

*Presented by Lois Young
For Applicant*

ACTION 61 OF 2002: BACONGO AND DOE

**APPLICANT'S RESPONSE SUBMITTED
ON
31ST JULY 2002 AT 2:30 P.M.**

1. Failure of EIA to comply with the Act and the Regulations so that NEAC did not have before it a complete EIA; and therefore were not entitled, in law, to approve this EIA conditionally or otherwise.

The decision by NEAC to approve such an incomplete EIA was

2. unreasonable or irrational and the decision of DOE on 5th April, 2002 premised on the unreasonable or irrational decision of NEAC was therefore unlawful.

- Evidence of Candy Gonzalez in her affidavit of 8th February 2002
3. and 22nd May 2002 are ninety-nine percent (99%) in conformity with the minutes of NEAC meetings on 24th October 2001, 8th and 9th November 2001.

- Requirements for the EIA are set out on pages 22 to 23 of
4. Applicant's Skeleton.

- The evidence that the EIA contained major deficiencies or gaps, is
5. set out on pages 24 to 33 of the Applicant's Skeleton.

***Applicability of R. v. Cornwall County Council,
ex parte. Hardy***

1. The Intervener questions the applicability of *R. v. Cornwall County Council, ex. parte. Hardy* to the instant case. The Intervener asserts that the decision in *R. v. Cornwall* was based on specific U.K. legislation not pertinent to Belize. This could not be further from the truth.

2. *Legislative basis for R. v. Cornwall*

The decision in *R. v. Cornwall* is premised on legislation which:

- (1) Requires that an EIA (or environmental statement) is carried out to determine the significance of environmental effects before a decision is made for certain projects.
- (2) Mandates that the environmental statement contain “the data required to identify and assess the main effects which the development is likely to have on the environment”
- (3) Requires a “description of measures envisaged in order to avoid, reduce and if possible, remedy the significant adverse effects”

(See 1999 U.K. Regulations Part II Schedule 4, at paragraph 8)

- (4) Presupposes that one of the purposes of an EIA is to provide information on the effects of a project to both the public and decision-makers.

3. *Belize’s legislation applies directly to R. v. Cornwall*

Belize’s legislation does all of these:

- (1) Belize’s Environmental Protection Act (Section 22) requires an Environmental Impact Assessment to be carried out for projects which may significantly affect the environment, and makes it a criminal offence (Section 23) to fail to carry out such an assessment according to the Act. The EIA Regulations (Regulation 12) prohibit the Department from considering a Schedule 1 project (such as a large hydro-electric dam) unless an environmental impact assessment has been prepared, and prohibit implementation of the project until the completed EIA has been reviewed by the DOE and NEAC (Regulation 22 (2) and 22 (3)).
- (2) It requires identification and assessment of the main effects on the environment:

- (a) The EIA shall include:

- i. “The data necessary to identify and assess the main effects, which the proposed development is likely to have on the environment”; Regulation 19(g)
 - ii. “A description of the likely significant effects, direct and indirect, on the environment”; Regulation 19(h)
 - (b) It requires mitigation measures:
 - a. The EIA shall include, *inter alia*:
 - i. Measures which a proposed developer intends to take to mitigate any adverse environmental effects (EPA Section 3);
 - ii. **All** mitigation measures to be employed to reduce adverse effects (Regulation 19(j));
 - iii. A mitigation plan (Regulation 19(k));
 - (c) It requires NEAC to consider, *inter alia*:
 - (i) The environmental effects of the project; Regulation 26(1)(a)
 - (ii) **The significance or seriousness of those effects**; Regulation 26(1)(b)
 - (iii) Comments concerning those effects received from the public in accordance with regulations; Regulation 26(1)(c)
 - (iv) The purpose of the project; Regulation 26(2)(a)
 - (d) The NEAC is required to consider “measures that are technically and economically feasible and that would mitigate or prevent **any** significant or serious adverse environmental effects of the project.” (Regulation 26(d));
- (3) It requires that the information in the EIA be available both to the public and to decision-makers. Belize’s Environmental Protection Act makes clear the requirement for public involvement in the assessment process (Section 20 (5) and 20 (6)). The EIA Regulations provide for public participation both **before** completion of the EIA (Regulation 18, 19(m) and 19(n)), and **after** completion of the EIA (Regulations 20 (f-i), 24, and 26(1)(c)). This is entirely consistent with the principle underscored by Lord Hoffman in *Berkeley v. Secretary of State for the Environment*, that a central purpose of the environmental statement is to provide the public with full environmental information. It is not sufficient for decision-makers to have this information, if the public does not have access to it.

