



**THE COUNCIL OF LEGAL EDUCATION
EUGENE DUPUCH LAW SCHOOL**

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delivered by

The Hon. Mr. Justice A. O. Conteh, JA

**“The Environment and Litigation:
Reflections on some Judicial Responses”**

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The Environment and Litigation: Reflections on some Judicial Responses.

- The need to protect the environment is today unarguable, or at least, should be so. The case for this is now almost self-evident, with global warming, the depletion of the ozone layer, melting glaciers and for the Caribbean and other island nations, the seemingly inexorable rise in sea levels.
- For the archipelagic nation state of The Bahamas, with water everywhere and not a mountain in sight or a hinterland to speak of, this may well present an existentialist threat.
- The environment affects everyone, private citizen and public official, rich and poor. We all live on the same terrestrial plane, Earth, though, of course, our individual circumstances may be different.
- Humanity's continued existence on planet Earth will however, on the available evidence, be for quite sometime.
- This will probably be so at least and not until space exploration can, like the early sea explorers of yore, yield some new and habitable planets.
- But this prospect is so much futuristic that it should not be of any moment in discussing our present earthly environment.
- At bottom, we are all beneficiaries of our environment; and this therefore makes it incumbent on all of us to regard ourselves as trustees with full fiduciary duties towards our environment.
- It is in this context that we find in some quarters strong public clamour, nay agitation, some times resulting in litigation concerning the environment.
- It is therefore not surprising that the justice system has come increasingly under pressure and public scrutiny in handling cases involving the environment.
- But a fundamental premise that is often assumed, but in my view needs to be asked is this: Are judges necessarily the right people to adjudicate and determine cases or controversies involving the environment?
- There may be no easy answer to this question and any answer there may be, may be mixed or not quite satisfactory.
- But an important feature of the maturation of any society and of a true democracy is that the judges, or the judiciary in the round, for good or ill, constitute the one group entrusted with the task of adjudicating disputes with any finality. This is so, whether the dispute is between private citizens themselves on the one hand or between them and public officials, including the government, on the other.

- How then has the judiciary responded to the several disputes, and claims affecting or involving the environment?
- It is evident that these claims and controversies are on the increase, and will not fade away. One thing however, is clear, judicial determination of these claims and controversies is not always satisfactory.
- But what exactly is the “environment” which has come to engage the courts.
- I am not aware of any statutory or judicial definition regarding this evidently important matter.
- There is however, a *working definition* which has been judicially cited with approbation; and it is thus:

“This is a difficult word to define. Its normal meaning relates to ‘surroundings,’ but obviously that is a concept that is relative to whatever object it is which is surrounded, Used in that sense, environmental law could include virtually anything; indeed as Einstein once remarked, ‘The environment is everything that isn’t me.’ However, ‘the environment’ has now taken on a more specific meaning though still a very vague and general one, and may be treated as covering the physical surroundings that are common to all of us, including air, space, water, land, plants and wildlife.”

(See Bell and Bell, on Environmental Law, 4th Edition, at page 4, cited in the Jamaican case of *Delapenha Funeral Ltd v. The Minister of Local Government and Environment*, JM 2008 SC 72, judgment delivered on 13th June, 2008.).

- That case oddly enough, was brought by proprietors of a funeral home who had been denied an extension permit on land they bought because of objections by the local citizens for fear of contamination of their water supply from the proposed activities at the funeral home. The earlier permits granted to the proprietors to develop their land were suspended. They applied for judicial review.
- In granting the application, the judge stated:

“It is clear to my mind that in this case both the National Resources Conservation Authority (NRCA) and the Minister acted in good faith and had the interests of the citizens at heart, in particular their health and safety. They had in mind the protection of the environment, of the water resources in the area. Both purported to act with the precautionary principle in mind but, regrettably, the result was that the Minister responsible for the Environment acted unlawfully. This case suggest to me that one way to implement and exercise the preventive and precautionary principles may be to categorise projects such as, the instant one, projects to do with cemeteries (because of their nature size and location) as requiring compulsory Environmental Impact Assessment before permits are granted....the EIA should begin as early as possible when projects are being planned. Ideally, it will allow for all stakeholders, the applicant for the permit, the statutory consultees, members of the public, and independent third parties such as local conservation and environmentalist groups to have some input and dialogue...conducting the EIA from the outset would foster greater public confidence in the

regulatory and planning systems and may be the prudent course to take in the long run...had the NRCA required or been able to require an EIA in the first place when the Company applied for the permits, the public objection and outcry by the citizens of Ramble, may well have been quelled, or at any rate substantially diminished.”

