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**ADMINISTRATIVE LAW: JUDICIAL REVIEW**

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

CV 2007 –

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO MAKE A CLAIM FOR JUDICIAL  
REVIEW PURSUANT TO PART 56.3 OF THE CIVIL PROCEEDINGS RULES, 1998 AND  
PURSUANT TO SECTION 5 (6) AND /OR 7 OF THE JUDICIAL REVIEW ACT,2000**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT ACT CHAPTER 35:05 AND THE  
REGULATIONS MADE THEREUNDER**

**AND**

**IN THE MATTER OF THE DECISION OF THE ENVIRONMENTAL MANAGEMENT  
AUTHORITY TO ISSUE A CERTIFICATE OF ENVIRONMENTAL CLEARANCE IN RELATION  
TO APPLICATION CEC 1033/ 2005**

BETWEEN

**SMELTA KARAVAN**

*Applicant*

AND

**THE ENVIRONMENTAL MANAGEMENT AUTHORITY**

*Respondent*

\*\*\*\*\*

**WITHOUT NOTICE APPLICATION FOR LEAVE TO  
MAKE A CLAIM FOR JUDICIAL REVIEW  
PURSUANT TO PART 56.3 OF THE CIVIL PROCEEDINGS RULES, 1998**

**The Name, Description and Interest of the Applicant:-**

- [1] The Applicant is a non profit company limited by guarantee incorporated under the Companies Act, 1995 Chapter 81:01 with its registered address situate at No. 6 Eckle Avenue, Maraval.. It was incorporated for the purpose, *inter alia*, of sensitising the public as to the issues and impacts which may arise from the establishment of aluminium smelters in Trinidad and Tobago.
  
- [2] The Applicant's membership comprises persons with a sufficient interest in and who reside immediately adjacent to and who have and will be directly and adversely affected by the establishment of the proposed Aluminium Smelter Complex comprising of an Aluminium Smelting Facility and an anode plant located at Union Estate, Union Village La Brea ("the proposed Complex"). These members reside in, *inter alia*, Union Road, La Brea,

and Vance River in the Ward of La Brea. The Applicant's wider membership comprise persons resident throughout Trinidad and Tobago who are and will be potentially affected directly and indirectly as members of the general public by the establishment of the proposed Complex. The Applicant and its members have a public interest in the proposed Complex.

- [3] The Applicant's membership include persons with extensive academic qualifications, professional and practical experience in relation to planning, environmental and sustainable developmental issues.
- [4] The Applicant's membership include and represent persons aggrieved and /or who may be injured and who are unable to file an application for judicial review on account of their poverty and/or their economically and socially disadvantaged position and who harbour sincere and legitimate concerns relating to the proposed Complex.

**The relief sought by the Applicant:-**

- [1] A declaration that the decision of the Environmental Management Authority ("the EMA") to issue a certificate of environmental clearance ("CEC") in application reference number CEC 1033 /2005 dated 2 April 2007 for the establishment of the proposed Complex ("the decision") is illegal and /or *ultra vires* and/or unreasonable and/or irrational and/or disproportionate to the lawful objective and/or was arrived at in a procedurally improper manner and/or contrary to the legitimate expectations of the public and /or contrary to the provisions of the Environmental Management Act, 2000 ("the Act") and is null void and of no effect;

- [2] An order of certiorari to remove into this Honourable Court and quash the decision;
- [3] An order of mandamus directed to the EMA requiring it to reconsider the decision in accordance with law;
- [4] A declaration that the practice of the EMA in deferring statutory consultation under section 28 of the Act until subsequent to the preparation and submission of an environmental impact assessment (“EIA”) is illegal and /or contrary to the term of the Act and or is procedurally improper;
- [5] A declaration that the EMA was in breach of its obligations under section 29 of the Act having failed to:-
- (i) post the administrative record
  - (ii) and provide a response to the public comments;
  - (iii) and an identification of the basis for the final action;
- for 45 days after notice of the final action in the Gazette;
- [6] A declaration that the EMA breached its obligation under section 29 of the Act to identify the basis for its final action;
- [7] All necessary and consequential directions;
- [8] Such further and/or other relief as the Honourable Court deems fit.

## **The Grounds upon which the Relief is Sought:**

[1] The decision of the EMA to grant a CEC was undertaken without the benefit of the requisite statutory consultation. The requirement of public comment and consultation is a principle which is central to the decision making process of the EMA as a matter of law and under the Act. The failure by the EMA to adhere to this central tenet flaws the entire process which resulted in the decision. The decision was illegal, procedurally improper, ultra vires, failed to satisfy and observe conditions required by law, and conflicts with the policy of the Act. This decision was also unreasonable, irregular an improper exercise of discretion and a breach or omission to perform a duty and in any event violates section 5 of the Judicial Review Act, 2000.

a.

- i. the Act mandates that an application be submitted for public comment upon the determination by the EMA that an EIA is required (“the pre-EIA stage”).
- ii. the failure to submit an application for public comment at the pre-EIA stage and before the preparation and submission of the finalised EIA precludes the public from making an input into the scope and range of matters to be included in the terms of reference (“TOR”) of the EIA. It fails to give the public sufficient time in which to give intelligent consideration or make an intelligent response or to afford the EMA an opportunity to give a proper explanation or sufficient reasons for particular proposals to satisfy the public. It also did not

allow members of the public who had a potential interest in the proposed Complex to know in clear terms what the proposals were and exactly why they were under consideration and/or the potential detrimental effects that the proposed Complex might have on them so that they could contribute at this formative stage to the preparation of the TOR.