4. The Intervener makes much of the reference to the EU Habitats Directive in *R. v. Cornwall*, and the fact that Belize is not bound by such a directive. In fact, the reference in *R. v. Cornwall* to the EU Habitats Directive is used for the sole purpose of determining what constitutes a “significant” and “main” effect. Judge Sullivan refers to the EU Habitats Directive in order to reinforce his conclusion that information about the effects of the proposed development on lesser horseshoe bats constitute a “significant” and a “main” effect.

5. In *R. v. Cornwall*, Judge Sullivan concludes: “If [the lesser horseshoe bats’] presence were found by the surveys and if it were found that they were likely to be adversely affected by the proposed development, it is, in my view, an inescapable conclusion, having regard to the system of strict protection for these European protected species, that such a finding would constitute a “significant adverse effect” and a “main effect” within the meaning of paragraphs 2 and 3 of Part II of Schedule 4 to the Regulations, with the result that the information required by those two paragraphs would have to be contained in the environmental statement and considered by the Planning Committee before deciding whether to grant planning permission.” (*R. v. Cornwall*, para. 61)

6. Like the EU Habitats Directive referred to in *R. v. Cornwall*, protection for the natural and cultural resources in the instant case are governed in Belize by Environmental Protection Act, the Forests Act (Chapter 213), the National Parks Act (Chapter 215), the Fisheries Act (Chapter 210), the Wildlife Protection Act (Chapter 220): protects Baird’s Tapir, Morelet’s Crocodile protected from killing by hunting. Agreed TOP’s would have dealt with these important issues and the Ancient Monuments and Antiquities Act (Chapter 330).

7. *Ratio of R. v. Cornwall*

The Applicant submits that the ratio of the Cornwall case is as follows:

- (a) An environmental statement must contain the data required to identify and assess the main effects which a development will have on the environment, and if that data is absent, then the EIA is incomplete;
- (b) That information must be considered by the public authority before its decision.
- (c) If the information is missing, then the public authority cannot consider it, and therefore a decision in the absence of this information is unlawful.

- (d) The environmental statement must contain measures envisaged to avoid, reduce and if possible remedy the significant adverse effects.
- (e) If there is missing data, then the said mitigation measures cannot be advanced, and as a consequence cannot be evaluated (*R. v. Cornwall* para. 56)
- (f) The environmental statement must have all information before the public authority makes a decision, i.e. before “outline planning permission” is given (roughly equivalent in this case with so-called “conditional” approval), and before the reserved matters stage, because of the requirement for publicity and consultation.

According to Sullivan, J. (para. 41):

“At the reserved matters stage there are not the same statutory requirements for publicity and consultation. The environmental statement does not stand alone.”

Although the adequacy of the information in an environmental statement is for the public authority to determine as a matter of primary fact, the court can review a decision to find the information adequate on the ground that it is *Wednsbury* unreasonable

8. For the instant case, it is irrelevant that the European Habitats Directive, in particular, was relied on to determine that the presence of the lesser horseshoe bat constituted a main effect, and that their disturbance constituted a significant adverse effect.

In the present case:

- Ruins from the Maya civilization are statutorily protected;
- The flora in the Chiquibul National Park is statutorily protected;
- Several species of fauna and birds have been internationally classified as endangered.
- Baird’s tapir, designated the National Animal of Belize, is identified by the EIA as endangered by the project;
- Morelet’s Crocodile, Jaguar, Ocelot and Marguay are similarly classified as endangered.

(see page 59 of Skeleton Arguments of the Applicant).

Conclusion

The Applicant submits that the present case is in principle, on all fours with the Cornwall case and factually hundred times more egregious than Cornwall because, as set out above in the above paragraphs:

- (a) Data was missing from the EIA of 24th August 2001 and the EIA itself acknowledged that further surveys were needed to supply this data.
- (b) NEAC could not logically consider this information or data, since it was missing from the EIA.
- (c) That regulation 19 (g) requires that the EIA contain the data (which the EIA itself said was necessary) in order to assess the main effects (as in Part II, Schedule 4, items 2 and 3 of the English Regulations of 1999).
- (d) And that NEAC needed all the information in order to comply with its obligations under Regulation 26 (b), viz:

“(b) the significance or seriousness of those effects”.