- I will have little more to say later on the Environmental Protection Act and the EIA, as tools for the protection of the environment, and the position in The Bahamas.
- Allow me, therefore, if you will, to interpose here what is arguably an acceptable *description* of the Bahamian environment, which has received the highest judicial approbation. It was given by the former President of the Court of Appeal and endorsed by the Privy Council in the Save Guana Cay case, about which I shall say more anon.
- It is along the following lines:

“The Bahamas is a country of 701 cays and reefs which stretch in an arc from approximately 58 miles south east of the east coast of Florida in the United States of America to just of Hispaniola. It is separated from Florida by the Gulf Stream and from the Greater Antilles by the Old Bahama Channel. None of the islands is mountainous, the highest point being just over 200 ft above sea level, it has no rivers and its natural fresh water reserves consist of ‘lenses’ of fresh water which sit in the all pervasive salt water that surrounds and sometimes permeates the islands. Geologically, the islands are mainly composed of soft, porous limestone, the centuries-old accumulated result of minute coral. Overall, the greater part of this country consists of shallow waters and banks-the Great Bahama Bank and the Little Bahama Bank.

In most, if not all, of the islands in The Bahamas, there are barrier coral reefs ringing them; parts of those coral reefs, if undisturbed and unpolluted, eventually become islands with their own ‘barrier’ reefs.”

- After noting that The Bahamas has no comprehensive legislation for environmental protection or public consultation on the disposition of public lands, the former President then continued:

“The ecology of The Bahamas is said to be ‘fragile’ and with the concern regularly mentioned in the national and international press about ‘bleaching’ and possible death of those reefs due to ‘global warming’ coupled with environmental degradation which may result from indiscriminate development of the islands, it is quite understandable that thinking persons would be concerned to protect, as far as humanly possible, their environment, not only for themselves, but also for their descendants who may have to inhabit these islands in the future.”

- The latter statement, in my estimation, provides a ringing validation, if one were ever needed, for the concerns, sometimes resulting in litigation, regarding the environment.
- It is therefore with some disquiet that some five years after the determination of the litigation over the construction of the Baker’s Bay development in the Guyana Cay case in the Abacos, one has to read what sounds like the obituary of the once pristine coral reefs affected by that

development. See, *The Bahamas Journal*, p.A 9 for Wednesday, 25th February, 2015; and *The Tribune* 26th February, 2015, p. 17 A.

- I therefore take this opportunity to congratulate and commend the organizers, facilitators and every participant in the Environmental Law Clinic which is seeking to contribute to raise public awareness of the economic, social and environmental values of the resources of the country, in particular, the understanding and use of existing environmental laws and policies; and the development of new and updated environmental laws and policies to enhance the sustainable development of The Bahamas.
- I accordingly, doff my figurative hat to both the Eugene Dupuch Law School and the College of The Bahamas for their collaborative exercise resulting in the Clinic. This is an exemplary exercise that should be replicated in other areas of Academia and the professions.
- Please allow me however, at this juncture, to enter a caveat, or at least, a plea in mitigation. And it is this: My comments here tonight are not intended or to be taken as judgmental or negative reflections on the outcome of some of the cases I may mention in the course of my presentation. And I was involved in some of them; and what I say should not therefore be taken as entering an extended dissenting opinion!
- I accordingly proffer in mitigation the *raison d'être* or the purpose of the Eugene Dupuch Distinguished Lecture series, namely, that it “*is intended to provide a forum for the scholarly discussion of topical jurisprudential matters that are of interest to the legal profession and civil society.*”
- And I do so safe in the knowledge that “Old Smokey Joe” himself will, with a twinkle in his eyes, and an approving smile on his lips, look down indulgently from his celestial perch on these proceedings.
- *Who represents the Environment in litigation?*
- First, a word about the *actors* in almost every litigation involving the environment.
- Who and how is the environment represented in litigation?
- In the nature of things, the environment, unlike natural persons or corporations cannot of itself, bring claims concerning it.
- The claims concerning the environment are almost invariably espoused by a group of persons or organizations who, sometimes for the purposes of litigation, incorporate themselves under one name or the other, in order to advance claims seeking to protect the interests of the environment.
- Some of the names or moniker of these groups are nothing if not inventive. For example, BACONGO (which stands for the Belize Alliance of Conservation Non-Governmental Organizations); reEarth; Save Guana Cay Reef Association Ltd; Responsible Development of

Abaco Ltd; Bimini Blue Coalition Ltd; and Save the Bay. In Jamaica we have, for example, the Northern Jamaica Conservation Association; and the Jamaica Environment Trust.

