

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL IN BELIZE

BETWEEN:

THE BELIZE ALLIANCE OF CONSERVATION
NON-GOVERNMENTAL ORGANISATIONS

Petitioner

-and-

(1) THE DEPARTMENT OF THE ENVIRONMENT
(2) BELIZE ELECTRICITY COMPANY LIMITED

Respondents

PETITION SEEKING AN INTERIM ORDER
AND, IF NECESSARY,
SPECIAL LEAVE TO DO SO

**TO THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
THE HUMBLE PETITION OF THE ABOVE NAMED PETITIONER SHEWETH
THAT:**

Background

1. The Petitioner, The Belize Alliance Of Conservation Non-Governmental Organisations (BACONGO) is an environmental organization, made up of nine separate entities across the entirety of Belize. It is a company incorporated under the Laws of Belize, and has been operating since 1994. It is well-recognized locally and internationally as an activist on behalf of the environment and public interest. Its constituent members include scientific experts, community leaders, It works to support the efforts of its members and to argue for a safe, healthy and sound environment for Belizeans and the wilderness of Belize; and for the rights of Belizeans to enjoy the protections granted by Belize's laws for the protection of their environment
2. The first respondent, the Department of the Environment (DOE) has statutory powers under the Environmental Protection Act 2000 (the EPA) and the Environmental Impact Assessment Regulations 1995 (the EIA Regulations) for considering and approving "Environmental Impact Assessments" submitted by developers wishing to undertake prescribed construction projects in Belize.

3. The second respondent, the Belize Electricity Company Limited (BECOL) wants to build a dam 49.5 meters high on the Macal River in Belize, incorporating a hydro -electric power station, and thus flood a large area of Belizean rain forest (extending approximately 20km up the Macal River) within the Chiquibul National Park and Forest Reserve. The dam, known as the Chalillo Dam, would be upstream of Cris to Rey village (population 800) and San Ignacio Town (population 12,000). The project is known as the Macal River Upstream Storage Facility (MRUSF).
4. People within Belize and elsewhere are most concerned about the effect which the construction, the dam and the flooding would have on, among other things
 - (1) the many rare plants and animals (which include the rare scarlet macaw and rare large cats including the puma, ocelot and jaguar),
 - (2) the Mayan archaeological sites in the area,
 - (3) the quality of drinking water in the downstream communities, and
 - (4) the safety of downstream communities. Dam failure would pose a high risk to these communities, and this risk is increased by lack of adequate studies of the dam site geology. Reviews by geological experts, including a member of the government-led committee which evaluated the EIA, determined that the EIA studies of the geology were wrong—misidentifying the dam site foundation as primarily granite, when it is actually composed of sedimentary rocks: sandstones and shales. Since the safety of any dam design is highly dependent upon the correct identification of the site geology, this failure to conduct adequate geological studies raises the probability of dam failure, and the hazard to downstream communities.
5. By virtue of the EPA and EIA Regulations, BECOL needed to submit, and obtain approval for, an EIA for the MRUSF. The purpose, structure and legal effect of the Belizean EIA regime is very similar to the equivalent regime in the UK; the requirements for what must be included within an EIA are materially the same. BECOL submitted its EIA in August 2001.
6. BECOL is 95% owned by Fortis Inc. of Canada. Fortis also owns 68% of Belize Electricity Limited (BEL) which owns and operates the electricity distribution system in Belize. On November 21 2001, BEL, BECOL and the Belize government signed a set of agreements concerning the Chalillo dam, collectively known as the "Third Master Agreement". As part of

these, the Government of Belize “represents and warrants” in section 6.1 that:

“ it is authorized and empowered by the provisions of the Constitution of Belize or any other law now in force to (i) pre-empt the authority and jurisdiction that any local, regional, municipal, or federal government or agency of Belize may have over the construction, ownership, financing, operation and maintenance of the Mollejon Project and the New Project and (ii) obtain or waive on behalf of the Producer and its contractors any licenses, permits, consents and regulatory approvals necessary in connection with the ownership, financing, construction operation and maintenance of the Mollejon Project and the New Project”

7. Further, under section 6.2:

“Waivers The Government hereby covenants and agrees to waive or to the extent not waiveable, to promptly grant or cause to be granted in the name of the Producer or its Contractors, any and all licenses, permits, consents and regulatory approvals necessary or required in connection with the construction, ownership, financing, operation and maintenance of the Mollejon Project by the Producer and its Contractors pursuant to any law, rule or regulation of Belize. There shall be no actions necessary on the part of the Producer or its Contractors to effectuate the forgoing.”

8. Under sections 7.1 and 7.2:

“7.1 Compliance with Environmental Laws The Government covenants and agrees to waive or cause to be waived, and indemnify the Producer against any private action under or with respect to any and all environmental laws or regulations now existing, or created hereafter, to which the Mollejon Project and the New Project may be subject other than any laws, rules or regulations set forth in the Mollejon Project Compliance Plan and the New Project Compliance Plan, as the case may be to which the Producer has agreed to be bound.

7.2 New Project Environmental Plan. An environmental impact assessment for the New Project has been prepared on behalf of and at the Producer’s expense and has been submitted to the Government’s Department of the Environment for its approval. The Government and the Producer will jointly develop a mutually agreeable environmental compliance plan for the New Project (the “New Project Compliance Plan”). As promptly as practical after the establishment of the New Project Compliance Plan, the Producer will take such steps as are necessary to comply with such plan.”
[emphasis added]

9. On 5th April 2002, the DOE approved the EIA and granted “environmental clearance” for the MRUSF subject to BECOL signing, and then complying

with, an “Environmental Clearance Plan” (ECP) which, in turn, placed various obligations on BECOL in implementing its proposals.