9. In the instant case, important information is not available with respect to the effects of this project on:

- (i) the Chiquibul Forest Reserve, Chiquibul National Park (S.I. 166 of 1991);
- (ii) archaeological and heritage resources;
- (iii) internationally recognized rare and endangered species; See:
 - i. the Executive Summary of NHM (page 6),
 - ii. Page 279 of Applicant’s Skeleton arguments: the endangered vertebrate species of international value one listed
 - iii Affidavit of Sharon Matola paragraph 36 to 41, Exhibit **5M3**; and
- (iv) other elements of the environment.

10. The EIA for Chalillo itself identifies many of the effects for which there is no information or insufficient information on “significant” and “main” effects. The Minutes of the NEAC meetings, and the affidavits filed on behalf of the Respondents confirm that NEAC and DOE found that much information is still missing with regard to significant and main effects of the project.

11. *Information missing for significant effects in the instant case*

- (1) CHIQUIBUL NATIONAL PARK AND FOREST RESERVE
(See pages 25 to 26 of Applicant’s Skeleton Arguments)

The area to be affected by the dam includes parts of the Chiquibul National Park and Chiquibul Forest Reserve, declared as such by S.I. 166 of 1991.

The area to be affected is protected by the laws of Belize:

- (a) The significance of a declared National Park is contained in its definition in Section 2 of the National Parks System Act, Chapter 215:

“ ‘National Park’ means any area established as a national park in accordance with the provisions of section 3 for the protection and preservation of natural and scenic values of national significance for the benefit and enjoyment of the general public”.

- (b) It is an offence to damage, destroy or remove from its place therein any species of flora unless authorized to do so by the Administrator. (National Parks System Act, Section 6)
- (c) Yet NEAC, without knowing the extent of the damage to the Chiquibul National Park, in effect, accepted that the damage could be adequately mitigated simply by an authorization from the Minister of Natural Resources.
- (d) Obtaining a permit to destroy is not mitigation.

(2) PLANT SPECIES

(See pages 26 to 27 of Applicant’s Skeleton Submission)

In relation to damage to plant species, apart from the NHM report the EIA acknowledged that plant species would be adversely impacted, but that without further surveys, it was impossible to determine the significance or seriousness of this impact (See page 27 of Applicant’s Skeleton Arguments; EIA Main, p. 186).

- (a) The EIA states that

“Due to the rarity of these plant species, significant impacts are likely to occur from habitat alteration (e.g. clearing, grubbing) related to construction activities.”

- (b) The EIA goes on to require additional survey work be undertaken prior to construction “to further identify the location and extent of plant species at risk in the reservoir area.”
- (c) The EIA states clearly that the effects of the project on plants at risk cannot be assessed without additional surveys: “Significant

residual adverse effects to plant species at risk are likely unless the success of a transplantation program can be verified and implemented, prior to construction.”

- (d) The determination that these surveys be done “prior to construction” are similar to the assertions referred to in *R. v. Cornwall* by English Nature and the Cornish Wildlife Trust that the bat surveys be done prior to construction. As Judge Sullivan concludes (para. 63) , the surveys must be done prior to the grant of planning permission:

“I appreciate that the advice of English Nature and of the Cornish Wildlife Trust was that the surveys should be carried out before the development started rather than before planning permission was granted. However, that advice was not, in my view consistent with the requirements of the Directive and the Regulations [see Belize’s EPA and Regulations], however understandable the reasons for the advice may have been, because the results of the surveys could have contained information which, under the Regulations, would have to be in the environmental statement which had to be considered by the respondent before deciding whether to grant planning permission.” (*R. v. Cornwall*, para. 63)

- (e) Mitigation through transplantation has not been proven (see para. 27 of Skeleton Argument) not unreasonable for the people of Belize to ask that time be taken to do test this measure.

(3) WILDLIFE
(See pages 27 to 29)

The Report in the EIA from the world-renowned Natural History Museum of London predicted significant adverse effects on the environment.

