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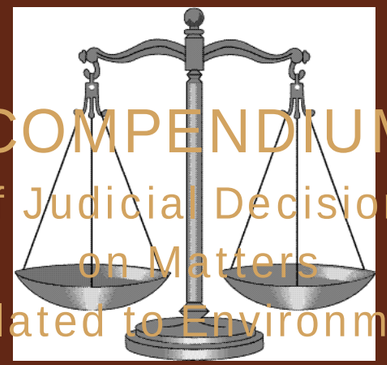

COMPENDIUM
of Judicial Decisions on Matters Related to Environment

National Decisions

Volume I

UNEP/UNDP/Dutch Government Joint Project on
Environmental Law and Institutions in Africa

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ISBN: 92-807-1762-6

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NATIONAL DECISIONS

Volume I

December 1998

ISBN 92-807-1762-6

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INTRODUCTION

This publication has been developed in pursuance of the aims of Agenda 21 which recognizes, among other things, the need to facilitate information exchange, including the dissemination of information on environmental law.

The compendium of judicial decisions was devised with two objectives. First, it aims to create awareness and enthusiasm among lawyers and non-lawyers alike on the current trends in the jurisprudence related to environmental matters. Second, it aims to provide resource materials for reflecting on specific pieces of court decisions from the point of view of scope and perspective, grounded as they are in the unique legal traditions and circumstances of different countries and legal jurisdictions.

The promotion of sustainable development through legal means at national and international levels has led to recognition of judicial efforts to develop and consolidate environmental law. The intervention of the judiciary is necessary to the development of environmental law, particularly in implementation and enforcement of laws and regulatory provisions dealing with environmental conservation and management. Thus, an understanding of the development of jurisprudence as an element of the development of laws and regulations at national and international levels is essential for long-term harmonization, development and consolidation of environmental law, as well as its enforcement. Ultimately, this should promote greater respect for the legal order concerning environmental management. Indeed, when all else fail, the victims of environmental torts turn to the judiciary for redress. But today's environmental problems are challenging to legislators and judges alike by their novelty, urgency and dispersed effect. Over the last two decades, many countries have witnessed a dramatic increase in the volume of judicial decisions on environmental issues as a result of global and local awareness of the link between damage to human health and to the ecosystem and a whole range of human activities. In many countries, the judiciary has responded to this trend by re-fashioning legal - sometimes age old - tools to meet the demands of the times, with varying degrees of success. But such practices have hardly taken root in Africa where not much judicial intervention has been in evidence.

The complexity of environmental laws and regulations at national and international levels makes it necessary for today's legal practitioners, particularly from Africa, to urgently assimilate and understand the concepts and principles arising from the developing jurisprudence. Only then would they be able to respond appropriately to the growing environmental challenges. In most countries, awareness of the potential of judicial intervention in the environmental field has grown largely because citizens bring proceedings in courts; while in other countries the effectiveness of the judicial mechanisms are still poor because of lack of information and a dearth of human and material resources. This is compounded by the weaknesses of institutions in charge of environmental law enforcement.

This Compendium is produced in the belief that this bottleneck can be overcome by the provision of information, such as is contained in the Compendium. The information will be a resource for training and awareness creation.

It is vital today that lawyers in all countries keep abreast of the jurisprudence in other countries, in order to appreciate pertinent changes and trends in their own countries. Comparative study of judicial intervention offers a formidable avenue for the enforcement of environmental law and the vindication of public rights. Courts have to entertain environmental suits and decide on the law in each specific context. As stressed by Raymond Avrilier in *"l'Ecologie à l'épreuve du droit",* " legal practitioners must understand and tackle questions of current policies, scope of administrative competence and conflicting expert evidence in environmental cases".

Given the novelty of environmental law, this Compendium is a unique opportunity for practitioners, particularly those from Africa, where case law is still scarce, to raise their level of awareness and sensitivity to ecological concerns and to share their experiences on possible approaches to resolving environmental disputes.

The Compendium is divided into national decisions and international decisions, each numbered Volume 1. It is anticipated that after one year, subsequent volumes will be published of either national decisions or international decisions, as the availability of materials and resources permit, and if the response to this Volume indicates that demand for such material exists. The volume on national decisions is itself divided into parts reflecting emerging themes in environmental litigation. However these themes provide only a loose grouping, and the reader would be well advised to read the cases without undue attention to the grouping adopted here, as in many instances, the themes recur in several cases. Secondly, the first part of the volume contains cases in the English language which are drawn from the common law jurisdictions while the second part contains cases in the French language which are drawn from the civil law

system. In both cases the reproduction of the cases is preceded by an overview and analysis of the cases. This is in the English language for both the English language and French language decisions. The decisions at international level contains judgements from the International Court of Justice as well as of arbitral tribunals. No particular thematic division has been attempted for these. The cases are reproduced simply in chronological order.

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The Legal Basis of Civil Action

Judicial intervention in environmental issues arises when persons resort to court action to seek redress for a grievance. Court action can be either civil action or criminal action. Civil action is resorted to typically by private parties while criminal action tends to be the preserve of public authorities. However, the boundaries are not at all seamless: there are many instances of public authorities bringing civil action, and of private individuals initiating criminal proceedings (i e. private prosecutions). These tend, however, to be exceptional. Whereas this Volume has focused on civil actions, there are examples of criminal prosecutions among the French cases.

The traditional position has been that, whereas a public authority may take action explicitly to protect the environment, a private litigant can only take court action to seek redress for a private injury. Any environmentally protective effect resulting from the private action would be purely incidental. Where the private individual wishes to bring action to redress an injury to the public he has to seek the permission of the Attorney General to use his name in an action known as a "relator action."

The traditional position found expression in the jurisprudence of the courts in common law and civil law jurisdictions alike. **Gouriet v Union of Post Office Workers** [1978] AC 435 is a leading English authority on the point. The House of Lords stated the position as follows:

> ... the jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement. To extend that jurisdiction to the grant of remedies for unlawful conduct which does not infringe any rights of the plaintiff in private law is to move out of the field of private law into that of public law with which analogies may be deceptive and where different principles apply. (p. 500).

A private individual could however bring action in his name on the basis of an interference with a public right in two situations: where the interference with the public right also interferes with some private right of the person concerned or where, in the absence of any interference with a private right, the person concerned has suffered damage peculiar to himself, which is additional to that suffered by the rest of the public.

The basis of a civil law claim is a "cause of action." This arises when an injury is caused to a person or property. If the injury is caused by a public body in the context of the exercise of public powers or the performance of a public duty the cause of action is in public law, whereas if it is caused by a private person the cause of action is in private law. The causes of action in public law are *ultra vires*, natural justice and error of law. The remedies for their redress are *certiorari*, prohibition, *mandamus*, and declaration. The causes of action in private law are trespass, nuisance, the rule in **Rylands v Fletcher** (the strict liability rule) and negligence. The remedies for their redress are an award of damages, injunction and a declaratory judgement.

A civil law action in public law is designed for challenging the legal validity of the decisions and actions of public bodies. This is the common law process of "judicial review." It is now largely provided for by statute. Judicial review is not to be confused with action taken in private law to redress private wrongs, and one may not seek judicial review instead of taking action in private law simply because the defendant happens to be a public authority. The remedy is specifically designed for challenging the exercise of public power or the performance or failure to perform a public duty. Where the dispute with the public body does not relate to the exercise of public power (or the performance of a public duty), redress cannot be sought through a judicial review application; the public body must be sued through an action in private law, like any other wrongdoer.

1. Judicial Review

Judicial review is a remedy that may be used to:

(i) quash a decision (*certiorari*)

(ii) stop unlawful action (prohibition)

(iii) require the performance of a public duty (*mandamus*)

(iv) declare the legal position of the litigants (declaration)

(v) give monetary compensation

(v) maintain the *status quo* (injunction).

Judicial review may be awarded where a public body has committed the following wrongful acts or omissions:

(i) where it has acted beyond its legal powers (i.e. *ultra vires*); a decision or an act of a public body may be *ultra vires* for reasons such as the failure to take into account relevant matters or taking into account irrelevant matters.

(ii) where it has acted contrary to the principles of natural justice, which require an absence of bias and a fair hearing in decision making.

(iii) where it has acted in error of law.

Judicial review is a remedy under both statute and the common law, and has been adopted by all the common law jurisdictions.

(a) Judicial review as a statutory remedy

Statutes typically provide that persons who are aggrieved with the decision of a public body may apply for a review to the courts. "Person aggrieved" was defined in a leading English authority **A.G (Gambia) v Njie** [1961] 2 All E.R. 540. Lord Denning said:

> The words "person aggrieved" are of wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busybody who is interfering in things that do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.

(b) Judicial review as a common law remedy

Quite apart from, and independently of, statutory provisions, judicial review is available as a common law remedy to which resort may always be had to challenge the decisions and actions of public bodies. In England, the Supreme Court Act 1981 and Order 53 of the Rules of the Supreme Court stipulate the procedure to be adopted in such cases. Similar procedures have been adopted by other common law jurisdictions.

Order 53 requires that the applicant seek leave of the court before filing the application. Leave is only granted if the court considers that the applicant has "sufficient interest" (or *locus standi*) in the matter in issue. Courts around the world have given varying interpretations to this concept, particularly in the context of environmental litigation. This has led to action in some countries, such as the Republic of South Africa, to introduce statutory provisions in the Constitution or elsewhere, widening the opportunities for access to the courts.

2. Action in private law

The private law causes of action are trespass, nuisance, the rule in **Rylands v Fletcher** (the strict liability rule) and negligence.

(a) Trespass

Trespass arises where a person causes physical matter to come into contact with another's land. Trespass, therefore, protects an occupier's right to enjoy his or her land without unjustified interference. It is limited, however, to direct, rather than indirect, interferences.

(b) Nuisance

There are two types of nuisance; public nuisance and private nuisance. Often the same act gives rise to both types of nuisance at the same time.

A public nuisance is an interference with the public's reasonable comfort and convenience. It is an interference with a public right and constitutes a common law criminal offence, quite apart from providing a cause of action in private law. In the English case of **Attorney General v P.Y. A. Quarries Ltd** [1957] 2 Q.B. 169 Lord Denning said of public nuisance:

> It is a nuisance which is so widespread in its range and so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

A private nuisance is an interference with an occupier's use and enjoyment of his land. Not all interferences, however, amount to a nuisance. Nuisances are those interferences which are unreasonable, causing material and substantial injury to property or unreasonable discomfort to those living on the property. The liability of the defendant arises from using land in such a manner as to injure a neighbouring occupier. Thus nuisance imposes the duty of reasonable use on neighbouring occupiers of land. It is the cause of action most suited to resolving environmentally related disputes between neighbouring landowners.

The reasonableness, or unreasonableness, of the use giving rise to the complaint is determined on the basis of the locality in which the activity in issue is carried out. The English case of **Sturges v Bridgeman** (1879) 11 Ch.D. 852 is illustrative of this point. A confectioner had for more than twenty years used a pestle and a mortar in his back premises which abutted on the garden of a physician. The noise and vibration were not felt as a nuisance and were not complained of. But in 1973 the physician erected a consulting room at the end of his garden, and then the noise and vibration became a nuisance to him. His action for an injunction was granted, the court holding that "whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but by reference to its circumstances."

(c) Strict Liability: the Rule in Rylands v Fletcher

This rule is based on the facts of the English case after which it is named. The defendant had constructed a reservoir to collect and hold water for his mill. Under his land were underground workings of an abandoned coal mine whose existence he was unaware of. After the reservoir had been filled the water escaped down the underground workings through some old shafts, and flooded the plaintiff's colliery. The plaintiff filed suit and the court decided that:

> the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of the escape.

The case was appealed to the English House of Lords which upheld the decision, one of the judges adding that the defendant was liable because he had been engaged in a "non-natural use of his land."

The rule makes an occupier strictly liable for the consequences of escapes from his land. However, this cause of action has not been relied a great deal partly because of difficulties in ascertaining the true meaning of "non-natural use." Some have argued that "non-natural use" refers to the conduct of ultra-hazardous activities on land, while others hold that it means no more than bringing on to land things "not naturally there."

(d) Negligence

Negligence arises from a failure to exercise the care demanded by the circumstances with the result that the plaintiff suffers an injury. In contrast to the three other causes of action, the basis for the action is not the occupation of property. A plaintiff needs to show that he is owed a "duty of care", and that the defendant has breached that duty of care, with consequent injury to the plaintiff.

The leading authority on negligence is the English case of **Donoghue v Stevenson** [1932] AC 562. Lord Atkinson said in that case that the duty of care is owed to "persons so closely and directly affected by the defendant's act that he ought reasonably to have them in contemplation as being so affected when directing his mind to the acts or omissions which are called into question." In other words, the duty of care is owed to those whom the defendant could *foresee* might suffer injury as a result of the defendant's act or omission.

3. The Remedies

The three remedies in private law are damages, injunction, and declaratory judgement.

An award of *damages* is compensation given to a party who has suffered an injury. The sum awarded is based on the principle that the injured person should be placed in the position he or she would have been in if he had not been injured.

An *injunction* is an order from the court directing a party either to do or to refrain from doing something. It is granted to stop a continuing or recurring injury, or in circumstances where damages would not be an adequate compensation. Typically, an injunction will not be granted unless the damage is serious. The Court will balance the inconvenience which declining to grant the injunction would cause the plaintiff against the inconvenience which granting it would cause the defendant.

A declaratory judgement is the court's declaration of the rights and duties of the parties before it. Its value lies in resolving a dispute by setting out clearly the legal position. Most litigants will act in accordance with the Court's declaration without the need for further orders. However, as the House of Lords in the English case of **Gouriet v Union of Post office Workers** "the jurisdiction of the Court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else." (p. 510)

4. The protection of the riparian owner's right to water

There is one other entitlement under the common law which can form a basis of environmental litigation; the riparian owner's right to water.

Under the English common law a landowner is presumed to own everything on the land "up to the sky and down to the center of the earth. However, running water, air and light are considered to be "things the property of which belongs to no person but the use to all" [see **Liggins v Inge** (1831) 131 E.R. 263, 268]. Therefore, a landowner has no property in running water, air and light; all that his proprietorship entitles him to, as an incident of such proprietorship, is a "natural right" to use these elements.

Thus, a landowner whose land abuts running water, i.e. a *riparian* owner, has a natural right to water. The riparian owner is able to exercise, as of right, the right available to all members of the public to use running water since he has an access to the water which non-riparian owners do not have. The right of use is available equally to all riparian owners and therefore any one riparian owner must use it reasonably. No one riparian owner may use the water in such a way as to prejudice the right of other riparian owners [**Embrey v Owen** (1851) 155 E.R. 579]. Other riparian owners have a cause of action if there is unreasonable use by any one owner.

The scope of the riparian owner's rights extends to access, quantity and quality. Access enables the riparian owner to navigate, embark and disembark on his land. Quantity enables the riparian owner to abstract, divert, obstruct or impound the water to the extent of its natural quantity. He may use the water abstracted for ordinary (domestic) purposes such as drinking, cooking and washing, and for these purposes may abstract as much as he needs without restriction. Secondly, he may use it for "extraordinary" purposes such as irrigation, but in this case must restrict the quantity he abstracts to that which does not prejudice the rights of other riparian owners. Thirdly, a riparian owner may attempt to abstract water for use outside of his land, but the common law disallows such "foreign" use of water. On quality the riparian owner is entitled to have the water in its natural state of purity.

If any of these rights are interfered with, the riparian owner has a cause of action. However, as the House of Lords held in the English case of **Cambridge Water Company v Eastern Counties Leather plc** ([1994] 1 All E.R. 910), the suit itself must be based on the traditional common law causes of action: trespass, nuisance, **Rylands v Fletcher** (strict liability) and negligence. It is the injury suffered which arises out of riparian ownership.

Background to the Civil Law Judicial System

Part II of this Compendium reproduces examples of judicial decisions deriving from France, and a number of other civil law jurisdictions. It is therefore important to consider briefly the civil law system. On the whole this is exemplified by the French legal system, from which most French speaking African countries have derived their legal systems.

French judicial decisions can only afford analogies, not precedents, for courts which are so differently constituted as those in the English-speaking common law world. However, some of these analogies point to principles of general application, even though there are distinct differences as regards their form and style.

Among these differences are, first, that the word *jurisprudence* is not generally used in the civil law legal system in the same sense as in the common law system. In the former, it refers to something like the *'Case Law'*, the English term *"jurisprudence"* being equivalent to the French *"Théorie générale du droit*.

The civil law system does not recognise the absolute authority of judicial precedents. It also attaches more weight to jurists writings than does the common law system. A key feature of the system is its grounding in a series of Codes and other statutes. Consequently, the fabric of the law is primarily statutory, the judiciary's task being limited mainly to applying the provisions of the existing legal texts.

In principle, in the civil law system, even decisions of the superior courts are not recognised as automatically binding. However, for a long time now, the decisions of the Courts (or la jurisprudence) have been acknowledged as playing a major role in the development of the law in the civil law system and the creative function of the judiciary is now widely accepted. But, even then, though it is now generally accepted that decisions of the *Court de Cassation*, for example, are to all intents and purposes, regarded as authoritative for the future, the lower Courts still resist innovations of the *Court de Cassation*. In this they are often encouraged by the writers of doctrine.

Another characteristic of the civil law system is that, although the decisions are reported in the Official Series on a scale probably comparable to that of common law jurisdictions, the legal judgements of the courts consist usually of a very short enunciations (embodied in a series of complex wordings (sentences), each prefaced by the words ***considérant que*** or ***attendu que*** (enumeration of facts and the reasons for the decision), without any citation or discussion of authorities.

An Example of a Civil Law Judicial System: The French Judicial System

In France, the judicial system and the various jurisdictional allocations are set out in the constitution and various basic statutes. Its structure is summarised briefly below.

1. On **the general principles** that apply in the organisation of justice in France, the following stand out:

- The collegiality of jurisdiction (up to three judges can be found in one court);
- The fixity and permanence of jurisdictions;
- The professional status of judges (being a dominant feature);
- The total independence of judges (from the political influence, the influence of other judges as well as of the parties among others);
- The fact that justice is free of charge;
- Equality of access to justice and neutrality of the judges;
- The public nature of the administration of justice;
- The adversary nature of proceedings before the judge;

- The rule of a dual level of jurisdiction (trial and appellate levels);

- The responsibility of the State to ensure that justice is carried out swiftly and adequately.

2. **The institutions of justice,** commonly called *"jurisdictions,"* are:

- The *tribunaux* at a first degree (e.g. Tribunal de Grande Instance) and;

- The *Cours d'appel* (Appellate courts) at the second level.

There are several appellate courts of co-ordinate jurisdiction in France. However, some jurisdictions at a superior level are also called "tribunal" such as the "Tribunal des Conflits" and others are called "Conseils" such as the "Conseil d'Etat" or the "Haute Cour de Justice". These terminologies have a bearing on the designation of judicial decisions. The decisions of tribunals are called "Judgements" while the decisions of the courts are called "arret"(or order). When the decision has been issued by only one judge, they are called "Ordonnance" or, in some cases, "Decisions".

Jurisdictions which have fewer cases to handle are said to be "Ordinary jurisdictions" and those whose work is voluminous and specialised are said to be the "juridictions spécialisées".

As regards the powers of the appellate courts, though the French legal system considers an appeal as the continuation of the original suit, the powers, prestige and duties of the judges in courts of original jurisdiction and those of the ones in the appellate courts are different to a large extent. The appellate court has powers as regards the amendment and return of plaints and memorandum of appeal; the withdrawal of the suit where there is mistake, or where there is need for separation; trial of misjoined suits; and the like.

The **French judiciary system** consists typically of two categories of judicial orders:

- The *juridictions judiciaires*, which have jurisdiction on both criminal and civil matters and;

- The *juridictions administratives,* which are many and among which the most important is the *Conseil d'Etat*, (presided by the Prime Minister or his representative). These deal with administrative matters.

The *Conseil d'Etat* has got four specialised sections and has advisory administrative powers related to finance, interior affairs, public works and social affairs. It gives opinions on major administrative issues.

One other section of the Conseil d'Etat is judicial in nature. It is composed of one chairman, three (3) vice-chairmen and a number of counsellors, "maître de requêtes", and "auditeurs". The Chairman is the judge of single matters brought before that section.

Many subordinate courts act under the supervision of the *Conseil d'Etat* as they deal with various issues such as the national budget, the efficacy of the general administration of the State, public enterprises and so on.

Apart from the two categories set out above there are other specific types of jurisdictions which are totally different from the ones mentioned above. There is the so-called *Tribunal des conflits*, which in rank, is on top or above the two orders of jurisdictions. It deals with matters that involve the determination of competence amongst the two known orders of jurisdiction, particularly when a conflict of mandates arises. Its role is limited to determining the jurisdiction which is competent in the matter. There is also the *Conseil Constitutionnel* whose main role is to determine the *'constitutionality of laws'*. Its role has evolved into an indirectly political one as it deals with cases involving, for example, claims related to presidential or parliamentary elections.

In summary the civil order deals with matters related to civil liability proceedings, including criminal offences, while the administrative order deals with matters related to public authorities' decisions affecting private persons. However, the boundary between the two orders of jurisdiction is not rigid.

One can also say that, in France, the courts have jurisdiction to try all suits of a civil nature except suits whose cognisance is expressly or impliedly barred by law.

As regards the nature or subject matter of the suits, certain courts in France are courts of special jurisdiction, inasmuch as some classes of cases involve disputes with which superior or specially experienced tribunals are particularly familiar, and which can more satisfactorily be disposed of by them, such as administrative decisions, revenue issues, and the like. Furthermore, cases of importance affecting considerable interests or involving questions of intricacy are left to be determined by the higher courts. Additionally, under the French Codes of Civil Procedure and Administrative Tribunals, it is provided that where the claim is in a particular field, that field is regarded as the subject-matter of the suit.

As regards the court in which such a suit should be brought, reference should be made to the administrative tribunals, particularly the "Conseil d'Etat" in the case of administrative jurisdictions. Under the French legal system, in matters relating to public matters, such as cases that involve public nuisances, suits may be may be instituted, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case. In principle, as in common law systems, a private individual cannot sue in respect of a public nuisance unless he shows that he has suffered special damage thereby.

Another relevant fact is that, under the French legal system, national courts are empowered to pass judgement against a non-resident foreigner, provided that the cause of action arose within the jurisdiction of the Court pronouncing the judgement.

The term *cause of action* as used here applies to torts as well as contracts. The meaning of the term *cause of action* has been the subject of considerable controversy. It has however been settled in the numerous decisions in which the question has been discussed extensively in the context of environmental litigation. It has been held that the term means either every material fact which needs to be proved by the plaintiff to entitle him to success, or everything which if not proved, would give the defendant an immediate right to judgement. The term is composed of many components, including the requirement that there must have been an infraction of the right claimed.

Jurisdiction in the French Civil Law System

As in any other legal system, the competence of a court in the French legal system means the "court's jurisdiction." Jurisdiction depends upon the nature or subject matter of a suit and upon its location, but often not on the pecuniary limits to the jurisdiction of the tribunal or court. While theories may differ as to the sources of judicial authority, environmental law suits now being litigated in many civil law countries, including France typically are initiated by environment protection organisations against Government agencies and local authorities' decisions. The standing of these organisations rests basically upon their claim as being the appropriate representatives of the public interest. The liability of government bodies to be sued often depends on the existing legislation. However, whether a suit will lie at the instance of the Government depends on the existing substantive law.

As a commentator said, "*according to the exact conception of it given by the Roman lawyers, "Jurisdiction"consists in taking cognisance of a case involving the determination of some juror relation, in ascertaining the essential points of it, and in pronouncing upon them.*" The word *jurisdiction* is commonly used to mean jurisdiction in the ordinary sense described above, that is, a reference to local or pecuniary jurisdiction or to the Parties. It can also refer to the subject matter of a suit or the legal authority of a court to do certain things. All these possible meanings are provided in the French Code of Civil Procedure, the Code of Administrative Tribunals and the other Statutes that create the specialised jurisdictions and make the distinction between the two categories of legal settings (or orders): the civil order and the administrative order.

The existence of jurisdictions is primarily determined with reference to the law of the country. However, it is a general principle in civil law systems that whenever jurisdiction is given to a court by an enactment, and such jurisdiction is only given on certain specified terms contained in the enactment itself, these terms must be complied with in order to sustain the claim to jurisdiction. If they are not complied with the claim to jurisdiction cannot be sustained. This principle is emphasised in the French Code of Civil Procedure and Code of Administrative Tribunals. However, to found jurisdiction, there must, in the first place, be authority to pass judgement, that is, the authority to entertain judicial proceedings.

French Case Law and Environmental Liability

This part attempts to explain the framework within which, in France, those whose property or health is harmed by environmental hazards find compensation, and also to define some of the principal areas of practice and procedure that arise in bringing or defending environmental cases in France, and in civil law systems generally.

The principles relating to civil liability for environmental damage in France do not constitute a single body of law, even though the Code of Civil Procedure and the Code of Administrative Tribunals give an orientation as to the methodological aspects of litigation in general, which also concern environmental matters.

These principles constitute a patchwork of concepts related to rights and duties which have been developed by the Courts and Tribunals over many years in the general area of civil liability and compensation, and specifically, in the area of the tort of nuisance.

In France, it is not necessary for the claimant to show that ownership or occupation of land has been affected by a public nuisance, as public nuisance is a criminal offence as well as a civil tort. To be a public nuisance, the relevant activity and its effects do not have to be widespread.

Increasingly, it is no longer necessary that a class or group of citizens who come within the sphere or neighbourhood of the operation of the nuisance must be materially affected in terms of their reasonable comfort and convenience. The grounds for civil liability for environmental harm result either from a breach of statutory duty or are created by specific provisions in the domestic legislation such as those of the "*Code Rural*".

The relevant "environmental torts" found in most civil law systems are negligence, nuisance and trespass. In these system most aspects of the law on nuisance can be described as having been developed specifically to address the consequences of pollution or other effects on the environment of hazardous activities and substances. The types of nuisance are based on the fundamental duty that each person has not to conduct himself in a manner that unreasonably interferes with the use by others of their land and property or with the enjoyment of others' public rights. In determining liability in nuisance, the judge is required to strike a balance between the interests of the claimant and those of the defendant, having regard to the level of interference that a neighbour can be expected to tolerate.

Liability for injury caused to another is generally based upon fault in French law, as provided in Article 1382 and 1384 of the Civil Code. Article 1384 provides that: "*A person is liable not only for the damage he causes by his own act, but for that caused by the acts of persons for whom he is responsible or by things that he has under his guard*".

Article 1384 of the Civil Code is considered by the French courts to have established a presumption of fault which cannot be rebutted by claims that there was no fault, and it is in fact similar to the system of absolute or strict liability, in that the liability of the person who under his guard has the inanimate object causing the damage is presumed liable, unless he can prove that the damage was the result of ***Force Majeure*****,** or the act of the plaintiff himself, or a ***cause étrangère*** which was normally unforeseeable so that the damage was unavoidable and could not be imputed to him.

The presumption of fault, which is applied to the automobile accidents for example, has been justified by the French courts on the basis of the equitable considerations on account of the large number of accidents caused by motor vehicles and the impossibility in many cases of proving fault on the part of the driver.

The application of Article 1384 in the area of environmental risks and industrial accidents is appropriate. Further guidance as to applying such a principle of liability can be found in the following quotation from a case of an industrial accident. An author pointed out that:

> "As machines took the place of man ... the number of accidents not only increased but, and this is more important, changed their character. Accidents came to have very often an obscure origin, an uncertain cause that made it hard to place responsibility ... The victim had to deal with powerful companies whose rules and obligations they did not know and with whom they engaged in such an unequal batter that they were defeated in advance. The defendants took refuge behind Article 1382 which, though it appears at first to give a basis for recovery in many cases, actually serves as a defence."

Besides, the right of private individuals to bring civil claims in respect of public and private nuisances is to be distinguished from the power of local authorities such as the so called *prefet*, in respect of statutory nuisances as defined under the Law on the Classified Installations or under the Rural Code. These laws impose administrative duties and sanctions to the owners or operators of such establishments as part of the prevention and inspection policy and procedures.

The tort of negligence also has wide application to a range of public activities, particularly in the building industry and in the field of regulatory control or nature protection (eg the control of wild fires). The key elements here are:

A- The existence of a situation in which the law requires a person to exercise care towards other person(s) who is or are the claimant(s),

B- Breach by the defendant of the objective standard of care,

C- Establishment of a link between the carelessness and the damage or injury which has resulted, and,

D- The reasonable foreseeability of the carelessness giving rise to the damage or injury which it has caused.

The continuing analysis and reappraisal by the tribunals of the basic principles underlying these rights and obligations in the environmental risk field is exemplified in the more recent decisions of the *"Conseil d'Etat"*, the highest jurisdiction dealing with administrative matters in France.

However, the cases dealt with by the *Conseil d'Etat* give the impression that it is not at ease with environmental matters, particularly on issues that involve transboundary aspects. The consequence of its attitude is illustrated in the questions that arise from its Sentence of 18 April 1986 related to **"Société Les Mines de Potasse d'Alsace versus Province de la Hollande Septentrionale et autres"**. In that particular case there were no stipulations in international law as at 22 December 1980, which would have prevented the administrative authorities mentioned in the case, from issuing pollution licences. To understand this negation of any of the then existing international rules by the French jurisdiction, it is worth reading the conclusions arrived at by the ***Commissaire du Gouvernement*** (equiv. Attorney General), which are remarkable from the point of view of the reasoning, but contestable from the point of view of its substantial foundations.

Meanwhile, in addition to making awards for compensation in case of damage, in many cases, the civil law courts also grant injunctions ordering persons causing environmental harm to cease the activities, which are responsible for damage. Injunctions may also be granted to restrain activities, which threaten to do harm. Occasionally, such injunctions may be mandatory, i.e. requiring the person not only to stop the polluting activity complained of, but also take a positive remedial action, such as to make safe a source of that pollution or remove it.

The ability of private individuals, or groups, to enforce the provisions of environmental protection legislation provides a person aggrieved by a polluting activity with a legal means of bringing pressure to bear on the person responsible for that activity to abate it or to prevent its repetition. In France, as in other countries, the threat of environmental litigation for industrial concerns has increased greatly in recent times, as the conceptual foundation of the principles of *locus standi* are increasingly under test and scrutiny. This is a result not only of wider powers of the environmental agencies to impose remedial liability but of changes in public administration and legal procedures that have increased the will and capability of private individuals to bring civil action claims against polluters. The claims concerning nuisances and damage to health arising from pollution frequently involve many claimants.

As far as procedure is concerned, the institution of legal suits is made by the presentation of a plaint to the court, in which a person sets forth his cause of action in writing. This can be in situations where either general legal principles are involved, - (principles of common application in almost all countries), or where those in which the French jurisprudence notions prevail.

The particular elements of the environment-related jurisprudence found in the French legal system simply constitute the context in which the policy issues such as combating water pollution, the management of classified establishments (or installations), protection of fauna , flora and the like, are resolved through the judicial system. However, the common characteristic of any legal system is that before any environmental resource that is declared public can be used, some kind of authorization from the government authority is necessary.

Lack of such an authorization, or shortcomings in the procedures for obtaining such an authorisation are considered as an offence. In that area, two kinds of permits are usually issued: - a permit or licence, which is less permanent and easily revoked, and - a concession, which sets up reciprocal rights and obligations between the grantor and the grantee. This is the main feature of major French environmental legislation and other resource-control based legislation in most countries that are attempting to modernise their environmental legislation.

In the French legal system, provisions to afford better administrative control over the management of environmental resources are often introduced by statutes that give the courts enough power to define or determine the rights of users so long as they observe the existing legal provisions and the balance of the interests involved, particularly with the respect due to private property and public interest. The licencing or administrative authorizations and the inspection systems are adopted in order to subject most natural resources to administrative control.

The following themes are recurrent in environmental litigation: the question of *locus standi*; the role of, and procedure for, environmental impact assessment; the choice of forum for filing suit; the public trust doctrine as a mechanism for environmental management; the precautionary principle; the polluter pays principle or the concept of liability for environmental damage; the concept of a human right to environment; and the proper place of procedural rules in environmental litigation. This attempt at categorization of the issues must not, however, lead to the [false] impression that the cases fall neatly into the categorizes set out here. Few court cases ever concern only one single issue, and this emerges clearly in the discussion that follows.

(a) Locus standi

The following cases illustrate the way courts have dealt with the issue of *locus standi* in environmental litigation.

1. **Sierra Club v Morton** 92 S.Ct. 1361 (1972) (USA)

2. **Von Moltke v Costa Areosa (Pty) Ltd** 1975 (1) [C.P.D.] 255 (South Africa)

3 **Wangari Maathai v Kenya Times Media Trust** HCCC No 5403 1989 (Kenya)

4. **Wangari Maathai v City Council of Nairobi** HCCC No 72 of 1994 (Kenya)

5. **L.N. Kariuki v County Council of Kiambu Misc. App.** No 446 of 1994 (Kenya)

6. **Oposa v Factoran** G.R. No 101083, July 30 1993 (Philippines)

7. **M. Farooque v Bangaldesh,** Civil appeal No 24 of 1995, 17 BLD (AD) 1997, vol XVII, pg 1 to 33; 1 BLC (AD) (1996), pg 189 219, 1996 (Bangladesh)

8. **Kajing Tubek v Ekran Bhd & Others** [1996] 2 Malayan Law Journal (Malasyia)

9. **Van Huyssteen & Others v Minister of Environmental Affairs & Tourism & Others** 1996 (1) SA 283 (C) (South Africa)

10. **Maina Kamanda v Nairobi City Council** HCCC No 6153 of 1992 (Kenya)

11. **Verstappen v Port Edward Town Board & Others** 1994 (3) SA 569 (South Africa)

12. **Festo Balegele and 749 others v Dar Es Salaam City Council** Misc. Civil Cause No 90 of 1991 (Tanzania)

13. **Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs & Tourism & Others** Case No 1672/1995 (South Africa).

14. **Minister of Health & Welfare v Woodcarb (Pty) Ltd & Another** 1996 (3) SA 155 (South Africa)

The traditional position on *locus standi* was articulated in the American case of **Sierra Club v Morton.** Sierra Club, a membership corporation with "a special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country", brought a suit for a declaratory judgement and for an injunction to restrain federal officials from approving an extensive skiing development in the Mineral King Valley in Sequoia National Forest. It relied on the Administrative Procedure Act which accorded judicial review to a "person suffering legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant statute." The Club based its case on the fact that the project would change the area's aesthetics and ecology. It did not allege that the challenged development would affect it or its members in their activities, or that they used Mineral King.

The Supreme Court observed that earlier decisions had held that persons had standing to obtain judicial review of federal agency action where they alleged that the challenged action had caused them "injury in fact." This case raised the question whether injury of a non-economic nature to interests that were widely shared could found a claim for judicial review. For instance, in reference to the road to be built through Sequoia National Park, the complaint alleged that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wild-life of the park and would impair the enjoyment of the park for future generations." The Court held that this type of harm could amount to an "injury in fact" sufficient to lay a basis for standing: aesthetic and environmental well-being, like economic well-being, were important ingredients of the quality of life, and the fact that particular environmental interests were shared by the many rather than the few did not make them less deserving of legal protection through the judicial process.

But, the Court also observed that the "injury in fact" test required more than an injury to a cognizable interest. The party seeking review had himself to be among the injured. In this instance, the impact of the proposed changes in the environment of the Mineral King would not fall indiscriminately upon every citizen. It would be felt directly only by those who used Mineral King, and for whom the aesthetic and recreational values of the area would be lessened by the development. The Sierra Club had not alleged that it or its members would be affected in their activities or pastimes by the development, that its members used Mineral King for any purpose, or that they used it in any way that would significantly be affected by the proposed actions. It had not done so deliberately in order to test the theory that the fact that this was a public action involving questions as to the use of natural resources, and that it had a longstanding concern with, and expertise in, such matters were sufficient to give it standing as a "representative of the public." The Court held, however, that a mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization was in evaluating the problem, was not sufficient by itself to render the organization adversely affected or aggrieved. Therefore, the Sierra Club lacked standing to maintain this action.

In a dissenting opinion Justice Douglas argued that there was need for a rule that allowed environmental issues to be litigated in the name of the inanimate object about to be despoiled; contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.

A South African court came to a similar decision in **Von Moltke v Costa Areosa** (Pty) Ltd the facts of which were comparable to **Sierra Club v Morton**. The applicant had been residing at Llandudno and subsequently purchased property there because "he disliked crowded city life, and wished to live in a peaceful and quiet area which was close to nature and to its natural condition." The house which he purchased was about a mile from Sandy Bay. He became aware that Sandy Bay was to be developed as a township and that an application had been submitted by the respondent company to the Divisional Council of the Cape. He filed his written objections with the Secretary of the Provincial Administration, and organized a petition for which he collected 4000 signatures, and a protest meeting. Subsequently, he ascertained that bulldozing operations had already commenced and that the indigenous vegetation was being destroyed.

The applicant alleged that the bulldozing operations would constitute a nuisance to his enjoyment of the property as well as to the surrounding area and that irreparable damage was being done to the natural vegetation and that the sand dunes were being disturbed. The applicant further contended that, by destroying the vegetation and interfering with the ecology, the respondent was committing a public nuisance. He sought an interdict to restrain the respondent from carrying on further operations and for an order directing the restoration of the property to the condition it had been in before the operations commenced. The respondent challenged the applicant's *locus standi* to bring the application.

The Court held that, assuming that the destruction of the vegetation constituted a public nuisance, what rights had the applicant in the matter? The party seeking relief had to show that he was suffering or would suffer some injury, prejudice or damage, or invasion of right peculiar to himself, and over and above that sustained by the members of the public in general. It was not enough to allege that a nuisance was being committed; an applicant had to go further and allege facts from which it could be inferred that he had a special reason for coming to court. As this applicant had failed to allege special damage or peculiar injury beyond that which he might sustain in common with other citizens he had failed to show that he had *locus standi* to come to court.

This traditional position was upheld by the Kenyan courts in **Wangari Maathai v Kenya Times Media Trust** in which the plaintiff sought a temporary injunction restraining the defendant from constructing a proposed complex at inside a recreational park in the center of Nairobi. The plaintiff was the Co-ordinator of the Greenbelt Movement, an

environmental non-governmental organization, but brought the suit on her own behalf. The defendant raised the objection that the plaintiff lacked locus standi to bring the suit, and this was upheld by the Court which pointed out that the applicant would not be affected more than any other resident of Nairobi. It was upheld again in **Wangari Maathai v Nairobi City Council** in which the plaintiff sued for a declaration that the subdivision, sale and transfer of lands belonging to the local authority was unlawful. The court held that the plaintiff had no particular interest in the matter. The application in **Lawrence Nginyo Kariuki v County Council of Kiambu** was also dismissed on the basis of *locus*. The plaintiff had argued that, because he was a shareholder of a farming company that owned land adjacent to a forest which the respondent proposed to alienate, he had sufficient interest to maintain a suit for restraining orders.

Oposa v Factoran and Dr Mohiuddin Farooque v Bangladesh provide an interesting contrast to the above decisions.

Oposa v Factoran raised the issue whether the petitioners minors had a cause of action to prevent the misappropriation or impairment of Philippine rainforests. The complaint was instituted as a taxpayers class suit. It alleged that the plaintiffs "[were] all citizens of the Republic of the Philippines, taxpayers and entitled to the full benefit, use and enjoyment of the natural resource treasure that is the country's virgin tropical rainforests."

The suit was said to be filed for the petitioners and others equally concerned but "so numerous that it [was] impracticable to bring them all before the court." The minors asserted that they "represent[ed] their generation as well as generations yet unborn." They sought orders to (1) cancel all existing timber licence agreements in the country; and (2) stop approving new timber licence agreements.

The Defendant sought a dismissal of the suit on the grounds that (1) there was no cause of action as the petitioners had not alleged a specific legal right violated by the respondent, and (2) the issue raised was a political question which properly pertained to the legislative and judicial branches of government. But the petitioners asserted that granting timber licence agreements to cover more areas for logging than what was available was a judicial question as it involved an abuse of discretion.

The Court held that the case was a class suit as the subject matter of the complaint was of common and general interest not just to several, but to all, citizens of the Philippines. Consequently, since the parties were so numerous, it was impracticable, if not impossible, to bring all of them before the court. The Plaintiffs were numerous and representative enough to ensure the full protection of all concerned interests. The Court held further that the petitioners could for themselves, for others of their generation and for the succeeding generations file a class suit. Their personality to sue on behalf of succeeding generations could only be based on the concept of intergenerational responsibility in so far as the right to a balanced and healthful ecology was concerned.

The Court held also that the complaint focused on one specific fundamental legal right, the right to a balanced and healthful ecology which was incorporated in the Constitution.

In **Dr Mohiuddin Farooque v Bangladesh** the appellant was the Secretary General of the Bangladesh Environmental Lawyers Association (BELA), an organization working in the field of environment and ecology. The Court held that it was an aggrieved person because the cause it espoused, both in respect of fundamental rights and constitutional remedies, was a cause of an indeterminate number of people in respect of a subject matter of public concern. Further, the organization was acting *bona fide* and did not seek to serve an oblique purpose. However, the Court rejected the submission that the Association represented not only the present generation but also the generation yet unborn. It stated that this finding in the **Oposa Case** had been based on constitutional provisions in the Philippines which did not exist in Bangladesh.

The **Oposa case and Dr Mohuiddin Farrooque v Bangladesh** apart, the majority of the cases have espoused the traditional position on *locus*, and looked for some interest of the party before the court which would suffer over and above the injury to be suffered by the general public.

In the Malaysian case of **Kajing Tubek v Ekran Bhd & Others** the plaintiffs were residents of longhouses in Belaga, Sarawak who were affected by the Government's proposed development of a hydroelectric project. They sought a declaration that before the project could be implemented the defendants had to comply with the Environmental Quality Act of 1974 requiring an EIA for prescribed activities. By an order the Minister had excluded the application of this Act to Sarawak and instead subjected the project to a procedure which, unlike the 1974 Act, did not

provide for public participation in the EIA process. The defendants challenged the plaintiffs' standing to bring the suit. The court held that the Plaintiffs' claim that their homes and land would be destroyed and their lives uprooted by the project, and that they would suffer far more greatly and directly than other members of the public as their "land and forest are not just a source of livelihood but constitute life itself, fundamental to their social, cultural and spiritual survival as native peoples" were sufficient to justify their having a substantial or genuine interest to have the legal position declared.

Similarly in the South African case of **Van Huyssteen v Minister of Environmental Affairs & Tourism** the respondents proposed to build a steel mill on a farm near a national park and a lagoon, and had applied for the rezoning of the land under the Land Use Planning Ordinance, 1985. The lagoon's wetlands were protected in terms of the Convention on Wetlands of International Importance. The lagoon was owned by a Trust, and the trustees, together with one beneficiary of the trust, were the applicants. The trustees intended to build a home on the trust property. Expert opinion was divided on whether the proposed mill would be environmentally undesirable. The applicants sought a temporary injunction pending further investigation. The Court held that the applicants had *locus standi* as their rights in respect of the trust property would be threatened.

The special interest of ratepayers in relation to their local authority was the basis for granting *locus* in the Kenya case of **Maina Kamanda v Nairobi City Council.** The court granted two Nairobi residents and rate payers standing to maintain a suit against the City Council on the basis that a rate payer, as opposed to a tax payer, has sufficient interest to challenge in court the action of a public body to whose expenses he contributes.

But the mere fact of being a ratepayer is not sufficient, as the South African case of **Verstappen v Port Edward Town Board** illustrates. The applicant was the co-owner of certain properties within the area of jurisdiction of the first respondent local authority. One of the properties was adjacent to a worked out quarry and the other opposite it. In 1985 the respondent started using the quarry area as a site for the disposal of waste. The applicant launched an application to interdict and restrain the respondents from using the quarry and to remove the refuse. The claim was based on the grounds that the waste disposal site and the manner in which the respondent managed it constituted a nuisance, and that the respondent was operating the facility illegally as it had not obtained a permit under the Environment Conservation Act of 1989.

The parties agreed that among the issues to be determined were first, whether the applicant had *locus standi* to complain about the respondent's failure to obtain a permit under the Environment Conservation Act and, second, whether the applicant had suffered an injury or reasonably apprehended that she would do so.

The applicant argued that she had *locus standi* to challenge the respondent's operation of the waste disposal site without the necessary permit on the grounds that: (i) she was suffering damage by reason of the operation of the site without the appropriate permit; and (ii) as a rate payer of the respondent's local authority area she was entitled to prevent illegality being committed by the respondent.

The Court observed that ratepayers had standing to interdict local authorities from dealing contrary to law with their funds or property. The rationale for this was the relationship of trust existing between the Council and the ratepayers in respect of municipal funds and property. The Court held that the mere fact that some municipal funds were spent in managing the waste disposal site could not afford the applicant *locus standi* to interdict what she regarded as an illegality as there was no allegation that the respondent's manner of operation of the site was more expensive than any others.

On the respondent's failure to obtain the required permit, the Court held that in order to determine whether a member of the public had *locus standi* to prevent the commission of an act prohibited by statute, the first inquiry was whether the Legislature prohibited the doing of the act in the interest of any particular person or class of persons or whether it was merely prohibited in the general public interest. If the former, any person who belonged to the class of persons in whose interest the doing of the act was prohibited could interdict the act without proof of any special damage. If not the applicant had to prove that he had suffered or would suffer special damage as a result of the doing of the act.

The Court held that there was no basis for holding that the applicant belonged to a special class of persons in whose interest the Act was passed; the Legislature intended the provisions to operate in the interests of the public at large. That being the case the applicant was required to show that the contravention of the Act by the respondent had caused or was likely to cause her some special damage. This she had failed to do (but see **Wildlife Society of South-**

ern Africa & Others v Minister of Environmental Affairs & Tourism & Others below).

The Court observed that it was only because the applicant sought an interdict based on the alleged unlawfulness of the respondent's conduct that she had not established the requisite *locus standi*. She plainly had *locus standi* to interdict the nuisance if was able to prove that the management and operation of the site constituted such nuisance (as the Tanzanian case of **Festo Balegele v Dar Es Salaam City Council** illustrates).

The Court held further that, even if it had been prepared to assume in favour of the applicant that her *locus standi* had been established it would not have granted an interim injunction pending the determination of the main issue of nuisance. The balance of convenience was the decisive factor in determining the proper way to exercise the discretion whether to grant an interdict. The manner in which the grant or refusal of an interdict would affect the immediate parties to the litigation was not the only matter relevant to the determination of the balance of convenience. Where the wider general public was affected, the convenience of the public had to be taken into account in any assessment of the balance of convenience. If the interests of the other ratepayers living in the respondent's local authority area were taken into account, the balance of convenience was overwhelmingly against the grant of any interim relief to the applicant.

In **Festo Balegele & 749 Others v Dar Es Salaam City Council** the applicants sought orders: (i) of *certiorari* to quash the decision of the respondent to dump the City's waste at Kanduchi Mtongani; (ii) prohibiting the respondent from continuing to dump waste at the site; and (iii) of *mandamus* to direct the respondent to establish an appropriate refuse dumping site and using it. The respondent did not dispute the fact that Kanduni Mtongani was zoned as a residential area; that the applicants resided there; that the dumped refuse was burning and emitting smoke which covered a wide area; and that it emitted an offensive smell and attracted swarms of flies. The applicant argued that, in dumping the refuse where it did, the respondent was executing its statutory duty unlawfully. It had turned the area into a health hazard and a nuisance to its residents. The applicants were thus aggrieved and had *locus standi* to apply for restraining orders. The respondent resisted the application and indicated that the disposal of refuse in the area was temporary while the respondent tried to find an alternative location. The respondent asked the court to exercise its discretion in its favour as it would otherwise fail to perform its statutory duty of refuse collection and disposal.

The Court found that the applicants had *locus standi*, being resident in the area, and granted the orders sought.

Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs & Tourism & Others illustrates the use of civil measures to enforce statutory duties of environmental conservation. The applicants applied for an order compelling the respondents to enforce the provisions of the Decree 9 (Environment Conservation) of 1992. The first applicant was the Wildlife Society of Southern Africa and the second applicant its Conservation Director. The third and fourth applicants were two lawful occupiers of cottages located on the coast and members of the Wild Coast Cottage Owners Association. The first respondent was the Minister of Environmental Affairs; the second respondent the Premier of the Eastern Cape; the third respondent the Minister of Agriculture and Environmental Planning of the Eastern Cape; and the fourth to seventh respondents the chiefs or headmen of certain areas in the Eastern Cape.

The applicants contended that the fourth to seventh respondents had granted rights of occupation and had allocated sites within the coastal conservation area to private individuals, in each case for a very small consideration. Shacks and dwellings had been constructed on those sites, which had resulted in environmental degradation, and roads, pathways and tracks had been created through environmentally sensitive areas. The applicants contended that, despite their efforts at persuading the first to third respondents to comply with the obligation to enforce compliance with the provisions of the Decree, the respondents had not done so.

After initially contesting the applicants' *locus standi* the first respondent conceded that the applicants had *locus standi* on the basis of the provisions of the Constitution. The Court remarked, *obiter*, that in circumstances where the *locus standi* afforded to persons by the Constitution was not applicable and when a statute imposed an obligation upon the State to take certain measures in order to protect the environment in the interests of the public, then a body such as the first applicant, with its main object being to promote environmental conservation in South Africa, should have *locus standi* at common law to apply for an order compelling the State to comply with its obligations in terms of such statute.

Minister of Health & Welfare v Woodcarb (Pty) Ltd & Another illustrates that public regulatory authorities also have *locus* to enforce statutory measures using the civil process. The second respondent was the owner a saw

milling business. This gave rise to saw dust and wood chips which needed to be disposed of through burning and the respondent installed a "Reese burner." In 1968 the Minister of Health had declared the whole country a "scheduled area" under the Atmospheric Pollution Act of 1965 with the result that persons carrying on "scheduled processes needed registration certificates authorizing the carrying on of the process." Wood burning was one such process. The respondent duly applied for a registration certificate and a provisional one was issued. In March 1992 the Department of Health issued a directive to the effect that burners of the category of the Reese burner should be phased out within three years. When the respondent's provisional certificate expired in early 1994 the applicants refused to renew it. In June 1994 the applicants commenced litigation to prevent the respondent from continuing to use the Reese burner.

The respondent resisted the application on the basis, among others, that the applicant had no *locus standi* to bring it. He contended that the statute did not authorize the applicant to take civil action to enforce its provisions since it conferred specific criminal penalties for contravention. The Court held that the Act contained no specific provisions which the applicant or any other interested party could invoke to stop a person from contravening it. In those circumstances the principle that the Act was exclusive as to what could be done to enforce its provisions did not arise.

(b) Environment Impact Assessment

Since the US Environment Protection Act 1969 mandated environmental impact assessment as an integral part of the development consent process many countries around the world have imposed a statutory requirement on developers to carry out environmental impact studies on their projects. Environmental Impact Assessment (EIA) is a structured process for gathering information about the potential impacts on the environment of a proposed project and using the information, alongside other considerations, to decide whether the project should or should not proceed, either as proposed or with modifications.

EIA focuses on the procedure for decision making. It does not itself determine whether or not the project should proceed; a project with potentially adverse environmental impacts may be allowed to proceed if acceptable mitigatory measures can be introduced. EIA aims to ensure that environmental factors are taken into account alongside other factors (such as cost implications, technical feasibility, labour issues, profitability and so on) in deciding whether a project should proceed. This is the innovative aspect of EIA: typically, without an EIA requirement, developers will consider only cost, technical issues and profitability. EIA is a mechanism for ensuring that environmental factors take their rightful place in the weighing scales.

The cases that follow illustrate the way in which US courts have interpreted the statutory requirement to carry out an impact assessment of proposed projects.

1. **Calvert Cliffs' Coordinating Committee, Inc. v United States Atomic Energy Commission** 449 F 2d 1109 (1971) (USA).

2. **Sierra Club v Coleman** XIV/6 ILM 1425 (USA)

3. **Sierra Club v Coleman** XV/6 ILM 1417 (USA)

4. **Scenic Hudson Preservation Conference v Federal Power Commission** 354 F.2d 608 (1965) (USA).

5. **Natural Resources Defence Council v United States Nuclear Regulatory Commission (Vermont Yankee)** 547 F. 2d 633 (1976) (USA).

6. **Vermont Yankee Nuclear Power Corp. v Natural Resources Defence Council, Inc. et al** 435 U.S. 519, 98 S.Ct. 1197.

Calvert Cliffs' Coordinating Committee, Inc. v United States Atomic Energy Commission dealt with four issues:

(1) the effective date for implementation of the statutory EIA requirement;

(2) how agencies must deal with projects which were already in the pipeline ("ongoing projects") at the time when the mandatory EIA requirement became effective;

(3) the role of the agency in evaluating the EIA report; and

(4) the role of EIA in setting environmental standards to be met by developers, and its relationship with other standard setting agencies.

The case arose out of the rules which were adopted by the Atomic Energy Commission to govern consideration of environmental matters in individual decisions. The petitioners objected to four aspects of the rules.

Although NEPA went into effect on 1st January 1970, the Rules imposed an effective date of 4th March 1971. They thus prohibited parties from raising non-radiological environmental issues at any hearing if the notice for that hearing appeared in the Federal Register before 4th March 1971.

In relation to ongoing projects, the Rules provided that when a construction permit for a facility had been issued before compliance with the National Environmental Policy Act (NEPA) was required, but an operating licence had yet to be issued, the Agency would not formally consider environmental factors or require modifications in the proposed facility until the time of issuance of the operating licence.

Third, the Rules required that the Agency's staff consider environmental factors but limited the role of the hearing board whose function was to conduct an independent review of the staff's recommendations. The Rules did not require the board to consider environmental factors unless these were affirmatively raised by outside parties or staff members;

Finally, the Rules prohibited the hearing board from conducting an independent evaluation and balancing of environmental factors if other responsible agencies had already certified that their own environmental standards were satisfied by the proposed federal action.

On the first issue, the Court observed that NEPA went into effect on January 1, 1970. The Commission's Rules, on the other hand, prohibited any consideration of environmental issues by its hearing boards at proceedings officially noticed before 4th March 1971, fourteen months after the Act went into effect. The result was that major federal acts having a significant environmental impact might be taken by the Commission without full compliance with NEPA. The Commission explained that the long time lag was intended to provide an orderly transition in the conduct of the Commission's regulatory proceedings, and to avoid unreasonable delays in the construction and operation of nuclear power plants urgently needed to meet the national requirements for electrical power. It argued that NEPA did not lay down detailed guidelines and inflexible timetables for its implementation, and that there was no bar to arrangements which were designed to accommodate transitional implementation problems.

The Court held that the absence of a timetable indicated that compliance was required immediately. Even if the long delay had been necessary the Commission would not have been relieved of all NEPA responsibility to hold public hearings on the environmental consequences of actions taken between 1st January 1970 and the final adoption of the Rules. Although the Act's effective date might not require instant compliance, it required that NEPA procedures, once established, be applied to consider prompt alterations in the plans or operations of facilities approved without compliance. The Court observed that the Commission's delay was based on what it believed to be a pressing power crisis. Inclusion of environmental issues in the pre 4th March 1971 hearings might have held up the licensing of some power plants for some time. The Court held however that the very purpose of NEPA was to tell federal agencies that environmental protection was as much a part of their responsibility as was the protection and promotion of industries they regulated. The specter of a national power crisis could not be used to create a blackout of environmental considerations in the agency review process.

The second issue related to the Commission's Rules governing a particular set of nuclear facilities: those for which construction permits had been granted without consideration of environmental issues but for which operating licences had yet to be issued. These facilities, still in varying degrees of construction, included the one of most immediate concern to one of the plaintiffs: the Calvertt Cliffs nuclear plant. The Commission's Rules recognized that the granting of a construction permit before NEPA's effective date did not justify disregarding environmental consequences until the operating licence proceedings, far into the future. It had provided for three measures during the pre-operating licence stage: it required that a condition be added to all construction permits, whenever issued, which would oblige the holders of the permits to observe all applicable environmental standards imposed by federal or state law; it required permit holders to submit their own environmental report on the facility during construction; and it initiated procedures for the drafting of its staff's detailed environmental statement in advance of operating licence proceedings.

The Court observed that the Commission refused to take any action as a result of the material in the environmental reports. It would allow construction to proceed on the original plans, regardless of what the reports showed, and would not consider requiring alterations in those plans even though the detailed statements had to contain an analysis of possible alternatives and might suggest relatively inexpensive but highly beneficial changes. Thus, reports and statements would be produced, but nothing would be done with them.

The Court observed that the Commission seemed to believe that the mere drafting and filing of papers was enough to satisfy NEPA. It argued that a full consideration of alternatives and independent action would cause too much delay at the pre-operating licence stage. It justified its Rules as the most that was "practicable in the light of environmental needs and other essential considerations of national policy." It cited the national power crisis as a consideration of national policy militating against delay in the construction of nuclear power facilities. The Court held that NEPA required that an agency had to consider alternatives to its actions which would reduce environmental damage. That principle required that consideration of environmental matters had to be more than a *pro forma* ritual. It was pointless to consider environmental costs without seriously considering action to avoid them.

The Court observed that the special importance of the pre-operating licence stage was that in cases where environmental costs were not considered in granting a construction permit, it was likely that the planned facility would include some features which did significant damage to the environment and which could not have survived a rigorous balancing of costs and benefits. At the subsequent operating licence proceedings this environmental damage would have to be fully considered. But by that time the situation would have changed radically. Once a facility had been completely constructed, the economic cost of any alteration might be very great. In the language of NEPA, there was likely to be an "irreversible and irretrievable commitment of resources" which would inevitably restrict the Commission's options. Either the licensee would have to undergo a major expense in making alterations in a completed facility or the environmental harm would have to be tolerated.

The Court held that by refusing to consider alterations until construction was completed the Commission might effectively foreclose the environmental protection desired by Congress. It might also foreclose rigorous consideration of environmental factors at the eventual operating licence proceedings. If "irreversible and irretrievable commitment of resources" had already been made, the licence hearing might become a hollow exercise. A full consideration of the cost implications in the original plans of a facility was appropriate well before the operating licence proceedings. In order that the pre-operating licence review be as effective as possible the Commission needed to consider the requirement of a temporary halt in construction pending review. Although final operation of the facility might be delayed thereby, some delay was inherent whenever a NEPA consideration was conducted, whether before or after the licence proceedings. It was far more consistent with the purposes of the Act to delay operation at a stage where real environmental protection might come about than at a stage where corrective action might be so costly as to be impossible. The Court held that the Commission had to go further than it had and consider action as well as file reports and papers at the pre-operating licence stage. Such consideration did not amount to a retroactive application of NEPA. Although the projects in question might have been commenced and initially been approved before 1st January 1, 1970 the Act applied to them since they had to still obtain operating licences before going into full operation.

The third issue related to the role of the agency in considering the EIA report. NEPA required that copies of an agency's staff's detailed statement, and comments on it, "shall accompany the proposal [for the project] through the existing agency review process." The Commission's Rules stated that if any party to a proceeding raised any environmental issue, the applicant's Environmental Report and the detailed statement would be offered in evidence. But if no party raised any environmental issue, such issues would not be considered by the Atomic Safety and Licensing Board. Therefore, although the Applicant's Environmental Report, the comments on it, and the Detailed Statement would accompany the application through the Commission's review process, they would not be received in evidence, and the Commission's responsibilities under the NEPA would be carried out in *toto* outside the hearing process.

The Court held that the word "accompany" had to be read to indicate a congressional intent that environmental factors, as compiled in the "detailed statement", had to be considered through the agency review process. NEPA required that agencies consider the environmental impact of their actions "to the fullest extent possible." Compliance to the fullest extent demanded that environmental issues be considered at every important stage in the decision making process concerning a particular action. Whereas consideration which was entirely duplicatory was not required, independent review of staff proposals by hearing boards was not a duplicative function. A truly independent review provided a crucial check on the staff's recommendations. The Court further observed that the Commission's hearing boards automatically considered non-environmental factors, even though these had previously been studied by the

staff. The review process was an appropriate stage at which to balance conflicting factors against one another. And it provided an important opportunity to reject or significantly modify the staff's recommended action. Environmental factors, therefore, could not be singled out and excluded at this stage from the proper balance of values envisioned by NEPA. The Court observed that the greatest importance of NEPA was to require agencies to *consider* environmental issues just as they considered other matters within their mandates.

The Court observed that the Commission's Regulations provided that in an uncontested proceeding the hearing board would on its own "determine whether the application and the record of the proceedings contain sufficient information, and the review of the application by the Commission's regulatory staff has been adequate." The Court held that NEPA required at least as much automatic consideration of environmental factors. In uncontested hearings, the board did not need necessarily to go over the same ground considered in the detailed statement. But it had to examine the statement carefully to determine whether the review by the Commission's regulatory staff had been adequate. And it independently had to consider the final balance among conflicting factors that was struck in the staff's recommendation.

