

IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO: 223 of 2014

BETWEEN

BELIZE TOURISM INDUSTRY ASSOCIATION

CLAIMANT

AND

NATIONAL ENVIROMENTAL  
APPRAISAL COMMITTEE

1<sup>st</sup> DEFENDANT

DEPARTMENT OF ENVIROMENT

2<sup>nd</sup> DEFENDANT

BELIZE ISLAND HOLDINGS LIMITED

3<sup>rd</sup> DEFENDANT

**Keywords:** Judicial Review; Declarations and Certiorari.

Environmental Protection Process; Memorandum of Understanding with Government; Environmental Impact Assessment; Terms of Reference; Environmental Compliance Plan; Definitive Agreement; Department of Environment; National Environmental Appraisal Committee;

Environmental Protection Act; Environmental Impact Assessment Regulations; Public Consultation; Public Hearing; Statutory Notice; Statutory Publication Requirements.

**Before the Honourable Mr. Justice Courtney A. Abel**

**Hearing Dates:** 24<sup>th</sup> February 2015  
30<sup>th</sup> June 2015  
1<sup>st</sup> July 2015  
17<sup>th</sup> July 2015  
13<sup>th</sup> January 2016.

**Appearances:**

Mr. Godfrey Smith, SC; Mr. Andrew Marshalleck, SC, and Ms. Leslie Mendez for the Claimant.

Mr. Nigel Hawke and Ms. Marcia Mohabir for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Mr. Eamon H Courtney, SC, and Ms. Pricilla Banner for the 3<sup>rd</sup> Defendant.

**JUDGMENT**  
**Delivered on the 13<sup>th</sup> day of January 2016**

**Introduction**

- [1] A multinational cruise company, Norwegian Cruise Line, have a an ambitious US\$50 million proposal to expand cruise tourism benefits to the southern region of Belize by building a port at the Island of Harvest Caye (near the Placencia peninsula) as well as a cruise ship day resort on the mainland waterfront site of Malacate (near Mango Creek); complemented by the construction of shops, restaurants, and an elaborate range of other amenities (“the Project”).
- [2] The Project also requires a grant by GOB of a 25 year concession for a berthing facility for cruise ships as the only cruise ship port of entry for Southern Belize at Harvest Caye.
- [3] The Claimant, the Belize Tourism Industry Association (“BTIA”) is seeking, by way of judicial review by this court, of the decisions of the Defendants, the National Environmental Appraisal Committee (“the NEAC”) and the Department of Environment (“the DOE”), following a highly critical public meeting, met to review and discuss an Environmental Impact Assessment (“the EIA”) submitted by the Defendant<sup>1</sup>, Belize Island Holdings Limited (“BIHL”), which resulted in support for and approval of the EIA, and thus giving a ‘green light’ to the Project.
- [4] The NEAC in effect decided to recommend to the responsible department of Government, the DOE, the approval of the EIA and an addendum to it, and the DOE, despite the complaints which have been made about certain statutory publication requirements relating to the EIA, then made the decision to accept the recommendation of the NEAC.
- [5] On the 6<sup>th</sup> day of March 2014, the BTIA sought and obtained the approval of its members to challenge the decisions of the NEAC and the DOE in the face of public criticism.

---

<sup>1</sup> The EIA has been described by BTIA as attracting “*massive and intense public interest, engendered wide controversy and drawn deep public opposition.*”

[6] The Claimant, by the present proceedings, is seeking, by the present judicial review proceedings, for this court to make certain adverse declarations to the Defendants; and to quash the decision of the NEAC and of the DOE claiming that such approval and acceptance are in breach of and as a result of non-compliance with the Environmental Impact Assessment Regulations as amended<sup>2</sup> and of the publication and notice requirements contained in these regulations.

**Issues**

[7] As a preliminary issue, whether the claimant may properly mount a challenge to the NEAC's recommendation and the DOE's approval of the EIA in light of the subsequent approval of a binding Environmental Compliance Plan ("ECP")?

[8] Whether the decision of the NEAC to recommend the approval of the EIA was in breach of the applicable EIA Regulations? More specifically:

- (a) What are the statutory publication and notice requirements to be observed prior to considering the approval of and EIA in the EIA Regulations?
- (b) Was there a failure to observe any of the statutory publication and notice requirements prior to considering the EIA for approval?
- (c) Ought the Court to determine that decision of the NEAC was thereby unlawful, null and void?
- (d) Ought the court to quash the decision of the NEAC?

[9] Whether the decision of the DOE to approve the EIA was in breach of the EIA and the EIA Regulations? Specifically:

- (a) Did the EIA fulfill the minimum requirements stipulated in Regulations 5 and 9 of the EIA Regulations?
- (b) Did the EIA fail to comply with the Terms of Reference ("TOR") in contravention of Regulation 21(1)(b) of the EIA Regulations?
- (c) Ought the Court to determine that decision of the DOE was thereby unlawful, null and void?
- (d) Ought the court to quash the decision of DOE?

[10] Are there any other declarations, orders or directions which this court ought to make to enforce or secure the enforcement of any declarations which the court has made?

---

<sup>2</sup> In 2007 (EIA Regulations)

## Parties

### Belize Tourism Industry Association

- [11] BTIA is a non-governmental representative organization registered in Belize established with the expressed objects of fostering the development of tourism in Belize as well as to promote and safeguard the business interests of its members; which is concerned in the business of tourism in Belize.
- [12] The mission of the BTIA is to advocate for issues that benefit its members, influence tourism policy, legislation and marketing for the sustainable development of the industry and of improved quality of the visitor experience.
- [13] In seeking to accomplish its mission, the BTIA endorses the sustainable growth of the tourism industry in Belize which involves utilizing methods that are least harmful to the environment; and that are developed in full compliance with the environmental laws of Belize.
- [14] The BTIA is a body representative of the entire tourism industry in Belize and includes persons and companies engaged in all aspects of tourism, such as the Belize Hotel Association, the Belize National Tour Operators' Association, the Association of Cruise Service Providers and Belize National Tour Guide Association, with local chapters in each district of the country of Belize.
- [15] BTIA's activities have included challenging governmental action where BTIA believed that the interest of the industry would be prejudiced which has included public interest litigation where the industry was affected (such as in **The Belize Tourism Industry Association v The Prime Minister et al**<sup>3</sup>).
- [16] BTIA's position is that a tourism project of such scale and magnitude as the Project, having obviously significant environmental impact to Belize, must, at minimum, comply with the laws of the country governing the EIA approval process, and considers that the Project was approved by a procedurally flawed and unlawful process – hence the present administrative law claim.

---

<sup>3</sup> Action 565 of 2004.

[17] The BTIA was, at all material times, a member of the NEAC including during when the EIA, the subject of the present claim, was recommended for approval to the DOE.

#### The National Environmental Appraisal Committee

[18] The NEAC is a creature of statute, the EIA Regulations, and an appointed body established<sup>4</sup> to carry out certain statutory functions pursuant to the EIA Regulations.

[19] The NEAC is comprised of members from various departments of government and sectors of society all prescribed by the EI Regulations<sup>5</sup>.

#### Department of Environment

[20] The DOE is a department of the Government of Belize (GOB) established by the Environmental Protection Act<sup>6</sup>, (“the EP Act”) and defined by subsidiary legislation under this act (the EIA Regulations).

[21] The DOE is headed by the Chief Environmental Officer who is appointed by the Governor General of Belize under the Constitution of Belize<sup>7</sup>.

[22] The DOE is tasked with the responsibility of monitoring the implementation of the EP Act and the EIA Regulations and to take necessary action to enforce these statutory provisions.

#### Belize Islands Holdings Limited

[23] BIHL is a company duly incorporated and existing under the Companies Act<sup>8</sup>, with registered office in Belize and formed by the Norwegian Cruise Line to develop the Project.

[24] BIHL is thus engaged in developing the lands which will be used to operate the Project.

---

<sup>4</sup> Pursuant to section 25 of the Environmental Protection (Environmental Impact Assessment) Regulations. See below at paragraph 107.

<sup>5</sup> See below at paragraph 120.