- iii. The TOR determines the scope, range and quality of the EIA. The TOR should adequately and comprehensively address all the issues that impact on and concern the public and persons who are likely to be affected if a CEC is issued in relation to the application. The quality of the CEC is substantially dependent upon the TOR.
  - iv. The EMA itself recognized the requirement of the process of public comment at the pre- EIA stage by embarking upon a consultation process in relation to an application of a similar nature.
  - v. Compliance with the requirement of public comment at the pre-EIA stage is mandatory. It provides for the public to express opinions in relation to environmental issues which might directly or indirectly affect them and adversely impact upon them. It allows the EMA to make an informed decision on a number of substantive issues including the preparation of the TOR.
  - vi. The failure by the EMA to embark upon a process of public comment in the pre-EIA stage necessarily affects the quality of any finalised TOR.
- b.
- i. The EMA did not embark upon a process of public consultation at the pre-EIA stage and consequently the TOR which was finalised was inadequate in that it did not deal

adequately or at all with the entirety of issues affecting the proposed Complex. Some of the issues which public comment or consultation at the pre-EIA stage could have addressed and which could and should have been included in the TOR include:

1. A more detailed description of the technological processes to be implemented in the proposed Complex;
  2. Provision of a properly supervised, impartial and adequate EIA consultation procedure;
  3. Preparation of baseline medical studies to properly assess impact;
- ii. The consequences of the lack of the requisite public comment or consultation being undertaken by the EMA at the pre-EIA stage, were that the finalised TOR and the consequent EIA were inadequate, incomplete and did not address sufficiently or at all relevant issues pertaining to the proposed Complex.
- iii. The prejudice which flowed from the defective pre EIA consultation were not and could not be cured by the subsequent or any subsequent consultation as the EIA process had already been concluded. Further the subsequent EMA consultation was in any event confined to the terms of the submitted EIA as constrained by its TOR.

[2] Further and in any event the attempt by the EMA to delegate its statutory obligation to consult at the pre-EIA stage did not comply with the Act, and was unlawful, ineffectual, and insufficient to compensate for its own breach of the Act as the consultation which was undertaken amounted to an improper

delegation and in any event was unfair, procedurally improper, inadequate/and unlawful.

- i. The EMA unlawfully delegated to a partisan third party, the National Energy Corporation (“NEC”) the sole responsibility for the pre-EIA public consultative exercise. NEC was the initial applicant for the CEC and later joined in a joint venture with a Venezuelan company ‘Sural’ and formed a local company ‘Alutrint Limited’. This shall be henceforth referred to compendiously as “NEC/Alutrint”.
- ii. This purported delegation to the NEC/Alutrint was in any event insufficiently imperative and did not have any or any clear or comprehensive directive as to the nature, scope or extent of the consultation
  1. the EMA initially only suggested but did not require any consultation to be undertaken in the acknowledgement to the application for the CEC;
  2. By letter dated 11 July 2005 the EMA advised the NEC/Alutrint that consultation was required, but in only in accordance with the Certificate of Environmental Clearance Rules, 2001 (“CEC Rules”) rule 5 (2) which allows for voluntary submission of results;
  3. In any event the CEC rules provide for limited consultation and does not embrace the full measure of public consultation prescribed by section 35 and 28 of the Act and in any event inadequately reflect the tenor, spirit and policy of the Act construed as a whole;
  4. the EMA provided no required parameters to NEC/Alutrint for the consultative exercise in relation

to length of the process, the methodology to be employed or the range of persons to be consulted;

5. The EMA did not stipulate the specific information which was to be disseminated leaving it to the discretion of the NEC/Alutrint to “identify and address” what it felt were potential impacts was inadequate
6. The EMA did not include any or any effective supervisory process to ensure that NEC/Alutrint undertook adequate consultation.

[3]

The purported public comment/ consultative process at the pre-EIA stage was partial, inadequate, lacked integrity and independence and was hence flawed.

- i. NEC/Alutrint had a vested interest and could not be and were not impartial facilitators. Other than the EMA itself, an impartial facilitator was the minimum standard required to comply with the requirement of fairness in the consultative process;
- ii. The documents disseminated by the NEC/Alutrint and /or the Advertorial published on 31 July 2005 in the Sunday Express (“the Advertorial”) did not include any or any sufficient explanatory documents to facilitate the public’s better understanding of the impact of the proposed Complex;
- iii. The information disseminated by NEC/Alutrint to the public did not identify or address potential impacts of the proposed Complex.
- iv. The consultative process was as a whole inadequate with respect to the time afforded for response and offended the rules of natural justice:

1. The members of the public contacted by letter were given an inadequate time frame to respond: the letters on behalf of NEC/Alutrint were issued on the 20<sup>th</sup> July 2005 and required a response by the 2<sup>nd</sup> August 2005
2. The 'advertorial' provided grossly inadequate response time, being published during the week of 31 July 2005. The public would have had to respond prior to the 5<sup>th</sup> of August 2005.
3. Flyers were posted through TTPOST on 28 July 2005. The public would have had to respond prior to the 5<sup>th</sup> of August 2005.

