

Belize

Substantial Compliance: Compliance with environmental statutory regime: EIA Process: Public Consultation

Belize Alliance of Conservation Non-Governmental Organizations v. (1) The Department of the Environment and (2) Belize Electric Company Limited (2003)

Belize lies on the Caribbean coast of Central America, bounded by Mexico in the north and Guatemala in the south and west. Twelve hundred years ago Belize and its neighbouring areas supported a flourishing Mayan civilisation...2. Modern Belize has a population of some 260,000. It exports timber, and grows sugar and other tropical products on the small areas of land suitable for cultivation...There is a growing tourism industry which attracts cruise ships to the coastal cayes and visitors to the ruins and wild life in the forests. But the country is still relatively poor. It has no oil or other such natural resources and it has difficulty in meeting the increasing demand for electricity. 3. The sole supplier of electricity in Belize is Belize Electricity Limited ("BEL"), a subsidiary of Fortis Inc of Newfoundland. Until about ten years ago, it generated about half the electricity used in Belize in diesel-driven power stations, using imported oil. 4. In 1992 BEL decided to construct a hydro-electric power station to supplement the diesel generators. It built a plant on the Macal River at Mollejón. The Macal is a river which rises in the Maya Mountains to the south and flows north through narrow valleys to join the Belize River some 25 kilometres north of Mollejón near the town of San Ignacio. The generator has an installed capacity of 25.2 KW but it is a "run of the river" plant, that is to say, no water is impounded and generation is dependent upon the seasonal flows of the river. In the dry season there is little water in the Macal and therefore little generation of electricity...5. Fortis Inc has now embarked on a more ambitious hydro-electric scheme. It proposes (through another subsidiary called Belize Electrical Company Limited ("BECOL")) to construct a 49.5 metre high dam further up the Macal River at Chalillo. This will hold back the waters of the Macal and its tributary the Raspaculo to create a lake which will extend about 20 kilometres up the Macal and some 10 up the Raspaculo. The object is to provide a permanent source of water which can enable both the Mollejón plant and a new 7.3 MW plant at Chalillo to generate electricity throughout the year. 6. The Chalillo dam proposal has aroused strong opposition from environmentalists, not only in Belize but in Fortis Inc's home country of Canada, in the United States and indeed throughout the world. The dam will flood nearly 10 square kilometres of land on the border between the Mountain Pine Ridge Forest Reserve and the Chiquibul National Park. These are areas which Belize has designated for preservation as national environmental resources on account of the importance of the plants and animals which are found there. During the last century Central America has lost 70% of its forests to human exploitation but the Belize National Parks now provide a safe habitat for many indigenous species which are threatened with extinction elsewhere. The area has the highest density of the surviving big cats (jaguar, puma and ocelot) in Central America. Morelet's crocodile (a rare species) lives in the rivers. Shy and secretive tapirs lumber through the woods. Gorgeous Scarlet Macaws, of which only about 1000 still exist anywhere in the world, nest in the trees by the river banks. ...8. The area has also been only lightly explored for archaeological sites. Traces of Mayan settlement have been found in the valleys....10. In the litigation which has given rise to this appeal, a group of environmental organisations in Belize claim that the decision to build the dam was unlawful.... The allegation is that the department of the Belize

government which approved the construction of the dam did not comply with the procedures required by law to be observed before such approval could be given.... The chief ground of challenge is that either the EIA did not comply with the provisions of the Act and Regulations and there had consequently been no EIA within the meaning of the Act or alternatively that, given the deficiencies of the EIA, it was unreasonable or irrational for the DOE to treat it as an adequate basis for approving the project.

Majority Decision (Lord Hoffman)

“The ground upon which the appellants submit that they can satisfy this demanding requirement is that the DOE postponed consideration of matters which should have been contained in the EIA. But, as their Lordships have observed, that only raises the question of what should have been in the EIA. Both the Chief Justice and the Court of Appeal cited with approval the remarks of Cripps J in the Land and Environment Court of New South Wales in *Prineas v Forestry Commission of New South Wales* (1983) 49 LGRA 402, 417: “I do not think the [statute] ... imposes on a determining authority when preparing an environmental impact statement a standard of absolute perfection or a standard of compliance measured by no consideration other than whether it is possible in fact to carry out the investigation. I do not think the legislature directed determining authorities to ignore such matters as money, time, manpower etc. In my opinion, there must be imported into the statutory obligation a concept of reasonableness ... [P]rovided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public ... to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations. The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations.” 70. Their Lordships also respectfully adopt these observations. It is not necessary that an EIA should pursue investigations to resolve every issue. This is not only common sense but contemplated by the terms of the Belize legislation itself. Thus regulation 5(f) says that an EIA should include an indication of “gaps in knowledge and uncertainty which may be encountered in computing the required information” and regulation 19(b), prescribing the form of an EIA, says it should contain a summary which highlights the “conclusions, areas of controversy and issues remaining to be resolved”.