<sup>6</sup> Section 3 of the Environmental Protection Act, Chapter 328 of the laws of Belize. See Below at paragraph 103.

<sup>7</sup> Section 107 of the Constitution of Belize

<sup>8</sup> Chapter 250 of the laws of Belize.

## Krystalsea Limited

- [25] Krystalsea Limited (“Krystalsea”), is a company established and existing under the Companies Act of Belize.
- [26] Krystalsea is the parent company of BIHL and was involved, along with BIHL, in the application for environmental clearance in respect of the Project.

## Background

- [27] Harvest Caye is a mixed mangrove and littoral forest island within Belize, in the Caribbean Sea, comprising approximately 71 acres in size which had a semi-developed beach. It comprises two offshore Cayes (the larger measuring approximately 58 acres and the smaller measuring approximately 13 acres).
- [28] The Project is establish not only as a port but also a cruise ship day resort complemented by the construction of shops, restaurants, beach marina and a floating deep water pier (to allow access off the vessel to the island), a system for the docking of the cruise ship, a park village primarily constructed on raised platforms to limit footprint (with open air structures for crafts and goods exchange), seating areas, entertainment areas, arrival and excursion departure areas, Back of House (BOH) areas complementing a pool club, beach refurbishment, a marina, pedestrian walkways throughout the island, an inland lagoon for kayaking and other non-motorised water sports, expansion of the beach on the windward side of the island, adventure activities such as zip lines and climb structures and a nature trail comprised of a floating pier for snorkeling and diving.
- [29] The Project infrastructure and operation at Malacate have a twofold purpose: (a) to be a mainland home base for all supplies and support items that need to be transported to and from the island, and, (2) to be a mainland site for pick-up and drop-off of all island employees and guests for tours and excursions, to complement the development at Harvest Caye.
- [30] Dredging and reclamation are important and major components of the Project; and the environmental impacts are both ecological and social in orientation (as both of which may be considered at least moderate). Dredging as it affects mangrove protection may also be involved. In addition concerns have been expressed about

the absence of field studies or surveys about the location, diversity, species abundance, richness and health of benthic (floor-bed) organism in the area of the Project.

- [31] On the 31<sup>st</sup> day of July 2013 BIHL entered into a Memorandum of Understanding (“MOU”) with the Government of Belize (“GOB”) regarding the development of the Project.
- [32] The MOU recognized the benefits which the GOB hoped to obtain from the Project. These benefits included investment in the economy, enhanced foreign exchange earnings, creating of meaningful employment, and improvement in government revenues which would contribute to the overall social and economic development of Belize. Also hoped for was much needed development, as a tourism destination, as well as the anticipated creation of employment and economic opportunities, in this part of southern Belize.
- [33] The MOU made reference to the need to be mindful of the general guidelines of the Belize National Sustainable Tourism Master Plan as the official policy document for the development of tourism in Belize. The Project was to be guided by it in its preparation, construction and operational phases.
- [34] Of some importance within the MOU was also the undertakings in respect of the Project of providing investment by BIHL of not less than US\$50 million, along with the usual applicability of the laws and other safeguards - compliance with which was supposed to protect and secure benefits to the county as a whole.
- [35] On 11<sup>th</sup> October 2013, BIHL’s consultant, IE Limited, commenced the process for obtaining approval for the development of the Project. In particular, by Mr. Carlo Arguelles, IE Limited wrote to Mr. Martin Alegria, the Chief Environmental Officer of the DOE, to submit a project information document that addressed the requests of the Environmental Checklist designed for tourism projects.
- [36] On 14<sup>th</sup> October, 2013 Mr. Alegria then wrote to Mr. Arguelles to inform him that after careful review by the DOE of both the proposal for the Project and a previously approved ECP for a project at the same site, the DOE had decided that it was best for BIHL to request a full blown EIA of the Project to be undertaken.

Mr. Alegria also indicated that the DOE would work closely with Mr. Arguelles to finalize the TOR required for the EIA.

- [37] It is noteworthy that an EIA may be considered an indispensable planning tool which would enable environmental authorities and stakeholders to determine whether a proposed project is acceptable or unacceptable from an environmental standpoint (by assisting in the determination of whether the potential environmental impacts of a project outweigh its benefits). It ought to look at both the adverse and beneficial environmental consequences of a project design on human health and natural and cultural environment; and determines what measures might mitigate any harmful consequences. It is a document that promotes environmentally sound development practices and helps the necessary decision making process and of determining whether a project should move forward or not.
- [38] The TOR for an EIA defines the minimum body of information that environmental authorities and stakeholders need to assess in order to arrive at a rational, well-informed decision of whether or not a proposed project is acceptable.
- [39] The TOR for an EIA are usually developed at the earliest stage of the EIA process and helps define the scope of the environmental assessment.
- [40] On the 14<sup>th</sup> November 2013, the DOE issued to BIHL the approved TOR in respect of the preparation of the EIA for the Project.
- [41] The TOR was a substantial 14 page document which was prepared for the scoping of the critical issues that would need to be addressed. It concerned the project description and physical environment, environmental issues, potential cumulative impacts and conclusions and recommendations; and included:
- i. Possible impacts on flora and fauna (marine and terrestrial) associated with habitat alterations and tourism related activities;
  - ii. Impacts on water resources and water quality;
  - iii. Possible impacts associated with the operations of a marina;
  - iv. Impacts associated with the extraction of material, dredging methods and proposed spoils disposal site;
  - v. Possible impacts associated with marine transportation, navigation and safety;



vi. Possible impacts associated with sedimentation; Possible impacts to the socio-economic framework of the nearby communities.”

- [42] In November 2013, in what may be considered fairly short order, considering the substantial nature of the document and the matters it had to consider, even taking into considering the explanation given of prior work having been done, BIHL, submitted to the DOE a draft EIA (“the November 2013 EIA”).
- [43] By memorandum dated 11<sup>th</sup> December 2013 Mr. Alegria then wrote to the Chief Executive Officer of the Ministry of Forestry, Fisheries and Sustainable Development that: (1) the DOE was in receipt of the November 2013 EIA, and, that, (2) the submission of the said draft document was in accordance with Regulation 21(1)(b) of the EI Regulations.
- [44] On 12<sup>th</sup> December 2013 Mr. Arguelles received a letter from the DOE informing that the DOE had received and reviewed the draft EIA and revealed that most of the thematic areas of the approved TOR were addressed.
- [45] The DOE in a letter dated 12<sup>th</sup> December 2013, replied to BIHL drawing to Mr. Arguelles’ attention a list of items in the TOR which had not been addressed in the EIA and which needed to be included.
- [46] Ultimately the DOE recommended:
- (1) that a monitoring plan should be implemented for the entire project,
  - (2) that editing be conducted in respect of the November 2013 EIA,
  - (3) that 13 copies of the revised EIA be re-submitted, one digital copy for dissemination to the NEAC for review,
  - (4) that hard copies be provided, along with a ledger, at the following locations for public review: Chairperson/community library of Independence Village, Placencia Village, and Seine Bight Village and Stann Creek District; and
  - (5) that there be compliance with Regulations 20(1) and (2) of the EIA Regulations relating to notices to the public.
- [47] On 16<sup>th</sup> December 2013, BIHL then submitted a revised EIA report for the Project to the DOE (“the December 2013 EIA”) and outlined significant additional measures.