[4]

Further, the consultative process embarked upon during the EIA stage was partial, inadequate, lacked integrity and independence and was hence flawed and in any event could not cure the breaches already occasioned by the failure to undertake adequate or any pre-EIA public comment/consultation.

- i. The TOR requirements were insufficient to ensure an adequate consultative exercise and left full conduct of the public consultation in the hands of NEC/Alutrint:
  1. NEC/Alutrint had a vested interest and an impartial facilitation team should have been required at a minimum.
  2. the agenda and format for each public meeting were left to be determined in the discretion of NEC/Alutrint
  3. the number of public consultations required were insufficient to properly apprise the public of the range of relevant issues;

- ii. As a consequence the public consultations during the EIA process did not outline or sufficiently outline the risks, impact and manner in which same could be mitigated so as to afford meaningful consultation with the public;
- iii. In breach of the two part procedure required in the TOR, NEC/Alutrint did not have a consultation at beginning of the EIA stage, firstly to sensitise stake holders and secondly to inform of the findings and proposed management plans. Instead of the prescribed procedure in the TOR, the NEC/Alutrint held two public meetings five days apart at the end of the EIA process.
- iv. The information provided was inadequate and/or misleading in that assurances as to the provision of information specifically requested by the public were never honoured either by:
  - 1. the provision of the information during the EIA consultation; or
  - 2. its inclusion in the finalised EIA or otherwise

[5]

The consultations that took place subsequent to the submission of the EIA were inadequate, unfair and hence flawed and could not cure the breaches occasioned by the breaches of the Act by the EMA relating to pre-EIA comment/consultation:

- i. The EMA consultation:

1. noted at the onset that it was only considering further comments that were limited to the contents of the EIA and not on any related or wider issues;
2. this purported consultation did not include a discussion with the public but was limited only to hearing the concerns of the public. Further the EMA did not have its experts on hand to address the concerns of members of the public who attended the meeting.

ii. The NEC/Alutrint consultations were inadequate in that:

- a. they did not adequately identify the potential impacts and health risks to the public but merely spoke to the process of smelting;
- b. the facilitators /moderators thereof clearly had a vested interest in the outcome and were not impartial or independent and interested in providing to the public information which could have adequately informed their opinions as to the effects and impacts which the proposed Complex might have.
- c. they presented modelling predictions to the public as definitive of what would transpire if the proposed Complex were established. Consequently the information presented to the public on the modelling predictions lacked accuracy and did not present adequately or at all the inherent uncertainty in modelling predictions and the inability to definitively predict scenarios that might occur that were not

and could not be factored into the modelling exercise.

[6]

In any event the EMA's decision upon issuing the CEC, was procedurally improper in that core matters of substance were not raised adequately or at all and put forward for public comment thus depriving members of the Applicant and of the wider public of any input in the decision with respect to these issues which could and might have affected the issuance of a CEC:

- i. The EMA deferred consideration and finalisation of numerous further matters ("the deferred matters"), which it purportedly issued as conditions to the CEC thereby precluded public comment thereon. These included:
  1. The Buffer zone management and monitoring plan;
  2. The Sediment and stormwater management plan;
  3. The Particulate monitoring plan;
  4. The Road traffic management plan;
  5. The Medical Monitoring Plan;
  6. The Environmental Management System - construction phase
  7. The Environmental Management System - operation phase
  8. The Source Emissions Testing plan;
  9. The Ambient Air Quality Monitoring plan;
  10. The Soil Monitoring plan;
  11. The Groundwater Monitoring plan;
  12. The Electromagnetic Radiation Monitoring Plan;
  13. The Spent Pot Lining Management Plan;
  14. The Decommissioning/Abandonment Plan; and
  15. The Emergency prevention and response plan.

- ii. Issues relating to the methodology and processes for the crushing and storage of spent pot liner (“SPL”);
- iii. The issue of cumulative impact from related activities was limited only to confirmed tenants and not reasonably foreseeable tenants;
- iv. The issue of cumulative impact from confirmed tenants was limited only to air emissions;
- v. The issue of cumulative impact from the Brighton Port;
- vi. The issue of the decommissioning of the proposed Complex;

[7] The decision to defer such consultation until subsequent to the preparation of the EIA was in any event an irrational or unreasonable exercise of discretion as having regard to the importance, complexity and scope of the issues raised

- i. it was unreasonable for the EMA not to embark upon a process to ensure that there was public input at the pre EIA stage; and
- ii. In any event since it was foreseeable that the EIA process might be lengthy, the deferral of public consultation by the EMA until subsequent to the submission of the EIA was unreasonable.

[8] The decision to grant a CEC is *ultra vires* and /or in excess of the authority of the EMA in that it purported to grant a CEC in respect of the proposed Complex in circumstances where it had not been fully satisfied of the deferred matters or of all matters relevant to the lawful exercise of its discretion;

[9] The decision to grant the CEC was arrived at in breach of the Applicant’s members’ legitimate expectations:

i. The EMA in its TOR publicly set out the parameters of study and analysis which was required to be set out in the EIA and in relation to which members of the public and the Applicant would be entitled to rely and have a right of comment upon.