- (a) It also stated that
“in order to detail more closely the magnitude of the identified impacts, and to assess other effects on wildlife, it would be necessary:
- To conduct further studies earlier in the wet season and later in the dry season, to determine the full year-round dispersal pattern and population size for at least the three target species, and to extend the geographical coverage of those studies.
 - To extend the study to account for the other species and communities of flora and fauna that will also be impacted by this project, and to confirm the

presence or absence of other important wildlife species previously reported in the Upper Macal River (e.g. Harpy Eagle)

- Further multi-year studies, including investigations of seasonal movements between different geographical areas over the total range of the Selva Maya population of Scarlet Macaw, will be necessary to understand the long-term population fluctuations of the Scarlet Macaw throughout its range.

We strongly recommend that, if either the “Proceed as Planned” or “Alternative Site” options are still considered viable, a far more thorough and long-term integrated study of all potential sites for both options is pursued. Much more information is required for an informed and defensible decision.”

(b) Very limited success or unproven success. The EIA says that mitigation is considered possible when demonstrated to be successful. Is it too much for us to ask that the developer to do some research?

(4) ARCHAEOLOGICAL SITES
(See pages 16 and 30 of Applicant’s Skeleton Argument)

The EIA states categorically, and the Department of Archaeology itself determined, that further surveys are needed to understand the impacts of the dam on archaeological and cultural heritage resources. Just as the EU Habitats Directive prevents the destruction of habitat for endangered species, under Section 33 of the Ancient Monuments and Antiquities Act, it is an offence to willfully damage, destroy or disturb any ancient monument.

(a) In the Minutes of the October 24, 2001 NEAC meeting George Thompson, Archaeological Commissioner is quoted:
“The member [from Archaeology] stated that a more extensive survey of the area needs to be done.” (October 24, 2001 Minutes 3.14).

(b) In his 17th April, 2002 affidavit at para. 6, he says:
“It was the view of the Archeology Department that we would need to know the extent of the settlements in the area to determine population size and we would need an archeological sampling of the mounds to determine levels of activity and period of occupation. We felt, however, that the compilation of this

information could be addressed in the Environmental Compliance Plan.”

- c) Missing from the EIA was the necessary information to enable NEAC to assess the significance or seriousness of the flooding of the Maya sites:

“The results of the studies in this area indicate that these sites are undocumented, and no archaeological information is known about the settlement and historical data of the region. It can only be postulated that the Maya were intensively using the resources of the area, as is suggested by the numerous ancient settlements along the riverine flood plains.” (EIA, volume IV, Archaeology, p. 10).

- d) Report of 30th March 2001 makes the situation more egregious because we now know that eight (8) prehistoric Maya sites are in danger of destruction.
- e) Further, it would be unreasonable to approve of the MRUSF before conducting studies to determine the extent and significance of settlements in the area to be affected by the MRUSF, just as it was unreasonable for the Cornwall County Council to decide that no significant harm would come to lesser horseshoe bats before conducting the necessary surveys. As we have shown and will refer to shortly, similar information is missing for other potentially significant effects on wildlife and human health and safety.
- f) No mitigation is suggested because there is no information available (page 30 (5.7.17))

(4) DAM HEIGHT

(and therefore energy production and extent of flooding)

There is no single dam height in the EIA, and Lynn Young admits that a dam height had not been determined.

- (a) Lynn Young 2nd Affidavit, (para. 10), states that

“the final dam height had not been settled, since trade offs could have been made in height and energy production for a number of reasons”.

- (b) The dam height is critical to the amount of energy that would be produced from the dam, since the energy depends on how much water is held back.

- (c) Dam height is also critical to the environmental effect, because it determines the area to be flooded. A small difference in dam height could make a very large difference in the area flooded. As stated in the affidavit of Ambrose Tillett, dated 17th May at paragraph 26:

“The height of the dam is of crucial importance to the environment because the dam’s height will determine the area to be flooded, which in turn will determine the environmental impact.”

And at paragraph 27:

“The importance of a dam height to environmental issues and repercussions cannot be understated.”

- (5) GEOLOGICAL STUDIES
(and therefore dam safety and cost of construction)

NEAC did not have definitive information about the geological foundation of the dam. In addition, the EIA contained false information, claiming that the dam site was primarily composed of granite, and was not near any faults. It is not sufficient that these studies would be conducted before construction of the dam...they needed to be done before the EIA was approved.