The Court observed further that it may have been supposed that whenever there are serious environmental costs overlooked or uncorrected by the staff, some party would bring them to the hearing board's attention. However, the Court held that it was unrealistic to assume that there would always be an intervenor with the information, energy and money required to challenge a staff recommendation which ignored environmental costs. NEPA established environmental protection as an integral part of the Commission's basic mandate. The primary responsibility for fulfilling that mandate lay with the Commission. Its responsibility was not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it had itself to take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation.

The fourth issue dealt with the interrelationship between the environmental duties imposed on agencies under NEPA and similar duties of environmental protection imposed on other agencies by other statutes. NEPA required a consideration of any and all types environmental impact of federal action. But the Commission's Rules excluded from full consideration a wide variety of environmental issues in particular issues which had been dealt with by other agencies. Thus, the Rules provided that no party may raise, and the Commission may not independently examine, any problem of water quality, perhaps the most significant impact of nuclear power plants. The Commission stated that it would defer totally to water quality standards devised and administered by state agencies and approved by the Federal government under the Federal Water Pollution Control Act: "certification by the appropriate agency that there is reasonable assurance that the applicant will observe standards and requirements will be considered dispositive for this purpose." The Commission's Rules provided that in such circumstances it would simply include a condition in all permits requiring compliance with water quality and other standards set by such agencies. The upshot was that the NEPA procedures would be applied only to those environmental issues wholly unregulated by any other federal, state or regional body.

The Court observed that NEPA mandated a case by case balancing judgement on the part of federal agencies. In each individual case, the economic and technical benefits of planned action had to be assessed and then weighed against the environmental costs, and alternatives had to be considered which would affect the balance of values. The point of the individualized balancing analysis was to ensure that the optimally beneficial action was taken. The Court held that certification by another agency that its own environmental standards were satisfied involved an entirely different kind of judgement. Such agencies, without overall responsibility for the particular federal action in question, attended only to one aspect of the problem: the magnitude of certain environmental costs. They simply determined whether those costs exceeded an allowable amount. Their certification did not mean that they found no environmental damage whatever. In fact there might be significant environmental damage, but not quite enough to violate applicable standards. Certifying agencies did not attempt to weigh that damage against the ensuing benefits and so the balancing analysis remained to be done. It might be that the environmental costs, though meeting prescribed standards, were nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgement was the agency with overall responsibility for the proposed federal action. By abdicating its discretion entirely to other agencies' certifications, the Commission neglected the mandated balancing analysis, thereby precluding concerned members of the public from raising a wide range of environmental issues in order to affect particular Commission decisions. The Commission had argued that the other agencies had the special environmental expertise but the Court held that NEPA did not overlook this consideration. It provided for full consultation with the other agencies, but it did not authorize a total abdication of discretion to the other agencies.

The Court observed that Federal agencies may have specific statutory duties under Acts other than NEPA to obey particular environmental standards. Section 104 of NEPA made clear that such duties were not to be ignored: "Nothing shall affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality (2) to coordinate or consult with any other Federal or state agency or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or state agency." Section 104 intended to ensure that the general procedural reforms achieved in NEPA did not wipe out the more specific environmental controls imposed by other statutes. The Court held that the third of these obligations made the granting of a license by the Commission contingent upon a water quality certification but it did not require the Commission to grant a licence once a certification had been issued, nor did it preclude the Commission from demanding water pollution controls from its licensees which were more strict than those demanded by the applicable water quality standards of the certifying agency. Water quality certifications essentially established a minimum condition for the granting of a licence. But that did not end the matter. The Commission could then go on to perform the very different operation of balancing the overall benefits and costs of a particular proposed project, and considering alternations (above and beyond the applicable water quality standards) which would further reduce environmental damage.

Sierra Club v Coleman considered the quality of the EIA report. The case arose as a result of the plan by the Department of Transport and the Federal Highway Administration to construct the "Darien Gap Highway" through Panama and Columbia to link the Pan American Highway system of South America with the Inter-American Highway.

In April 1974, well after the project was underway and well after the selection of the precise route of the highway had been made, the Federal Highway Administration (FHWA) prepared and circulated to certain parties a draft Environmental Impact Assessment. In December 1974 it issued a final assessment. The Sierra Club and three other environmental organizations sought to enjoin any further action on the project, claiming that the preparation and issuance of the assessment satisfied neither the procedural nor the substantive requirements of NEPA.

The Court found that there were three deficiencies in FHWA's compliance with the NEPA requirements. First FHWA failed to circulate either its draft or final assessment to the Environmental Protection Agency for its comments. Second, the assessment failed to discuss the problems of the transmission of aftosa, or foot and mouth disease, the risk of which was recognized if a stringent control programme was not in place. The assessment failed to discuss the environmental impact upon the USA of the breakdown of the aftosa control programme, should this occur. Thirdly, the assessment failed adequately to discuss possible alternatives to the route that had been chosen. The section on the alternative routes was devoted to an analysis of why the shorter route was preferable to the longer route from the point of view of engineering and cost. It had no discussion of the environmental impact of possible alternatives to the route actually selected.

The Court held that it was indispensable for the statement to discuss the relative impacts of other land routes though they might cost more or be less feasible from the engineering perspective. The Court found that the assessment was not an adequate environmental impact statement. Indeed, the Court observed, the decision to build the highway on the chosen route had been made well before the statement was begun. The Court enjoined further work on the project until such a time as compliance with NEPA had been effected.

In a sequel to the case, the Defendants produced a final Environmental Impact Statement for the project, and went back to court to seek a lifting of the injunction to enable them proceed with the project. The plaintiffs contended that the assessment was still defective and sought an extension of the injunction. The Court observed that the premise from which any environmental impact statement had to begin was the recognition that its goal was to provide a detailed discussion sufficient to allow the agency decision maker fully to consider the possible environmental effects of various alternative paths the agency might choose to pursue with respect to a given project. The Court held that the statement was still deficient and extended the injunction until the deficiencies were remedied.

Scenic Hudson Preservation Conference v Federal Power Commission dealt with the consideration of alternatives to the line of action proposed. The case arose from an application by the petitioners to set aside granting a licence to construct a pumped storage hydroelectric project on the Hudson River. Under the Federal Power Act, to be licensed by the Commission, a prospective project had to meet the statutory test of being "best adapted to a comprehensive plan for improving or developing a waterway." The Commission therefore had to compare the project with available alternatives and only grant the application if no other better adapted alternatives were available. The Court held that, for the Commission properly to discharge its duty, the record on which it based its determination had to be complete. In this case, the Commission had failed to compile a record which was sufficient to support its decision: it

had ignored certain relevant factors and failed to make a thorough study of the possible alternatives to the project. The Commission's order was therefore set aside.

Natural Resources Defence Council v United Sates Nuclear Regulatory Commission ("Vermont Yankee") involved a proceeding to licence a specific nuclear reactor, the Vermont Yankee. It highlights the pitfalls inherent in incremental licensing arrangements and the need to avoid these by comprehensive procedures.

The petitioners sought consideration of the environmental effects of that portion of the "nuclear fuel cycle" attributable to operation of the reactor. The Appeal Board, on the other hand, held that Licensing Boards must consider the environmental effects of transport of fuel to a reactor and of wastes to reprocessing plants, but need not consider the "operations of the reprocessing plants or the disposal of wastes" in individual licensing proceedings.

The Court observed that a reactor licensing was an action requiring a detailed environmental impact statement under the National Environmental Protection Act. The impact statement needed to consider, among other things: (i) any adverse environmental effects which could not be avoided should the proposal be implemented, and (ii) any irreversible and irretrievable commitment of resources which would be involved in the proposed action should it be implemented. The Court held that this language encompassed radioactive wastes generated by the operation of a nuclear power station. To justify its decision that reprocessing and waste disposal issues need not be considered at the licensing stage the Appeal Board had argued that (i) these issues were too speculative, and that (ii) they were more appropriately considered when reprocessing and waste disposal facilities were themselves licensed.

The Court noted that the Board agreed that there would be an incremental effect ultimately resulting from the operation of the reactor as a result of the operation of whatever reprocessing and disposal grounds might from time to time be used during the life of the plant. The Board's opinion however was that these effects were too "contingent and presently undefinable" to be evaluated at the time of licensing in view of the 40 year expected life of the reactor. The Court observed that the obligation to make reasonable forecasts of the future was implicit in NEPA. Therefore an agency could not "shirk its responsibilities under NEPA by labelling any and all discussion of future environmental effects as 'crystal ball inquiry'." Further, meaningful information concerning the effects of waste reprocessing and disposal technology was available and the possibility that improved technology might be developed during the 40 year life span of a reactor did not render consideration of environmental issues too speculative. NEPA's requirement for forecasting environmental consequences far into the future implied the need for predictions based on existing technology and those developments which could be extrapolated from it. The Court held that, as more and more reactors producing more and more wastes were brought into being, "irretrievable commitments [were] being made and options precluded, and the agency [had to] predict the environmental consequences of its decisions as it [made] them."

The second argument by the Board was that licensing proceedings for reprocessing plants were a more appropriate proceeding in which to weigh the environmental effects of reprocessing and waste disposal. The Court noted that the real question posed by the Board's opinion was whether the environmental effects of the wastes produced by a nuclear reactor could be ignored in deciding whether to build it because they would later be considered when a plant was proposed to deal with them. It observed that once a series of reactors were operating, it was too late to consider whether the wastes they generated should have been produced, no matter how costly and impractical reprocessing and waste disposal turned out to be; all that remained were engineering details to make the best of the situation which had been created. The Court observed that NEPA's purpose was to break the cycle of such incremental decision-making. Further decisions to licence nuclear reactors which generated large amounts of toxic wastes were a paradigm of "irreversible and irretrievable commitment of resources" which had to receive detailed analysis under the NEPA. The Court held that, in the absence of effective generic proceedings to consider these issues, they had to be dealt with in individual licensing proceedings.

This decision was overturned by the Supreme Court in **Vermont Yankee Nuclear Power Corp v Natural Resources Defence Council** on the basis, among others, that, reviewing courts must not engraft their own notions of proper procedures upon agencies.

(c) Choice of Forum

The concept of "conflicts of laws" describes the situation in which a legal dispute is governed by the laws of more than one legal system. This can be either because the acts or omissions over which there is a dispute occurred in more than one country or because the parties have their domicile ("country of residence") in different countries. An exam-

ple of such a situation is provided by the case of a multinational corporation whose domicile is in one country (typically an industrialized country) but which carries out business activities in another (typically a non-industrialized country) through a subsidiary. With the increasing globalization of the world economy, this phenomenon is becoming the norm rather than the exception.

"Conflicts of laws" provides the rules for resolving such conflicts. The traditional rule is that the natural forum ("forum conveniens") in which a dispute should be determined is that with which it has the most real and substantial connection. Such connecting factors include (i) factors of convenience, expense and availability of witnesses; (ii) the law governing the relevant transaction; and (iii) where the parties reside or carry on business. In effect, unless there are exceptional circumstances, action must be filed in the country where the transaction took place. In the example of the multinational above, action must be filed in the non-industrialized country where the activities in question are carried out rather than in the country of domicile of the multinational.

The concern is often expressed however that the traditional rule enables multinational and other global operators to take advantage of the less stringent standards, weak enforcement capability and puny penalties that are characteristic of poor countries. In the field of environmental conservation poor countries often have inadequate health and safety and environmental standards; lack the institutional capability to monitor and enforce the standards, inadequate as they are; and lack mechanisms for imposing appropriate penalties on offenders. The result is that environmental degradation and damage to health and safety goes unpunished and unremedied.

In recent years it has increasingly been argued that the traditional rule of *forum conveniens* needs to be altered to provide that multinational corporations may be sued in their countries of domicile for the actions or omissions of their subsidiaries abroad. This would enable litigants in poor countries to take advantage of the high standards, strong enforcement systems and stringent penalties in industrialized countries. Additionally, it would ensure that multinationals are held to the same standards at home as abroad. This would contribute to an overall improvement in environmental conservation and health and safety protection around the world.

The two cases below illustrate the trends in the jurisprudence of a number of legal systems.

1. **Charan Lal Sahu v Union of India** AIR 1990 Supreme Court 1480 (Bhopal Gas Disaster) (India)

2. **Englebert Ngcobo & Others v Thor Chemicals Holdings Ltd & Others** No 1994 N 1212 (UK) (the **Thor Chemicals** case).

Charan Lal Sahu v Union of India arose out of the Bhopal Gas Disaster, which occurred on the night of 2nd December 1984 in Bhopal, India. Toxic gas escaped from a storage tank at the Bhopal chemical plant of the Union Carbide (I) Ltd, a subsidiary of the American multinational, Union Carbide Corporation. This killed approximately 3000 people, injured up to 30,000 people, polluted the environment and affected flora and fauna. On 7th December 1984 the Chairman of Union Carbide came to Bhopal and was arrested but later released on bail.

Between December 1984 and January 1985 suits were filed by several American lawyers in various courts in America on behalf of several victims. Some suits were also filed before the District Court of Bhopal by individual claimants. On 6th February 1985 all suits in various US district courts were consolidated. On 29th March the Indian Parliament passed the Bhopal Gas Disaster (Processing of Claims) Act (1985), giving the Government the exclusive right to pursue the claims on behalf of the victims. On 12th May 1986 the US court allowed the application of Union Carbide on forum *non conveniens* on condition that Union Carbide consent to the jurisdiction of the courts in India.

On 5th September 1986 the Government filed a suit for damages in the District Court of Bhopal. On 16th December 1986 Union Carbide filed a written statement contending that they were not liable on the ground that they had nothing to do with the Indian company; that they were a different legal entity; and that they never exercised any control over the Indian subsidiary company. On 14th February 1989 the Court ordered an overall settlement of the suit on the basis that Union Carbide would pay US$470 million to the Government of India "in full settlement of all claims, rights and liabilities" by 31st March 1989.

In **Charan Lal Sahu v Union of India** certain victims of the disaster challenged the constitutional validity of the Bhopal Gas Disaster (Processing of Claims) Act (1985). They argued that the Act took away the right of action by the victims and wrongfully vested this in the State. They contended that the State could not act on behalf of the victims as it was itself a joint tortfeasor, having allowed the operation of a dangerous industrial activity to proceed. The Court

held, however, that the State was entitled to step in on grounds, *inter alia*, of the right of *parens patrie*, and protect the rights of the victims who otherwise would have experienced great difficulty in pursuing the claims, particularly as the victims were mostly poor, ignorant and illiterate people who would be ill equipped to pursue claims in courts in the USA and in India.

Other victims challenged the settlement arrived at on 14th February 1989 as being too low and, in any case, as invalid because it was agreed to without consulting the victims. In **Union Carbide Corporation v Union of India & Others** AIR 1990 Supreme Court 273, the Court explained the basis of the settlement. The basic consideration motivating the settlement was the compelling need for urgent relief to alleviate the suffering of the victims which had been intense and unrelieved. Even after years of litigation basic questions of the fundamentals of the law as to liability of Union Carbide and the quantum of damages were yet to be debated. The Court considered it a compelling duty to secure immediate relief to the victims, and therefore facilitated a settlement. In assessing the quantum of damages payable the Court adopted the principle that the measure of damages payable had to be correlated to the magnitude and the capacity of the enterprise because such compensation must have a deterrent effect. But, in effecting a settlement the Court did not pronounce on certain important legal questions such as principles of liability of multinationals operating with inherently dangerous technology in developing countries as, in view of the settlement, there was no occasion to do so.

The Court observed *obiter* that the Bhopal gas leak disaster emphasized the need for laying down norms and standards that the Government ought to follow before granting licences for industries dealing with dangerous materials. One condition for such licences could be the creation of a fund for payment of damages in case of an accident. Claims from such fund would be processed through a procedure designed to cut out delay, and the basis of payment should be fixed by statute, taking into account the nature of damage inflicted, its consequences and the ability of the party responsible to pay, thus incorporating a punitive element.

In a separate opinion one of the judges expressed the view that a multinational corporation should be made liable to the laws of the country in which it carries out its activities. The liability should not be restricted to the affiliate company; the parent company should also be made liable for any damage caused. Another judge observed that the victims had been handicapped by the fact that the immediate tortfeasor was a subsidiary of a multinational with its Indian assets totally inadequate to satisfy the claims arising out of the disaster. The judge expressed the view that it was necessary to ensure that (i) foreign corporations seeking to establish operations in India agreed to submit to the jurisdiction of the courts in India in respect of tortious acts in India; (ii) liability of such a corporation was not limited to such of its assets (or the assets of its affiliates) as may be found in India; the victims should be able to reach out to the assets of such corporations anywhere in the world; and (iii) any decree obtained in Indian courts should be capable of being executed against the foreign corporation, its affiliates and their assets without further procedural hurdles in those countries.

Thus, in the Bhopal Gas Disaster case, the issue was pronounced on only obiter. The position in the next case was more clear-cut.

In **the Thor Chemicals Case** temporary workers at a plant belonging to the second defendant, Thor Chemicals South Africa (Proprietary) Ltd in Natal filed suit against their employer's parent company in England. The South African company was a wholly owned subsidiary of the first defendant, a UK company. The third defendant was the Chairman of the South African company, and the Chairman and Managing Director of the UK parent company.

The South African plant manufactured and reprocessed mercury compounds. The three employees were exposed to hazardous and unsafe quantities of mercury. The first plaintiff's husband died and his widow brought suit on his behalf. The second plaintiff became ill and disabled. The third defendant also died from the exposure, and his mother sued on his behalf. None of the plaintiffs could have sued the employer, the second defendant, in South Africa because section 7 of the South African Workmen's Compensation Act 1941 prohibited action by an employee against his employer for injuries sustained at work. Instead, irrespective of fault, an employee was entitled to claim workmen's compensation from the Commissioner who administers a workmen's compensation fund. Each of the workmen had been paid some compensation under this scheme. The Commissioner was empowered to pay an increased amount of compensation if there was negligence on the part of the employer. Notwithstanding the prohibition under section 7, section 8 expressly permitted a workman to sue a third party tortfeasor such as the defendants in South Africa in respect of injuries sustained at work. It was accepted that an action in South Africa would lie against the defendants for events in South Africa, and the defendants undertook that they would submit to jurisdiction in South Africa. But the plaintiffs case was that negligence by all three defendants in England as well as in South Africa caused exposure

to mercury, and so they had brought their claims in England against all three defendants whose domiciliary forum was England.

The Plaintiff's submitted that the defendants had a mercury processing plant in England with Bill Smith as the production foreman. Between 1981 and 1987 inspectors from the Health and Safety Executive in England reported high levels of mercury in the air and in the urine of the work force at the plant. In 1987 the plant was closed down, having been moved in two stages in 1985 and 1987 to the South African subsidiary in Natal. All three defendants were responsible for the research, design, set up and commissioning of the South African plant and Bill Smith was sent out to South Africa to assist in the setting up process and in the supervision of workers. All defendants were aware of the potential hazards to health and safety by exposure to high levels of mercury. It was Smith's job to see to it that the workers were aware of these hazards and to ensure (a) that safe working practices were in place; (b) that adequate and properly maintained safety equipment was used; (c) that workers were properly trained in safety; and (d the health and safety of workers was properly monitored. The plaintiffs submitted that the negligence of all three Defendants caused the exposure of the three temporary workers to hazardous levels of mercury. They alleged that an unsafe working system was transferred from England to South Africa identical to that which was known by the Defendants to be unsafe, that all three Defendants were vicariously liable for Bill Smith's negligence and that tortious liability therefore existed in England. The Defendants sought stay of the proceedings on the ground that England was not an appropriate forum, and South Africa was clearly a more appropriate forum.

The Court observed that the law on *forum conveniens* was that stay would only be granted where the court was satisfied that there was some other available forum having competent jurisdiction in which the case might be tried more suitably in the interest of all the parties and in the interest of justice. The natural forum was that with which the action had the most real and substantial connection. Connecting factors included (i) factors of convenience, expense and availability of witnesses; (ii) the law governing the relevant transaction; and (iii) where the parties resided or carried on business. But the Court had to consider all the circumstances of the case, including circumstances which went beyond those taken into account when considering connecting factors with other jurisdictions. One such factor could be that the plaintiff would not obtain justice in the foreign jurisdiction. As to the extent to which a legitimate personal or juridical advantage might be relevant, the mere fact that the Plaintiff had such an advantage in proceedings in England could not be decisive; the fundamental principle was where the case might be tried suitably for the interest of all the parties and for the ends of justice. Thus, damages on a higher scale, a more appropriate procedure of discovery, a power to award interest as a general rule in England must not deter a court from granting a stay simply because the Plaintiff would be deprived of such an advantage, provided that the court was satisfied that substantial justice would be done in the appropriate available forum.

The Court held that the plaintiffs had evidence available to demonstrate a nexus between negligence in England and the damage which occurred in South Africa. If a stay were granted the Plaintiffs might have difficulty in mounting their case in South Africa in so far as it related to negligence in England, and there was a grave danger that justice would not be done. On the issue of the unavailability of legal aid in South Africa, the plaintiff's impecuniosity would of itself not constitute a basis for refusing stay. On the basis of these factors the Court would allow the case to proceed in England.

(d) Public Trust

Roman law developed a legal theory known as the "doctrine of public trust." Its basis was the belief that certain common properties such as rivers, the seashore, forests and the air were held by the State in trust for the general public. The resources were conceived of as being owned either by no one (*res nullius*) or by every one in common (*res communious*). The English common law adopted this doctrine. It vested ownership of common properties in the Sovereign and stipulated that the Sovereign could not grant ownership in them to private owners if the effect of such grant was to interfere with the public interest: the resources were held in trust by the Sovereign for the benefit of the public. This factor distinguished common properties from general public properties which the Sovereign could grant to private owners.

From its Roman origins, the Public Trust doctrine has become part of the law of all countries with a common law heritage. It enjoins the Government to protect common property resources for the benefit of the general public, and not permit their use for private purposes. Such property may not be sold or converted to other kinds of use.

The Public Trust doctrine under the English common law extended only to certain traditional uses such as navigation, commerce and fishing. Subsequently the courts expanded the doctrine to cover ecologically important lands

generally. It is now considered that the needs of environmental conservation are relevant in determining which lands, waters, or airs are protected by the public trust doctrine. The cases below illustrate the use of the Public Trust doctrine for environmental conservation in litigation in various countries.

1. **M.C. Mehta v Kamal Nath & Others** (1977) 1 SCC 388 (India)

2. **In re: Human Rights Case (Environment Pollution in Balochistan**) P L D 1994 Supreme Court 102 (Pakistan)

3. **General Secretary West Pakistan Salt Miners Labour Union v The Director of Industries and Mineral Development, Punjab, Lahore** 1994 S C M R 2061 (Pakistan)

4. **Niaz Mohammed Jan Mohammed v Commissioner of Lands & Others** HCCC No 423 of 1996 (Kenya)

5. **Abdikadir Sheikh Hassan v Kenya Wildlife Service** HCCC No 2059 of 1996 (Kenya)

6. **Commissioner of Lands v Coastal Aquaculture Ltd** Civil Appeal No 252 of 1996 (Kenya)

The three cases below, from India and Pakistan respectively, illustrate the extent to which courts in those countries have gone to dispense with procedural hurdles in public interest cases in addition to illustrating reliance on the public trust doctrine for environmental conservation. The Supreme Court of India blazed the trail. It took the view that when any member of a public or social organization espoused the cause of the poor and the downtrodden such member should be permitted to move the Court even by merely writing a letter without incurring expenditure of his own. In such a case the letter was regarded as an appropriate proceeding falling within the purview of Article 32 of the Constitution. This was the beginning of the exercise of new jurisdiction in India known as epistolary jurisdiction, which has been followed in Pakistan and Bangladesh, the two neighbouring jurisdictions.

In **M.C. Mehta v Kamal Nath & Others** a news item appeared in the Indian Express stating that a private company in which the family of Kamal Nath (former Minister for Environment and Forests) had a direct link, had built a club on the banks of a river encroaching land including substantial forest land which was later regularized when Kamal Nath was the Minister. It was stated that earth movers and bulldozers were used to turn the course of the river in an effort to create a new channel by diverting the river flow, and save the club from future floods. The Supreme Court took notice of the news item because the facts disclosed therein, if true, would be a serious act of environmental degradation.

The Court observed that the Public Trust doctrine rested on the principle that certain resources like air, sea, waters and the forests have such a great importance to the public as a whole that it would be wholly unjustified to make them a subject of private ownership. The doctrine enjoined the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. The Court held that the Government committed a breach of public trust by leasing the ecologically fragile land to the company, cancelled the lease and ordered the restoration of the land to its original condition.

In In re: Human Rights Case (Environment Pollution in Balochistan the Supreme Court noticed a news item in a daily newspaper to the effect that business tycoons were making attempts to purchase a coastal area of Balochistan and convert it into a dumping ground for waste material, including nuclear waste. This would have created an environmental hazard and pollution, and would violate Article 9 of the Constitution.

The Court enquired from the Chief Secretary, Balochistan whether coastal land of Balochistan or any area within the territorial waters of Pakistan had been or was being allotted to any person or whether an application for allotment had been made. In compliance with the notice the Chief Secretary made enquiries from various departments who submitted reports which were forwarded to the Court. The reports showed that no plot had been allotted for dumping nuclear waste. The Court observed that no person would apply for allotment of land for dumping nuclear or industrial waste. This would be a clandestine act in the garb of a legal and proper business activity. The authorities were therefore to be vigilant and regularly check that allottees do not dump nuclear or industrial waste on the land or in the sea.

The Court made the following orders: (i) the authorities were to submit details of persons to whom land had been allotted, (ii) if any application for allotment was made full particulars were to be supplied to the Court; and (iii) the authorities should insert a condition in allotment letters that the allottee would not use the land for dumping nuclear or industrial waste.

In **General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewra, Jhelum v The Director, Industries and Mineral Development, Punjab, Lahore** the petitioners based their claim on the right to have clean and unpolluted water. Their apprehension was that in case the miners were allowed to continue their activities, the watercourse, reservoir and pipeline would get contaminated. The petition was filed under Article 184(3) of the Constitution.

The Court observed that Article 9 of the Constitution provided that "no person shall be deprived of life or liberty save in accordance with the law." Further that the word "life" had been given an extended meaning and could not be restricted to vegetative life or mere animal existence. The Court held that the right to have unpolluted water was a right to life itself.

The Court observed that in human rights cases/public interest litigation under Article 184(3) of the Constitution, the procedural trappings and restrictions of being aggrieved persons and other similar technical objections could not bar the jurisdiction of the Court. The Court had vast power to investigate into questions of fact as well as independently by recording evidence, appointing Commissions or any other reasonable and legal manner to ascertain the correct position. The Court therefore established a Commission to ascertain the position and report and granted other remedial measures.

The Kenyan cases illustrate the use of the public trust doctrine to review the exercise of statutory powers by public authorities.

In **Niaz Mohammed Jan Mohammed v Commissioner of Lands & Others** the plaintiff was the proprietor of land in Kisauni/Nyali area within Mombasa Municipality. During the construction of the New Nyali Bridge in 1979, a new access road to Kisauni and Nyali was constructed. This traversed certain plots of lands, among them the plaintiff's. The Commissioner of Lands therefore compulsorily acquired the lands under the provisions of the Land Acquisition Act. The plaintiff thereafter enjoyed a road frontage and direct access to that road until November 1995 when the Commissioner of Lands created a new leasehold title from a portion which remained uncovered by the tarmac road and allocated this to the third to fifth defendants. The plaintiff protested against this as an interference with his easement rights of access to the new road and its road reserve, and an unlawful alienation of public land to private developers. He filed suit seeking orders for a declaration that the allocation was null and void and that the land in issue should remain a road and road reserve. He also sought temporary restraining orders against the third to fifth defendants.

The plaintiff's case was that he had private rights to protect which were intertwined with public rights. His private rights arose from his position as a frontager. The portion of his land which was acquired was not acquired for any other purpose but for construction of a road. If not all of it was used, any remaining portions comprised the remaining road and its road reserve. Under the Local Government Act such areas were under the control of the local authority which exercised trusteeship rights and had no right of alienation in breach of that trust.

The Court held that there was no right of compulsory acquisition of any land by the Government for purposes other than those provided for in the Constitution. If it were not so a loophole would be created for any Government which did not mean well for its citizens. It could compulsorily acquire land on the pretext of public good, compensate the owners of the property acquired with taxpayers' money and then allocate the land to those it wished. The law required that, subsequent to the acquisition, the land must be used only for the purpose for which it was acquired. In this instance the land had been acquired for the construction of a public road. Unutilized portions remained road reserves. If it was found that it was unnecessary to have acquired those portions for the expressed purpose, equity required that the portions be surrendered back to the persons from whom the land had been compulsorily acquired. Further the road and its reserves were vested in the local authority to hold in trust for the public. Therefore neither the Government nor the local authority could alienate it under the Government Lands Act.

In **Abdikadir Sheikh Hassan v Kenya Wildlife Service** the applicants sought orders restraining the defendants from removing the hirola antelope from its natural habitat in Arawale to Tsavo National Park or any other place on the ground that it was a gift to the people of the area and should be left there. The defendant argued against the application on the basis that the application was seeking to curtail it from carrying out its express statutory mandate.

The Court observed that according to the common law and customary law of Kenya those entitled to the use of the land were also entitled to its fruits which included the fauna and flora, unless these had been taken away by the law. Under the Constitution of Kenya only minerals and oils were excluded from the ownership of those entitled to the use

of the land. The Wildlife (Conservation and Management) Act entitled Kenya Wildlife Service to conserve the wild animals in their natural state. It did not entitle it to translocate them. The Court held that Kenya Wildlife Service would be acting outside its powers if it were to move any animals or plants away from their natural habitat without the express consent of those entitled to the fruits of the earth on which the animals lived. Consequently, as the respondent was trying to deplete through translocation the applicants' heritage they were entitled to maintain the suit and were entitled to an injunction.

In **Commissioner of Lands v Coastal Aquaculture Ltd** the Commissioner of Lands gave notice of an intention to acquire land which belonged to Coastal Aquaculture Ltd "for "Tana River Dealt Wetlands." A date was set for an inquiry to hear compensation claims. The respondent objected to the notice on the basis that, among other things, it did not state either the public body for which the acquisition was being made or the public purpose to be served by the acquisition. The evidence at the inquiry showed that the land had been acquired for the Tana and Athi Rivers Development Authority.

The Court held that the notice should have specified that the Tana and Athi Rivers Development Authority was the public body for which the land was being acquired. Simply stating in the public notice that the Government intended to acquire the land for "Tana and Athi River Development Wetlands" and which gave the impression that it was a public body is not good enough, being neither a public body nor a public benefit.

(e) The Precautionary Principle

The United Nations Conference on Environment and Development which was held in Rio de Janeiro, Brazil in June 1992 marked an important milestone in the development of the law on environmental conservation. Among the important documents adopted at Rio was the Rio Declaration of Environment and Development. This is a set of 27 principles which States are urged to adopt in order to integrate environmental conservation in their development programmes. It is not a legally binding document. However, it sets standards for States to follow and falls under the category of "soft law."

Principle 15 deals with the concept of precaution. It states that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.

Along with the Polluter Pays Principle, Principle 16, The Precautionary Principle quickly became one of the most frequently cited of the Rio principles. The cases that follow illustrate the way in which courts around the world have dealt with the issue of precaution in the context of litigation.

1. **R v Secretary of State for Trade and Industry ex parte Duddridge Journal of Environmental Law** vol. 7 No 2, 224 (UK)

2. **Shehla Zia v WAPDA** P L D 1994 Supreme Court 693 (Pakistan)

3. **Greenpeace Australia Ltd v Redbank Power Company Pty Ltd & Singleton Council** (1995) 86 LGERA 143 (Australia)

4. **Nicholls v Director General of National Parks and Wildlife** 1994 84 LGERA 397 (Australia)

5. **Leatch v National Parks & Wildlife Service and Shoalhaven City Council** (1993) 81 LGERA 270 (Australia)

R v Secretary of State for Trade and Industry ex parte Duddridge was an application for judicial review of the decision of the Secretary of State for Trade and Industry whereby he declined to issue regulations to the National Grid Company plc and/or other licence holders under the Electricity Act 1989 so as to restrict the electromagnetic fields from electric cables which were being laid as part of the national grid. The application was brought on behalf of three children who lived in an area where the National Grid Company was then laying a new high voltage underground cable. The applicants alleged that non-ionizing radiation which would be emitted from the new cables when commissioned and would enter their homes and schools, would be of such a level as might expose them to a risk of developing leukaemia. They argued that the Secretary of State should issue regulations which would remove any

such risk by requiring that the electromagnetic fields do not exceed a stipulated level or some other level at which, on current research, there was no evidence to suggest or otherwise hypothesize any possible risk to the health of those exposed to such fields.

The applicants argued that, in considering the issue whether there existed any danger or risks of personal injury from electromagnetic fields (EMFs) the Secretary of State had approached the matter in the wrong way; he had asked himself whether there was any evidence that such exposure does in fact give rise to a risk of childhood leukaemia. Because the scientific evidence did not establish that there was such a risk he concluded that he needed not use his power to regulate EMFs. They submitted that the proper approach would have been to ask himself whether there was any evidence of a*possible* risk even though the scientific evidence was presently unclear. This would have pitched the threshold for action at a lower level of scientific proof and the answer would have been yes, and he would have been obliged to make regulations.

The basis of the applicants' argument in favour of the lower threshold of scientific proof was that the Secretary of State was obliged to apply the precautionary principle when considering whether to take action for the protection of human health. That principle required that precautionary action be taken where the mere possibility existed of a risk of serious harm to the environment or to human health. Where this possible risk existed, a cost-benefit analysis had to be undertaken so as to determine what action would be appropriate. An application of the principle in this case would have required that the Secretary of State conduct a cost benefit analysis to ascertain what action could be taken and at what cost so as to reduce any possible risk to health from exposure to EMFs. This would have had to be done even though the scientific evidence did not show that the risk to health actually existed. The Secretary of State had not done this and, say the applicants, this failure vitiated the exercise of his discretion.

The Secretary of State argued that he was under no obligation to apply the precautionary principle under EC or other law. The applicants accepted that unless the Secretary of State was bound to apply the precautionary principle, his acceptance of the advise that there was no basis on which to restrict human exposure to EMFs and the consequent exercise of his discretion to decline to issue regulations could not be impugned by judicial review.

The Court accepted that, if the Secretary of State was shown to be under a legal obligation to apply the precautionary principle to legislation concerned with health and the environment, the possibility of harm raised by the existing state of scientific knowledge was such as to oblige him to apply it in considering whether to issue regulations to restrict exposure to EMFs. He would be obliged to conduct the cost-benefit analysis necessary for the proper application of the principle. The Court held that Community law did not impose upon member states an immediate obligation to apply the precautionary principle in considering legislation relating to the environment or human health. Therefore the applicants had failed to show any ground for impugning the Secretary of State's decision not to issue regulations.

Similarly, in **Shehla Zia v WAPDA** citizens having apprehension against construction of a grid station in a residential area sent a letter to the Supreme Court for consideration as a human rights case. Considering the gravity of the matter which might involve and affect the life and health of the citizens at large, notice was issued to the Authority (WAPDA).

The Court noted that there was a trend in support of the fact that there might be a likelihood of adverse effects of electro-magnetic fields on human health. It held that as there was a state of uncertainty the authorities should observe the rules of prudence and precaution. The rule of prudence was to adopt measures which might avert the danger if it were to occur. The rule of precaution was first to consider the welfare and safety of the human beings and the environment and then to pick up a policy and execute the plan which was more suited to obviate the possible danger or take such alternate precautionary measures which might ensure safety. To stick to a particular plan on the basis of old studies or inconclusive research could not be said to be a policy of prudence and precaution.

The Court therefore appointed a Commissioner to examine and study the scheme, planning device and technique employed by the Authority and report whether there was any likelihood of any hazard or adverse effect on the health of the residents of the locality. The Commissioner might also suggest a variation in the plan to minimize the danger.

Greenpeace Australia v Redbank Power Company Pty Ltd & Singleton Council raised the applicability of the precautionary principle in the context of the obligations under Climate Change Convention. As in the **Duddridge case** the attempt to apply the precautionary principle failed to persuade the Court that the decision of the public authority should be reviewed.

In March 1994 Singleton Council granted to Redbank Power Company development consent for the construction of a power station and ancillary facilities. Greenpeace Australia Ltd objected contending that the impact of air emissions from the project would unacceptably exacerbate the greenhouse effect and that the Court should apply the precautionary principle and refuse development consent for the proposal.

The Court observed that the evidence established that the project would emit carbon dioxide, a greenhouse gas, an issue which Greenpeace contended should outweigh all other factors to be taken into account in the assessment of the project, and should lead to the refusal of the consent. The Court observed however that the relevant policy documents stopped short of prohibiting energy development which could emit greenhouse gases. Further there was uncertainty in the evidence about the effect of carbon dioxide emission from this project. Although it would emit carbon dioxide, the impact that would have on global warming was very uncertain. Greenpeace's contention was that scientific uncertainty should not be used as a reason for ignoring the environmental impact of carbon dioxide emission; the Court should take into account the precautionary principle. But the court held that the application of the precautionary principle dictated that a cautious approach should be adopted in evaluating the various relevant factors in determining whether to give consent; it did not require that the greenhouse issue should outweigh all other issues.

Similarly, in **Nicholls v Director General of National Parks and Wildlife** the applicant appealed against the decision of the Director General to grant a licence to the Forestry Commission to "take or kill" any protected fauna in the course of carrying out forestry operations within a specified area. The applicant's case was directed against alleged imperfections in the fauna impact statement. The Court held that the fauna impact statement was only one of a number of tools to be used in determining whether or not a general licence should be issued, and the applicant's attack failed to take account of the ongoing opportunities for inspection, survey and assessment which could lead to responsive changes to the conditions of the licence.

Further the applicant argued that the Court was obliged, as a matter of law, to take into account Australia's international obligations, i.e the precautionary approach. However the Court held that the precautionary principle was not framed as a legal standard.

Leatch v National Parks & Wildlife Service was an instance in which the application of the precautionary principle resulted in a review of the public authority's decision. In this case, Shoalhaven City Council applied to the Director General of the National Parks and Wildlife Service for a licence to "take or kill" endangered fauna. The need for the licence arose from the granting of development consent by the Council to itself for the construction of a link road. The licence application was supported by a fauna impact statement pursuant to s.92B of the National Parks and Wildlife Act. The Director General granted the licence. An objector, May Leatch, appealed submitting that there had been a failure to include "to the fullest extent reasonably practicable" a description of the fauna affected by the actions. She argued further that the precautionary principle should be applied.

The Court observed that the precautionary principle was a statement of common sense and had already been applied by decision makers in appropriate circumstances prior to the principle being spelt out. The Court held that, while there was no express provision requiring consideration of the precautionary principle, consideration of the state of knowledge or uncertainty regarding a species, the potential for serious or irreversible harm to an endangered fauna and the adoption of a cautious approach in protection of endangered fauna was consistent with the subject matter, scope and purposes of the Act. The application of the precautionary principle was the most apt in a situation of a scarcity of scientific knowledge of species population, habitat and impacts, which was the case in this instance. Accordingly, the licence should not be granted until much more was known.

The Polluter Pays Principle/Liability for Environmental Damage

Like the Precautionary Principle, the Polluter Pays Principle has been enshrined in the Rio Declaration on Environment and Development as Principle 16. It states as follows:

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account that the polluter should, in principle bear the costs of pollution, with due regard to the public interest and without distorting international trade and investment.

The Polluter Pays Principle addresses liability for environmental damage. It is aimed at ensuring that persons engaged in potentially polluting activities internalize the environmental costs of their activities and put in place

preventive measures. The Polluter Pays Principle is given effect in the civil law causes of action of trespass, nuisance, the rule in **Rylands v Fletcher** and negligence which define the nature and extent of the polluter's liability.

The cases that follow are instances of the use of the concept of the polluter pays principle to allocate liability for environmental damage. The first case deals with the question, in a given set of circumstances "who is the polluter?", while the second defines the extent of liability of the polluter.

1. **Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd** 1990 (4) SA 749 (South Africa)

2. **Indian Council for Enviro-Legal Action v Union of India & Others** (1996) 3 SCC 212 (India)

Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd deals with the problem of causation, a key element in imposing liability. The plaintiffs instituted action for an order interdicting the defendants from manufacturing and/or distributing in South Africa hormonal herbicides. The first plaintiff was the Natal Fresh Produce Growers Association one of whose objects was the "promotion and protection of the interests of growers of all kinds of fresh produce." The second and third plaintiffs were farmers who grew fresh produce in an area within and adjoining the place generally known as Tala Valley, Natal. The defendants were registered manufacturers and/or distributors of certain hormonal herbicides.

The plaintiffs alleged that hormonal herbicides used within South Africa were transported through water and air and deposited on fresh produce growing within Natal. They alleged that this had damaged and would continue to damage plants grown and owned by the plaintiffs. Further that the damage flowed as a result of the distribution and consequent use of the herbicides and that the use was caused, accommodated and encouraged by the manufacture and distribution of the herbicides for use within South Africa. The plaintiffs argued that the damage could not be prevented except by the elimination of the use of these herbicides within South Africa.

The defendants pointed out that they did no more than manufacture and distribute hormonal herbicides which were duly registered for sale under the relevant laws. These activities were lawful and the manufactured products were capable of perfectly lawful use. They submitted that the lawful manufacture and distribution of these products was not rendered wrongful by the fact that they were used to the detriment of the plaintiff farmers by third parties for whose conduct the defendants were not legally responsible.

The Court held that it could not be the case that *any* use of hormonal herbicides *anywhere* in South Africa resulted in damage to fresh produce in Tala Valley. Further, the allegation that the use of hormonal herbicides was caused, accommodated and encouraged by their manufacture and distribution was not warranted by the facts. By manufacturing and distributing their products the defendants facilitated or accommodated the use of hormonal herbicides by others, but that did not amount to procuring, instigating or encouraging such use so as to make them legally responsible for the actions of the users. The facts did not warrant the conclusion that the manufacture and distribution of hormonal herbicides *caused* the use of such herbicides by others, in the sense that the manufacturers were legally responsible for such use. The only connection between the activities of the defendants and the damage producing use of hormonal herbicides by others was that the manufacture and distribution of hormonal herbicides facilitated such use. But that was not enough to saddle the manufacturers with legal responsibility for the conduct of the users.

The second case deals with the nature and extent of the polluter's liability for environmental damage. The Court in this case went further than the traditional rule in **Rylands v Fletcher**, which is applied in most other jurisdictions, in defining the nature and extent of a polluter's liability.

In **Indian Council for Enviro-Legal Action v Union of India** the respondents operated chemical factories without the requisite licences and had not installed equipment for treatment of highly toxic effluent which they discharged. The discharges polluted water aquifers and the soil. An environmental organization filed a petition by way social action litigation on behalf of the villagers whose right to life had been infringed by the respondents' action.

The Court observed that according to the rule laid down by the Constitution Bench of the Supreme Court in **Oleum Gas Leak Case** once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity *irrespective* of whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on. In the words of the Constitution Bench, such an activity "... can be tolerated only on condition that the enterprise en-

gaged in such hazardous or inherently dangerous activity indemnify all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not." The Constitutional Court assigned the reason for stating the law in those terms to be that the enterprise alone has the resources to discover and guard against the hazards, and not the person affected, and the practical difficulty on the part of the person affected in establishing the absence of reasonable care or that the damage to him was foreseeable by the enterprise. The Bench also observed that such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in **Rylands v Fletcher** - apart from proof of damage to the plaintiff by the act or negligence of the defendant - these are foreseeability and non-natural use of land.

The Court observed that the question of liability of the respondents to defray the costs of remedial measures could also be looked at from another angle, viz., the Polluter Pays Principle, according to which the responsibility for repairing the damage was that of the offending industry. The Court held that the respondents were absolutely liable to compensate for the harm caused by them to the villagers in the affected area, to the soil and to the underground water, and hence they were bound to take all necessary measures to remove the sludge and other pollutants lying in the affected area, and also to defray the cost of the remedial measures required to restore the soils and underground water sources.

Riparian Right to Water

The doctrine of riparian rights to water has already been discussed. The following two cases illustrate the use of this doctrine for water protection.

1. **M.C. Mehta v Union of India** AIR 1988 Supreme Court 1115 (India)

2 **Nairobi Golf Hotels (Kenya) Ltd v Pelican Engineering and Construction Co. Ltd** HCCC No 706 of 1997

In **M.C. Mehta v Union of India**, the city of Kanpur Nagar Mahapalika had a statutory obligation to collect and remove sewage, maintain waterworks and guard against pollution of water used for human consumption. The city discharged its sewage into the river without treatment. The petitioner filed a petition for the prevention of nuisance caused by the pollution of the river.

The Court observed that under the common law a municipal corporation could be restrained by an injunction in an action brought by a riparian owner who had suffered on account of the pollution of the water caused by the discharge into the river of insufficiently treated sewage. In this instance the petitioner was not a riparian owner. He was "a person interested in protecting the lives of the people who make use of the river water." The Court held that he had a right to maintain the petition. The nuisance caused by the river pollution was a public nuisance, and it would not be reasonable to expect any particular person to take proceedings to stop it. The petition was therefore entertained as a public interest litigation. The Court held that the Petitioner was entitled to move the Court in order to enforce the statutory provisions which imposed duties on the municipal authorities.

In **Nairobi Golf Hotels (Kenya) Ltd v Pelican Engineering and Construction Co. Ltd** the plaintiff filed a suit against the defendant claiming damages and a permanent injunction to restrain the defendant from constructing a dam across a river and from trespassing on the plaintiff's land. The plaintiff based its suit on its ownership of land along whose boundary was a river from which, with the permission of the Water Apportionment Board, it abstracted water for use on its property. The defendant's land did not border the river but it proceeded to erect a dam on the river for use to irrigate his land. The Defendant argued that, as under the relevant statute water was vested in the Government, the plaintiff had no *locus standi* to bring the suit.

The Court held that under the common law a riparian owner had a right to take a reasonable amount of water from the river as it flowed past his land for domestic use. The plaintiff, by virtue of being a riparian owner, could apply for an injunction under the common law to restrain the defendant from using water for irrigation purposes.

Section 1

Locus Standi

SIERRA CLUB, PETITIONER,

v.

ROGERS C.B. MORTON, INDIVIDUALLY, AND AS SECRETARY OF THE INTERIOR OF THE UNITED STATES, ET AL.

No. 70-34

Argued Nov. 17, 1971

Decided April 19, 1972

Action by membership corporation for declaratory judgement that construction of proposed ski resort and recreation area in national game refuge and forest would contravene federal laws and for preliminary and permanent injunctions restraining federal officials from approving or issuing permits for the project. The United States District Court for the Northern District of California granted a preliminary injunction and the defendants appealed. The United States Court of Appeals, Ninth Circuit, 433 F.2d 24, vacated the injunction and remanded the cause with directions, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that, in absence of allegation that corporation or its members would be affected in any of their activities or pastimes by the proposed project, the corporation, which claimed special interest in conservation of natural game refuges and forests, lacked standing under Administrative Procedure Act to maintain the action.

Affirmed.

Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Blackmun filed dissenting opinions.

Mr. Justice Powell and Mr. Justice Rehnquist took no part in consideration or decision of the case.

1. Action - 13

"Standing to sue" means that party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.

See publication Words and Phrases for other judicial constructions and definitions.

2. Action - 13

Where party does not rely on any specific statute authorizing invocation of judicial process, question of his standing to sue depends upon whether he has alleged such a personal stake in the outcome of the controversy as to ensure that dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.

3. Administrative Law and Procedure - 65

Where Congress has authorized public officials to perform certain functions according to law and has provided by statute for judicial review of those actions under certain circumstances, inquiry as to standing must begin with determination of whether statute in question authorizes review at behest of the plaintiff.

4. Constitutional Law - 55, 56

Congress may not confer jurisdiction on federal courts to render advisory opinions, to entertain friendly suits or to resolve political questions, because suits of that character are inconsistent with judicial function under the Constitution, but where dispute is otherwise justiciable, question whether litigant is proper party to request an adjudication of particular issue is one within power of Congress to determine. U.S.C.A. Const. art. 3 § 1 et seq.

5. Administrative Law and Procedure - 668

"Injury in fact" test for standing to sue under Administrative Procedure Act requires more than injury to cognizable interest and requires that party seeking review be himself among the injured. 5 U.S.C.A. § 702 .

6. Administrative Law and Procedure - 668

Fact of economic injury is what gives a person standing to seek judicial review under a statute authorizing review of federal agency action, but once review is properly invoked, that person may argue the public interest in support of his claim that agency has failed to comply with its statutory mandate.

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7. Administrative Law and Procedure - 665

Organization may represent its injured members in proceeding for judicial review.

8. Administrative Law and Procedure - 668

Organization's mere interest in a problem, no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within Administrative Procedure Act providing judicial review for person who suffers legal wrong because of agency action, or who is adversely affected or aggrieved by agency action. 5 U.S.C.A. § 702.

See publication Words and Phrases for other judicial constructions and definitions.

9. Administrative Law and Procedure - 668

Requirement that party seeking judicial review of administrative agency's action must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through judicial process, but serves as a rough attempt to put decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. 5 U.S.C.A. § 702.

10. Administrative Law and Procedure - 665

Organizations or individuals are not entitled to vindicate their own value preferences through judicial process.

11. Administrative Law and Procedure - 668

Declatory Judgement - 292

In absence of allegation that membership corporation or its members would be affected in any of their activities or pastimes by proposed ski resort and recreation area in national game refuge and forest, the corporation, which claimed special interest in conservation of natural game refuges and forests, lacked standing under Administrative Procedure Act to maintain action for injunctive relief and declaratory judgement that the proposed development would contravene federal laws. 5 U.S.C.A. §§ 1, 41, 43, 45c, 497, 688; Fed. Rules Civ. Proc. rule 15, 28 U.S.C.A.

*Syllabus**

Petitioner, a membership corporation with "a special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country", brought this suit for a declaratory judgement and an injunction to restrain federal officials from approving an extensive skiing development in the Mineral King Valley in the Sequoia National Forest. Petitioner relies on § 10 of the Administrative Procedure Act, which accords judicial review to a "person suffering legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant statute." On the theory that this was a "public" action involving questions as to the use of natural resources. The Court of Appeals reversed, holding that the club lacked standing, and had not shown irreparable injury.

*The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Leland R. Selna, Jr., San Francisco, Cal., for petitioner.

Sol Gen. Erwin N. Griswold, for respondents.

Mr. Justice STEWART delivered the opinion of the Court.

The Mineral King Valley is an area of great natural beauty nestled in the Sierra Nevada Mountains in Tulare County, California, adjacent to Sequoia National Park. It has been part of the Sequoia National Forest since 1926, and is designated as a national game refuge by special Act of Congress[1]

Though once the site of extensive mining activity, Mineral King is now used almost exclusively for recreational purposes. Its relative inaccessibility and lack of development have limited the number of visitors each year, and at the same time have preserved the valley's quality as a quasi-wilderness area largely uncluttered by the products of civilization.

The United States Forest Service, which is entrusted with the maintenance and administration of national forests, began in the late 1940's to give consideration to Mineral King as a potential site for recreational development. Prodded by a rapidly increasing demand for skiing facilities, the Forest Service published a prospectus in 1965, inviting bids from private developers for the construction and operation of a ski resort that would also serve as a summer recreation area. The proposal of Walt Disney Enterprises, Inc., was chosen from those of six bidders, and Disney received a three-year permit to conduct surveys and explorations in the valley in connection with its preparation of a complete master plan for the resort.

[1]Act of July 3, 1926 § 6, 44 Stat. 821, 16 U.S.C. § 688.

The final Disney plan, approved by the Forest Service in january 1969, outlines a $35 million complex of motels, restaurants, swimming pools, parking lots, and other structures designed to accommodate 14,000 visitors daily. This complex is to be constructed on 80 acres of the valley floor under a 30-year use permit from the Forest Service. Other facilities, including ski lifts, ski trails, a cog-assisted railway, and utility installations, are to be constructed on the mountain slopes and in other parts of the valley under a revocable special-use permit. To provide access to the resort, the State of California proposes to construct a highway 20 miles in length. A section of this road would traverse Sequoia National Park, as would a proposed high-voltage power line needed to provide electricity for the resort. Both the highway and the power line require the approval of the Department of the Interior, which is entrusted with the preservation and maintenance of the national parks.

Representatives of the Sierra club, who favor maintaining Mineral King largely in its present state, followed the progress of recreational planning for the valley with close attention and increasing dismay. They unsuccessfully sought a public hearing on the proposed development in 1965, and in subsequent correspondence with officials of the Forest Service and the Department of the Interior, they expressed the Club's objections to Disney's plan as a whole and to particular features included in it. In June 1969 the Club filed the present suit in the United States District of California, seeking a declaratory judgement that various aspects of the proposed development contravene federal laws and regulations governing the preservation of national parks, forests, and game refuges[2] and also seeking preliminary and permanent injunctions restraining the federal officials involved from granting their approval or issuing permits in connection with the Mineral King project. The petitioner Sierra Club sued as a membership corporation with "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country," and invoked the judicial-review provisions of the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

After two days of hearings, the District Court granted the requested preliminary injunction. It rejected the respondents' challenge to the Sierra Club's standing to sue, and determined that the hearing had raised questions "concerning possible excess of statutory authority, sufficiently substantial and serious to justify a preliminary injunction...." The respondents appealed, and the Court of Appeals for the Ninth Circuit reversed. 433 F.2d 24. With respect to the petitioner's standing, the court noted that there was "no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the respondents] other than the fact that the actions are personally displeasing or distasteful to them," id., at 33, and concluded:

"We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority." Id., at 30.

Alternatively, the Court of Appeals held that the Sierra Club had not made an adequate showing of irreparable injury and likelihood of success on the merits to justify issuance of a preliminary injunction. The court thus vacated the injunction. The Sierra Club filed a petition for a writ of certiorari which we granted, 401 UY.S. 907, 91 S.Ct. 870, 27 L.Ed.2d 805, to review the questions of federal law presented.

II

[1-4] The first question presented is whether the Sierra Club has alleged facts that entitle it to obtain judicial review of the challenged action. Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663, as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Flast v. Cohen, 392 U.S. 83, 101, 88 S.Ct. 2942, 1953, 20 L.Ed.2d 947. Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain cir-

[2]As analyzed by the District Court, the complain alleged violations of law falling into four categories. First, it claimed that the special-use permit for construction of the resort exceeded the maximum-acreage limitation placed upon such permits by 16 U.S.C. § 497, and that issuance of a "revocable" use permit was beyond the authority of the Forest Service. Second, it challenged the proposed permit for the highway through Sequoia National Park on the grounds that the highway would not serve any of the purposes of the park, in alleged violation of 16 U.S.C. § 1, and that it would destroy timber and other natural resources protected by 16 U.S.C. §§ 41 and 43. Third, it claimed that the Forest Service and the Department of the Interior had violated their own regulations by failing to hold adequate public hearings on the proposed project. Finally, the complaint asserted that 16 U.S.C. § 45c requires specific congressional authorization of a permit for construction of a power transmission line within the limits of a national park.

cumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.[3]

The Sierra Club relies upon § 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 702, which provides:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Early decisions under this statute interpreted the language as adopting the various formulations of "legal interest" and "legal wrong" then prevailing as constitutional requirements of standing.[4] But, in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184, and Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192, decided the same day, we held more broadly that persons had standing to obtain judicial review of federal agency action under § 10 of the APA where they had alleged that the challenged action had caused them "injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated[5]

In *Data Processing*, the injury claimed by the petitioners consisted of harm to their competitive position in the computer-servicing market through a ruling by the Comptroller of the Currency that national banks might perform data-processing services for their customers. In *Barlow*, the petitioners were tenant farmers who claimed that certain regulations of the Secretary of Agriculture adversely affected their economic position vis-à-vis their landlords. These palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review.[6] Thus, neither *Data Processing* nor *Barlow* addressed itself to the question, which has arisen with increasing frequency in federal courts in recent years, as to what must be alleged by persons who claim injury of a non economic nature to interests that are widely shared.[7] That question is presented in this case.

III

[5] The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

The Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a "public" action involving questions as to the use

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[3] Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions. Muskrat v. United States. 219 U.S. 346. 31 S.Ct. 450, 55 L.Ed. 246, or to entertain "friendly" suits. United States v. Johnson, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413, or to resolve "political questions," Luther v. Borden. 7 How, 1, 12 L.Ed. 581, because suites of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, the question whether the litigant is a "proper party to request an adjudication of a particular issue," Flast v. Cohen, 392 U.S. 83, 100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947, is one within the power of Congress to determine. C.f. FCCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477, 60 S.Ct. 693, 698, 84 L.Ed. 869: Flast v. Cohen, *supra*, 392 U.S., at 120, 88 s.Ct., at 1963 (Harlan, J., dissenting); Associated Industries of New York State v. Ickes, 2 Cir., 134 F.2d 694, 704. See generally Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L.J. 816, 827 et seq. (1969); Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U.Pa. L.Rev. 1033 (1968).

[4] See, e.g., Kansas City Power & Light Co. v. McKay, 96 U.S.App.D.C. 173, 281, 225 F.2d 924, 932; Ove Gustavsson Contracting Co. v. Floete, 2 Cir., 278 F.2d 912, 914; Duba v. Schuetzle, 8 Cir., 303 F.2d 570, 574. The theory of a "legal interest" is expresed in its extreme form in Alabama Power Co. v. Ickes, 302 U.S. 464, 479-481, 58 S.Ct. 300, 303-304, 82 L.Ed. 374. See also Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 137-139, 59 S.Ct. 366, 369-370, 83 L.Ed. 543.

[5] In deciding this case we do not reach any questions concerning the meaning of the "zone of interests" test or its possible application to the facts here presented.

[6] See, e.g., Hardin v. Kentucky Utilities Co., 390 U.S. 1, 7, 88 S.Ct. 651, 655, 19 L.Ed.2d 787; Chicago v. Atchison, T. & S.F.R. Co., 357 U.S. 77, 83, 78 S.Ct. 1063, 1067, 2 L.Ed.2d 1174; FCC v. Sanders Bros. Radio Stationa, *supra*, 309 U. S., at 477, 60 S.Ct., at 698.

[7] No question of standing was raised in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed. 2d 136. The complaint in that case alleged that the organizational plaintiff represented members who were "residents of Memphis, Tennessee who use Overton Park as a park land and recreation area and who have been active sing 1964 in efforts to preserve and protect Overton park as a park land and recreation area."

of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a "representative of the public."[8] This theory reflects a misunderstanding of our cases involving so-called "public actions" in the area of administrative law.

The origin of the theory advanced by the Sierra Club may be traced to a dictum in Scripps-Howard Radio v. FCC, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229, in which the licensee of a radio station in Cincinnati, Ohio, sought a stay of an order of the FCC allowing another radio station in a nearby city to change its frequency and increase its range. In discussing its power to grant a stay, the Court noted that "these private litigants have standing only as representatives of the public interest." Id., at 14, 62 S.Ct., at 882. But that observation did not describe the basis upon which the appellant was allowed to obtain judicial review as a "person aggrieved" within the meaning of the statute involved in that case,[9] since Scripps-Howard was clearly "aggrieved" by reason of the economic injury that it would suffer as a result of the Commission's action.[10] The Court's statement was, rather, directed to the theory upon which Congress had authorized judicial review of the Commission's actions. That theory had been described earlier in FCC v. Saknders Bros. Radio Station, 309 U.S. 470, 477, 60 S. Ct. 693, 698, 84 L.Ed. 869, as follows:

"Congress had some purpose in enacting section 402(b) (2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal."

[6] Taken together, *Sanders* and *Scripps-Howard* thus established a dual proposition: the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.[11] It was in the latter sense that the "standing" of the appellant in *Scripps-Howard* existed only as a "representative of the public interest." It is in a similar sense that we have used the phrase "private attorney general" to describe the function performed by persons upon whom Congress has conferred the right to seek judicial review of agency action. See *Data Processing, supra*, 397 U.S., at 154, 90 S.Ct., at 830.

The trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been toward recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and toward discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review.[12] We noted this development with approval in *Data Processing*, 397 U.S., at 154, 90 S.Ct., at 830, in saying that the interest alleged to have been injured "may reflect 'aesthetic, conservational, and recreational' as well as economic values." But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.