- All these groups, by whatever appellation or acronym they choose to go by, have in common an interest in one aspect or the other of the environment. At least, that is the claim.
- These groups are almost invariably the ones who bring litigation concerning the environment, with the avowed aim of protecting or furthering the interests of the environment.
- I have mentioned the odd case from Jamaica, Delapenha Funeral Home Ltd. a private entity which successfully brought a case against the Minister of Local government and the Environment when the latter tried impermissibly, though laudably on environmental grounds, to stop the claimant from developing their land because of protest by local residents over fears of contamination of their water resources.
- Ranged against the environmental groups on the other side is one government official agency or the other, sometimes even Prime Ministers or relevant Ministers and, what compendiously may be called, the Developer, or Developers.
- The claims would often seek to challenge or nullify approval given by the former to the latter to undertake some development. This may be the construction of hydro-electric dams, electric plant, a hotel, the supply of water resources, road or some high-end housing development including a golf course, or a water amusement park involving Dolphins.
- Because of its incorporeal nature as already mentioned, the environment cannot act or speak for itself; the groups claiming to represent it are faced from the outset of the litigation process, with sometimes almost insuperable barrier, namely, standing or warrant to bring the suit itself.
- These groups are sometimes regarded as meddlesome agitators or busy-bodies and even as “Tree Huggers.”
- From the point of view of officialdom and probably that of the Developer, these groups are perceived as against development.
- It is however questionable whether litigation is the best medium to achieve a balanced and sustainable development of a country’s resources.

Standing to bring challenge in respect of the Environment

- From the point of view of litigation concerning the environment, the first hurdle to overcome therefore is standing to bring the action.
- The requirements of *locus standi* or standing to bring public interest litigation, especially in environmental litigation, are now increasingly being liberalized.

- This, it must be said, is to the credit of the judiciary which has come to recognize litigation involving the environment as being in the public interest.
- This may account for the number of cases in the courts in the region concerning the environment, whether here in The Bahamas, or in Belize or Jamaica.
- But this has not always been so, as veterans in this field of litigation would readily attest. In some cases, attempts to mount legal challenges concerning the environment have been given short shrift by the courts on the simple ground that the group concerned lacked standing or sufficient interest to bring the claim.
- This is an area of litigation in which, in my view, the judiciary should be much more responsive to and susceptible of concerns by well meaning groups regarding issues concerning environmental protection.
- But the fact of the matter is that the issue of standing nearly always hovers, like the sword of Damocles, over environmental groups who may seek to mount challenges to some decisions concerning developments that they claim may adversely impact the environment.
- The law reports are filled with cases demonstrating the vacillation by the courts in according standing in judicial review cases.
- For example, the English case of *R v. Secretary of State for the Environment, ex p. Rose Theatre Trust Co.* (1990) 1 All E.R 754; (1990) 2 WLR 186, demonstrates a stricter view of standing; while the case of *R. v .Secretary of State for Foreign and Commonwealth Affairs, Ex p. World Development Movement Ltd.* (1995) 1 WLR 386, exemplifies the liberal approach to standing by the courts.
- In the region, it is safe to say that the courts have adopted a more flexible and liberal approach towards standing.
- However, *the issue of standing* in environmental litigation is integral to the *nature* of the format of the litigation itself involving the environment.
- Indeed, in the Save Guana Cay Reef Association case, at the start of the judicial review application, not only was the Association's application for an injunction refused, but the review application itself was also dismissed by a judge of the Supreme Court on the ground that the Association lacked standing.
- But the Court of Appeal later reinstated the application, and the developers (even though not parties), gave an undertaking to stop work until the outcome of the judicial review proceedings was known.
- Ideally, this should be the better approach: if there is a credible challenge by a responsible group on environmental grounds, the developer should await the outcome of the process of judicial review. But this is not always so.

- *Judicial review* is almost always the format of the litigation involving the environment.

What then is *judicial review*?

- In a nutshell, it is the basic procedural mechanism by which the courts scrutinize public bodies and public law functions, and intervene as a matter of discretion to quash, prevent, require or clarify not because they disagree with the merits of a decision, but so as to correct or right a recognizable public law wrong, whether for unlawfulness, unreasonableness or unfairness: See, *Judicial Review Handbook*, by Michael Fordham (3rd Edition).
- In The Bahamas, as in most Commonwealth Caribbean countries, there is no single *statutory* basis for judicial review. It is largely governed by *Rules of Court*.
- In judicial review proceedings, the claimant is seeking one or the other of what were historically called *prerogative orders*, and now simply orders of *certiorari*, *prohibition*, and *mandamus*.
- The source of these orders, in my view, still permeates their availability in judicial review proceedings.
- The prerogative origins of these orders ensured that they were, by definition, not issued to a claimant as of right, but rather, as a matter of discretion.
- This is still the case today, even in the modern guise the orders have taken.
- The grant of relief in the form of any of these orders by the court is *discretionary*.
- But before obtaining any of the available remedies, which now include a *declaration*, *injunction* and in an appropriate case, *damages*, the applicant in judicial review proceedings has to overcome the hurdle of obtaining the *leave or permission of the court*.
- This is where, in my view, the format of proceeding by way of judicial review to seek to protect the environment is at its most vulnerable, as judges have been known to deny or refuse leave.
- Refusal of leave to proceed is not, however, necessarily the end of the road of the process. The decision to refuse leave is, of course, subject to appeal.
- I had mentioned the liberal stand of the judiciaries in the region towards standing, and as already noted, the Court of Appeal has been known to reverse the a judge's refusal of leave.