The TOR specifically required

1. that cumulative ‘environmental and social impacts’ be addressed. It also stated that the study area should also include lands that will be directly disturbed by the facilities or by its associated infrastructure such as off site facilities, access and utility corridors. It further required that health effects be addressed that are likely to result from the project in combination with other existing, approved, and proposed projects (projects that have been advanced to the public disclosure stage) or reasonably-foreseeable activities in the area;
2. Hazards to be considered should include but not be limited to earthquakes and related events, storms and floods, accidents, (e.g. fires and explosions), gaseous emissions, terrorist activities and occupational health and safety;
3. preparation of a groundwater monitoring plan;
4. preparation of monitoring programmes for assessing air quality during the operation of the proposed Complex;
5. preparation of a traffic management plan during the construction and operational phases;
6. preparation of an emergency response plan;
7. preparation of a detailed monitoring plan to ensure that mitigation measures achieve their objectives and where not so, contingency plans to minimise

adverse situations. Monitoring programmes should address the physical, biological and social impacts... and the parameter to be monitored and their respective frequencies of measurement;

8. provide emissions profiles for the proposed Complex dealing with, *inter alia*, worst case and upset conditions;

The Applicant will rely at the trial of this matter on the TOR for its full terms meaning purport and effect.

- ii. At a public consultation on the 14<sup>th</sup> of November 2005 required by the EMA through the TOR a public assurance was given by a representative of NEC/Alutrint that the air modelling which would be undertaken would take into account 'upset conditions'.
- iii. At public consultations required by the EMA through the TOR on the 9<sup>th</sup> and 14 November 2005 assurances were given by representatives of NEC/Alutrint that information specific to the Chinese technology to be employed would be provided for public comment.
- iv. Contrary to the legitimate expectations of the Applicant and the public, and without affording notice or a hearing in relation to same, the EMA issued a CEC in circumstances where the EIA did not address adequately or at all matters set out in the TOR
  1. In this regard the deferred matters were not provided to the EMA or submitted for public comment and were instead left to be dealt with after the grant of the CEC;
  2. The issue of cumulative impact from related activities was limited only to confirmed tenants and not reasonably foreseeable tenants;

3. The issue of cumulative impact from confirmed tenants was limited only to air emissions;
  4. The issue of cumulative impact from the Brighton Port was not required to be adequately addressed;
  5. the issue of decommissioning was not addressed
  6. the Air Modelling which is undertaken did not take into account 'upset conditions.'
  7. The hazard scenarios which were addressed do not include any reference to scenarios dealing with earthquakes and related events, storms and floods or terrorist activities.
- v. As a consequence of this the members of the Applicant and of the public were denied the opportunity to be apprised sufficiently or at all of matters directly and centrally relevant to the establishment of the proposed Complex and thereby suffered considerable prejudice in being unable to respond to and/or comment on same;

[10]

The decision to grant the CEC is unreasonable/ irrational and /or disproportionate in that:

- i. the EMA issued a CEC without the benefit of all the matters required by the TOR or by its subsequent review reports having been addressed adequately or at all;
- ii. consequently the EMA did not have the full benefit of the requisite information in relation to these issues.
- iii. In any event the EMA acting lawfully could not have properly issued a CEC unless and until it was fully and adequately satisfied of the deferred matters. Notwithstanding the same, the EMA issued a CEC which admits to the fact that the deferred matters were outstanding.

- iv. Further the issuance of the CEC without the benefit of the deferred matters and the matters which were not addressed precluded public comment or participation on same.
- v. In particular the consideration of the issue of management and disposal of Spent Pot Liner (“SPL”) in the EIA is inadequate and the issuance of a CEC in those circumstances was unreasonable:
  - a. having recognised the accepted dangerous nature of SPL, the EMA accepted a disposal plan relating to same in which the particulars have not been fully or adequately discussed or presented or in respect of which the public was not allowed to comment or to be consulted.
  - b. no investigation as to the existence of, or proposed conclusion of bi lateral treaties necessary to comply with international obligations relating to the transport of hazardous wastes
- vi. the Human Health and Ecological Risk Assessment (“HHERA”) submitted was flawed in that:
  - a. Instead of assessing the impact to human health of predicted increases in particulate matter, the HHERA assumes that when levels are below United States Environmental Protection Agency Standards (“USEPA”) and World Health Organisation (“WHO”) standards there are no impacts. This was incorrect as epidemiological data accepted by the EMA, demonstrates that health effects of exposure to particulate matter are observable well below those standards and that in fact there is no threshold

below which health effects have not been observed in respect of particulates.