[7,8] Some courts have indicated a willingness to take this latter step by conferring standing upon organizations that have demonstrated "an organizational interest in the problem" of environmental or consumer protection. Environmental defense Fund, Inc. v. Hardin, 138

[8] This approach to the question of standing was adopted by the Court of Appeals for the Second Cirvuit in Citizens Committee for Hudson Valley v. Volpe. 425 F.2d 97, 105:

"We hold, therefore, that the public interest in environmental resources - an interest created by statutes affecting the issuance of this permit - is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest."

[9] The statute involved was § 402(b) (2) of the Communications Act of 1934, 48 Stat. 1093.

[10] This much is clear from the *Scripps-Howard* Court's citation of FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869, in which the basis for standing was the competitive injury that the appellee would have suffered by the licensing of another radio station in its listening area.

[11] The distinction between standing to initiate a review proceeding, and standing to assert the rights of the public or of third persons once the proceeding is properly initiated, is discussed in 3 K. Davis, Administrative Law Treatise §§ 22.05-22.07 (1958).

[12] See, e.g., Environmental defense Fund, Inc. v. Hardin, 138 U.S. App. D.C. 391, 395, 428 F.2d 1093, 1097 (interest in health affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); Office of Communication of United Church of christ v. FCC, 123 U.S.App.D.C. 328, 339, 359 F.2d 994, 1005 (interest of television viewers in the programming of a local station licensed by the FCC); Scenic Hudson Preservation Conf. v. FPC, 2 Cir., 354 F.2d 608, 615-616 (interests in sesthetics, recreation, and orderly community planning affected by FPC licensing of a hydroelectric project); Reade v. Ewing, 2 Cir., 205 F.2d 630, 631-632 (interest of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration); Crowther v. Seaborg, D.C., 312 F. Supp. 1205, 1212 (interest in health and safety of persons residing near the sit of a proposed atomic blast).

U.S.App.D.C. 391, 395, 428 F.2d 1093, 1097.[13] It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. See, e.g., NAACP v. Button, 371 U.S. 415, 428, 83 S.Ct. 328, 335, 9 L.Ed.2d 405. But a mere "interest in a problem," no matter how longstanding the interest and no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. The Sierra club is a large and long-establishment to the cause of protecting our Nation's natural heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

[9,10] The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process[14] It does give as at least a rough attempt to put a decision as to whether review will be sought i the hands of those who have direct stake in the outcome. That goal could be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than indicate their own value preferences through the judicial process[15] The principle that the Sierra Club would ... us establish in this case would do ....that.

[11] As we conclude that the Court of Appeals was correct in its holding, the Sierra Club lacked standing to contain this action, we do not reach ...other questions presented in the pe..., and we intimate no view on the ... its of the complaint. the judgement ....

affirmed.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration of decision of this cas.

Mr. Justice DOUGLAS, dissenting.

I share the views of my Brother BLACKMUN and would reverse the judgement below.

The critical question of "standing"[16] would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of

[13] See Citizens Committee for Hudson Valley v. Volpe, n. 9, *supra*; Environmental Defense Fund, Inc. v. Corps of Engineers, D.C. 325 F.Supp. 728, 734-736; Izaak Walton League of America v. St. Clair, D.C. 313 F.Supp. 1312, 1317. See also Scenic Hudson Preservation Conf. v. FPC. *supra*, 354 F.2d, at 616:

"In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under § 313(b) [of the Federal Power Act]."

In most, if not all, of these cases, at least one party to the proceeding did assert an individualized injury either to himself or, in the case of an organization, to its members.

[14] In its reply brief, after noting the fact that it might have chosen to assert individualized injury to itself or to its members as a basis for standing, the Sierra Club states:

"The Government seeks to create a reads I win, tails you lose' situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which dos not warrant an injunction adverse to a competing public interest. Counsel have ..aped their case to avoid this trap."

The short answer to this contention is that the trap" does not exist. The test injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interest of the general public in support of his claims for equitable relief. See n. 12 and accompanying text, *supra.*

[15] Every school boy may be familiar with ...exis de Toequeville's famous observation, written in the 1830's, that "scarce-... any political question arises in the United States that is not resolved,, sooner or later, into a judicial question." 1 Democracy in America 280 (1945). Less familiar, however, is De Toequeville's further observation that judicial review is effective largely because it is not available simply at the beherest of a partisan faction, but is exercised only to remedy a particular, concrete injury.

"It will be seen, also, that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trail of an individual, legislation is protected from wanton assault and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution." Id., at 102.

[16] See generally Association of data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); Barlow v. collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). See also Mr. Justice Brennan's separate opinion in Barlow v. Collins, *supra*, 397 U.S., at 167, 90 S.Ct., at 838. The issue of statutory standing aside, no doubt exists that "injury in fact" to "aesthetic" and "conservational" interests is here sufficiently threatened to satisfy the cease-or-controversy clause. Association of Data Processing Service Organizations, Inc. v. Camp, *supra,* 397 U.S., at 1564, 90 S. Ct., at 830.

the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, Should Trees Have Standing? Toward Legal Rights for Natural Objects, 45 S.Cal.L.Rev. 450 (1972). This suit would therefore be more properly labeled as Mineral King v. Morton.

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes.[17] The corporation sole - a creature of ecclesiastical law - is an acceptable adversary and large fortunes ride on its cases.[18] The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.[19]

Mineral King is doubtless like other wonders of the Sierra Nevada such as Tuolumne Meadows and the John Muir Trail. Those who hike it, fish it, hunt it, camp in it, frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be few or many. Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.

The Solicitor General, whose views on this subject are in the Appendix to this opinion, takes a wholly different approach. He considers the problem in terms of "government by the Judiciary." With all respect, the problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed. it is of course, true that most of them are under the control of a federal or state agency. The standards given those agencies are usually expressed in terms of the "public interest." Yet "public interest" has so many differing shades of meaning as to be quite meaningless on the environmental front. Congress accordingly has adopted ecological standards in the National Environmental Policy Act of 1969, Pub.L. 91-90, 83 Stat. 852, 42 U.S.C. § 4321 et seq., and guidelines for agency action have been provided by the Council on Environmental Quality of which Russell E. Train is Chairman. See 36 Fed.Reg. 7724.

Yet the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.[20] As early as 1894, Attorney General Olney

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[17] In *rem* actions brought to adjudicate libelants' interests in vessels are well known in admiralty. G. Gilmore & C. Black, The Law of Admiralty 31 (1957). But admiralty also permits a salvage action to be brought in the name of the rescuing vessel. The Camanche, 8 Wall. 448, 476, 19 L.Ed. 397 (1869). And, in collision litigation, the first-libeled ship may counterclaim in its own name. The Gylfe v. The Trujillo, 209 F.2d 386 (CA2 1954). Our case law has personified vessels:

"A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron .... In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed .... She acquires a personality of her own." Tucker v. Alexandroff, 183 U.S. 424, 438, 22 S.Ct. 195, 201, 46 L.Ed. 264.

[18] At common law, an officeholder, such as a priest or the king, and his successors constituted, a corporation sole, a legal entity distinct from the personality which managed it. Rights and duties were deemed to adhere to this device rather than to the officeholder in order to provide continuity after the latter retired. The notion is occasionally revived by American courts. E.g., Reid v. Barry, 93 Fla. 849, 112 So. 846 (1927), discussed in Recent Cases, 12 Minn.L.Rev. 295 (1928), and in Note, 26 Mich.L.Rev. 545 (1928); see generally 1 W. Fletcher, Cyclopedia of the Law of Private Corporation §§ 50-53 (1963); 1 P. Potter, Law of Corporations 27 (1881).

[19] Early jurists considered the convention corporation to be a highly artificial entity. Lord Coke opined that a corporation's creation "rests only in intendment and consideration of the law." Case of Sutton's Hospital. 77 Eng. Rep. 937, 97.. (K.B.1612). Mr. Chief Justice Marshall added that the device is "an artificial being, invisible, intangible, and existing only in contemplation of law." Trustees of Dartmouth College v. Woodward, Whate, 518, 636, 4 L.Ed. 629 (1819). Today, suits in the names of corporations are taken for granted.

[20] The federal budget annually includes about $75 million for underwriting about 1,500 advisory committees attached to various regulatory agencies. These groups are almost exclusively composed of industry representatives appointed by the President or by Cabinet members. Although public members may be on these committees, they are rarely asked to serve. Senator Lee Metcalf warns: "Industry advisory committees exist inside most important federal agencies, and even have offices in some. Legally, their function is purely as kibitzer, but in practice many have become internal lobbis - printing industry handouts in the Government Printing Office with taxpayers' money, and even influencing policies. Industry committees perform the dual function of stopping government from finding out about corporations while at the same time helping corporations get inside information about what government is doing. sometimes, the same company that sits on an advisory council that obstructs or turns down a government questionnaire is precisely the company which is withholding information the government needs in order to enforce a law." Metcalf, The Vested Oracles: How Industry Regulates Government, 3 The Washington Monthly, July 1971, p. 45. For proceedings conducted by Senator Metcalf exposing these relationships, see Heqrings on S. 3067 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 91st Cong., 2d Sess. (1970); Hearings on S. 1637, S. 1964, and S. 2064 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 92d Cong., 1st Sess. (1971).

predicted that regulatory agencies might become "industry-minded," as illustrated by his forecast concerning the Interstate Commerce Commission:

"The Commission ..... is, or can be made, of great use to the railroads. it satisfies the popular clamor for a government supervision of railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things." M. Josephson, The Politicos 525 (1938).

Years later a court of appeals observed, "the recurring question which has plagued public regulation of industry [is] whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect." Moss v. CAB, 139 U.S.App.D.C. 150, 152, 430 F.2d 891, 893.

The voice of the inanimate object, therefore, should not be stilled. that does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.

Perhaps they will not win. Perhaps the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land. that is not the present question. The sole question is, who has standing to be heard?

APPENDIX TO OPINION OF DOUGLAS J.,

DISSENTING

Extract From Oral Argument of The Solicitor General

"As far as I know, no case has yet been decided which holds that a plaintiff which merely asserts that, to quote from the complaint here, its interest would be widely affected [a]nd that 'it would be aggrieved' by the acts of the defendant, has standing to raise legal questions in court.

"But why not? Do not the courts exist to decide legal questions? And are they not the most impartial and learned agencies that we have in our governmental system? Are there not many questions which must be decided by the courts? Why should not the courts decide any question which any citizen wants to raise?

"As the tenor of my argument indicates this raises, I think, a true question, perhaps a somewhat novel question, in the separation of powers ....

"Ours is not a government by the Judiciary. It is a government of three branches, each of which was intended to have broad and effective powers subject to checks and balances. In litigable cases, the courts have great authority. But the Founders also intended that the congress should have wide powers, and that the Executive Branch should have wide powers. All these officers have great responsibilities. They are not less sworn that are the members of this Court to uphold the Constitution of the United States.

"This, I submit, is what really lies behind the standing doctrine, embodied in those cryptic words 'case' and 'controversy' in Article III of the Constitution.

"Analytically one could have a system of government in which every legal question arising in the core of government would be decided by the courts. It would note be, I submit, a good system.

"More important, it is not the system which was ordained and established in our Constitution, as it has been understood for nearly 200 years.

"Over the past 20 or 25 years, there has been a great shift in the decision of legal questions in our governmental operations int the courts. this has been the result of continuous whittling away of the numerous doctrines which have been established over the years, designed to minimize the number of governmental questions which it was the responsibility of the courts to consider.

"I've already mentioned the most ancient of all: case or controversy, which was early relied on to prevent the presentation of feigned issues to the court.

"But there are many other doctrines, which I cannot go into in detail: review-ability, justiciability, sovereign immunity, mootness in various aspects, statutes of limitations in laches, jurisdictional amount, real party in interest, and various questions in relation to joinder.

"Under all of these headings, limitations which previously existed to minimize the number of questions decided in courts, have broken down in varying degrees.

"I might also mention the explosive development of class actions, which has thrown more and more issues into the courts.

"If there is standing in this case, I find it very difficult to think of any legal issue arising in government which will not have to await one or more decisions of the Court before the administrator, sworn to uphold the law, can take any action. I'm not sure that it's good for the courts. I do find myself more and more sure that it is not the kind of allocation of governmental powers in our tripartite constitutional system that was contemplated by the Founders.

"I do not suggest that the administrators can act at their whim and without any check at all. On the contrary, in this area they are subject to continuous check by the Congress. Congress can stop this development any time it wants to."

Mr. Justice BRENNAN, dissenting.

I agree that the Sierra Club has standing for the reasons stated by my Brother BLACKMUN in Alternative No. 2 of his dissent. I therefore would reach the merits. Since the Court does not do so, however, I simply note agreement with my Brother BLACKMUN that the merits are substantial.

Rather than pursue the course the Court has chosen to take by its affirmance of the judgement of the Court of Appeals, I would adopt one of two alternatives:

1. I would reverse that judgement and, instead, approve the judgement of the District Court which recognized standing in the Sierra Club and granted preliminary relief. I would be willing to do this on condition that the Sierra Club forthwith amend its complaint to meet the specifications the Court prescribes for standing. If Sierra Club fails or refuses to take that step, so be it; the case will then collapse. But if it does amend, the merits will be before the trial court once again. As the Court, *ante*, at 1364 n. 2, so clearly reveals, the issues on the merits are substantial and deserve resolution. They assay new ground. They are crucial to the future of Mineral Kind. They raise important ramifications for the quality of the country's public land management. They pose the propriety of the "dual permit" device as a means of avoiding the 80-acre "recreation and resort" limitation imposed by Congress in 16 U.S.C. § 497, an issue that apparently has never been litigated, and is clearly substantial in light of the congressional expansion of the limitation in 1956 arguably to put teeth into the old, unrealistic five-acre limitation. In fact, they concern the propriety of the 80-acre permit itself and the consistency of the entire, enormous development with the statutory purposes of the Sequoia Game Refuge, of which the Valley is a part. In the context of this particular development, substantial questions are raised about the use of a national park area for Disney purposes for a new high speed road and a 66,000-volt power line to serve the complex. Lack of compliance with existing administrative regulations is also charged. These issues are not shallow or perfunctory.

2. Alternatively, I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues. this incursion upon tradition need not be very extensive. Certainly, it should be no cause for alarm. It is no more progressive than was the decision in *Data Processing* itself. It need only recognize the interest of one who has a provable, sincere, dedicated, and established status. We need not fear that Pandora's box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past. Who would have suspected 20 years ago that the concepts of standing enunciated in *Data Processing* and *Barlow* would be the measure for today And Mr. Justice DOUGLAS, in his eloquent opinion, has imaginatively suggested another means and one, in its own way, with obvious, appropriate, and self-imposed limitations as to standing. As I read what he has written, he makes only one addition to the customary criteria (the existence of a genuine dispute; the assurance of adversariness; and a conviction that the party whose standing is challenged will adequately represent the interest he asserts), that is, that the litigant be one who speaks knowingly for the environmental values he asserts.

I make two passing references:

1. The first relates to the Disney figures presented to use. The complex, the Court notes, will accommodate 14,000 visitors *a day* (3,100 overnight; some 800 employees; 10 restaurants; 20 ski lifts). The State of California has proposed to build a new road from Hammond to Mineral King. That road, to the extent of 9.2 miles, is to traverse Sequoia National Park. It will have only two lanes, with occasional passing areas, but it will be capable, it is said, of accommodating 700-800 vehicles per hour and a peak of 1,200 per hour. We are told that the State has agreed not to seek any further improvement in road access through the park.

If we assume that the 14,000 daily visitors come by automobile (rather than by helicopter or bus or other known or unknown means) and that each visiting automobile carries four passengers (an assumption, I am sure that is far too optimistic), those 14,000 visitors will move in 3,500 vehicles. If we confine their movement (as I think we properly may for this mountain area) to 12 hours out of the daily 24, the 3,500 automobiles will pass any given point on the two-lane road at the rate of about 300 per hour. this amounts to five vehicles per minute, or an average of one every 12 seconds. This frequency is further increased to one every six seconds when the necessary return traffic along that same two-lane road is considered. And this does not include service vehicles and employees' cars. Is this the way we perpetuate the wilderness and its beauty, solitude, and quiet?

2. The second relates to the fairly obvious fact that any resident of the Mineral King area - the real "user" - is an unlikely adversary for this Disney-governmental project. He naturally will be inclined to regard the situation as one that should benefit him economically.

VON MOLTKE v. COSTA AREOSA (PTY.) LTD. (CAPE PROVINCIAL DIVISION)

1974. AUGUST 28; SEPTEMBER 26. DIEMONT, J.

Nuisance. —Interdict restraining a public nuisance sought. —What an individual applying for relief must prove in order to establish locus standi in judicio. — Must at least allege facts to show he has a special reason for coming to Court. —Failure to establish locus standi *on the facts.*

Whether the party seeking an interdict restraining a nuisance proceeds by way of summons or on motion he must show that he is suffering or will suffer some injury, prejudice, or damage or invasion of right peculiar to himself and over and above that sustained by the members of the public in general. It is not enough to allege that a nuisance is being committed, he must go further and at the very least allege facts from which it can be inferred that he has a special reason for coming to Court.

Application for interdict restraining the respondent from carrying on certain alleged development operations. Facts not material to this report have been omitted.

E. L. King, for the applicant.

G. Friedman, S.C. (with him *R. M. Marais, S.C.* and *P. B. Hodes*), for the respondent.

Cur. adv. vult.

Postea (September 26).

DIEMONT, J.: The applicant in this matter is Frederick Baldur Harrer Braun Von Moltke, who resides at Llandudno in the Cape Peninsula. The respondent is a private company, Costa Areosa (Pty.) Ltd. of Trust Bank Centre, Heerengracht, Cape Town.

The applicant states in his founding affidavit that he has been residing at Llandudno since February of this year and that on 19 August he purchased a property there. He states that he bought the property because he dislikes crowded city life and he wishes to live in a peaceful and quiet area which is close to nature and to its natural condition. The house which he purchased and in which he now resides is approximately one mile as the crow flies—or perhaps I should say as the sea gull flies—from an area commonly known as Sandy Bay. He states further that on 19 July of this year he became aware for the first time that Sandy Bay was to be developed as a township and that an application had been submitted by the respondent company to the Divisional Council of the Cape. He learned that the township scheme was to include a shopping centre, a game park and a funicular railway. This troubled him and he accordingly proceeded to the respondent company's offices in the Trust Bank Centre where he was shown a model of the housing scheme and a brochure. He was distressed by what he learned and decided to oppose the scheme and in due course he filed his written objection with the Secretary of the Provincial Administration. Indeed, he was so concerned that he set about organising a petition for which he claims that he now has 4 000 signatures. He alleges further that he was also instrumental in organising a protest meeting at Hout Bay.

He states further in his affidavit that he was under the impression that the development of Sandy Bay would be held over until the local government had had an opportunity of considering the objections to the scheme for the development of Sandy Bay, and he says that he was informed that the Divisional Council had resolved to hold a meeting in due course in order to consider these objections.

The deponent goes on to state that on Tuesday, 27 August, he ascertained that bulldozing operations had already commenced on the property and that the indigenous vegetation was being destroyed at a point approximately 200 yards above the high water mark. On the following day, Wednesday 28 August, he spoke to the driver of the bulldozer on the site and endeavoured to persuade him to stop his operations, but the driver was unco-operative and when he endeavoured to continue the discussion the driver seized a stone in a threatening manner. In conclusion he alleges that the bulldozing operations and the development of Sandy Bay will constitute a nuisance to his enjoyment of the property he has purchased as well as to the surrounding area and that irreparable damage is being done to the natural vegetation and also that the sand dunes are being disturbed.

An affidavit was also filed by the Secretary of the Divisional Council who states that no final decision has yet been taken by the Council in regard to the development of this area but that objections have been lodged and will be considered at a future meeting of the Council.

The applicant now seeks an interdict which will restrain the respondent from carrying on any further operations

for the development of the Sandy Bay area and for an order directing the respondent to restore the property to the condition it was in before the operations commenced.

When the matter came before me on 28 August, Mr. *Marais*, who appeared for the respondent, stated that he had had no opportunity to consider these affidavits nor had he had time to obtain and file opposing affidavits. The matter was accordingly postponed to give the respondent time to consider his position and to file opposing affidavits. These have now been filed.

In the first of these affidavits Ian Grant Fraser, a director of the respondent company, challenges the applicant's *locus standi* to bring these proceedings against his company and asks that the application be dismissed with costs. He goes on to state that, in view of the great public interest which the matter has aroused, he deems it advisable to deal with the allegations made by the applicant. He says that he is "acutely aware that the development which it proposed for the area known as Sandy Bay requires approval from various public authorities and recognises that interested members of the public are entitled to put their points of view to such authorities".

He claims that it is not necessary to consider the merits or demerits of the proposed development of Sandy Bay; the scheme will in due course be judged by the authorities. He alleges further that the applicant has assumed without making any proper enquiries that the bulldozing operations complained of are the first steps in the development of the proposed scheme. This, he says, is quite incorrect. He denies emphatically that this is so and he says that he resents any suggestion and respondent is attempting to commence construction without having obtained approval for the proposed development. He says that the respondent is engaged in determining the seaward boundary of its property and that this entails a surveyor having to get to the beach with elaborate and cumbersome survey equipment. Respondent further contemplates erecting a fence along his seaward boundary and it will be necessary to establish an access road to facilitate the task of the fencing contractor. In any event the respondent wishes to exercise closer control over its property and to have vehicular access to the beach and adjacent area. There is, he says, no doubt that Sandy Bay has acquired a certain fame or notoriety, depending on one's point of view, as a beach frequented by nudists. Extensive publicity has led to large numbers of visitors coming to the beach. This has given rise to a number of problems, one of which is the absence of toilet facilities. The respondent accordingly deems it necessary to provide a quick access road so that it can exercise supervision and control its property. In any event, the owners of the respondent company are entitled to provide an easy access road to the beach for their own use and for the enjoyment of their families and friends.

[The learned Judge dealt further with the affidavits and continued.]

It is clear from these affidavits that a number of facts are in dispute and that no final interdict can be granted on these contested issues. But applicant claims that on the admitted facts before the Court a rule *nisi* operating as a temporary interdict can be granted. Mr. *Friedman*, who now appears with Mr. *Marais* for the respondent, contends that not even a temporary interdict can be granted since the applicant lacks *locus standi in judicio*. He argues that so far as the common law is concerned the applicant must show not only that the respondent's activities in bulldozing the bush constitute a nuisance, but also that he is so affected by that nuisance that he has the right to ask the Court for relief. Mr. *King*, for the applicant, argues that by destroying the vegetation and interfering with the ecology the respondent company is committing a public nuisance. The respondent denies that the ecology is suffering; the vegetation which is threatened is not indigenous but alien, namely, Rooikrans Bush. Assuming that the destruction of this vegetation constitutes a public nuisance_which I doubt_what rights has applicant in the matter? He lives at Llandudno which is some considerable distance away from Sandy Bay. Respondent avers that the configuration of the land is such that Sandy Bay and its environs are barely visible from Llandudno, and there is no suggestion on the papers that applicant can see the site of the bulldozer's operations from where he lives. Nor does applicant allege that he frequently visits Sandy Bay; indeed, he does not even allege that he has ever been there. All he says in his affidavit is that he is approximately one mile from Sandy Bay and that he bought his property to be close to nature and for peace and quiet.

It is not necessary to labour the point further. Whether he proceeds by way of summons or on motion the party seeking relief must show that he is suffering or will suffer some injury, prejudice, or damage or invasion of right peculiar to himself and over and above that sustained by the members of the public in general. It is not enough to allege that a nuisance is being committed, he must go further and at the very least allege facts from which it can be inferred that he has a special reason for coming to Court.

He has failed to make such allegation and consequently it seems to me that the objection taken is sound.

Mr. *King*, contends in the alternative that, even if the Court cannot interdict the alleged nuisance, the applicant is entitled to statutory relief. He argues that it is common cause that the respondent company has made application for the establishment of a township, and he refers to sec. 13 of the Ordinance, 33 of 1934 (C), which provides that:

"From the time application is made for the establishment of a township or the sub-division of an estate, until such time as such township or sub-divided estate has become an approved township or approved sub-divided estate, as the case may be, or the application has lapsed or has been refused or withdrawn—

(a) the land to which the application relates shall not be sub-divided or laid out in any manner and no building shall be erected thereon;

.....

unless the consent of the Administrator shall first have been obtained."

As respondent's application is still pending the land cannot be "laid out in any manner". It is argued that if "laying out" includes the levelling and removal of bush, the respondent company is contravening the Ordinance, and can therefore be interdicted from continuing its operations.

In my view the construction of an access road to a piece of land does not constitute the "laying out" of the land. The phrase "to lay out" suggests something more_a detailed planning or plotting of land or buildings. But counsel for the respondent contends that even if the conduct complained of can be described as the first step or commencement of the "laying out" of this land, the applicant has no *locus standi* to object. In support of this contention counsel relies on the judgment of SOLOMON, J., in *Patz* v. *Greene & Co.,* 1907 T.S. 427 at p. 433:

"In the case of *Chamberlaine* v. *Chester and Birkenhead Railway Co.,* 18 L.J. Ex 494, the law on this subject is thus laid down by Chief Baron POLLOCK in delivering the considered judgment of the Court:

'With respect to the first point, there is no doubt as to the general rule. Where a statute prohibits the doing of a particular act affecting the public no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage....'."

In commenting on this passage SUTTON, J., said in this Court in *Neethling and Another* v. *S.A. Central Co-operative Grain Co. Ltd.,* 1933 C.P.D. 179 at p. 185, that it was "not only good law, but also common sense". I respectfully agree.

The Ordinance provides machinery for the enforcement of its provisions. Where an application is made to establish a township and the applicant is so optimistic of the prospects that he proceeds to sub-divide the land or lay-out the land before obtaining approval, he is contravening sec. 13 and committing an offence which renders him liable to conviction and a fine not exceeding R 5 000 or imprisonment for ten years, or to both fine and imprisonment (sec. 62). Moreover, sec. 61 imposes a duty on the local authority to take all lawful steps necessary for enforcing compliance with the provisions of a scheme in the course of preparation or awaiting approval. If the local authority fails to perform its duty the Administrator may perform such duty. There is ample machinery for enforcing the provisions of the Ordinance and it is therefore unnecessary for a member of the public to take the initiative unless he can bring himself within the terms of the general rule set out in the judgment of SOLOMON, J., cited above. Since the applicant has not alleged any special damage or peculiar injury beyond that which he may have sustained in common with other citizens he has failed to show that he has *locus standi* in respect of the alleged infringement of the Townships Ordinance.

Finally, it is argued by Mr. *King* that, quite apart from the Townships Ordinance, the Town Planning Regulations are being contravened in that the respondent company is putting the land to a use for which it is not zoned.

I do not propose considering the merits of this argument since the same objection to the *locus standi* of the applicant applies.

It follows that the applicant is entitled to relief neither in respect of an alleged public nuisance nor in respect of the alleged contraventions of the Townships Ordinance and the Town Planning Regulations.

The application is accordingly dismissed with costs.

Applicant's Attorneys" *Herold, Gie & Broadhead.* Respondent's Attorneys: *Buiski, Herbstein & Ipp.*

HIGH COURT CIVIL SUIT NO. 5403 OF 1989

PROFESSOR WANGARI MAATHAI, CO-ORDINATOR, GREEN BELT MOVEMENT) —PLAINTIFF

v.

KENYA TIMES MEDIA TRUST LTD. — RESPONDENT

RULING

A chamber Summons was filed on 27.11.1989 by the applicant-plaintiff seeking a temporary injunction restraining the Defendant Company from embarking further on the construction of the proposed Kenya Times Complex at Uhuru Park until determination of the suit or further orders of the court.

The applicant plaintiff is one Professor Wangari Maathai and she is described as Co-ordinator, Green Belt Movement. Appearing for the plaintiff is Professor Ooko Ombaka and he is assisted by Mr. Githu Muigai and Mr. Mohamed Nyaoga.

Mr. Oraro appears for the defendant.

Mr. Oraro has raised a preliminary objection and by a Chamber Summons dated 1.12.89 he sought to strike out the plaint on 7 grounds but learned counsel wishes to proceed on 2 grounds only for the purposes of his preliminary objection.

(1) That the plaint discloses no cause of action against the defendant, and

(2) That the plaintiff has no *locus standi* to file the suit or the application.

Professor Ombaka who was content to be addressed as Mr. Ombaka had raised objections to the hearing of the preliminary objection and "Grounds of Objection" are contained in a document dated 4.12.1989. Mr. Ombaka asked for his objections to the preliminary points to be heard first and after discussions with learned counsel the court adjourned to consider the various points that had been raised. The Court ruled that the preliminary objection would proceed first and informed Mr. Ombaka that whatever subject matter he raised in his Answer was up to himself providing it was relevant.

Mr. Ombaka in his Grounds of Objection alleged inter alia that:

1. The Chamber Summons - and the ground of objection annexed thereto were totally without merit and intended to prevent a fair hearing of the issues raised and are contrary to Public Policy.

2. The suit was for certain declarations and the law was that no cause of action need be disclosed (although in fact such cause of action is actually disclosed).

3. That the plaint has not yet been served on the defendant as provided by law and consequently the plaintiff can amend her plaint should she so wish at her sole discretion. The application to strike out the plaint is thus premature and is an abuse of the court process.

Mr. Oraro commenced his preliminary objection and addressed the Court with his arguments based on the two grounds that he had chosen and which grounds — are opposed and objected to by Mr. Ombaka.

Learned Counsel Mr. Oraro said it was trite rule of law that before a person applied for a temporary injunction he or she must show a cause of action which is dependent on the validity of the plaint. In the present case the plaintiff filed her plaint but refused to serve the plaint — — on the defendant. In fact learned counsel said that the plaintiff proudly stated (through her advocate Mr. Ombaka) that the defendant could not object to her plaint (Mr. Oraro said "invalid" plaint) because it had not yet been served, the criticism of non service of the plaint upon the defendant must be merited. Mr. Oraro would have been entitled to ask for an adjournment apart from other remedies available to him but learned counsel has elected to proceed and he has a copy of the plaint. It is noted that the 3rd ground of objection made by Mr. Ombaka in writing states the plaint has not been served on the defendant "as the provided by law" and consequently the plaintiff can amend her plaint should she so wish at her sole discretion. The application to strike out her plaint is thus premature and is an abuse of the court process.

This court will set out the appropriate Orders and rules shortly so that the plaintiff can be aware of the wrongful

submissions being put forward based on misinterpretation of the very clear Orders and rules to be found in the Civil Procedure Act and the Civil Procedure Rules.

It is difficult to see how, if a plaint has not been served on a defendant, that the defendant can possibly have any idea of the case against him.

For that matter how can it be that non service of a plaint can be "as provided by law"? How can it be an abuse od the court process to make an application to strike out a plaint?

Mr. Oraro said he had a simple legal answer to the objections of Mr. Ombaka and he referred to Order VI rule 13(1) of the Civil Procedure Rules which reads:

At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that

(2) it discloses no reasonable cause of action or defence.

At some stage in his Answer to Mr. Oraro's submissions Mr. Ombaka submitted that an interlocutory court (meaning this court) cannot decide on the merits of a suit which the court has not been able to assess the merits by way of trial.

The court notes that Order VI rule 13(2) provides "No evidence shall be admissible on an application under subrule 1(2) but the application should state the grounds on which it is made". There is no question of this court hearing the plaint on its merits and assessing the same. No evidence is admissible on the precise application now being made.

The Court now refers to **Order IV rule I of Suit and Issue of Proceedings**" (Quotes placed by the court, so also is the underlining) "Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed."

Order IV rule 3(1) reads,

"When a suit has been filed a summons shall be served to the defendant ...."

"Every Summons shall be accompanied by a copy of the plaint".

Order iv rule 3(3) reads,

Mr. Oraro says the suit must be a valid suit - not an invalid suit to be amended later. Mr. Ombaka seems to think that he can keep the material facts of his claim away from the defence by not serving the plaint.

[sic] If a layman wanted to file a suit and he was enabled to look at the 3 Civil Procedures Rules, commencing under the marginal note **"Institution of suit and Issue of Proceedings**" namely Order IV rule 1, rule 3(1) and rule 3(3) he would face 3 simple sentences.

Is it possible that a trained Advocate who is entitled to call himself professor and/or Doctor, assisted by two other trained advocates can put forward such erroneous arguments based on simple straightforward rules in respect of which they are supposed to be experts?

Mr. Ombaka submitted that Order VI rule 13 (he actually said order V rule 13) must be read in the context of the entire code and in particular to Order VI rule 1 which empowers a party to amend once before the pleadings are closed. Learned Counsel submitted that any other interpretation which does not give effect to Order VIA rule 1 does not make sense. He said moving to strike down a claim when it could be amended without leave of the court would render Order VIA rule 1 nugatory. It would defeat the course of justice.

The Court has dealt with Order VI rule 13 which it finds does not have to be read in the context of the entire code or Order VIA rule 1 and this submission is dismissed.

Mr. Oraro had referred to Order XXXV rule 1 to show that a Judgement could be obtained by summary procedure and that there was more than one way to obtain a ruling or judgement without trial and he asked the court to contrast the Order with the application being made under Order VI rule 13.

Mr. Ombaka said the reference to the order was unnecessary because it related to summary procedure.

Mr. Oraro for the Defendant Company had addressed the count on the basis that the plaintiff had brought the action in a private capacity. In order to arrive at this conclusion he had dealt at length with representative actions and showed that the plaintiff had not complied with the Civil Procedure Rules for taking representative actions and that the contents of the plaint did not show any such intention. Learned Counsel dealt with many authorities and he supplied the court with copies of those authorities.

Mr. Oraro then switched his address and dealt with relator actions and showed that on good authorities only the Attorney General could file and prosecute an action on behalf of the public. Here again learned counsel supplied the court and the plaintiff's advocate with copies of the authorities.

Learned Counsel further concluded that the plaintiff could not file a relator action or otherwise, on behalf of the public.

Mr. Ombaka in his answer made positive statements that the plaintiff's action was not a relator action and it is not a representative action. Learned Counsel said it is a personal action against Kenya Times Ltd. There is no claim in the suit that the plaintiff is bringing that suit on behalf of anyone else other than herself.

Learned Counsel further said that anything else in the plaint does not mean anyone but herself. "Co-ordinator" merely describes herself.

Mr. Ombaka said it may strengthen her standing before the court because of the subject matter of the suit. There had been a suggestion that the plaint may have been brought on moral or social grounds. He would support that.

Learned Counsel said his friend puts an interlocutory court in a position whereby a trial court would be hearing the evidence. The court remarked that this latter point has already been dealt with when discussing the position under Order VI rule 13 and other rules and no further comment will be made.

The court now looks again at the three (3) Grounds of Objection filed by Mr. Ombaka against the preliminary objection raised by Mr. Oraro. The court discussed the 3rd ground in some detail and after full consideration all three (3) grounds of objection were dismissed with costs.

This leaves the preliminary objection to be considered on the two grounds put forward. They are each to be considered separately.

The first ground is that the plaint shows no reasonable cause of action against the defendant. It is noted that the description "reasonable" is not used.

Mr. Ombaka in the second ground of his Grounds of Objection (which have been dismissed) stated that ".... in this case such cause of action is actually disclosed".

The court now turns to the plaint itself, to ascertain the cause of action. Paragraph 1 describes the plaintiff as a co-ordinator but as her learned counsel has said this term merely describes herself.

Paragraph 2 describes the Defendant as a company limited by decree [sic]. Paragraph 3.1 records that the plaintiff's application for a licence to organize a demonstration to protest against the location of the complex has not been quoted.

b. refers to the support for the complex.

c. refers to opposition for the complex.

d. refers to violation of the green belt.

e. refers to fencing and the ground breaking ceremony. A breach of the Land Planning Act and Regulations and Building By Laws is alleged.

It is further alleged that consent has not been applied for but goes on to allege that consent cannot be legally given. It is further alleged that the Defendant has committed an offence under Regulation 10 of the Development and Use of Land (Planning) Regulations 1961. Paragraph 4 refers to the Constitution and democracy.

The Court has now perused the plaint and finds that the plaint discloses no cause of action against the defendant.

This finding is sufficient for the court to strike out the plaint. However, the court will also consider the second ground which alleges that the plaintiff has no *standi* to file the suit or the application.

Under sub-paragraph (e) it is alleged that there are breaches of Government or Local Government Laws, Regulations and By-Laws. It is not alleged that the plaintiff is able or has any right to bring an action in respect of these alleged breaches of law.

Nor is it alleged that the Defendant Company is in breach of any rights, public or private. There is no allegation of damage or anticipated damage or injury. In particular it is not alleged that the Defendant Company is in breach of any rights, public or private in relation to the plaintiff nor has the company caused damage to her nor does she anticipate any damage or injury.

It is well established that only the Attorney General can sue on behalf of the public but in any event the plaintiff does not wish to bring an action on behalf of anyone else. In the plaint there is no allegation that the plaintiff has a right of action against the defendant company.

Mr. Ombaka had said it may strengthen her (plaintiff's) standing before the court because of the subject matter of the suit and he adopted what he said had been a suggestion that the plaint may have been brought on moral or social grounds.

This may be so. The plaintiff has strong views that it would be preferable if the building of the complex never took place in the interests of many people who had not been directly consulted. Of course many buildings are being put up in Nairobi without many people being consulted. Professor Maathai apparently thinks this, is a special case. Her personal views are immaterial.

The Court finds that the plaintiff has no right of action against the Defendant Company and hence she has no *locus standi*.

While only one of these two findings would suffice, the court strikes out the plaint on both grounds, (1) that the plaint discloses no reasonable cause of action against the defendant and (2) the plaintiff has no *locus standi*. Orders accordingly, The Plaintiff will pay the costs of the Defendant.

The application filed on 27.11.1989 seeking a temporary injunction is dismissed with costs. This dismissal follows the striking out of the plaint leaving no sub-stract for the application. In any event the application would have been dismissed because it does not comply with the conditions laid down in Order XXXIX which are necessary to bring an application under the Order. Further the undated affidavit in support of the application does not comply with the provisions of Order XVIII of the Civil Procedure Rules.

In other words the application for a temporary injunction was a non-starter from the date of filing.

For the sake of clarity the Court repeats:-

the preliminary objection made by Mr. Oraro for the Defence and dated 1st December, 1989 is upheld on the 2 grounds that were argued. The Court found (1) that the plaint disclosed no reasonable cause of action against the and (2) that the plaintiff has no *locus standi* to file the suit or the application.

The plaint is struck out on both grounds with costs to be paid to the defendant. The application filed by the plaintiff on 27.11.89 seeking a temporary injunction is dismissed with costs.

The grounds of objection to the preliminary point filed by the plaintiff on 4.12.89 are dismissed with costs. There will be Orders accordingly.

Dated and delivered at Nairobi this 11th day of December 1989 in Court No.4.

N. DUGDALE
JUDGE
11.12.89

REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case No.72 Of 1994

1. PROF. WANGARI MAATHAI)
2. PIUS JOHN NJOGU) PLAINTIFFS
3. JOHN F. MAKANGA)

v.

1. CITY COUNCIL OF NAIROBI)
2. COMMISSIONER OF LANDS) DEFENDANTS
3. MARKET PLAZA LIMITED)

RULING

The plaintiffs sued the defendants and sought these declarations:-

(a) That the subdivision, sale and transfer of L.R. 209/1855/2 - L.R. 57271 is irregular and breached special condition in the grant dated 1.8.1928. It is ultra vires the powers of the first defendant which is Nairobi City Council.

(b) That the issuance of Certificates of Title by the Commissioner of Lands is irregular and contrary to law.

(c) The revocation of subdivision of Land Ref. 209/1855 - I.R. 2562 together with revocation of sale thereof.

(d) An injunction to restrain the 3rd defendant from selling or carrying out any construction work on L.R. 209/1855/2. A chamber summons dated 7.1.1994 has been filed in court and seeks an injunction against the third Defendant to restrain it from constructing anything on the plot in question. It is supported by the affidavit of the first plaintiff which swears that the plot is in danger of being alienated. The plaintiffs will be obstructed in execution of any decree that they may obtain against the defendants if construction work is permitted to continue unabated.

In its grounds of opposition dated 17.1.1994 the third defendant denies that it is disposing off the plot and says, an injunction will cause hardship to the third defendant because the approval of the building plans by the Nairobi City Council is valid only for a year. The third defedant's title is guaranteed by the provisions of the Registration of Titles Act Cap. 281 under which the title has been issued. An injunction if granted will render the provisions of the Registration of Title Act nugatory.

The third defendant also filed the application dated 17.1.1994 for an injunction against the plaintiffs.

The second defendant filed an affidavit in which it is deponed that the Nairobi City Council applied for the subdivision of the plot in question and the approval was given in the normal way.

In their grounds of opposition the plaintiffs said they do not intend to damage the plot in question save by way of lawful litigation in courts of law. The third defendant alone had filed a defence. It denies breach of the 1928 special condition upon which the suit is based. It denies a sale to it of the plot but claims a lawful allocation thereof which conferred good title. In paragraph 16 of this defence it is pleaded:-

"This third defendant contends that the plaintiffs herein have no *locus standi* to bring the proceedings now before the court and shall at the appropriate time move the Honourable Court to strike out this suit".

There is also paragraph 19 which pleads:-

"The third defendant shall rely on the provisions of section 23 of the Registration of Titles Act Cap 201 which provides inter alia, that the certificate of Title issued by

the Registrar to a purchaser of land upon a transfer **shall** be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the **indefeasible** owner thereof .... and the title to that proprietor shall not be subject to challenge."

There is of course section 24 of the Registration of Titles Act which says that the remedy of a person aggrieved by such registration as that of the 3rd defendant is in damages only.

As pleaded in paragraph 16 of the defence of the third defendant the time to raise the issue of *locus standi,* came on 27.1.1994 when the point was taken by the third defendant that the plaintiffs had no right to appear and be heard in this case and their suit be struck out. For this proposition of lack of standing Mr. Muigua relied on the House of Lords decision in GOURIET AND OTHERS Vs. H.M. ATTORNEY GENERAL AND UNION OF POSTS OFFICE ENGINEERING UNION [sic] [1971] AC 435 at Pages 437 Letter C:

HELD: Allowing the appeals by the defendants and dismissing the plaintiff's appeal.

(1) That save and in so far as the local Government Act 1972, section 222 gave local authorities a limited power to do so, only the Attorney General could sue on behalf of the public for the purpose of preventing public wrongs and that a private individual could not do so on behalf of the public, though he might be able to do so if he would sustain injury as a result of a public wrong, for the courts had no jurisdiction to entertain such claims by private individuals who had not suffered and would not suffer damage (Post pp. 481A. 494 F.G.) page 481.

But in the present case, the transgression of those limits inflicts no private wrong upon these plaintiffs and although the plaintiffs, in common with the rest of the public might be interested in the larger view of the question yet the constitution of the country has wisely entrusted the privilege with a public officer, and has not allowed it to be usurped by private individuals.

"That it is the exclusive right of the Attorney General to represent the public interest even where individuals might be interested in the larger view of the matter it is not technical, not procedural, not fictional. It is constitutional. I agree with Lord Westbury L.C. that it is also wise".

It was submitted on behalf of the third defendant that the present case should have been brought by way of a relator action if the Attorney General saw it fit to do so. The plaintiffs have not shown that they suffer any private injury if the proposed multi storey car park building is built. The basis of the plaintiff's action is they allege that they are rate payers in the City of Nairobi. The third defedant had submitted that these elements of rate paying are unsupported because no amount of rate is indicated, when paid, in respect of what property the plaintiffs are concerned with. Even rate paying alone, does not entitle the plaintiffs to sue unless they show that they stand to suffer injury or damage over and above other rate payers if the building is constructed. As pleaded in paragraph 19 of the third defedant's defence section 23 of the Registration of Titles Act Cap 281 require that a certificate of title issued by the Registrar to the purchaser upon transfer shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the indefeasible owner thereof/and the title to that proprietor shall not be subject to challenge.

This is however subject to encumbrances, easements, restrictions and conditions, contained or endorsed on such certificate. There is the First of August 1928 special condition to which the third defendant says it has not been breached because the present plot L.R. 209/1855 - I.R. 2562 has been continually used as a municipal market, but the portion now known as L.R. 209/1855/2 I.R. 57271 has always been used as a parking area.

In paragraphs 8 and 10 of the 3rd defendant's defence it is stated that the suit premises were not purchased by the third defendant but allocated to it and made payment of KShs.2 million by way of stand premium as opposed to any purchase price. In paragraph 9 of this defence fraud on the part of the defendants is denied in that the First defendant, Nairobi City Council acted legally and within its powers when it applied for the subdivision. It is said the third defendant is a stranger to the plaintiff's allegations that the plaintiffs are aggrieved by the said allocation, subdivision and transfer to the third defendant of L.R. No. 209/1855/2. In that connection the third defendant contends that the plaintiffs have no *locus standi* to bring these proceedings.

On the basis of lack of standing and the provision of section 23 of the Registration of Titles Act I was urged to hold that the plaintiffs had no right to sue, no right to appear, no right to be heard in these proceedings.

On the other hand Mr. Khaminwa for the plaintiffs, submitted in relation to the attack and lack of evidence of details of rate paying, that they had intended to call oral evidence of this at the hearing of the application for injunction and the present preliminary point has come prematurely and at the wrong time because the 3rd defendant must wait to give the plaintiffs the opportunity to show by oral evidence that the plaintiffs have a standing. Mr. Khaminwa thinks the provision of section 23 cannot be looked at this stage when dealing with whether the plaintiffs have a right to speak against an owner of a title registered under the Registration of Titles Act.

A number of authorities were cited by Mr. Khaminwa.

One of this is the INLAND REVENUE COMMISSIONERS Vs. NATIONAL FEDERATION OF SELF EMPLOYED [1985] AC 617 Page 653.

"Suffice it to refer to the judgement of Lord Parker C.J. in REG. Vs. Thames Magistrate's Court ...." a cause of certiorari; and to the words of Lord Wilberforce in Gouriet Vs. Union of Post Office Workers [1978] AC 435, 482 where he stated the modern position in relation to the prerogative orders: "These are often applied for by individuals and the courts have allowed them liberal access under a generous conception of *Locus Standi.* The one legal principle which is implicit in the case law and accurately reflected in the rule of court, is that in determining the sufficiency of an applicant's interest it is necessary to consider the matter to which the application relates. It is wrong in law, as I understand the cases, for the court to attempt an assessment of the sufficiency of an applicant's interest without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, or reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave. The limb represented by the need for an applicant to show, when he seeks leave to apply, that he has such a case is an essential protection against abuse of legal process. It enables the court to prevent abuse by busy bodies, cranks, and other mischief makers. I do not see any further purpose served by the requirement for leave".

According to the plaintiffs the matter of their complaint here is the subdivision, allocation and transfer and registration of the suit premises in the name of the third defendant. The sufficiency of the plaintiffs' interest must be looked at with regard to the kind of premises the suit land is. As already stated that the title issued to the 3rd defendant herein cannot be challenged in the absence of the matters set out in section 23 of the Act. This is the subject matter of the plaintiff's complaint in respect whereof the third defendant has rightly raised a preliminary point that the applicants have no right to be heard to challenge, whether as rate payers, the third defendant's title. In my considered view there is no further investigation required to ascertain what the subject of the plaintiffs' complaint is. It is there in their plaint, in their chamber summons. At this stage the plaintiffs must show, and they have failed to show, that there has been any failure of any public duty in which they alone have a unique interest as opposed to that of the public generally.

I have been referred to a passage in Wade, Administrative Law which in itself cries for answer. In the Lord Denning book: "The Judge and the Law" I was referred to a passage like that of the Inland Revenue Commissioner's case which deals with: "Exceptions had been made, particularly in applications for certiorari or prohibition, but by and large standing was narrowly construed". The plaintiffs are not before the court on any matter of certiorari or prohibition but by way of an ordinary suit by plaint restricted by the nature of the statute law in Kenya and restricted by their own interest in the subject matter of complaint namely as rate payers which they have not been able to make out a case.

I am therefore satisfied that the plaintiffs have no locus standi in this case and they should not be heard. Accordingly the plaintiff's suit is struck out as urged in the preliminary objection. The plaintiffs will pay all the defendants the costs of this suit.

Delivered this 17th day of March 1994
in the presence of:

Khaminwa for the plaintiffs absent

Kinyua for the 1st defendant

Miss Kimani for the 2nd defendant

Mr. Muigua for the 3rd defendant.

(M. OLE KEIWUA)
JUDGE

REPUBLIC OF THE PHILIPPINES
SUPREME COURT
MANILA

JUAN ANTONIO, ANNA ROSARIO and JOSH ALFONSO, all surnamed OPOSA, minors and represented by their parents ANTONIO and RIZALINA OPOSA

G.R. No. 101083

ROBERTA NICOLE SADIUA, minor, represented by her parents CALVIN and ROBERTA SADIUA,

CARDO, AMANDA SALUD and PATRISHA, all surnamed FLORES, minors and represented by their parents ENRICO and NIDA FLORES,

GIANINA DITA R. FORTUN, minor, represented by her parents SIGRIFD and DOLORES FORTUN,

GEORGE II and MA. CONCEPCION, all surnamed MISA, minors and represented by their parents GEORGE and MYRA MISA,

BENJAMIN ALAN V. PESIGNA, minor, represented by his parents ANTONIO and ALICE PESIGAN,

JOVIK MARIE ALFARO, minor, represented by her parents JOSE and MARIA VIOLETA ALFARO,

MARIA CONCEPCION T. CASTRO, minor, represented by her parents JOSE and ANGELA DESAMPARADO,

CARLO JOAQUIN T. NARVASA, minor represented by his parents GREGORIO II and CRISTINE CHARITY NARVASA,

MA MARGARITA, JESUS IGNACIO, MA ANGELA and MARIE GABIELLE, all surnamed SAENZ, minor, represented by their parents ROBERTO and AURORA SAENZ.

KRISTINE, MARY ELLEN, MAY, GOLDA MARTHE and DAVID IAN, all surnamed KING, minors, represented by their parents MARIO and HAYDEE KING.

DAVID FRANCISCO and THERESE VICTORIA, all surnamed ENDRIGA, minors, represented by their parents BALTAZAR and TERESITA ENDRIGA.

JOSE MA. and REGINA MA., all surnamed ABAYA, minors, represented by their parents ANTONIO and MARICA ABAYA,

MARILIN, MARIO, JR. and MARIETTE, all surnamed CARDAMA, minors, represented by their parents MARIO and LINA CARDAMA,

CLARISSA, ANN MARIE, NAGEL and IMRE LYN, all surnamed OPOSA, minors and represented by their parents RICARDO and MARISSA OPOSA,

PHILIP JOSEPH, STEPHEN JOHN and ISAIAH JAMES, all surnamed QUIPIT, minors, represented by their parents JOSE MAX and VIIMI QUIPIT,

BUGHAW CIELO, CRISANTO, ANNA, DANIEL and FRANCISCO, all surnamed BIBAL, minors, represented by their parents FRANSCICO, JR. and MILAGROS BIBAL, and

THE PHILLIPINE ECOLOGICAL NETWORK, INC..
Petitioners

v.

THE HONORABLE FULGENCIO S. FACTORAN, JR., in his capacity as the Secretary of the Department of Environment and Natural Resources, and THE HONORABLE ERIBERTO U. ROSARIO, presiding Judge of the RTC, Makati, Branch 66, — Respondents

AUGUST 9, 1993

NOTICE OF JUDGMENT

Sir:

Please take notice that on JULY 30, 1993, *decision/resolution*, copy attached, was rendered by the Supreme Court in the above-entitled case the original of which is now on file in this office.

Respectfully,

DANIEL T. MARTINEZ
Clerk of Court

By: LUZVIMINDA D. PUNO
Assistant Clerk of Court

DAVID FRANCISCO and THERESE VICTORIA, all surnamed ENDRIGA, minors, represented by their parents BALTAZAR and TERESITA ENDRIGA.

JOSE MA. and REGINA MA., all surnamed ABAYA, minors, represented by their parents ANTONIO and MARICA ABAYA,

MARILIN, MARIO, JR. and MARIETTE, all surnamed CARDAMA, minors, represented by their parents MARIO and LINA CARDAMA,

CLARISSA, ANN MARIE, NAGEL and IMRE LYN, all surnamed OPOSA, minors and represented by their parents RICARDO and MARISSA OPOSA,

PHILIP JOSEPH, STEPHEN JOHN and ISAIAH JAMES, all surnamed QUIPIT, minors, represented by their parents JOSE MAX and VIIMI QUIPIT,

BUGHAW CIELO, CRISANTO, ANNA, DANIEL and FRANCISCO, all surnamed BIBAL, minors, represented by their parents FRANSCICO, JR. and MILAGROS BIBAL, and THE PHILLIPINE ECOLOGICAL NETWORK, INC. — Petitioners

Present: NARVASA, C.*J.*,[1] CRU FELICIANO, PADILLA, BIDIN, S.GRISO AQUINO, REGALADO, DAVIDE, JR., ROMERO, NOCON, BELLOSILLO, MELO QUIASON, PUNO, and VITUG, J.J.

v.

THE HONORABLE FULGENCIO, FACTORAN, JR., in his capacity as the Secretary of the Department of Environment and Natural Resources, and THE HONORABLE ERIBERTO U. ROSARIO, Presiding Judge of the RTC, Makati, Branch 66 — Respondents

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DECISION

DAVIDE, JR., *J.*:

In a broader sense, this petition bears upon the right of Filipinos to a balanced and healthful ecology which the petitioners dramatically associate with the twin concepts of "inter-generational responsibility" and "inter-generational justice". Specifically, it touches on the issue of whether the said petitioners have a cause of action to "prevent the misappropriation or impairment" of Philippine rainforests and "arrest the unabated hemorrhage of the country's vital life-support systems and continued rape of Mother Earth."

The controversy has its genesis in Civil Case No. 90-777 which was filed before Branch 66 (Makati, Metrol Manila) of the Regional Trial Court (RTC), National Capital Judicial Region. The principal plaintiffs therein, now the principal petitioners are all minors duly represented and joined by their respective parents. Impleaded as an additional plaintiff is the Philippine Ecological Network, Inc. (PENI), a domestic, non-stock and non-profit corporation organized for the purpose of, *inter alia*, engaging in concerted action geared for the protection of our environment and natural resources. The original defendant was the Honorable Fulgencio S. Factoran, Jr., then Secretary of the Department of Environment and Natural Resources (DENR). His substitution in this petition by the new Secretary, the Honorable Angel C. Alcala, was subsequently ordered upon proper motion by the petitioners. The complaint[2] was instituted as a taxpayers' class suit[3] and alleges that the plaintiffs "are all citizens of the Republic of the Philippines, taxpayers, and entitled to the full benefit, use and enjoyment of the natural resource treasure that is the country's virgin tropical rainforests." The same was filed for themselves and others who are equally concerned abut the preservation of said resource but are "so numerous that it is impracticable to bring them all before the Court." The minors further asseverate that they "represent their generation as well as generations yet unborn."[5] Consequently, it is prayed for that judgment be rendered:

> "x x x ordering defendant, his agents, representatives and other persons acting in his behalf to —
>
> (1) Cancel all existing timber license agreements in the country;

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1 No part; related to one of the petitioners.

2 Rollo, 164; 186.

3 Id., 62-65, exclusive of annexes.

4 Under Section 12, Rule 3, Revised Rules of Court.

5 Rollo, p.67.

(2) Cease and desist from receiving, accepting, processing, renewing or approving new timber license agreements."

And granting the plaintiffs "x x x" such other reliefs just and equitable under the premises."[6]

The complaint starts off with the general averments that the Philippine archipelago of 7,100 islands has a land area of thirty million (30,000,000) hectares and is endowed with rich, lush and verdant rainforests in which varied, rare and unique species of flora and fauna may be found: these rainforests contain a genetic, biological and chemical pool which is irreplaceable; they are also the habitat of indigenous Philippine cultures which have existed, endured and flourished since time immemorial; scientific evidence reveals that in order to maintain a balanced and healthful ecology, the country's land area should be utilized on the basis of a ratio of fifty-four per cent (54%) for forest cover and forty-six per cent (46%) for agricultural, residential, industrial, commercial and other uses; the distortion and disturbance of this balance as a consequence of deforestation have resulted in a host of environmental tragedies, such as (a) water shortages resulting from the drying up of the water table, otherwise known as the "aquifer," as well as of rivers, brooks and streams, (b) salinization of the water table as a result of the intrusion therein of salt water, incontrovertible examples of which may be found in the island of Cebu and Municipality of Racoor, Cavite, (c) massive erosion and the consequential loss of soil fertility and agricultural productivity, with the volume of soil eroded estimated at one billion (1,000,000,000) cubic meters per annum — approximately the size of the entire island of Catanduanes, (d) the endangering and extinction of the country's unique, rare and varied flora and fauna, (e) the disturbance and dislocation of cultural communities, including the disappearance of the Filipino's indigenous cultures, (f) the siltation, of rivers and seabeds and consequential destruction of corals and other aquatic life leading to a critical reduction in marine resource productivity, (g) recurrent spells of drought as is presently experienced by the entire country, (h) increasing velocity of typhoon winds which result from the absence of windbreakers, (i) the flooding of lowlands and agricultural plains arising from the absence of the absorbent mechanism of forests, (j) the siltation and shortening of the lifespan of multi-billion peso dams constructed and operated for the purpose of supplying water for domestic uses, irrigation and the generation of electric power, and (k) the reduction of the earth's capacity to process carbon dioxide gases which has led to perplexing and catastrophic climatic changes such as the phenomenon of global warming, otherwise known as the "greenhouse effect."

Plaintiffs further assert that the adverse and detrimental consequences of continued deforestation are so capable of unquestionable demonstration that the same may be submitted as a matter of judicial notice. This notwithstanding, they expressed their intention to present expert witnesses as well as documentary, photographic and film evidence in the course of the trial.

As their cause of action, they specifically allege that:

"CAUSE OF ACTION

7. Plaintiffs replead "by reference the foregoing allegations.

8. Twenty-five (25) years ago, the Philippines had some sixteen (16) million hectares of rainforests constituting roughly 53% of the country's land mass.

9. Satellite images taken in 1987 reveal that there remained no more than 1.2 million hectares of said rainforests or four per cent (4.0%) of the country's land area.

10. More recent surveys reveal that a mere 850,000 hectares of virgin old-growth rainforests are left, barely 2.8% of the entire land mass of the Philippine archipelago and about 3.0 million hectares of immature and uneconomical secondary growth forests.

11. Public records reveal that defendant's predecessors have granted timber license agreements ("TLA's") to various corporations to cut the aggregate area of 3.89 million hectares for commercial logging purposes.

    A copy of the TLA holders and the corresponding areas covered is hereto attached as Annex "A".

12. At the present rate of deforestation, i.e. about 200,000 hectares per annum or 25 hectares per hour — nighttime, Saturdays, Sundays and holidays included — the Philippines will be bereft of forest resources after the end of this ensuing decade, if not earlier.

13. The adverse effects, disastrous consequence, serious injury and irreparable damage of this continued trend of deforestation to the plaintiff minors' generation and to generations yet unborn are evident and incontrovertible. As a matter of fact, the environmental damages enumerated in paragraph 6 hereof are already being felt, experienced and suffered by the generation of plaintiff adults.

[6] Id., 74.

14. The continued allowance by defendant of TLA holders to cut and deforest the remaining forest stands will work great damage and irreparable injury to plaintiffs — especially plaintiff minors and their successors — who may never see, use, benefit from and enjoy this rare and unique natural resource treasure.

This act of defendant constitutes a misappropriation and/or impairment of the natural resource property he holds in trust for the benefit of plaintiff minors and succeeding generations.

15. Plaintiffs have a clear and constitutional right to a balanced and healthful ecology and are entitled to protection by the State in its capacity as the *parens patriae.*

16. Plaintiffs have exhausted all administrative remedies with the defendant's office. On March 2, 1990, plaintiffs served upon defendant a final demand to cancel all logging permits in the country.

A copy of the plaintiffs' letter dated March 1, 1990 is hereto attached as Annex "B".

17. Defendant, however, fails and refuses to cancel the existing TLA's, to the continuing serious damage and extreme prejudice of plaintiffs.

18. The continued failure and refusal by defendant to cancel the TLA's is an act violative of the rights of plaintiffs, especially plaintiff minors who may be left with a country that is desertified (sic), bare, barren and devoid of the wonderful flora, fauna and indigenous cultures which the Philippines has been abundantly blessed with.