The Administrative Justice Act of Barbados, 1983.

- In my view, a commendable example that could, usefully be emulated here in The Bahamas and perhaps in other Commonwealth Caribbean countries, is the *Administrative Justice Act* of Barbados, which came into force in that country on 7th July, 1983.
- The stellar example of this Act is to put applications for judicial review on a statutory basis.
- The object of that Act is “*to provide for the improvement of administrative justice... and for related matters.*”
- This Act provides in its section 3 as follows:

“*3 (1) An application to the court for relief against administrative act or omission may be made by way of an application for judicial review in accordance with this act and with rules of court.*”
- But of particular significance is the definition of “*administrative act or omission*” against which judicial review may be launched. This is defined in section 2 of the Act as meaning “*an act or omission of a Minister, public official, tribunal, board, committee or other authority of the Government... exercising, or purporting to or failing to exercise any power or duty conferred or imposed by the Constitution or by any enactment.*”
- And still of further significance, is the provision contained in section 6 of the Act regarding entitlement to relief. This provides that the Court may on an application for judicial review, grant relief as follows:

(a) *to a person whose interests are adversely affected by an administrative act or omission;*

(b) *to any other person if the court is satisfied that that person’s application is justifiable in the public interest in the circumstances of the case*”
- And of significant practical importance in terms of access to justice, *Part 56 of the Barbados Supreme Court (Civil Procedure) Rules, 2008*, provides in *Rule 56.2*, for *who* may apply for judicial review as follows:

“(a) *any person, group or body whose interests have been adversely affected by the decision which is the subject of the application; or*

(b) *any other person, group or body who satisfies the court that an application is justifiable in the public interest and in the circumstances of the case.*”
- Again, of especial significance is the provision in *Rule 56.3 (1)* that it “*is not necessary first to obtain permission for an application for judicial review.*”
- These beneficent provisions, which should delight the heart of any group seeking to litigate the protection of the environment are, in my view, worthy of emulation, not only here in The Bahamas, but in the wider Commonwealth Caribbean.

- If properly and purposively applied, it would attenuate the spectre haunting groups or persons of being non-suited for lack of standing to mount judicial review challenges concerning the environment.
- This would underscore the fact that any action or development that may have deleterious effect on the environment should

be of public concern, and be remediable in law. The Ancient Romans had a name for this type of litigation: the *actio popularis*.

- Therefore, in my view, litigation concerning such developments should be viewed as public interest litigation, and a claimant ought not, simply on the ground of standing alone, to be non-suited.
- But *standing* is not the only obstacle in the way of environmental groups seeking to mount challenges concerning developments which they claim may adversely affect the environment.
- There is the bug-bear of *delay*. The adverse effects of some developments on the environment may be long term and in some cases may not be immediately apparent, and could be irreversible.
- The secrecy and uncertainty often attendant on whether a particular decision has been taken regarding a particular development, may also present difficulties in the way of challenge by way of judicial review.
- The decision approving the development which may possibly have adverse effects for the environment may only come to light later, and in some cases, much too late for any viable challenges to be mounted.
- This is because, the Rules of Court as they presently stand provide for only a rather narrow window within which a challenge can be mounted.
- *Order 53 Rule 4 of The Rules of the Supreme Court* provides:

“An application for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.”

- Given the *milieu* within which important decisions are taken, whose defining characteristic is secrecy or non-disclosure, at best, the time frame within which challenges may be made, is, to put it charitably, giving hostage to fortune.
- The dilemma this may pose for would-be challengers was recently illustrated in by The Wilson City Electric Plant case from Abaco.-SCCivApp. No. 139 of 2010
- The group that brought the case was the Responsible Development of Abaco (RDA) Ltd. and a Mr. Mathew McCoy. The defendants were the Prime Minister and several of his Cabinet

ministers, including the Attorney-General, and the South Abaco District Council and The Bahamas Electricity Corporation (BEC).