10. BACONGO sought judicial review of that decision. On 19th December 2002, the Chief Justice allowed the challenge in part (ordering that a public hearing should be held but declining to quash the decision to grant environmental clearance).
11. BACONGO appealed against that decision. On 31 March 2003, the Court of Appeal rejected the appeal. It gave its reasons on 17 June 2003. On 20 June 2003, the Court of Appeal granted BACONGO final leave to appeal to the Privy Council.

BACONGO’s substantive appeal to the Privy Council

12. BACONGO intends to appeal to the Privy Council. Among other things, it intends to argue that the EIA was deficient in that it failed properly to assess various key aspects and impacts of the proposals (including, for example, the impact on plants and animals, the impact on archaeology, and the geology of the rock on which the dam would be built).
13. Instead, those matters (which the NEAC and the DOE recognised needed to be assessed) were left for future assessment (including pursuant to conditions in the ECP) following approval of the project, and, in some cases, following the commencement, or even completion, of construction work; and, partly by reference to those future assessments, left over questions of what measures would be used to mitigate those impacts and, in the case of the rock geology, left over the question of dam design (a key safety issue). The Geology and Petroleum Division representative on the EIA evaluation committee insisted that an evaluation of the dam site geology be conducted, and considered it important for proper dam design. One of the world’s leading experts on geotechnical engineering has evaluated the geological studies in the EIA and found that they are not sufficient as a basis to design a dam that is either safe or viable.
14. “In Berkeley –v- Secretary of State for the Environment [2000] 3 WLR 420 Lord Hoffman observed that the purpose of the EIA regime:

“... is to ensure that planning decisions which may affect the environment are made on the basis of full information. ... The Directive requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an E.I.A. And an essential element in this procedure is that what the Regulations call the “environmental statement” by the developer

should have been "made available to the public" and that the public should have been "given the opportunity to express an opinion" in accordance with article 6(2) of the Directive. ... The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues. "

15. The Court of Appeal in England, considering requirements for what is to be included in an Environmental Statement/Environmental Impact Assessment (which are materially the same as those in Belize) has recently held in Smith –v- Secretary of State for the Environment [2003] EWCA Civ 262 that the planning authority (in the English regime) will act unlawfully if they attempt to leave over questions which relate to the significance of the impact on the environment, and the effectiveness of any mitigation. BACONGO submits that the same principle applies to the equivalent regime in Belize and that the DOE acted unlawfully in granting environmental clearance as it did.
16. BACONGO also intends to argue that the public hearing (which the Chief Justice and one member of the Court of Appeal held was required) should, as a matter of EIA logic and law, have been held before the DOE considered whether to grant environmental clearance (rather than after it, as happened) and should have informed that decision; and that the failure to do so renders the DOE's decision unlawful.

Events since the decision of the Court of Appeal

17. At various times during the course of the above litigation, BACONGO has asked BECOL to give, and BECOL has declined to give, an undertaking not to commence work on the MRUSF which would cause environmental damage until the conclusion of this challenge. However, between the commencement of BACONGO's challenge and the decision of the Belize Court of Appeal, BECOL did not proceed with dam construction.
18. BACONGO applied to the Court of Appeal for an interim order preventing construction work from proceeding or taking any further steps leading to the construction of the MRUSF prior to the substantive hearing of the appeal before the Privy Council. On 25th June 2003, the Court of Appeal held that it "does not have statutory jurisdiction under the Court of Appeal Act to grant an injunction ancillary to an appeal to Her Majesty in Council...".

19. Since the Court of Appeal rejected BACONGO's appeal, BECOL has commenced work on the MRUSF at a rate which is considerably accelerated compared to that contemplated in the EIA. BECOL and the DOE have refused to give any detailed information on what works are underway or the timetable for the works. However, environmental damage has already been caused and it is clear that the works which BECOL intends to undertake over the next few months would cause very significant irreversible environmental and other damage.
20. BECOL apparently also now intends to continue construction activities during Belize's next rainy season (later this year) which were not contemplated within the EIA (which had allowed for additional assessments to be undertaken in a dry season prior to a subsequent rainy season). This construction carries with it additional risks of erosion and threats to downstream communities associated with flash flooding.

The Macal River Hydroelectric Development Act 2003

21. On 16 June 2003, the Belize parliament passed the Macal River Hydroelectric Development Act 2003. It purports to exclude the jurisdiction of the courts (including the Privy Council) in relation to the MRUSF and amounts to an impermissible interference by the legislature with the administration of justice, being designed to influence the judicial determination of the dispute in contravention of Article 6(7) of the Belize constitution.

BACONGO's APPLICATION FOR INTERIM RELIEF

22. BACONGO thus asks the Privy Council to exercise its inherent jurisdiction and make an order which preserves the current situation, including most particularly, the subject matter of the appeal (being the site of, and land affected by, the MRUSF) pending the Privy Council's substantive hearing of BACONGO's appeal.
23. If it is necessary, BACONGO seeks special leave of the Privy Council to do so.
24. Unless such an order is being made, the irreversible damage done by the construction works are likely to render academic BACONGO's appeal.
25. BACONGO thus seeks an order preventing BECOL, pending the substantive hearing of BACONGO's appeal, from continuing with construction and associated works for the MRUSF pursuant to the ECP and the environmental clearance of 5th April 2002, or otherwise.

26. By reason of urgency, this petition has been prepared without full detail of the argument and matters relied on by the Appellant. Further detail will be provided in a skeleton argument as soon as reasonably practicable.

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