental and other objectives and for the public to be consulted."*

The role of the Courts, of course, is not to make that critical informed choice, that is for policy-makers to do. But the Courts can insist and ensure that the applicable rules are observed, including consulting the public where the case clearly warrants this.

Accordingly, I am unable to grant the reliefs sought by the applicant, but direct and order that the first respondent, DOE, should hold a **public hearing** on the project conformable with Regulation 24 and in fulfillment of the responsibility of the first respondent under section 3(3) of the Act.

A. O. CONTEH
Chief Justice

DATED: 19th December, 2002.