- [48] By memorandum dated 17<sup>th</sup> December 2013 Mr. Alegria then wrote to the members of the NEAC to distribute copies of the December 2013 EIA. Mr. Alegria requested that the members review the document and forward any written comments to the DOE on or before the 29<sup>th</sup> January 2014. Mr. Alegria also informed the members that the site inspection and public consultation were scheduled for 22<sup>nd</sup> January 2014. Mike Huesner, BTIA's representative, was also addressed in the memorandum.
- [49] On 22<sup>nd</sup> December 2013 a "Public Notice" was published in the Amandala Belize newspaper notifying the general public that the EIA for the Project had been submitted to the DOE and that the said EIA would be reviewed by the NEAC before a final decision was taken by the DOE. The public was also informed that the EIA would be available for public review and comments on or before 28<sup>th</sup> January 2014 and that comments could be submitted to the DOE. The public was also invited to a Public Consultation for the EIA which would be conducted on 22<sup>nd</sup> January 2014 at 7:00p.m., at the Independence High School Auditorium. The public was also informed that copies of the said EIA were available at specified locations.
- [50] Also on 22<sup>nd</sup> December 2013 the very same public notice was published in The Reporter Newspaper.
- [51] On the 5<sup>th</sup> January, 2014 the same notices were published in the Amandala newspapers; and then published the same in the Reporter newspapers as on the 22<sup>nd</sup> December 2013.
- [52] On the 21<sup>st</sup> January 2014 the DOE received a letter from the BTIA requesting that a public hearing be held in addition to the public consultation set for the 22<sup>nd</sup> January 2014. A public hearing being a formal setting for the general public to express their views and position on a project and the EIA. A public consultation is also a process where information is provided about a project and an EIA; and a question and answer session would follow. By a public consultation the stakeholders and general public would be considered an actual part of the decision making process in regards to the matter under discussion.
- [53] On 22<sup>nd</sup> January 2014 the members of the NEAC conducted a site inspection to both Harvest Caye and Malacate Beach. The Site Inspection Report disclosed by

the NEAC and DOE, indicates that the BTIA member on the NEAC, Mike Huesner, was present for this site visit.

- [54] Later on 22<sup>nd</sup> January 2014 the public consultation was held in Independence Village and was widely attended and reported on in the media. The members of the NEAC were present for that public meeting.
- [55] The public consultation generated significant public interest and numerous persons stood firmly in opposition to the Project and vigorously expressed their opinion in opposition to it; and made complaints against the EIA. The DOE took detailed notes of the opinions expressed.
- [56] By virtue of an email dated 27<sup>th</sup> January 2014 and based on the public consultation which had taken place in Independence Village, the DOE indicated to Mr. Arguelles of IE Limited, that on the recommendation of all the NEAC members, the DOE was postponing the NEAC meeting to review the EIA of the Project (referred to in that email as the Krystalsea Limited EIA) which was scheduled for 12<sup>th</sup> February 2014.
- [57] The basis of the recommendation was to address the overall quality of the EIA and to assess specific related environmental issues “*raised in the public consultation meeting*”. The DOE provided detailed recommendations in respect of each of the issues to be reviewed.
- [58] As a result of the recommendations made and information gathered from the public consultation IE Limited, the entity which prepared a supplement of the EIA, submitted a Public Consultation Report dated 6<sup>th</sup> February 2014.
- [59] By email dated 11<sup>th</sup> February 2014, IE Limited submitted the Supplemental Information (“Supplemental Information”) requested by the DOE.
- [60] By letter dated 12<sup>th</sup> February 2014, the DOE expressed thanks to IE Limited for presentation to the NEAC on the supplemental information resulting from the Public Consultation held on 22<sup>nd</sup> January 2014. The DOE also indicated that the NEAC had decided at its meeting on that day to review the EIA two weeks after its submission by IE Limited.
- [61] The next meeting for a review of the said EIA was therefore scheduled for 26<sup>th</sup> February 2014.

- [62] By email dated 13<sup>th</sup> February 2014, the DOE stated that it had submitted the said information to the NEAC for review. The DOE also indicated that it would inform IE Limited of the date of the NEAC meeting to review the EIA so that IE Limited may address any concerns of the NEAC. The DOE also recommended that the public be informed of the Supplemental Information submitted “*addressing concerns raised at the Public Consultation meeting*” and advised that “*this information be lodged at the same places the EIA was lodged, for public review, and that such be published in the newspaper at the earliest possible.*”
- [63] On the 19<sup>th</sup> February 2014, a “Public Notice” was published in the Amandala newspaper entitled “*Harvest Caye Nature Park – EIA Supplemental Information and Consultation Report*”. In this notice the public was informed that the supplemental report for the Project was submitted to the DOE for review and would be available for public review and comments on or before Tuesday 25<sup>th</sup> February 2014. The public was also notified that copies of the supplemental report could be perused at the Village Council’s offices in Independence, Placencia and Seine Bight, the Independence Library and at the DOE.
- [64] A question arises whether the Consultation Report and Supplemental Information was legally required for public consultation.
- [65] On the 21<sup>st</sup> of February 2014, BIHL submitted an addendum to the EIA purporting to address the many concerns raised at the public consultation.
- [66] On 23<sup>rd</sup> February 2014, the very same public notices published on the 19<sup>th</sup> February were also published in the Sunday editions of the Amandala Belize and The Reporter (which are distributed on Friday 21<sup>st</sup> February 2014).
- [67] It is alleged by the Claimant that the Notices published in the Amandala and Reporter newspapers, respectively, did not comply with the statutory requirements for the publication of such notices as required by Section 20 (1) of the EIA Regulations in the following material particulars:
- (i) It failed to specify the times and the period during which the EIA could be inspected; and
  - (ii) It failed to specify the date on which the EIA shall be available to the public; and

(iii) The Notice published in the Reporter was only published for one week and not two as required by the Regulations.

[68] Complaint is also made of the notice given to the public to submit their comments.

[69] The NEAC met on the 4<sup>th</sup> of March 2014 to review and discuss the EIA and its addendum (including the supplemental information). At this meeting, NEAC decided to recommend to the DOE that environmental clearance be granted to Krystalsea Limited subsequent to the signing of the ECP. That the ECP, which should be developed by the DOE for subsequent input by the NEAC, should address, certain terms and conditions, including the following matters:

- (1) The need to further identify and evaluate alternatives/options for the over the water deck, proposed on the windward side of the small island for recreational use. The detailed designs of the preferred option must be submitted to the DOE Environment, for subsequent input from the relevant governmental agencies, prior to its approval for construction.
- (2) To demonstrate its corporate social responsibility in assisting with wildlife protection, the developer will work closely with the Forest Department for the development and implementation of a Manatee Conservation Program for the project area. Likewise, the developer shall consult with the Mining Unit of the Ministry of Natural Resources in making available suitable dewatered spoils as fill material for interested communities within the zone of influence.
- (3) The developer must conduct a Rapid Ecological Assessment of the proposed dredge spoils disposal site on mainland. The EIA is to be conducted based on a TOR approved by the DOE, and the assessment report submitted to the DOE and Forest Department for vetting and approval, prior to commencing any dredging operations thereon. Furthermore, a copy of the land use/access agreement for both the dredge spoils disposal site and the Malacate site must be submitted to the DOE, prior to commencing any land based activities.
- (4) Based on the extremely high national interest on safeguarding against unnecessary environmental degradation at both the Caye and all destinations, a comprehensive environmental monitoring programme will be executed by the DOE and key stakeholders.

- (5) The developer must consult with the Belize Port Authority for the docking of cruise ship vessels and conducting hydrographic surveys of the project area. Furthermore, the proposed navigational lane from Harvest Caye to Malacate and to the Thunderbird Marina (Fab 1 Limited) must be properly demarcated, in consultation with the Belize Port Authority, to mitigate against impacting the benthic environment.
- (6) The use of renewable energy sources and energy conservative measures will be incorporated into the design of required infrastructure.
- (7) The discharge of brine from the Reserve Osmosis Plant will be by marine diffusion. The location of the marine discharge area must be based on oceanographic conditions, including current flow and water depth, allowing for rapid dilution and dispersal, thus minimizing environmental impacts.
- (8) A performance bond/surety bond of \$500,000.00 for the construction phase and the first two years of operations, will need to be taken out by the developer, in the name of the DOE.”

[70] It is this decision of the NEAC, made on the 4<sup>th</sup> March 2014, which is one of the decisions being challenged in the present proceedings.