19. Defendant's refusal to cancel the aforementioned TLA's is manifestly contrary to the public policy enunciated in the Philippine Environmental Policy which, in pertinent part, states that it is the policy of the State —

(a) to create, develop, maintain and improve conditions under which man and nature can thrive in productive and enjoyable harmony with each other;

(b) to fulfill the social, economic an other requirements of present and future generations of Filipinos and;

(c) to ensure the attainment of an environmental quality that is conducive to a life of dignity and well-being". (F.D. 1151, 6 June 1977)

20. Furthermore, defendant's continued refusal to cancel the aforementioned TLA's is contradictory to the Constitutional policy of the State to —

a. effect "a more equitable distribution of opportunities, income and wealth" and "make full and efficient use of natural resources (sic), (Section 1, Article XII of the Constitution);

b. "protect the nation's marine wealth." (Section 2, Ibid);

c. "conserve and promote the nation's cultural heritage and resources (sic)," (Section 14, Article XIV, id.);

d. "protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." (Section 16, Article II, id.)

21. Finally, defendant's act is contrary to the highest law of humankind — the natural law — and violative of plaintiffs' right to self-preservation and perpetuation.

22. There is no other plain, speedy and adequate remedy in law other than the instant action to arrest the unabated hemorrhage of the country's vital life - support systems and continued rape of Mother Earth."[7]

On 22 June 1990, the original defendant, Secretary Factoran, Jr., filed a Motion to Dismiss the complaint based on two (2) grounds, namely: (1) the plaintiffs have no cause of action against him and (2) the issue raised by the plaintiffs is a political question which properly pertains to the legislative or executive branches of Government. In their 12 July 1990 Opposition to the Motion, the petitioners maintain that (1) the complaint shows a clear and unmistakable cause of action, (2) the motion is dilatory and (3) the action presents a justiciable question as it involves the defendant's abuse of discretion.

On 18 July 1991, respondent Judge issued an order granting the aforementioned motion to dismiss.[8] In the said order, not only was the defendant's claim — that the complaint states no cause of action against him and that it raises a political question — sustained, the respondent Judge further ruled that the granting of the reliefs prayed for would result in the impairment of contracts which is prohibited by the fundamental law of the land.

[7] Rollo, p.73.

[8] Annex "B" of Petition: Id., 43-44.

Plaintiffs thus filed the instant special civil action for *certiorari* under Rule 65 of the Revised Rules of Court and ask this Court to rescind and set aside the dismissal order on the ground that the respondent Judge gravely abused his discretion in dismissing the action. Again, the parents of the plaintiffs-minors not only represent their children, but have also joined the latter in this case.[9]

On 14 May 1992, we resolved to give due course to the petition and required the parties to submit their respective Memoranda after the Office of the Solicitor General (OSG) filed a Comment in behalf of respondents and the petitioners filed a reply thereto.

Petitioners contend that the complaint clearly and unmistakably states a cause of action as it contains sufficient allegations concerning their right to a sound environment based on Articles 19, 20 and 21 of the Civil Code (Human Relations), Section 4 of Executive Order (E.O.) No. 192 creating the DENR, Section 3 of Presidential decree (P.D.) No. 1151 (Philippine Environmental Policy), Section 16, Article II of the 1987 Constitution recognizing the right of the people to a balanced and healthful ecology, the concept of generational genocide in Criminal Law and the concept of man's inalienable right to self-preservation and self-perpetuation embodied in natural law; Petitioners likewise rely on the respondent's correlative obligation, per Section 4 of E.O. No. 192, to safeguard the people's right to a healthful environment.

It is further claimed that the issue of the respondent Secretary's alleged grave abuse of discretion in granting Timber License Agreements (TLAs) to cover more areas for logging than what is available involves a judicial question.

About the invocation by the respondent Judge of the Constitution's non-impairment clause; petitioners maintain that the same does not apply in this case because TLAs are not contracts. They likewise submit that even if TLAs may be considered protected by the said clause, it is well settled that they may still be revoked by the State when public interest so requires.

On the other hand, the respondents aver that the petitioners failed to allege in their complaint a specific legal right violated by the respondent Secretary for which any relief is provided by law. They see nothing in the complaint but vague and nebulous allegations concerning an "environmental right" which supposedly entitles the petitioners to the "protection by the state in its capacity as parens patriae." Such allegations, according to them, do not reveal a valid cause of action. They then reiterate the theory that the question of whether logging should be permitted in the country is a political question which should be properly addressed to the executive or legislative branches of Government. They therefore assert that the petitioners' recourse is not to file an action in court, but to lobby before Congress for the passage of a bill that would ban logging totally.

As to the matter of the cancellation of the TLAs, respondents submit that the same cannot be done by the State without due process of law. Once issued, a TLA remains effective for a certain period of time — usually for twenty-five (25) years. During its effectivity, the same can neither be revised nor cancelled unless the holder has been found, after due notice and hearing to have violated the terms of the agreement or other forestry laws and regulations. Petitioners' proposition to have all the TLAs indiscriminately cancelled without the requisite hearing would be violative of the requirements of due process.

Before going any further, we must first focus on some procedural matters. Petitioners instituted Civil Case No 90-777 as a class suit. The original defendant and the present respondents did not take issue with this matter. Nevertheless, we hereby rule that the said civil case is indeed a class suit. The subject matter of the complaint is of common and general interest not just to several, but to all citizens of the Philippines. Consequently, since the parties are so numerous, it becomes impracticable, if not totally impossible, to bring all of them before the court. We likewise declare that the plaintiffs therein are numerous and representative enough to ensure the full protection of all concerned interests. Hence, all the requisites for the filing of a valid class suit under Section 12, Rule 3 of the Revised Rules of Court are present both in the said civil case and in the instant petition, the latter being but an incident to the former.

This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to use on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature." Nature means the created world in its entirety.[10] Such rhythm and harmony indispensably include, *inter alia*, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their

[9] Paragraph 7, Petiton, 6; Rollo, 20.

[10] Webster's Third New International Dictionary, unabridged, 1986, 1508.

exploration, development and utilization be equitably accessible to the present as well as future generations.[11] Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. But a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.

The *locus standi* of the petitioners having thus been addressed. We shall now proceed to the merits of the petition.

After a careful perusal of the complaint in question and a meticulous consideration and evaluation of the issues raised and arguments adduced by the parties, we do not hesitate to find for the petitioners and rule "against the respondent Judge's challenged order for having been issued with grave abuse of discretion amounting to lack of jurisdiction. The pertinent portions of the said order read as follows:

x x x x

"After a careful and circumspect evaluation of the Complaint, the Court cannot help but agree with the defendant. For although we believe that plaintiffs have but the noblest of all intentions, it (sic) fell short of alleging, with sufficient definiteness, a specific legal right they are seeking to enforce and protect, or a specific legal wrong they are seeking to prevent and redress (Sec. 1, Rule 2, RRC). Furthermore, the Court notes that the Complaint is replete with vague assumptions and vague conclusions based on unverified data. In fine, plaintiffs fail to state a cause of action in its Complaint against the herein defendant, [sic]

> Furthermore, the Court firmly believes that the matter before it, being impressed with political color and involving a matter of public policy, may not be taken cognizance of by this Court without doing violence to the sacred principle of "Separation of Powers" of the three (3) co-equal branches of the Government.
>
> The Court is likewise of the impression that it cannot, no matter how we stretch our jurisdiction, grant the reliefs prayed for by the plaintiffs, i.e., to cancel all existing timber license agreements in the country and to cease and desist from receiving, accepting, processing renewing or approving new timber license agreements. For to do otherwise would amount to "impairment of contracts" abhored (sic) by the fundamental law."[12]

We do not agree with the trial court's conclusion that the plaintiffs failed to allege with sufficient definiteness a specific legal right involved or a specific legal wrong committed, and that the complaint is replete with vague assumptions and conclusions based on unverified data. A reading of the complaint itself belies these conclusions.

The complaint focuses on one specific fundamental legal right — the right to a balanced and healthful ecology which, for the first time in our nation's constitutional history, is solemnly incorporated in the fundamental law. Section 16, Article II of the 1987 Constitution explicitly provides:

> "SEC. 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."

This right unites with the right to health which is provided for in the preceding section of the same article.

> "SEC. 15. The State shall protect and promote the right to health of the people and instill health consciousness among them."

While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation — aptly and fittingly stressed by the petitioners — the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of the framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come — generations which stand to inherit nothing but parched earth incapable of sustaining life.

The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment. During the debates on this right in one of the plenary sessions of the 1986 Constitutional Commission, the following exchange transpired between Commissioner Wilfrido Villacorta and Commissioner Adolfo Azcuna who sponsored the function in question:

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[11] Title XIV (Environment and Natural Resources), Book IV of the Administrative Code of 1987, E.O. No. 292.

[12] Annex "B" of Petition: Rollo, 43-44.

"MR. VILLACORTA:

> Does this section mandate the State to provide sanctions against all forms of pollution — air, water and noise pollution?

MR. AZCUNA:

> Yes, Madam President. The right to healthful (sic) environment necessarily carries with it the correlative duty of not impairing the same and, therefore, sanctions may be provided for impairment of environmental balance." [13]

The said right implies, among many other things, the judicious management and conservation of the country's forests. Without such forests, the ecological or environmental balance would be irreversibly disrupted.

Conformably with the enunciated right to a balanced and healthful ecology and the right to health, as well as the other related provisions of the Constitution concerning the conservation, development and utilization of the country's natural resources,[14] then President Corazon C. Aquino promulgated on 10 June 1987 E.O. No. 192,[15] Section 4 of which expressly mandates that the Department of Environment and Natural Resources "shall be the primary government agency responsible for the conservation, management, development and proper use of the country's environment and natural resources, specifically forest and grazing lands, mineral resources, including those in reservation and watershed areas, and lands of the public domain, as well as the licensing and regulation of all natural resources as may be provided for by law in order to ensure equitable sharing of the benefits derived therefrom for the welfare of the present and future generations of Filipinos." Section 3 thereof makes the following statement of policy:

> "SEC.3. Decl*aration of Policy.* — It is hereby declared the policy of the State to ensure the sustainable use, development, management, renewal, and conservation of the country's forest, mineral, land, off-shore areas and other natural resources, including the protection and enhancement of the quality of the environment, and equitable access of the different segments of the population to the development and use of the country's natural resources; not only for the present generation but for future generations as well. It is also the policy of the state to recognize and apply a true value system including social and environmental cost implications relative to their utilization, development and conservation of our natural resources."

This policy declaration is substantially re-stated in Title XIV, Book IV of the Administrative Code of 1987,[16] specifically in Section 1 thereof which reads:

> "SEC.1. Decl*aration of Policy.* — (1) The State shall ensure, for the benefit of the Filipino people, the full exploration and development as well as the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources, consistent with the necessity of maintaining a sound ecological balance and protecting and enhancing the quality of the environment and the objective of making the exploration, development and utilization of such natural resources equitably accessible to the different segments of the present as well as future generations.
>
> (2) The State shall likewise recognize and apply a true value system that takes into account social and environmental cost implications relative to the utilization, development and conservation of our natural resources."

The above provision stresses "the necessity of maintaining a sound ecological balance and protecting and enhancing the quality of the environment." Section 2 of the same Title, on the other hand, specifically speaks of the mandate of the DENR; however, it makes particular reference to the fact of the agency's being subject to law and higher authority. Said section provides:

> "SEC.2, mandate. — (1) The Department of Environment and Natural Resources shall be primarily responsible for the implementation of the foregoing policy.
>
> (2) It shall, subject to law and higher authority, be in charge of carrying out the State's constitutional mandate to control and supervise the exploration, development, utilization, and conservation of the country's natural resources."

Both E.O. No. 192 and the Administrative Code of 1987 have set the objectives which will serve as the bases for policy formulation, and have defined the powers and functions of the DENR.

It may, however, be recalled that even before the notification of the 1987 Constitution, specific statutes already paid special attention to the "environmental right" of the present and future generations. On 6 June 1977, P.D. No. 1151 (Philippine Environmental Policy) and P.D. No. 1152 (Philippine Environment Code) were issued. The former "declared a continuing policy of the State (a) to create, develop, maintain and improve conditions under which man and nature can thrive in productive and enjoyable harmony with each other, (b) to fulfil the social, economic and other requirements of present and future generations of Filipinos, and (c) to insure the attainment

[13] Record of the Constitutional Commission, Vol. 4, 913.

[14] For instance, the Preamble and Article XII on the National Economy and Patrimony.

[15] The Reorganisation Act of the Department of Environment and Natural Resources

[16] E.O. No. 292.

of an environmental quality that is conducive to a life of dignity and well-being."[17] As its goal, it speaks of the "responsibilities of each generation as trustee and guardian of the environment for succeeding generations."[18] The latter statute, on the other hand, gave flesh to the said policy:

Thus, the right of the petitioners (and all those they represent) to a balanced and healthful ecology is as clear as the DENR's duty — under its mandate and by virtue of its powers and functions under E.O. No. 192 and the Administrative Code of 1987 — to protect and advance the said right.

A denial or violation of that right by the other who has the correlative duty or obligation to respect or protect the same gives rise to a cause of action. Petitioners maintain that the granting of the TLAs, which they claim was done with grave abuse of discretion, violated their right to a balanced and healthful ecology; hence, the full protection thereof requires that no further TLAs should be renewed or granted.

A cause of action is defined as:

> "x x x an act or omission of one party in violation of the legal right or rights of the other; and its essential elements are legal right of the plaintiff, correlative obligation of the defendant, and act or omission of the defendant in violation of said legal right."[19]

It is settled in this jurisdiction that in a motion to dismiss based on the ground that the complaint fails to state a cause of action,[20] the question submitted to the court for resolution involves the sufficiency of the facts alleged in the complaint itself. No other matter should be considered; furthermore, the truth or falsity of the said allegations is beside the point for the truth thereof is deemed hypothetically admitted. The only issue to be resolved in such a case is: admitting such alleged facts to be true, may the court render a valid judgment in accordance with the prayer in the complaint?[21] In Militante vs. Edrosolano,[22] this Court laid down the rule that the judiciary should "exercise the utmost care and circumspection in passing upon a motion to dismiss on the ground of the absence hereof [cause of action] lest, by its failure to manifest a correct appreciation of the facts alleged and deemed hypothetically admitted, what the law grants or recognizes is effectively nullified. If that happens, there is a blot on the legal order. The law itself stands in disrepute."

After a careful examination of the petitioners' complaint, we find the statements under the introductory affirmative allegations, as well as the specific averments under the sub-heading CAUSE OF ACTION, to be adequate enough to show, *prima facie,* the claimed violation of their rights. On the basis thereof, they may thus be granted, wholly or partly, the reliefs prayed for. It bears stressing, however, that insofar as the cancellation of the TLAs is concerned, there is the need to implead, as party defendants, the grantees thereof for they are indispensable parties.

The foregoing considered, Civil Case No. 90-777 cannot be said to raise a political question. Policy formulation or determination by the executive or legislative branches of Government is not squarely put in issue. What is principally involved is the enforcement of a right *vis-a-vis* policies already formulated and expressed in legislation. It must, nonetheless, be emphasized that the political question doctrine is no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review. The second paragraph of section 1, Article VIII of the Constitution states that:

> "Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."

Commenting on this provision in his book, Philippine Political Law,[23] Mr. Justice Isagani A. Cruz, a distinguished member of this Court, says:

> "The first part of the authority represents the traditional concept of judicial power, involving the settluement of conflicting rights as conferred by law. The second part of the authority represents a broadening of judicial power to enable the courts of justice to review what was before forbidden territory, to wit, the discretion of the political departments of the government.

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[17] Section 1.

[18] Section 2.

[19] Ma-ao Sugar Central Co., vs Barrios, 79 Phil. 666 [1947]; Community Investment and Finance Corp. vs. Garcia, 88 Phil. 215 [1951]; Remitere vs. vda. de Yulo, 16 SCRA 251 [1966]; Carenas vs. Rosales, 19 SCRA 462 [1967]; Virata vs. Sandiganbayana, 202 SCRA 680 [1991]; Madrona vs. Rosal, 204 SCRA 1 [1991].

[20] Section 1(q), Rule 16, Revised Rules of Court.

[21] Adamos vs. J.M. Tuason and Co., Inc. 25 SCRA 529 [1968]; Virata vs. Sandiganbayan, supra,; Madrona vs. Hosal, supra.

[22] 39 SCRA 473, 479 [1971].

[23] 1991 ed., 226-227.

> As worded, the new provision vests in the judiciary, and particularly the Supreme Court, the power to rule upon even the wisdom of the decisions of the executive and the legislature and to declare their acts invalid for lack of excess of jurisdiction because tainted with grave abuse of discretion. The catch, of course, is the meaning of grave abuse of discretion, which is a very elastic phrase that can expand or contract according to the disposition of the judiciary."

In Daza vs. Singson,[24] Mr. Justice Cruz, now speaking for the Court, noted:

> "In the case now before us, the jurisdictional objection becomes even less tenable and decisive. The reason is that, even if we were to assume that the issue presented before us was political in nature, we would still not be precluded from resolving it under the expanded jurisdiction conferred upon us that now covers, in proper cases, even the political question. Article VII, Section 1, of the Constitution clearly provides: x x x."

The last ground invoked by the trial court in dismissing the complaint is the non-impairment of contracts clause found in the Constitution. The court a quo declared that:

> "The Court is likewise of the impression that it cannot, no matter how we stretch our jurisdiction, grant the reliefs prayed for by the plaintiffs, i.e., to cancel all existing timber license agreements in the country and to cease and desist from receiving, accepting, processing, renewing or approving new timber license agreements. For to do otherwise would amount to "impairment of contracts" abhored (sic) by the fundamental law."[25]

We are not persuaded at all; on the contrary, we are amazed, if not shocked, by such a sweeping pronouncement. In the first place, the respondent Secretary did not, for obvious reasons, even invoke in his motion to dismiss the non-impairment clause. If he had done so, he would have acted with utmost infidelity to the Government by providing undue and unwarranted benefits and advantages to the timber license holders because he would have forever bound the Government to strictly respect the said licenses according to their terms and conditions regardless of changes in policy and the demands of public interest and welfare. He was aware that as correctly pointed out by the petitioners, into every timber license must be read Section 20 of the Forestry Reform Code (P.D. No.705) which provides:

> "x x x Provide*d,* That when the national interest so requires, the President may amend, modify, replace or rescind any contract, concession, permit, licenses or any other form of privilege granted herein x x x.

Needless to say, all licenses may thus be revoked or rescinded by executive action. It is not a contract, property or a property right protected by the due process clause of the Constitution. In Tan vs Director of Forestry,[26] this Court held:

> "x x x A timber license is an instrument by which the State regulates the utilization and disposition of forest resources to the end that public welfare is promoted. A timber license is not a contract within the purview of the due process clause; it is only a license or privilege, which can be validly withdrawn whenever dictated by public interest or public welfare as in this case.
>
> "A license is merely a permit or privilege to do what otherwise would be unlawful, and is not a contract between the authority, federal, state, or municipal, granting it and the person to whom it is granted; neither is it property or a property right, nor does it create a vested right; nor ...taxation (37 CIJ.168). Thus, this Court held that the granting of license does not create irrevocable rights, neither is it property or property rights (People vs. Ong.. 54 O.G. 7576). x x x "

We reiterated this pronouncement in Felipe Yamael, Jr. & Co., Inc. vs. Deputy Executive Secretary:[27]

> "x x x Timber licenses, permits and license agreements are the principal instruments by which the State regulates the utilization and disposition of forest resources to the end that public welfare is promoted. And it can hardly be gainsaid that they merely evidence a privilege granted by the State to qualified entities, and do not vest in the latter a permanent or irrevocable right to the particular concession area and the forest products therein. They may be validly amended, modified, replaced or rescinded by the Chief Executive when national interests so require. Thus, they are not deemed contracts within the purview of the due process of law clause *[See sections 3(ee) and 20 of Pres. Decree No. 705, as amended, "Also,* Tan v. Director of Forestry, G.R. No L-24548, October 27, 1983, 125 SCRA 302]."

Since timber licenses are not contracts, the non-impairment clause, which reads:

> "SEC. 10, No law impairing the obligation of contracts shall be passed."[28]

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[24] 180 SCRA 496, 501-502 [1989]. See also, Coseteng v. Mitra, 187 SCRA 377 [1990]; Gonzales vs. Macaraig, 191 SCRA 452 [1990]; Llamas vs. Orbos, 202 SCRA 844 [1991]; Bengzon vs. Senate Blue Ribbon Committee, 2202, 44.

[25] Rollo, 44.

[26] 125 SCRA 302, 325 [1983].

[27] 190 SCRA 673, 684 [1990].

[28] Article III, 1987 Constitution.

cannot be invoked.

In the second place, even if it is to be assumed that the same are contracts, the instant case does not involve a law or even an executive issuance declaring the cancellation or modification of existing timber licenses. Hence, the non-impairment clause cannot as yet be invoked. Nevertheless, granting further that a law has actually been passed mandating cancellations or modifications, the same cannot still be stigmatized as a violation of the non-impairment clause. This is because by its very nature and purpose, such a law could have only been passed in the exercise of the police power of the state for the purpose of advancing the right of the people to a balanced and healthful ecology, promoting their health and enhancing the general welfare. In Aba vs. Foster Wheeler Corp.,[29] this Court stated:

> "The freedom of contract, under our system of government, is not meant to be absolute. The same is understood to be subject to reasonable legislative regulation aimed at the promotion of public health, moral, safety and welfare. In other words, the constitutional guaranty of non-impairment of obligations of contract is limited by the exercise of the police power of the State, in the interest of public health, safety, moral and general welfare."

The reason for this is emphatically set forth in Nebia vs. New York,[30] quoted in Philippine American Life insurance Co. vs. Auditor General,[31] to wit:

> "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

In short, the non-impairment clause must yield to the police power of the state.[32]

Finally, it is difficult to imagine, as the trial court did, how the non-impairment clause could apply with respect to the prayer to enjoin the respondent Secretary from receiving, accepting, processing, renewing or approving new timber licenses for, save in cases of renewal, no contract would have as of yet existed in the other instances. Moreover, with respect to renewal, the holder is not entitled to it as a matter of right.

WHEREFORE, being impressed with merit, the instant Petition is hereby GRANTED, and the challenged Order of respondent Judge of 18 July 1991 dismissing Civil Case No. 90-777 is hereby set aside. The petitioners may therefore amend their complaint to implead as defendants the holders or grantees of the questioned timber license agreements.

No pronouncement as to costs.

SO ORDERED.

HILARIO G. DAVIDE, JR.
Associate Justice

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[29] 110 Phil. 198, 203 [1970]: footnotes omitted.

[30] 291 U.S. 502, 523, 78 L. ed. 940, 947-949.

[31] 22 SCRA 125, 146-147 [1968].

[32] Ongsiako vs. Gamboa, 86 Phil. 50 [1950]; Abe vs. Foster Wheeler Corp., supra,: Phil. American Life Insurance Co. vs. Auditor General, supra,: Alalayan vs. NPC, 24 SCRA 172 [1968]: Victoriano vs. Elizalde Rope Workers' Union, 59 SCRa 54 [1974]; Kabiling vs. National Housing Authority, 156 SCRA 623 [1987];

C O N C U R:

(No part: related to one of the parties)

ANDRES R. NARVASA

Chief Justice

(Please see seperate opinion concurring in the result)

(SAGANI A. CRUZ
Associate Justice

FLORENTINO P. FELICIANO
Associate Justice

TEODORO R. PADILLA
Associate Justice

ABDULWAHID A. BIDIN
Associate Justice

CAROLINA C. GRINO-AQUINO
Associate Justice

FLORENZ D. REGALADO
Associate Justice

FERIDA RUTH P. ROMERO
Associate Justice

RODOLFO A. NOCON
Associate Justice

JOSUE N. BELLOSILLO
Associate Justice

JOSE A.R. MELO
Associate Justice

CAMILO D. QUIASON
Associate Justice

DEYWATO S. PUNO(No part in the deliberations)
Associate Justice

No part. I was not yet with the Court when the case was deliberated upon
JOSE C. VILUG
Associate Justice

C E R T I F I C A T I O N

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ANDRES R. NARVASA

Chief Justice

CLERK OF COURT

G.R. No. 101083

(Juan Antonio, Anna Rosario and Jose Alfonso, all surnamed Oposa, minors, and represented by their parents Antonio and Rizalina Oposa, et al. v. The Honorable Fulgencio S. Factoran, Jr. and the Honorable Eriberto U. Rosario.)

Promulgated:

Feliciano, J.: Concurring in the result
JULY 30 1993

I join in the result reached by my distinguished brother in the Court, Davide, Jr., J. in this case which, to my mind, is one of the most important cases decided by this Court in the last few years. The seminal principles laid down in this decision are likely to influence profoundly the direction and course of the protection and management of the environment, which of course embraces the utilization of all the natural resources in the territorial base of our polity. I have therefore sought to clarify, basically to myself, what the Court appears to be saying.

The Court explicitly states that petitioners have the *locus standi* necessary to sustain the bringing and maintenance of this suit (Decision, pp.11-12). *Locus standi* is not a function of petitioners' claim that their suit is properly regarded as a class suit. I understand *locus standi* to refer to the legal interest which a plaintiff must have in the subject matter of the suit, because of the very broadness of the concept of "class" here involved — membership in this "class" appears to embrace everyone living in the country whether now or in the future — it appears to me that everyone who may be expected to benefit from the course of action petitioners seek to require public respondents to take, is vested with the necessary *locus standi*. The Court may be seen therefore to be recognizing a beneficiaries' right of action in the field of environmental protection, as against both the public administrative agency directly concerned and the private persons or entities operating in the field or sector of activity involved. Whether such a beneficiaries' right of action may be found under any and all circumstances, or whether some failure to act, in the first instance, on the part of the governmental agency concerned must be shown ("prior exhaustion of administrative remedies"), is not discussed in the decision and presumably is left for future determination in an appropriate case.

The Court has also declared that the complaint has alleged and focussed upon "one specific fundamental legal right" the right to a balanced and healthful ecology" (Decision, p.14). There is no question that "the right to a balanced and healthful ecology" is "fundamental" and that, accordingly, it has been "constitutionalized." But although it is fundamental in character, I suggest, with every great respect, that it cannot be characterized as "specific," without doing excessive violence to language. It is in fact very difficult to fashion language more comprehensive in scope and generalized in character than a right to "a balanced and healthful ecology." The list of particular claims which can be subsumed under this rubric appears to be entirely open-ended; prevention and control of emission of toxic fumes and smoke from factories and motor vehicles; of discharge of oil, chemical effluents, garbage and raw sewage into rivers, inland and coastal waters by vessels, oil rigs, factories, mines and whole communities; of dumping of organic and inorganic wastes on open land, streets and thoroughfares; failure to rehabilitate land after strip-mining or open-pit mining; kaingin or slash-and-burn farming; destruction of fisheries, coral reefs and other living sea resources through the use of dynamite or cyanide and other chemicals; contamination of ground water resources; loss of certain species of fauna and flora; and so on. The other statements pointed out by the court: Section 3, Executive Order NO. 192 dated 10 June 1987; Section 1, Title XIV, Book IV of the 1987 Administrative Code; and P.O. No. 1151, dated 6 June 1977 — all appear to be formulations of policy, as general and abstract as the constitutional statements of basic policy in Article II, Section 16 ("the right — to a balanced and healthful ecology") and 15 ("the right to health").

P.O. No. 1152, also dated 6 June 1977, entitled "The Philippine Environment Code," is, upon the other hand, a compendious collection of more "specific environment management policies" and "environment quality standards" (fourth "Whereas" clause, Preamble) relating to an extremely wide range of topics:

(a) air quality management;

(b) water quality management;

(c) land use management;

(d) natural resources management and conservation embracing:

(i) fisheries and aquatic resources;

(ii) wild life;

(iii) forestry and soil conservation;

(iv) flood control and natural calamities;

(v) energy development;

(vi) conservation and utilization of surface and ground water;

(vii) mineral resources

Two (2) points are worth making in this connection. Firstly, neither petitioners nor the Court has identified the particular provision or provisions (if any) of the Philippine Environment Code which give rise to a specific legal right which petitioners are seeking to enforce. Secondly, the Philippine Environment Code identifies with notable care the particular government agency charged with the formulation and implementation of guidelines and programs dealing with each of the headings and subheadings mentioned above. The Philippine Environment Code does not in other words, appear to contemplate action on the part of private persons who are beneficiaries of implementation of that Code.

As a matter of logic, by finding petitioners' cause of action as anchored on a legal right comprised in the constitutional statements above noted, the Court is in effect saying that Section 15 (and Section 16) of Article II of the Constitution are self-executing and judicially enforceable even in their present form. The implications of this doctrine will have to be explored in future cases; those implications are too large and far-reaching in nature even to be hinted at here.

My suggestion is simply that petitioners must, before the trial court, show a more specific legal right — a right cast in language of a significantly lower order of generality than Article II (15) of the Constitution — that is or may be violated by the actions, or failures to act, imputed to the public respondent by petitioners so that the trial court can validly render judgement granting all or part of the relief prayed for. To my mind, the Court should be understood as simply saying that such a more specific legal right or rights may well exist in our corpus of law, considering the general policy principles found in the Constitution and the existence of the Philippine Environment Code, and that the trial court should have given petitioners an effective opportunity so to demonstrate, instead of aborting the proceedings on a motion to dismiss.

It seems to me important that the legal right which is an essential component of a cause of action be a specific, operable legal right, rather than a constitutional or statutory policy, for at least two (2) reasons. One is that unless the legal right claimed to have been violated or disregarded is given specification in operational terms, defendants may well be unable to defend themselves intelligently and effectively; in other words, there are due process dimensions to this matter.

The second is a broader-gauge consideration — where a specific violation of law or applicable regulation is not alleged or proved, petitioners can be expected to fall back on the expanded conception of judicial power in the second paragraph of Section 1 of Article VIII of the Constitution which reads:

> "Section 1. x x x
>
> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government." (Emphases supplied)

When substantive standards as general as "the right to a balanced and healthy ecology" and "the right to health" are combined with remedial standards as broad ranging as "a grave abuse of discretion amounting to lack or excess of jurisdiction," the result will be, it is respectfully submitted, to propel courts into the uncharted ocean of social and economic policy making. At least in respect of the vast area of environmental protection and management, our courts have no claim to special technical competence and experience and professional qualification. Where no specific, operable norms and standards are shown to exist, then the policy making departments — the legislative and executive departments — must be given a real and effective opportunity to fashion and promulgate those norms and standards, and to implement them before the courts should intervene.

My learned brother Davide, Jr., J. rightly insists that the timber companies, whose concession agreements or TLA's petitioners demand public respondents should cancel, must be impleaded in the proceedings below. It might be asked that, if petitioners' entitlement to the relief demanded is not dependent upon proof of breach by the timber companies of one or more of the specific terms and conditions of their concession agreements (and this, petitioners implicitly assume), what will those companies litigate about? The answer I suggest is that they may seek to dispute the existence of the specific legal right petitioners should allege, as well as the reality of the claimed factual nexus between petitioners' specific legal right and the claimed wrongful acts or failures to act of public respondent administrative agency. They may also controvert the appropriateness of the remedy or remedies demanded by petitioners, under all the circumstances which exist.

I vote to grant the Petition for *Certiorari* because the protection of the environment, including the forest cover of our territory, is of extreme importance for the country. The doctrines set out in the Court's decision issued today should, however, be subjected to closer examination.

Florentino P. Feliciano

DR. MOHIUDDIN FAROOQUE
V.
BANGLADESH AND OTHERS

Number: Civil Appeal No.24 of 1995

Official Citation: 17 BLD (AD) 1997, Vol. XVII, Page - 1 to 33, 1 BLC (AD) (1996) Page - 189 to 219

Year: 1996

02. Brief Description of the holding or analysis by the Court:

A.T.M. AFZAL, C.J.,

The liberalized view as expounded by my brother is an update, if I may say so, of the liberalization agenda which was undertaken in the case of Kazi Mukhlesur Rahman, 26 DLR (SC) 44. It is a matter of some pride that quite early in our Constitutional Journey the question of *locus standi* was given a liberal contour in that decision by this Court at a time when the Blackburn cases were just being decided in England which established the principle of "sufficient interest" for a standing and the doctrine of public interest litigation or class action was yet to take roots in the Indian Jurisdiction. The springboard for the liberalization move was the momentous statement made in that case:

"It appears to us that case was found to be a person aggrieved not because he brought any personal grievance before the Court but because, to quote from the Judgement itself, "we heard him in view of the constitutional issue of grave importance raised in the instant case involving an international treaty affecting the territory of Bangladesh and his complaint as to an impending threat to his certain fundamental rights guaranteed by the constitution, namely, to move freely throughout the territory of Bangladesh, to reside and settle in any place therein as well as his right of franchise. Evidently, these rights attached to a citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching upto the continental shelf."

Two principles were established in that case, (1) that when there is a threat to a fundamental right of the citizens any one of them can invoke the jurisdiction under article 102 of the Constitution, that any citizen from any part of the country can become a petitioner and (2) that if a constitutional issue of grave importance is raised (in that case it was an international treaty affecting territory of Bangladesh) a petitioner qualifies himself to be a person aggrieved.

The liberal interpretation given to the expression "any person aggrieved" in the judgements of my learned brothers, in my opinion, approximates the test of or if the same is capsulized [sic], amounts to, what is broadly called, "sufficient interest". Any person other than an officious intervenor or a wayfarer without any interest or concern beyond what belongs to any of the 120 million people of the country or a person with an oblique motive, having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from breach of public duty or for violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. Now what is 'sufficient interest' will essentially depend on the co-relation between the matter brought before the Court and the person who is bringing it. It is not possible to lay down any strait-jacket formula for determining sufficient interest, which may be applicable in all cases. Of necessity the question has to be decided in the facts of each case as already pointed out in the case of Kazi Mukhlesur Rahman. This topic has been eloquently summed up by the Indian Supreme Court in the case of S.P. Gupta and others, AIR 1982 SC 149 and I fully subscribe to that statement. It reads:

> "What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not possible for the court to lay down any hard and fast rule or any strait-jacket formula for the purpose of defining or delimiting 'sufficient interest'. It has necessarily to be left to the discretion of the Court. The reason is that in a modern complex society which is seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable section of the people by creating new social, collective 'diffuse' rights and interests imposing new public duties on the State and other public authorities infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The Judge who has the correct social perspective and who is on the same wavelength as the Constitution will be able to decide, without any difficulty and in conso-

> nance with the constitutional objectives, whether a member of the public moving the Court in a particular case has sufficient interest to initiate the action."

A person pleading sufficient interest may be able to cross, what is called, the threshold stage on the averments made in the writ petition but it will always remain open for prospective respondent to contest the said claim on facts and also to assail the *bonafides* or even the appropriateness in a particular case of the petitioner for seeking a relief invoking the constitutional jurisdiction of the High Court Division under article 102 of the Constitution ... but the consideration would have been different if any organization representing a weaker section of the society has come to complain about a breach of any fundamental right of its members or any public wrong done to the members generally in breach of any provision of the constitution or law. The Court will have to decide in each case, particularly when objection is taken, not only the extent of sufficiency of interest but also the fitness of the person for invoking the discretionary jurisdiction under article 102 of the Constitution. Ordinarily, it is the affected party which is to come to the Court for remedy. The Court in considering the question of standing in a particular case, if the affected party is not before it, will enquire as to why the affected party is not coming before it and if it finds no satisfactory reason for non-appearance of the affected party, it may refuse to entertain the application.

As regards the *locus standi* of the appellant in the present case, I agree with my learned brothers that the High Court Division wrongly decided the issue upon wrongly relying on the Sangbad Patra Parishad case which has got no application to the facts of the present case. Facts of the appellant's case have been elaborately noticed in the judgement of Mustafa Kamal, J. and I may state briefly that the appellant is the Secretary General of the Bangladesh Environmental Lawyers Association (BELA) and the said organization is working in the field of environment and ecology. In the writ petition the activities of FAP, FAP-20 and the FPCO have been impugned on the ground, *inter alia,* that the said activities would adversely affect more than a million human lives and natural resources and the natural habitat of man and other flora and fauna and that they aroused wide attention for being allegedly anti-environment and anti-people project. The appellant stated in the writ petition that as an environmentally concerned and active organization, BELA conducted investigations at various times in 1992-93 in the FAP-20 areas. The appellant alleged that no proper environmental impact assessment has been undertaken in relation to FAP projects even though the European parliament declared in its resolution of 24 June 1993 that there was urgent need of changing the FAP's classification within the World Bank project scheme from category 'B' to category 'A' requiring full environmental assessment for projects which appear to have significant adverse effect on the environment.

A group of environmental lawyers possessed of pertinent, *bonafide* and well-recognized attributes and purposes in the area of environment and having a provable, sincere, dedicated and established status is asking for a judicial review of certain activities under a flood action plan undertaken with foreign assistance on the ground, *inter alia,* of alleged environmental degradation and ecological imbalance and violation of several laws in certain areas of the district of Tangail. The question is: does it have sufficient interest in the matter for a standing under article 102?

It is very interesting that Justice Douglas of the U.S. Supreme Court in his minority opinion went so far as to say in Sierra Club Vs. Morton, 401 U.S. 907 (1971) (No.70-34) that contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. The learned Judge further said: Ecology reflects the land ethic; and Aldo Leopold wrote in A Sand County Almanac 204 (1949), 'The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively, the land." That as I see it, is the issue of "standing" in the present case and controversy.

The Rio Declaration on Environment and Development containing 27 principles include, among other, it may be noted for the present purpose:

> Principle 3: The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.
>
> Principle 10: Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceeding, including redress and remedy, shall be provided.

> Principle 10 above seems to be the theoretical foundation for all that have been vindicated in the writ petition and also provides a ground for standing.

In this context of engaging concern for the conservation of environment, irrespective of the locality where it is threatened, I am of the view that a national organization like the appellant, which claims to have studied and made research on the disputed project, can and should be attributed a threshold standing as having sufficient interest in the matter, and thereby regarded as a person aggrieved to maintain the writ petition subject to the objection or objections as may be raised by the respondents if a Rule is issued ultimately.

MUSTAFA KAMAL, J.

In Bangladesh an unnoticed but quiet revolution took place on the question of *locus standi* after the introduction of the Constitution of the People's Republic of Bangladesh in 1972 in the case of Kazi Mukhlesur Rahman vs. Bangladesh, 26DLR(SC)44, decided on September 3, 1974 and hereinafter referred to as Kazi Mukhlesur Rehman's Case. The appellant challenged the Delhi Treaty signed on the 16th May, 1974 by the Prime Ministers of the Government of Bangladesh and the Republic of India providing therein inter alia that India will retain the southern half of South Berubari Union No.12 and the adjacent enclaves and in exchange Bangladesh will retain the Dahagram and Angarpota enclaves. The ground of challenge was that the agreement involved cession of Bangladesh territory and was entered into without lawful authority by the executive head of government. The High Court Division summarily dismissed the writ petition holding that the appellant had no *locus standi*. At the hearing of the certificated appeal before the Appellate Division it was urged by the appellant that since the remedies available under Article 102(2) of our Constitution are discretionary, the words "any person aggrieved" should be construed liberally and given a wide meaning, although in the facts and circumstances of a particular case the Court may regard the personal interest pleaded by a petitioner as being slight or too remote. Reliance was placed by the appellant upon the case of Main Fazal Din vs. The Lahore Improvement Trust, 21DLR(SC)225 in which Hamoudur Rahman, C.J. had occasion to say that the right considered sufficient for maintaining a proceeding of this nature is not necessarily a right in the strict juristic sense but it is enough if the applicant discloses that he has a personal interest in the matter which involves loss of some personal benefit or advantage or the curtailment of a privilege or liberty or franchise. Upon considering several American and Indian decisions of the time and a lone Australian decision, the Appellate Division held as follows:

> "It appears to us that the question of *locus standi* does not involve the Court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstances of each case.

Locus standi was granted to the appellant even though he was not a resident of the southern half of South Beriberi Union No.12 or adjacent enclaves involved in the Delhi Treaty because he had raised a constitutional issue of grave importance involving an international treaty affecting the territory of Bangladesh and posing an impending threat to his fundamental rights under Article 36 of the Constitution and his right of franchise. These rights, attached to a citizen, are not local. They pervade and extend to every inch of the territory of Bangladesh stretching upto the continental shelf.

This Court, therefore, settled seven general principles in Kazi Mukhlesur Rahman's case, viz.-(1) the High Court Division does not suffer from any lack of jurisdiction under Article 102 to hear a person. (2) The High Court Division will grant *locus standi* to a person who agitates a question affecting a constitutional issue of grave importance, posing a threat to his fundamental rights which pervade and extend to the entire territory of Bangladesh. (3) If a fundamental right is involved, the impugned matter need not affect a purely personal right of the applicant touching him alone. It is enough if he shares that right in common with others. (4) In interpreting the words "any person aggrieved", consideration of "Fundamental Rights" in Part III of the Constitution is a relevant one. (5) It is the competency of the person to claim a hearing which is at the heart of the interpretation of the words "any person aggrieved". (6) It is a question of exercise of discretion by the High Court Division as to whether it will treat that person as a person aggrieved or not. (7) The High Court Division will exercise that jurisdiction upon due consideration of the facts and circumstances of each case.

8 years thereafter we find an echo of some of the above principles in the Indian Supreme Court case of S.P. Gupta and others vs. President of India, AIR1982(SC)149, at paragraph 19A:

> "What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not possimined [sic] by the Court to lay down any hard fast rule or any straitjacket formula for the purpose of defining or delimiting 'sufficient interest'. It has necessarily to be left to the discretion of the Court. The reason is that in a modern complex society which is seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable section of the people by creating new social, collective 'diffuse' rights and interests imposing new public duties on the State and other public authorities infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The Judge who has the correct social perspective and who is on the same wave-length as the Constitution will be able to decide, without any difficulty and inconsonance with the constitutional objectives, whether a member of the public moving the Court in a particular case has sufficient interest to initiate the action".

Coming now to our situation, the Sangbadpatra Parishad Case was no authority for the proposition that an environmental lawyers' association is not a person aggrieved when it espouses the causes of a large number of people on an environmental issue. The High Court division's reliance on this decision was misplaced, to say the least, because the *ratio decidendi* of the said case was that an association of newspaper owners and news organizations, espousing not the causes of the downtrodden and the poor

who have no access to justice, but the cause of its members who are opulent enough to seek redress on their own, cannot in a representative capacity be a person aggrieved, when the association's own interest are not in issue. That case was not an authority even for the proposition that an association can never be a person aggrieved if it espouses the causes of its members in a representative capacity. The *Sangbadpatra Parishad* case was decided on the facts of that case and that is how it should be read.

We now proceed to say how we interpret Article 102 as a whole. We do not give much importance to the dictionary meaning on punctuation of the words "any person aggrieved". Article 102 of our Constitution is not an isolated island standing above or beyond the sea-level of the other provisions of the Constitution. It is a part of the over-all scheme. Objectives and purposes of the Constitution. And its interpretation in inextricably linked with the (i) emergency of Bangladesh and framing of its Constitution, (ii) the Preamble and Article 7, (iii) Fundamental Principles of State Policy, (iv) Fundamental Rights and (v) the other provisions of the Constitution.

As to (i) above, it is wrong to view our Constitution as just a replica with local adaptations of a Constitution of the Westminster model among the Commonwealth countries of Anglo-saxon legal tradition. This Constitution of ours is not the outcome of a negotiated settlement with a former colonial power. It was not drawn upon the consent, concurrence or approval of any external sovereign power. Nor is it the last of an off-replaced and off substituted Constitution after several Constitutions were tried and failed, although as many as 13 amendments have so far been made to it. It is the fruit of a historic war of independence, achieved with the lives and sacrifice of a telling number of people for a common cause making it a class apart from other Constitutions of comparable description. It is a Constitution in which the people features as the dominant actor. It was the people of Bangladesh who in exercise of their own self-proclaimed native power made a clean break from the past unshackling the bondage of a past statehood and adopted a Constitution of its own choosing. The Constitution, historically and in real terms, is a manifestation of what is called "the People's Power". The people of Bangladesh, therefore, are central, as opposed to ornamental, to the framing of the Constitution.

As for (ii), the Preamble and Article 7, the Preamble of our Constitution stands on a different footing from that of other Constitutions by the very fact of the essence of its birth which is different from others. It is in our Constitution a real and positive declaration of pledges, adopted, enacted and given to themselves by the people not by way of a presentation from skilful draftsmen, but as reflecting the ethos of their historic war of independence. Among other pledges the high ideals of absolute trust and in Faith in the Almighty Allah, a pledge to secure for all citizens a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social and the affirmation of the sacred duty to safeguard, protect and defend the Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh are salutary in indicating the course or path that the people wish to tread in the days to come. Article 7 of the Constitution bestows the powers of the Republic with the people and the exercise of the people's power on behalf of the people shall be effected only under and by the authority of, the Constitution. Article 7 does not contain empty phrases. It means that all the legislative, executive and judicial powers conferred on the Parliament, the Executive and the Judiciary respectively are constitutionally the powers of the people themselves and the various functionaries and institutions created by the Constitution exercise not their own indigenous and native powers but the powers of the people on terms expressed by the Constitution. The people, again, is the repository of all power under Article 7.

As for (iii), Part II of the Constitution, containing Fundamental Principles of State Policy, Article 8(2) provides that the principles set out in this Part "shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh." It is constitutionally impermissible to leave out of consideration Part II of our Constitution when an interpretation of Article 102 needs a guidance.

As for (iv), Part III of the Constitution bestows Fundamental Rights on the citizens and other residents of Bangladesh. Article 44 (1) guarantees the right to move the High Court Division in accordance with Article 102 (1) for the enforcement of these rights. Article 102 (1) is therefore a mechanism for the enforcement of Fundamental Rights which can be enjoyed by an individual alone in so far as his individual rights are concerned, but which can also be shared by an individual in common with others when the rights pervade and extend to the entire population and territory. Article 102 (1) especially cannot be divorced from Part III of the Constitution.

As for (v), the other provisions of the Constitution which will vary from case to case may also come to play a role in interpreting Article 102 of the Constitution.

Article 102 therefore is an instrumentality and a mechanism, containing both substantive and procedural provisions, by means of which the people as a collective personality, and not merely as a conglomerate of individuals, have devised for themselves a method and manner to realize the objectives, purposes, policies, rights and duties which they have set out for themselves and which they have strewn over the fabric of the Constitution.

With the power of the people looming large behind the constitution horizon it is difficult to conceive of Article 102 as a vehicle or mechanism for realizing exclusively individual rights upon individual complaints. The Supreme Court being a vehicle, a medium or mechanism devised by the Constitution for the exercise of judicial power of the people on behalf of the people, the people will always remain the focal point of concern of the Supreme Court while disposing of justice or propounding any judicial theory or interpreting any provision of the Constitution. Viewed in this context interpreting the words "any person aggrieved" meaning only and exclusively individuals and excluding the consideration of people as a collective and consolidated personality will be a stand taken against the constitution. There is no question of enlarging *locus standi* or legislation by Court. The enlargement is writ large on the face of the Constitution. In a capitalist laissez faire concept of private ownership of the instruments and means of production and distribution, individual rights carry the only weight and the judiciary exists primarily to protect the capitalist rights of the individuals, but in our Constitution Article 13, a Fundamental Principle of State Policy, provides that the people shall own and control the instruments and means of production and distribution under three forms, namely, (a) state ownership, that is, ownership, by the State on behalf of the people; (b) co-operative ownership, that is, ownership by co-operatives on behalf of the members and (c) private ownership, that is, ownership by individuals. Where there is a State ownership on behalf of the people of the instruments and means of production and distribution the concept of exclusive personal wrong or injury is hardly appropriate. The High Court Division cannot under the circumstances adhere to the traditional concept that to invoke its jurisdiction under Article 102 only a person who has suffered a legal grievance or injury or an adverse decision or a wrongful deprivation or wrongful refusal of his title to something is a person aggrieved.

This is not to say that Article 102 has nationalized each person's cause as every other person's cause. The traditional view remains true, valid and effective till today in so far as individual rights and individual infraction thereof are concerned. But when a public injury or public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved it is not necessary, in the scheme of our Constitution, that the multitude of individuals who have been collectively wronged or injured or whose collective fundamental rights have been invaded are to invoke the jurisdiction under Article 102 in a multitude of individual writ petitions, each representing his own portion of concern. In so far as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organization, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102.

It is, therefore, the cause that the citizen-applicant or the indigenous and native association espouses which will determine whether the applicant has the competency to claim a hearing or not. If he espouses a purely individual cause, he is a person aggrieved if his own interests are affected. If he espouses a public cause involving public wrong or public injury, he need not be personally affected. The public wrong or injury is very much a primary concern of the Supreme Court which in the scheme of our Constitution is a constitutional vehicle for exercising the judicial power of the people.

The High Court Division will exercise some rules of caution in each case. It will see that the applicant is in fact espousing a public cause, that his interest in the subject matter is real and not in the interest of generating some publicity for himself or to create mere public sensation, that he is acting *bona fide*, that he is not a busybody or an interloper, that it is in the public interest to grant him standing and that he is not acting for a collateral purpose to achieve a dubious goal, including serving a foreign interest.

This writ petition is concerned with an environmental issue. In our Constitution there is no specific fundamental right dealing with environment, nor does it find a place in the Fundamental Principles of State Policy. If we take the averments of the appellants in the writ petition on their face value, and do not entertain any contrary assertions thereto at this stage, it is obvious that the association-appellant as an environmental association of lawyers is a person aggrieved, because the cause it espouses, both in respect of fundamental rights and constitutional remedies, is a cause of an indeterminate number of people in respect of a subject matter of public concern and it appears, on the face of the writ petition itself, that it has devoted its time, energy and resources to the alleged ill-effects of FAP-20, it is acting bona fide and that it does not seek to serve an oblique purpose. It has taken great pains to establish that it is not a busybody. Subject to what emerges after the respondents state their case at the hearing of the writ petition the appellant cannot be denied entry at the threshold stage on the averments made in the writ petition.

We have given reasons of our own why the appellant is a person aggrieved, but we have to say specifically that we do not accept Dr. Farooque's submission that the association represents not only the present generation but also the generation yet unborn. This claim is based on a case of Philippines Supreme Court, Juan Antonio Oposa and others vs. Honourable Fulgencio S. Factoran and another in which the twin concepts of "inter-generational

responsibility" and "inter-generational justice" were agitated by the plaintiff minors represented by their respective parents to prevent the misappropriation or impairment of Philippine rain forest. The minors asserted that they "represent their generation as well as generation yet unborn". The minor's *locus standi* was allowed because "the right to a balanced and heartful ecology" was a fundamental right and several laws declaring the policy of the State to conservation of the country's forest "not only for the present generation by for the future generation as well" were guaranteed. (The South Asian Environmental Law Reporter, Vol.13, September, 1994, Colombo, Sri Lanka, pp. 113-145). Our Constitution does not contain any analogous provision.

As to the apprehension of floodgates the people as a whole is no doubt a flood and the Constitution is the sluice-gate through which the people controls its own entry. Our Courts will be prudent enough to recognize the people when the people appears through an applicant as also those who masquerade under the name of the people. Taking up the people's causes at the expense of his own is a rare phenomenon, not a commonplace occurrence.

We hold therefore that the association-appellant was wrongly held by the High Court Division not to be a "person aggrieved" in the facts and circumstances of the case and we hold further that the appellant is "any person aggrieved" within the meaning of both Article 102 (1) and Article 102 (2)(a) of the Constitution.

The appeal is allowed and Writ petition No.998 of 1994 is remanded to the High Court Division for hearing on merit. There will be no order as to costs.

(Signed) Mustafa Kamal J.

LATIFUR RAHMAN, J.:- The traditional rule as to *locus standi* is that judicial remedy is available only to a person who is personally aggrieved. This principle is based on the theory that the remedies and rights are correlative and therefore only a person whose own right is violated is entitled to seek remedy. In case of private individual and private law this principle can be applied with some strictness, but in public law this doctrine cannot be applied with the same strictness as that will tantamount to ignoring the good and well being of citizens, more be particularly from the view point of public good for whom the state and the Constitution exist.

'Bela' is actively working in the field of environmental problems of the Bangladesh. It is to be kept in mind that 'Bela' has got no direct personal interest in the matter, strictly speaking it is not an aggrieved person if we just give a grammatical construction to the phrase 'aggrieved person' which means person personally aggrieved. In our Constitution nowhere the expression aggrieved person has been defined. An expression appearing in the Constitution must get its light and sustenance from the different provisions of the constitution and from the scheme and objective of the constitution itself.

In our Constitution, the preamble provides that the people of Bangladesh proclaimed Independence on the 26th day of March, 1971 and through a historic war for national independence established independent, sovereign Bangladesh. The preamble of our Constitution envisages a socialistic society free of all kinds of exploitation. In other words, the Constitution contemplates a society based on securing all possible benefits to its people, namely, democratic, social, political and equality of justice in accordance with law. The Constitution is the supreme embodiment of the will of the people of Bangladesh and as such all actions must be taken for the welfare of the people for whose benefits all powers of the Republic vest in the people and the exercise of such power shall be effected through the supremacy of the Constitution. If justice is not easily and equally accessible to every citizen there then can hardly be a Rule of Law. If access to justice is limited to the rich, the more advantaged and more powerful sections of society, then the poor and the deprived will have no stake in the Rule of Law and they will be more readily available to turn against it. Ready and equal access to justice is a *sine qua non* for the maintenance of the Rule of Law. Where there is a written Constitution and an independent judiciary and the wrongs suffered by any section of the people are capable of being raised and ventilated publicly in a court of law there is bound to be greater respect for the Rule of Law. The preamble of our Constitution really contemplates a society where there will be unflinching respect for the Rule of Law and the welfare of the citizens. Article 7(1) of our Constitution reads as follows:-

"7.(1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution."

The supremacy of the constitution is a special and unique feature in our Constitution. Neither in the Constitution of India nor in the Constitution of Pakistan is there reassertion of the supremacy of the Constitution. This is a substantive provision which contemplates exercise of all powers in the Republic through the authority of the Constitution.

Part II of our Constitution relates to fundamental principles of State Policy. Article 8(2) provides that these principles are not enforceable in any court but nevertheless are fundamental to the governess of the country and it shall be the duty of the State to apply the principle in making the laws. The principles, primarily being social and economic rights, oblige the state, amongst other [sic] themselves, to secure a social order for the promotion of

welfare of the people, to secure a right to work, to educate, to ensure equitable distribution of resources and to decentralize power to set up legal Government institutions composed of people from different categories of people as unit of self governance. A Constitution of a country is a document of social evolution and it is dynamic in nature. It should encompass in itself the growing demands, needs of people and change of time. A Constitution cannot be morbid at all. The language used by the framers of the Constitution must be given a meaningful interpretation with the evolution and growth of our society. An obligation is cast on the Constitutional Court which is the apex court of the country to interpret the Constitution in a manner in which social, economic and political justice can be advanced for the welfare of the state and its citizens. Mr. Mahmudul Islam, author of "Constitution law of Bangladesh" opined in his book as follows:-

> "An expression occurring in the Constitution cannot be interpreted out of context or only by reference to the decisions of foreign jurisdictions where the constitutional dispensation is different from ours."

The author dealing with the Constitution of Bangladesh has very aptly said that the meaning of the expression 'aggrieved person' must be understood keeping in view of the pronounced scheme and objectives of the Constitution. The Constitution is a living document and therefore its interpretation should be liberal to meet the needs of the time and demands of the people. By referring to the various provisions of the Constitution of Bangladesh, I find that it ensures liberties and socio-economic justice exhorted for a purposeful application to all categories of the population.

The Constitution of Bangladesh recognizes the welfare of the people in unambiguous terms. If we take a traditional restive rule and remain contented with it then the same will be disastrous for the welfare of a poor, uneducated society like ours in the contest of social and economic unequals. Time has come when this court must act according to the needs of doing social justice to the large segment of population. This relaxation of the strict rules of *locus standi* can be expanded in two ways. First, representative standing and citizen standing. The former relates to the standing in a matter pertaining to a legal wrong or injury being caused or threatened to be caused to a person or class of person who, by reason of property helplessness or disability or economic inability cannot move the court for relief. The later relates to standing in a matter in which breach of public duty results in violation of collective right of the public at large. In this case, the appellant is not moving this application as peoples of the locality being poor and economically crippled cannot field the application before the court, but by this action of the respondents a public wrong or public injury is causing damage to environment and human health in Bangladesh in which specific filed 'Bela' is actively associated. Thus, I find that this organization has got sufficient interest in the matter and the question of standing must be liberally construed in the context of our Constitutional scheme and objectives as indicated above.

I also honestly feel that there is a positive duty on the judiciary to advance and secure the protection of the Fundamental rights of its people as found in our Constitution. Strictly it may be correct to say that only a person whose rights are infringed has a right to make an application to assert his right, be it fundamental or otherwise. But it is important to note that there is a constitutional duty on the judiciary to secure and advance the fundamental rights of its people in view of our Constitutional mandate. In such an event this court is under a duty to act and inquire into allegations of infringement of rights even though technically a perfect application in terms of Article 102 of the Constitution is not before the court. Independence of judiciary and its separation from the executive ensures proper functioning of the courts. The Court is required to protect and enforce fundamental rights guaranteed to the people, it interprets and protects the Constitution, enforces the constitutional limitations on the power of the government, decides disputes between the State and its citizens and between citizens. Presently, I am concerned with the protection of the rights of the people and will restrict to the same. The people have been guaranteed life, liberty, equality, security, freedom from needs, wants, illiteracy and ignorance, dignity of man and socio-economic and political justice. Any law, action and order made and passed in violation of fundamental rights guaranteed to the People [sic]. We can thus see how judiciary upholds, protects, and defends the Constitution and effectively enforces the fundamental rights guaranteed by the constitution itself. The judiciary defends the constitution and attains the pivotal enviable position as the guardian of the people and also the conscience of the people. In the area of economic regulation, control and planning the judiciary has used law as an instrument for the eradication of poverty, inequality and exploitation and strengthened the hands of the State in widening the gamut of its welfare activities. The terms 'welfare State', 'mixed economy', 'socialist republic' etc. have been the judiciary vast scope for social engineering. Effective access to justice can thus be seen as the most basic requirement, the most basic "human rights" of a system which purports to guarantee legal rights. The types of cases which were considered at the early stages of development of the rule of locus standi are those where there is a specific legal injury either to the applicant or to some other person or persons for whose benefit the action is brought arising from violation of some constitutional or legal right or legally protected interest. Apart from such cases, there is a category of cases where the State of a public authority may act in violation of a constitutional or statutory obligation, or fail to carry out such obligation resulting in injury to public interest or public injury as distinguished from pri-

vate injury. Who then in such cases can complain against such act or omission of the State or public authority? Can any member of the public sue for legal redress? Or is such right or standing limited only to a certain class of persons? Or is there no one who can complain? Must the public injury go unredressed?

Thus I hold that a person approaching the court for redress of a public wrong or public injury has sufficient interest (not a personal interest) in the proceedings and is acting for the public benefit and not for his personal gain or private profits, without any political motivation or other oblique consideration has *locus standi* to move the High Court under Article 102 of the Constitution of Bangladesh.

Dr. Mohiuddin Farooque has cited a large number of decisions from Indian jurisdiction to show how the question of *locus standi* has been considered in the High Courts of India including the Supreme Court for evolution and development of public interest limitation in India. He has cited various decisions from other countries as well in his written argument to show that public interest litigation is a new jurisprudence which the courts in other jurisdictions are evolving. I will not refer to all those cases as the language of article 102 of our Constitution is not in perimetria with the language of those Constitutions.

If we look to the cases recently disposed of by the supreme Court of India then we find that there is a trend of judicial activitism to protect environment through public litigation in environmental cases. In Bangladesh such cases are just knocking at the door of the court for environmental policy making and the court is being involved in this case. There is a trend to liberalize the rules of standing throughout the world inspite of the traditional view of the *locus standi*. The Supreme Court of India initially took the view that when any member of a public or social organization so espouse the cause of the poor and the down-trodden, such member should be permitted to move the Court even by merely writing a letter without incurring expenditure of his own. In such a case, the letter was regarded as an appropriate proceeding falling within the purview of Article 32 of the Constitution. This was thus the beginning of the exercise of a new jurisdiction in India, known as epistolary jurisdiction.

The operation of Public interest Litigation should not be restricted to the violation of the defined fundamental rights alone. In this modern age of technology, scientific advancement, economic progress and industrial growth the socio-economic rights are under phenomenal change. New rights are emerging which call for collective protection and therefore we must act to protect all the constitutional, fundamental and statutory rights as contemplated within the four corners of our Constitution.

In conclusion, I hold that the appellant may not have any direct personal interest but it has sufficient and genuine interest in the matter complained of and it has come before the court as a group of public spirited young lawyers to see that the public wrong or public injury is remedied and not merely as a busy body perhaps with a view to gain cheap popularity and publicity.