- (a) The EIA itself states that further investigations of the geology are necessary to:
“reduce the uncertainty by conducting further investigations including precise mapping of geological contacts and landforms...Mitigation measures could include sealing cavities (if identified).” (EIA Main, p.236)
- (b) The significance of determining the geology properly is apparent from the Minutes of the NEAC meetings, where the representative from GPD and the Chairman of NEAC decide that further studies need to be done:

“...it had been decided by the chairman of NEAC, BECOL representatives and [the member from GPD] that an independent geologist would be hired to assess the rock formation.” (November 9, 2001, Minutes 1.02)
- (c) Foundation geology is of critical importance to the construction of a dam. According to Chapter 2 of the World Commission on

Dams Report (JV 1st; para. 59-61; ex.“JV5”, cited at page 49 of Applicant’s Skeleton Arguments):

“Foundation problems are the most common cause of failure in concrete dams, with internal erosion and insufficient shear strength of the foundation each accounting for 21% of failures”.

- (d) Failure to properly analyse the geology, according to the Report (JV 1st; para. 62; ex.“JV6”) is one of the major causes of cost overruns and delays in time schedules for dam construction.
- (e) The Intervener argues that the fact that NEAC was aware of the dispute over the geology was sufficient to allow it to make a decision. However, following the judgement in *R. V. Cornwall*, once a determination was made that information was required concerning the geological foundation, it would be unreasonable to make a decision on the EIA or the project in the absence of such information.
- (f) Affidavit of James Code is irrelevant to these processings: this evidence was not in the EIA and was not before NEAC. Importantly, Brian Holland’s report was in NEAC’s possession, but not considered.
- (7) HYDROLOGY
(and therefore energy production, and risk of flooding)

The hydrological data is fundamental to calculating the amount of energy to be produced by the dam. If the measurements of water flow are not done properly, it is impossible to know how much energy would be produced by the dam.

The production of energy is the basic purpose of this project. NEAC is required by Regulation 26(2)(b) to consider the purpose of the project. In the instant case, the hydrological data is incomplete and possibly wrong. Therefore, there is not sufficient information on the amount of energy that would be produced by the dam therefore NEAC can not properly consider whether this project would meet its basic purpose.

- (a) The EIA itself stresses the importance of correct hydrological data, and the need for further study (Vol.I, Hydrology study, p. 16):

“It should be stressed that the above estimates for Chalillo have been made on the basis of only five flow measurements at Chalillo. Additional flow measurements should be undertaken as

per the program recommended for Chalillo in the field trip report in Appendix C before final design to confirm the above relationships.” (Vol.I, Hydrology study, p. 16)

- (b) These studies have not been done. Therefore—by the evidence of the EIA itself—the estimates of how much water flows at the dam site, and therefore how much energy would be produced by the dam, is in doubt.
- (c) Further, the basic information in the EIA about hydrology could be completely wrong, according to the EIA itself, and requires further study (Vol.I, Hydrology study, p. 6-7):

“The current meter used for measuring flows at the Cristo Rey gauging section had not been calibrated since 1980 and did not appear to be adequate for estimating low velocity discharges...It was therefore recommended that a new meter be purchased to make duplicate measurements with the old meter to check its accuracy...and rectify the error on prior measurements prior to recalibrating the old meter...” (Vol.I, Hydrology study, p. 6-7)

- (d) NEAC itself considered these studies important, and noted that the studies should have been done:

“[The hydrology member] went on to mention that more hydrological studies should have been conducted by BECOL years before the actual preparation of the EIA.” (October 24, 2001, Minutes 3.10)

(8) EIA ACKNOWLEDGES ITS OVERALL INADEQUACY

The EIA acknowledges its own overall inadequacy as follows:

“Due to unproven or limited effectiveness of the identified mitigative measures, and due to information deficiencies, it is likely that significant adverse effects will result for the proposed project.” (Main Report, p. 189; see Skeleton Arguments of Applicant, p. 28)

While the EIA acknowledges the likelihood that significant adverse effects will result, information deficiencies make it impossible to determine the seriousness or significance of these effects, as NEAC is required to do by Regulation 26(b).

12. *EIA is missing information required by Belize's Regulation 19(g)*

Above we have shown examples of the self-admitted, so to speak, omissions in the EIA. The examples I have cited show that information is missing for the main effects of the project.

As submitted in the Cornwall case by the Applicant's solicitor Mr. McCracken at paragraph 39:

"There was not the necessary data required to assess the main effects. By assess, I submit it is meant, evaluate."