- b. HHERA is in part based upon air dispersion models which seriously underestimated the level of particulate matter which would result from the proposed activity (below)
- c. It failed to take into account the cumulative impact from all “existing, approved, and proposed projects.... or reasonably foreseeable activities in the area” as required by the TOR or at all.
- d. It failed to assess the baseline health characteristics of the persons within the study area;

vii. Air Dispersion Model

- a. The air dispersion models underestimated the levels of particulate matter resulting from the establishment of the proposed Complex as it failed to account for:
  - i. transformation of acid gases including Hydrogen Fluoride into particulates;
  - ii. the high ambient levels of particulate matter resulting from Sahara Dust which occur from April to November in the Caribbean Sea;

viii. Fragmentation

- a. It is a basic feature of environmental management that the cumulative impact from associated activities is relevant to the assessment of the environmental impact flowing from any particular activity;
- b. The EMA in recognition of the importance and relevance of this specified in the TOR that NEC/Alutrint should address the cumulative impact likely to result from the proposed Complex in

combination with other existing approved and proposed projects in the region that could reasonably be considered to have a combined effect;

- c. In breach of this mandate NEC/Alutrint confined its assessment of cumulative gaseous impact from the Urea, Ammonia Nitrate and power plant (CEC1404/2006) that were to be built at the Union Estate. A very limited assessment arising from the cumulative impact arising from the infrastructure at the Brighton Port was also submitted.
- d. The EMA did not address sufficiently or at all:
  - i. the wider social and environmental issues arising from the required power plant;
  - ii. the effects arising out of the establishment of docking facilities for cargo vessels and reclamation of land for cargo storage facilities at the La Brea industrial estate;
  - iii. the cumulative effects of the expansion of the Union Estate for the specific purpose of obtaining additional space for the aluminium smelter
- ix. Further, the TOR was inadequate with respect to the manner, extent and quality of consultation and the nature of the inputs which were required
- x. In any event the EMA's own requirements as set out in the TOR as to consultation were not fulfilled as NEC/Alutrint did not submit to the EMA transcripts of their presentations to the public at the meetings held on 9 and 14 November 2005. Accordingly the EMA was not afforded the opportunity to consider these presentations;

- xi. The decision to allow Alutrinc/NEC the discretion to facilitate their own consultative process was unreasonable;
- xii. Having regard to the gravity and importance of the issues raised by the establishment of the proposed Complex, the inadequacy of the information supplied to the EMA and to the levels of public consultation afforded in relation to same, the decision to issue the CEC was disproportionate to and /or paid insufficient regard to the statutory mandate of the EMA and /or the objects of Act;

**The Facts Which Entitle the Applicant to make this Application:**

- [1] The Act was assented to on 8 March 2000 in recognition of the fact that environment and the impact of the environmental conditions on human health constitute a shared responsibility and benefit for everyone in the society<sup>1</sup>.
- [2] The objects of the Act include the development and implementation of laws, policies and other programmes for, *inter alia*, the conservation and wise use of the environment to provide adequately for meeting the needs of present and future generation and enhancing the quality of life<sup>2</sup>;
- [3] The EMA is established by the Act and its wide ranging functions include, a duty to take all appropriate action for the prevention and control of pollution and conservation of the environment (section 16 (1) h) and a duty to facilitate co-operation among persons and manage the environment in a

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<sup>1</sup> Preamble to the Act.

<sup>2</sup> Section 4 (d) (i)

manner which fosters participation and promotes consensus (section 16 (2)).

[4] Under section 18 of the Act the EMA is required to establish a National Environmental Policy (“NEP”) which is to be approved by the Minister, submitted for public consultation and laid in Parliament. The most recent NEP of September 2005 recognises that Trinidad and Tobago is one of most industrialised in the Commonwealth Caribbean region and suffers the attendant environmental problems associated with the production of a wide range of commodities including processed food, petroleum products, nitrogen, ammonia, urea, fertilizer, rum, soap, paint and wood products<sup>3</sup>.

[5] The NEP also recognised that atmospheric emissions from vehicle and industrial emission aggravate a deteriorating environmental condition.

[6] The NEP stipulates in section 2.2 and specific objectives to, *inter alia*:

- i. prevent, reduce or where possible recycle all forms of pollution to ensure adequate protection of the environment and consequently the health and well being of humans;
- ii. (develop within the carrying capacity (the assimilative capacity of the environment) of the country through national physical development and planning; and the sustainable use of renewable resources and the conservation of non-renewable resources; and

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<sup>3</sup> NEP Section 1.2

- iii. empower stakeholders, including communities to care for their own environments by providing opportunities to share in managing their local resources and the right to participate in decision making;

[7] The EMA and all other governmental entities are required by the Act in section 31 to “conduct their operations and programmes in accordance with the NEP”.

[8] In or around 24 May 2004 the Government of Trinidad and Tobago (“GORTT”) took a decision to establish an aluminium smelting facility in Trinidad and Tobago. Further to this decision the GORTT acting through the National Energy Corporation entered into a memorandum of understanding with certain aluminium producers, namely Alcoa Inc of the USA and Sural of Venezuela to establish aluminium smelters in Trinidad and Tobago.

[9] No public consultation was undertaken by the GORTT either directly or indirectly in relation to the proposed aluminium smelters.

[10] Further to this decision the GORTT entered into a joint venture with the Venezuelan Company Sural and established a joint venture company called ALUTRINT Ltd (“Alutrint”) incorporated in April 2005 to establish the proposed smelter. Alutrint is 60% owned by the GORTT and 40% by Sural.