Before parting with the case, I want to mention specifically that any application filed by an individual, group of individuals, associations and social activists must be carefully scrutinized by the court itself to see as to whether the petitioner has got sufficient and genuine interest in the proceeding to focus a public wrong or public injury.

BIMALENDU BIKASH ROY CHOUDHURY, J. A review of the authorities of this court, however, indicates that no exhaustive or definitive meaning could have yet been given to the said expression and the courts sometimes lapsed into the traditional view which originated from the old English decisions. But law does not remain static. It loses its rigidity with the gradual change of the social order to meet the demands of the change.

In order to ensure that the mandates of the Constitution are observed the High Court Division of the Supreme Court is vested with the power of judicial review under article 102 which is contained in Part VI of the Constitution. The power is wide enough to reach any person or place where there is injustice.

In this backdrop the meaning of the expression “person aggrieved” occurring in the aforesaid clauses (1) and (2) (a) of article 102 is to be understood and not in an isolated manner. It cannot be conceived that its interpretation should be purged of the spirit of the constitution as clearly indicated in the Preamble and other provisions of our Constitution, as discussed above. It is unthinkable that the framers of the Constitution had in their mind that the grievances of millions of our people should go unredressed, merely because they are unable to reach the doors of the court owing to abject poverty, illiteracy, ignorance and disadvantaged condition. It could never have been the intention of the framers of the constitution to outclass them. In such harrowing conditions of our people in general if socially conscious and public-spirited persons are not allowed to approach the court on behalf of the public or a section thereof for enforcement of their rights the very scheme of the Constitution will be frustrated. The inescapable conclusion, therefore, is that the expression “person aggrieved” means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellowbeings for a wrong done by the Government or a local authority in not fulfilling its constitutional or statutory obligations. It does not, however, extend to a person who is an interloper and interferes with things which do not concern him. This approach is in keep-

ing with the constitutional principles that are being evolved in the recent times in different countries.

Although we do not have any provision like article 48-A of the Indian Constitution for protection and improvement of environment, articles 31 and 32 of our Constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life.

In the face of the statements in the writ petition BELA is concerned with the protection of the people of this country from the ill-effects of environmental hazard and ecological imbalance. It has genuine interest in seeing that the law is enforced and the people likely to be affected by the proposed project are saved. This interest is sufficient enough to bring the appellant within the meaning of the expression "person aggrieved". The appellant should be given locus standi to maintain the writ petition on their behalf.

KAJING TUBEK & ORS

v.

EKRAN BHD & ORS

HIGH COURT (KUALA LUMPUR)

ORIGINATING SUMMONS No. S5-21-60-1995
JAMES FOONG J 19 June 1996

Environmental Law - Environmental Quality Act 1974 - Whether Minister permitted to make amendments retrospectively - Environmental Quality Act 1974 - Interpretation Act 1948, 1967 s 20

Civil Procedure - Declaration - Application for - hydroelectric project in Sarawak approved without adherence to procedures set down in environmental legislation and guidelines - Plaintiffs deprived of vested rights to obtain copy of environmental assessment report and to make representations to review panel on project - Legislation provided for penal offences in the event of breach - Whether plaintiff entitled to declaration as private individual - Environmental Quality Act 1974 s 34A

Civil Procedure - Locus standi - Allegation of plaintiffs that hydroelectric project would destroy their houses and lives - Plaintiffs sought declaration that project approved without adherence to procedures set down in environmental legislation and guidelines - Whether plaintiffs had substantial or genuine interest to have legal position declared.

The plaintiffs were residents of long houses in Belaga, Sarawak who were affected by the Government's proposed development of a hydroelectric project in Bakun covering approximately 69,640 hectares of land ("Bakun HEP"). The first defendant was the project proponent of the Bakun HEP; the second defendant was the Director General of Environmental Quality; the third defendant was the Government of Malaysia; the fourth defendant was the Natural Resources and Environment Board and the fifth defendant was the Sarawak State Government. The plaintiff sought a declaration that before the first defendant carried out the construction of the Bakun HEP, they had to comply with the Environmental Quality Act of 1974 (the 'EQA'), the guidelines prescribed under s 34A of the Act, and the regulations made thereunder. Under the EQA, certain prescribed activities could only be carried out with the approval of the Director General of Environmental Quality ('the prescribed activities'). Specifically, s 34A of the EQA imposed a duty upon any person who carries out any of the prescribed activities to submit a report to the Director General, containing an assessment of the environmental impact of the proposed activity and a proposal of measures that shall be undertaken to control any adverse environmental impact (the 'EIA'). According to guidelines issued by the Director General, such EIA must be made available to the public and the public are invited to comment on the proposed project to a review panel, which is an independent body. This review panel would then make recommendations to the Director General for his consideration and approval. However, by an order made by the Minister known as the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 (the 'Minister's Order' it was provided that the prescribed activities shall not apply to Sarawak. Subsequently, the Director General issued a press release stating that the EIA prepared by the first defendant was subject to the Sarawak Natural Resources and Environment (Prescribed Activities) Order 1994 (the 'Sarawak Order'), and not the regulations made under the EQA by the Federal Government. As the Sarawak Order did not have any provisions on the public's entitlement to a copy of the EIA and for subsequent public comments to be submitted to the review panel before an approval could be granted by the Director General, the State Natural Resource Board could review and approve the EIA. The EIA submitted by the first defendant was accordingly considered and approved. By these acts of the defendants, the plaintiffs claimed that they had been deprived of their accrued/vested rights to obtain a copy of the EIA, to be heard and make representation before the EIA is approved. The defendants contended that: (1) the plaintiffs had no *locus standi* to bring the action as they had not suffered any specific, direct or substantial damage which was different from that common to the rest of the public; (b) as the EQA had provided for a penal offence in the event of breach of s 34A, a declaration sought for by the plaintiffs as private individuals cannot be entertained; (c) the court's power to make declaratory judg-

ments was confined to matters which were justiciable in the High Court, and to gant the plaintiffs' declaration would entail the court enforcing on the state of Sarawak, laws and regulations which Parliament did not have legislative authority to enact; (d) the Minister's order suspending the application of the prescribed activities to Sarawak merely amended the procedure for the approval of the EIA from the Director General to the Sarawak Board and did not extinguish any vested/accrued rights of the plaintiffs; (e) the underlying objective of the plaintiffs was to avoid losing their land, crops, houses and ancestral burial sites if the Bakun HEP was to proceed and these were matters which could only be resolved under the provision of the Land Code of Sarawak; (f) the proper relief is an order of *mandamus* against the second defendant to exercise its statutory duty under 0.53 of the Rules of the High Court and not by way of declaration as the substance of the plaintiffs' grievances were actually against the second and third defendants for the purported abdication of its statutory powers. The plaintiffs' contentions were that: (a) the Minister's power under s 34A of the EQA was restricted to prescribing of activities which fell under s 34A but not to suspend the application of these activities to the state of Sarawak; (b) though the Minister's order was made retrospectively, this was done under s 34A of the EQA which did not provide the Minister with a power to amend the law retrospectively.

Held, granting the declaration sought by the plaintiffs:

(1) The plaintiffs' claim that their homes and land would be destroyed, their lives uprooted by the project and that they would suffer far more greatly and directly than other members of the public as their 'land and forest are not just a source of livelihood but constitute life itself, fundamental to their social cultural and spiritual survival as native peoples', was sufficient to justify the plaintiffs having a substantial or genuine interest to have a legal position declared.

(2) Even though there was provision for a criminal offence which provided for a penal remedy, the plaintiffs were entitled to seek their declaration as they had suffered specific, direct and substantial damages.

(3) The issue before this court concerned the validity of an order made by the Minister under s 34A of the EQA in its procedural aspect of its enactment. This was a real and substantial controversy which this court had jurisdiction to determine, irrespective of whether there existed a state law or a federal legislation governing a similar underlying subject matter. The matter to be determined is justiciable for this forum.

(4) The Minister has corresponding power to 'disprescribe' or 'unprescribe' any prescribed activities. When Parliament had delegated the Minister with power to prescribe any activity, it would be unjustifiable for him to return to the house on every single activity he wished to disprescribe which in his opinion had become unnecessary or inapplicable.

(5) There was no express provision in the EQA to permit the Minister to make any amendments retrospectively. If he wished to avail himself of the powers in S 20 of the Interpretation Act to give effect to the retrospectively of his order, he must say so expressly.

(6) Under the guidelines issued by the Director General, public participation in the form of obtaining a copy of the EIA, commenting thereto and making representation was explicitly provided. All these were to be complied with before the review panel made its recommendation to the Director General who in turn takes into consideration these recommendations before arriving at a decision. This process was therefore mandatory and any decision made by the Director General without the above procedure being adhered to would be against the legal provisions of the EQA and its subsidiary legislation. With this, the entitlement to a copy of the EIA, commenting thereon by the public became a right and the plaintiffs were entitled to such rights.

(7) The Minister's order suspending the application of the prescribed activities to Sarawak was not about a transfer of procedure, but the extinction of the EQA in its application on certain material activities in Sarawak. Where a right to prosecute existed, it was no longer procedural but substantive.

(8) The plaintiffs' apprehension that their land, crops, houses and ancestral burial sites would be devastated if Bakun HEP were to proceed did not extinguish their vested rights to make representations and be heard before the EIA was approved under the EQA. The rights of the plaintiffs under the EQA were distinct and separate from the rights under the Land Code of Sarawak. But this did not mean that just because the plaintiffs wished to enforce their rights under the EQA they possessed a sinister motive as claimed.

(9) The court would not refuse the plaintiffs' application solely on the ground that an alternative remedy was available. The court would consider the granting of the form of relief most likely to resolve the disputes between the parties.

Notes

For cases on declarations, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1104-1126.

For cases on *locus standi*, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2272-2290.

Cases referred to

Chief Assessor, Property Tax, Singapore v Howe Yoon Chong [1979] MLJ 207

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12
Hanson v Radcliffe Urban District Council [1922] 2 Ch 490
Howe Yoon Chong v Chief Assessor, Property Tax, Singapore [1978] MLJ 87
Ibeneweka v Egbuna [1964] 1 WLR 219
Lonrho Ltd & Anor v Shell Petroleum Co Ltd & Anor (No 2) [1982] AC 173
Penang Development Corp v Teo Eng Huat & Anor [1993] 2 MLJ 97
Petaling Tin Bhd v Lee Kian Chan & Ors [1994] 1 MLJ 657
Phillips v Eyre (1870) LR 6 QB 1
R v Secretary of State for the Home Development, ex p Al-Mehdawi [1989] 1 All ER 777
Salijah bte Ab Lateh v Mohd Irwan Abdullah [1996] 1 SLR 63
Tan Sri Hj Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177
Wong Pot Heng & Anor v Kerajaan Malaysia [1992] 2 MLJ 885
Yamaha Motor Co. Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213
Yew Bon Tew & Anor v Kenderaan Bas Mara[1983] 1 MLJ 1

Legislation referred to

Borneo States (Legislative Powers) Order 1963
Environment Quality Act of 1974 ss 34, 34A(1), (2), 34A(8)
Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 item 13(b)
Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 s 2
Federal Constitution arts 73, 74, 76A, 77, 95B, 95C, 128(1), (2) Ninth Schedule
Interpretation Acts 1948, 1967 ss 3, 20, 30(1)(b)
Natural Resources Ordinance (Cap 84) s 11A(1)
Natural Resources and Environment (Prescribed Activities) Order 1994 s 2(2), item 4(ii)
Rules of the High Court 1980 O 53

GS Nijar (Meenakshi Raman and Thayalan with him) (*Meena Thayalan & Partners)* for the plaintiffs.
Shafee Abdullah (CG Oh with him) (Shafee & Co) for the first defendant.
Stanley Isaac (Senior Federal Counsel) (*Abu Bakar Fais* with him for the second and third defendants.
JC Foong (Sarawak State Attorney General) for the fourth and fifth defendants.

James Foong J: The plaintiffs in this action are residents of longhouses of Long Bulan, Uma Daro and Baku Kalo in the district of Belaga, the seventh division of Sarawak. Sometime in September 1993, the Federal Cabinet of Malaysia announced its approval of the proposed development of a hydroelectric project in the seventh division of Sarawak, an area known as Bakun covering approximately 69,640 hectares of land to meet the long-term power and energy requirements of the nation. It involves three stages; the creation of a reservoir, construction of a dam and the transmission of the generated electric power from Sarawak in East Malaysia to Peninsular Malaysia by transmission cables which will, for a greater part, be submerged across the South China Sea. This project, which is commonly termed the 'Bakun Hydroelectric Project' ('Bakun HEP') will, according to the plaintiffs, directly and adversely involve the destruction of their longhouses, ancestral burial sites as well as land and forests from which they seek shelter, livelihood, food and medicine - all of which they claim to have a strong cultural attachment.

Under the Environment Quality Act of 1974 ('the EQA') - which was passed by the Federal Parliament of Malaysia and became law on 15 April 1975 - certain activities to be prescribed by the Minister charged with the responsibility for environment protection ('the Minister') can only be carried out with the approval of the Director General of Environmental Quality ('the Director General'), who is the second defendant in this action. This, as the long title of the EQA specifies, is for the 'prevention, abatement, control of pollution and enhancement of the environment and the purpose connected therewith. Section 34A of the EQA imposes a duty upon any person who carries out any of the prescribed activities to submit a report to the Director General in accordance with the guidelines prescribed by the Director General. This report should contain an assessment of the impact such activity which is proposed to be carried out will have or is likely to have, on the environment and a proposal of measures that shall be undertaken to prevent, reduce or control any adverse impact on the environment. (This report shall be known as 'EIA').

According to para 3.4.7 of the Handbook of Environmental Impact Assessment Guidelines ('the Guidelines') passed and approved by the Director General, a detailed EIA prepared by the proponent of the project must be made available to the public. And under para 4.5 of the Guidelines, the public are invited to comment on the proposed project to a review panel, which is an independent body of experts or representatives of interested organizations appointed with the prime task of reviewing a detailed EIA and to evaluate the environmental, development costs and benefits to the community. This re-

view panel will formulate its recommendation to the Director General for his consideration and decision on its approval.

By an order known as the 'Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987' numbered as PU(A) 362/87 ('PU(A) 362') which came into effect on 1 April 1988, the Minister prescribed a number of activities to be 'prescribed activities' falling within the EQA. One such activity in item 13(b) is:

13 Power Generation and Transmission:

(b) Dams and hydroelectric power schemes with either or both of the following:

(i) dams over 15 meters high and ancillary structures covering a total area in excess of 40 hectares;

(ii) reservoirs with a surface area in excess of 400 hectares.

However, on 27 March 1995, the Minister, purportedly 'in exercise of the powers conferred by s 34A of the EQA' by an order known as the 'Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995' numbered as PU(A)117 ('PU(A) 117') 'disprescribe' or 'unprescribe' (terms used by counsel for the first defendant), inter alia, item 13(b) of the prescribed activity made by him in PU(A) 362. This PU(A) 117 was gazetted on 20 April 1995. The mode used in s 2 of this amendment order reads as follows:

2 The Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 is amended by inserting, after paragraph 2, the following paragraphs:

3 In relation to the State of Sarawak, this Order shall not apply in respect of the prescribed activities listed in the First Schedule of the national Resources and Environment (Prescribed Activities) Order 1994 published under Part II of the Sarawak Government *Gazette* dated 11 August 1994, save that if there are any inconsistencies between the two Orders, this Order shall prevail.

4 Notwithstanding paragraph 3, the prescribed activities listed as Items 2, 5(a) and (b), 8, 9, 10, 12, 13(a), (c) and (d), 15, 16 and 18 in the Schedule shall continue to apply in respect of the State of Sarawak.

One of the most controversial provisions of this amendment order is that it 'shall be deemed to have come into force on 1 September 1994'. In short, the provisions herein are made to apply retrospectively.

Sarawak - as early as 1949, before she jointed Malaysia - had a legislature known as the 'Natural Resources Ordinance' ('the Sarawak Ordinance'). Under s 11A(1) of the Sarawak Ordinance, a State Natural Resources Board ('the Sarawak Board') created under this Ordinance could prescribe certain activities, which inter alia 'may injure, damage or have adverse impact on the quality of the environment or the natural resources of the state', to require the approval of the Sarawak Board before they could be implemented. On 5 July 1994, the Sarawak Board by an order known as the 'Natural Resources and Environment (Prescribed Activities) Order 1994' ('the Sarawak Order'), besides prescribing certain activities which require the Sarawak Board's approval, also lays down procedure for the application for such approvals. In respect of procedure, it requires the project proponent to submit to the Sarawak Board an EIA for the Board's consideration. The fundamental difference between this sarawak Order and the Guidelines is essentially the entitlement to a copy of the EIA by the public and the subsequent public comments to the review panel before an approval can be granted by the Director General. The Sarawak Order does not contain such provisions. This, basically, is the discontentment of the plaintiffs. Of course, one of the prescribed activities in the Sarawak Order includes, under item 4(ii), the 'construction of dams, artificial lakes or reservoirs with a surface area of 50 hectares for impounding water' and under s 2(2) of the same Order, 'measurement of area shall be construed to mean the minimum area prescribed...'

The first defendant is the project proponent of the Bakun HEP. The plaintiffs claimed that on 7 March 1994, the EIA for the Bakun HEP was commissioned and subsequent to this, there were various public pronouncements by government leaders that the EIA would be made available to the public for their comments and views before approval. Through the exhibits annexed to the first plaintiff's affidavit were also letters from the Minister assuring certain public interest groups that all EIA procedures under the EQA for this project have to be complied with and public views will be considered. Suddenly, on 1 April 1995, the Press reported that the first defendant's chairman had claimed that the first segment of the EIA submitted by his company had been approved by the Director General and with this, the first defendant would be able to start preparatory works at the lower end of the reservoir, which involved the clearing of 69,000 hectares of forest. A few days later, on 7 April 1995, the Director General in a Press release clarified that the EIA prepared by the first defendant is:

> ... subjected to the Sarawak Order and not the Federal Government regulations. All prescribed activities related to the development of land, water, forestry, agriculture and other natural resources in Sarawak are subject to the Order (the Sarawak Order), including the

> construction of hydroelectric dams -; since Ekran Bhd's (the first defendant) submission was made after the Order came into force, it is within the Board's (the Sarawak Board's) purview to review and approve it. The first part of the EIA submitted by Ekran Bhd two month ago was accordingly considered and approved on 27 March - *The New Straits Times Press* on 7 April 1995

as found in exh E of the first plaintiff's affidavit affirmed on 5 May 1995. It is pertinent at this stage to note that the Sarawak Order, though made on 5 July 1994, was also enacted to be effective retrospectively to 1 September 1994.

By these acts of the defendants, the plaintiffs claim they have been deprived of their accrued/vested rights to obtain a copy of the EIA, to be heard and make representations before the EIA is approved. They are now seeking 'a declaration that before the first defendant carries out the prescribed activity, viz the construction of the Bakun HEP, the first defendant has to comply with the EQA including s 34A of the said Act and/or the guidelines prescribed by the second defendant under s 34A of the said Act and the regulations made thereunder.'

The third defendant is the Government of Malaysia, while the fourth and fifth defendants were added into these proceedings upon the suggestion of this court and agreed upon by all parties then present, principally for the reason that the subject matter concerns and involves them.

As expected, the plaintiffs' application brought a barrage of objections from all the defendants which raised numerous legal issues. For the sake of clarity, this court shall deal with each of them under separate headings.

Locus Standi

The defendants submit that the plaintiffs have no locus standi to bring this action; in short, they have suffered no specific, direct or substantial damage other and different from that which was common to all the rest of the public.

The learned Attorney General of Sarawak enlightens this court of the fact that there are over 9,000 inhabitants in the area that would be flooded as a result of the creation of the reservoir for the Bakun HEP, plus another 2,000 people residing in the proposed water catchment area. This totals approximately 10,000 natives affected by the Bakun HEP and any damage so caused by this project is not peculiar or special to the plaintiffs alone. In any event, any loss of their land, houses and crops will be compensated in accordance with the provisions of the Land Code of Sarawak and not to be remedied by a declaration that the first defendant must comply with the EQA.

The law on *locus standi* in a public action has been extensively and comprehensively detailed in the learned judgments of Salleh Abas LP in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at p 20. There is no necessity for this court to repeat them except to proceed straight into the elaboration of the principles expounded. It was agreed by two (Salleh Abas LP and Hashim Yeop Sani SCJ) of the three majority judges in the above mentioned case that the best approach to the determination of *locus standi* is the proposition pronounced by the (then)Supreme Court in the case of *Tan Sri Jh Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 at p 179, which is as follows:

> The sensible approach in the matter of locus standi in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute *which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared*, even though he could get no other relief, should suffice (Emphasis added.)

A perusal of the plaintiffs' affidavits, without any creditable evidential challenge from the defendants, confirms that the plaintiffs are natives to the area affected by the Bakun HEP. They have claimed that their homes and land will be destroyed, their lives uprooted by the project and they will suffer far more greatly and directly than other members of the public. To them, 'our land and forest are not just a source of our livelihood but constitute life itself, as they are fundamental to our social, cultural and spiritual survival as native people.' This itself, in the opinion of this court, is sufficient to justify the plaintiffs having a substantial or genuine interest to have a legal position declared.

The plaintiffs may be just three members of a community of 10,000 affected by the Bakun HEP, but as Viscount Radcliffe in *Ibeneweka v Egbuna [1964] 1 WLR 219* aptly put (at p 226):

> ... there has never been any unqualified rule of practice that forbids the making of a declaration even when some of the persons interested in the subject of the declaration are not before the court ... Where, as here, defendants have decided to make themselves the champions of the rights of those not represented and have fought the case on that basis, and where, as here, the trial judge takes the view that the interested parties not represented are in reality fighting the suit, so to say, from behind the hedge, there is, in their Lordships' opinion, no principle in law which disentitles the same judge from disposing of the case by making a declaration of title in the plaintiffs' favour.

Enforcement of a public duty on which a penal sanction is provided

Section 34A of the EQA imposes a duty on any person

who carries out any of the prescribed activities to submit an EIA to the Director General. When a project proponent proceeds with the project without the approval from the Director General of the EIA, he commits a breach of s 34A of the EQA, and under s 34(A)(8) of the EQA, he:

> ... shall be guilty of an offence and shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a period not exceeding two years or to both and to a further fine of one thousand ringgit for every day that the offence is continued after a notice by the Director General requiring him to comply with the act specified therein has been served upon him.

By this decree, the defendants claim that the EQA has provided a provision for breach of s 34A of the ECA. When such penal remedy is created by statutory provision, a declaration sought for by the plaintiffs as private individuals cannot be entertained. This is supported by the (then) Supreme Court decision in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, where Abdul Hamid CJ (Malaya) (as he then was) held (at p 32) that:

> With all due respect to the learned judge, my view is clear in that fundamentally where a statute creates a criminal offence by prescribing a penalty for the breach of it but not providing a civil remedy - the general rule is that no private individual can bring an action to enforce the criminal law, either by way of an injunction or by a declaration or by damages. I am inclined to the view that it should be left to the Attorney General to bring an action, either of his own motion or at the instance of a member of the public who 'relates' the facts to him; see *Gouriet v Union of Post Office Workers & Ors* [1977] 3 All ER 70.

The reason behind this is best put by Salleh Abas LP in the same case as follows (at p 26):

> It is unacceptable that criminal law should be enforced by means of civil proceedings for a declaration when the court's power to grant that remedy is only at the discretion of the court. Jurisdiction of a criminal court is fixed and certain. The standard of proof in a criminal case is different from that required in a civil case and moreover the Attorney General is the guardian of public interest and as the Public Prosecutor, he, and not the court, is in control of all prosecutions. How can a prosecution of this nature be done behind his back? These are some of the most serious objections to the exercise by a civil court of its discretionary power relating to declaratory and injunctive remedies. Our system requires the public to trust the impartiality and fair-mindedness of the Attorney General. If he fails in his duty to exhibit this sense of fairness and to protect public interest of which he is the guardian, the matter can be raised in Parliament or elsewhere.

However, there can be two exceptions to this rule as pointed out by the learned Attorney General of Sarawak acting for the fourth and fifth defendants. This is expounded in the judgment of Lord Diplock in *Lonrho Ltd & Anor v Shell Petroleum Co Ltd & Anor (No 2)* (1982) AC 173 at p 185, which is consistent with *Government of Malaysia v Lim Kit Siang.* The exceptions are:

> The first is where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals as in the case of the Factories Act and similar legislation ...
>
> The second exception is where the statute creates a public right (a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers what Brett J in *Benjamin v Starr* (1874) LR 9 CP 400 at p 407 described as 'particular, direct and substantial' damage 'other and different from that which was common to all the rest of the public.

Even on these exceptions, the learned Attorney General of Sarawak contends that the plaintiffs have failed to satisfy the first. The EQA, he submits, is for inter alia 'the prevention, control of pollution and enhancement of the environment and to regulate prescribed activities.' In short, it is only a regulatory system for environmental quality control and the enhancement, without reference to any class or body of persons for whom such control or enhancement is to benefit; such an Act is not for the protection of any class of the public, but for the public generally.

> Mr. Nijar, arguing for the plaintiffs, disagrees. He submits that by looking at the EQA, it is apparent that the obligations for public participation in an EIA before approval -as provided by paras 3.4.7 and 4.5 of the Guidelines - are imposed for the benefit of the interested public. Though this court may agree that it may be for the benefit of the interested public, it is without reference to any particular class or body. It certainly does not grant protection to any class of the public but only to the public at large. For this, in the opinion of this court, the plaintiffs do not fall within this particular exception.

On the second exception, this court finds the circumstances of this case more applicable particularly to the findings of this court under the heading of 'Locus Standi'. The plaintiffs are natives to the location where the Bakun HEP is to be carried out. Operations of this project involve cutting down trees, diverting natural water flow and submerging large tracts of land with water. This obviously involves the destruction of the plaintiffs' homes and land and they would have to be relocated as admitted by the defendants. When the forest which is an integral part of the plaintiffs' lives is destroyed, such a deprivation would certainly uproot and immensely affect their lives. These sufferings and damages definitely are 'particular, direct and substantial', to the plaintiffs themselves, which are obviously different and apart from what other members of the public would suffer. The plaintiffs may only be three of a community of 10,000 but, as ut-

tered earlier, numbers is not the criteria for the granting or refusal of declaratory relief. What is fundamental is that the plaintiffs themselves have in this case suffered specific, direct and substantial damages caused by the Bakun HEP. Within this exception, this court finds that the plaintiffs are entitled to seek their declaration prayed for in this application, even though statutory provision in this case subscribes a criminal offence which provides for a penal remedy.

Justiciable and the Power of the State Legislature to Make Laws

In quoting the Singaporean case of *Salijah bte Ab-Lateh v Mohd Irwan Abdullah* [1996] SLR 63 at p 69, the learned Attorney General of Sarawak points out that the power to make declaratory judgment is confined to several principles, one of which is that it must be restricted 'to matters which are justiciable in the High Court.' With the assistance of the learned senior federal counsel acting for the second and third defendants, they explain that environment per se is an abstract thing. It is multi-dimensional so that it can be associated with anything surrounding human beings. The power to legislate on environmental matters, would, therefore, necessarily depend on specific activity to which the environmental matter relates. In this respect, both Parliament and the state legislatures of Sarawak are competent to make laws on environmental impact provided that they are confined to activities which are identified in the Constitution as belonging to their respective legislative jurisdiction the law on the legislative jurisdiction between states and the federal authority need to be elaborated.

(1) Under art 73 of the Federal Constitution, while Parliament may make laws for the whole or any part of the Federation, the Legislature of the State may make laws for the whole or any part of the State.

(2) Under art 74 of the Federal Constitution, Parliament's power to make laws is in respect of matters enumerated in the Federal list or the Concurrent list (that is to say, the list I or list III as set out in the Ninth Schedule of the Federal Constitution).

(3) Under art 77 of the Federal Constitution, the legislature of the State has power to make laws with respect to any matters not enumerated in any of the lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has the power to make laws. This power is called the residual power of legislation and it is preserved for the State Legislatures.

(4) Article 95B of the Federal Constitution accords special legislative powers to the State of Sabah and Sarawak. The supplement to List III (known as "List IIIA") in the Ninth Schedule is deemed to form part of the Concurrent List ('List III') and the matters enumerated in that list is deemed not to be included in the Federal List ('List I'). In this supplement to the Concurrent List is the power of the State of Sarawak to make laws on 'the production, distribution and supply of water power and of electricity generated by water power' (List IIIA 13).

(5) In addition to the express powers given under the Ninth Schedule of the Federal Constitution to the State of Sarawak to make laws, the Yang Di-Pertuan Agong acting under art 95C read together with art 76A of the Federal Constitution has given powers to the State of Sarawak to make laws inter alia, on 'Electricity and distribution of gas.' This is under the Borneo States (Legislative Powers) Order 1963 LN 17.5.

(6) Under the State List (List II), and supplementary list to List III (List IIIA) of the Ninth Schedule of the Federal Constitution, together with the additional express powers made under Borneo States (Legislative Powers) Order 1963 LN 17.5, the State of Sarawak has exclusive jurisdiction to make laws affecting land use, forestry (which includes the removal of timber and biomass), impounding of inland water, diversion of rivers, electricity and the production of electricity generated by water, including the removal of burial sites.

(7) In respect of environmental impact, it is neither in the Federal List (List I),or the Concurrent List (List III), and the defendants claim that under art 77 of the Federal Constitution, the State of Sarawak is lawfully entitled to legislate over such matters, as seen to be carried through the Sarawak Ordinance and the Sarawak Order.

From the above, the learned senior federal counsel points out that in respect of the Bakun HEP, the state of Sarawak has competent and exclusive jurisdiction to govern the relevant activities involved. The Minister, recognizing this fact and removing any inconsistency between federal and State jurisdiction,by PU(A) 117 excluded the application of EQA on certain relevant prescribed activities to the state of Sarawak. The operation of the Sarawak Order, he claims,is never dependent upon PU(A) 117; the Minister has prescribed the material activities, the most relevant of which is the construction of dams and hydroelectric power schemes in PU(A) 362, at a time when the Sarawak Ordinance had not been amended yet to include a new s 11A for Sarawak to assume identical powers and jurisdiction as in s 34A of the EQA. To grant the declaration sought for by the plaintiffs, in the opinion of the learned Attorney General of Sarawak, would mean:

> the court is seeking to enforce on the state of Sarawak, laws and regulations which Parliament did not have legislative authority to enact, or the constitutionality of such law is questioned, and with regard to which, there are already state laws and regulations for environmental protection and enhancement.

These are matters not justiciable for this court to consider.

The response from the plaintiffs contained in Mr. Nijar's reply is that the environment has increasingly become a subject matter of international concern and the Malaysian Government - since the Stockholm Conference in 1972 - has participated in international conferences, entered into treaties, been signatories to international conventions and agreed to be internationally bound by protocols relating to environment. The country has carried out these actions as part of its obligations in external affairs. To effect these international commitments, the Federal Government must have power at national level to pass laws relating to matters located within the states otherwise its external affairs obligations will be impaired. He cites the Convention on Biological Diversity, which Malaysia is signatory, that imposes binding obligations on the government to pass laws for the preservation and sustainable use of all the rich flora and fauna within the country. Matters concerning the environment is, therefore, an external affairs power which the federal legislature has power under the Federal List (List I) to enact laws.

Before one embarks upon this issue, it is relevant to determine the definition and meaning of the word 'justiciable'. Edgar Joseph Jr SCJ (as he then was) in *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657 at p 672 has undertaken this task and found in *Black's Law Dictionary* (5th Ed, 1983) at p 1004, on the meaning of the term 'justiciability':

> The term refers to real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character; '*Gulmarin & Dean Inc v George Town Textile Mfg Co* 249 SC 561, 155 SE 2d 618, 621.

To begin with, this court wishes to reiterate that the issue before it is not what is the appropriate legal measures to safeguard the environment; which seems to be the undertone of Mr. Nijar's reply, and if allowed to proceed further would completely blur the relevant issues before this court. Basically, from the arguments and a scrutiny of the plaintiffs' application, the nucleus of the plaintiffs' challenge is on the validity of PU(A) 117, in relation to the procedural aspect of its enactment. This does not involve the determination of the jurisdictional aspect between state legislation and the Federal Parliament concerning who has the legislative power on various matters, either listed or not listed in the Ninth Schedule of the Federal Constitution. This is a constitutional challenge, this court is not the proper forum for under arts 128(1) and (2) of the Federal Constitution, only the Federal Court to the exclusion of any other court can decide any question whether a law made by Parliament or by the legislature of the state is valid. There certainly is no application of such nature before this court.

Irrespective of whether there is a state law existing concurrently with a federal law, this court shall not be hampered in its determination to grant or refuse a declaratory relief, if found justifiable to do. If there is any inconsistency or conflict of the laws, then it is up to the respective executive authority or its relevant legislation to resolve such matters in accordance with the correct and appropriate procedure as laid down by law. One does not expect an individual (whose right is affected either by a state or federal legislation) in an attempt to enforce his right granted either by a state or federal legislature to be defeated by a claim from the respective executive, each claiming it has the rights and powers to enact the material piece of law and doing nothing to resolve this. If the executive from either the state or federal body has chosen to ratify and resolve such conflicts, the least he can do is to do it correctly according to the law. If it is carried out incorrectly or no action ever taken at all, the courts should not stand idly by to allow the concerned parties involved to take advantage of this situation. In a declaratory relief, which is an all-purpose remedy used in an extraordinary variety of cases, the court will weigh the advantages of granting a declaratory relief against the disadvantages, with the minimum requirement to achieve justice to deal with the aggrieved party's claim at hand. In this case, the issue before this court concerns the validity of PU(A) 117 in its procedural aspect of its enactment. This is a real and substantial controversy which this court has jurisdiction to determine, irrespective of whether there exists a state law or a federal legislature governing a similar underlying subject matter. For this, this court finds that the matter to be determined is justiciable for this forum.

Ultra Vires

(a) Power to 'disprescribe'

The plaintiffs claim that under s 34A of the EQA, the Minister's power is restricted to prescribing of activities to fall under the EQA. He has no power to suspend the application of PU(A) 362 to the state of Sarawak for this does not fall within the terms of the enabling provision of s 34 of the EQA.

> Section 34A(1) of the EQA provides:
>
> The Minister, after consultation with the Council, may by order prescribe any activity which may have significant environmental impact as prescribed activity.

By implication, it is the opinion of this court that he, too,

has corresponding power to (borrowing the words of Mr. Shafee, counsel for the first defendant) 'disprescribe' or 'unprescribe' any prescribed activities. This approach is necessary to give full effect to the objective of the EQA, which in the long title spells out as:

> An Act relating to the prevention, abatement, control of pollution and enhancement of the environment and for the purposes connected therewith

As society progresses, environmental characteristics and values also change, caused either by human attitude, depletion of the subject matter or the inapplicability of a prescribed activity. Environmental matters do not remain static, and the constant change in its character requires the Minister to prescribe as well as disprescribe to move with times. When Parliament has delegated the Minister with power to prescribe any activity, it would be unjustifiable for him to return to the distinguished house on every single activity he wishes to disprescribe which, in his opinion, has become unnecessary or inapplicable. To interpret s 34A(I) EQA strictly is to tie the hands of the Minister when change has come and is needed. This would create an impractical approach which certainly is not the intention of Parliament.

(b) Retrospectivity

PU(A) 117, though in the form of an order by the Minister, is subsidiary legislation according to s 3 of the Interpretation Acts 1948 and 1967 ('Interpretation Act'). Section 20 of the Interpretation Act permits this piece of subsidiary legislation to be made retrospective deeming it to come into force on 1 September 1994 when it was only gazetted on 20 April 1995. However, Mr. Nijar points out that though PU(A) 117 can be made retrospective, it was not done so under s 20 of the Interpretation Act. Instead, PU(A) 117 was expressly made 'in exercise of the powers conferred by s 34A of the EQA 1974.' Again s 34A of the EQA, he claims, has never provided the Minister with a power to amend the law retrospectively. If the Minister wishes to avail himself of the provision of s 20 of the Interpretation Act which empowers him to amend retrospectively, he must cite this provision explicitly but this is not apparent in PU(A) 117. In support of this contention, he quoted the case of *Howe Yoon Chong v Chief Assessor, Property Tax, Singapore* [1978] 2 MLJ 87, where 'Rajah J at p 90 held that:

> The Minister in this matter exercised his powers under s 63 of the Act; if he had wished to exercise his powers under the Interpretation Act he should have said so in his declaration, which he did not. He has exercised his powers only under s 63 of the Act, and s 63, as can be seen from a plain reading of it, gives him no power to levy fees.

Though the senior federal counsel was quick to point out that the above case was overruled by the Singapore Court of Appeal reported in *Chief Assessor, Property Tax, Singapore v Howe Yoon Chong* [1979] 1 MLJ 207, the Court of Appeal did not make any specific comments to the above proposition. As rationally held by the English Court of Appeal in the case of *R v Secretary of State for the Home Department, ex p Al-Mehdawi* [1989] 1 All ER 777 at p 781, where an appellate court (the House of Lords in this case) expressed no view on the soundness or otherwise of the reasoning of the court below, the decision of the court below has a 'powerful persuasive influence on that particular issue.

This court is certainly influenced by the proposition of Rajah J above and to a greater extent by the decision of Eusoff Chin J. in *Wong Pot Heng & Anor v Kerajaan Malaysia* [1992] 2 MLJ 885, where the learned judge, with clarity and precision has this to say (at p 893):

> ...s 20 of the Interpretation Acts does not apply to emergency regulations made under s 2 of the 1979 Act (Emergency (Essential Powers) Act 1979). Since s 2 of the 1979 Act itself does not contain any provision empowering the Yang Di-Perruan Agong to make emergency regulations with retrospective effect, I hold that both the new regs 9B and 13(2) inserted into the regulations by the amending regulations are invalid in so far as it purports to operate retrospectively.

Similarly in our case, there is no express provision in the EQA to permit the Honourable Minister to make any amendments retrospectively. Section 34A(1) of the EQA empowers the Minister to prescribe any activities as prescribed activities including, as this court has ruled, making of amendments thereto to cater for changes, but these changes are in anticipation of the future and not for the past. The Minister has explicitly stated in the operative part of PU(A) 117 that he enacted this order in exercise of his powers conferred by s 34A of the EQA, but when the purported enacting provision does not provide him with a right to make amendments retrospectively, he in turn acquires no such right to do so under that particular provision of the statute. A perusal of other sections in the EQA also reveals no provision for the Minister to amend subsidiary legislation retrospectively. If he wished to avail himself of the powers in s 20 of the Interpretation Act to give effect to the retrospectivity of his Order, he must, as stated above, say so expressly. But no utterance was ever made, nor is there any strong indication that he did so in this amending order.

The proposition in *Wong Pot Heng's* case has been criticized by the defendants for relying too heavily on Indian and English authorities where no similar provisions such as our s 20 of the Interpretation Act exists in both those countries. This contention is completely unjustified, when the rational of strict interpretation of this section is based on the equitable and general principle that legislation should 'deal with future acts, and ought not to change the character of past transactions carried upon the faith of the then existing law ...' per Willes J in *Phillips*

v Eyre (1870) LR 6 QB 1.

It is pertinent at this point to also refer to s 30 of the Interpretation Act, which provides under sub-s (1)(b) that:

> 30(1) The repeal of a written law in whole or in part shall not -
>
> (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.

The essential element of this provision for the purpose of this case centers upon the question of whether the plaintiffs have acquired any rights. The defendants, of course, have strenuously argued that the plaintiffs have acquired no right nor been granted any under the EQA and all the subsidiary legislation related thereto. On the other hand, the plaintiffs have insisted upon a vested and/or an accrued right to a copy of the EIA and to be heard and make representation. Thus, in order to decide on this matter, the EQA and its subsidiary legislation must be examined.

To start off with, s 34A(2) of the EQA provides that the EIA 'shall be in accordance with the guidelines prescribed by the Director General ...'. With this, the Guidelines become a subsidiary piece of legislature when published by the Director General. Under paras 1.4.5, 1.6.1, 3.4.7 and 4.5 of the Guidelines, public participation in the form of obtaining a copy of the EIA, commenting thereto and making representation is explicitly provided and in fact encouraged for a 'responsible, interested and participating public is important in environmental management.' All these are to be complied with before the review panel makes its recommendation to the Director General who, in turn, takes into consideration these recommendations before arriving at a decision. This process is, therefore, mandatory and any decision made by the Director General without the above procedure being adhered to will be against the legal provisions of the EQA and its subsidiary legislature. With this, the entitlement to a copy of the EIA, commenting thereon by the public becomes a right, and for this the plaintiffs are entitled to such rights. Denial of these rights would be contrary to the legal provisions and therefore should be rejected. Consequently, since PU(A) 117 is a piece of legislation that repeals a written law and since the rights of the plaintiffs are affected by its effectiveness, s 30(1) of the Interpretation Act also prohibits it from being valid.

Mr. Shafee then argues that, in the alternative, PU(A) 117 did not extinguish any vested/accrued rights of the plaintiffs; it merely amended the procedure for the approval of the EIA from the Director General to the Sarawak Board under the Sarawak Ordinance. This line of approach could be related to the principle expressed by Lord Brightman in *Yew Bon Teu & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 (at p 2) where:

> ... no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

In the opinion of this court, this argument is most unattractive for all intents and purposes. PU(A) 117 is not about a transfer of procedure, but the extinction of the EQA in its application on certain material activities in the state of Sarawak. The Sarawak Ordinance and the Sarawak Order by far are completely different pieces of legislation which, from the arguments of the learned Attorney General of Sarawak and the senior federal counsel, stand on their own footing, separate and apart from the EQA. Though it may regulate on a similar prescribed activity as the EQA, they are based on its own enactment with separate and distinct procedures. Where a right to prosecute an action exists, as in this case for the plaintiffs, it is no longer procedural but substantive.

Usefulness

The learned Attorney General of Sarawak questions the usefulness of this declarations sought for by the plaintiffs. He emphasizes that after the EIA was submitted by the first defendant, it was deliberated and approved by the Sarawak Board which consisted also of the Director General as one of its members. Under such circumstances, what useful purpose would it serve by ordering the first defendant to re-submit an EIA to comply with s 34A of the EQA? For after all, the Director General will similarly approve it as he did as a member of the Sarawak Board.

This submission is rather insubstantive as it is elementary that it is not the Director General who approved the EIA in Sarawak, but the Sarawak Board. He may be a constituent of the Sarawak Board but, it is not in his capacity as the Director General under the EQA to approve the EIA. The Sarawak Board and the Director General under the EQA are two separate institutions, each guided by its own set of legal procedures and the most notorious difference is the absence in the Sarawak Order of the right of the public to a copy of the EIA, and the right to be heard and make representation before the approval of the EIA is granted. This difference may change the whole course of things as input through public participation as provided by the Guidelines may cause the approving authorities under the EQA to take an entirely different cause of action, or to impose certain conditions that may be beneficial to the project and the public as a whole. The very essence of EQA is to formulate 'measures that shall be taken to prevent, reduce or control the adverse impact on environment.' To achieve this, as laid

down under the Guidelines, public participation is necessary, for after all, the interaction between people and their environment is fundamental to the concept of impact. Thus, it is relevant, and indeed mandatory for the authorities to hear the views of the public first, before granting its approval. Even if the views of the public are rejected, of which they are entitled to do, at least the law as promulgated by the elected representatives of the people is being followed. It makes a mockery of the whole issue to say that the EIA can be approved first and if the public has any constructive ideas, they can submit later. This certainly is illogical, deprived of good sense and sound reasoning.

Motives

The fourth and fifth defendants question the motive of the plaintiffs in applying for the declaration sought. They feel that the underlying objective of the plaintiffs is to avoid losing their land, corps, houses, and ancestral burial sites if the Bakun HEP is to proceed. The plaintiffs' concern, they add, 'is not about environment per se, but about matters which can only be resolved under the provision of the Land Code of Sarawak; by their actions, the plaintiffs can bolster their case against imminent extinguishment of their rights over state land occupied by them under native customary tenure.'

Indeed, the plaintiffs are apprehensive that their land, crops, houses and ancestral burial sites will be devastated if the Bakun HEP is to proceed. But this does not extinguish their vested rights to make representation and be heard before the EIA is approved by the Director General under the EQA and its lawful subsidiary legislation. Relevant provisions of the Land Code of Sarawak may deal and settle the affairs of the plaintiffs relating to their land, but these are matters to be of concern only after the relevant approval is granted to the first defendant under the EQA. The rights of the plaintiffs under the EQA are distinct and separate from the rights under the Land Code of Sarawak which, this court is confident, also provides adequately for the plaintiffs. But this does not mean that just because the plaintiffs wish to enforce their rights under the EQA they possess a sinister motive as claimed. In any event, the affidavits of the plaintiffs disclose their genuine concern of the environmental impact of the Bakun HEP, and all they wish is to be granted a right to obtain a copy of the EIA, be heard and make representation before the EIA is approved. Being people directly and peculiarly affected, the plaintiffs would authoritatively be able to contribute some constructive views for consideration by the authorities; after all, the concept of environmental impact is the interaction between people and their environment.

Proper Procedure

(a) mandamus

The first defendant complains that the plaintiffs are seeking a declaration to compel them to comply with the EQA, but however, upon closer scrutiny, the substance of the plaintiffs' grievances are actually against the second and third defendants for the purported abdication of its statutory powers. Thus, the appropriate procedure is an order of mandamus against the second defendant to exercise its statutory duty under O 53 of the Rules of the High Court 1980 and not by way of this declaration.

In the opinion of this court, this conception is rather restrictive in modern times when there is a dynamic development of declaratory Order in the field of administrative law. The appropriate approach should be those expressed by the authors de Smith, Woolf and Jouell in *Judicial Review of Administrative Actions* (5th Ed) at p 753:

> Normally a court will not be deterred from the granting of a declaration because some alternative remedy is available. The fact that on an application for judicial review an applicant could have obtained an order of mandamus or prohibition is no reason for refusing declaratory relief. The court in practice will adopt an entirely pragmatic approach and having taken into account the wishes of the parties will grant the form of relief most likely to resolve satisfactorily the disputes between the parties.

Based on this, this court will not refuse the plaintiffs' application solely on the ground that an alternative remedy is available. Instead, this court will consider the granting of the form of relief most likely to resolve the disputes between the parties.

(b) Collateral Attack

The learned Attorney General of Sarawak has accused the plaintiffs of mounting a collateral attack when there is no jurisdictional defect visible on the face of PU(A) 117. He supported this allegation with the case of *Penang Development Corp v Teoh Eng Huat & Anor* [1993] 2 MLJ 97, where the dictum suggests that a collateral attack is not permissible when, ex facie the order does not include obvious jurisdictional defect. The illustration from *Wade on Administrative Law* (6th Ed) at p 333 was adopted by the learned judge in *Penang Development Corp's* case to explain the situation where collateral attack is allowed in cases when the order is bad on the face of it. An example of such a case is where action for damages is brought against magistrates and judges of inferior courts on account of orders made by them outside their jurisdiction. Such orders being bad on the face of it could be treated by the court as invalid and the court shall proceed directly to hear the claim for damages. PU(A) 117 as it stands, claims the learned Attorney General of Sarawak, has no obvious ex facie jurisdictional defect which would entitle the plaintiffs to skip an initial

claim to invalidate this order first, before proceeding onto a request for an order to compel the first defendant to comply with the EQA. In short, this submission is that the plaintiffs should have mounted a direct attack.

Mr. Nijar, in his reply, immediately explains that it was not the motive of the plaintiffs to carry out a collateral attack. He narrates the change of events caused by the executive in altering the law which now makes the plaintiffs' application appear like a collateral attack. He gives the following chronology of events to explain his position.

> *On 20 April 1995,* the plaintiffs filed this application consequent to the Director General's disclosure on 7 April 1995 that the Bakun HEP was no longer under his jurisdiction.
>
> *On 20 April 1995,* the same date as this application was filed PU(A) 117 was gazetted with retrospective effect from 1 September 1994, which is the same day as the coming into force of the Sarawak Order.

With this change, the nature of the plaintiffs' claim appears to be a collateral attack when it was not at the time of filing, for s 34A of the EQA, PU(A) 362/87 and the Guidelines were all effective and operational to the whole of Malaysia. To remedy this, Mr. Nijar now seeks an amendment to his first prayer in this application with the inclusion of '... and that the Environment Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 is invalid.'

Firstly, this court finds these explanations tendered by the plaintiffs acceptable to explain the approach undertaken by them which now appears to be in the form of a collateral attack. To overcome such procedural objections, the amendments sought should be allowed, as they have answered all the questions positively posted in the propositions stated in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 regarding amendments.

On the first question of whether the plaintiffs' application is bona fide, this court, after evaluating the explanation given by Mr. Nijar on the change of circumstances caused by the retrospective nature of the relevant legislation and the contents of the submissions by all parties, finds no other cause for the plaintiffs to make this application except with *bona fide* intention. For the second question of whether prejudice will be caused to the defendants by this amendment, this court finds none, for throughout the entire argument of the parties the nucleus is whether this amendment order PU(A) 117 is valid. The defendants have, in fact, based their entire submissions on this point and covered practically all angles of this issue. This amendment will not prejudice them but will deal with the actual issue so raised by all parties. In respect of the final question of whether the amendment would not in effect turn the plaintiffs' claim from one character into another inconsistent character, this court finds in the negative. The plaintiffs' claim is for a declaration to compel the first defendant to comply with a specific provision of the EQA, but to do so now, in view of the purported amendments made through PU(A) 117, it is necessary to mount a direct attack lest it be accused of being in the nature of a collateral attack. The main characteristic of the original prayer has not been changed by this proposed amendment, for it is the continued insistence of the plaintiffs that the EQA still applies. In order to do so now, it is only appropriate that the amendment be included so that it will be comprehensive. However, for the sake of correct order, this court hereby allows the proposed amendment to take precedent, rather than subsequent, to the existing words contained in prayer 1. This would put all matters squarely in its proper prospective.

Conclusion

The power of this court to make a declaration is almost unlimited, except 'limited by its own discretion' (Sterndale MR in *Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490 at p 507). However, as cautiously warned by Edgar Joseph Jr SCJ (as he then was) in *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657 (at pp 674-675):

> ... decided cases still afford guidance, at the very least, as to what factors the courts have in the past regarded as relevant when exercising their discretion as to whether to grant or refuse declaratory relief. Broadly stated, the court must weigh the advantages of granting declaratory relief as against the disadvantages. The minimum requirement must be to achieve justice between litigants and that is 'a subject on which experience may teach the courts of one generation to take what they may regard as a wider or more liberal view than that of their predecessors' (see *Brickfield Properties v Newton* [1971] 3 All ER 328 per Sachs LJ at p 335 speaking of the rules of practice and procedure).

From the facts and arguments presented, it is understandable why the plaintiffs are aggrieved. The legislature of Malaysia has enacted the EQA to be applicable on the entire nation. Subsidiary legislations relating thereto were made by the executive delegated with powers to do so. This, obviously, is to give full effect to the meaning and purpose of the EQA. Under the guidelines prescribed by the Director General, as provided for under the EQA itself, a valid assessment of an EIA prepared by the project proponent of the prescribed activities cannot be made without some form of public participation (para 1.4.5 of the Guidelines). This is essential, for interaction between people and their environment is fundamental to the concept of environmental impact (para 1.6.1 of the Guidelines). For this, a right is vested on the plaintiffs to obtain and be supplied with a copy of the EIA

coupled with the right to make representation and be heard. While waiting to exercise their rights and being assured by executives through their leaders - including those directly in charge that the relevant procedures of the EQA will be adhered to - the Minister suddenly strikes a mortal blow by gazetting PU(A) 117. Though it is claimed by the defendants that this amendment order only alters the procedure in the evaluation of the EIA on the Bakun HEP, in substance and infact and visible to all, it tantamounts to the removal of the entire rights of the plaintiffs to participate and to give their views before the EIA is approved. This court shall not stand idly by to witness such injustice especially when the plaintiffs have turned to this institution to seek redress. If the minimum requirement for the granting of a declaration is to achieve justice, then based on the facts and law of this case, the plaintiffs amply qualify. For these, this court hereby grants:

(i) a declaration that the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 is invalid;

(ii) and a declaration that before the first defendant carries out the prescribed activity, viz the construction of the Bakun HEP, the first defendant has to comply with the EQA including s 34A of the said Act and/or the guidelines prescribed by the second defendant under s 34A of the said Act and the regulations made thereunder; and

(iii) costs to the plaintiffs.

Order accordingly.

Report by Ng Sheau Jiuan

VAN HUYSSTEEN AND OTHERS NNO

v.

MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM AND OTHERS 1996 (1) SA 283 (C) CAPE PROVINCIAL DIVISION

FARLAM J 1995 June 15, 28 Case No 6570/95

Flynote: Sleutelwoorde

Constitutional law - human rights - Protection of - Fundamental rights in terms of chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 - Persons who may claim relief - Claim by 'person acting in his or her own interest' in s 7(4)(b)(i) - Words 'own interest' wide enough to cover an interest as trustee.

Constitutional law - Human rights - Right of access to State information in terms of s 23 in chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 - Section 24(b) must be generously interpreted - Does not merely codify existing law of natural justice - latter not confined to audi alteram partem and nemo iudex in sua causa rules - Test of 'procedurally fair administrative action' under s 24(b) is whether principles and procedures were followed which, in particular situation, were right, just and fair - Procedurally unfair to owner of nearby residential land for application under Land Use Planning Ordinance 15 of 1958 (C) for rezoning of farmland as industrial land to be decided before completion of investigation by board of enquiry appointed under s 15(1) of Environmental Conservation Act 73 of 1989 into proposal to build steel mill on the land to be rezoned - Owner entitled to interdict against provincial functionaries from deciding rezoning application pending finalisation of enquiry by board.

Environmental law - Environmental policy - compliance in terms of s 3 of Environmental Conservation Act 73 of 1989 with policy determined under s 2 - Effect of on provincial administration functionaries considering rezoning application under Land Use Planning Ordinance 15 of 1985 (C) - Functionaries obliged to exercise powers in accordance with policy determined under s 2 of Act.

Environmental law - Board of investigation in terms of s 15 of Environmental Conservation Act 73 of 1989 - Minister cannot be compelled to appoint board of investigation in terms of s 15(1) - Likewise cannot be compelled to amend or amplify an appointed board's terms of reference.

Environmental law - Board of investigation in terms of s 15 of Environmental Conservation Act 73 of 1989 - Investigation by board under that section markedly superior to a provincial departmental enquiry because of advantages of evidence under oath, interrogation, publicity and right to subpoena.

Headnote: Kopnota

Section 15(1) of the Environmental Conservation Act 73 of 1989 empowers but does not obliged the Minister of Environmental Affairs to appoint a board of enquiry to assist him in evaluating a proposed development, and consequently, no one can compel him to do so. It follows too that, where a board has been appointed, no one has the right to demand the amplification or amendment of its terms of reference.

Any Minister or official charged with making a rezoning decision under the Land Use Planning Ordinance 15 of 1985 (C) is obliged, by s 3 of the Environmental Conservation Act 73 of 1989, to exercise the powers conferred on him by the ordinance in accordance with the policy determined under s 2 of that Act.

By reasons of s 24 (b) of the Constitution of the Republic of South Africa Act 200 of 1993, anyone whose rights will be affected by a rezoning decision has the right to procedural fairness in respect of such decision. That section does not merely codify the common law relating to natural justice which, in any event, is not limited to the *audi alteram partem* and *nemo iudex in sua causa rules.*

A party entitled to procedural fairness, as contemplated in s 24 (b) of the Constitution, is entitled to 'the principles and procedures ... which, in any particular situation or set of circumstances, are right and just and fair' (as stated by Lord Morris of Borth-y-Gest in *Wiseman V. Borneman* [1971] AC 297 (HL) at 308H-309B [1969] 3 All ER 275 at 278(E). Even if that statement does not

correctly reflect the South African common law, then it is nonetheless the correct test to apply under s 24(b) of the Constitution, where the words 'the right to procedurally fair administrative action' must be generously interpreted and austerity of tabulated legalism must be avoided.

An investigation by a board of enquiry appointed under s 15(1) of the Environmental Conservation Act of 1989 is markedly superior to a departmental investigation by a provincial administration in relation to a rezoning application because of the advantages it has in attempting to arrive at the truth in regard to disputed facts and to differing expert opinions, namely testimony on oath, interrogation, publicity and the right to subpoena any person who in its opinion may give material information and/or who may produce any book document or thing which may have a bearing on the subject of the investigation, to give evidence and can be interrogated and/or to produce the book, document or thing.

The sixth and seventh respondents proposed to build a steel mill on portion of a farm at Saldanha, near the West Coast National Park and the Langebaan Lagoon, and had applied to the Provincial Administration of the Western Cape for the rezoning of the land under the Land Use Planning Ordinance 15 of 1985 (C). The lagoon's wetlands were protected in terms of the Convention on Wetlands of International Importance to which South Africa was a contracting party. Erf 2121 Langebaan was situated opposite the lagoon and was owned by the W Trust, the trustees of which were the first three applicants. The first applicant was joined as fourth applicant in his personal capacity as one of the trust beneficiaries. The trustees intended to build a holiday home or a permanent home on the trust property. Expert opinion was divided on whether the proposed mill would be environmentally undesirable. The applicants applied in a Provincial Division, as a matter of urgency, for a rule *nisi* ordered (a) the first respondent (i) to make available, in terms of s 23 of the Constitution, copies of all documents in his possession relevant to the proposed will (ii) to appoint a board of investigation in terms of s 151(1) of the Environmental Conservation Act 1989 to assist him in the evaluation of the proposed mill of certain specified, related issues; (b) ordering the second and third respondents (the Premier of the Western Cape Province and the Minister of Agriculture, Planning and Tourism of that province) to hold in abeyance the rezoning decision, pending the finalisation of the enquiry under s 15(1), the latter order to operate as an interim interdict pending the return day of the rule *nisi.* Before the hearing, the first respondent appointed a board of investigation under s 15(1) and offered, without admitting that he was obliged to do so, to make the relevant documents available to the applicants. The applicants accordingly did not pursue the orders sought in (a)Ii) and (ii) above but did ask for an order calling on the first respondent to amend and/or amplify the Board's terms of reference. The first respondent resisted the latter and further contended that the applicants had not been entitled to the documents they had sought. The second, third, sixth and seventh respondents opposed the order sought in (b) above.

Held, that the applicants had no right to compel the first respondent to appoint a board of enquiry under s 15(1) of the Environmental Conservation Act 1989 and therefore no right to an order compelling him to amplify or amend the board's terms of reference accordingly, the applications for the order on him to appoint a board and to amend and/or amplify the terms of reference of the board which he did appoint were dismissed with costs.

Held, further, that, applying the interpretation of s 23 of the Constitution laid down in *Nortje and Another v Attorney-General, Cape, and Another* 1995 (2) SA 460 (C) ((1995 (1) SACR 446 (C)), the applicants did reasonably require the document sought for the purpose of protecting their rights to the trust property which was potentially threatened by the proposed mill in order to exercise their rights to object to the rezoning accordingly, the first respondent was ordered to pay the applicant's costs of the application seeking the said documents.

Held, further, in regard to the application for an order interdicting the second and third respondents from making a decision on the rezoning application pending the finalisation of the board's investigation, that the words @in his or her own interest' in s 7(4)(b)(i) of the Constitution were wide enough to cover an interest as a trustee and the first three applicants accordingly had *locus standi*, as their rights in respect of the trust property would be threatened if second and third respondents decided the rezoning application in favour of sixth and seventh respondents before the finalisation of the board's investigation; for the trust property clearly had value as the potential site of a holiday home and the Court could take judicial notice of the fact that sites for holiday homes would be more valuable if they were in close proximity to beautiful unspoilt natural areas and less valuable if such areas were polluted or otherwise detrimentally affected.

Held, further, in regard to the interdict sought, that s 3 of the Environmental Conservation Act 1989 obliged functionaries charged with the duty of deciding on rezoning applications under the Land Use Planning Ordinance 15 of 1985 (C) to exercise their powers in accordance with the policy determined under s 2 of the Act and that s 24(b) of the Constitution entitled them to procedural fairness in respect of such rezoning decision accordingly, the applicants had a right protectable by interdict.

Held, further, that it would be an infringement of the applicant's rights to procedural fairness if the provincial administration's functionaries decided the rezoning application before the board's enquiry had been completed

because an investigation by the board of enquiry would be markedly superior to that which those functionaries could make, by reason of the very considerable advantages of testimony on oath, interrogation, publicity, and the right to subpoena witnesses which the board alone had.