This is exactly the same requirement that our regulations expect in an EIA (Regulation 19 (g)):

"Significant Environmental Impacts. The data necessary to identify and assess the main effects which the proposed development is likely to have on the environment."

13. *NEAC/DOE find important deficiencies in EIA*

In addition to the EIA's self-admitted omissions, the NEAC and DOE themselves admit and document omissions and information deficiencies brought about by the:

- (a) absence of mitigation measures for many significant impacts
- (b) absence of adequate mitigation measures for some significant impacts
- (c) incomplete information
- (d) inaccuracies

The Minutes of the NEAC meetings of 24th October 2001, 8th November 2001 and 9th November 2001 are replete with statements about the omissions and deficiencies of the EIA (see pages 33 to 41 of the Skeleton Arguments of the Applicant)

14. *IRRATIONALITY OF DECISIONS IN THE INSTANT CASE*

- (1) The Respondents claim that EIA does not have to address every aspect or contain all possible information about a project.
- (2) It is not our contention that it must. We agree that that an EIA does not need to contain every scrap of information about a project.

However, a decision-making body such as NEAC must have in front of it sufficient information to make a reasoned, rational decision. A determination of what constitutes sufficient information must be guided by, among others: the information required by the Environmental Protection Act and Regulations and the information required by a previously agreed-upon terms of reference.

(3) We submit that there was very important information missing from the EIA which undermines the rationality of the November 9, 2001 decision. The Respondents imply that the information missing in this EIA is insignificant. The Respondents go so far as to say that the NEAC discharged its duty by pointing out how much information still needed to be gathered about the extent of environmental impacts.

(4) In fact, we assert that the importance of the information that was missing goes to the irrationality of the decision of November 9, 2001. In identifying missing information, the proper measure by NEAC would be to return the EIA to the Developer to complete the information before NEAC could make a decision.

15. Conflict between NEAC's affidavits and Minutes of NEAC Meetings

The Applicant submits further that the decision of NEAC was unreasonable due to information deficiencies acknowledged by DOE and NEAC. As shown by the evidence of the meetings of NEAC, members considered the EIA inadequate and that further studies were needed to assess the significance of the project's effects.

The Respondents contend that the affidavits of various members of NEAC speak to their satisfaction with the information provided in the EIA and by BECOL afterward. These affidavits were produced after this complaint was filed before the court. Their contention is contradicted directly by the Minutes of Meeting, as the Applicant has shown in its Skeleton Arguments at page 33 to 41.

The Minutes demonstrate that up to the last moment when NEAC voted to approve the EIA and project, NEAC as a whole, and Ismael Fabro, the head of the Department of Environment in particular, believed that more studies would be required to understand the benefits and/or impacts of the project. However, the NEAC voted to approve the project and require these studies to be done afterward.

16. Test of Wednsbury Unreasonableness

The test of Wednsbury unreasonableness, it is submitted, although “nominally pitched very high,” is in practice interpreted and applied as legal unreasonableness. Authority for this is in Wade & Forsyth, “Administrative Law”, 8th Edition at page 366:

“It might seem from such language that the deliberate decisions of Ministers and other responsible public authorities could almost never be found wanting. But, as may be seen in the following pages, there are abundant instances of legally unreasonable decisions and actions at all levels. This is not because ministers and public authorities take leave of their senses, but because the courts in deciding cases tend to lower the threshold of unreasonableness to fit their more exacting ideas of administrative good behaviour.”

17. In the present case, not only is NEAC’s decision legally unreasonable, it is also Wednesbury unreasonable in the traditional sense.

The Case of Warren v. Electricity Commission of New South Wales [1990] cited by the Respondents is entirely different from the present case. The only similarity is that Warren’s concerned the transmission of electricity and this case concerns the generation of electricity. Warren concerned the adequacy of the environmental statement. The case before the Court concerns major gaps in information and mitigation measures.

In Warren, the applicant was dissatisfied with the environmental statement because she claimed:

- (1) the Elcon had not considered the possible connection between ELF electric and magnetic fields and damage to human beings including the initiation and promotion of cancer; (page 9 of report); and
- (2) Elcon failed to deal with two separate matters concerning the Aboriginal community)page 10 of report)

The evidence showed the contrary:

- (1) There was no evidence of a cancer connection and the evidence taken in by Elcon had been a great deal (page 27 of report);
- (2) The Aboriginal communities had not challenged Elcon’s decision, and Elcon had gone out of its way to preserve what was left of the Tarana Bora Site. There was no evidence that Elcon had misrepresented the views of that community. Indeed Elcon had realigned the transmission line to avoid going over the Bora grand (page 13)

18. The case of Warren does show, however, an EIA must be complete and a final decision would be a nullity if it was made

consequent upon a superficial, subjective or non-informative environmental impact statement (page 5 of report) (Tally this with the incomplete information in the present EIA and lack of any or any real mitigation).