[71] On 5<sup>th</sup> March 2014 the DOE wrote then to Mr. Carlos Arguelles of IE Limited to inform them that the NEAC had met on 4<sup>th</sup> March 2014 to review the EIA and the “*supplemental information*” for the Project. The DOE informed Mr. Arguelles that the NEAC recommended to the DOE that environmental clearance be granted subsequent to the signing of an ECP which was required to address among other conditions, the terms and conditions of the NEAC decision<sup>9</sup>:

[72] On the 27<sup>th</sup> of March 2014, BTIA, through its Attorney-at-law, Mr. Godfrey Smith, wrote to Mr. Martin Alegria, in his capacity as Chief Environmental Officer and Chairman of the NEAC, expressing many concerns which were itemised. The letter principally urged that a public hearing be conducted so that the public may be given its opportunity to be heard on the supplemental information and the socio economic considerations.

---

<sup>9</sup> See Paragraph \* above.

- [73] In response, the GOB wrote a letter dated the 14<sup>th</sup> of April 2014 denying BTIA's request and asserting that the NEAC and the DOE observed all its obligations under the Regulations and that the EIA is in full compliance with Regulations 5 and 9 and the TOR.
- [74] BIHL finalized the EIA in April 2014 based on the recommendations of the DOE.
- [75] For a period of almost seven (7) weeks the ECP was being developed by DOE, based on the EIA, the Supplemental Information and the NEAC's inputs. And on the 23<sup>rd</sup> April 2014, acting upon the NEAC's recommendation, the DOE made the decision to approve the EIA and signed the ECP along with the Developer.
- [76] It is this decision of the DOE, made on the 23<sup>rd</sup> April 2014, which is the other decision being challenged in the present proceedings.
- [77] By letter dated 23<sup>rd</sup> April 2014, Mr. Martin Alegria, Chief Environmental Officer of the DOE, wrote to BIHL and informed it that environmental clearance was granted jointly to Krystalsea and BIHL for the construction and operation of a cruise tourism port and day resort at Harvest Caye inclusive of land based facilities at Malacate. Mr. Alegria also informed BIHL that Krystalsea and BIHL were required to comply with all the stated terms and conditions within the ECP and that disregard of the terms and conditions stipulated in the said Compliance Plan may result in revocation of the Environmental Clearance and/or legal actions being taken jointly against Krystalsea and BIHL.
- [78] During the period April to May, BIHL/Krystalsea and the DOE reviewed the monitoring fee and jointly agreed in accordance with the ECP that the monitoring fee would be the sum of BZ\$200,000.00.
- [79] On 22<sup>nd</sup> May 2014 Krystalsea and BIHL paid the environmental monitoring fee for the Project in the sum of \$200,000.00 and the DOE acknowledged receipt of payment of the said fee on the 23<sup>rd</sup> May 2014.
- [80] BTIA has expressed its grave concern about alleged procedural impropriety that attended both the NEAC and the DOE's decisions. It expressed its belief that the proper procedure under the EP Act and EP Regulations were sacrificed in order to give way to business expediency.

- [81] On the 9<sup>th</sup> September 2014 BIHL also executed a Definitive Agreement in relation to the Project and referenced in the MOU with the Government of Belize. This is a 25 year agreement in which an exclusive port has been approved for the Stann Creek and Toledo Districts, by way of the Project, for the term of the Agreement. The Agreement makes detailed provisions for project construction, Project operations, a passenger fee, exemption from taxes and duties under applicable legislation, an undertaking for GOB to licence all cruise ships calling at the Port under the Hotels and Tourist Accommodation Act, site impact policy, Authorisation of other cruise ships, Obligations of GOB, certain Representations and Warranties of GOB and BIHL, provision for a completion date, termination provisions, Catastrophe and other Miscellaneous provisions.
- [82] Since the approval of the EIA the DOE has conducted site visits and follow up. The DOE has been visiting the Harvest Caye and Malacate Beach on a routine basis, has closely monitored the project and has made recommendations to BIHL which have been complied with.
- [83] BTIA considers that for a project of this magnitude, public participation is of paramount importance and that the process through which approval was given allowed for minimal public participation with the relevant authorities in the decision making process.
- [84] BTIA, although they oppose the Project on the basis of lack of due process in designing the TOR for the EIA, the carrying out of the EIA and the review process which followed, including the consultation process and subsequent process of review by the NEAC, they are not trying to stop the Project, and have not sought a permanent injunction. The process is very important to the BTIA for past and future EIA's, and it considers that such process is not a mere formality, but is of concern to them as it feels the process allows the public to have a sufficient opportunity to review, consult and comment – particularly after the supplementary information was completed. Though the BTIA wanted a public hearing it is not pressing for a public hearing at this time and it appears that no one is now pressing for a public hearing.



### **The Court Proceedings**

[85] After obtaining permission to apply for judicial review on the 16<sup>th</sup> July 2014, BTIA filed an application for judicial review against the Defendants.

[86] BTIA are seeking Declarations and Orders from this court quashing the decisions of the NEAC and the DOE which would result, they hope, in the Project reverting to the pre-approval stage, but it seems not necessarily in stopping the Project.

[87] Specifically the grounds for the Judicial Review Reliefs sought are as follows:

#### **In relation to the NEAC Decision**

- i. The NEAC's decision to recommend the approval of the EIA in circumstances where there was a failure to observe the statutory publication and notice requirements prior to considering approval is unfair, Wednesbury unreasonable, unlawful, null and void. In particular, the NEAC failed to observe Regulation 20(1) of the EIA Regulations.
- ii. The Notice of the addendum to the EIA was not published in accordance with Regulation 20 of the EIA Regulation, as amended in that:-
  - (a.) The published notice did not state the name of the Applicant as prescribed by Regulation 20 (1)(a);
  - (b.) The published notice did not specify the times and the period during which the EIA could be inspected as prescribed by Regulation 20(1)(f)
  - (c.) The published notice did not specify the date on which the EIA shall be available to the public as prescribed by Regulation 20(1)(b)
  - (d.) The published notice was not published in two newspapers for two consecutive weeks. The addendum was published in the Reporter Newspaper for only one week in clear breach of the statutory requirement as prescribed by Regulation 20(1).
  - (e.) The published notice provided only one clear day for the public to submit their comments to the Department of the Environment effectively defeating the clear purpose and legislative intent for publication under the Regulation.

In relation to the DOE Decision

- i. The DOE acted unlawfully by approving an EIA that failed to meet the minimum requirements prescribed by Regulations 5 and 9 of the EIA Regulations. The EIA failed to:
  - (a.) Address how construction of the berm perimeter would affect the survival of mangroves and the potential loss of these mangroves on marine resources in accordance with Regulations 5(b) and (d) and 9 (h);
  - (b.) Assess how dredging would increase turbidity and sedimentation that would harm marine resources in accordance with Regulation 5(b) and 9(h); and
  - (c.) Address how the project would avoid or mitigate the impacts on seagrass beds in accordance with Regulation 9(j).
- ii. The DOE acted unlawfully by approving an EIA that failed to comply with the DOE's Terms of Reference in clear contravention of Regulation 21 (1) (b) of the EIA Regulations. In particular, the EIA failed to comply with:-
  - (a.) Clause 3.6 of the TOR by failing to conduct a benthic assessment in order to adequately assess the direct impacts of the proposed disposal of 1 million cubic meters of dredged spoil;
  - (b.) Clause 1.5 of the TOR by failing to assess how construction of the berm perimeter would affect the survival of mangroves and the potential loss of these mangroves on marine resources in contravention of Clause B 1.5;
  - (c.) Clauses 1.5 and 1.7 of the TOR by failing to provide any measures that would be undertaken to avoid or mitigate the impacts on the seagrass beds in contravention of Clause B 1.5 and B1.7;
  - (d.) Clause 6.4 of the TOR by providing waste disposal plans that would be harmful to the environment; and
  - (e.) Clauses 1.6, 1.7 and 2.3 of the TOR by failing to assess how dredging would increase turbidity and sedimentation that would harm marine resources.