Held, further, that the applicants would suffer irreparable harm if the functionaries so decided because, although their decision could be taken on review, review was a discretionary remedy and there might be factors which could induce the Court to refuse an order which might necessitate the demolition of an expensive steel mill; furthermore, that damages would not be an adequate alternative remedy because they would be extremely difficult to quantity.

Held, further, that, insofar as it was relevant, the balance of convenience or fairness favoured the granting of an interdict and that the Court should exercise its discretion in favour of the applicants. (At 310C-D.) Interdict accordingly granted to applicants with costs, with leave reserved to second and third respondents to set the matter down for argument as to whether the order should be uplifted on the ground that the finalisation of the board's decision was being unduly delayed.

The following decided cases were cited in the judgment of the Court:

Re Davis (1947) 75 CLR 409

Harnischfeger Corporation and Another v Appleton and Another 1993 (4) SA 479 (W)

Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A)

Marlin v Durban Turf Club and Others 1942 AD 112

Minister of Home Affairs and Another v Collins MacDonald Fisher and Another [1980] AC 319 (PC) ([1979] 3 All ER 21)

Nortje and Another v Attorney-General, Cape, and Another 1995 (2) SA 460 (C) (1995 (1) SACR 446)

R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321

Russel v Duke of Norfolk and Others [1949] 1 All ER 109 (CA)

S v Leepile and Others (1) 1986 (2) SA 333 (W)

S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1)

S v Zuma and Others 1995 (2) SA 642 (CC) (1995 (1) SACR 56)

Sutter v Scheepers 1932 AD 165

Turner v Jockey Club of South Africa 1974 (3) SA 633 (A)

Wiseman v Borneman [1971] AC 297 (HL) ([1969] 3 All ER 275).

Case Information

Application for a *mandamus* and an interdict. The facts appear from the reasons for judgement.

D P de Villiers QC (with him *T D Potgieter)* for the applicants.

G D van Schalkwyk SC (with him *R C Hiemstra)* for the first, second and third respondents.

M Helberg SC for the sixth and seventh respondents.

No appearance for the fourth, fifth, eighth and ninth respondents.

Cur adv vult.

Postea (June 28).

JUDGEMENT

Farmlam J; On 26 May 1995 Messrs A M van Huyssteen, H P Venter and J D Coetzee, in their capacities as trustees for the time being of the Wittedrift Trust, instituted proceedings by notice of motion against the following respondents:

(1) the Minister of Environmental Affairs and Tourism of the National Government, as first respondent;

(2) the Premier of the Western Cape Province, as second respondent;

(3) the Minister of Agriculture, Planning and Tourism, Western Cape, as third respondent;

(4) the Interim Council of the West Coast Peninsula (Vredenburg, Saldanha, St Helena Bay and Paternoster), as fourth respondent;

(5) the Municipality of Langebaan, as fifth respondent;

(6) Iscor Ltd, as sixth respondent;

(7) Saldanha Steel (Pty) Ltd (a subsidiary of sixth respondent), as seventh respondent; and

(8) the National Parks Board, as eighth respondent.

Subsequently the Minister of Finance, Nature and Environmental Affairs, Western Cape, was joined as ninth respondent. During the course of the argument I ordered that Mr Van Huyssteen, in his personal capacity, be joined as fourth applicant.

In the original notice of motion first, second and third applicants sought, as a matter of urgency, orders in the following terms:

(a) a rule *nisi* in terms whereof:

(i) first respondence was to be ordered to make available to the applicants, in terms of s 23 of the Constitution of the Republic of South Africa Act 200 of 1993, copies of all documentation in his possession relevant to the proposed steel factory at Vredenburg-Saldanha, including all the correspondence, inter-office and inter departmental memoranda, minutes of meetings and discussions, notes, impact studies, reports and disclosures of interest by any person(s) involved in the decision-taking process with reference to the proposed development of a steel factory by sixth or seventh respondent at Vredenburg-Saldanha;

(ii) first respondent was to be ordered to appoint a board of enquiry in terms of s 15(1) of the Environmental Conservation Act 73 of 1989 in order to assist him in the evaluation of:

(A) the proposed development of a steel factory by sixth respondent or seventh respondent at Vredenburg-Saldanha;

(B) the probable secondary industrial development resulting therefrom should it proceed;

(C) the probable development of the Saldanha Bay harbour and/or are quay and in the surrounding bay resulting therefrom should it proceed; and

(D) the probable impact of the foregoing on the environment and, in particular, the Langebaan Lagoon, the West Coast National Park and the surrounding environment, as also the eco-system which is thereby supported and housed;

(iii) second and third respondents were to be ordered to hold in abeyance the rezoning decision with regard to the land on which it is proposed that the abovementioned development will take place, pending the finalisation of the abovementioned enquiry in terms of s 15(1) of the Environmental Conservation Act 73 of 1989;

(iv) first respondent was to be ordered to pay the costs of the application; and

(v) second and third respondents were to be ordered to pay the costs of the application, jointly and severally with first applicant, only should they oppose it.

(b) an interim interdict in terms of *(a)(iii)* above pending the return day of the rule *nisi* sought; and

(c) further and/or alternative relief on the basis that no relief was to be sought against any party except first, second and third respondents if such party did not oppose the application.

In amplification of the last paragraph it was stated in the notice of motion that the respondents, apart from first, second and third respondents, were only joined in so far as it might be necessary because of their interest in the proposed steel development at Vredenburg-Saldanha, but that a costs order would be sought against any of these other respondents should they oppose the application.

Fourth, fifth and eighth respondents do not oppose the relief sought and abide the judgment of the Court. Ninth respondent has not given notice of his intention to oppose the application and he has not participated in any way in the proceedings.

On 7 June 1995 first respondent appointed a board of investigation in terms of s 15(1) of the Environmental Conservation Act 73 of 1989 to consider and report on the environmental consequences of the proposed steel mill development at Saldanha.

On 8 June 1995, in an affidavit filed on his behalf, first respondent offered, without admitting that he was obliged to do so, to make available to the applicants the relevant documents, subject to suitable arrangements.

The applicants no longer seek a rule *nisi* and an interim interdict pending the return day inasmuch as those respondents who oppose the application have had the opportunity to the affidavits in support of their opposition.

In view of the fact that the first respondent has appointed a board of investigation under s 15(1) of Act 73 of 1989 and has made the relevant documentation available to them, the applicants no longer seek the relief summarised in para *(a)*(i) and (ii) above. They persist, however, in asking for an order interdicting second and third respondents from proceeding with the rezoning application until after the board appointed by the first respondent has held its investigation and reported thereon. They contend in this regard that if second and third respondents were in the circumstances of this case to decide the rezoning application before the finalisation of the board's

investigation, this would amount to an infringement of their right to procedurally fair administrative action which is entrenched in s 24*(b)* of the Constitution.

They also ask for an order calling upon first respondent to amend and/or amplify in certain respects the terms of reference of the board of investigation appointed by him.

First respondent opposes the relief sought against him and contends:

(i) that applicants are not entitled to an order in respect of the documents because they do not require any documents at this stage to exercise or protect any of their rights;

(ii) that the applicants were not entitled to an order compelling him to appoint a board of investigation because the provisions of s 15(1) of Act 73 of 1989 are directory and/or empowering and not peremptory; and

(iii) that they are accordingly not entitled to an order interdicting them from taking the relevant rezoning decision pending the finalisation of the investigation to be conducted by the board appointed by first respondent. They contend that applicants have no right to have the rezoning decision held in abeyance until the board has conducted its investigation and made its findings and/or recommendations because, so it is contented, there is no obligation on second or third respondent to take such findings or recommendations into account before making a decision on the rezoning application and, in the circumstances of this case, it cannot be said that they will be any procedural unfairness if the rezoning decision is made before the board has completed its work.

They contend further that applicants have no well-grounded apprehension of irreparable harm if the interim relief is not granted and that, in any event, applicants have not shown, on the assumption that the interdict sought is of a temporary nature, that the balance of convenience is in their favour. In this latter regard they contend that applicants have not made out a case that it will be legally impossible for them to enforce, by way of review, the rights to which they lay claim.

Sixth and seventh respondents oppose the interdict sought against second and third respondents (it being common cause that the granting of such an interdict would adversely affect sixth and seventh respondents) on the following grounds:

(a) that the order sought amounts to a final interdict which should not be granted because:

  (i) applicants do not have the necessary *locus standi;*

  (ii) they have not shewn that they have any right which is being infringed;

  (iii) even if they have shewn such a right, they have not shewn any infringement thereof; and

  (iv) even if they have shewn all the aforegoing, they have an alternative remedy;

(b) alternatively, if the interdict sought is in essence a temporary interdict, then the application should fail because:

  (i) they have shewn no *prima facie* right;

  (ii) they have failed to indicate any possibility of irreparable harm;

  (iii) they have failed to prove that the balance of fairness is in their favour; and

  (iv) even if they have shewn all the aforegoing, the Court in the exercise of its discretion should still refuse to grant an interdict in this case.

In the following paragraphs I shall endeavour to set out some of the facts which are common cause because the parties.

Sixth respondent intends erecting a steel mill, which will occupy an area of between 40-80 hectares on portions of the farm Yzervarkensrug at Saldanha. The land in question is near the West Coast National Park and the Langebaan Lagoon. In terms of the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar 1971), to which South Africa is a contracting party, South Africa has undertaken to protect, *inter alia*, the wetlands of the Langebaan Lagoon which are part of a sensitive eco-system of international importance.

Erf 2121, Langebaan (to which I shall hereinafter refer as 'the trust property') is registered in the name of the trustees for the time being of the Witterdrift Trust, of which, as I have said, the first three applicants are the trustees for the time being. Mr Van Huyssteeen in his personal capacity is one of the beneficiaries of the trust. The intention of the trustees is eventually to build a holiday home or a permanent home on the trust property, which is situated at Meeuklip, Langebaan, right opposite the lagoon.

Sixth respondent has applied to the Provincial Administration of the Western Cape in terms of the provisions of the Land Use Planning. Ordinance 15 of 1985 (C) for the rezoning of the land so that a steel mill may be erected and operated thereon. A difference of opinion has arisen

between experts as to whether the steel mill development is desirable in all the circumstances. Some experts support the proposed development while others are opposed to the proposed development at this stage have expressed the view that not enough investigation has been done for a decision to be taken as to whether the proposed development should be allowed to proceed.

Included in the papers are an evaluation of a CSIR environmental impact study on the proposed steel mill project which was drawn up by the Council for the Environment at the request of first respondent and comments on the CSIR environmental impact study prepared by Dr P A Cook, a senior lecturer in Zoology at the University of Cape Town, who is the chairman of the Mariculture Association of Southern African and an internationally recognised authority on shellfish; Dr G A Robinson, the chief executive of the eighth respondent (who made the comment in his personal capacity); Dr Allan Heydorn, a specialist consultant to the Southern African branch of the World Wide Fund for Nature, the world's leading non-governmental conservation body; and Mr M A Sweijid, a lecturer in the Department of Zoology, who is currently engaged in postgraduate research relating to abalone on the South African coast.

Applicants contend that the best way to resolve (in so far as resolution is possible) the serious difference of opinion which has arisen between the experts regarding the desirability of sixth and seventh respondents' being allowed to proceed with the proposed steel mill project in proximity to the sensitive environment, in respect of which South Africa has international obligations under the Ramsar Convention, is by way of an investigation under s 15 of Act 73 of 1989.

They say further that a departmental investigation and consideration of the rezoning application by second and third respondents, assisted by the officials and resources of the Provincial Administration of the Western Cape, will, from the nature of things, be superficial and no real substitute for the thorough and extensive investigation in depth which will be able to be carried out by the board of investigation in terms of s 15 of Act 73 of 1989, which, unlike the provincial procedures, will involve the subpoenaing of witnesses and documents, the interrogation under oath, in public, of witnesses with the opportunity given to interested parties, subject to the control by the chairman of the board of investigation, to present evidence and rebut opposing opinions which are believed to be erroneous. In this regard it is relevant to point out that the chairman of the board appointed by first respondent is Dr the Honourable J H Steyn, a former Judge of this Court.

In an affidavit filed on behalf of second and third respondents, Mr Vice Hilary Theunissen, a deputy chief planner in the Department of Housing, Local Government and Planing (Land Affairs) of the Provincial Administration of the Western Cape, explains the procedure being followed by second and third respondents in considering the rezoning application. He states that the views of interested parties and experts, even those with reservations regarding the desirability of the project, are from time to time obtained and they are given adequate opportunity to bring their views to the attention of second and third respondents. The expertise of the Cape Nature Conservation, a division of the Provincial Administration, is also being utilised so as to ensure that eventually a well considered decision can be made regarding the rezoning application. He referred to a number of meetings, inspections and discussions which have taken place in order to indicate the thoroughness with which second and third respondent and the Western Cape Provincial Administration have been handling the matter. He admits that the Provincial Administration does not have the same statutory powers but denies that second respondent will not be able to make a lawful and considered decision in terms of Ord 15 of 1985 without such powers.

Before the submissions of counsel are considered it is desirable to set out the relevant statutory provisions of the Constitution, the Environment Conservation Act 73 of 1989, the general policy determined in terms of s 2(1) thereof, and the Land Use Planning Ordinance 15 of 1985 (Cape).

Section 7 of the Constitution provides as follows:

'(1)The chapter shall bind all legislative and executive organs of state at all levels of government.

(2) This chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

(3) Juristic persons shall be entitled to the rights contained in this chapter where, and to the extent that, the nature of the rights permits.

(4) (a) When an infringement of or a threat to any right entrenched in this chapter is alleged, any person referred to in para (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in para (a) may be sought by -

(i) a person acting on his or her own interest;

Section 23 of the Constitution provides as follows:

'Every person shall have the right to access to all information held by the State or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights'.

Section 24 of the Constitution read as follows:

'Every person shall have the right to-

(a) lawful administrative action where any of his or her rights to interests is affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.'

Section 35(1) and (3) of the Constitution provides as follows:

'(1)In interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.

...

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.'

Sections 2 and 3 of the Environment Conservation Act 73 of 1989, which make up Part 1 of the Act, read as follows:

'2 (1) Subject to the provisions of ss (2) the Minister may by notice in the *Gazette* determine the general policy, including policy with regard to the implementation and application of a convention, treaty or agreement relating to the environment which has been entered into or ratified, or to be entered into or ratified, by the Government of the Republic, to be applied with a view to -

(a) the protection of ecological processes, natural systems and natural beauty as well as the preservation of biotic diversity in the natural environment;

(b) the promotion of sustainable utilization of species and ecosystems and the effective application and reuse of natural resources;

(c) the protection of the environment against disturbance, deterioration, defacement, poisoning, pollution or destruction as a result of man-made structures, installations, processes or products or human activities; and

(d) the establishment and maintenance of acceptable human living environment in accordance with the environmental values and environmental needs of communities;

(e) the promotion of the effective management of cultural resources in order to ensure the protection and responsible use thereof;

(f) the promotion of environmental education in order to establish an environmentally literate community with a sustainable way of life;

(g) the execution and co-ordination of integrated environmental monitoring programmes.

(1A) The Minister may, in determining the policy under ss (1), if in the opinion of the Minister it will further the objectives mentioned in ss (1) (a), (b), (c), (d), (e) (f) and (g), determine norms and standards to be complied with.

(2) The policy contemplated in ss (1) shall be determined by the Minister after consultation with -

(a) each Minister charged with the administration of any law which in the opinion of the Minister relates to a matter affecting the environment;

(b) the Minister of State Expenditure;

(c) the Administrator of each province; and

(d) the council.

(3) The Minister may at any time, subject to the provisions of ss (2), by like notice substitute, withdraw or amend the policy determined in terms of ss (1).

3(1) Each Minister, Administrator, local authority and government institution upon which any power has been conferred or to which any duty which may have an influence on the environment has been assigned by or un-

der any law, shall exercise such power and perform such duty in accordance with the policy referred to is s2.

(2) The Director-General shall ensure that the policy which has been determined under s 2(1), is complied with by each Minister, Administrator, local authority and government institution referred to in ss (1), and may -

(a) take any steps or make any inquiries he deems fit in order to determine if the said policy is being complied with by any such Minister, Administrator, local authority or government institution; and

(b) if in pursuance of any step taken or inquiry made under para (a), he is of opinion that the said policy is not being complied with by any such Minister, Administrator, local authority or government institution, take such steps as he deems fit in order to ensure that the policy is complied with by such Minister, Administrator, local authority or government institution'.

In Part II of the Act provision is made for the establishment of a Council for the Environment and a Committee for Environmental Co-ordination and the appointment of boards of investigation in terms of s 15, which reads as follows:

'(1)The Minister shall from time to time appoint a board of investigation to assist him in the evaluation of any matter or any appeal in terms of the provisions of this Act.

(2) The board of investigation shall consist of -

(a) (i)a Judge or retired Judge of the Supreme Court of South Africa;

(ii) a magistrate or retired magistrate;

(iii)any person admitted in terms of the Admission of Advocates Act 74 of 1964 to practice as an advocate; or;

(iv) any person admitted in terms of the Attorney's Act 53 of 1979 to practice as an attorney, who in the opinion of the Minister has a knowledge of matters relating to the environment, and is designated by him as chairman; and

(b) such number of other persons as the Minister deems necessary and in his opinion have expert knowledge of the matter which the board of investigation has to consider.

(3) A session of the board of investigation shall take place on the date and at the time and place fixed by the chairman, who shall advise the Minister and the relevant parties in writing thereof.

(4) The board of investigation may for the purposes of the investigation -

(a) instruct any person who in its opinion may give material information concerning the subject of the investigation or who it believes has in his possession or custody or under his control any book, document or thing which has any bearing upon the subject of the investigation, to appear before such board;

(b) administer an oath to or accept an affirmation from any person called as a witness at the investigation; and

(c) call any person present at the investigation as a witness and interrogate him and require him to produce any book, document or thing in his possession or custody or under his control.

(5) An instruction referred to in ss (4)(a) to appear before the board of investigation shall be by way of a subpoena signed by the chairman of the board.

(6) (a)A session of the board of investigation shall be held in public.

(b) The decision of the board and the reason therefor shall be reduced to writing.

(7) A member of the board of investigation who is not in the full-time employment of the State may be paid from money appropriated by Parliament for that purpose such remuneration and allowances as the Minister may, with the concurrence of the Minister of State Expenditure, determine either in general or in any particular case.

(8) The Director-General shall designate, subject to the provisions of the Public Service Act 111 of 1984, as many officers and employees of the Department as may be necessary to assist the board in the administrative work connected with the performance of the functions of the board of investigation: Provided that with the approval of the Minister such administrative work may be performed by any person other than such officer or employee at the remuneration and allowances which the Minister with the concurrence of the Minister of State Expenditure may determine.'

Part V of the Act, as its name indicates, deals with the control of activities which may have a detrimental effect on the environment. Sections 21 and 22, which are contained in this Part of the Act, deal with the identification of activities which will probably have a detrimental effect on the environment and the prohibition of the un-

dertaking of identified activities. They read as follows:

'21(1) The Minister may by notice in the *Gazette* identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.

(2) Activities which are identified in terms of ss (1) may include any activity in any of the following categories, but are not limited thereto:land use and transformation;

(a) land use and transformation;

(b) water use and disposal;

(c) resource removal, including natural living resources;

(d) resource renewal;

(e) agricultural processes;

(f) industrial processes;

(g) transportation;

(h) energy generation and distribution;

(i) waste and sewage disposal;

(j) chemical treatment;

(k) recreation

(3) The Minister identifies an activity in terms of ss (1) after consultation with -

(a) the Minister of each department of State responsible for the execution, approval or control of such activity;

(b) the Minister of State Expenditure; and

(c) the Administrator of the province concerned.

22(1) No person shall undertake an activity identified in terms of s 21(1) or cause such an activity to be undertaken except by virtue of a written authorization issued by the Minister or by an Administrator or a local authority or an officer, which Administrator, authority or officer shall be designated by the Minister by notice in the *Gazette.*

(2) The authorization referred to in ss (1) shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be compiled and submitted by such persons and in such manner as may be prescribed.

(3) The Minister or the Administrator, or a local authority or officer referred to in ss (1), may at his or its discretion refuse or grant the authorization for the proposed activity or an alternative proposed activity on such conditions, if any, as he or it may deem necessary.

(4) If a condition imposed in terms of ss (3) is not being complied with, the Minister, any Administrator or any local authority or officer may withdraw the authorization in respect of which such condition was imposed, after at least 30 days' written notice was given to the person concerned.'

Part VII of the Act contains certain general provisions, among which are s 31A (which was inserted by s 19 of Act 79 of 1992), which deals with the powers of the Minister, and Administrator (now a provincial premier), local authorities and government institutions where the environment is damaged, endangered or detrimentally affected and s 34, which deals with compensation for loss. They read as follows:

'31A(1) If, in the opinion of the Minister or the Administrator, local authority or government institution concerned, any person performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, the Minister, Administrator, local authority or government institution, as the case may be, may in writing direct such person -

(a) to cease such activity; or

(b) to take such steps as the Minister, Administrator, local authority or government institution, as the case may be, may deem fit, within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect.

(2) The Minister or the Administrator, local authority or government institution concerned may direct the person referred to in ss (1) to perform any activity or function at the expense of such person with a view to rehabilitating any damage caused to the environment as a result of the activity or failure referred to in ss (1), to the satisfaction of the Minister, Administrator, local authority or government institution, as the case may be.

(3) If the person referred to in ss (2) fails to perform the activity or function, the Minister, Administrator, local authority or government institution, depending on who or which issued the direction, may perform such activity or function as if he or it were that person and may authorize any person to take all steps

required for that purpose.

(4) Any expenditure incurred by the Minister, an Administrator, a local authority or a government institution in the performance of any function by virtue of the provisions of ss (3), may be recovered from the person concerned.'

'34(1) If in terms of the provisions of this Act limitations are placed on the purposes for which land may be used or on activities which may be undertaken on the land, the owner of, and holder of a real right in, such land shall have a right to recover compensation from the Minister or Administrator concerned in respect of actual loss suffered by him consequent upon the application of such limitations.

(2) The amount so recoverable shall be determined by agreement entered into between such owner or holder of the real right and the Minister or Administrator, as the case may be, with the concurrence of the Minister of State Expenditure.

(3) In the absence of such agreement the amount so to be paid shall be determined by a court referred to in s 14 of the Expropriation Act 63 of 1975 and the provisions of that section and s 15 of that Act shall *mutatis mutandis* apply in determining such amount.'

Included in this part of the Act is s 40, which provides for the State, including a provincial administration, to be bound by the provisions of the Act.

Acting in terms of s 2(1) of the Act, the then Minister of Environmental Affairs, Mr J A van Wyk, issued a notice (No 51 of 1994, which was published in *Government Gazette* 15428 of 21 January 1994) containing the general policy determined by him thereunder.

The preamble contains the following:

'The environmental policy is based on the following premises and principles:

* Every inhabitant of the Republic of South Africa has the right to live, work, and relax in a safe, productive, healthy and aesthetically and culturally acceptable environment and therefore also has a personal responsibility to respect the same right of his fellow man.

* Every generation has an obligation to act as a trustee of its natural environment and cultural heritage in the interest of succeeding generations. In this respect, sobriety, moderation and discipline are necessary to restrict the demand for fulfillment of needs to sustainable levels.

* The State, every person and every legal entity has a responsibility to consider all activity that may have an influence on the environment duly and to take all reasonable steps to promote the protection, maintenance and improvement of both the natural environment and the human living environment.

* The maintenance of natural systems and ecological processes and the protection of all species, diverse habitats and land forms is essential for the survival of all life on earth.

* Renewable resources are part of complex and interlinked ecosystems and must through proper planning and judicious management be maintained for sustainability. Non-renewable natural resources are limited and their utilisation must be extended through judicious use and maximum reuse of materials with the object of combating further over-exploitation of these resources.

* The concept of sustainable development is accepted as the guiding principle for environmental management. Development and educational programmes are necessary to promote economic growth, social welfare and environmental awareness, to improve standards of living and to curtail the growth in the human population. Such programmes must be formulated and applied with due regard for environmental considerations.

* A partnership must be established between the State and the community as a whole, the private sector, developers, commerce and industry, agriculture, local community organisations, non-governmental organisations (representing other relevant players), and the international community so as to pursue environmental goals collectively.'

The section on environmental management systems contains the following paragraph:

'Each Minister, Administrator, local authority and government institution upon which any power has been conferred or to which any duty which may have an influence on the environment has been assigned by or under any Act shall exercise such power and perform such duty with a view to promoting the objectives stated in s 2 of the Environment Conservation Act 73 of 1989.'

the section on land use and nature conservation reads as follows:

Judicious use of land is an important foundation of environmental management. All government institutions, and also private owners and developers, must therefore plan all physical activities, for example forestry, mining, road

building, water storage and supply, agriculture, industrial activities and urban development in such a way as to minimise the harmful impact on the environment and on man and, where necessary, to facilitate rehabilitation. A balance must be maintained between environmental conservation and essential development. Before embarking on any large-scale or high-impact development project, a planned analysis must be undertaken in which all interested and affected parties must be involved. In order to attain the sustainable utilisation of resources, the principles of integrated environmental management are accepted as one of the management mechanisms.

Particular efforts must be made to conserve valuable high-potential agricultural land for agricultural purposes, to protect water resources and sites and objects of significant cultural interest; to combat deforestation of indigenous forests, soil erosion, desertification; and to prevent the destruction of wetlands and other environmentally sensitive areas. Among the main attractions South Africa has to offer as a tourist destination are its aesthetic qualities and the scenic beauty of the environment, assets that must also be considered. Scientific conservation principles must be applied in all land-use planning.

Nature conservation

A national nature conservation plan, including the compilation of a complete inventory of and a classification system for protected areas will be developed by the Department of Environmental Affairs to ensure the maintenance of South Africa's biodiversity. The interests and wishes of the local populations must be considered in the establishment of each new protected area. Effective management and control should be established to make possible the sustainable use of economically viable natural resources, for example game, marine resources, veld and natural forests.

The maintenance of the ecological integrity and natural attractiveness of protected areas must be pursued as a primary objective.

All responsible government institutions must apply appropriate measures, based on sound scientific knowledge, to ensure the protection of designated ecologically sensitive and unique areas, for example wilderness areas, fynbos, grasslands, wetlands, islands, mountain catchment areas, indigenous forests, deserts, Antarctica and the coastal zone.'

Section 16(1) of the Land Use Planning Ordinance 15 of 1985, which is to be found in Part II of the ordinance, provides that either the Administrator (now the Premier) or, if authorised thereto by the provisions of a structure plan, a council may grant or refuse an application by an owner of land for the rezoning thereof. (It is common cause in the present matter that sixth respondent's application does not fall to be decided by the relevant council.)

Section 36 of the Ordinance provides as follows:

'36(1) Any application under chap II or III shall be refused solely on the basis of a lack of desirability of the contemplated utilisation of land concerned including the guideline proposals included in a relevant structure plan in so far as it relates to desirability, or on the basis of its effect on existing rights concerned (except any alleged right to protection against trade competition).'

It is clear, in my view, that the contentions of the parties in this case raise the following questions for decision:

1. Have the applicants the right to an order compelling first respondent to appoint a board of investigation?

2. Have they the right to ask for an order compelling him to amend and/or amplify the terms of reference of the board appointed by him?

3. Have they the right to have documentation in the possession of the first respondent relating to the proposed steel mill development made available to them?

4. Have the applicants *locus standi* to claim an order requiring second and third respondents to refrain from deciding the rezoning application before the board appointed in terms of s 15(1) has finalised its investigation?

5. Have the applicants shewn that they have a right which is going to be infringed?

6. If they have shewn that they have such a right, have they shewn an actual or threatened infringement?

7. Have the applicants an alternative remedy?

8. Have the applicants shewn that they will suffer irreparable harm unless the interdict sought is granted?

9. Have the applicants shewn that the balance of fairness is in their favour?

10. Should the Court in the exercise of its discretion grant the interdict sought?

(1) *Have the applicants the right to compel first respondent to appoint a board of investigation?*

In support of his submission that the applicants have such a right Mr *De Villiers QC*, who with Mr *Potgieter* appeared on behalf of the applicants, relied very strongly

on the use of the word 'shall' in the English (signed) text of s 15(1) of Act 73 of 1989. (The Afrikaans text merely uses the present tense ('Die Minister stel van tyd tot tyd 'n ondersoekaan ...').)

It is however clear, as Mr *Van Schalkwyk SC*, who appeared with Mr *Hiemstra* on behalf of the first, second and third respondents, submitted that the use of the expression 'shall' does not necessarily indicate a legislative intention to impose an obligation: in some cases a provision containing the word 'shall' may be merely directory or empowering. Most of the cases in which the word 'shall' has been construed concerned the question as to whether the failure to do something which the statute in question has said 'shall' be done, visits the transaction concerned with nullity: see *Suter v Scheepers* 1932 AD 165 and the many cases in which it has been referred to. This is not such a case: here the question to be answered is whether the use of the word indicates an obligation to act as opposed to an empowerment. As Starke J said in the Australian case of *Re Davis* (1974) 75 CLR 409 at 418-19:

'The word "shall" does not always impose an absolute and imperative duty to do or omit the act prescribed. The word is facultative: it confers a faculty or power .... The word "shall" cannot be construed without reference to its context.'

From the context it is clear, in my view, that the Minister is not obliged to appoint a board. The purpose for which a board is appointed is to assist the Minister in evaluating a matter. As Mr *Van Schalkwyk* contended, there is no express provision that the Minister is obliged to follow the advice given. Nor is he precluded from making a decision in cases where he has not appointed a board. That this is so is borne out by the use of the expression 'from time to time', which is a clear indication that the appointment of a board is not a prerequisite for the consideration of every matter or appeal. This is a clear indication in my view that the provision in question is permissive but not obligatory.

From the fact that the first respondent, in my view, is empowered, but not obliged, by s 15(1) of Act 73 of 1989 to appoint a board it must follow, as Mr *Van Schalkwyk* contended, that no-one can compel him to appoint a board.

Consequently the first question arising for decision in this case must be decided against the applicants.

(2) *Have the applicants the right to an order compelling first respondent to amplify and/or amend the board's terms of reference?*

I think that it must follow, as Mr *Van Schalkwyk* submitted, that if applicants cannot compel the appointment of a board they have no right to demand the amplification or amendment of its terms of reference. The Minister is empowered to appoint a board to advise him on matters on which he desires assistance. Applicants have no right to tell him that he should be assisted on some other matter which he has not set out in the board's terms of reference.

(3) *Have the applicants the right to have the documentation in the possession of first respondent relating to the steel mill project made available to them?*

Section 23 of the Constitution was considered by the Full Bench of this Court in *Nortje and Another v Attorney-General, Cape, and Another* 1995 (2) SA 460 (C) (1995 (1) SACR 446) in relation to a claim by accused persons to the statements contained in the police docket relating to their case. At 474F-475A (460*e-j* (SACR)) Marais J (as he then was), with whom Fagan DJP and Scott J concurred, said:

'The right of access to the information of which s 23 is plainly not absolute and unqualified. Apart from potential limitations of the right which might be permissible in terms of s 33(1), s 23 contains its own qualification in that the information requested must be "required for the exercise or protection of any" of the rights of the person concerned. In resisting the applicants' contentions, Mr. *Slabbert,* on behalf of the State, submitted that "required" is to be understood as "needs" rather that "desires", and that, in this sense, it cannot be said that an accused person requires the witnesses' statements in the police docket in order to exercise or protect his rights. Such a narrow construction of the word "required" does not seem to me to be justified. I think that the word must be understood as meaning "reasonably required", and I have little doubt that the statements in the police docket of witnesses to be called, as well as of those not to be called, would ordinarily be reasonably required by an accused person in order to prepare for trial in a criminal prosecution. That it is his or her right to defend himself or herself is, of course, beyond question. There may well be other material in the police docket which is not reasonably required. The reasonableness of the request must be judged, I think, by taking the respective positions of both the accused and the State into account. It cannot be right to view the question solely through the accused's spectacles. One thinks, for instance, of correspondence between the prosecutor or Attorney-General and the investigating officer, or communications between the investigating officer and his superior regarding the progress of the investigation, or possible leads that could be followed. In the present case, however, it is only the witnesses' statements that are in issue.'

In the present case no question of a possible limitation

in terms of s 33(1) of the Constitution need be considered because Mr *Van Schalkwyk* did not suggest that, if the documentation sought by the applicants under s 23 was required by them for the exercise or protection of any of their rights, first respondent could refuse to make it available because of any limitation on applicants' right under s 23 of the Constitution arising under s 33 (1) thereof.

In the present case the first, second and third applicants, as owners of the trust property, and fourth applicant as a beneficiary under the trust did in my view reasonably require the documentation referred to in the relevant paragraph in the notice of motion for the purpose of protecting their rights to the trust property which was potentially threatened by the proposed steel mill if it was undesirable (so that the rezoning stood to be refused under s 36 of the ordinance) in order to exercise their rights to object to the rezoning, which they had because of their interest therein flowing from the trust property which, it will be remembered, was right opposite the Langebaan lagoon, the area which, in view of some at least of the experts who have expressed views on the topic, may well be detrimentally affected by the proposed development. Applicants were also able to protect their right by persuading first respondent to exercise his powers under Act 73 of 1989. It is to be noted that s 23 of the Constitution does not limit in any way the rights for the exercise or protection of which an applicant is entitled to seek access to officially held information, nor is there any limitation or restriction in respect of the manner or form in which such exercise or protection will take place.

I am satisfied therefore that the applicants have made out a case under s 23 of the Constitution in respect of documentation in first respondent's possession relating to the steel mill project. Whether all the documentation sought having been made available without prejudice by first respondent, the only question to be considered at this stage is whether the applicants are entitled to costs.

The application against second and third respondents.

I turn now to consider the applicants' prayer for an order interdicting second and third respondents from making a decision on the rezoning application before the finalisation of the board's investigation.

(4) *Locus standi*

Here, as appears from the summary I gave of the questions to be considered in this case, the first question to which I must try to find the answer is whether the applicants have *locus standi* to ask for the interdict sought against second and third respondents.

The objection of a lack of *locus standi*, which was not taken by second and third respondents, is taken by sixth and seventh respondents, whose counsel, Mr *Helberg*,contended, relying on *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 533J-534E, that applicants had to show that they had a direct interest in the relief sought and that they had not done so. He contended further, relying again on the *Jacobs* case (at 540H), that a person asking for relief cannot lay claim to *locus standi* if his interest in the case is no more and no less than the interest which all citizens have therein.

In developing this submission he referred to the fact that, although the papers reveal that the trust property is situated at Meeuklip, Langebaan, right opposite the lagoon, there is no indication as to how far it is from the proposed development.

He referred further to the fact that the applicants referred to the structure plan for the Vredenburg-Saldanha area which had been approved in terms of s 4 of the ordinance and which provided that the area in question, ie the area where the proposed steel mill was to be built, was to be allocated for heavy industry. He pointed to the fact that there was no evidence before the Court that the trust property was in the area for which the structure plan was approved and said that *prima facie* it did not fall in that area: clearly, so he contended, the areas of Vredenburg-Saldanha on the one hand and Langebaan on the other are not in the same municipal area.

He referred further to the fact that first applicant said in his affidavit that

'die belewenis en genot voortspruitend uit die eienaarskap van hierdie eiendom (ie the trust property) hou direk verband met die belewenis en genot voortspruitend uit die strandmeer, die natuur en die omgewing aldaar. Die waarde van hierdie eiendom hou na my mening ook daarmee verband", and refereed to the fact that the applicants do not allege that the value of the property as a result of the development will be prejudicially affected or reduced. In the light of these considerations, he submitted, the applicants have not succeeded in shewing that they have the necessary *locus standi* to bring the application.

Mr *De Villiers* submitted that Mr *Helberg's* arguments regarding *locus standi* were refuted by the provisions of s 7(4)(b) of the Constitution, which evinced a clear intention to put an end to the previous restrictive approach to *locus standi* adopted by the courts. He submitted further that, apart from the fact that Mr Van Huyssteen in his personal capacity is before the Court as fourth applicant, a purposive approach to interpreting s 7(4)(b) would lead to the conclusion that trustees suing on behalf of the trust would clearly be regarded as falling within the manning of s 7(4)(b). I agree that the 'own interest' referred to in s 7(4)(b)(i) is wide enough to cover an interest as trustee. As Professor J R L Milton, Professor M G

Cowling, Dr P G van der Leeuw, Mr M Francis, Mr P G Schwikkard and Professor J R Lund point out in the chapter on 'Procedural rights' in Van Wyk *et al* (eds) *Rights and Constitutionalism - The New South African Order* at 421, the Constitution had adopted and entrenched a very liberalised notion of legal standing. This 'more generous approach to legal standing' *op cit* at 422) is applicable, as s 7 (4) makes clear, in all cases where an infringement of or a threat to any right entrenched in chap 3 of the Constitution is alleged. Applicants rely on a threatened infringement of s 24 (b) of the Constitution which gives them an entrenched right to procedurally fair administrative action where any of their rights or legitimate expectations are affected or threatened. First, second and third applicants' rights as trustees in respect of the trust property in my view will be affected or threatened if second and third respondents decide the rezoning application in favour of sixth and seventh respondents before the finalisation of the board's investigation and if such action on their part amounts to procedurally unfair administrative action (a question which I shall consider later in this judgment). I say that their rights in respect of the trust property, which is right opposite the lagoon, must of necessity be diminished by industrial activity which pollutes or otherwise detrimentally affects the natural beauty and enjoyment associated with being near to the lagoon. One of the purposes for which the trust property may well be used is for the erection of a holiday home and it clearly has value as the potential site of a holiday home. A court can take judicial notice of the fact that the sites for holiday homes will be more valuable if they are in close proximity of beautiful unspoilt natural areas and that they will be much less valuable if such areas are polluted or otherwise detrimentally affected. Whether or not the trust property is in the area earmarked in the Vredenburg-Saldanha structure plan for heavy industry takes the matter no further as it is clear form s 5(3) of the ordinance that a structure plan does /not confer or take away any right in respect of land', nor does it matter that the papers do not indicate how far the trust property is from the proposed steel mill development. What they do indicate is that if the views of those experts who are opposed to the development are right the lagoon will be adversely affected: as I have said if the lagoon is adversely affected it is clear that the trust property, which is right opposite it, will also be adversely affected.

It is also clear that Mr Van Huyssteen in his person capacity, as fourth applicant, will be affected in his interests as a beneficiary entitled to use and occupy the trust property and the benefits associated with such use and occupation which clearly include those flowing from its proximity to the lagoon.

I am accordingly satisfied that the applicants have *locus standi* to ask for the order sought by them against second and third respondents.

(5) *Applicants' right:*

The next question to be considered is whether the applicants have the right in the circumstances of this case to the interdict sought.

I have already said that the applicants have the right to procedurally fair administrative action in this case. The question to be considered is whether it would be procedurally unfair for them if second and third respondents were to decide the rezoning application before the board has finalised its investigation. It is accordingly necessary to consider what would amount to procedural fairness or unfairness in the circumstances of this case.

Mr *Van Schalkwyk* contended that the applicants have no rights to the order sought by them on this part of the case because there is no provision in the ordinance which requires that the findings and/or recommendations of a board of investigation appointed in terms of s 15(1) of Act 73 of 1989 (where one has been appointed) must be taken into account before a rezoning decision is made. He also formulated his submission in this regard as follows:

'There is nothing which legally requires the functionary charged with a rezoning decision to take into account the findings and/or recommendations of a board of investigation which has been appointed under other legislation for other purposes.'

It may be that when the ordinance was passed there was nothing which compelled a functionary charged with making a rezoning decision to take into account findings or recommendations made by boards appointed under other legislation. But since the ordinance was passed in 1985 two important things have happened which will impinge directly on rezoning applications; the first was the enactment and coming into operation of the Act 73 of 1989 and the publication of the general policy determined in terms of s 2 thereof and the second was the enactment and coming into operation of the new Constitution. The direct linked between a rezoning application under the ordinance and Act 73 of 1989 is to be found in s 3 of Act 73 of 1989, which has been quoted above and which clearly obliges second and third respondents to exercise the powers conferred by the ordinance (which undoubtedly may have an influence on the environment) in accordance with the policy determined under s 2 of the Act. That policy (the material provisions of which have been quoted above) requires

'all responsible government institutions (which phrase clearly includes second and third respondents) to apply appropriate measures based on sound scien-

tific knowledge to ensure the protection of designated ecologically sensitive and unique areas, for example ... wetlands ....'.

The wetlands in question have been designated for protection under an international convention to which South Africa is a party.

That there is a direct link between s 24(b) of the Constitution and the duties of a functionary deciding a rezoning application under the ordinance is indisputable, because s 24(b) of the Constitution applies to all administrative action whereby any person's rights or legitimate expectations are affected or threatened. A decision to rezone the property on which sixth and seventh respondents propose to erect a steel mill to allow the erection and operation thereof will undoubtedly affect applicants' right to the trust property if the effect of the operation of the proposed steel mill will be to pollute or otherwise detrimentally affect the lagoon, for the reasons I have already given.

It must follow that the applicants have the right to procedural fairness in respect of the rezoning decision.

Mr. Helberg contended that s 24(b) merely codifies the common law relating to natural justice and that, as it is not suggested that second and third respondents will deny the applicants a hearing (and thuys fail to comply with the *audi alteram partem* rule) or be biased (and thus fail to comply with the *nemo iudex in sua causa* rule), there can be no breach of natural justice and thus no procedural unfairness in refusing to wait until after the board has completed its investigation.

I cannot agree with this submission.

Apart from the fact that I do not agree that the rules of natural justice in our law are limited to the *audi alteram partem* and the *nemo iudex in sua causa* rules, I do not think that one can regard s 24(b) as codifying the existing law and thus read down, as it were, the wide language of the paragraph, unless the existing law was already so wide and flexible that it was covered by the concept of procedural fairness.

It is not entirely clear in England whether natural justice is 'but a manifestation of a broader concept of fairness' or whether 'natural justice' applies to 'judicial decisions' and 'a duty to act fairly' exists in 'administrative or executive determinations': see Craig *Administrative Law* 2nd ed 207. Whichever is the correct formulation, everyone appears to accept the correctness of Tucker LJ's *dictum in Russell v Duke of Norfolk and Others*[1949] 1 All ER 109 (CA) at 118D-E, which is in the following terms:

'There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.'

(This *dictum* has been quoted with approval from time to time in South African decisions: see for example *Turner v Jockey Club of South Africa 1974 (3) SA 633 (A) at 646E.)*

One of the statements cited by *Craig (loc cit)* for the view that natural justice is a manifestation of the broader concept of fairness is the well-known *dictum* of Lord Morris of Borth-y-Gest in *Wiseman v Borneman [1971] AC 297 (HL) ([1969] 3 All ER 275) at 308H-309B (AC) and 278C-E (All ER) which reads as follows:*

'My Lords, that the competition of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. natural justice, it has been said, it only "fair play in action". Nor do we wait for directions from Parliament. The common law has abundant riches; there may we find what Byles J called "the justice of the common law" *(Cooper v Wandsworth Board of Works* (19863) 16 CBNS 180 at 194).'

Whatever the position may be in English law and whatever the best formulation of the English rules on the topic may be, I am of the view that in our law the so-called *audi alteram partem* and *nemo iudex in sua causa* rules are but part of what the Appelate Division described as the 'fundamental principles of fairness' in the leading case of *Marlin v Durban Turf Club and Others 1942 AD 112 at 126,* where Tindall JA said:

'The expression in question (natural justice), when applied to the procedure of tribunals such as those justice mentioned, seems to me merely a compendious (but somewhat obscure) way of saying that such tribunals must observe certain fundamental principles of fairness which underlie our system of law as

well as the English law. Some of these principles were stated, in relation to tribunals created by statute, by Innes CJ in *Dabner v South African Railways* 1920 AD 583 in these terms: "Certain elementary principles, speaking generally, they must observe; they must hear the parties concerned; those parties must have due and proper opportunity of producing their evidence and stating their contentions and the statutory duties must be honestly and impartially discharged." It will be noted that the learned Chief Justice avoided using the term "natural justice". And in *Barlin v Licensing Court for the Cape* 1924 AD 472 the phrase used is: "have the fundamental principles of justice been violated?"'

It follows from what I have said that even if s 24(b) is to be regarded as merely codifying the previous law on the point, a party entitled to procedural fairness under the paragraph is entitled, in appropriate case, to more than just the application of the *audi alteram partem* and the *nemo iudex in sua causa* rules. What he is entitled to is, in my view, what Lord Morris of Borth-y-Gest described as 'the principle and procedures ... which, in (the) particular situation or set of circumstances, are right and just and fair'.

If I am wrong in saying that the test formulated by Lord Morris of Borth-y-Gest is in accordance with our previous law, then I am satisfied that it is the correct test under s 24(b). I say this because I do not think that the expression 'procedurally fair administrative action' is a term of art which, when used in a statute, particularly in the Constitution, leads to what I have called a reading down of the statutory language. Section 35(1) and (3) of the Constitution enjoin a court interpreting chap 3 of the Constitution to promote 'the values which underlie an open and democratic society based on freedom and equality' and in interpreting any law and in the application and development of the common law to 'have due regard to the spirit, purport and objects of (the) chapter'.

The correct interpretation of the meaning of 'the right to procedurally fair administrative action' entrenched in s 24(b) of the Constitution must be a 'generous' one, 'avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights ... referred to', to adopt the language of Lord Wilberforce in *Minister of Home Affairs and Another v Collins MacDonald Fisher and Another* [(1980] AC 319 (PC) at 328-9 ([1979] 3 All ER 21 at 25h), an approach which has been approved by the Constitutional Court in S *v Zuma and Others* 1995 (2) SA 642 (CC) at 651 A-D (1995 (1) SACR 568 at 578c-g) and S v *Makwanyane and Another* (case CCT/3/94 delivered on 6 June 1995 *(per* Chaskalson P at para [10] of the unreported judgement)* see also *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 395-6 (also approved in *S v Zuma (supra* at 651E-H (SA) and 578h-579b (SACR))), where Dickson J, as he then was, when discussing how the meaning of a right or freedom guaranteed under the Canadian Charter of Rights and Freedoms is to be ascertained, said:

'The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection.'

In my view the interpretation contended for by Mr *Helberg* is legalistic, and it does not secure for individuals the full measure of the fundamental right entrenched in s 24(b).

(6) *Infringement or threatened infringement of applicants' rights;*

The next aspect to be considered is whether it would be unfair for second and third respondents not to wait the finalisation of the investigation by the board appointed by first respondent before making a decision on the rezoning application. Mr *Van Schalkwyk* submitted that this Court could only make a finding on the point if it were clear that the investigation and consideration of the rezoning application by the Provincial Administration would be inadequate and in some way inferior to the investigation by the board. He referred to what is said in Mr Theunissen's affidavit regarding the procedure being followed by the Provincial Administration in this regard and submitted that there was nothing to show that this procedure would not be as good, if not better, than the investigation by the board.

I do not agree. It is clear that there is a vast difference of opinion between the various experts who have commented upon the desirability, from an environmental view, of allowing the development to proceed. Where such differences exist and where they appear, as here, to be irreconcilable, then experience shows that there is no better way of getting at the truth than through a hearing where the witnesses who hold and espouse opposing views can testify under oath and in public and where they are subject to interrogation. While *Wigmore's* statement (Wigmore *Evidence* vol 5 at 1367 (Chadbourn rev, 1974)) that cross-examination is 'the greatest legal engine ever invented for the discovery of the truth' and Lord Macmillan's assertion (quoted by Richard du Cann QC in *The Art of the Advocate* (1985 ed) at 95-6) that 'properly used, cross-examination in an English court constituted the finest method of eliciting and establishing truth yet devised' may contain elements of exaggeration, it is generally recognised that a skilful interrogator can expose the inadequacies and fallacies in erroneous evidence in a manner which can seldom if ever be replicated by any other method for establishing the truth. Furthermore, the fact that the board will hold its hearings in public is another factor calculated to improve the quality of the

testimony given because, as in the case of judicial proceedings, publicity makes for trustworthiness and completeness of testimony: see, for example, Wigmore *Evidence* vol 6 at 1834 (Chadbourn rev, 1976), cited with approval by Ackermann J in S *v Leepile and Others (1)* 1986 (2) SA 333 (W) at 338B-339J.

In addition to the very considerable advantages of testimony on oath and interrogation and publicity must be added the advantages of being able to subpoena any person who in its opinion may give material information and/or who may produce any book, document or thing which may have a bearing on the subject of the investigation to give evidence and be interrogated and/or to produce the book, document or thing.

None of these advantages is available in the Provincial Administration consideration of the application. The advantages enjoyed by the board render its investigation markedly superior to what may be called administrative investigation and make the expressed attitude of second and third respondents that they wish to be able to decide this application, beset as it is with basic and seemingly irreconcilable differences of opinion between the experts, difficult to understand. Wilfully to ignore the advantages which must flow from what will, in my judgment, inevitably be a better investigation far more likely to arrive at an answer based, as the general environmental policy determined in terms of s 2(1) of Act 73 of 1989 requires, on 'sound scientific knowledge' is to adopt a procedure which is unfair to all those persons who may be affected by the decision made.

I wish to emphasize what it is that I am saying in this case and what it is that I am not saying. I am not saying that in every opposed rezoning application a public hearing must be held where the protagonists of the various views and other persons able to give material information can be interrogated and where the production of documents and other things with a bearing on the matter can be compelled. What I am saying is that, in the special circumstances of this case, where such an enquiry is going to be held and the whole matter thoroughly gone into by a board which will enjoy substantial advantages over those engaged on a departmental investigation, then there will be procedural unfairness if the departmental investigation is not held in abeyance until the board has finalised its investigation.

There is a further advantage which will flow from following such a course. If the rezoning application is granted before the board's investigation is finalised and the board thereafter comes to the conclusion that the development should not be allowed to proceed and recommends accordingly, then, even if first respondent accepts the board's recommendation and identifies the operation of sixth and seventh respondent's steel mill, in terms of s 21(1) of Act 73 of 1989, as an activity which in his opinion may have a substantial detrimental effect on the environment and refuses to authorise sixth and seventh respondents to operate the mill, unless in itself it constitutes a hazard to the environment, will not be able to be removed. Sixth and seventh respondents will also, in these circumstances, be entitled to compensation in terms of s 34(1) of the Act for the actual loss suffered by them in consequence of the limitation placed by first respondent on the purposes for which the steel mill site may be used. At the moment the site may not be used for the operation of a steel mill. If the rezoning application is granted, sixth and seventh respondents will acquire the right so to use it and a right to compensation if first respondent subsequently takes the right so as to use the land away or imposes restrictions which cause sixth and seventh respondents loss. As a result a right to compensation may arise, payable out of public revenue, for a loss which in its turn can only be suffered if second and third respondents proceed to consider the rezoning application before the board has finalised its investigation. The aspect to which I have just referred is a further factor relevant in deciding whether what second and third respondents want to do will be procedurally unfair, because respondent may well be deterred from acting under s 21 of the Act and refuse a permit under s 22 thereof if, as a result of the actions of second and third respondents, sixth and seventh respondents would have a claim to what might well amount to massive compensation.

The fact to which I have just referred (the possibility of sixth and seventh respondents acquiring a claim, or an enhanced claim, to compensation after rezoning and followed by s 21 identification) is relevant also in regard to the question as to whether I should exercise my discretion (if I have one) in favour of the applicants and I shall return to it when I consider that question.

I am accordingly satisfied that applicants have shewn that an infringement of their right to procedurally fair administrative action is threatened.

Other requirements for an interdict

I now proceed to consider whether the applicants have established the other requirements for an interdict: that they will suffer irreparable harm and have no alternative remedy unless the order sought is granted, that the Court should exercise its discretion in their favour and, on the assumption that the relief they seek is of an interim nature and that they have established their right *prima facie* that the balance of convenience is in their favour. I shall assume, without deciding, that an applicant for an order prohibiting an infringement of one of his constitutional rights has to shew the other essentials for an interdict, although it is not self-evident that this is so. (It may be that factors of the kind I am now to consider would in any event have to be considered, to some extent at least,

in deciding the question of unfairness).

7. *No irreparable harm and no alternative remedy;*

Mr. *Van Schalkwyk* contended that the applicants are not entitled to the order they seek because they have not shewn that they will suffer irreparable harm and that they have no alternative remedy.

He contends in this regard that if the rezoning decision is given in favour of sixth and seventh respondents and the applicants are of the view, after finalisation of the board's investigation, that the rezoning decision is reviewable the 'harm' can be repaired by means of review. The answer to that submission in my view is that a review is a discretionary remedy. If the proposed steel mill site is rezoned and a steel mill erected thereon, the possibility exists that a reviewing Court will be reluctant to make an order the effect of which will be the demolition of an expensive steel mill: cf *Thompson and Another v Van Dyk and Another* (CPD, case No 7417/93), an as yet unreported decision of this Court, delivered on 9 December 1993, and the cases there cited.

Mr *Van Schalkwyk* contended further that if the rezoning decision were given in favour of sixth and seventh respondents and the board were to report against the development, then first respondent could act in terms of the Act so as to stop the operation of the steel mill. Here again the applicants will have no right to demand such action. First respondent has a discretion under the section and it is by no means clear that he will exercise it against sixth and seventh respondents.

It is also clear that a claim for damages cannot be an adequate alternative remedy because it will be extremely difficult for applicants to quantify.

I am accordingly satisfied that the applicants have shewn that they will suffer irreparable harm and have no alternative remedy.

(8) *Balance of convenience and discretion;*

In view of my finding that the applicants have a right to procedurally fair administrative action in this matter and that what second and third respondents propose to do amounts to an infringement or threatened infringement of that right, I am not sure that it is necessary for me to express an opinion on the question of the balance of convenience in this matter but, inasmuch as it was argued and the question of the balance of convenience, or the 'balance of fairness' as Fleming DJP called it in *Harnischfeger Corporation and Another v Appleton and Another* 1993 (4) SA 479 (W) at 491C, a case to which Mr *Helberg* referred me, has relevance in regard to whether I should exercise my discretion (on the assumption that I have a discretion in a case where constitutional relief is sought), I propose to set out my views on this aspect of the case.

If the order sought is not granted and a decision is given in favour of sixth and seventh respondents and the board reports later that the proposed development is undesirable and is likely to be detrimental to the environment, first respondent will have a discretion, as I have said, as to whether he should act in terms of ss 21, 22 and 31A of the Act. If he does so, the amounts expended by sixth and seventh respondents will be wasted and compensation will be payable to sixth and seventh respondents. It is by no means clear whether first respondent will in those circumstances, where is presented with a potentially expensive fait accompli, exercise his discretion against sixth and seventh respondents.

On the other hand, if the board's investigation leads to a finding that the proposed development cannot be regarded as undesirable in that it will probably not detrimentally impact on the environment or that such impact can be satisfactorily addressed by imposing conditions, then the rezoning application will in all probability be granted and the applicants will have no reason to fear that their rights will be adversely affected. Mr *Helberg*, however, contended that the board's investigation will take time: he spoke of as long as two years and he referred to a statement made in the affidavit filed on behalf of sixth and seventh respondents that a delay in giving the decision on the rezoning application may lead to a reconsideration of the whole project.

Mr *De Villiers* had a twofold answer to this contention. Firstly, he said, it is clearly the wish of first respondent that the investigation should be disposed of as speedily as is reasonably possible. Secondly, he said, this Court can deal with this aspect by building into the order a provision for second and third respondents to set the matter down for further hearing (after due notice to the applicants) for further argument on this aspect if they are of the view that the investigation is taking too long.

In my view, there is merit in both of Mr *De Villiers*' submissions. It is clear from the provisions of s 15 of Act 73 of 1989 that the investigation does not take the form of a trial. the chairman, who is a retired Judge of great experience, will be in charge. He will be able to put a stop to anything amounting to an attempted filibuster on the part of anyone appearing before the board. He will also be aware of the first respondent's desire for the investigation to be finalised as soon as reasonably possible and I have no doubt will act accordingly. The order I propose to make incorporates Mr *De Villiers'* suggestion regarding a possible re-set down of the matter if it is believed that undue time is elapsing (which suggestion was first contained in

an open offer made by the applicants to second and third respondents before the hearing).

In the circumstances I am satisfied that the balance of convenience, or fairness, favours the applicants and that I should exercise my discretion in favour of the applicants in respect of the relief sought by them against second and third respondents.

Order

The order I make is the following:

1. First, second and third applicants' application for an order against first respondent calling upon him to appoint a board of investigation in terms of s 15(1) of Act 73 of 1989 to investigate sixth and seventh respondents' proposed steel factory development at Bredenburg-Saldanha and applicants' application for an order against first respondent to amend/or amplify the terms of reference of the board of investigation appointed by him in terms of the said s 15(1) are dismissed with costs, such costs to include those occasioned by the employment of two counsel.

2. Second and third respondents are ordered to hold in abeyance the decision on the rezoning application with reference to the site on which the development of a steel factory by sixth and seventh respondents is envisaged, pending the finalisation of the investigation of the board appointed in terms of s 15(1) of Act 73 of 1989; provided that second and third respondents shall have the right to set the matter down for further argument (on 10 days' notice to the applicants and to sixth and seventh respondents) on the question as to whether the order made in this paragraph should be uplifted on the ground that the finalisation of the said board's investigation is being unduly delayed.

3. The second, third, sixth and seventh respondents are ordered, jointly and severally, to pay the applicants' costs in respect of the application for the order contained in para 2 above.

4. First respondent is ordered to pay the costs of first, second and third applicants in relation to their claim for documentation to be made available to them.

Applicants' Attorneys: *Cloete, Baker & Partners*. First, Second and Third Respondents' Attorney: *State Attorney.* Sixth and Seventh Respondents' Attorneys: *Gildenhuys, Van der Merwe Inc,* Pretoria.

REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 6153 OF 1992

MAINA KAMANDA & ANOTHER, PLAINTIFFS
v.
NAIROBI CITY COUNCIL & ANOTHER, DEFENDANTS

RULING

The Applicants are two Nairobi residents and rate payers. They have instituted the present action against the 1st Respondent, the Nairobi City Council and the 2nd Respondent, the erstwhile Chairman of the Nairobi City Commission inter alia to restrain the 1st Respondent from permitting the 2nd Respondent to continue to enjoy certain facilities and perquisites which he had enjoyed when he had been the Chairman of the Nairobi City Commission. These facilities and perquisites are the 1st Respondent's house LR No.330/492 Korosho Road (it had been described in the pleadings as LR No.330/493 Korosho Road, but this was subsequently corrected to read LR 330/492 Korosho Road), its office known as the Mayor's Parlour and telephones therein, and its Mercedez Benz motor car registration number KAA 807S.

Upon the filing of the suit, the Applicants applied for and obtained ex-parte, a temporary injunction which did not apply to the 1st Respondent's Korosho Road house because at that time the correction in its description had not yet been made, but which did apply to all the other facilities and perquisites of the 1st Respondent already described. At the beginning of the subsequent, inter partes hearing of the related application, a preliminary objection was raised on behalf of the 2nd Respondent that the Applicants had no locus standi to bring the action they had brought. This same ground was among the grounds of objection filed on behalf of the 1st Defendant. I decided it would be convenient and proper that this ground should be argued first, for if it succeeded, that would be the end of the that matter.

The arguments put forward in support of the objection were that the Applicants had no locus standi since they had not shown that they had sufficient interest in seeking the relief they were seeking; that since what they claimed was a matter in the realm of a public wrong, ex relatione, they required the permission of the Attorney General to being the action which they had not got; that the Applicants have improperly brought the action in a representative capacity; and that the Applicants are mere busy bodies who seek to abuse the process of the court by instituting the action. But in considering this matter of a mixed question of law and fact, I have to take into consideration its surrounding circumstances. They are simply this that the Applicants say among other things, that as rate payers, they object to the 1st Respondent continuing to extend its facilities and perquisites to the 2nd Respondent after he had ceased to be the Chairman of the Nairobi City Commission and that this amounted to a misuse of the funds of the 1st Respondent and that as ratepayers, they had sufficient interest to bring the action. I think that it is now well settled that a ratepayer as opposed to a tax payer, has sufficient interest as such, to challenge in court the action of a public body to whose expenses he contributes. This was eloquently set forth in the following passage from the speech of Lord Diplock in the House of Lords case of IRC v National Federation of Self-Employed and Small Business Ltd (1982) AC 617 at 740 et seq:

> "For my part I need only refer to Reg. v. Greater London Council, Ex parte Blackburn (1976) 1. W.L.R. 550. In that case Mr. Blackburn who lived in London with his wife who was a ratepayer, applied successfully for an order of prohibition against the council to stop them acting in breach of their statutory duty to prevent the exhibition or pornographic films within their administrative area. Mrs. Blackburn was also a party to the application. Lord Denning M.R. and Stephenson L.J. were of opinion that both Mr. and Mrs. Blackburn had locus standi to make the application: Mr. Blackburn because he lived within the administrative area of the council and had children who might be harmed by seeing pornographic films and Mrs. Blackburn not only as a parent but also on the additional ground that she was a ratepayer. Bridge L.J. relied only on Mrs. Blackburn's status as a ratepayer; a class of persons to whom for historical reasons the court of King's Bench afforded generous access to control ultra vires activities of the public bodies to whose expenses they contributed. But now that local government franchise is not limited to ratepayers, this distinction between the two applicants strikes me as carrying technicality to the limits of absurdity having regard to the subject matter of the application in the Blackburn case. I agree in substance with what Lord Denning M.R. said at P.559, though in language more eloquent than it would be my normal style to use:

> 'I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and courts in their discretion can grant whatever remedy is appropriate'. (The italics in this quotation are my own)".