- The Applicants had sought leave to apply for judicial review “*In relation to the construction of a power plant by BEC at Wilson City (The Power Plant). Work on the Power Plant, at which it is proposed to burn very low grade oil, Bunker C fuel, in order to generate electricity has already begun.*”
- The Applicants sought wide -ranging relief against the official defendants and to prohibit BEC from proceeding with the construction or extension of its power plant.
- The learned judge at first instance non-suited the applicants on the ground that their application for judicial review was late to be effective.
- On appeal against the judge’s dismissal of their application, the Court of Appeal reversed the learned judge’s refusal of their application on the basis of delay, and allowed the appeal on the ground that there was no adequate and meaningful consultation relative to the location and construction of the power plant.
- If I may say so with respect, this was an enlightened and progressive decision as it underscored the position that where there is legitimate expectation to be adequately and meaningfully consulted, the decision-making process regarding a development with impact on the environment must have regard to this.
- However, this case reveals the need for adequate and timely information regarding developments with environmental implications being made available to the public.
- This would complement the requirement that judicial review applications must be made promptly or at least within the time frame stipulated in the Rules of Court (Order 53. 4, RSC).
- But how could an application be made when the date of the decision sought to be impugned is not even made public or known?
- There is therefore much force in having in place the much bruted Freedom of Information Act. Such legislation would make available to the public relevant information regarding decisions relating not only to the environment but other areas of public life as well.
- In terms of application for judicial review of environmental decisions and delay, I would commend the view expressed by Sykes J in the Jamaican case of the Pear Tree Bottom Hotel (Claim No. HCV 3022 of 2005). The claim concerned an environmental permit granted to developers to build a hotel on the northern coastline of Jamaica, just outside of Runaway Bay, in the parish of St. Ann. Against this the applicants sought judicial review for orders of *certiorari*, *mandamus* and *declaration*.
- One of the objections raised on behalf of the respondents (the Natural Resources Conservation Authority and the National Environmental and Planning Agency) who had given the permit, was

delay: it was argued on their behalf that judicial review should be applied for at the earliest opportunity and that any delay in applying for judicial review could be fatal to the applicant's prospect of securing the remedy asked for; and that in that case, although the applicants applied for judicial review within the three months period (available under the Jamaican Rules of Court), the applicants' delay should disentitle them from getting any of the orders they prayed for.

- In dismissing this contention, Justice Sykes stated:
- *"I accept that early challenge to decisions is desirable but that cannot translate to a policy that says delay, without more, means deprivation of remedy even if the person applies within the three months period. On this approach the courts could not grant even a declaration. Such an approach would not be the application of discretion but judicial fettering of the discretion granted by the law. I agree with the sentiment expressed by Philpot and Jones, He who hesitates is lost: Judicial review and planning permission, J.P.L 2000 June 564-589, 567 where they said that '(i)n the case of applications for judicial review, therefore, the complexity of the issues involved and the difficulty or ease involved in assembling the necessary documentation should be a relevant consideration to the assessment of whether the application has been made promptly'...*

The more complex the matter the greater the need for care, accuracy and precision. It must not be forgotten that in an application for leave the applicant may not have the vital information that is in the possession of the authority being challenged."

- Apart from issues of *standing* and *delay* which can derail challenges to environmental decisions, there are other practical, sometimes formidable obstacles in the way of advancing these.
- These other challenges often stem from the relative financial standing of environmental groups as against the administration itself whose decision they seek to impugn and the developers of the project that is the subject of the challenge.
- It is common knowledge that environmental groups are generally, not overly-endowed with financial resources, as they are with enthusiasm for the cause they espouse. Most of them have shallow pockets. And their struggle, in terms of resources, compared with the other side, can be comparable with David's against Goliath.
- But a fact of life *is* that litigation is expensive and *costs* associated with it can be crippling, perhaps, except for the super rich, for whom costs are no object.
- The *costs of litigation* sometimes therefore present environmental groups with a dilemma, on the horns of which they may come unstuck.
- A recent challenge mounted by the Bimini Blue Coalition, an avowedly environmental group comprising mostly of inhabitants of the Bimini islands, to have judicially reviewed certain decisions concerning developments on North Bimini, exemplified some of the problems associated with costs in litigation.