- [88] In support of the application for judicial review the BTIA at first filed the Second Affidavit (together with Exhibits) of Herbert Haylock, its then President, sworn to on the 16<sup>th</sup> July 2014 and the first hearing of the claim was listed for 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> February 2015. Pursuant to directions given the application was also supported by the 1<sup>st</sup> Affidavit of Heidi Weiskel sworn to on the 12<sup>th</sup> March 2015, an expert witness.
- [89] In opposition to the application the NEAC and the DOE filed on 12<sup>th</sup> March 2015 the 1<sup>st</sup> Affidavit of Martin Alegria and on the 13<sup>th</sup> March 2015 the 1<sup>st</sup> Affidavit of William F. Precht, an expert witness.
- [90] BIHL relied on the 3<sup>rd</sup> Affidavit of Colin Murphy filed on the 5<sup>th</sup> March 2015.
- [91] The application eventually came for trial on the 30<sup>th</sup> June 2015 on which occasion BTIA, without any explanation sought to rely on the Affidavit of Mr. Osmany Salas, its then President, filed on the same day, 30<sup>th</sup> June 2015 substantially in the same terms of the previous Affidavit of Mr. Herbert Haylock. The Affidavit was in support of an application for relief from sanctions for their failure to file this Affidavit within 14 days of receipt of the order granting permission to file Affidavits. The grounds was essentially that on the 27<sup>th</sup> June 2015 Mr. Herbert Haylock, the former President of the claimant Association informed that he does not intend to attend trial in the matter due to the change in presidency of the Claimant, the application was made promptly the Defendants would not be prejudiced and that it would be in the interest of justice to grant permission.
- [92] The Defendants opposed the application of BTIA to use the Affidavit of Mr. Osmany Salas in the place of the Affidavit of Mr. Herbert Haylock which application was granted by this court, for reasons which I undertook to provide as part of my decision in the case. I now give my reasons.
- [93] The Claimant's application was granted under Part 26.9 of the RSC on the basis that the failure of BTIA to comply with directions of the court for filing Affidavits in support of its case, would produce no injustice to the Defendants.
- [94] The court felt that as the other parties had not been taken by surprise by the nature of the evidence, which was largely formal and/or not in dispute, and the application

was necessary to put things right and allow the case to proceed expeditiously, without any further delay, and to save expense.

[95] The court considered that the application of the Claimant to substitute witness would also allow the parties to be on an equal footing and that it would otherwise be wholly disproportionate to strike out the claim at this stage of the proceedings, given the importance of the case, the complexity of the of the issues involved and the number of persons who would be affected by the strike out, instead of substituting the new witness and also considering the financial position of the parties. The court considered that absolutely no advantage would be gained by BTIA by calling the new President to deal with formal matters and to proceed with the trial.

[96] At the trial the Court had the benefit of substantial cross-examination of the expert witnesses and generally preferred the evidence of Mr. William F. Precht to that of the expert Ms. Heidi Weiskel both of whom deal with the question whether the EIA provided the information required by the TOR and whether the approval of the Project should have been given without additional field studies or surveys about the location, diversity, species abundance, richness and health of benthic (the sea floor in the sediment and just above the sediment) organism in the project area as required by the TOR. It had also been questioned, by Ms. Heidi Weiskel, whether conclusions formulated in the EIA documents have the information to substantiate them as required by the TOR. More specifically it has been questioned whether the EIA addresses how dredging would increase turbidity and sedimentation would harm marine resources; also whether the EIA fails to address the TOR regarding benthic assessment, impact of construction of the berm perimeter on mangroves and marine resources, measures to avoid and mitigate impacts on seagrass beds, whether waste disposal plans are harmful to the environment and finally, whether there are any impacts of dredging on turbidity and sedimentation and impacts on marine resources.

[97] The court considers on balance that the evidence of Ms. Heidi Weiskel was not as persuasive as that of Mr. William F. Precht but generally was not particularly impressed by both experts and their general lack of objectivity. It was felt that both

experts came with an axe to grind and were generally not of great assistance to the court in arriving at an impartial decision on the issues with which they dealt.

[98] The Court also benefited from substantial Skeleton Arguments of BTIA filed on the 16<sup>th</sup> July 2015 and from BIHL filed on the 10<sup>th</sup> August 2015.

[99] The court also had the benefit of substantial oral arguments from Counsel taking part and are grateful to them for their diligence.

### **The Legislative Framework**

#### **The Environmental Protection Act**

[100] The relevant legislation impacting environmental protection is the Environmental Protection Act<sup>10</sup> as amended<sup>11</sup> (“the EP Act”) which is an extremely modern and well thought out piece of legislation which was by design, enacted, among other things, to encourage the laudable objective of public participation in the decision making process relating to environmental matters.

[101] The EP Act also makes provisions for EPAs’ to be submitted to the DOE<sup>12</sup> for evaluation and recommendations, by persons intending to undertake any project which may significantly affect the environment; and provides that such persons would have to consult with the public and other interested bodies or organisations when making such an EPA<sup>13</sup>.

[102] Any such project affecting the environment would then have to be assessed<sup>14</sup> and may be approved or not; but if approved may be subject to the signing of an ECP, defined to be a legally binding document containing environmental conditions, guidelines, policies and restrictions which the developer agrees to abide by as a condition for project approval<sup>15</sup>. Any such project would also involve the payment of an environmental monitoring fee; the positing of guarantees or performance bonds; and, such other conditions as may be reasonably required for environmental purposes<sup>16</sup>.

---

<sup>10</sup> Chapter 328, Revised Edition 200, Laws of Belize, Passed on 14<sup>th</sup> October 1992, as No. 22 of 1992.

<sup>11</sup> Principally by the Environmental protection (amendment) Act, 2009, No. 5 of 2009, passed on 20<sup>th</sup> April 2009.

<sup>12</sup> See Section 20 (1) of the EI Act.

<sup>13</sup> See Section 20 (5) of the EI Act.

<sup>14</sup> See Section 20(4).

<sup>15</sup> As defined by Regulation 2 of the EPA Regulations.

<sup>16</sup> See Section 20.

- [103] The DOE is responsible for monitoring the implementation of the EP Act and Regulations and for their enforcement<sup>17</sup> (in relation to which it has considerable powers<sup>18</sup>). It operates under prescribed statutory powers, duties and functions<sup>19</sup> and its approval (provisional or final) is required in relation to any EIA or ECP<sup>20</sup>. The Developer which has submitted an EIA is not permitted to proceed with the project unless and until it has signed an ECP and received environmental clearance from the DOE<sup>21</sup> and any breach of any such condition would be a criminal offence<sup>22</sup>.
- [104] The DOE is also funded by a statutory fund (called an Environmental Management Fund) to assist it in its work<sup>23</sup>.
- [105] The EP Act creates certain criminal offences in relation to environmental protection and the implementation of the Act<sup>24</sup> (including for non-compliance with EIAs' and ECPs'<sup>25</sup>) as well as provides for civil causes of action to be sued upon by persons who suffer loss or damage as a result of misconduct under the Act<sup>26</sup>. Other significant matters are contained in the EP Act which are not immediately relevant to the present proceedings.

#### The Environmental Impact Assessment Regulations

- [106] The relevant subsidiary legislation is the Environmental Impact Assessment Regulations<sup>27</sup> as amended by the Environmental Impact Assessment (Amendment) Regulations, 2007<sup>28</sup> (together "the EIA Regulations").
- [107] The EIA Regulations makes provisions for the regulation of EIAs' including the minimum content of EIA's, the Environmental assessment process, TOR, public participation during the course of an EIA (including by public hearings and on the

---

<sup>17</sup> See Section 3(3).

<sup>18</sup> See Part X of the EP Act.

<sup>19</sup> See Section 4.

<sup>20</sup> See Section 45A of the AEP Act.

<sup>21</sup> Regulation 22A (2) of the EPA Regulations.

<sup>22</sup> Regulation 22A (4) of the EPA Regulations.

<sup>23</sup> Part XI of the EP Act.

<sup>24</sup> See Part VII.

<sup>25</sup> See Section 22 of the Act.

<sup>26</sup> See Section 40.

<sup>27</sup> Statutory Instrument No. 107 of 1995 passed on 30<sup>th</sup> September 1995, Revised Edition 2003, Laws of Belize.