- [11] Additionally, GORTT entered into an agreement with Alcoa Inc for the establishment of another aluminium smelter locally.
- [12] The Minister with responsibility for the Environment (“the Minister”), under section 35 of the Act, enacted the Certificate of Environmental Clearance (Designated Activities) Order, 2001 which set out the relevant activities for which a Certificate of Environmental Clearance (“CEC”) would be required from the EMA. Included in the list of activities in the Order is activity 21 being “establishment of a facility for production or refining of metals or their related products.”
- [13] The Minister has further established the Certificate of Environmental Clearance Rules, 2001 (“the CEC Rules”) under section 26 (h) of the Act rules setting out the procedure to be followed by any person in applying for a CEC.
- [14] In addition the EMA has published a “Guide to the Application for a Certificate of Environmental Clearance” (the CEC Guide”) which is freely available to the public and available for download on the EMA’s website.
- [15] In considering any application for a CEC the EMA is entitled in appropriate circumstances to require further information and/or an environmental impact assessment (“EIA”) pursuant to section 35 (4) of the Act.

- [16] If the EMA is of opinion that any application for a CEC requires the submission of an EIA it is required by section 35 (5) of the Act to submit the application for public comment in accordance with section 28 of the Act.
- [17] The scope of any EIA which is required is determined in a two stage procedure whereby the EMA first issues draft terms of reference for the EIA to an applicant for a CEC and then thereafter embarks upon a consultative process following which it finalises the terms of reference. The CEC Guide states that the Terms of Reference are intended to be a “written statement on the parameters, goals/objectives and scope of a study or assessment”.
- [18] Despite the requirements of section 28 of the Act, the EMA has developed a practice of deferring the statutory public consultation in relation to applications for which EIAs are required until after the TOR is settled and the final EIA is submitted. This has the effect of precluding and/or severely limiting public input into the TOR of a proposed EIA and further has the effect of limiting public participation in the CEC process reducing the overall period of public participation in the process.
- [19] The Applicant was formed arising out of the public concern attendant upon public notification of the intention to establish the proposed Complex. Several of its members had engaged in peaceful public protest and demonstrations of concern arising out of the adverse impacts of smelters.

- [20] Other members of the Applicant were persons living directly adjacent to the proposed smelter who are and will be adversely affected by its establishment and who are include persons who are so socially and financially challenged as to be otherwise unable to initiate action to protect the infringement of their rights.
- [21] The Applicant was formed primarily with the intention of sensitising persons to the adverse impacts of the proposed smelter and has embarked itself upon peaceful demonstrations and projects to disseminate information.
- [22] Aluminium smelters generate copious amount of highly hazardous waste including SPL, the disposal of which poses a high and dangerous risk. There are well documented cases internationally of environmentally catastrophic events which have arisen consequent upon improper or inadequate disposal of SPL and other waste matters from smelter which have occasioned severe and adverse human health consequences. Adverse effects have included the poisoning by cyanide of extensive drinking water aquifers and damage to the human central nervous system, thyroid and cardiovascular, neurological and respiratory systems. The potential for adverse impact in a land mass as small as Trinidad and Tobago is significant.
- [23] On the 20<sup>th</sup> day of April, 2005, an application for a CEC was made by one Prakash Saith on behalf of NEC/Alutrint for the establishment of the proposed Complex (“the application”). This application is contained in the register of documents made available to the public by the EMA. The Applicant will

refer to this register for its full terms true meaning purport and effect.

[24] On May 6 2005 the EMA acknowledged receipt of the application and made a request for further information. By this letter the EMA also suggested but did not require that NEC/Alutrint undertake public consultation.

[25] On 15 June 2006 the EMA notified the NEC/Alutrint of its determination that an EIA was required in respect of the application.

[26] Thereafter, the EMA issued the draft TOR to the NEC/Alutrint under letter dated 11 July 2005.

[27] Further correspondence from the EMA of 11 July 2005 to the NEC/Alutrint outlined the duty to undertake consultation in accordance with Rule 5 (2).

[28] By letter of 5 August 2005 the NEC/Alutrint wrote to the EMA noting its suggested amendments to the draft TOR and outlining the public consultation exercise which it had undertaken with respect to the draft TOR together with public comments received. One comment included a complaint as to the length of the effective time provided for response.

[29] The consultative exercise undertaken consisted of:

- i. The distribution of a package to selected stateholders under cover of letter dated 20 July 2005;
- ii. Publication of a centrefold advertisements during the week of 31 July 2005;

- iii. Distribution of flyers through TTPost to the La Brea community on 28 July 2005;and
- iv. The posting of the said advertisement and a poster presentation at the Union Estate Communication Centre on 29 July 2005.

[30] The EMA finalised and issued the TOR in respect of the application on 19 August 2005.

[31] The TOR outlined the parameters and scope of the EIA process including the nature of the consultative process required. The Applicant will refer to the TOR at the trial of this matter for its full terms true meaning purport and effect.

[32] The EIA prepared on behalf of NEC/Alutrint was submitted to the EMA on 23 January 2007.

[33] The EIA set out, *inter alia*, the dates of the stakeholder consultations and partial transcripts of the two public consultations undertaken on 9 and 14 December 2005. Additionally the EIA comprised the following documents: the Environmental Impact Statement (“EIS”), the Social Impact Assessment for the Proposed Establishment of an Aluminium Complex at Main Site, Union Industrial Estate, La Brea, Trinidad (“SIA”) and the Air Dispersion Modelling Report for the Proposed Establishment of an Aluminium Complex at Main Site, Union Industrial Estate, La Brea, Trinidad (“ADM”).

[34] On 13 February 2006, the EMA wrote to NEC/Alutrint acknowledging receipt of the EIA submitted by NEC/Alutrint.

[35] Thereafter the EMA forwarded a copy of the Administrative Record for public viewing to the following government offices:

- i. Department of Natural Resources and the Environment (Tobago);
- ii. Point Fortin Borough Corporation; and
- iii. the Siparia Regional Corporation.

[36] On the 8 March 2006, EMA wrote to the following entities enclosing the EIA and requesting assistance in its review:

- i. Occupational Health and Safety Division of the Ministry of Labour.
- ii. The Office of Disaster Preparedness and Management of the Ministry of National Security.
- iii. The Fire Services Division.
- iv. The Town and Country Planning Division
- v. The Siparia Regional Corporation Town and Country Planning Division.
- vi. The Water Resources Agency.

[37] The EMA by Legal Notice advised the public of the lodging of the Administrative Record at the government offices listed at paragraph 13 and gave notice of the public comment period from Monday 13 March 2006 to Friday 28 April 2006, a period forty-seven calendar days.

[38] Thereafter several public comments were sent to the EMA in respect of the EIA and the application;

- [39] On 26 May 2006, the EMA wrote to NEC/Alutrint stating that several deficiencies in the EIA had been identified and attached a Review and Assessment Report detailing matters that were required to be addressed before the application could be determined.
- [40] The EMA advertised and hosted a public consultation at the La Brea Community Centre on 27 May 2006 to receive comments limited to matters relating to the EIA.
- [41] On 18 August 2006, NEC/Alutrint wrote to the EMA attaching its response to the Review and Assessment Report dated 18 August 2006, (“the Supplementary EIA”).
- [42] The EMA prepared an Administrative Record for the Supplementary EIA and by public notice established a further public comment period from Monday 11 September 2006 to Tuesday 10 October 2006, a period of 30 calendar days.
- [43] On 06 September 2006, the EMA wrote to the following entities enclosing a copy of the administrative record for the Supplementary EIA to facilitate public viewing of same:
- i. the Point Fortin Borough Corporation.
  - ii. the Department of Natural Resources and the Environment (Tobago).
  - iii. the Siparia Regional Corporation.
- [44] On 17 October 2006 the EMA wrote to NEC/Alutrint requiring further clarification of information provided in the Supplementary EIA attaching its “Review Comments on the Supplementary Report”. In this document, EMA advised that Alutrint was required to develop a plan for the conduct of

public consultation meetings based on the EIA Report and all subsequent revisions, including the Supplementary EIA. The EMA further advised NEC/Alutrint that a Human Health and Ecological Risk Assessment (“HHERA”) was required to be conducted.

[45] On 20 November 2006, NEC/Alutrint wrote to EMA advising that while it objected to the conduct of the HHERA and additional public consultations, that it would in fact undertake these tasks as requested.

[46] On 23 November 2006, NEC/Alutrint submitted to the EMA and addendum to the Supplementary EIA providing the clarifications requested (“the Addendum”).

[47] On 5 December 2006, NEC/Alutrint wrote to the EMA stating the HHERA would not be available for submission until 31 January 2007.

[48] On 07 December 2006, NEC/Alutrint held a public consultation and submitted a transcript of the proceedings to the EMA.

[49] On 13 December 2006, the EMA wrote to NEC/Alutrint noting that all the information requested had not yet been supplied and that no decision in relation to the application could be made until a thorough a review of all the outstanding information was undertaken.

[50] Further public consultations were undertaken by NEC/Alutrint who held a public update meeting on 14

December 2006 and a cottage meeting on 19 December 2006.

[51] On 20 December 2006, NEC/Alutrint wrote to the EMA requesting a speedier review period. On 10 January 2007, the EMA responded stating that it could not commit to a substantially reduced review period due to the fact that this review period includes time for review by the EMA's expert advisors, other government agencies, as well as any necessary public review.

[52] On 30 January 2007, the EMA wrote to NEC/Alutrint attaching the preliminary findings of its review of the Addendum stating that it reserved the right to issue a subsequent review on receipt of the HHERA and the final report on Public Update Meetings.

[53] On 08 February 2007, NEC/Alutrint wrote to the EMA inviting it to attend a meeting where a presentation of the HHERA would be made to the project affected communities of La Brea.

[54] On 14 February 2007, NEC/Alutrint wrote to the EMA enclosing a copy of the HHERA stating that "the results of the HHERA indicate that there are no likely health or ecological effects to the people, plants, fish and wildlife in the surrounding community of La Brea, resulting from the incremental impact of these three facilities on the existing environment".

[55] On 05 March 2007, Dr. Peter Vine wrote to the EMA submitting comments on the HHERA. On 05 March 2007,

Cathal Healy-Singh wrote to the EMA with respect to deficiencies in the Public Consultation process and the HHERA.