- The Bimini Blue case, in my view, epitomizes the vulnerability challenges to decisions concerning the environment can and often do encounter.
- Bimini Blue was given leave to bring the judicial review proceedings by the judge in November, 2013. On 19th December, 2013, the judge however dismissed an application by Bimini Blue for an interim injunction to prevent the development from proceedings while the judicial review application was pending.
- On the application of the respondents who included several high officials(the Government), and the developers of the project, the judge ordered Bimini Blue to provide security for their costs in the sums of \$250, 000.00 for the Government respondents and, \$400,000.00 for the developers.
- The judge however further ordered that the judicial review proceedings be dismissed if Bimini Blue failed to provide the security he had ordered within 21 days; and he then stayed the proceedings in the meantime.
- Bimini Blue then appealed to the Court of Appeal on the issue of the quantum of the security for costs the judge had ordered.
- It later filed an application seeking an order from that court to enjoin the developers from carrying on any dredging as part of their construction work until such time that they could provide or show a permit or permits granted to them by the Director of Physical Planning. The Court of Appeal, by a majority, refused that application.
- On appeal to the Privy Council, the Board granted a conservatory order in favour of Bimini Blue stopping the dredging until such time the developers could show that they had a permit they could rely on; and in the meantime, they could apply to the Bahamian courts to have the interim injunction discharged.
- The developers applied to have that stay removed and the judge in the Supreme Court obliged.
- On Bimini Blue's appeal to the Court of Appeal that court again, by a majority, ruled that the judge was correct to have lifted the stay on the dredging activities of the developers because they produced a permit they could rely on granted by the DPP.
- On a further appeal by Bimini Blue to the Privy Council, the Board ruled that the stay was correctly lifted because the developers had, even though at the last minute and while the matter was before the Board, produced a permit they could rely on. {See generally the judgment of the Privy Council in Bimini Blue Coalition Limited v. The Prime Minister of The Bahamas and others,(2014) UKPC 23, 24th July,2014}.
- A consolation prize for Bimini Blue, if it can be called that, was that the Court of Appeal in its ruling on the security for costs almost halved what the judge in the Supreme Court had ordered.

- But in the result, given Bimini Blue’s inability to give an undertaking in damages to stop the dredging by the developers against the outcome of the proceedings and the Privy Council having upheld the discharge of the interim injunction it had ordered, the dredging proceeded apace.
- Academics and other pundits will long debate the soundness of the decision, given the crux of the issue in question against the backdrop of the overall judicial proceedings Bimini Blue had sought to mount against the development.
- The question remains though: what is a “permit” to dredge under the provisions of the Conservation and Protection of the Physical Landscape of The Bahamas Act?
- Does it include a permit obtained *after* the eleventh hour, as it were, when proceedings were already in train concerning the lawfulness of the dredging activities?
- Can it include a permit obtained *after* the impugned dredging activities had commenced?
- Can it include a permit issued by the DPP without evidence of application for it by the developers at the time of its issue? And in the face of the developers’ earlier contention that, in any event, the Act under which the permit was issued was not applicable to their dredging activities?
- In my respectful opinion, the issue of the permit became caught up in a semantic obfuscation regarding what *is* a valid permit and “a permit that the developers could rely on.”
- In my view, regrettably, for both the development of environmental law and the soundness of official decisions regarding developments with implications for the environment, the proceedings by Bimini Blue were never brought to a definitive end.
- The status of the permit in that case is in stark contrast with the permits in the Dolphins and Blue Illusion case regarding developments on Blackbeard’s Cay, just off the northern end of New Providence island. (2013/PUB/ jrv/00034 Ex Parte re Earth Ltd.)
- In this case, the learned judge found that the nub of the judicial review application was whether or not the permits the developer sought to rely on were issued “in accordance with the specific statutory pre-requisites.”
- He found, after an analysis of the various statutes pursuant to which the permits were issued, that they were not properly issued, and accordingly granted the relief the applicant, reEarth, had sought.
- In arriving at his decision to grant the relief, the judge also examined whether there was compliance with certain international instruments such as UNEP’s Specially Protected Areas and Wildlife Protocol (SPAW), and the Convention on International Trade in Endangered Species (CITES). He found there was non-compliance.

- An appeal against the judge’s decision was dismissed as result of the “inadvertence” of the respondents to file the record of appeal. I therefore say no more on this, save to say it marked a victory for the captive dolphins!
- In the challenge by Bimini Blue, perhaps a more charitable view of the outcome of that case could be that the technicality of a permit should not be allowed to stymie a development that on its face held so much potential to transform the face and economy of Bimini islands and its inhabitants.
- But the nagging question remains: what can be done about the valuable and irreplaceable corral reef that had to be destroyed in the dredging operations necessary to construct the development?
- *The trend of judicial decisions regarding the environment.*
- The jury may still be out on the issue of the judiciary and the environment. But some tentative conclusions can still be made.
- What is clear is that the case-law generated by environmental issues reveals that both here in The Bahamas and the region, the judiciary is not unmindful of the paramount need to protect the environment.
- This is clearly so in cases where that protection can be grounded in the provisions of the relevant statutes affecting the environment, and the courts would accordingly grant the appropriate relief, whether by way of *certiorari*, *mandamus*, or a *declaration or an injunction*.
- This trend was articulated in the judgment of Sykes J, in the Pear Tree Bottom Hotel case. In granting the relief the applicants had requested, he stated:
 - *“No one in this case has sought to argue that the protection of the environment is a matter of relative unimportance. While it is not a first generation right at par with human rights which attract the highest level of scrutiny, it is certainly an issue that has far reaching consequences that reverberate long after the decision maker and his generation have passed on and for that reason ought to attract a relatively high degree of scrutiny and where there are serious errors in procedure the law ought to say so and grant the appropriate remedy.”*
- Similarly, in the Wilson City Electric Plant case from Abaco brought by the environmental group, Responsible Development of Abaco, the Court of Appeal set aside the trial judge’s dismissal of the application for judicial review on account of delay. In granting most of the relief sought by the group, the President of the Court stated:
 - *“I would grant the declaration prayed ...namely, that the appellants had a legitimate expectation to be adequately and meaningfully consulted in the decision-making process relative to the location and construction of the power plant at Wilson City, Abaco, which was breached by the respondents. Consequentially that would affect the decisions... which are provisional only. I would also make an order of mandamus directing the seventh respondent (The Bahamas Electricity*

corporation), to conduct a process of full and proper public consultation on the operation of the plant going forward.”

- The trend however, also discloses, in my view, the need for a *clear, unambiguous and comprehensive statutory foundation relating to the protection of the environment.*
 - A survey by the Caribbean Law Institute of the Environmental Laws of the Commonwealth Caribbean had, as long ago as 1992, identified the problem in the following terms:
 - “*Much of the resource legislation in the Commonwealth Caribbean region lacks adequate environmental and institutional focus. Such environmental-related legislation as exists is, more often than not, inherited from the British, and is often fragmented and dispersed over several enactments. Responsibility for administering applicable legislation is likewise fragmented among several government departments, unsupported by appropriate institutional arrangements to coordinate and direct relevant initiatives. Effectual resource legislation must provide adequate environmental/institutional focus and must be both determinative of, and responsive to its operational environment. Such legislation will establish the parameters of sound environmental management and is indispensable to for sustainable development.*”
- (Caribbean Law Institute, *The Environmental Laws of the Commonwealth Caribbean*, CLI, 1992, p.1
- I can only therefore, at this stage, nearly a quarter of a century later, plaintively re-echo the call for an environment-protection specific legislation in The Bahamas. Other countries in the Caribbean region have done so.
 - Ideally, such a statute should be anchored in an *Environmental Protection Act* supported by appropriate and complementary regulations.
 - I think the undoubted need to protect the environment is far too serious to be found scattered in a myriad of legislation and regulations as at present.
 - A comprehensive Act on the protection of the environment and supplementing regulations, would also be in the interest of would- be investors, both local and foreign, who would then have ready access to the law that might affect any project they are interested in that would have consequences for the environment.
 - The rules of engagement would therefore be available to all interested parties. This can only foster the objectives of sustainable development
 - The dubiety surrounding the present provisions regarding the protection of the environment came out sharply in the challenge by Bimini Blue to the dredging activities by the dredger, the *Nicolo Machiavelli*, which had been hired by the developers at great expense to dredge a channel on the sea bed off north Bimini in order to facilitate the construction of a pier for the berthing of ferries they hoped to operate as part of the overall development of their project.
 - It was argued at first on behalf of the respondents (the government and the Developers) that the provisions of the Conservation and Protection of the Physical Landscape of The Bahamas Act and its regulations were inapplicable to dredging on the sea bed.

- Even the Court of Appeal itself was divided on this issue. But the developers had at the start of the project applied for a permit under this Act; but due, perhaps, to some misunderstanding in official circles about its relevance and applicability, no response was forthcoming.
- It was only when the case reached the Privy Council that it was admitted by the respondents, on the advice of their London legal advisers that the Act was applicable to the dredging activities. But these had already commenced *before* the grant of the permit that was later issued.
- This illustrates more than anything else the need for a *comprehensive Act dedicated to the protection of the environment in the round*.
- As things now stand, it is only after a project has been approved and is underway that challenges are mounted and the exercise becomes mired in confusion as to the legislation that is exactly applicable.

The Absence of a Comprehensive Environmental Protection Act.

It is a curious feature that despite Bahamas' environmental circumstances and, even with a Government Ministry responsible for environmental health, there is no comprehensive statute dealing with *the protection of its environment*. This fact has been commented on by a former President of The Bahamas Court of Appeal and the Privy Council in the challenge brought by the Save Guyana Cay Reef Association case regarding the development in Baker's Bay in Abaco.

(See the judgment of the Board in Save Guana Cay Reef Association case, at paras 12 and 31).

What there is instead, is a miscellany of particular legislation, such as the Wild Birds Protection Act; the Plants Protection Act; Marine Mammal Protection Act, including, the Captive Dolphins Regulations; the Conservation and Protection of the Physical Landscape Act; and the Town Planning Act, through which any attempt to achieve the goal of environmental protection may be teased out.

Ominously for the protection of the environment, none of these statutes requires an *Environmental Impact Assessment to be prepared and published* before approval of any major infrastructural works or development; and worrisome still, there is *no statutory requirement for an EIA* to be obtained by a developer *before* permission is given for a major project likely to affect the environment.

This state of affairs can and should be troubling for anyone interested in the protection of the environment.

Yes, at the present obtaining an EIA for submission to The Bahamas Environmental, Science and Technology Commission (BEST Commission), is a standard practice.

But there is *no* a statutory requirement to do so, and the acronym BEST, does not in my respectful view, reflect the best practice or arrangement that could be made for the protection of the environm

The BEST Commission, first established in 1994, with a chairman and board members drawn from various governmental and non-governmental agencies with environmental responsibilities in the country, undoubtedly performs a very useful role. Paramount among its functions is to advise the Government on the environmental impact of various development proposals submitted to it.

It is not doubted that it acts as the watchdog of the public interest when it brings its expert scrutiny to bear on the EIAs submitted to it before tendering its advice thereon to the Government.

But the whole apparatus in so far as the protection of the environment is concerned, does not have a statutory basis.

The need for an Environmental Protection Act and Regulations mandating an Environmental Impact Assessment.

In my respectful view, the present framework for the protection of the environment could and should be enhanced and systematized by having in place comprehensive and composite statutory provisions with complementary regulations.

Such a statutory regime should require that anyone undertaking a project which may significantly affect the environment must cause an environmental impact assessment (EIA) to be carried out and submitted to the Ministry of the Environment or the BEST Commission.

Such a regime may also prescribe the form and content of the EIA to be submitted.

But more importantly, the regime should stipulate that work on the project shall not commence *until the EIA in respect of it is approved.*

Such a system will ensure that a decision to approve or authorize a project likely to have significant environmental effects is *preceded by public disclosure* of as much relevant information about such effects as can be reasonably be obtained and the opportunity for *public information and discussion* of the issues raised concerning the effects of the project on the environment.

The EIA should also *identify the adverse effects or impact* the development would have on the environment and *the mitigative steps* to be taken to ameliorate such impact.

Also, a satisfactory EIA will be one that is comprehensive in its treatment of the subject matter it relates to, objective in its approach, and importantly, *alerts the decision-maker and members of the public* of the effects of the proposed project.

In my view, the abiding merit of such a regime for the protection of the environment will be that it will *distinguish between the procedure to be followed in arriving at the decision to approve the project and the merits of the project itself.*

The procedure to be followed in arriving at the decision is a matter of statute; while the merit of the project is for the competent authority, usually a department of government.

As a matter of statute, the *procedural requirements* will be binding on the decision maker. But *the merits of the proposal* are entirely for the decision maker.

This is a crucial distinction, which I dare say the judiciary tries, in the various responses to litigation involving the environment, to observe and adhere to. But it has not always been an easy task, and it is one that is often fraught with confusion and misunderstanding.

A crucial objective of a properly formatted EIA regime is to inform public consultation on the proposed project. This will ensure that in the words of Lord Hoffman in Berkley v. Secretary of State for the Environment (2001) 2 AC, 603 , at 615:

“The inclusive and democratic procedure...in which the public, however misguided or wrong-headed its views may be, is given an opportunity to express its opinion on the environmental issues.”

Let me in this regard, end with another quotation, this time from the judgment of Linden JA in the Canadian Federal Court of Appeal in the case of Bow Valley Naturalists Society v. Minister of Canadian Heritage, (2001) 2 FC 461 at p 494, which I think properly encapsulates the role and function of the courts in the struggle for the protection of the environment:

“ The Court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to the scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of the mitigating factors proposed. It is not for the judges to decide what projects are to be authorized but, as long as they follow the statutory process, it is for the responsible authorities.”

I conclude therefore, by saying that an astute appreciation of litigation involving the environment will show that, at the end of the day, it really is about the *affirmation of the rule of law*.

That is, to ensure that such statutory provisions and procedures there are, are followed and observed in the interest of the environment. This surely, must redound to everyone’s individual and collective benefit.

Judges try as best as they could, to ensure that the legal regime for the protection of the environment, such as it is, is adhered to by all, including, the government, the developers and the environmental groups mounting the challenges.

The Hon. Mr. Justice A. O. Conteh, JA
3rd March, 2015