<sup>28</sup> Statutory Instrument No. 27 of 2007 passed on 14<sup>th</sup> march 2007, Laws of Belize.

recommendation of the NEAC), the contents of a report of an EIA, publication of submitted EIAs', action by the DOE after receiving an EIA, the nature and effect of the any advice by the DOE to the developer in relation to any EIA, deficiencies in EIA's, the establishment of the NEAC and the process which it is required to follow, and, for appeals against decisions of the DOE (including providing for a procedure etc.), and finally provisions are made for compliance by the developer with any ECP.

[108] Regulation 20 of the EIA Regulations requires that where an environmental impact assessment has been submitted a notice be published in at least two widely circulated newspapers for two consecutive weeks. The Regulation expressly provides as follows:-

*20. (1) A person who has submitted an environmental impact assessment which fulfils Regulation 21(1)(b) shall publish a notice, vetted and approved, by the DOE, in at least two widely circulated newspapers for two consecutive weeks. The notice shall contain or be:*

- (a) stating the name of the applicant;*
- (b) the location of the land or address in respect of which the environmental impact assessment relates;*
- (c) stating that application has been made and indicating the location and nature of the proposal to which the application relates;*
- (d) stating that an environmental impact assessment has been prepared in respect of the proposal;*
- (e) naming a place where a copy of the environmental impact assessment may be inspected free of charge;*
- (f) specifying the times and the period (being the prescribed period) during which the environmental impact assessment can be so inspected;*
- (g) stating that any person may during the prescribed period make objections and representations to the Department in relation*

*to the effects of the proposed project activity on the environment;*

- (h) the date on which the environmental impact assessment shall be available to the public;*
- (i) the deadline and address for filing comments on the conclusions and recommendations of the environmental impact assessment.*

[109] Regulation 22 of the EIA Regulations specifically states that:-

*22. (1) The Department shall advise the developer of its decision within sixty days after the completed environmental impact assessment has been received by the Department.*

*(2) Until the developer is advised under sub-regulation (1), the developer shall not commence or proceed with the undertaking.*

*(3) Where a developer is required to supply further or additional information in respect of environmental impact assessment then the environmental impact assessment shall not be deemed to have been completed until the developer has supplied such further or additional information to the satisfaction of the Department.*

[110] Regulation 23 of the EIA Regulations also expressly states that:

*Where the environmental impact assessment is deficient in any respect, the Department may on the recommendation of the National Environmental Appraisal Committee require the developer:*

- (a) To conduct further work or studies;*
- (b) To supply further information;*
- (c) To amend the environmental impact assessment accordingly; and*
- (d) To resubmit the environmental impact assessment by a later mutually agreeable date.*

[111] The DOE, on the recommendation of the NEAC, may require a public hearing or consultations after taking into consideration specific factors.



[112] I have carefully considered the cases submitted by Counsel for BTIA in relation to interpreting Regulation 20 and the role of public participation and consultation in environmental matters, such as under consideration. The case of **Talisman (Trinidad) Petroleum Limited v Environmental Management Authority**<sup>29</sup> where it itemized some of the advantages of public participation, is particularly insightful, as follows:-

- i. it improves the understanding of issues among all parties;
- ii. finds common ground and determines whether agreement can be reached on some issues; and
- iii. highlights tradeoffs that must be addressed in reaching decisions.

[113] Likewise the UK decision of **R v North and East Devon Health Authority, Ex Parte Coughlan**<sup>30</sup> where it is observed that to be proper:

*“...consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose.”*

[114] The Jamaican case of **Northern Jamaica Conservation Association & Ors v The Natural Resources Conservation Authority and the National Environment and Planning Agency**<sup>31</sup> also provides useful guidance. Here the Court dealt with a situation where two addenda and a marine ecology report were not included in the EIA when the public meeting was held. Sykes J found that ‘*consultation process was flawed because an important part of the EIA was not placed in the public domain*<sup>32</sup>. The Court explained at para. 49 that:-

*“It does not follow ... that flaws in the consultation process will necessarily mean that the decision should be quashed. It would seem that it depends on the seriousness of the flaw and the impact that it had or might have had on the consultation process. Consultation is the means by which the decision- maker receives concerns, fears*

---

<sup>29</sup> No. EA3 of 2002 at page 19.

<sup>30</sup> [2000] 3 ALL ER 850.

<sup>31</sup> HCV 3002 of 2005

<sup>32</sup> See at para. 121.

*and anxieties from the persons who might or will be affected by his decision. These concerns should be taken into account conscientiously when making his decision ... the Court's will examine what took place and make a judgment on whether the flaws were serious enough to deprive the consultation process of efficacy ...”*

- [115] On a fair reading of the provisions of EIA Regulations it seems to me clear that reference to an EIA for public consultation must be reference to a completed, and not a partial or incomplete EIA (including any Consultation Report and/or Supplemental Information and/or Addenda). It seems to me that to find otherwise would seem to be to defeat the purpose of the public consultation process, if it is to be a meaningful exercise, and if it is to function meaningfully as part of the decision making process.
- [116] In addition, and most importantly, it seems to me that it would be defeating the expressed objective of providing the opportunity for any affected or interested person, during the prescribed period, to make objections and representations to the DOE in relation to the effects of the proposed project activity on the environment. If the EIA is incomplete, and thereby such persons would not have, what might be important, supplemental information and material before them, because it was omitted, the effect would be that they would be deprived of the opportunity to comment on the very information which the process was designed to encourage them to comment on and to engage their participation. They might be denied the opportunity to comment and express their views on proposed project activity that may be harmful on the environment and which they may be affected by as a result of such information being omitted. This court cannot imagine that by enacting the EI Regulations the legislature intended it to be so self-defeating.
- [117] It may be, however that the significance of the omitted information may be fact sensitive, and a determination of whether the public consultation provision has been defeated may therefore turn on the facts and circumstances of the individual case. But as a matter of principle it is clear that reference to an EIA for public consultation must be considered from the start, without short-cuts, as reference to a completed EIA with all information and material available to the public for consultation.

[118] It also seems to me that the addendum to the EIA submitted by BIHL on the 21<sup>st</sup> of February 2014 purporting to address the many concerns raised at the public consultation, ought to be made available for comment at a public consultation, for the public to express a view whether indeed its concerns had been met, if the process of consultation is to be meaningful (as it ought and presumably is required to be by the Regulations).

[119] Under the EI Regulations the NEAC is appointed<sup>33</sup> and is required to:

- (a) review all environmental impact assessments;
- (b) advise the DOE of the adequacy or otherwise of environmental impact assessments;
- (c) advise the DOE of circumstances where a public hearing is deemed necessary;
- (d) make recommendations to the DOE on ways to improve the efficiency and effectiveness of the EIA.

[120] The NEAC, under the Regulations, is comprised of members from various departments of government and sectors of society including: (1) the Chief Environmental Officer or his nominee, (2) the Commissioner of Lands and Surveys, (3) the Director of Health Services, (4) the Chief Forest Officer or his nominee, (5) the Fisheries Administrator or his nominee, (6) the Chief Meteorologist or his nominee, (7) the Director of Geology and Petroleum or his nominee; (8) the Chief Engineer or his nominee, (9) a suitably qualified person trained in Coastal Zone or Marine Resources Management or related field, on the recommendation of the Department, (10) a suitably qualified person trained in Human Development or Social Services, on the recommendation of the Department, (11) a suitably qualified person representing a Tertiary Level Institution in Belize, on the recommendation of the Department; and (12) two registered non-governmental or private sector representatives appointed by the Minister on the recommendation of the Department, who shall serve for a period not exceeding two years<sup>34</sup>.

---

<sup>33</sup> Pursuant to section 25 the EIA Regulations

<sup>34</sup> Pursuant to section 25(2) of the EIA Regulations

[121] In the case of *BACONGO v the Department of the Environment and Another*<sup>35</sup> the Judicial Committee of the Privy Council authoritatively considered a group of environmental organisations in Belize which challenged, by way of judicial review, a decision to build a dam on the Macal River in Belize. The challenge was that the decision was unlawful as the DOE did not comply with procedures required by law to be observed before such approval could be given. The procedures were contained in the EP Act and the EIA Regulations (prior to them being amended). The court looked at the then statutory scheme, the EIA, the decision to approve the project as well as the grounds of appeal (including the basis on which the EIA was alleged to be deficient), and usefully outlined the way in which such matters ought to be looked at and considered. The Judicial Committee of the Privy Council, in a majority decision, decided, by the way, that on the facts of the case, the DOE was not obliged to hold a statutory public hearing; and, that in any event, such a decision was not irrational. Also, that there was nothing to show that the DOE, which was making a political decision about the public interest, did not fairly apply the procedures prescribed by the Act and Regulations.