Lord Diplock concluded his speech with the following penultimate paragraph with which I respectfully also agree and adopt, in my consideration of the matter now before me:

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The Attorney General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does so against government departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge".

The matter that the Applicants have raised is not a misguided or trivial complaint of an administrative error; it is one that involve a serious allegation of misapplication of public funds by a local authority.

As stated in Constitutional and Administrative Law, ECS Wade and AW Bradley, (10th Edn, 1985 pp660 - 661):

> "An injunction may be claimed against a public authority or official, to restrain unlawful acts which are threatened or are being threatened, for example to restrain unlawful interference with private rights or to restrain ultra vires action such as improper expenditure of local funds".

This brings me to the issue whether the present suit can be instituted as a relator action without leave of the Attorney General. In the recent case of Oginga Odinga and 3 others v Zachariah Richard Chesoni and the Attorney General, Misc. Civil Application No. 602 of 1992, the three Judge Constitutional Bench of the High Court, when dealing with the question of relator actions had this to say:

> "When it comes to the public interest, where a party suffers generally as any other, then relator actions lie. These actions fall under as 61 and 62 of the Civil Procedure Act and they are limited to public nuisance and public charity. The Attorney General is the principal aggrieved party but 2 or more private persons, having interest in the given action, and with the Attorney General's written consent, can sue".

That a relator action was required in the specific action concerning a public charity as provided for by the Civil Procedure Act, was reiterated in the case of Wafk Commissioners v Mohamed bin Umeya bin Abdulmajid bin Mwijabu and Ali Mohamed Ali Bashir (1984) 2 KAR. Hancox JA as he then was had this to say:

> "One other final matter remains. The Respondents did not initially obtain the Attorney General's consent required under S.62 of the Civil Procedure Act. It was given for the institution of this suit by the then Attorney General on 4th June, 1977".

But even if the present action can be said to be a relator action, and I do not think so, I will not prevent the Applicants from bringing to the notice of this court the improper conduct of the 1st Respondent. I have already referred to the penultimate paragraph of Lord Diplock speech in the National Federation case supra. Nearer home, Hancox JA as he then was, stated in Njau v Nairobi City Council (1982-1988) 1 KAR 229 at 239 that:

> "Even though that became a relator action, the tenor of Lord Denning's remarks, and that of Lord Diplock in the National Federation case, show that the tendency is not to prevent people bringing to the attention of the courts unlawful conduct by public authorities with a view to redress or getting the unlawful conduct stopped".

As to the objection that the Applicants had followed the wrong procedure in bringing a representative suit, that has only to be stated to be rejected. It is true that in the plaint and the affidavits in support of the injunction application, it is averred that the 2nd Respondents' use of the facilities and perquisites of the 1st Respondent would give him an unfair advantage over the Applicant and other persons who are like the 2nd Respondent, aspirants in the forthcoming civic elections, but this passing remark does not make the present suit a representative one. And though I do not think that the political rivalry between the Applicants and the 2nd Respondent gives the former any cause of action and locus standi, the Applicants as I have already stated, have as rate payers, sufficient interest in bringing to the attention of this court any alleged unlawful act being committed by the 1st Respondent and to seek its stoppage.

The issue of locus standi is not a matter to be considered in the abstract and apart from the surrounding circumstances which I have already alluded to, there are other relevant matters revealed in the affidavits filed in support of and in opposition to the injunction application. It seems to me that there is more than meets the eye con-

cerning the circumstances under which the 2nd Respondent because a tenant of the 1st Respondent. Secondly how did house No. LR 330/493 which had been repaired and lavishly furnished as the official residence of the Mayor of the 1st Respondent pass into the hands of another person.

In the result and taking into account all the authorities cited to me in this matter, I rule that the Applicants have locus standi to bring the present suit.

Dated and delivered this 8th day of December, 1992.

A. M. AKIWUMI
JUDGE.

VERSTAPPEN
v.
PORT EDWARD TOWN BOARD AND OTHERS

DURBAN AND COAST LOCAL DIVISION

Magid J

1993 September 29; November 24 Case No. 4645/93

Environmental law—Waste disposal—Operating disposal site without a permit as required

by s 20(1) of Environment Conservation Act 73 of 1989—Minister not having prescribed form for application for permit and information required therein as contemplated by s 20(2)—Clear intention of Legislature that permit required to 'establish, provide or operate' a waste disposal site expressed in s 20(1) not to be overridden by Minister's failure to make appropriate regulations—Operating disposal site without a permit unlawful even though regulations providing for application for permit not made.

Environmental law—Waste disposal—Operating disposal site without a permit as required

by s 20(1) of Environment Conservation Act 73 of 1989—Locus standi of person challenging unlawful operating of such site—Environment Conservation Act intended to operate in interests of public at large—Party seeking to interdict local authority from unlawfully operating such site required to show that contravention of Act has caused or is likely to cause him/her some special damage.

Environmental law—Waste disposal—Operating disposal site without a permit as required by s 20(1) of Environment Conservation Act 73 of 1989—

Locus standi *of ratepayer challenging unlawful operation of such site by local authority—Mere fact that local authority spending some municipal funds in operating such site not affording party* locus standi *to interdict such illegality where it is not established that local authority's manner of operating site more expensive than alternative methods.*

Interdict—Interim interdict—Requirements—Balance of convenience—Such not restricted to how interdict would affect immediate parties to litigation—Where general public affected, convenience of public to be taken into account.

The requirement, enacted in s 20(1) of the Environment Conservation Act 73 of 1989, of a permit issued by the Minister of Water Affairs to 'establish, provide or operate' a waste disposal site is plainly couched in the most pere]mptory language. The clear intention of the Legislature as expressed in s 20(1) of the Act cannot be overridden by the Minister's failure, whether inadvertent or intentional, to make the appropriate regulations as intended in s 20(2) providing for a form of application for such permit and the prescribed information required.

The Court accordingly held that the Minister's failure to promulgate the regulations

foreshadowed in s 20(2) of the Act did not render lawful the conduct of the first respondent local authority in operating the waste disposal site (which the applicant sought to interdict) without a permit in terms of s 20(1) of the Act.

It is clear from the language of the Environment Conservation Act 73 of 1989 that the

Legislature intended the provisions of the Act to operate in the interests of the public at large. That being the case, an applicant seeking an interdict against the unlawful operation of a waste disposal site without a permit issued in terms of s 20(1) of the Act is required to show that the contravention of the Act by the respondent has caused or was likely to cause him/her some special damage.

The Court held on the facts that the applicant had not shown that she had suffered any special damage at all.

The applicant also sought to establish her *locus standi in judicio* to apply for an interdict restraining the first respondent local authority from committing the illegality of operating the waste disposal site without the afore-

mentioned permit on the basis that she was a ratepayer of the first respondent and that in several reported cases the Courts had afforded ratepayers the right to interdict local authorities from dealing with their funds or property contrary to law. The Court held that it did not consider that the mere fact that some municipal funds were obviously spent in managing and operating the waste disposal site in question could conceivably afford the applicant *locus standi* to interdict what she regarded as an illegality. The Court held that it had not been established on the papers that the first respondent's manner of operating of the waste disposal site was more expensive than any of the various methods suggested by the applicant.

The manner in which the grant or refusal of an interim interdict would affect the immediate parties to the litigation is not the only matter relevant to a determination of the balance of convenience, which is relevant to the exercise by the Court of its discretion to grant or refuse an interdict. Where, as in the present case the wider general public is affected, the convenience of the public must be taken into account in any assessment of the balance of convenience.

Application for an interim interdict in which certain questions were argued *in limine*. The facts and the nature of the questions to be decided appear from the reasons for judgement.

R J. Salmon for the applicant.

G D Harpur for the first respondent.

No appearance for the second, third and fourth respondents.

Cur adv cult.

Postea (November 24).

Magid J: The applicant is a co-owner of certain immovable properties which are situated within the area of jurisdiction of the first respondent local authority. I shall refer to these properties (albeit only co-owned by the applicant) as 'the applicant's properties'. The other respondents (the Minister of Water Affairs and Forestry, the Minister of National Health and Health Services: House of Assembly, and the Administrator of Natal) have been cited because of their interest in the matter, and as none of them is opposing the relief sought by the applicant, I shall hereinafter refer to the first respondent as 'the respondent'.

One of the applicant's properties is adjacent to a worked-out quarry and the other is described as being 'opposite' thereto. Whatever the position may actually be, it is not in issue that the applicant's properties are fairly near the quarry whose town planning zone is for what is described as 'extract industry'.

In about 1985 the respondent started using the quarry area as a site for the disposal of waste. For the past eight years the applicant has sought the assistance of the respondent, the Department of Water Affairs, the Department of National Health and virtually every other authority she could appeal to to cause the respondent to cease using the quarry site for waste disposal purposes.

It is unnecessary for present purposes to record the history of all those efforts. Suffice it to say that until approximately April 1993 the respondent expressed an intention to seek an alternative site for the disposal of waste emanating from its local authority area. The applicant then came to the conclusion that the respondent had abandoned that intention and accordingly launched an application, which she alleged was urgent, for the issue of a rule *nisi* calling upon the respondent and others (though no relief was sought against them) to show cause against the grant of the following relief:

'*(a)* That the first respondent is hereby interdicted and restrained from using or permitting the use by any other person of lots 38 and 39 Banners Rest, Port Edward, for the purposes of the disposal of refuse, litter or any other waste material.

(b) That the first respondent is directed to take all such steps as may reasonably be necessary to prevent the use by any other person of the said lots for any of the purposes referred to in para *(a)* above.

(c) That the first respondent is directed within 14 days of the date of this order to remove from the said lots any visible, exposed or offensive refuse, litter or other waste material of any nature.

(d) That the first respondent is directed to pay the costs of this application, save that in the event that any of the other respondents should oppose the application, such respondents are ordered to pay the costs of the application jointly and severally with the first respondent.'

The applicant based her claim to relief on two grounds: firstly, that the waste disposal site and the manner in which the respondent managed it constituted a nuisance; and secondly, in the alternative, that the respondent was operating its waste disposal site unlawfully.

It is common cause that the dispute between the parties as to whether the site or its management constitutes a nuisance is incapable of resolution on the papers.

When the matter came before me I was informed that the parties had agreed that the following questions would be argued *in limine*, namely:

1. Does the applicant have *locus standi in judicio* to complain to the Court of the first respondent's failure to obtain a permit as required by the Environment Conservation Act 73 of 1989 ("the Act")?

2.(i) In view of the fact that no regulations dealing with waste management have been promulgated under the Act, is the first respondent presently obliged to obtain a permit to operate a disposal site?

(ii) Is the first respondent's conduct unlawful in that it is operating a disposal site without a permit?

3. Has the applicant made out a case that she has suffered an "injury actually committed" or that she reasonably apprehends that she will do so?

4. Does the applicant have no other satisfactory alternative remedy?'

During the course of argument I drew attention to the fact that the relief claimed in the notice of motion is couched in final form and accordingly enquired of *Mr. Salmon*, who appeared for the applicant, whether interim or final relief was now being sought. He indicated that the applicant wanted the question of nuisance settled once and for all and that accordingly, if a I answered the questions posed above favourably to the applicant, she would merely be seeking interim relief pending the determination of the question of nuisance by the hearing of oral evidence. In those circumstances *Mr. Salmon* accepted that the interim relief could not be cast in the broad terms set forth in the notice of motion, because it would be necessary to qualify any order by reference to the admitted failure of the respondent to obtain a permit in terms of the Act to operate its waste disposal site.

The relevant provisions of the Act.

I shall deal first with the issues set forth in para 2 of the questions submitted for my decision. Subsections (1) and (2) of s 20 of the Act read as follows:

(1) No person shall establish, provide or operate any disposal site without a permit issued by the Minister of Water Affairs and that Minister may:-

(a) issue a permit subject to such conditions as he may deem fit;

(b) alter or cancel any permit or condition in a permit;

(c) refuse to issue a permit:

Provided that such Minister may exempt any person or category of persons from obtaining a permit, subject to such conditions as he may deem fit.

(2) Any application for a permit referred to in ss (1) shall be in the form and be accompanied by such information as the Minister may prescribe.'

The requirement of a permit to 'establish, provide or operate' a waste disposal site is plainly couched in the most peremptory of language. It is however, common cause that the Minister has not prescribed the form and information referred to in s 20(2) of the Act. The word 'prescribe' is defined in s 1 of the Act as meaning 'prescribe by regulation or notice in the *Gazette'*.

Mr. Harpur, counsel for the respondent, submitted that for this reason the prohibition contained in s 20(1) of the Act (and I quote from his heads of argument)

'can only operate at the earliest from the date upon which the regulations have been promulgated and commence operation'.

He relied for this submission on the judgment in *S v Van der Horst and Others* 1991 (1) SA 552 (C). *Mr. Salmon*, on the other hand, relied on the judgment in *S v Koopman* 1991 (1) SA 474 (NC), which disagreed with *Van der Horst's* case. Fortunately, it is unnecessary for me to express any view as to which of the views expressed in the two judgments is preferable; for, in my judgment, neither of them is directly in point, and in any event the clear intention of the Legislature as expressed in s 20(1) of the Act cannot be overridden by the Minister's failure, whether inadvertent or intentional, to make the appropriate regulations.

If some person desires to 'establish, provide or operate' a waste disposal site he requires a permit from the Minister to do so. And if the Minister has failed to prescribe the form on which such application is made or the information which must accompany it, such person may make an application to the Minister in whatever reasonable form he desires, furnishing all such information as the Minister might reasonably be likely to need. If the Minister were to decline to deal with the application because it was not on the appropriate form or did not contain sufficient information, I have no doubt at all that any Court would hold such a decision by the Minister to be so grossly unreasonable as to justify review. This is not to say, of course, that the Minister would not be entitled to require that such an applicant furnish such further information as might reasonably be required to enable the Minister properly to assess the merits of the application.

But *Mr. Harpur's* argument that the failure on the part of the Minister to promulgate the regulations foreshadowed in s 20(2) of the Act renders lawful the conduct of the respondent in operating the site without a permit in terms of s 20(1) of the Act is without any merit at all.

I accordingly answer in the affirmative both questions contained in para 2 of the issues I was asked to determine.

The applicant's locus standi.

Mr. Salmon argued that the applicant had *locus standi* to challenge the respondent's operation of the waste disposal site without the necessary permit on one or other or both of the following grounds, namely that:

(a) she is suffering damage by reason of the operation of the site without the appropriate permit (*Patz v Greene & Co* 1907 TS 427

(b) as a ratepayer of the respondents' local authority area she is entitled to prevent an illegality being committed by the respondent (*Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A)).

In order to determine whether a member of the public has *locus standi* to prevent the commission of an act prohibited by statute, the first enquiry is whether the Legislature prohibited the doing of the act in the interests of any particular person or class of persons or whether it was merely prohibited in the general public interest. If the former, any person who belongs to the class of persons in whose interests the doing of the act was prohibited may interdict the act without proof of any special damage. If not, the applicant must prove that he has suffered or will suffer such special damage as result of the doing of the act. These principles are clearly set forth, *inter alia*, in *Patz v Greene & Co (supra); Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd* 1933 AD 87 and the *Jacobs* case *(supra).*

I am satisfied that there is no basis for holding that the applicant belongs to a special class of persons in whose interests the Act was passed, for I have no doubt at all that the Legislature intended its provisions to operate in the interests of the public at large. This intention appears clearly from the language of the Act itself. That being the case, the applicant is required to show that the contravention of the Act by the respondent has caused or is likely to cause her some special damage.

The only allegations in this regard in the applicant's founding papers are contained in the following paragraphs of her affidavit which read as follows:

13. During the time that lots 38 and 39 have been used as described above, I have suffered ill-health, including shingles and outbreaks of boils and I suspect that the cause of these is related to the unhealthy threat to the environment posed by the above mentioned dumping on lots 38 and 39.

32. Apart from the threat to the health of both my husband and myself, the proximity of a waste disposal site to lots 40 and 42 has had the effect of devaluing those properties. The first respondent has admitted this inasmuch as it has on two occasions agreed to reduce the municipal rates paid by myself.

33. In my humble submission, it stands to reason that the market value of a property adjacent to a waste disposal site will not be as high as that of a property with a beautiful view of a pristine valley. I together with my co-owners have therefore suffered irreparable harm in the depreciation in the value of our property and I reasonably anticipate that we will continue to suffer such harm for as long as the first respondent is allowed to continue with its unlawful conduct. In this connection, I wish to emphasise that, in spite of the undertakings and allegations of representatives of the first and second respondents, the condition of the dump on lots 38 and 39 Banners Rest remains appalling.'

It is unnecessary to set out the replies to these allegations but it is plain that they are substantially in dispute. I am doubtful whether it can be said that the applicant has established on the papers that she has suffered any special damage at all. There is in my judgment inadequate evidence to enable me to determine on the papers that the value of her property has been diminished in any way. Certainly, without expert evidence in that regard, I would not be prepared to hold that a property's value is diminished by reason of its proximity to a waste disposal site rather than a disused quarry in the same position. And the applicant does not make the case that her health has been permanently impaired by the proximity of the waste disposal site. Indeed, she merely 'suspects' that her ill-health is attributable thereto.

The second basis on which the applicant claims to be entitled to interdict the respondent from committing the illegality of operating the waste disposal site without a permit is that she is a ratepayer of the respondent. In several cases Courts have afforded ratepayers the right to interdict local authorities from dealing contrary to law with their funds or property (*Dormer v Town Council of Cape Town* (1886) 4 SC 240; *Cairncross v Oudtshoorn Town Council* (1897) 14 SC 272; *Maberley v Woodstock Municipality* (1901) 18 SC 443 (10 CTR 749)). The rationale for such decisions appears to be 'that there is a relationship of trust between the council and the ratepayers in respect of municipal funds and property' *(per* Juta AJA in *Director of Education, Transvaal v McGagie and Others* 1918 AD 616 at 628). The executive government of a country appears to be on a different footing from a local authority (*Dalrymple and Others v Colonial Treasurer* 1910 TS 372).

Mr. Salmon, for the applicant, set considerable store by the judgment in *Jacobs's* case *supra*, in which it was held

that one of the applicants had *locus standi* to review certain decisions of the local authority because he was a ratepayer thereof. An analysis of the judgment and more particularly that portion thereof at 536D-537H makes it clear that the *locus standi* of the ratepayer *qua* ratepayer arose because the decisions which were being attacked as *ultra vires* created a situation that involved the spending of municipal funds, albeit to a limited extent.

I do not consider that the mere fact that some municipal funds are obviously spent in managing and operating the waste disposal site can conceivably afford the applicant *locus standi* to interdict what she regards as an illegality. It is not established on the papers that the respondent's manner of operation of the site is more expensive than any of the various methods suggested by the applicant.

In my judgment, therefore, the applicant is not entitled, *qua* ratepayer, to the interim relief sought by her on the ground of the alleged unlawfulness of the operation of the site.

I may say that, even if I am wrong in this view, the balance of convenience is so considerably in favour of the respondent (a matter to which I shall revert presently) that I should not, in the exercise of my discretion, have been disposed to grant the interim relief sought by her.

Injury and alternative remedy.

These are questions 3 and 4 which I was requested to determine.

The wrong complained of, namely the operation of the waste disposal site without the appropriate permit, is common cause, although the respondent contends that by reason of the failure of the Minister to promulgate regulations in terms of the Act such operation is not unlawful. I have already held that there is no merit in this contention. Obviously, if the respondent's operation of the waste disposal site constitutes a nuisance, that is an injury actually committed by the respondent or reasonably apprehended by the applicant. But it is common cause that the dispute on the question is not capable of resolution on the papers. Moreover, it seems to me that in the case of nuisance an interdict is the most satisfactory remedy and a claim for damages is unlikely to be a satisfactory alternative.

But as the parties are agreed that the question of nuisance is one of the issues which, on any basis, must be referred for the hearing of oral evidence, it is unnecessary to provide any answer to questions 3 and 4.

Discretion and balance of convenience.

I have already come to the conclusion that the applicant has, on the papers, not established her *locus standi* to interdict the respondent from continuing with its unlawful operation. This is not, however, to say that she could not by means of proper evidence establish that she has indeed suffered loss as a result of the respondent's failure to obtain a permit to operate its waste disposal site.

Moreover, she plainly has *locus standi* to interdict the nuisance if she is able to prove that the management and operation of the site constitutes such a nuisance. It was only because she seeks an interdict based on the alleged unlawfulness of the respondent's conduct that I have held that the applicant has not established the requisite *locus standi* to entitle her to relief on that issue.

But even if I had held or been prepared to assume in favour of the applicant that her *locus standi* had been established '*prima facie* though open to some doubt', I would not have been inclined to grant an interim interdict pending the determination of the main issue of nuisance.

The Court has a discretion to grant an interdict, which is an extraordinary remedy. The balance of convenience is usually the decisive factor in determining the proper way to exercise such discretion unless the prospects of success are substantially in favour of the applicant. *(Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D)). I am not satisfied on the papers that the prospects of success are substantially in favour of the applicant; but oral evidence may change that opinion.

In the *Olympic Passenger Service* case *supra* at 383F Holmes J said:

(B)y balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.'

I do not believe that the learned Judge intended to suggested that the manner in which the grant or refusal of an interdict would affect the immediate parties to the litigation was the only matter relevant to a determination of the balance of convenience. Where, as in this case, the wider general public is affected, the convenience of the public must be taken into account in any assessment of the balance of convenience (cf *Roberts v Chairman, Local Road Transportation Board, Cape Town, and Another* (2) 1979 (4) SA 604 (C) at 607E; *Bamford v Minister of Community Development and State Auxiliary Services* 1981 (3) SA 1054 (C) at 1061D; *Corium (Pty) Ltd and Others v Myburgh Park Langebaan (Pty) Ltd and Others* 1993 (1) SA 853 (C) at 858F).

In my opinion, if the interests of the other ratepayers living in the respondent's local authority area are taken into account, the balance of convenience in this matter is overwhelmingly against the grant of any interim relief to the applicant, even if one were to assume in her fa-

vour that she does indeed have *locus standi* on one or other of the bases contended for by her.

In my judgment, therefore, the applicant is not entitled to any of the interim relief sought by her. Counsel were agreed that whether or not I granted such interim relief the matter would have to be referred for the hearing of oral evidence, *inter alia* on the issue of the alleged nuisance caused by the respondent's operation of the waste disposal site. At my request counsel agreed on the issues to be referred for the hearing of oral evidence and I have only partially altered such agreed draft.

Finally it seems to me that the respondent has been successful in resisting the applicant's claim to be entitled to interim relief and is therefore entitled to the costs necessarily involved in the argument before me. The remaining costs ought in my judgment to be reserved for the decision of the Court hearing the oral evidence in the case.

In the result, therefore, the order I grant is the following:

1. The matter is adjourned to dates to be arranged with the Registrar for the hearing of oral evidence on the following issues:

(a) whether the respondent's operation of the waste disposal site has the effect of diminishing the value of the properties situate at and described as lots 40 and 42 Banners Rest, Port Edward;

(b) whether, if it does, such diminution is more that the diminution which would in any event have been occasioned by the continuation of the site in its former condition as a disused quarry;

(c) alternatively to *(a)* and *(b)*, whether the applicant has a reasonable and well founded apprehension of such diminution;

(d) the effect, if any, on the value of the said properties of the proposed continued rehabilitation of the waste disposal site;

(e) whether any such damage suffered, or on well founded grounds apprehended by the applicant, is sufficiently material to afford her *locus standi* to claim an interdict on the basis of the first respondent's failure to obtain a permit in terms of the Environment Conservation Act 73 of 1989;

(f) Whether the conduct by the first respondent of the waste disposal site constitutes a nuisance to the applicant in that:

(i) it constitutes a danger to her physical or psychological health;

(ii) it unreasonably or unfairly and materially disturbs or annoys the applicant or interferes with her rights as a co-owner of the properties described in the application;

(g) whether, if the said conduct does constitute a nuisance, any reasonably practicable steps could have been taken by the first respondent to prevent that nuisance, in particular whether the first respondent could reasonably have utilised an alternative site.

2. The Rules of Court shall apply as if this matter were a trial action in which the pleadings had closed and the issues defined.

3. The applicant is to pay the first respondent's costs of and incidental to the argument on the question of interim relief.

4. Save as is set forth in para 3 of this order, all the costs of the application are reserved for determination by the Court hearing such oral evidence and determining the said issues.

Applicant's Attorneys: *Garlicke & Bousfield Inc.* First Respondent's Attorneys: *Barry Botha & Breytenbach*. Second, Third and Fourth Respondents' Attorney: *State Attorney.*

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

MISC CIVIL CAUSE NO. 90 OF 1991

FESTO BALEGELE AND 794 OTHERS — APPLICANTS

v.

DSM CITY COUNCIL — RESPONDENT

RULING

RUBAMA, S:-

The application by FESTO BALEGELE and 794 others against the Dar es Salaam City Council made under s.2(2) of the Judicature and Application of Laws Ordinance, Cap. 453; the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, Cap. 560 as amended by the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Amendment) Act, 1968 and s. 95 of the Civil Procedure Code, 1966 is for the following Orders:

(i) an Order of certiorari to remove to the High Court and quash the decision of the Respondent to dump the City's waste and refuse at Kunduchi Mtongani;

(ii) an Order of Prohibition to prohibit the Respondent from continuing to carry out its decision to use Kunduchi - Mtongani as a refuse dumping site.

(iii) an Order of Mandamus to direct the Respondent to discharge its function properly and according to law by establishing an appropriate refuse dumping site and using it and

(iv) an Order that the costs of this Application be met by the Respondent.

The application is supported by a thirty three (33) paragraphed affidavit sworn by the said FESTO BALEGELE and opposed by a twenty four (24) paragraphed counter affidavit sworn by ALOYSIUS MUJULIZI SSEFUNKUUMA, a soliciter in the employment of the respondent. In the counter affidavit, the respondent also gave notice that at the hearing of the application by Festo Balegele and 794 others, the respondent was going to raise a preliminary objection on points of law. Paragraph 2 of the counter affidavit detailed the nature of the preliminary objection on points of law to be raised. This was duly raised on the hearing date. Both Mr. Kakoti and Mr. Mujulizi argued the respondent's case on the raised preliminary objection. Mr. Maikusa replied for the applicants'. Briefly the raised preliminary objection was to the effect that the application before the court was misconceived and thus qualified to be dismissed. I reserved ruling; when I came to give it, it was to the effect that the raised preliminary objection was without merit. I dismissed and undertook to give my reasons for that decision "in the final Order of the Court."

In the matter of an Application for Orders of Certiorari, Prohibition and Mandamus by Abdi Athumani and 9 others v. The District Commissioner of Tunduru District, The District Executive Director of Tunduru district, The District Commissioner of Songea District and the District Executive Director of Songea District, consolidated Miscellaneous Civil Causes No. 2 and 3 of 1987 (Mtwara Registry) unreported), this Court (Rubama, J.) had addressed itself on the issue that had been raised by the respondent as a preliminary point in the matter now before the court. I still hold that finding valid and follow it in this application.

In the case of Abdi Athumani and 9 others (supra), the applicants had sought and obtained Orders of Certiorari Prohibition and Mandamus. Some of them had been refused trading licences by the appropriate licencing authorities not in accordance with the Business Licencing Act No. 25 of 1972. Eight of the Applicant had been served with Removal Orders under the Township (Removal of Undesirable Persons) Ordinance. I stated:

".... In entertaining these applications by the ten applicants, the Court has usurped no powers . This court has had powers to entertain such applications for ages: see Northern Tanzania Farmers' Cooperative Society v. W.H. Shellukindo 1978 LET n. 36. This court, a creature of statute in entertaining such applications performs for the benefit of the people. As was stated by Brett, L.J. in R.v. Local Government Board (1982) 10 QBD 309 at 321 that:

'wherever the legislature entrusts to any body of persons other than its superior courts the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling those bodies.

It is one of High Court's duties to exercise supervisory powers on bodies other than a superior court that are entrusted by Parliament to take decisions that affect the rights of the people to ensure that these bodies perform within the limits set to them by the Parliament. This ensures consistent application of the country's entrenched principles of freedom and justice by the Government agencies. The Parliament's decision ensures avoidance of this Republic's duties being executed on people's whims where people are reduced to numbers without any personal regard to hearship [sic] of the very people said by the officials to be serving. These supervisory powers ensures existence of tangible values like justice, truth, consistency within which are embedded elements such as compassion and dedication. The grant by the Parliament of these supervisory powers ensures that expediency or 'might is right' - forces that are always inconsistent and without permanency are eliminated. In entertaining such applications, the High Court does not set itself to embarrass or belittle the Government or its Agencies, in order for itself to look more important in the eyes of the people. As stated, the supervisory powers have been granted to the High Court by the Government and common sense dictates that Government would not have put itself in such untenable position."

The following facts are not in dispute:

(i) that Kunduchi Mtongani is within the area of jurisdiction of the Dar es Salaam City Council;

(ii) that Kunduchi - Mtongani is zoned in the respondent's Master Plan as a residential area;

(iii)that the applicants reside at Kunduchi Mtongani;

(iv) that the respondent has been dumping the City's collected refuse and waste at Kunduchi Mtongani and instead of at one of the five sites designated in the City's Master Plan for dumping the collected City's refuse and waste effective September, 1991 soon following this Court's order in Civil Case 299/88 (Dar es Salaam Registry) in which the respondent was ordered not to dump refuse at Tabata;

(v) that the dumped refuse and waste at Kunduchi Mtongani is presently burning emanating much smoke covering a wide area;

(vi) that the dumped refuse and waste emanates offensive smell and has attracted swarms of flies.

Mr. Mwaikusa correctly submitted that refuse collection and its disposal was one of the respondent's mandatory duties under the Local Government (Urban Authorities) Act, 1982. He further correctly submitted that the respondent was required by law to perform its statutory duties lawfully. Mr. Mwaikusa submitted however that the respondent in disposing of the collected city's refuse and waste at Kunduchi Mtongani was thereby executing its statutory duty unlawfully. Elaborating on this submission, Mr. Mwaikusa quoted to the court several authorities all of which are of persuasive effect. He submitted that the action of dumping the City's collected refuse and waste at Kunduchi Mtongani was ultra vires the Act as the Dar es Salaam City Council, the respondent:-

(i) had not taken into consideration the relevant factors in coming to its decision: Associated Provincial Picture Houses Limited v.Wednesbury Cooperation (1948) IKB 223. Mr. Mwaikusa argued that the relevant factors that the respondent should have considered ins electing Kunduchi Mtongani as the City's collected refuse and waste dumping area were the general land development plan of the area; that Kunduchi Mtongani was zoned a residential area; that Kunduchi Mtongani was not within one of five sites zoned for garbage disposal (ii) choice of the area was without plausible justification. Mr. Mwaikusa pointed out that it was one of the duties of the respondent to enforce as provided by ss.35 and 36 of the Town and Country Planning Ordinance, Cap. 378 land development plan. The counsel submitted that the respondent was dumping refuse at an area marked residential and where in fact people are residing thereby posing a health hazard and nuisance to the residents. By this decision, the counsel went on to submit, the place which is at any rate too small for the requirements of the respondent has been an attraction of swarms of flies and is offensively smelly thereby making life of the residents extremely unbearable. To compound this state, the refuse has been put on fire emanating smoke. Mr. Mwaikisa concluded that Kunduchi Mtongari as a refuse dumping site was too small for the purpose and the methods of the disposal of the refuse primitive [sic]. The place has been turned into a health hazard and a nuisance to its residents. The decision of the respondent, Mr. Mwaikusa went on to submit, looked at objectively, was devoid of any plausible justification that could have made any reasonable body of persons reach it: Bromley London Borough Council v. London Council and Another (1982) I All ER 129. (iii) appeared to have reached its decision of the choice of the area through outside dictation. Mr. Mwaikusa submitted that it appeared the respondent was dictated to by the Central Government on the choice of Kunduchi Mtongani as the City's refuse dumping place. As the enabling Act does not permit the respondent to abdicate its powers in favour or another body, Mr. Mwaikusa argued, the act of the respondent was ultra wires the Act. H. Lavender & Son Ltd. v. Minister of

Housing and Local Government (1970) 2 All ER 871.

Mr. Mwaikusa further submitted that the applicants, residents of Kunduchi Mtongani were "aggrieved" and thus with locus standi to apply for the orders of certiorari and prohibition, Regina v. Liverpool Corporation, Ex. parte Liverpool Taxi Fleet Operators' Association and Another (1972) 2 Q.B. 299.

Mr. Mwaikusa lastly prayed for an order of Mandamus by requiring of the respondent (i) stoppage of the nuisance it was causing, (ii) compliance with this Court's Order issued in the case of Joseph D. Kessy and Others v. The City Council of Dar es Salaam Civil, Case No. 299 of 1988 (Dar es Salaam Registry) (unreported) (iii) compliance with the land development plan by selecting one of the five sites designated for the City's disposal of collected refuse and waste as shown in the City's Master Plan.

Mr. Kakoti, the respondent's solicitor submitted that the respondent in disposing of refuse at Kunduchi Mtongani is performing a statutory duty lawfully. In landfilling the abandoned stone quarries at Kunduchi Mtongani, the respondent are "reconditioning" the land through sanitary landfilling. This action was not ultra vires the Act. As for the sought order of Mandamus, by Mr. Kikoti submitted that the applicants had not complied with the conditions preodent for the issue of the Order: Alfred Lakaru v. Town Director (Arusha) (1980 TLR 326 (Maganga, J.).

On the submission by Mr. Mwaikusa that the respondent appeared to be acting on dictation of the Central Government thereby making its action of dumping garbage at Kunduchi Mtongani ultra vires the Act, Mr. Kakoti submitted that it was the duty of the Treasury of the Republic to provide such funds as were adequate for the provision of public health service. On the order of prohibition, Mr. Mujulizi submitted that it was not the intention of the respondent to dispose of refuse at Kunduchi Mtongani indefinitely. The decision to dispose of refuse at the area was a temporary one while the respondent was looking for an alternative place for the dumping refuse. Mr. Mukulini prayed that the court exercise its discretion in favour of the respondent who would otherwise fail to perform its statutory duty of refuse collection and disposal.

I have above dealt with the issue of court's jurisdiction in entertaining applications for orders of certiorari, prohibition and mandamus. It is best that I move on to deal with the issue of the locus standi of the applicants as both Mr. Mwaikusa and Mr. Kakoti had touched the subject in their submissions. It is not disputed that the applicants are residents of Kunduchi Mtongani. This taken together with the several facts that I have outlined above as not disputed make the applicants persons "aggrieved" by the decision of the respondent. I accept the affidavit of Festo Balegele that the residents of Kunduchi Mtongani working through its Committee of which the said Festo Balegele was the secretary and through its Member of Parliament had made representations to the respondent, among others, to stop dumping the City's collected refuse and waste at Kunduchi Mtongani but to no avail. Their representations were not taken seriously.

Taking into consideration the submission of Mr. Mwaikusa on this issue, I find that the applicants resort to this court was in order. As what this Court had said in Abdi Athumani and others v. The District Commissioner of Tunduru District, the District Executive Director of Tunduru District, The District Commissioner of Songea District and the District Executive Director of Songea District (supra) at p. 23 appropriately covers the applicants in the application under consideration, I find it fitting to adopt it here:

"... applicants in resorting to this Court have done nothing wrong or unconstitutional at all. For the applicants to have come to this Court in search of justice have demonstrated their belief in the even handed administration of justice in this Republic. Every citizen has a right when he feels that the Government does not function within the orbit or limits dictated by justice that it-the Government-had set on itself to seek redress in courts of law. A move by citizens such as these ... applicants have taken in search of what they consider as their rights should not be taken as intended to embarrass the Government or its Agencies. ... It is in the interest of all people of good will, reason, foresight, moderation and certainly the Government that one of its institutions clothed with appropriate powers exists to reassure the people that the Republic's admirable objectives and their executions are intact.

On consideration of the affidavit, counter affidavits and the very elaborate and able submissions by the three counsel, I am of the view that the respondent's decision of disposing the City's refuse and waste at Kunduchi Mtongani was ultra vires the Local Government (Urban Authorities) Act, 1982 for the reasons submitted by Mr. Mwaikusa which I accept. Further the manner of disposal of the collected refuse and waste terminates any possible claim by Mr. Kakoti that the respondent are in the process of reconditioning the disused stone quarries at Kunduchi Mtongani. By collecting refuse from all over the City to dump it at Kunduchi Mtongani contrary to the City's Master Plant; that Kunduchi Mtongani is by this Master Plan not zoned as one of the five sites for refuse disposal but zoned residential and that there are several people residing there to whom a nuisance has been created. The place has been made intolerably smelly and dirty with flies all over and the deposited refuse burning and emanating smoke. It is a statutory duty of the City Council, the respondent; to stop nuisance and not

to create it. The submission by Mr. Kakoti that the respondent was respondent was reconditioning the land at Kunduchi Mtongani stands no close examination. What the respondent is doing now is not sanitary landfilling as that process is understood but just refuse dumping. The dumped refuse attracts flies and emanates foul smell. The dumped refuse which has been set on fire emanates smoke which could be a source of danger to the residents' health. It is not material in this regard who has set fire to the dumped refuse; it is its after effects that is of concern here. As to Mr. Mujulizi's submission that the respondent intends to use Kunduchi Mtongani dump temporarily to give itself time to look for and locate another site, I only have to state that the respondent has had a long time to sort out this matter. By the very existence of five sites in its Master Plan for refuse disposal, the question of unpreparedness does not arise. But even if the Master Plan had not provided for the possible sites for refuse dumping, I would still not find merit in the submission of Mr. Mujulizi on the issue of being given time to look for a dumping site. Refuse collection and disposal as one of the statutory duties of the respondent should have been given then priority treatment it deserved. Peoples' health and enjoyment of life are partly dependent on living on healthy surroundings. I would further reject Mr. Mujulizi's submission in this regard for the very reasons stated by Lugakingira, J. in Joseph D. Kessy and others v. The City Council (supra) at p. 15 to 16 of the hand written ruling:

"I will say at once that I have never heard it anywhere for a public authority, or even an individual, to go to court and confidently seek for permission to pollute the environment and endanger peoples' lives, regardless of their number. Such wonders appear to be peculiarly Tanzanian, but I regret to say that it is not given to any court to grant such a prayer. Article 14 of our Constitution provides that every person has a right to live and to protection of his life by the society. It is therefore a contradiction in terms and a denial of this basic right deliberately to expose anybody's life to danger or, what is eminently monstrous, to enlist the assistance of the Court in this infringement."

In view of the findings, this Court brings into court the decision of the respondent of dumping refuse at Kunduchi Mtongari and quashes it. This court further prohibits the Dar es Salaam City Council from continuing to carry out its decision of using Kunduchi Mtongani as a refuse dumping site. This court lastly issues an order of mandamus and directs the Dar es Salaam City Council to discharge its function properly and in accordance with the law by establishing an appropriate refuse dumping site and using it.

The respondent is to bear the costs of this application. Lastly I wish to highlight two points that this Court is not here concerned with the wisdom or, indeed, the fairness of the respondent's decision of selecting Kunduchi Mtongani as the City's dumping place of the collected refuse and waste. All I am concerned with is the legality of that decision: was it within the powers that the Republic's Parliament has conferred by legislation to the Dar es Salaam City Council? Secondly, I wish to emphatically state that I have not come to the above decision lightly. I bear in mind that only on 9th September, 1991, the respondent was ordered by this Court to stop disposal of the City's refuse at Tabata Dump. I take judicial notice of the disorientation that order had caused to the respondent, but I can do nothing in this regard than to express understanding of the feeling and then to apply the law. I can do no better than adopt the poetic and extremely illustrative language of MAKAME, J. (as he then was) in the case of Republic v. Agnes Doris Liundi (1980) TLR 38, 44, to express my view of how my hands are tied:

"... This necessary finding causes me personal anguish, but my powers and my interpretation role are circumscribed by the law. I have to take the law as it is, not as I might personally wish it to be. I have my legal training and professional ethics to be true to my oath of office to be faithful to, and at the end of the day my conscience to live with. As William Shakespeare puts it, "So does conscience make cowards of us all."

YAHYA RUBAMA
JUDGE
3/1/92

Coram - RUBAMA, J
Mr. Maikusa assisted by Mr. Naasoro for the applicants.
Mr. Kaketi assisted by Mr. Mujulizi for the respondents.
Ruling delivered.

YAHYA RUBAMA
JUDGE
3.1.92

WILDLIFE SOCIETY OF SOUTHERN AFRICA AND OTHERS

v.

MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS TRANSKEI SUPREME COURT PICKERING J

1996 June 21, 27 Case No 1672/95

Environmental law—Environmental conservation—Application for mandamus *compelling State*

to comply with its obligations to protect environment imposed by statute—Wildlife Society having locus standi *to apply for such order by virtue of s 7 of Constitution of the Republic of South Africa Act 200 of 1993.*

Environmental law—Environmental conservation—Application for mandamus compelling

State to comply with its obligations to protect environment imposed by statute—Order granted where State's actions falling short of compliance with such statutory obligation.

Recusal—Of presiding Judge in civil trial—On grounds of bias—Application for mandamus

compelling State to comply with statutory obligations to protect environment—Some of applicants members of Wild Coast Cottage Owners Association—Presiding Judge occupier or owner of cottage on Wild Coast—Judge not member of Association—Fact of occupation not giving rise to reasonable apprehension of bias—Judge not standing to gain from proceedings—Application refused.

Practice—Parties—Locus standi—*Where statute imposing obligation on State to protect*

environment—Semble: Body such as Wildlife Society should have locus standi *at common law to apply for order compelling State to comply with its obligations in terms of statute.*

The applicants applied for an order compelling the first, second and third respondents to take

steps to enforce the provisions of s 39(2) of Decree 9 (Environment Conservation) of 24 July 1992 (Tk). The first applicant was the Wildlife Society of Southern Africa and the second applicant its Conservation Director. The third and fourth applicants were two lawful occupiers of cottages on the Wild Coast and members of the Wild Coast Cottage Owners Association. The first respondent was the Minister of Environmental Affairs of South Africa, the second respondent the Premier of the Eastern Cape, the third respondent the Minister of Agriculture and Environmental Planning of the Eastern Cape and the fourth to seventh respondents the chiefs or headmen of certain areas in the Eastern Cape.

The applicants contended that the fourth to seventh respondents had granted rights of

occupation and had allocated sites within the coastal conservation area to private individuals, in each case for a relatively small consideration. Shacks and dwellings had been constructed on those sites, which had resulted environmental degradation, and roads, pathways and tracks had been created through environmentally sensitive areas. It was conceded that considerable and irreversible environmental degradation of the Transkei Wild Coast within the coastal conservation zone had been and was occurring at the time of institution of the proceedings. The applicants contended that, despite all their efforts at persuading the first to third respondents to comply with the obligation to enforce compliance with the provisions of s 39 of the Decree, the respondents had not done so. It was common cause that the administration of s 39 was vested in the first respondent.

At the commencement of the hearing of the application the Court was informed that an

agreement had been reached between the applicants and the second and third respondents which terminated the litigation between the applicants and those parties.

The first respondent applied in *limine* for the recusal of the presiding Judge on the grounds

that he was the occupier or owner of a cottage on the Wild Coast. It was contended that this fact could cause the first respondent reasonably to suspect that the pre-

siding Judge would be biased against the first respondent. The presiding Judge refused the application, stating that he was neither a member of the Cottage Owners Association nor of the Wildlife Society. He was of the opinion that, were his occupation of the cottage in question illegal in terms of the Decree, the man*damus* sought by appellants would obviously be inimical to his own interests. In any event, the mere fact that he was the occupier of a cottage on the Wild Coast could not in any way give rise to a reasonable apprehension of bias on his part.

After initially contesting the applicants' l*ocus standi*, the first respondent conceded this issue

on the basis that the applicants had *locus standi* by virtue of the provisions of s 7(4)(b) read with s 29 of the Constitution of the Republic of South Africa Act 200 of 1993. The Court remarked, o*biter*, that there was much to be said for the view that in circumstances where the *locus standi* afforded to persons by s 7 of the Constitution was not applicable and when a statute imposed an obligation upon the State to take certain measures in order to protect the environment in the interests of the public, then a body such as the first applicant, with its main object being to promote environmental conservation in South Africa, should have *locus standi* at common law to apply for an order compelling the State to comply with its obligations in terms of such statute. One of the principal objections often raised against the adoption of a more flexible approach to the problem of l*ocus standi* was that the floodgates would thereby be opened, giving rise to an uncontrollable torrent of litigation. It was not certain that to afford l*ocus standi* to a body such as the first applicant in circumstances such as these would open the floodgates to a torrent of frivolous or vexatious litigation against the State by cranks or busybodies. Neither was it certain, given the exorbitant costs of Supreme Court litigation, that, should the law be so adapted, cranks and busybodies would flood the Courts with vexatious or frivolous applications against the State. Should they be tempted to do so, an appropriate order of costs would soon inhibit their litigious ardour. It might well be that the time has arrived for a re-examination of the common-law rules of standing in environmental matters involving the State and for an adaptation of such rules to meet the ever-changing needs of society.

As regards the merits of the application for a man*damus*, the first respondent's opposition to

the application rested largely upon the fact that there was in existence a Task Group which had been established to tackle the issue. The Court held, however, that the Task Group was a non-statutory, advisory body of uncertain nature and duration, whose actions had in any event fallen short of establishing that the provisions of s 39(2) of the Decree were being enforced by first respondent. The Court held accordingly that the applicants were entitled to an order that first respondent enforce the provisions of s 39(2) of the Decree.

The following decided cases were referred to in the judgment of the Court:

Bamford v Minister of Community Development and State Auxiliary Services 1981 (3)

SA 1054 (C)

Bromley London Borough Council v Greater London Council and Another [1982]

All ER 129 (CA)

BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union

and Another 1992 (3) SA 673 (A)

Executive Council, Western Cape Legislature, and Others v President of the Republic

of South Africa and Others 1995 (4) SA 877 (CC) (1995 (10) BCLR 1289)

R v Inland Revenue, Commissioners: Ex parte National Federation of Self-Employed

*and Small Businesses Ltd [*1982] AC 617

R v Inspectorate of Pollution and Another, Ex parte Greenpeace Ltd (No 2) [1994] 4

All ER 329 (QB)

Sher and Others v Sadowitz 1970 (193 (C)

Van Huysteen and Others NNO v Minister of Environmental Affairs and Tourism and

Others 1996 (1) SA 283 (C).

The following statutes were considered by the Court:

The Constitution of the Republic of South Africa Act 200 of 1993, ss 7, 126(3), 229,

235(6): see *Juta's Statutes of South Africa 1995* vol 5 at 1-209

Decree 9 (Environmental Conservation) of 24 July 1992 (Tk), s 39.

Application for an order compelling the respondents to enforce the provisions of Decree 9 (Environment Con-

servation) promulgated by the former government of Transkei on 24 July 1992. The facts appear from the reasons for judgment.

J J Gauntlett SC (with him *R A K Vahed*) for the applicants.

M T K Moerane SC (with him *L P Pakade*) for the first respondent.

X M Petse for second and third respondents.

No appearances for fourth to seventh respondents.

Cur adv vult.

Postea (June 27).

Pickering J: The four applicants herein, namely the Wildlife Society of Southern Africa, Keith Cooper, the Conservation Director of the Wildlife Society, and two lawful occupiers of certain cottages on the Transkei Wild Coast, seek, as first to fourth applicants respectively, an order against the Minister of Environmental Affairs and Tourism of the Republic of South Africa (first respondent); the Premier of the Eastern Cape Province (second respondent); the Member of the Executive Council for Agriculture and Environmental Planning of the Eastern Cape Province (third respondent) and four chiefs or headmen of certain administrative areas (fourth to seventh respondents) in the following terms:

1. That the first, second and third respondents are ordered forthwith to take such steps and to do such things as may be necessary:

(a) to enforce the provisions of Decree No 9 (Environment Conservation) promulgated by the former Government of Transkei on 24 July 1992 ("the Decree");

(b) to, without derogating from the generality of para 1(*a)* hereof, enforce the provisions of s 39(2) of the Decree in the coastal conservation area established in terms of s 39(1) of the Decree.

2. That it is hereby declared that, save to the extent that the Environment Conservation Act 73 of 1989 ("the Act") and the General Policy determined in terms of s 2 of the Act on 21 January 1994 and 9 May 1994 conflicts with or contradicts the Decree in particular and other legislation of the former Government of Transkei in general, the Act and the said General Policy apply to and are enforceable in the territory that formerly constituted the Republic of Transkei.

3. That subject to para 2 of this order, the first, second and third respondents are ordered forthwith to take such steps and to do all such things as may be necessary to:

(a) enforce the provisions of the Act;

(b) comply with the aforesaid General Policy;

(c) secure compliance with the aforesaid General Policy

in the territory that formerly constituted the Republic of Transkei.

4. That, save to the extent that they may be permitted to in terms of any law, the fourth, fifth, sixth and seventh respondents be and they are hereby restrained and interdicted from granting or purporting to grant any rights in land which formed part of the territory that formerly constituted the Republic of Transkei.

5. That the respondents, jointly and severally, are ordered to pay the costs of this application.'

First applicant, an association incorporated not for gain in terms of s 21 of the Companies Act 61 of 1973, was incorporated with its main object being

'to promote environmental conservation and environmental education in Southern Africa'.

Its aim is 'to promote public participation in caring for the Earth' and its credo and mission is

'to contribute to conserving the Earth's vitality and diversity by:

(a) promoting and participating in environmental education;

(b) building environmental values and sustainable life styles;

(c) securing the protection and wise use of natural areas of wild life;

(d) generating individual and community action;

(e) serving as an environmental watchdog;

(f) influencing policy and decision-making;

(g) operating democratically'.

Third and fourth applicants are members of the Wild Coast Cottage Owners Association ('the Cottage Owners Association'), a voluntary association of persons who are all owners or occupiers of approved sites in designated and recognized resort areas along the Transkei Wild Coast.

It is common cause between the parties that over the past few years certain land use practices have developed along almost the entire Transkeian coast line which have been destructive, are destructive and are potentially destructive of the ecological integrity of that coast line and that, as such, they constitute a very real threat to the environmental sensitivity of the area in question.

In order fully to understand applicants' complaints in respect of such land use practices it is necessary to set out the provisions of s 39 of Decree 9 (Environmental Conservation) (Tk) ('the Decree') referred to in para 1 of the notice of motion. Section 39 provides as follows:

39(1) There is hereby established on the landward side of the entire length of the sea-shore excluding any national park, national wildlife reserve, municipal land, seaside resort, site occupied in terms of proc 174 of 1921 or Proc 26 of 1936, privately-owned land and leasehold land, a coastal conservation area 1 000 metres wide measured:-

(a) in relation to the sea, as distinct from a tidal river and tidal lagoon, from the high-water mark;

(b) in relation to a tidal river or tidal lagoon, from the highest water-level reached during ordinary storms during the most stormy period of the year, excluding exceptional or abnormal floods.

(2) Notwithstanding anything in any other law or in any condition of title contained, no person (including any department of State) shall within the coastal conservation area, save under the authority of a permit issued by the Department in accordance with the plan for the control of coastal development approved by resolution of the Military Council:-

(a) clear any land or remove any sand, soil, stone or vegetation;

(b) develop any picnic area, caravan park or like amenity;

(c) erect any building;

(d) construct any railway, landing-strip, slipway, landing stage or jetty;

(e) build any dam, canal, reservoir, water purification plant, septic tank or sewerage works;

(f) lay any pipeline or erect any power-line or fencing;

(g) establish any waste disposal site or dump any refuse;

(h) construct any public or private road or any bridlepath or footpath; or

(i) carry on any other activity which disturbs the natural state of the vegetation, the land or any waters or which may be prescribed.'

The land practices and other activities with which applicants are concerned are set out in the affidavit of Mr. Cooper as follows:

(a) the grant of rights of occupation and the allocation of sites within the coastal conservation area by individual chiefs, headmen or tribal authorities (including the fourth to seventh respondents) to private individuals which result in effect to a disposal of the land in question for a relatively small consideration;

(b) the construction of shacks, dwellings and other structures on such sites aforesaid resulting in environmental degradation and detracting from the aesthetic qualities of the coastal conservation zone;

(c) the construction of roads, pathways and tracks along cliff edges, through forests and other environmentally sensitive areas causing permanent damage to such areas and which again detract from the environmentally aesthetic qualities of the coastal conservation zone;

(d) the insensitive and unsustainable exploitation of the resources (including the marine resources) in such areas'.

These practices occur along and within almost the entire Transkeian coastal conservation zone established in terms of s 39(1) of the Decree. In some instances, in return for the allocation of a site to a particular individual, the chief or headman involved was paid an amount in the order of approximately R200 together with a bottle of brandy. Neither chiefs nor headmen have authority to allocate sites.

All these averments are admitted by first respondent.

Applicants have set out in great detail specific instances of such abuses which have been and are occurring within areas falling within the coastal conservation zones. The abuses are graphically illustrated in the photographs annexed both to the founding affidavit and to the replying affidavit attested to by third applicant, Mr. MacRobert. The destruction of natural vegetation; of indigenous bush; of coastal dunes and forest; and of mangrove areas, in order to clear the way for construction to take place, is clearly depicted. It is clear, therefore, and this is not denied by the respondents, that considerable and irreversible environmental degradation of the Transkei Wild Coast within the coastal conservation zone has been and was occurring at the time of the institution of these proceedings on 7 September 1995, in blatant contravention of the provisions of s 39 of the Decree.

Second applicant avers in his affidavit that he has been, both personally and in his capacity as Conservation Director of first applicant, closely associated with and interested in the environmental and nature conservation priorities along the Wild Coast for more than 20 years. He was the chief architect of a report published by first applicant during April 1977 at the request of the then Transkei government, in which a preliminary survey of the Wild Coast was undertaken in order to assist that Government with its development plans. During 1992 first applicant was retained by the then Transkei government to compile a survey of Transkei forests, including all the coastal forests, and second applicant was again involved in the publication thereof.

Because of the concern of the applicants at the unabated environmental degradation observed by them, they, together with certain others, instructed their attorneys to address a letter on 16 May 1995 to, inter alia, first, second and third respondents in which attention was drawn to the unlawful practices which were occurring and in which the respondents were requested to take the requisite action in order to put a halt to such practices. On 17 May 1995 fourth applicant, Mr. Taylor, and his attorney, Mr. Ridl, attended a meeting at Bisho with third respondent, Minister Delport, at which, *inter alia*, third respondent indicated that he wished to co-operate with the efforts made by applicants to halt the unlawful practices but that he had had no success since taking office in preventing them. It was agreed that Mr. Ridl would prepare a memorandum for third respondent, detailing the law applicable and setting out the steps which could be taken by him. Such a memorandum was duly prepared and delivered to third respondent. Mr Ridl referred therein specifically to s 39 of the Decree and urged, *inter alia*, that criminal prosecutions should be instituted without delay against identified offenders.

Prior to the meeting with third respondent the third applicant, Mr. MacRobert, had met with second respondent, Premier Mhlaba, who had stated in relation to the destructive activities taking place that the applicants should 'stop the vultures'.

Applicants aver that, despite all their efforts to persuade first, second and third respondents to comply with the obligation to enforce compliance with the provisions of s 39 of the Decree, the respondents have not done so and that they are accordingly obliged to seek the relief set out in the notice of motion.

It is common cause that the administration of chapter 7 of the Decree, within which falls s 39, is vested in first respondent, and only first respondent chose to file an affidavit in opposition to this application. In this affidavit, attested to by Mr. Botha, a legal administration officer in the employ of first respondent's department,it is averred that the applicants have not brought the application in good faith and that the application amounts to an abuse of the process of Court in that applicants were aware or should have been aware of the recommendation made by first respondent during May 1995 to the effect that a task group be established to address the concerns of the applicants.

The Eastern Cape Coastal Development Task Group ('the Task Group'), in the formation of which Mr. Botha avers the Cottage Owners Association, amongst others, was instrumental, held its first meeting on 14 August 1995 and the Cottage Owners Association, of which third applicant is a member, was there represented by fourth applicant. The brief of the Task Group, as set out in Mr. Botha's affidavit, is to address, inter alia, the following issues:

1. Determining and drafting appropriate amendments to the Environment Conservation Act 73 of 1989 to enable it to apply in the former Transkei and Ciskei.

2. Establishing a sub-committee to identify and proceed with appropriate action to assign relevant decrees to the Eastern Cape Provincial Government.

3. Making recommendations regarding the replacement of decrees with relevant sections of the Environment Conservation Act.

4. Assisting the Eastern Cape Government to direct a formal request to the Department of Environmental Affairs for the president to assign relevant decrees or sections thereof to the Eastern Cape provincial Government.

5. Undertaking a survey of the coast line to determine the number, position, state and ownership of:

(i) legal cottages;

(ii) illegal cottages;

(iii) other developments.

6. Presenting data to the relevant authorities with regard to possible legal action against illegal occupiers of coastal sites.'

Mr. Botha refers further to the fact that certain action has been taken by first respondent relating to the institution of criminal proceedings in the Port St. John's magistrate's court against certain persons in respect of alleged contraventions of s 39 of the Decree, as well as an application for an interdict brought on 31 October 1995 in the Transkei provincial Division by first respondent against nine respondents (including the fourth respondent in these proceedings). He states that other applications for interdicts against illegal occupiers of other sites along the Wild Coast will soon be launched.

In reply the applicants deny that they were or should have been aware of the recommendation allegedly made by first respondent during May 1995, in that no public reference to such recommendation was made by first respondent either in the Parliamentary debate on his department or elsewhere. In this regard it appears from the minutes of the first meeting of the Task Group that such recommendation was contained in a letter written by first respondent to third respondent. Applicants admit that on 13 July 1995 fourth applicant was invited to be a member of the Task Group, but allege that this was the first intimation any of the applicants had concerning the establishment thereof. They point out that, despite their wealth of experience and knowledge of the Transkei coast line, neither first nor second applicants were invited to participate in the affairs of the Task Group. They allege further that the action taken by first respondent in order to enforce compliance with s 39 of the Decree was only taken after institution of these proceedings. They aver that the unlawful development taking place in the coastal conservation zone has actually increased since the institution of these proceedings and furnish details, again supported by photographic evidence, of illegal building activities which occurred at various places along the Wild Coast during the months of October to December 1995, immediately prior to the filing of the replying affidavit and in respect of which first respondent has taken no action. They deny therefore that the application constitutes an abuse of the proceedings of the Court.

At the commencement of the hearing of the application I was informed that an agreement had been reached between applicants and the second and third respondents, who were concerned that the litigation should be resolved and that proper communication between themselves and applicants should be restored. The terms of that agreement are not relevant to the determination of this application. The application then proceeded against first and fourth to seventh respondents. Although I was informed by both Mr. Gauntlett, who with Mr. *Vahed* appeared for applicants, and Mr *Moerane*, who with Mr. *Pakade* appeared for first respondent, that fourth to seventh respondents had, to the best of their knowledge, not entered an appearance to oppose the application, I have since discovered, whilst in the course of preparing this judgment, just such a notice not forming part of the indexed papers. Fourth to seventh respondents did not, however, file any opposing papers, nor were they represented at the hearing of the application. In the circumstances it can be taken that they abide by the decision of the Court.

Application for recusal

Before commencement of argument Mr Mo*erane* informed me that he had instructions to apply for my recusal from the case. He stressed that in making the application he was acting on the specific instructions of the Government Attorney, Mr. Jika, and that the application involved no imputation upon my integrity. After hearing argument in this regard I refused the application for my recusal and indicated that my reasons for so doing would follow. These then are my reasons:

The law in respect of the test for bias has recently been settled in the case of BTR *Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A). At 694F-695B Hoexter JA stated:

In *R v Chondi and Another* 1933 OPD 267 Krause JP made the following observations (at 271) which in this country are as pertinent now as they were some 60 years ago:

"It is a matter in of the gravest public policy that the impartiality of the courts of justice should not be doubted, or that the fairness of a trial should not be questioned; otherwise, the only bulwark of the liberty of the subject, in these times of revolutionary tendencies, would be undermined."