Dissenting Judgment of Minority delivered by Lord Walker of Gestingthorpe

“In this most unsatisfactory state of affairs a few essential points are clear. The geology in the EIA was seriously wrong, as both Mr Fabro and Dr Merritt now accept....Here not even the most protracted and determined paper chase could have got at the true facts...119. I would therefore have allowed the appeal and quashed the DoE’s decision... to grant environmental clearance for the project. I would have done so on the ground that the EIA was so flawed by important errors about the geology of the site as to be incapable of satisfying the requirements of the EPA and the Regulations....121. The Attorney- General’s submissions call for respectful attention but they do not alter my view of what should be the outcome of the appeal. Belize has enacted comprehensive legislation for environmental protection and direct foreign investment, if it has serious environmental implications, must comply with that legislation. The rule of law must not be sacrificed to foreign investment, however desirable (indeed, recent history shows that in many parts of the world respect for the

rule of law is an incentive, and disrespect for the rule of law can be a severe deterrent, to foreign investment). It is no answer to the erroneous geology in the EIA to say that the dam design would not necessarily have been different. The people of Belize are entitled to be properly informed about any proposals for alterations in the dam design before the project is approved and before work continues with its construction.”

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Jamaica

Public Consultation: EIA Process

The Northern Jamaica Conservation Association and the Jamaica Environment Trust V. The Natural Resources Conservation Authority and the National Environment and Planning Agency.

Facts: “Along the northern coastline of Jamaica there is a bit of land, nestled by the sea, just outside of Runaway Bay, in the parish of St. Ann. It is rich in biodiversity. It is known as Pear Tree Bottom. It has caught the eye of many persons. Local residents and environmentalists have for years lauded and enjoyed its picturesque grandeur. It teems with wildlife ranging from potoos and patoos to yellow snakes and yellow-billed parrots. It is agreed that it is a very sensitive area from an ecological standpoint...Some years ago Tank-Weld Ltd. purchased the property and had in mind to develop a resort there. For whatever reason, it did not follow through with its intention and in 2003 sold the land to Spanish hotel developers known as the Pinero Group. The Pinero Group also found the location idyllic and wish to build a 1918 room hotel at the site. In Jamaica, the Pinero Group takes the corporate form of Hoteles Jamaica Pinero Limited (“HOJAPI”)...” The Pinero Group sought and received a permit through for a development of a Bahai Principe Resort at the place called Pear Tree Bottom. “The applicants’ submission can be placed under three categories. Firstly, they submit that the NRCA frustrated the legitimate expectation of the applicants; the legitimate expectation being that the respondents would comply with its stated policy of having consultation with the public and other interested groups in accordance. Second, they submit that the NRCA acted irrationally in that it acted upon a flawed EIA and that in and of itself placed it in breach of its statutory mandate to take into account only material consideration and exclude irrelevant considerations. Thirdly, they say that the applicant failed to give sufficient regard to the concerns expressed by the Water Resources Authority (“WRA”).”

Held: Justice Sykes

“The consultation process was flawed because an important part of the EIA [the marine ecology report] was not placed in the public domain and the public was not told about this omission. The public were led to believe that the EIA was all that there was when this was not the case and this was known the NRCA and NEPA. The public were therefore deprived of participating in a consultation process that was based on full and complete information. The NRCA and NEPA did not give sufficient weight to the empirical weaknesses of the EIA and this weakness was all the more significant when the proposed project was to take place in an ecologically sensitive area. That fact alone ought to have suggested that a relatively high quality of empirical work needed to be undertaken. The NRCA therefore failed to act in accordance with its mandate given in the NRCA Act.”

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As would seem the emerging trend in the Caribbean, public consultation is the major weapon being used by judges to set aside environmental planning permissions. In this

case, the Pear Tree Bottom Hotel Project was principally set aside because of the failure of the planning agencies to ensure adequate public consultation on a critical aspect of the EIA. The Court found that the hotel development was being considered for an ecologically sensitive area close to the marine ecosystem yet the marine ecology report was not placed in the public domain. Thus the public was denied the opportunity to comment on the report which the Court felt was undoubtedly and important report that would have been considered by the planning agencies in granting approval for the hotel development.