[122] In relation to EIAs' the Judicial Committee adopted the observations that the statute does not impose a standard of absolute perfection but of reasonable compliance taking into account such matters as money, time, manpower etc. Also that it would satisfy the requirement of substantial compliance with the EI Act and EI Regulations provided it 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, to the effect of the activity on the environment, and the consequence to the community, inherent in the carrying out or not of the activity in question. It specifically noted that:

*“Environmental control in Belize is an iterative process which does not stop with the approval of the EIA. The Act expressly provides for an approval subject to conditions (s20 (7)), as was granted in this case. An EIA is required to include a monitoring plan and the*

---

<sup>35</sup> (2004) 64 WIR 68 at para. 71.

*NEAC is required to consider the need for a 'follow-up programme'. It is not therefore in their lordships' opinion wrong to approach an EIA as if it represented the last opportunity to exercise any control over a project which might damage the environment.<sup>36</sup>*

[123] The Judicial Committee on the facts of that case, found it impossible to find that the EIA was inadequate to meet the requirements of the legislation.

**As a preliminary matter whether the claimant may properly mount a challenge to the NEAC's recommendation and the DOE's subsequent approval of the EIA in light of an already approved ECP?**

[124] The question raised by this issue is whether the present claim is purely academic.

[125] The Belize Court of Appeal, judicial review case of *Ya'axche Conservation Trust v Sabido et al*<sup>37</sup>, considered an authorization given by a Chief Forest Officer under an Order pursuant to the National Parks System Act, and whether it was ultra vires. The question arose on appeal of whether the question for determination was academic. The Court of Appeal considered that the applicable general principle for making a determination on whether a question is academic is clear. The general principle is that academic appeals will not ordinarily be entertained and that the court would only decide live issues between the parties. The court will not pronounce upon abstract questions of law when there is no dispute to be resolved; but that this rule is not absolute but in the discretion of the court to be decided on the facts of the particular case.

[126] Specifically in relation to public law cases the Court of Appeal authoritatively opined that a court will still have a discretion, even if there is no 'lis' to be decided which will directly affect the rights and obligation of the parties, but that such discretion ought to be exercised with caution, and that academic questions should only be heard if there is a good reason in the public interest for doing so. That such a good reason may be where a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved

---

<sup>36</sup> See Paragraph 71 page 15

<sup>37</sup> Civil Appeal No. 8 of 2011 dated 14<sup>th</sup> March 2014.

in the near future. Another good reason might be if the question is one of substantial public importance or might be a potentially important constitutional point or otherwise may be in the public interest for the question to be entertained.

[127] The law seems clear as to what the general approach appears to be to determine if the question before the court is indeed academic, and that if it is found so to be, accordingly to determine if there is some good reason to nevertheless entertain the question.

[128] The question raised by the Defendants of whether the present issue is academic is grounded on the basis that no relief at all has been claimed against BIHL, that no attempt has been or will be made to stop the Project; and that if this Court rules in favour of the BTIA the decision would not impact the validity of the ECP.

[129] It is submitted by BIHL that the ECP having been duly approved and executed and the monitoring process having commenced, the challenge of the EIA approval process, as a planning tool, having been superseded and replaced by the ECP, and by the execution of the Definitive Agreement between BIHL and the GOB, is spent, abstract and obsolete.

[130] In response, BTIA submits that the Claim is not academic for the following reasons:-

- i. The project is still ongoing and the environmental control process is an iterative process which does not come to an end with the approval of the EIA.
- ii. Clause 4.3 of the ECP shows utility of 'further information' stating that 'additional environmental protection measures will be incorporated' as further information becomes available.
- iii. Mr. Alegria under cross examination stated that under the ECP the DOE retains the power to supervise and give directions to the Developer for the protection of the environment. He also stated that monthly reports on the progress of the project are prepared. There is therefore still scope to incorporate relevant public comments on the addendum to the EIA into the ECP. Public participation could still provide the DOE and the Developer with useful information pertaining to the project.

- iv. In any event, the academic nature of a claim does not operate as an absolute bar, especially in matters involving an issue of public interest.
- v. That the present case is one which the Court should entertain as the Claim is undoubtedly one of great public importance and raises a discrete point of statutory construction, namely Regulation 20 of the EIA Regulations.
- vi. The Affidavit of Osmany Salas, as well as the testimony of Mr. Martin Alegria on cross-examination, established clearly that this Claim concerns a project of serious public interest. Mr. Salas set out the significant public interest that the project generated, as demonstrated by the overwhelming public attendance at the public consultation on the 22<sup>nd</sup> of January 2014 and Mr. Martin Alegria stated that about 500 persons were in attendance.
- vii. Mr. Alegria characterized the project as one of the three biggest dredging projects undertaken in Belize. Plainly, adherence to environmental protection rules and regulations of a project of this magnitude is of great public importance.
- viii. Further, one of the two issues to be decided by this Court involves a discrete point of statutory interpretation which is likely to arise in the future. The issue is whether the EIA Regulations require the DOE and the Developer to publish for public review an addendum to the EIA arising from and after the public consultations pursuant to Regulation 20.
- ix. As indicated by Mr. Alegria on the stand, the DOE receives many project proposals on a yearly basis which signals that the issue of re-publication of an addendum to an EIA or supplemental information under Regulation 20 of the EIA Regulations is one which is very likely to re-emerge and so must be clarified.
- x. Lastly, the Claimant commenced this Claim timely and before any works under the project had begun. The 3<sup>rd</sup> Defendant was fully aware of this Claim from its initiation and participated in the proceedings since the leave stage. The 3<sup>rd</sup> Defendant, therefore, should be stopped from raising the stage of operations as a bar to the Claim when it is clear that they knew of the possibility that this Claim may be decided in favour of the Claimant. By

proceeding with the project, the 3<sup>rd</sup> Defendant accepted the risks which the Claim posed to their investment.

[131] I must say that I found the submissions of the BTIA very substantial and persuasive; and correspondingly those of the NEAC, DOE and BIHL not at all persuasive.

[132] For the reasons substantially outlined by BTIA therefore I have found that the questions for determination is not, indeed is far from, academic, and in any event, even if I did find it to be academic, that there are many good reasons (as outlined by them) to nevertheless entertain the question.

**Whether the decision of the NEAC to recommend the approval of BIHL's EIA was in breach of the EIA Regulations?**

[133] Counsel for BTIA submits that the process undertaken in the present case did not meet the basic requirements to conduct a proper consultation.

[134] Counsel for BTIA accepted that it is not every flaw or omission which would impeach the process, but submitted that considering the deficiencies highlighted at the public consultation, the 'Supplemental Information' significantly amended the EIA, and the public should have been given the opportunity to express its views on those changes.

[135] It was also submitted that the DOE failed to adhere to the principles for properly conducting consultation in:-

- i. Treating the document entitled 'Supplemental Information' as merely providing additional information on the EIA, and in so doing, treating their duty to publish as a mere formality;
- ii. Failing to adhere to the publication requirements under Regulation 20 of the EIA Regulations; and
- iii. Failing to provide the members of the public adequate time to be able to review and prepare their comments on the 'Supplemental Information'.

[136] Counsel for BTIA also submitted that the 'Supplemental Information' did not merely provide additional information but effectively, changed or revised the nature of the project.

[137] By contrast it has been submitted by Counsel for BIHL, and adopted by Counsel for the NEAC and DOE, that:



- (i) the undisputed fact is that the statutory publication in respect of the EIA was made and is unchallenged,
- (ii) the Supplemental Information was in fact published and in fact to a wider sector of the public in a more accessible manner than contemplated by the EIA Regulations,
- (iii) the fact that there was not strict compliance with the notice requirements in the circumstances of this particular case did not render the notices invalid, particularly since the notices in respect of the EIA had previously been published so as to introduce the matter into the public domain,
- (iv) there was no legal requirement to publish the Supplemental Information. Further, the fact that the elements of the Notice identified above were not specified was not fatal to the EIA approval process which is demonstrated by the factual circumstances and relevant legal authorities.