19. Warren also makes the point that the determining authority has an obligation to consider the submissions from the public with respect to the publicly exhibited EIA.

20. The Bow Valley Naturalists Society v. Min. of Canadian Heritage [2001]

The assumption was that the EIA had all the information to enable the decision maker to make a reasoned decision.

21. The facts of this case are like no other in the reports. The damage to the environment is devastating in its variety and depth. The return is very limited. Mr. Young has shown a pre EIA consultation done by an expert on behalf of AMEC. Her public consultation Text included in the EIA shows that the public was very much concerned about public health issues, that the cost of electricity should go down as a result of the project, and BECOL's monopoly status. These comments were not discussed and considered by NEAC as a group.

22. Sent to NEAC and ignored by them, were the reports of Ambrose Tillett and of NRDC, the former an expert in hydrology and dams, trained at the U.W.I. and in Britain, the latter a caretaker of the environment. These reports discussed the several matters set out in pages 63 to 71 of the Applicant's Skeleton Arguments, which addressed hard-edged issues such as that, as an alternative, bagasse can be stored to provide year round capacity to the grid, and that Chalillo will not lower our electricity rates or control flooding.

23. The result is a scatty and superficial review by NEAC (see criticism of that in Warren Case, page 5) of the Chalillo EIA. And, it is submitted, NEAC is a public authority whose purpose is to safeguard the environment and protect the heritage of all Belizeans.

24. BIAS

It is without doubt that the average informed and unbiased Belizean, could only have stood by, after hearing the Prime Minister say on the public 6:30 news broadcast that he hoped his presence at the pro Chalillo demonstration would influence NEAC, and fear that this was indeed so. A fortiori, after the state of the Nation Address. Such an opinion would be supported when the Chairman of NEAC aligns himself with the GOB to seek to prevent a review of NEAC's decision.

25. To the reasonable informed bystander in Belize, the decision of 9th November 2001 would have to have been influenced by:

- (1) the Government's public pronouncements on its unalterable support the project and by the P.M. statement that he hoped to influence NEAC his way. How would that work, the reasonable, informed bystander would ask? The answer would be that as the P.M. of Belize, with some not considerable influence over the terms of your employment, benefits, promotional opportunities and so on, want you to know that it would please me greatly if your approved the Project.
- (2) By the fact that GOB was a part the proponent – it had a financial interest in the project and had expended tax payers money on the project.
- (3) By the fact that the Chairman of NEAC is by the Director of Environment and stepped outside of his rights – which are to defend the action of the Committee he chairs, NEAC, to align himself with the Government and try to persuade this Court not to grant the Applicant leave to challenge NEAC's decision, not, for example, because the procedure employed by NEAC was unassailable, but because the government had already spent money.

26. To the reasonable informed bystander in Belize, the decision of the DOE on 5th April 2002 would have been influenced by the fact that GOB had already in the 3rd Master Agreement, agreed with BECOL and BEL to waive the laws of Belize as they applied to

this Project, including the environmental laws, unless BECOL voluntarily chose to keep those laws.

27. This is as obvious a condition of bias on the Courts of Belize will ever see in a situation like this. Apparent BIAS, I emphasize, is the perception. The repercussions are, it is submitted, frightening for the democracy of Belize. On bias alone it is submitted both decisions should be struck down.

28. The Applicant is entitled to be concerned with the environmental consequences of decisions premised on substantive unlawfulness and improper procedure.

In R. v. Secretary of State for Trade and Industry ex p Greenpeace 19 January 2000 at 35 the court acknowledged that Greenpeace was not concerned solely with the way in which the European Directive had been transposed. It was also concerned with the environmental consequences of a decision premised on an unlawful transposition.

29. In the present case, the Applicant should not, it is submitted, be prejudiced in the eyes of the Court because it is concerned about the environmental consequences of NEAC's and the DOE's decision to approve the dam project.

31st July 2002