British Virgin Islands

Illegal Environmental Approval (Action Contrary to Protected Area) : Bias

Virgin Islands Environmental Council v The Attorney General and Quorum Island BVI Limited

Facts: Quorum is a company incorporated in the BVI and is the developer of the Beef Island Project. Quorum's Chief Executive Officer is Mr. Hung. Quorum owns 659.2 acres of land on Beef Island which includes the site upon which the Beef Island Project is proposed to be built. In May 2004 when the Minister and other government ministers went to Kong Kong, the Minister repeated his commitment to seeing the development of a five-star resort and golf course at Beef Island. This was followed by the Minister's letter of 22nd August 2004 to Mr. Hung wherein he expressed his government's firm commitment to seeing the Beef Island Project completed during this term of office and that the Project remains a top priority of his government. Some four months later, negotiations commenced with the intention on agreeing a Development Agreement. A year later, on 2nd December 2005, the Development Agreement was signed following approval by the Executive Council. On 1st March 2006, the Executive Council directed that tourist development projects with a value in excess of \$10 million must be referred to the Minister for decision. Then, on 29th June 2006, the first public meeting was convened. During the course of the next seven months of consultation, members of the public and various statutory consultees, including the Planning Department and the Conservation and Fisheries Department expressed concern about the adverse impact of the Project. The placing of a golf course and a marina adjacent to Hans Creek, alleged to be a Fisheries Protected Area and the last virginian mangrove system in the BVI, engendered considerable opposition from the public who felt that that would result in an increased risk of sedimentation and of toxic chemicals being released into the water and that would have devastating effect to the fisheries industry of the BVI. On 31st January 2007, the Minister granted planning approval with a number of stringent conditions attached. In essence, the Decision was arrived at 32 months from the date of the visit to Hong Kong.

Held: Hariprashad-Charles J:

In the realm of public law, illegality, as a ground for judicial review means a failure to understand the law which regulated the decision-making process...The main thrust of this ground, as advanced by VIEC, is that the development proposals will, in part, involve development within an area declared a "marine protected area" pursuant to Regulation 51 (5) of the Fisheries Regulations 2003, namely Hans Creek, Beef Island. VIEC asserts that Hans Creek was declared a fisheries protected area in accordance with the relevant statutory provisions. Quorum and the Attorney General insist that Hans Creek has never been declared a fisheries protected area within the meaning and power granted under the Fisheries Act. The key issue which falls for determination is whether Hans Creek is a protected area within the meaning of the various statutory

provisions. Before I attempt to resolve this issue, I should say that I have positively found from the evidence that the proposed project will, in part, involve development within the Hans Creek area....Section 13(1)(b) of the Fisheries Act provides that “The Minister may, by Order published in the Gazette, declare any area of the fishery waters together with the area of land up to the high watermark adjacent to the fishery waters to be a protected area.” By subsection (2), an Order made under subsection 13(1)(b) may prohibit fishing within the protected area of any fish or identify a specified part of the protected area to be used as a shelter for such purpose as the Minister may specify in the Order. Section 79(1) of the said Act provides that “The Minister may make Regulations for the better carrying into effect of the Provisions of this Act.” Subsection (2) lists from (a) to (x) the types of matters in respect of which the Minister can make Regulations. Of some relevance is (j) which in effect provides that the Minister may make Regulations regulating or prohibiting the entry into any fishing priority area or protected area declared as such under the Act or any class of vessel and prescribing any activities which may not be undertaken in that area. Now, to the Fisheries Regulations 2003. The Preamble states that “The Minister, in exercise of the powers conferred on him by section 79 of the Fisheries Act, makes the following Regulations.” The Regulations are therefore expressly made pursuant to the power granted to the Minister under section 79 of the Fisheries Act, viz. for the better carrying into effect of the provisions of the Fisheries Act. Regulation 51(1) states as follows:“No person shall carry out any development activity, whether terrestrial or otherwise which may or is likely to adversely impact on a marine protected area declared as such by the Minister by Order in the Gazette.” [emphasis added] Regulation 51(5) expressly provides: “Without prejudice to sub-regulation (1), the following areas identified in the maps in Schedule 5 are hereby declared to be fisheries protected areas (a)...(b) Hans Creek, Beef Island;...In my judgment, the Decision made by the Minister was illegal as it was made in contravention of Regulation 51(5) of the Fisheries Regulations read in conjunction with the applicable statutory provisions....Regulation 51(1) of the Fisheries Regulations imposes an absolute prohibition on carrying out development activity that may or is likely to have an adverse impact on a marine protected area. Regulation 64(1) makes it a criminal offence to contravene “a provision of these Regulations.”...Based on my finding that Hans Creek is a fisheries protected area and that the word ‘marine’ before the phrase ‘protected area’ was intended to apply to Hans Creek under Regulation 51(5) of the Fisheries Regulations, it seems to me that any breach of the prohibition in Regulation 51(1) is a criminal offence....”.

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