[138] I have carefully considered the facts and circumstances of the case and the submissions of Counsel and have concluded that there was indeed a breach of Regulation 20 of the EIA Regulations in that the published notice in relation to the Addendum to the EIA only appeared in the Amandala Newspaper twice in the same week, namely on the 19<sup>th</sup> and 23<sup>rd</sup> of February 2014, and in the Reporter Newspaper for only one week, namely on the 23<sup>rd</sup> of February 2014.

[139] In addition I have also concluded that the content of the published notice was deficient in that it:-

- (1) Failed to state the name of the Applicant in breach of Reg. 20(1)(a).;
- (2) Failed to specify the times and the period during which the EIA could be inspected in breach of Reg. 20(1)(f);
- (3) Failed to specify the date on which the EIA shall be available to the public in breach of Reg. 20(1)(h); and
- (4) Failed to provide adequate time for the public to prepare its comments. The deadline given to the public to submit their comment was the 25<sup>th</sup> of February 2014 and the Notice was published in both newspapers on the 23<sup>rd</sup> of February 2014. The published notice provided only one clear day for the public to

submit their comments to the DOE effectively defeating the clear purpose and legislative intent for publication under the Regulation.

[140] I have as a consequence determined that the decision of the NEAC to recommend the approval of the EIA was in breach of the EIA Regulations, prior to considering the EIA for approval.

[141] I have carefully looked at and considered the significance of the breaches which I have found and of the omitted information and all the facts and circumstances of the case generally with a view to determining what consequence should flow from my findings that the consultation process was somewhat short-circuited and short-cuts were taken, which ought not to have happened, and how this court could send a message to ensure that should this situation arise in the future the NEAC would be discouraged from taking a similar course and send a clear signal that this court would frown upon this taking place; and hopes that it will not happen again in the future should such a similar situation arise. Specifically that a completed EIA with all information and material will in the future be made available to the public for consultation and that there should be full compliance with the statutory publication and notice requirements.

[142] Having taken all the facts and matters into consideration I have decided on the facts of the present case that the defects were not such as to be fatal to the process, as there was indeed substantial and meaningful consultation as evidenced by the significant terms and conditions which the DOE attached to the ECP and the Compliance Plan based on and arising from the public consultations that did take place; that so much water has now flowed under the bridge, as it were, and the Project, as a matter of policy and reality has been advanced to a significant degree; and also the fact that BTIA have not taken the position that the Project ought to be stopped and have not applied to this court for an injunction to stop it; all leading to the conclusion substantively that the public consultation was not significantly defeated, but that a significant matter of principle has arisen for determination. It is hoped by this decision that this matter of principle has finally been put to rest.

[143] I have therefore come to the conclusion that though the non-compliance was not trivial or *de minimis*, nor can be condoned or countenanced without some

expression by this court of utter disapproval, it was not, however, so flagrant a defiance of statutory obligation as to amount to bad faith, but constituted substantial compliance with the Regulations such that this court ought not to determine that the decision of the NEAC was thereby rendered unlawful, null and void; and thereby ought to be considered vitiated or quashed. In arriving at this conclusion the position of BTIA overall to focus on the EIA and not to attempt to stop the Project nor to challenge the ECP and the Definitive Agreement between the GOB and BIHL, in seeking to protect the public interest, not as a mere academic exercise, has been taken into account, and that the Project should proceed with the protections which have been put in place by the terms and conditions attached to the ECP and the Definitive Agreement.

**Whether the decision of the DOE to approve the EIA was in breach of the EPA and the EPA Regulations?**

- [144] Counsel for BTIA submits that the decision of the DOE to approve the EIA is unlawful, null and void in that the EIA failed to comply with the TOR in clear contravention of Regulation 21(1) (b) of the EIA Regulations.
- [145] Counsel for BTIA also submits that Regulation 21 of the EIA Regulations stipulates that upon receiving the EIA the DOE ought to have examine the EIA to determine whether it complied with the previously agreed term.
- [146] Counsel for BTIA submits that the EIA fails to comply with the TOR in many specified respects based on the evidence of it expert witness.
- [147] Counsel for BIHL on the other hand submits that the evidence of the expert for the Defendants and BIHL, William Precht, is to be preferred to that of Heidi Weiskel for BTIA. Counsel for BIHL seeks to rely in his submissions on the considerable admissions made by Dr Weiskel during her cross-examination.
- [148] I have already indicated that I agree with Counsel for BIHL that their expert witness is to be preferred based on the respective performance of the experts under cross-examination.
- [149] Based on the conclusion which the court reached on the unsatisfactory nature of the expert evidence this court is unable to reach a conclusion in BTIA's favour on the questions: (a) whether the EIA fulfilled the minimum requirements stipulated in

Regulations 5 and 9 of the EIA Regulations, and (b) Whether the EIA fail to comply with the TOR in contravention of Regulation 21(1)(b) of the EIA Regulations.

[150] The court generally felt that BTIA had not discharged its burden in relation to these issues. As a result this court is unable to determine that the decision of the DOE was thereby unlawful, null and void, and that the decision of the DOE ought to be quashed.

### **Costs**

[151] As a result of determination which this court has made the court considers that the Claimant has largely and significantly been successful against the Defendants and so the Defendant should pay the Claimant's costs of the proceedings. However the court considers that the extent to which the Claimant has not succeeded should be taken into account in assessing the costs which the Defendants should pay and after hearing Counsel for the parties have assessed the costs which the Defendants should pay in the sum of BZ50, 000.00.

### **Disposition**

#### **In relation to the NEAC Decision**

[152] This court declares:

- (a) that there was indeed a breach of Regulation 20 of the EIA Regulations in that the published notice in relation to the Addendum to the EIA only appeared in the Amandala Newspaper twice in the same week, namely on the 19<sup>th</sup> and 23<sup>rd</sup> of February 2014, and in the Reporter Newspaper for only one week, namely on the 23<sup>rd</sup> of February 2014.
- (b) that the content of the published notice was deficient in that it:-
  - (1) Failed to state the name of the Applicant in breach of Reg. 20(1)(a).;
  - (2) Failed to specify the times and the period during which the EIA could be inspected in breach of Reg. 20(1) (f);
  - (3) Failed to specify the date on which the EIA shall be available to the public in breach of Reg. 20(1) (h); and
  - (4) Failed to provide adequate time for the public to prepare its comments. The deadline given to the public to submit their comment was the 25<sup>th</sup> of February 2014 and the Notice was published in both newspapers on

the 23<sup>rd</sup> of February 2014. The published notice provided only one clear day for the public to submit their comments to the DOE effectively defeating the clear purpose and legislative intent for publication under the Regulation.

- (c) that the decision of the NEAC to recommend the approval of the EIA was in breach of the EIA Regulations, prior to considering the EIA for approval.
- (d) that the public consultation was nevertheless not significantly defeated (even though as a matter of principle, the consultation process was somewhat short-circuited and short-cuts were taken, which ought not to have happened, and one hopes this will not happen in a similar situation in the future) but that as there was substantial and meaningful consultation as evidenced by the fact that BTIA have not taken the position that the Project ought to be stopped and have not applied to this court to stop it, any defects in the statutory publication and notice requirements is not fatal to the NEAC's decision to recommend the approval of the EIA in all the circumstances and will not render it null and void.

In relation to the DOE's

[153] This court is unable to grant any declarations on the questions:

- (a) Whether the EIA fulfilled the minimum requirements stipulated in Regulations 5 and 9 of the EIA Regulations,
- (b) Whether the EIA fail to comply with the TOR in contravention of Regulation 21(1)(b) of the EIA Regulations.

[154] For the reasons given above, the Defendants should pay the Claimant's costs of the present proceedings assessed in the sum of BZ50, 000.00.

---

**The Hon Mr. Justice Courtney A. Abel**