It is the right of the public to have their cases decided by persons who are free not only from fear but also from favour. In the end the only guarantee of impartiality on the part of the courts is conspicuous impartiality. To insist upon the appearance of a real likelihood of bias would, I think, cut at the very root of the principle, deeply embedded in our law, that justice must be seen to be done. It would impede rather than advance the due administration of justice. It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so clearly trivial in nature as to be disregarded under the de mini*mis* principle) he is disqualified, no matter how small the interest may be. See in this regard the remarks of Lush J in *Sergeant and Others v Dale* (1877) 2 QBD 558 at 567. The law does not seek, in such a case, to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter. I find myself in complete agreement with what was forcibly stated by Edmund Davies LJ in the *Metropolitan Properties case supra* at 314C-D:

"With profound respect to those who have propounded the 'real likelihood' test, I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged, and that any development which appears to emasculate that requirement should be strongly resisted."'

With these remarks in mind I turn to consider the merits

of the application. The relief sought by applicants is, *inter alia*, the first respondent to enforce the provisions of the Decree, more especially in relation to the illegal building of cottages and roads in the coastal conservation zone; and (ii) a *declarator* to the effect that the provisions of the Environment Conservation Act 73 of 1989 apply to the area comprising the former Transkei insofar as they are not inconsistent with the provisions of the Decree. It is perhaps also relevant to reiterate that third and fourth applicants are lawful occupiers of cottages on the Wild Coast and that both are members of the Cottage Owners Association. I am not now, nor have I been, a member of the Cottage Owners Association or of the Wildlife Society.

The basis of the application for my recusal is that I too am the (lawful) occupier/owner of a cottage on the Wild Coast and that this fact may cause the first respondent reasonably to entertain the suspicion that I will be biased against it. I have deliberately placed the word 'lawful' in parenthesis as the gravamen of Mr *Moerane's* submission appears to be that because the legality of the occupation and/or ownership of certain cottages on the Wild Coast is under scrutiny, not only by first respondent, but also by the well-known Heath Commission into unlawful land dealings in the Eastern Cape, my right, title or interest to the cottage which I occupy may well be under threat. In these circumstances a reasonable perception might be created that I could not apply my mind objectively to the issues raised by the application. I do not intend to enter into a debate as to the legality or otherwise of my occupation of the cottage in question which, to the best of my knowledge, was constructed more than 60 years prior to the promulgation of the Decree, although I have no reason to doubt such legality. In my view Mr *Moerane's* argument bears the seeds of its own destruction. Having regard to the nature of the main relief sought herein, namely the enforcement of the provisions of the Decree against illegal occupiers and builders of cottages, it seems to me that the only parties who could remotely have cause to complain about my possible partiality are the applicants. Were my occupation of the cottage to be illegal in terms of the Decree the *mandamus* sought by applicants would obviously be inimicable to my own interests.

In any event, leaving the argument as to legality aside, I have no doubt whatsoever that the mere fact that I am the occupier of a cottage on the Wild Coast, in the absence of anything more such as my membership of the Cottage Owners Association, could not in any way in the circumstances of this case give rise to a reasonable apprehension of bias on my part by first respondent. Compare *Bromley London Borough Council v Greater London Council and Another* [1982] 1 ALL ER 129 (CA) at 131*j*-132*a*.

Accordingly the application falls to be dismissed.

<u>*Locus standi*</u>

The first issue raised, and one which occupied a not inconsiderable part of applicant's heads of argument, concerned the question of *locus standi*. Despite the earlier attitude of first respondent as evinced in Mr Botha's affidavit, Mr. *Moerane* in his heads of argument conceded that applicants had *locus standi*. As I understand it, this concession was based on the provisions of s 7(4)(*b)*, read with s 29, of the Constitution of the Republic of South Africa Act 200 of 1993 ('the Constitution'). See *Van Huysteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* 1996 (1) SA 283 (C).

I may mention that in my opinion there is also much to be said for the view that, in circumstances where the *locus standi* afforded persons by s 7 of the Constitution is not applicable and where a statute imposes an obligation upon the State to take certain measures in order to protect the environment in the interests of the public, then a body such as the first applicant, with its main object being to promote environmental conservation in South Africa, should have *locus standi* at common law to apply for an order compelling the State to comply with its obligations in terms of such statute.

In a far-sighted article, 'The Ecological Norm in Law or the Jurisprudence of the Right Against Pollution' (1975) 92 SA*LJ* 78, the late Professor Barend van Niekerk stated that the knowledge which society had then about the nature of environmental pollution and its encroaching dangers to all members of society called urgently for

'a critical re-evaluation of how the existing legal rules concerning *locus standi* should be adapted in order to cope more adequately with the interests of society in general and of each member of society in particular'.

(AT 88.) He was of the opinion that the most obvious solution to the problem of *locus standi* was 'to regard the environment as being peculiarly of interest to every member of society' and he continued by saying that, because the effect of environmental blight will not spare any member of society in the final analysis, it did not seem misplaced

'in terms of existing legal principles to give every member of society the right to protect what amounts to his own interest. An adoption of this line of reasoning will not ... erode the basic principle of our law on which *locus standi* to sue is based, namely "that no man can sue in respect of a wrongful act, unless it constitutes the breach of a duty owed to him by the wrong-doer, or unless it causes him some damage in law".'

See too Rabie and Eckard '*Locus Standi*: The Administration's Shield and the Environmentalist's Shackle' (1976) 9 C*ILSA* 139; Cheryl Loots '*Locus Standi* to Claim Relief in Enforcement of Legislation' (1987) 104 *SALJ* 131; Tobias van Reenen *'Locus Standi* in South African Environmental Law: A Reappraisal in International and Comparative Perspective' 1995 (2) S*AJELP*; and compare *Bamford v Minister of Community Development and State Auxiliary Services* 1981 (3) SA 1054 (C) at 1060A.

I am well aware that the English law relating to lo*cus standi* has developed very differently to the South African law in this regard. (As to which see, in particular, Baxter *Administrative Law* at 668-9; *Cheryl Loots (op cit)*.) Nevertheless the English cases are instructive and it is interesting to note that the requirement in English law of 'sufficient interest' has been interpreted as being merely a means of protection against 'busy-bodies, cranks and other mischief-makers'. *R v Inland Revenue Commissioners: Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 653G-H. In the same case at 644C Lord Diplock stated that there would be 'a grave l*acuna* in our system of law if a pressure group ... or even a single public-spirited taxpayer were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped'.

In R *v Inspectorate of Pollution and Another, Ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 329 (QB) the Court upheld the *locus standi* of the Greenpeace Organisation

'who, with its particular experience in environmental matters, its access to experts in the relevant realms of science and technology (not to mention the law), is able to mount a carefully selected, focused, relevant and well-argued challenge'.

(At 350h.)

At 350e-*f*, Otton J stated that if he were to deny standing to Greenpeace,

'those it represents might not have an effective way to bring the issues before the court. There would have to be an application either by an individual employee ... or a near neighbour. In this case it is unlikely that either would be able to command the expertise which is at the disposal of Greenpeace. Consequently, less well-informed challenge might be mounted which would stretch unnecessarily the court's resources and which would not afford the court the assistance it requires in order to do justice between the parties.'

One of the principal objections often raised against the adoption of a more flexible approach to the problem of *locus standi* is that the floodgates will thereby be opened, giving rise to an uncontrollable torrent of litigation. It is well, however, to bear in mind a remark made by Mr. Justice Kirby, President of the New South Wales Court of Appeal, in the course of an address at the Tenth Anniversary Conference of the Legal Resources Centre, namely that it may sometimes be necessary to open the floodgates in order to irrigate the arid ground below them. I am not persuaded by the argument that to afford *locus standi* to a body such as first applicant in circumstances such as these would be to open the floodgates to a torrent of frivolous or vexatious litigation against the State by cranks or busybodies. Neither am I persuaded, given the exorbitant costs of Supreme Court litigation, that should the law be so adapted cranks and busybodies would indeed flood the courts with vexatious or frivolous applications against the State. Should they be tempted to do so, I have no doubt that an appropriate order of costs would soon inhibit their litigious ardour.

In any event, whilst cranks and busybodies who attempt to abuse legal process do no doubt exist, I am of the view that lawyers are sometimes unduly apprehensive and pessimistic about the strength of their numbers. The meddlesome crank and busybody with no legal interest in a matter whatsoever, mischievously intent on gaining access to the court in order to satisfy some personal caprice or obsession, is, in my view, as has been remarked elsewhere, more often a spectral figure than a reality.

Twenty-one years have passed since Professor *Van Niekerk's* clarion call for an adaptation of the law relating to *locus standi* in environmental matters. It may well be that the submissions made by him have come of age and that the time has arrived for a re-examination of the common law rules of standing in environmental matters involving the State and for an adaptation of such rules to meet the ever-changing needs of society. Compare M M Corbett 'Aspects of the Role of Policy in the Evolution of our Common Law' (1987) 104.SA*LJ* 52

<u>The application for a *mandamus* against first respondent</u>

As will have been seen from the above exposition of the facts, the crisp defence raised by first respondent is that, in view of the fact that the Task Group was, to applicants' knowledge, addressing the very issues raised by this application and that action has in fact been taken by first respondent in regard to these issues, the application is unnecessary and amounts to an abuse of the process of Court.

The Court has a general inherent power to set aside proceedings on the ground that they are frivolous and/or vexatious and that they amount to an abuse of the process of the Court. In Sher *and Others v Sadowitz* 1970 (1) SA 193 (C) Corbett J (as he then was) reiterated that it is clear that the power is one that should be sparingly exer-

cised and only in very exceptional cases, and that the Court must be satisfied, before setting aside such a proceeding, that it is as a matter of certainty obviously unsustainable. (At 195C-D.)

It appears from the minutes of the first meeting of the Task Group on 14 August 1995 that the recommendation for the establishment thereof was contained in a letter from first respondent to third respondent. In these circumstances it is hardly surprising that applicants knew nothing thereof until after its formation. What is relevant, however, is that fourth applicant was invited to and did attend the meeting of the Task Group as a representative of the Cottage Owners Association of which third applicant is a member and that the applicants were therefore aware of the existence of the Task Group prior to the institution of these proceedings. Applicants aver that the Task Group's role was advisory only and that at no time did the Group even suggest that decisive action be taken against illegal land practice users. They aver further that the fact that the Task Group met only once a month is indicative of the ineffective and totally inappropriate manner in which the urgent problem was being addressed. In my view, far from these proceedings being an abuse of the process of the Court, a perusal of the minutes of the meeting of the Task Group on 14 August 1995 bears out applicants' averments. It appears therefrom that the main function of the Task Group was 'to advise the various Ministers on the appropriate steps to be taken regarding problems in the coastal areas'. (At para 9.3.) That the main function was indeed advisory is borne out by the minutes themselves. At that meeting fourth applicant specifically stated that, whilst there was a need to rationalise legislation, it was essential that urgent action be taken against offenders immediately so as to prevent the proliferation of illegal cottages estimated as comprising up to 300 units. He pointed out that to wait until the legislation had been rationalised would be disastrous as by then valuable coastal resources would have been irreparably damaged. His speech elicited an expression of appreciation from the chairman. A 'list of actions' was determined at the conclusion of the meeting, in which every action to be taken was accorded a priority ranging from 1 to 5, as well as medium term. Not surprisingly, the issue of a press release informing the public of the establishment of the Task Group and of its activities was accorded priority 'number one'. Despite fourth applicant's impassioned plea to take action and not to wait for the rationalisation of legislation, such rationalisation was accorded priority 'number two'. Only then was priority 'number three' referred to, in the following somewhat startling terms:

'(D)etermine political support from proposed action against owners of cottages erected illegally.'

In this regard the action to be taken was stated to be:

'(P)resent proposed "test case" legal action against the owners of 20 seaside residential sites on State land close to the high water mark near Manteku Store in the Mtambelala Administrative Area, Lusikisiki district, to the Minister of Land Affairs; Eastern Cape Agriculture and Conservation and Environmental Affairs and Tourism to determine support *for initiative.'* (My emphasis.)

What exactly constituted 'political support' and why such 'political support' had to be determined before action could be taken to stop the blatantly illegal degradation of the coastal conservation zone of the Wild Coast was not explained, nor has it since been explained by Mr. Botha, who participated in the meeting of the Task Group. It is difficult to understand why, in the face of overwhelming evidence of illegal land practice uses, it was considered necessary to determine 'political support' for action to be taken to put a stop thereto and why there should have been such a remarkable and disturbing reluctance immediately to invoke the provisions of s 39 of the Decree. It is telling that nowhere in his affidavit does Mr. Botha state why it was necessary to adopt such a 'kid glove' approach, nor does he state that first respondent was logistically unable to enforce the provisions of s 39.

Priority 'number 4' in terms of the 'list of actions' was stated as being to

'inform relevant authorities of the illegal activities to stop of the issuing of certificates or identification of sites' (sic).

The action required in respect thereof was stated as follows:

'Inform via Minister of Environmental Affairs and Tourism the Eastern Cape Premier (with respect to permission of our traditional leaders); Eastern Cape Minister of Agriculture and Conservation (in respect of actions by Agriculture Development Officers); Department of Land Affairs (in respect of former Land Tenure Department and Surveyor General); Department of Justice (in respect of magistrates) of current problems and request *that* all illegal activities perpetuated in the erection of illegal cottages and alienation of land be ceased.' (My emphasis.)

In these circumstances, where 'political support' for legal action had to be first determined and where persons illegally allocating sites, sometimes in return for little more than a bottle of brandy, were to be 'requested' to stop doing so, applicants' averred sense of frustration at the lack of any concrete action in terms of s 39 of the Decree becomes almost palpable. The overwhelming sense to be gained from a reading of the minutes of the Task Group is that of the slow and inexorable grinding of wheels across a bureaucratic landscape, regardless of the urgency of the situation. My above comments should not be misconstrued. The Task Group may well be performing excellent work in regard to other matters, such

as the eventual rationalisation of applicable legislation. My comments relate only to its performance in relation to the enforcement of Decree 9. When it is borne in mind that the Task Group is a non-statutory advisory body of uncertain nature and duration, its difficulties in this regard are perhaps understandable. The fact remains, however, that first respondent's opposition to this application is based largely upon the existence of the Task Group and its actions and these actions have, in my view, fallen woefully short of establishing that the provisions of s 39(2) of the Decree were and are being enforced by first respondent.

It is also clear from the papers that it was only after the institution of this application that first respondent took the action referred to by Mr. Botha in his affidavit. In the light of the minutes of the Task Group the inference is inescapable that the launching of the application galvanised first respondent into such action as it eventually took. The action taken by first respondent does not, however, in any way address all the abuses raised by applicants in their papers.

I am satisfied in all the circumstances that applicants were and are entitled to approach the Court for relief. In granting relief to the applicants the Court is not crossing the boundary between what is administration, whether good or bad, and what is an unlawful failure to perform a statutory duty by the body or person charged with performance of that duty.

In my view, however, the relief sought by applicants in para 1 (a) of the notice of motion is couched in terms that are much too wide and vague. I am therefore not prepared to grant an order in terms of para 1 (a) of the notice of motion. Applicants' case was premised throughout on land practice uses in contravention of s 39 of the Decree. In my view, therefore, applicants are entitled only to an order in terms of para 1 (b), namely that first respondent enforce the provisions of s 39(2) of the Decree. Such an order is easily capable of compliance and, as I have stated above, nowhere has first respondent averred that it lacks the logistical means to enforce those provisions.

The application for a *declarator*

This aspect of the case can, in my view, be very shortly disposed of. It is common cause that before 27 April 1994 Decree 9 applied within the area which comprised the then Republic of Transkei and that the Environment Conservation Act 73 of 1989 applied within the area which then comprised the Republic of South Africa. Mr *Gauntlett* submitted, with specific reference to s 235(6) read with s 126(3) of the Constitution of the Republic of South Africa Act 200 of 1993, that the Environment Conservation Act 73 of 1989 now applied to and was enforceable in the territory that formerly constituted the Republic of Transkei.

In my view, however, Mr. *Moerane* correctly submitted that the relevant section of the Constitution Act in this regard was s 229, which provides:

Continuation of existing laws

Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority.'

'Section 229 provides a constitutional foundation for the continuation of the "old laws" after the coming into force of the Constitution ... the continuity given by s 229 is applicable only to areas in which such laws were in force prior to the commencement of the Constitution.'

(Per Chaskalson P in Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC) (1995 (10) BCLR 1289) at para [87].)

Clearly, therefore, until such time as the Environment Conservation Act 73 of 1989 is applied by a law of a competent authority to the whole of the national territory, it shall continue to apply only to that part of the national territory in which it was in force immediately before the commencement of the Constitution. (Compare s 232 of the Constitution.)

Section 235(6), read with s 126(3), relied upon by Mr *Gauntlett*, deals with the question of executive authority and does not purport to extend the territorial application of any laws which immediately prior to the commencement of the Constitution were in force in any particular area forming part of the national territory.

The application for a de*clarator* in terms of para 2 of the notice of motion must accordingly fail. I furthermore decline Mr. *Gauntlett's* invitation to grant a *declarator* incorporating certain submissions made by Mr. Botha during the course of his presentation at the first meeting of the Task Group on 14 August 1995. This was not the relief sought by applicants and neither first respondent, nor Mr. Botha in particular, were required to apply their minds thereto.

In these circumstances the relief sought by applicants in terms of paras 2 and 3 of the notice of motion must be refused.

The interdict sought against fourth to seventh respondents

As I have stated above, these respondents, despite having entered an appearance to oppose the application, filed no papers and did not appear at the hearing. Accordingly

they have not denied applicants' allegations concerning the wrongful and unlawful allocation by them of sites to certain persons. This being so, applicants are entitled to an order against them in terms of para 4 of the notice of motion.

Costs

It is clear that the primary focus of the application was the interdictory relief sought against the various respondents in differing respects. The application for a *declarator* constituted a relatively insubstantial component of the application as a whole. In these circumstances, although applicants have failed in their application for a *declarator*, they have nevertheless achieved substantial success in the application as a whole and there is accordingly no reason why they should be deprived of any part of their costs against first respondent. Such costs will be paid by first respondent jointly and severally with second and third respondents, who in terms of their agreement with applicants agreed to pay such costs. Counsel were agreed that the costs of two counsel should be allowed.

Insofar as fourth to seventh respondents are concerned, no order for costs was sought against them nor, in my view, would any such order be appropriate in the circumstances of this case.

It remains, however, to deal with the question of the wasted costs incurred in consequence of the postponement of the application on 18 April 1996, which costs were reserved for later decision. It appears from the papers that the date of 18 April 1996, which fell during the Court recess, was specifically allocated by the Registrar at applicants' request after consultation with the Judge President. A notice of set down of the matter was then served on the Government Attorney by applicants' attorney on 3 April 1996. Mr. Jika, the Government Attorney, states in an affidavit that the matter was set down for hearing on that date without any prior consultation with himself or first respondent. On receipt of the notice of set down he immediately communicated with his counsel, only to be advised that they would not be available as senior counsel was out of the country. He then advised applicants' attorney of record, Mr. Poyser, that the date was not suitable. According to Mr. Poyser, this letter only came to his attention on 9 April 1996 after Easter weekend. Mr. Jika telephoned Mr. Poyser on 9 April 1996 and reiterated his concern that the matter had been set down during recess without prior consultation with him. According to Mr. Poyser, he advised Mr. Jika to liaise directly with applicants' instructing attorneys so as to avoid unnecessary delays.

Mr. Jika is silent as to whether or not he did so, but accordingly to him on 16 April 1996 he again wrote to Mr. Poyser advising him that an application would be made for the postponement of the matter on 18 April 1996. On 17 April 1996 Mr. Poyser replied, stating that the application would proceed. On 18 April 1996 a substantive application for postponement was filed by Mr. Jika after 10:00 am. The lateness of the application, which contained factual averments which required to be answered, made a postponement unavoidable. In my view the fact that Mr. Moerane was not available to argue the application on 18 April 1996 would not normally have constituted a valid ground on which to seek a postponement. Mr. Jika was also dilatory in failing to launch the substantive application for a postponement on failing to receiving a positive reply to his request therefore on 9 April 1996. On the other hand, in requesting the permission of the Judge President for the hearing of the matter during the Court recess, the applicants were seeking an indulgence to suit the convenience of themselves and their counsel. In these circumstances applicants should, in my view, have consulted with respondents concerning the suitability of the proposed date of hearing.

I am accordingly of the view that the most appropriate and fair order would be that each party pay their own costs in respect of the hearing on 18 April 1996.

The order

The following order is therefore made:

1. That the first respondent be and is hereby ordered forthwith to take such steps and to do such things as may be necessary to enforce the provisions of s 39(2) of the Decree 9 (Environment Conservation) promulgated by the former Government of Transkei on 24 July 1992.

2. That, save to the extent that they may be permitted to in terms of any law, the fourth, fifth, sixth and seventh respondents be and they are hereby restrained and interdicted from granting or purporting to grant any rights in land which formed part of the territory that formerly constituted the Republic of Transkei.

3. That first respondent is ordered to pay the costs of this application jointly and severally with second and third respondents, the one paying the others to be absolved. Such costs shall exclude the reserved costs of the hearing on 18 April 1996, in respect of which each party shall bear their own costs.

Applicants' Attorneys: *Ridl-Glavovic*, Westville; *John C Blakeway & Leppan, Inc, Umtata.* First, Second and Third Respondents' Attorney: *Government Attorney*, Umtata.

MINISTER OF HEALTH AND WELFARE
v.
WOODCARB (PTY) LTD AND ANOTHER

NATAL PROVINCIAL DIVISION

HURT J 1995 March 29; December 15 Case No. 1773/94

Environmental law - Pollution - Atmospheric pollution - Carrying on 'scheduled process' within a controlled area in contravention of s.9(1) of Atmospheric Pollution Prevention Act 45 of 1965 - Remedies - Remedy of interdict available to enforce provisions of Act - Minister of Health and Welfare not limited to remedy of criminal prosecution.

Environmental law - Pollution - Atmospheric pollution - Carrying on

'scheduled process' within a controlled area in contravention of s.9(1) of Atmospheric Pollution Prevention Act. 45 of 1965 - Remedies - Interdict - *Locus standi* - Minister of Health and Welfare responsible for proper administration and enforcement of Act - Purpose of provisions of ss 9-13 of Act being to 'control' installation and use of 'scheduled processes' throughout Republic - Minister needing remedy of interdict for that purpose - Minister accordingly having *locus standi* to apply for such interdict - Where one of respondent's neighbours applicants in such proceedings, Minister also having *locus standi* to apply for interdict restraining conduct infringing right to 'an environment which is not detrimental to their health and well-being' enshrined in s 29 of Constitution of the Republic of South Africa Act 200 of 1993.

Environmental law - Pollution - Atmospheric pollution - Carrying on

'scheduled process' within a controlled area in contravention of s 9(1) of Atmospheric Pollution Prevention Act 45 of 1965 - Generation of smoke in such circumstances an infringement of neighbours' right to 'an environment which is not detrimental to their health and well-being' enshrined in s 29 of Constitution of the Republic of South Africa Act 200 of 1993.

The Atmospheric Pollution Prevention Act 45 of 1965 does authorize the Minister of Health and Welfare to apply for an interdict to enforce the provisions of s 9(1) thereof and to restrain conduct which constitutes the carrying on of a 'scheduled process' within a controlled area without a current registration certificate in contravention of s 9(1). The Minister is not limited to the specific criminal penalties provided for contraventions of s 9. The Act provides no specific 'remedies' which the Minister or any other interested party can invoke to stop a person from contravening it. In such circumstances the principle that the Act is exclusive as to what may be done to enforce its provisions does not arise. (At 161D/E-F, read with 159H-1, paraphrased.

The dictum in Johannesburg City Council v Knoetze and Sons 1969 (2) SA 148 (W) at 154F-155B approved and applied.

The Minister of Health and Welfare is responsible for the proper administration and enforcement of the Atmospheric Pollution Prevention Act. The whole purpose of the legislation, and particularly of the provisions of ss 9-13 of the Act, is to 'control' the installation and use of scheduled processes throughout the Republic, seeing that the whole of the Republic has been designated as a 'controlled area'. It cannot, in these circumstances, be contended that the Minister does not need the remedy of injunction to enable her to control these processes effectively and thereby discharge her duties under the Act. Accordingly the Minister has *locus standi* to apply for an interdict to restrain conduct which constitute a contravention of s 9(1) of the Act. (At 1611-162A.)

Conduct which is unlawful in the light of s 9 of the Atmospheric Pollution Prevention Act (*in casu* the generation of smoke producing noxious or offensive gases at the respondents' sawmill by means of a scheduled process) is also 'an infringement of the rights of the respondents' neighbours to an environment which is not detrimental to their health and well-being', enshrined for them in s 29 of the Constitution of the Republic of South Africa Act 200 of 1993. Insofar as none of those neighbours are applicants for an interdict straining such infringement, the Minister of Health and welfare can rely on the provisions of s 7(4)(b)(iv) of the Constitution for *locus standi* to apply to Court for an interdictre to restrain conduct which infringes the rights under s 29 of the neighbours of such respondent. (At 164E-G.)

The following decided cases were cited in the judgement of the Court:

Johannesburg City Council v Knoetze and Sons 1969 (2) SA 148 (W)

Madrassa Anjuman Islamia v Johannesburg Municipality 1917 AD 718 Plascon-Evans Paints Ltd. v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

The following statutes were considered by the Court:

The Atmospheric Pollution Prevention Act 45 of 1965, ss 9, 10, 11, 12 and 13; see Juta's Statutes of South Africa 1995 vol 3 at 1-270-1-271.

The Constitution of the Republic of South Africa Act 200 of 1993, ss 7(4)(b)(iv) and 29: see Juta's Statutes of South Africa 1995 vol 5 at 1-211 and 1-213.

Application for an interdict. The facts appear from the reasons for judgement.

C.J. Hartzenberg SC (with him M.G. Roberts) for the applicant.

D.A. Gordon SC for the respondents.

Cur adv vult.

Postea (December 15).

Hurt J: The second respondent is the current owner of an immovable property described as 'Sub I Versameling No. 15759'. I say 'current owner', because the first respondent was the owner of the property until 1993, when the respondents concluded an agreement in terms of which the first respondent sold the property to the second respondent which then 'employed' the first respondent to run a sawmilling business on the property. That business had hitherto (since 1991) been owned and operated by the first respondent. Initially this application was brought against the first respondent only but when the first respondent indicated, in the answering affidavit, that it was no longer the owner of the immovable property, an application was made by the applicant to join the second respondent. When the matter was argued, Mr. Gordon, who appeared for the respondents, made no point of the distinction between ownership of the property and conduct of the business and I will consequently refer to the first and second respondents collectively for the purposes of this judgement as 'the respondent'.

In the latter part of 1991 the respondent established the sawmilling plant on the property referred to above. The property is situated in an almost exclusively agricultural area but, as I understand the papers, the timber which was to be handled in the sawmill was not (or was not all) grown on the respondent's farm. Part of the operation of the sawmill involved disposing of the large quantity of 'sawdust and wood chips generated by the sawing and other treatment processes. The volume of this material apparently exceeded, by far, any market demand for it, and, because it is not easily degradable into compost, the only option open to the respondent for its disposal was to burn it. With this purpose in mind, the respondent installed a piece of equipment called a 'Rheese burner' (I am opting for the spelling used by the respondent) on its property, and to this unit the respondent consigned all the sawdust and other non-usable or unsellable by-products of the sawmilling operation. It is this burning process which has given rise to this application and it is necessary to set out briefly the history of the development of the dispute.

In 1968 the then Minister of Health had, in terms of the powers vested in him by s 8 of the Atmospheric Pollution Prevention Act 45 of 1965 (to which I shall hereinafter refer as 'the Act'), declared the whole of the Republic of South Africa to be a 'controlled area'. Section 9 (1) of the Act precludes any person from carrying on a 'scheduled process' in such a controlled area unless he (or she or it) is the holder of a current registration certificate authorizing him to carry on that process.[1]

A scheduled process is defined as 'any work or process specified in the Second Schedule'. Item 67 of the Second Schedule reads:

'Wood-burning and wood-drying processes: That is to say, processes in which wood is burned or subjected to heat in such a manner as to give rise to noxious or offensive gases.'

'Noxious or offensive gas' is defined in the definition section of the Act (s 1(1)) as a number of specified groups of compounds in the gaseous phase. I shall deal at a later stage with those that are relevant to the issues in this application,

In December 1991 the respondent submitted a written application, in terms of s 10(1) of the Act, for the registration certificate which would authorize the operation of the Rheese burner. There was a great deal of debate and much correspondence was exchanged between the respondent and the Department of Health concerning the issue of the certificate, but, on 15 January 1993, a provisional certificate was issued, valid for a period of eight months. The certificate authorized the burning of sawdust, wood chips and planks, subject, *inter alia,* to the following conditions:

1...

2. An efficient incinerator will be used for the construction of wood waste. Wood will be properly dried before being fed into the appliance.

5. The incinerator will only be started up after break-up of any inversion condition and will not be operated outside normal daytime working hours.

I may mention for the sake of completeness that part of the difficulties which caused the delay between the respondent's application for the registration certificate and the grant of the provisional one was that the Department of Health had issued a directive, in March 1992, to the effect that conical burners, of which the Rheese burner is a species, should be phased out as combustion equipment for wood waste over a three-year period because they could not be operated so as to comply with the guidelines limiting the generation of smoke and fly-ash. When the respondent was informed of this policy, it undertook, through its attorneys, to phase out the Rheese burner within the next three years, but the Department indicated that the phasing out policy only applied to holders of existing certificates and not to applicants who had not yet been granted certificates. After some debate, the respondent was informed that the provisional certificate would be issued to it on the understanding that positive steps would be taken to replace the Rheese burner with an approved appliance and that design of such appliance should commence immediately.

During 1992 and 1993 the Department of Health received a series of complaints from occupiers of property in the neighbourhood of the respondent's property about the emission of smoke from the respondent's works. Moreover, the period of eight months for which the provisional registration certificate was granted expired and the applicant's representative, Lloyd, declined a request to extend the period of the provisional certificate. In February 1994 Mr. G.C. Coetzee, an inspector in the Department of Health, and a Mr. Potgieter, also employed in the Department, visited the respondent's premises for the purpose of inspecting the combustion equipment and the burning process. They had a discussion with Mr. Griffith and Mr. Hunt, directors of the respondent, in the course of which the problems of smoke emission and the steps which the respondent had taken, and was taking, to cure it, predominated. Inter alia, the respondent's directors informed the applicant's representatives that it was the respondent's intention to replace the Rheese burner with a system incorporating a Dutch oven as the combustion equipment by the end of 1995. On 28 February 1994 the respondent wrote a letter to the Department, confirming these discussions and the intention to replace the Rheese burner 'as soon as possible and in any event not later than 31 December 1995'. Mr. Coetzee replied to this letter, stating that the respondent had been requested to submit to the Department a programme outlining its plans to reduce smoke emission and to replace the offending equipment and that no such programme had been forthcoming in the respondent's letter. He went on to say that:

'Due to the serious air pollution caused by the plant and the effect on neighbouring premises, you are hereby notified that, in terms of s 10 (3) of the Act, a registration certificate shall not be issued and you must therefore immediately stop the incineration of wood sawdust, bark or any other wood products, until such time as you have installed a replacement unit which has been approved and registered in terms of the Act.'

This was met by a protest from the respondent to the effect that other operators of Rheese burners were being given more time than was the respondent to phase out their equipment and that, considering that the respondent employed approximately 500 persons, any attempt by the Department to shut the sawmill down would cause 'major political and social problems'. There was an exchange of further correspondence, but in June 1994, the respondent was informed that litigation aimed at preventing it from continuing with its use of the Rheese burner was pending. The application was, in fact, served on the respondent on 6 June 1944. The applicant put up a number of affidavits by people who own or occupy properties in the neighbourhood of the respondent's property. Without exception, these deponents stated that the Rheese burner has continually generated such quantities of smoke as to adversely affect their enjoyment of their rights of occupation and use of their properties. Various photographs of the Rheese burner in action have also been put before me, as also has been a transcript of a meeting between the directors of the respondent and a number of the farmers from the area where, to put it at its mildest, acrimony ran high.

In general, the deponent for the respondent, Mr. Griffith, does not challenge the fact that smoke is emitted from time to time, though he says that it is not emitted with a frequency, or in quantities, which justify the attitude of those who have objected to the operation of the mill on the basis that the emissions from the Rheese burner constitute a 'nuisance'. The basis upon which the respondent opposes the application is, firstly, that the applicant has no *locus standi* to bring it; secondly, that it is not proven, on the affidavits as they stand, that the Rheese burner emits 'noxious gas' and, accordingly, that the respondent is acting unlawfully by using it; and, thirdly, that the respondent has taken all the steps which it is obliged to take in order to reduce the degree of emission and will, in any event, be replacing the Rheese burner 'by October, 1995'.

Locus standi

The *respondent's* contention is that the Act does not authorize the applicant to take civil action to enforce its provisions and, further, that it is not competent for the applicant or for the Court to enforce those provisions by way of the grant of an interdict. Elaborating on this theme, Mr. Gordon stated that the Act provides specific criminal penalties for contraventions of s 9, and that these

were contemplated by the legislator as conferring upon the applicant the powers necessary to enable her to take steps against infringers. Mr. Hartzenberg's answer to this contention is that the applicant, as the person upon whom responsibility for the administration and application of the Act devolves, must implicitly be vested with *locus standi* to seek the assistance of this Court. He submitted that, in many cases, the applicant would need to take swift and effective action to prevent conduct which was resulting in the pollution of the atmosphere, and that the comparatively cumbersome and slow procedure of criminal prosecution might be wholly inappropriate to achieve the necessary remedy. Moreover, he pointed out that the criminal sanction provided by the Act is, in the case of a first offence, a fine not exceeding R500 and in the case of a second and subsequent convictions, a fine not exceeding R2,000. Such penalties, he said, might frequently pale into insignificance against the profits which an unscrupulous industrialist might be able to reap by keeping the cost of controlling pollution from his works to a minimum. Prevention, too, is invariably better than cure, he submitted, and the Act has no procedure whereby the applicant can take positive steps to preclude an infringer of its provisions from continuing with his conduct, notwithstanding that it constitutes a criminal offence.

In this connection, Mr. Hartzenberg referred me to the judgement of Trollip J in the case of Johannesburg City Council v Knoetze and Sons 1969 (2) SA 148 (W) at 150-55. In that judgement Trollip J (as he then was) dealt, firstly, with the question of whether the Supreme Court had jurisdiction to grant an interdict to restrain the performance of conduct which, of itself, constitutes a statutory offence, and, secondly, with the question of who has *locus standi* to move the Court for an interdict where the Court has jurisdiction to grant one. The learned Judge referred firstly to the general principle formulated by Kotze AJA in Madrassa Anjuman Islamia v Johannesburg Municipality 1917 AD 718 at 727, to the following effect:

'If it be clear from the language of a statute that the Legislature, in creating an obligation, has confined the party complaining of its non-performance, or suffering from its breach, to a particular remedy, such party is restricted thereto and has no further legal remedy; otherwise the remedy provided by the statute will be cumulative.'

After considering the ambit of this general principle and its application to the statute with which he was dealing (which prescribed the payment of certain registration and licence fees for commercial vehicles), Trollip J concluded that the remedies afforded the local authority by the ordinance were such as to negate any suggestion that the local authority could sue civilly to recover unpaid fees. The learned Judge then proceeded to consider whether the statute also impliedly precluded the local authority from seeking an interdict to prevent the owner of the vehicles in question form using them until the arrear fees had been paid and the vehicles properly registered. The ordinance in question contained a provision making it an offence to operate a vehicle on a public road unless it was duly licensed. Trollip J quoted the *dictum* of Solomon JA in the *Madrassa case supra* at 725, to the following effect:

"To exclude the right of a Court to interfere by way of interdict, where special remedies are provided by statute, might in many instances result in depriving an injured person of the only effective remedy that he has, and it would require a strong case to justify the conclusion that such was the intention of the Legislature.'

Trollip J went on to say (at 154F):

'It is true that the qualification - unless the statute otherwise provides - is not incorporated in the well-known rule laid down by Solomon J (as he then was) in Patz v Green & Co. 1907 TS 427 at 433. That decision has on that account been criticized in certain decisions ... But with respect I think that in Patz v Greene & Co. the Court was satisfied that the statute in question had not expressly or by necessary implication excluded the civil remedy of interdict (see at 434-5), and it was therefore primarily concerned with the locus standi of the applicant to apply for the interdict (see the argument at 427). Consequently, the rule there laid down accepted, I think, that the right of interdict was available, and it was directed towards defining the person or class of persons who had *locus standi* to claim its enforcement. Thus, in the Madrassa case, at 726, the same learned Judge who had announced the rule applied it to determine the *locus standi* of the applicant ... In my view, therefore, Patz v Greene Ltd. does not add to or conflict with the rule quoted above from ... the Madrassa case. The case will be referred to again later on the question of the present applicant's *locus standi*.

Now the ordinance does not exclude, expressly or by necessary implication, the remedy of interdict to enforce observance of s 4 (1). That remedy, as pointed out above, is applicable to future or continuing breaches; the statutory remedy of prosecution and punishment under s 4(2) relates to past breaches; and the two can therefore coexist without any conflict. Consequently the reasoning above for excluding the civil remedy for recovering arrear fees and penalties does not apply. Hence, in my view, future of continuing breaches of s.4(1) can be restrained by interdict.'

In my respectful view, this reasoning applies with equal and absolute force to the provisions of the Act in this case. In fact it may be said to apply a *fortiori* because the Act contains no specific 'remedies' which the applicant or any other interested party could invoke to stop a person from contravening it. And in those circumstances

the principle that the Act is exclusive as to what may be done to enforce its provisions does not arise.

On the question of whether the City Council had *locus standi* to seek an interdict, Trollip J held that, because the ordinance contained the provision prohibiting persons from operating unlicensed or unregistered vehicles on public roads, and because, in terms of other sections of the ordinance, a portion of licence fees paid by persons residing within the area of a local authority accrue to the local authority, the local authority in question had a sufficient 'partial interest' to vest it with *locus standi*. I think it is clear from the judgement that the learned Judge did not consider the mere prohibition against operation of vehicles without compliance with the duty to register them an insufficient basis upon which to find that the local authority could interdict their unlawful operation.

In this case the Act contains a similar prohibitory provision relating to the operation of an unregistered scheduled process. But it contains no provision for payment of any fee for the purpose of registration. Does that affect the applicant's power to use interdict proceedings to restrain contraventions? I think not. As contended by Mr. Hartzenberg, the applicant is responsible for the proper administration and enforcement of the Act. The whole purpose of the legislation, and particularly of the provisions of ss 9-13 of the Act, is to 'control' the installation and use of scheduled processes throughout the Republic, seeing that the whole of the Republic has been designated as a 'controlled area'. There is, in these circumstances no basis for a contention that the applicant does not need the remedy of injunction to enable her to control these processes effectively and thereby discharge her duties under the Act.

Unlawfulness

The second defence raised by the respondent is to the effect that it has not been established on the papers that the operation of the Rheese burner constitutes a 'scheduled process' as defined in item 67 of the Second Schedule, read with the definition of 'noxious or offensive gases' in the definition section. Mr. Gordon submitted (quite correctly, of course) that, this being an application on motion for final relief, and there being conflicts of fact on the affidavit evidence, the application falls to be decided only on the averments of the respondent, taken together with those of the applicant which are admitted, or not denied, by the respondent. (See Plascon-Evans Paints Ltd. v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 6634-5.) In the Plascon-Evans case, however, Corbett JA (as he then was) stressed certain qualifications to the general rule. He said (at 6341-635C):

'In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd. 1949 (3) SA 1155 (T) at 1163-5; Da Mata v Otto NO 1972 (3) SA 858 (A) at 882 D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court ... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see e.g. Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283 E-H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the Associated South African Bakeries case supra at 924A).'

Now, apart from the evidence of a number of the applicant's neighbours to the effect that the Rheese burner regularly belched large quantities of smoke over the surrounding countryside (which assertions are amply supported by unchallenged photographic evidence), the applicant has also put up affidavits by Dr. N. Boegman MSc. (Chemistry) (Stellenbosch), BCom (SA), PhD (Environmental Studies) Wits); Mr. P du Toit BSc. (Eng), Bluris (UP); Mr. W.A. Potgieter BSc. (Chemistry and Physics), BSc. (Hons) Biochemistry), Diploma in Control and Administration of Air Pollution (University of Southern California); and Mr. G.C. Coetzee, BSc. Hons (Industrial Chemistry). Each of these deponents has observed the Rheese burner in operation at various times when it has been generating smoke. Each of them deposed to having visited the respondent's works for this purpose, although some of the observations relied upon were made from a short distance away from the works. Each of them states unequivocally that the burner was being fed with wet (or at least undried) sawdust, chips and bark and that no proper precautions were taken to control the rate of input of the material into the burner. The result of this type of operation, they all aver, is that incompleted combustion occurs because the material itself stifles the rate at which air, and accordingly oxygen, can be fed to it to cause the combustion process to go to completion. Each of them expresses the view that the Rheese burner is, in any event, inherently incapable of burning this type of material properly (i.e. without the generation into the atmosphere of products of incomplete combustion, notwithstanding certain modifications which the respondent has attempted to make to it). While each of them was particularly concerned with the question of whether the respondent had complied with the restrictions and conditions contained in the provisional registration certificate, it is clear from their affidavits that each of them is satisfied that the process of burning the woodwaste is a 'scheduled process' as contemplated under item 67 of

the Second Schedule. Mr. Du Toit says this specifically in para 10 of his affidavit. Moreover, the evidence which they give about their discussions with the representatives of the respondent over the period between January 1993 and June 1994 makes it absolutely clear that their contention was that the process used by the respondent necessitated the holding by the respondent of a registration certificate. Dr. Boegman says, in paras 13 and 14 of his affidavit:

'13. My gemelde waarnemings was soos volg, mamlik:

(a) Die Rees-verbrander her rook afgeskei war van tyd tot ryd gekleurd was. Die mate waartoe die rook gekleurd was, was sodaning dat van tyd tot tyd die agtergrond agter die rook nie duidelik gesien kno word nie. In die digte gebiede van die rook kon die agtergrond glad nie gesien word nie.

(b) Dit was opmerklik dat van die rook teen die kante van die Rees-verbrander uitgeborrel het.

(c) Na my mening was dit ook duidelik dat 'n redelike konsentrasie van digte geel materiaal in die rook.

(d) Tydens 'n tydperk van sowat 10 minute wat ek die rook dopgehou het, was daar twee tydperke waartydens swar geel rook uitgeborrel het elke tydperk waarvan sowat drie minute geduur het.

14. Na my mening, stel die rook wat afgeskei word deur die Rees-verbrander wel skadelike of hinderlike gasse daar, soos omskryf in art 1 van die Wet en wel omdat soldanige rook onder andere verbindings van koolwaterstowwe, fenole en organiese stikstof bevat.'

Mr. Griffith, the deponent for the respondent says, somewhat tersely, in answer to these averments:

'I note that Boegman lays no foundation for the conclusion that the smoke generated by the Rheese burner contained combinations of carbon monoxide, phenols and organic plant matter. I do not acknowledge his status as an expert.' And, as to Mr. Du Toit's statement that the process is one hit by item 67 of the Second Schedule:

'I submit that it is incorrect to state that the burning of the respondent's waste necessarily causes the gases referred to in this paragraph. In this regard I refer to the specific wording of item 67 of the Second Schedule, which clearly shows that it is possible to burn such products without causing the emission of such gases. I accordingly deny the allegations in para. 10, and I do not admit that the deponent has the necessary expert status to reliably express such opinions.'

In response, Dr. Boegman, Mr. Potgieter and Mr. Lloyd (the deponent to the main founding affidavit, who also has BSc. Hons in chemistry) all state that it is a matter of simple and common chemical knowledge that the incomplete combustion of wood products such as those in question is inevitably, as a chemical law as it were, associated with the generation of the compounds mentioned and Mr. Potgieter sets out a detailed explanation why this is so. Although this detail is only set out in the replying affidavits, I think, having regard to the attitude of the respondent before the application was moved, that the applicant could justifiably have been under the impression that the question of whether the operation of the Rheese burner constituted a 'scheduled process' was not really an issue. In any event it is clearly not sufficient for the respondent to content itself, in the circumstances of this case, with a mere challenge of the witnesses' status to give the evidence which they have. The chemical aspects in issue are hardly intricate - at least the respondent has not put up the evidence of any suitably-qualified witness to say that they are - and I do not think that this type of unsubstantiated and unspecified challenge by the deponent for the respondent generates a *bona fide* dispute which would warrant me ignoring the evidence of these qualified witnesses.

The result is that I take the view, on the evidence to which I can have regard for the purpose of considering whether the applicant can be granted final relief on these papers, that the applicant has established that the operation of the Rheese burner by the respondent without a certificate of registration under s.9 of the Act is unlawful conduct. It is not only unlawful in the light of s.9, but, in my view, the generation of smoke in these circumstances, in the teeth of the law, as it were, is an infringement of the rights of the respondent's neighbours to 'an environment which is not detrimental to their health or well-being', enshrined for them in s. 29 of the Constitution of the Republic of South Africa Act 200 of 1993. Insofar as none of those neighbours are applicants in this matter, I think that the applicant can rely upon the provisions of s.7 (4)(b)(iv) of Act 200 of 1993 for *locus standi* to apply to this Court for an interdict to restrain conduct which infringes the rights under s. 29 of the neighbours of the respondent.

As to the respondent's contentions that the interdict should not be granted because the respondent is in the process of replacing the Rheese burner combustion system with one which will meet the specifications of the inspectors in the Department of Health, the respondent has, as a result of the (regretted) time which it has taken for me to deliver this judgement, had a longer period within which to instal and commission the replacement equipment than the respondent opted for when the matter was argued. In a supplementary affidavit by Mr. Griffith, made on 27 March 1995 (and which, despite an objection by Mr. Hartzenberg, I decided to admit), the respondent states that the Rheese burner will, as a result of the implementation of the new programme, be phased

out completely by the end of October 1995. Despite this undertaking, and despite the circumstances that the Rheese burner may already have ceased to operate, I am of the view that the grant of an interdict is necessary, having regard to the unfortunately acrimonious history of the matter and the ambivalent attitude displayed by the respondent. However, in view of the fact that the dispute was already a fairly longstanding one when the matter came before the Court, and taking into account the possibility that the respondent's programme of replacement may not have kept up to schedule, I think that justice will be done if I order the interdict to take effect from 31 January 1996.

As to the question of costs, I need only say that, in the light of the attitude taken by the respondent, I consider that the applicant was justified in seeking relief from the Court. The applicant has been successful on all the aspects raised by the respondent and I see no reason why the costs of the application should not follow the result. Furthermore this is plainly a matter in which the applicant was justified in employing two counsel.

I make the following order:

1. With effect from 31 January 1996 the first and second respondents are interdicted from carrying on a wood burning process on the property Versameling No. 15759, Lidgetton, in the district of Lions River, Natal, in which process, wood waste, chips, bark and/or sawdust are burnt in an apparatus known as a 'Rheese burner'.

2. The first and second respondents are ordered to pay the costs of the applicant in this application, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel.

Applicant's Attorney: State Attorney. Respondents' Attorneys: Venn, Nemeth & Hart.

[1] the Atmospheric Pollution Prevention Act 45 of 1965 provides as follows:

'9. **Premises on which scheduled process carried on to be registered**

(1) Save as provided in ss (4) of s 11, no person shall within a controlled area:-

(a) carry on a scheduled process in or on any premises, unless:

(i) he is the holder of a current registration certificate authorizing him to carry on that process in or on those premises; or

(ii) in the case of a person who was carrying on any such process in or on any premises immediately prior to the date of publication of the notice by virtue of which the area in question is a controlled area, he has within three months after that date applied for the issue to him of a registration certificate authorizing the carrying on of that process in or on those premises, and his application has not been refused;.....'

The remainder of s 9(1) is not material to this report - Eds.

(2) An efficient incinerator will be used for the construction of wood waste. Wood will be properly dried before being fed into the appliance.

.....

(5)The incinerator will only be started up after break-up of any inversion condition and will not be operated outside normal daytime working hours.

Section 2

Environmental Impact Assessment

CALVERT CLIFFS' COORDINATING COMMITTEE, INC., ET AL., PETITIONERS, V. UNITED STATES ATOMIC ENERGY COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS, BALTIMORE GAS AND ELECTRIC COMPANY, INTERVENOR. CALVERT CLIFFS' COORDINATING COMMITTEE, INC., ET AL., PETITIONERS, V. UNITED STATES ATOMIC ENERGY COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Nos. 24839, 24871

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

146 U.S. App. D.C. 33; 449 F.2d 1109; 1971 U.S. App. LEXIS 8779;
2 ERC (BNA) 1779; 17 A.L.R. Fed. 1; 1 ELR 20346

April 16, 1971, Argued
July 23, 1971, Decided

DISPOSITION:

Remanded for Proceedings Consistent with this Opinion.

CORE TERMS: environmental, license, certification, fullest, water quality, balancing, staff, detailed statement, alteration, environmental quality, operating license, federal government, water, environmental protection, environmental impact, practicable, recommendation, federal agencies, proposed action, effective date, abdication, guidelines, accompany, environmental damage, national policy, review process, appendix, insure, federal action, regulations

JUDGES: Wright, Tamm and Robinson, Circuit Judges.

OPINION BY: WRIGHT

OPINION: J. SKELLY WRIGHT, Circuit Judge:

These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material "progress."[1] But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. In these cases, we must for the first time interpret the broadest and perhaps most important of the recent statutes: the National Environmental Policy Act of 1969 (NEPA).[1] We must assess claims that one of the agencies charged with its administration has failed to live up to the congressional mandate. Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.

NEPA, like so much other reform legislation of the last 40 years, is cast in terms of a general mandate and broad delegation of authority to new and old administrative agencies. It takes the major step of requiring all federal agencies to consider values of environmental preservation in their spheres of activity, and it prescribes certain procedural measures to ensure that those values are in fact fully respected. Petitioners argue that rules recently adopted by the Atomic Energy Commission to govern consideration of environmental matters fail to satisfy the rigor demanded by NEPA. The Commission, on the other

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[1] Environmental Quality Improvement Act of 1970, 42 U.S.C.A. §§ 4371-4374 (1971 Pocket Part); Water and Environmental Quality Improvement Act of 1970, Pub. L. 91-224, 91st Cong., 2d Sess. (1970), 84 Stat. 91.

[2] 42 U.S.C.A. § 4321 et seq. (1971 Pocket Part).

hand, contends that the vagueness of the NEPA mandate and delegation leaves much room for discretion and that the rules challenged by petitioners fall well within the broad scope of the Act. We find the policies embodied in NEPA to be a good deal clearer and more demanding than does the Commission. We conclude that the Commission's procedural rules do not comply with the congressional policy. Hence we remand these cases for further rule making.

We begin our analysis with an examination of NEPA's structure and approach and of the Atomic Energy Commission rules which are said to conflict with the requirements of the Act. The relevant portion of NEPA is Title I, consisting of five sections.[5] Section 101 sets forth the Act's basic substantive policy: that the federal government "use all practicable means and measures" to protect environmental values. Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations. In Section 101(b), imposing an explicit duty on federal officials, the Act provides that "it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy," to avoid environmental degradation, preserve "historic, cultural, and natural" resources, and promote "the widest range of beneficial uses of the environment without undesirable and unintended consequences."

Thus the general substantive policy of the Act is a flexible one. It leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances. However, the Act also contains very important "procedural" provisions—provisions which are designed to see that all federal agencies do in fact exercise the substantive discretion given them. These provisions are not highly flexible. Indeed, they establish a strict standard of compliance.

NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department. The Atomic Energy Commission, for example, had continually asserted, prior to NEPA, that it had no statutory authority to concern itself with the adverse environmental effects of its actions.[4] Now, however, its hands are no longer tied. It is not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to consider environmental issues just as they consider other matters within their mandates. This compulsion is most plainly stated in Section 102. There, "Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act." Congress also "authorizes and directs" that "(2) all agencies of the Federal Government shall" follow certain rigorous procedures in considering environmental values.[5] Senator Jackson, [*1113] NEPA's principal sponsor, stated that "no agency will [now] be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions."[6] He characterized the requirements of Section 102 as "action-forcing" and stated that "otherwise, these lofty declarations [in Section 101] are nothing more than that."[7]

The sort of consideration of environmental values which NEPA compels is clarified in Section 102(2) (A) and (B). In general, all agencies must use a "systematic, interdisciplinary approach" to environmental planning and evalu-

[3] The full text of Title I is printed as an appendix to this opinion.

[4] Before the enactment of NEPA, the Commission did recognize its separate statutory mandate to consider the specific radiological hazards caused by its actions; but it argued that it could not consider broader environmental impacts. Its position was upheld in State of New Hampshire v. Atomic Energy Commission, 1 Cir., 406 F.2d 170, cert. denied, 395 U.S. 962, 89 S. Ct. 2100, 23 L. Ed. 2d 748 (1969).

[5] Only once—in § 102(2) (B)—does the Act state, in terms, that federal agencies must give full "consideration" to environmental impact as part of their decision making processes. However, a requirement of consideration is clearly implicit in the substantive mandate of § 101, in the requirement of § 102(1) that all laws and regulations be "interpreted and administered" in accord with that mandate, and in the other specific procedural meassures compelled by § 102(2). The only circuit to interpret NEPA to date has said that "this Act essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment."
Zabel v. Tabb, 5 Cir., 430 F.2d 199, 211 (1970). Thus a purely mechanical compliance with the particular measures required in § 102 (2) (C) & (D) will not satisfy the Act if they do not amount to full good faith consideration of the environment. See text at page 1116 infra. The requirements of § 102(2) must not be read so narrowly as to erase the general import of §§ 101, 102(1) and 102(2) (A) & (B).

On April 23, 1971, the Council on Environmental Quality—established by NEPA—issued guidelines for federal agencies on compliance with the Act. 36 Fed. Reg. 7723 (April 23, 1971). The Council stated that "the objective of section 102(2) (C) of the Act and of these guidelines is to build into the agency decision making process an appropriate and careful consideration of the environmental aspects of proposed action * * *." Id. at 7724.

[6] Hearings on S. 1075, S. 237 and S. 1752 Before Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. 206 (1969). Just before the Senate finally approved NEPA, Senator Jackson said on the floor that the Act "directs all agencies to assure consideration of the environmental impact of their actions in decisionmaking." 115 Cong.Rec. (Part 30) 40416 (1969).

[7] Hearings on S. 1075, supra Note 6, at 116. Again, the Senator reemphasized his point on the floor of the Senate, saying: "To insure that the policies and goals defined in this act are infused into the ongoing programs and actions of the Federal Government, the act also established some important 'action-forcing' procedures." 115 Cong.Rec. (Part 30) at 40416. The Senate Committee on Interior and Insular Affairs Committee Report on NEPA also stressed the importance of the "action-forcing" provisions which require full and rigorous consideration of environmental

ation "in decisionmaking which may have an impact on man's environment." In order to include all possible environmental factors in the decisional equation, agencies must "identify and develop methods and procedures * * * which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations."[8] "Environmental amenities" will often be in conflict with "economic and technical considerations." To "consider" the former "along with" the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and "systematic" balancing analysis in each instance.[9]

To ensure that the balancing analysis is carried out and given full effect, Section 102(2) (C) requires that responsible officials of all agencies prepare a "detailed statement" covering the impact of particular actions on the environment, the environmental [**10] costs which might be avoided, and alternative measures which might alter the costbenefit equation. The apparent purpose of the "detailed statement" is to aid in the agencies' own decision making process and to advise other interested agencies and the public of the environmental consequences of planned federal action. Beyond the "detailed statement," Section 102(2) (D) requires all agencies specifically to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." This requirement, like the "detailed statement" requirement, seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made. Moreover, by compelling a formal "detailed statement" and a description of alternatives, NEPA provides evidence that the mandated decision making process has [**11] in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own.

Of course, all of these Section 102 duties are qualified by the phrase "to the fullest extent possible." We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts.

Unlike the substantive duties of Section 101(b), which require agencies to "use all practicable means consistent with other essential considerations," the procedural duties of Section 102 must be fulfilled to the "fullest extent possible."[10] This contrast, in itself, is revealing. But the dispositive factor in our interpretation is the expressed views of the Senate and House conferees who wrote the "fullest extent possible" language into NEPA. They stated:[11]

> "The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in [Section 102(2)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance."

Thus the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of statutory authority.[12] Consid-

[8] The word "appropriate" in § 102(2) (B) cannot be interpreted to blunt the thrust of the whole Act or to give agencies broad discretion to downplay environmental factors in their decision making processes. The Act requires consideration "appropriate" to the problem of protecting our threatened environment, not consideration "appropriate" to the whims, habits or other particular concerns of federal agencies. See Note 5 supra.

[9] Senator Jackson specifically recognized the requirement of a balancing judgment. He said on the floor of the Senate: "Subsection 102(b) requires the development of procedures designed to insure that all relevant environmental values and amenities are considered in the calculus of project development and decisionmaking. Subsection 102(c) establishes a procedure designed to insure that in instances where a proposed major Federal action would have a significant impact on the environment that the impact has in fact been considered, that any adverse effects which cannot be avoided are justified by some other stated consideration of national policy, that short-term uses are consistent with long-term productivity, and that any irreversible and irretrievable commitments of resources are warranted." 115 Cong.Rec. (Part 21) 29055 (1969).

[10] The Commission, arguing before this court, has mistakenly confused the two standards, using the § 101(b) language to suggest that it has broad discretion in performance of § 102 procedural duties. We stress the necessity to separate the two, substantive and procedural, standards. See text at page 1128 infra.

[11] The Senators' views are contained in "Major Changes in S. 1075 as Passed by the Senate," 115 Cong.Rec. (Part 30) at 40417-40418. The Representatives' views are contained in a separate statement filed with the Conference Report, 115 Cong.Rec. (Part 29) 39702-39703 (1969).

erations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance.

We conclude, then, that Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse. As one District Court has said of Section 102 requirements:

"It is hard to imagine a clearer or stronger mandate to the Courts."[13]

In the cases before us now, we do not have to review a particular decision by the Atomic Energy Commission granting a construction permit or an operating license. Rather, we must review the Commission's recently promulgated rules which govern consideration of environmental values in all such individual decisions.[14] The rules were devised strictly in order to comply with the NEPA procedural requirements—but petitioners argue that they fall far short of the congressional mandate.

The period of the rules' gestation does not indicate overenthusiasm on the Commission's part. NEPA went into effect on January 1, 1970. On April 2, 1970—three months later—the Commission issued its first, short policy statement on implementation of the Act's procedural provisions.[15] After another span of two months, the Commission published a notice of proposed rule making in the Federal Register.[16] Petitioners submitted substantial comments critical of the proposed rules. Finally, on December 3, 1970, the Commission terminated its long rule making proceeding by issuing a formal amendment, labelled Appendix D, to its governing regulations.[17] Appendix D is a somewhat revised version of the earlier proposal and, at last, commits the Commission to consider environmental impact in its decision making process.

The procedure for environmental study and consideration set up by the Appendix D rules is as follows: Each applicant for an initial construction permit must submit to the Commission his own "environmental report," presenting his assessment of the environmental impact of the planned facility and possible alternatives which would alter the impact. When construction is completed and

[12] Section 104 of NEPA provides that the Act does not eliminate any duties already imposed by other "specific statutory obligations." Only when such specific obligations conflict with NEPA do agencies have a right under § 104 and the "fullest extent possible" language to dilute their compliance with the full letter and spirit of the Act. See text at page 1123 infra. Sections 103 and 105 also support the general interpretation that the "fullest extent possible" language exempts agencies from full compliance only when there is a conflict of statutory obligations. Section 103 provides for agency review of existing obligations in order to discover and, if possible, correct any conflicts. See text at pages 1020-1021 infra. And § 105 provides that "the policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies." The report of the House conferees states that § 105 "does not obviate the requirement that the Federal agencies conduct their activities in accordance with the provisions of this bill unless to do so would clearly violate their existing statutory obligations." 115 Cong.Rev. (Part 29) at 39703. The section-by-section analysis by the Senate conferees makes exactly the same point in slightly different language. 115 Cong.Rec. (Part 30) at 40418. The guidelines published by the Council on Environmental Quality state that "the phrase 'to the fullest extent possible' is meant to make clear that each agency of the Federal Government shall comply with the requirement unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 36 Fed.Reg. at 7724.

[13] