

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

ACTION NO. 61

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

AND

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

AND

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

AND

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

THE QUEEN

And

THE DEPARTMENT OF THE ENVIRONMENT

BELIZE ELECTRIC COMPANY LIMITED - Respondents

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

- Applicant

Revised Skeleton Arguments
On behalf of the applicant (Bacongo)

June 7 2002

1.0 **Time Estimate**

1.1 Hearing of the substantive application for Judicial Review is set for 11th day of June 2002 before the Hon. Chief Justice, Abdulai O. Conteh.

1.2 The hearing of this matter is estimated to last five (5) days.

2.0 **List of Issues**

2.1 Was the consideration by NEAC of the EIA without terms of reference previously approved in writing by the Chief Environmental Officer, and in any case, without terms of reference, ultra vires regulation 21 of the Regulations and illegal.

2.2 Was the decision of NEAC not to require a public hearing on the Chalillo Project before coming to the decision of 9th November 2001 ultra vires regulation 24(2) of the Regulations in that in so deciding they acted for an improper purpose and failed to take relevant factors into account; and unreasonable in the Wednesbury sense.

2.3 Given that the EIA as presented to NEAC on 29th August 2001 was incomplete, was the review by NEAC on the 24th October 2001, 8th and 9th November 2001 of the incomplete EIA ultra vires section 3 of the Act.

- 2.4 Was the decision of 9th November 2001 illegal because in the process of making it NEAC failed to take into account, or to give proper consideration to, the statutory considerations set out in regulation 26 of the Regulations.
- 2.5 By failing to take into account or to give proper consideration to other relevant and proper factors was the decision of 9th November 2001 unreasonable and therefore illegal.
- 2.6 Was the decision of the 9th November 2001 to conditionally approve the EIA in its defective state, ultra vires the powers, duties and functions of the DOE under section 4 of the Act, and regulation 21 of the Regulations, and ultra vires the duties of NEAC under regulations 25(1) and 26 of the Regulations.
- 2.7 Given that the Chief Environmental Officer is a servant of the Government of Belize and the Chairman of NEAC, and that, prior to submission of the EIA to the DOE and from as early as 26th January 2001 the Government had covenanted to BECOL to waive or cause to be waived environmental laws, rules or regulations other than those to which BECOL agreed to be bound, was there a real danger that the Chairman of NEAC would be biased in favour of approving the EIA when NEAC considered the EIA submitted by BECOL.
- 2.8 Was the decision of 9th November 2001 to give conditional approval of the EIA ultra vires section 3(3) of the Act and regulations 23 of the Regulations

3.0 Propositions of Law

3.0 Procedural Requirements

3.1 A breach of a mandatory procedural requirement invalidates a decision, whereas a breach of a directory procedural provision does not necessarily do so, although it may do so in certain circumstances.

3.2 In O'Reilly v Mackman (1983) 3 A.C. 237 at 275 - 276 per Lord Diplock stated thus:

“Where the legislation which confers upon a statutory tribunal its decision-making powers also provides expressly for the procedure it shall follow in the course of reaching its decision, it is a question of construction of the relevant legislation, to be decided by the Court in which the decision is challenged, whether a particular procedural requirement is mandatory, so that its non-observance in the process of reaching the decision makes the decision itself a nullity, or whether it is merely directory, so that the statutory tribunal has a discretion not to comply with it if, in its opinion, the exceptional circumstances of a particular case justify departing from it.” See page hereof.

3.3 The learned authors of “Judicial Review” Michael **Suppeston Q.C.** and James **Goudie Q.C.**, 2nd edition at **paragraph 7.2 to 7.4**, explain that a classic test to distinguish mandatory and directory provisions was laid down in 1877 and that the whole scope and purpose of the enactment must be taken into consideration, as well as the importance of the provision to be disregarded and its relation to the general object to be secured by the Act. See pages 168(2), 168(3) & 168(4) hereof.

3.4 The Environmental Impact Assessment Regulations, Statutory Instrument No. 107 of 1995, (the Regulations) require that a developer submit draft terms of reference in writing to the Department of the Environment (DOE) for the purposes of an environmental impact assessment (EIA). The Regulations expressly require that these terms of reference be examined by the DOE, and only if approved in writing by the DOE, can the developer begin an EIA.

3.5 Thus:

“15” (1) the developer shall submit draft Terms of Reference in writing to the Department for the purposes of an EIA.

“17” (2) where the Terms of Reference for the EIA have been agreed between the developer and the Department, and approved in writing by the Department, the developer shall commence the EIA and submit the same to the Department by the specified date.”

3.6 Upon receiving an EIA, the DOE, and consequently the NEAC, have an obligation to examine the EIA to see if it complies with the previously agreed terms of reference.

3.7 Thus:

Upon receiving the EIA, the Department:

“21 (b) Shall examine the EIA or cause the same to be examined to determine whether it complies with the previously agreed terms of reference”

3.8 It is clear that the scheme of the Act contemplates terms of reference for preparation of the EIA which are to be approved by the Chief Environmental Officer, and used as a road map by NEAC in the evaluation process. This helps to eliminate the scattered approach to evaluation revealed by the minutes of NEAC meetings on the EIA.

3.9 **The Evidence:**

3.9.1 It is common ground that NEAC considered the EIA on three separate meetings, namely the 24th of October 2001, the 8th and 9th of November 2001. On the 9th of November 2001, the decision was made to grant conditional approval of the EIA.

3.9.2 It was only after the second meeting that the secretary to NEAC wrote to BECOL, on the 25th of October, 2001, asking for the terms of reference.

3.9.3 See the letter of 25th October 2001, which says:

“.....The NEAC would like to express its concerns regarding the omission of several pages of information from several sets of documents. In addition, the pagination of information in the appendices was sometimes very confusing and misleading giving the impression that some information could have been inadvertently omitted. The

NEAC felt that this could have been avoided if more care, importance and attention was placed on its review prior to submission.”

This letter then asks for several items, additional information including “Terms of Reference for EIA”.

See pages 189 – 190 hereof.

3.9.4 See affidavit of Candy Gonzales dated 9th of February 2002 paragraphs 78 to 85, in which she states:

“78 *“One of the documents that was requested by NEAC in its 24th of October meeting was the Terms of Reference for the EIA of the “MRUSF.”*

“79 *The Chief Environmental Officer said that the DOE had this document and that it would be provided. Despite repeated oral and written requests the DOE at no time provided a copy of any written agreement by the Department for Terms of Reference for the MRUSF”.*

“80 *The inclusion of the request for a “Terms of Reference” in the Department’s letter to BECOL (“CG7”) indicates that, in fact, the Department was not in possession of the Terms of Reference, or not aware of it.”*

“81 *At no time in the NEAC meetings did the Chief Environmental Officer indicate that the Department had done any comparison between the EIA for the MRUSF and a Terms of Reference”.*

- “82** *I once again requested a copy of the Terms of Reference in an email to the Department dated the 29th of October 2000. A copy of this email is herein exhibited and marked “CG13”.*
- “83** *By November 5th, I had still not received a copy of the Terms of Reference from the Department”.*
- “84** *The CD-ROM provided by the Department and referred to on the 5th of November email (“CG10”) contained five sets of “Terms of Reference” that the Department said had been received from the developer.”*
- “85** *None of these alleged “Terms of Reference” had a specified date, or indicated written authorization from the Department. Printed copies of these alleged “Terms of Reference” documents are herein exhibited and marked “CG14”, “CG15”, “CG16”, “CG17”, and “CG18”.*

3.95 In the TOR on archaeology, it says that the *“fees for the Canadian archaeologist will be under the responsibility of the client.”* The client is not the DOE. These are clearly TORs between BECOL and its contractors and bear no indication of DOE input.

- 3.96** The letter from NEAC’s secretary Icilda Humes to Lynn Young of BECOL asking for the terms of reference, amongst other things, is at Pages 189 to 190 hereof.
- 3.9.7** Ismael Fabro is unable in any of his affidavits to deny that terms of reference delivered on 5th of August 2001, were, first of all, not approved by him in writing as required by Regulation 17 of the Regulation; and secondly, made available to NEAC members so as to enable the members to determine their compliance with the EIA.
- 3.9.8** Ismael Fabro (30th April 2002,) and Valdemar Andrade (30th April 2002) make statements in their affidavits, (Fabro in 2 and 3, Andrade in 10 and 11), suggesting 1999 TORs for a 1999 EIA, were continued and were the terms of reference for the AMEC EIA done in June of 2001. But the connection between the two cannot be taken any further. There is every chance that objectives overlapped between the 1999 TORs and the ones supplied to NEAC in November of 2001.
- 3.9.9 But it is unreasonable to suggest that in considering an EIA submitted in August of 2001, NEAC should consider it against TORs supplied in March of 1999 for a different EIA.
- 3.9.9.1 In fact Fabro wrote Mr. MSukhnandan on 17 March 1999 that the EIA should have all the sub-consultancies integrated “*and included in an integrated manner in the overall EIA Report. In addition, the reports generated by these sub-consultants should be part of the entire set of*

documents accompanying the EIA, perhaps in the form of Annexes.” See Exhibit J.S.2 to affidavit of Joseph Sukhnandan.

3.9.10 In fact the 1999 EIA was rejected by NEAC.

See:

NEAC Minutes of the 24th of October 2001, Item 1.06:

“The Chairman proceeded to give a brief description of the project, including a brief history of the previous document submitted by BECOL while not accepted by the NEAC as it was not up to par with the standards required under the EIA Regulations, 1995.”

3.9.11 A second EIA for 2001 was paid for by CIDA;

See:

Contribution Agreement between AMEC and CIDA, exhibit “GR2” to affidavit of Grainne Ryder dated the 21st May 2002 at page hereof, where it is specifically stated that AMEC should deliver, amongst other things, an “EIA Report.”

3.9.12 Neither, contrary to Regulation 21 (b) of the Regulations were the five sub-terms of reference received on or after the 5th of November 2001 used by NEAC in their consideration of the EIA on the 24th October the 8th or 9th of November 2001.

See:

Minutes of NEAC meetings on the 24th of October, the 8th of November and the 9th of November 2001. These are at pages 171 - 188 hereof.

3.9.13 To Summarize:

- 3.9.13.1 The terms of reference supplied by BECOL on 5th November consisted of four sub-terms of reference and one scope of TOR. No other terms of reference were given NEAC.
- 3.9.13.2 These terms of reference were not approved in writing by the DOE as those finally agreed on, as is required by Regulation 17 of the Regulations.
- 3.9.13.3 NEAC did not have the benefit of any terms of reference for the purpose of reviewing the EIA received on the 29th of August 2001, until on or after the 5th of November 2001. And the decision complained of was made on the 9th of November 2001.

4.0 Ultra Vires

- 4.1 A public authority may not act outside its powers (ultra vires)
- The view of Clive Lewis in “Judicial Review in Public Law” 2nd Edition is that the ultra vires concept is at the foundation of the Courts’ powers of review of public authorities. He describes the scope of the ultra vires principle at paragraph 5-002:

“A decision will be ultra vires where the public body has exceeded the scope of the powers vested in it by statute (or prerogative), or has breached one of the recognized principles developed by the courts to govern the exercise of discretionary power. These principles

cover all the substantive grounds of judicial review, including ensuring that the public body considers irrelevant considerations and does not consider relevant considerations, that the body acts for the proper purposes and does not act in a way that no reasonable public body would act, that it has not unlawfully fettered or delegated its powers and that it observes common law and statutory procedural requirements.”

See pages 156 - 158 hereof.

4.2

4.3 Regulations require NEAC, based on three factors, to recommend to the DOE that a public hearing be held about an activity requiring an EIA. In this context, although expressed in discretionary terms, it is submitted that, the DOE has a duty to act once NEAC makes the recommendation.

In this case, it is submitted that the Chalillo Dam Project qualified under all three factors.

4.4 Thus:

“24. (1) The Department, on the recommendation of NEAC, may require a public hearing in respect of any undertaking, project or activity in respect of which an EIA is required pursuant to these regulations.”

“24 (2) In order to determine whether an undertaking, project or activity requires a public hearing, the Department shall take into account the following factors:

(a) the magnitude and type of the EIA, the amount of investment, the nature of the geographical area, and the commitment of the natural resources involved in the proposed undertaking, project or activity;

(b) the degree of interest in the proposed undertaking, project or activity by the public, the Department and other

government agencies, as evidenced by public participation in the proposed undertaking, project or activity;

(c) the complexity of the problem and the possibility that information presented at a public hearing may assist the developer to comply with its responsibilities regarding the proposed undertaking, project or activity.”

4.5 The Evidence:

4.5.1 There is no dispute that there was a considerable amount of discussion in Belize about the Chalillo Dam Project. **As stated in paragraph 20 in the affidavit of Jamillah Vasquez dated the 8th of February 2002:**

“20” This project has been one of the most widely debated issues in the history of Belize, with weekly articles in each of the country’s newspapers, numerous television programs and radio shows. Dozens of school classrooms across the country have asked BACONGO’s assistance in providing information for debate of the subject.”

4.5.2 Several affidavits filed by the Respondents also acknowledged the level of public interest in the project.

4.5.3 From the EIA it is clear that the 9.5 square kilometers of the Chiquibul National Park would be flooded with water at least

30 meters deep; water quality would deteriorate; with high ammonia content; mercury levels in fish would increase; rare birds (Scarlet Macaw) animals (Baird's Tapir and Morelet's Crocodile) and a score of other animal species would be displaced, if not driven to extinction, and according to the report of the Natural History Museum of London:

- *“Significant and irreversible reduction of biological diversity in Belize, initially at the population level but later potentially at the species level, some of the species affected being of international importance.”*
- *“Fragmentation of the proposed Mesoamerican Biological Corridor.”*
- *“Rapid reduction in the already endangered Scarlet Macaw sub-species (Ara Macao Cyanoptera), leading to population inviability and probable eventual extirpation from Belize.”*
- *“Reduction in nutrients and essential biological debris materials that facilitate the productivity of downstream eco-systems.”*
- *“Negative impacts on bio diversity and ecological interactions extending well beyond the Dam and its impoundment.”*
- *“Serious negative (and probably long-term) accumulative impacts from illegal hunting and settlers as a result of increased access to the area caused by improved roads and more navigable waterways.”*

See: The Executive Summary of the Report of the Natural History Museum of London can be found at pages 277-282 hereof.

4.5.4 Maya sites would be flooded, and their extent or value never ascertained.

See:

Archaeology, Appendix Volume IV, Page 10:

“The Department of Archeology’s registry shows that there are upward of 2,000 sites recorded nationwide. Under the laws of Belize all archeological resources are protected for both their scientific and touristic values. Presently, there are national concerns about resources, such as the flora, fauna and the fragile reef system. These resources, unlike the archeological sites when destroyed, have the potential for regeneration, but Belize’s cultural resources are not renewable and once destroyed, are lost forever (both sites and information.)

The results of the studies in this area indicate that these sites are undocumented and no archeological information is known about the settlement and historical data of this region. It can only be postulated that the Mayas were intensively using the resources of the area, as is suggested by the numerous ancient settlements along the riverine flood plain.”

4.5.5 That there was a conflict over the geology of the dam was evident, or should have been to NEAC members from their **first meeting on the 24th of October 2001 where the minutes record at 3:13:**

“There appeared to be inconsistencies in the data presented with respect to the geology of the project site. For instance there was no justification for slope, and from the information on the geology of Belize, the rock type identified were not likely to exist in that area. It was also noted that the EIA did not consider the effect of slope failure. More detailed information on topography needs to be presented.”

4.5.6 The Chalillo Dam is estimated to cost \$28 million United States Dollars.

4.5.7 And it is axiomatic that the construction of a dam in the above circumstances poses a problem of great complexity.

4.6 It is submitted that the scheme of the Regulations contemplates that NEAC, as the examiner of EIAs, is in the best position to determine these factors; and therefore the DOE would have a duty to carry out these recommendations before NEAC decides on the EIA.

4.7 In coming to this decision it is not relevant what any individual member of NEAC may or may not have understood of the public’s reaction. Neither is it relevant what debates, meetings or otherwise, have been held by other people or organizations. In fact, it is probably only by

virtue of these public utterances that NEAC would be able to assess the degree of interest in the proposed undertaking, project or activity by the public.

- 4.8** That the DOE should hold such a public hearing before making a decision on an EIA is entirely in keeping with the rules of fairness. As happened here, and it is not disputed, the proposed developer met on at least two occasions with NEAC members (the 8th and 9th of November 2001). It is also clear that the proposed developer corresponded with and met on many occasions with Ismael Fabro, the Chairman of NEAC, and other NEAC members.

See Minutes of the 8th of November 2001:

“1.03 the NEAC was informed that a meeting was held, subsequent to the last meeting of the NEAC, with Mr. Lynn Young, Director Belize Electric Company Limited BECL (BECOL) and Mr. Joseph Sukhnandan, Project Manager, to discuss NEAC’s request for additional information. This information was submitted to the Department of the Environment (DOE) and distributed to the rest of NEAC members prior to this session.”

“1.04 the Chairman informed the committee that Mr. Young and Mr. Sukhnandan, accompanied by parties involved in the preparation of the EIA, would be present in the afternoon to address concerns of the NEAC”.

See paragraph 136 of affidavit of Candy Gonzalez:

“John Evans, an engineer from Fortis and Jeremy Gilbert from AMEC, the company that prepared the EIA, were present at the 9th November meeting of NEAC.”

4.9 The matters that NEAC members considered in deciding not to hold a public hearing until after it had approved the EIA were irrelevant, and reveal a misconception on the part of the Chairman as to the NEAC’s responsibility as a decision maker on an issue affecting the public.

4.10 See Minutes of Meeting of the 9th of November 2001 items 1.04 to 1.12:

1.07”the Chairman informed the NEAC that the placement of the document in the public libraries could be considered a formal mechanism for public participation.”

1.11 “Another member commented that he was also of the opinion that public hearings would not assist at this time because of the high level of emotions surrounding the issue”.

1.12 “the Chairman stated that he was not disregarding the public hearing process, but the

NEAC must ensure that public comments are substantial. He suggested that after a decision is made that public consultations be held to get suggestions for additional litigation measures that could be included in the ECP”.

4.11 BACONGO requested public hearings.

See paragraph 70 of Jamillah Vasquez affidavit dated 8th February 2002:

“70 The NEAC and the Department ignored repeated requests by BACONGO to hold public hearings and to consider comments that had been sent to the Department for review.”

4.12 It is clear that the scheme of the Regulations contemplates that such a public hearing is to be held under the auspices of the DOE, as the public authority that will ultimately give the project the green light.

4.13 Where a project which will affect the public, it is fair and equitable for the public to also be given a formal opportunity to directly address the decision making body on its concerns.

4.14 In this case, however, NEAC heard BEL and BECOL and AMEC, but chose not to invite the public to present their concerns and views before making a decision on an important project.

5.2.1 See: Sec. of State for Education & Science v Metropolitan Borough of Tameside (1976) 3 All E R 665 @ 681 Page Lord Wilberforce

“If a judgment requires, before it can be made, the existence of some facts then, although the evaluation of those facts is for the Secretary of State alone, the Court must enquire whether those facts exist, and have been taken into account whether the judgment has been made on a proper self direction as to those facts, whether the judgment has not been made on other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge.”

5.3 The scheme of the Environment Protection Act Chapter 328 and the Environmental Impact Assessment Regulations SI