- [56] On 9 March 2007, the EMA wrote to NEC/Alutrint attaching a “Review of the Human Health and Ecological Risk Assessment” requesting a response by 13 March 2007.
- [57] On 12 March 2007, NEC/Alutrint wrote to the EMA in response to its letter of 09 March 2007 attaching its responses to the “Review of the Human Health and Ecological Risk Assessment”.
- [58] On 15 March 2007, the EMA wrote to NEC/Alutrint expressing concerns about its response to the “Review of the Human Health and Ecological Risk Assessment” with particular reference to mercury emissions and possible interactions for phytotoxic air pollutants.
- [59] On 15 March 2007, the EMA wrote to NEC/Alutrint stating that the EMA had delayed its decision so as to afford NEC/Alutrint adequate time to respond to the “Review of the Human Health and Ecological Risk Assessment” and that a determination of the matter would be made by 02 April 2007.
- [60] On 16 March 2007, NEC/Alutrint wrote to EMA providing its responses to the EMA’s “Review of the Human Health and Ecological Risk Assessment” attaching a memorandum from SENES Consultants Limited on same.

- [61] On 16 March 2007, the EMA wrote to NEC/Alutrint repeating the contents of its 15 March 2007 letter stating that the EMA delayed its decision to afford NEC/Alutrint adequate time to respond to the "Review of the Human Health and Ecological Risk Assessment" and that a determination of the matter would be made by 02 April 2007.
- [62] On 21 March 2007, the EMA wrote to NEC/Alutrint requesting proof of contractual agreement(s) between NEC/Alutrint and a licensed hazardous waste facility in the United States for the disposal of SPL.
- [63] On 02 April 2007, the CEC for the proposed Complex was issued to the NEC/Alutrint by the EMA subject to purported conditions.
- [64] On 21 April 2007 NEC/Alutrint wrote to the EMA advising that the letter of intent re: SPL disposal could be treated as non confidential.
- [65] On 12 June 2007 over two months after the decision, the EMA issued a document entitled "Notice of Final Action Response to Public Comments Received."
- [66] As late as 15 June 2007 this document did not appear on the national register and it was only on 25 June 2007 that a member of the Applicant obtained a copy of same.
- [67] To date the EMA has not issued any identification of the basis for its final action in this matter.

**Alternative Remedy: C.P.R. Part 56.3 (3) (e)**

- [1] This application for judicial review is premised upon grounds which include but are not limited to breaches of section 28 of the Act and the members of the Applicant include persons who did not submit written comments to the EMA in relation to the proposed Complex.
- [2] Accordingly, no alternative remedy exists and this decision is properly the subject of an application for judicial review.

**Delay: C.P.R. Part 56.3 (3) (G)**

- [1] This application involved voluminous and highly technical information which required, *inter alia*, the advice and evidence of experts from overseas.
- [2] In addition, the members of the Applicant include persons who are socially and economically disadvantaged and for whom mobility and access are limited.
- [3] In addition the statutorily required response to the public comments received by the EMA was improperly issued on 12 June 2007 and placed upon the public register subsequent to 15 June 2007;
- [4] There has been to date no publication to the knowledge of the members of the Applicant of the statutorily required "identification of the basis for final action".
- [5] In the circumstances this application has been made promptly and in any event within three months of the decision complained of.

DETAILS OF ANY CONSIDERATION WHICH THE APPLICANT KNOWS THE RESPONDENT HAS GIVEN TO THE MATTER IN QUESTION IN RESPONSE TO A COMPLAINT MADE BY OR ON BEHALF OF THE APPLICANT

- [1] The members of the Applicant were unable to properly issue a pre-action protocol letter as the EMA delayed in providing its statutorily required responses to the comments of members of the public until 12 June 2007 (and was only available subsequent to the 15 June 2007). To date, there has been no publication of the statutorily required "identification of the basis for final action".
- [2] In the circumstances the members of the Applicant were severely prejudiced in assessing the reasoning process of the EMA in relation to the multiplicity of issues which were relevant so as to properly determining whether or not there existed reasonable grounds for challenging same.
- [3] In any event the EMA does not have the legal power to change the decision being challenged.

NAME AND ADDRESS OF THE APPLICANT'S ATTORNEY AT LAW AND THE APPLICANT'S ADDRESS FOR SERVICE

The Applicant's address for service is c/o of N.D. Alfonso & Co, Suite 2 Chancery Courtyard, 13-15 St. Vincent Street, Port of Spain, Attorneys-at-Law for the Applicant.

I, **Wayne Kublalsingh**, Director of the Applicant certify that the facts stated above are true, that I am entitled to the remedies sought and to an order giving me leave to make a claim for Judicial Review.

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**Wayne Kublalsingh**  
**Director**  
**SMELTA KARAVAN**

Attached are : (i) a Draft Notice in accordance with Section 7 (2) of the Act;  
(ii) a Draft Order.

Dated this 29th day of June, 2007

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**N.D. Alfonso & Co**  
**Attorneys-at-Law for the Applicant**

**NOTICE:**

This application will be heard by the \_\_\_\_\_ on \_\_\_\_\_  
the \_\_\_\_\_ day of \_\_\_\_\_, 2007 at \_\_\_\_\_ a.m. at  
the Hall of Justice, Knox Street, Port of Spain.

If you do not attend this hearing an Order may be made in your absence.

**OR**

The \_\_\_\_\_ will deal with this application by –

The **Court Office** is at the Hall of Justice, Knox Street, Port of Spain, telephone number 623-2416, FAX No. 623-5238. The office is open between 8:00 am and 4:00 pm. Mondays to Fridays except Public Holidays and Court Holidays.

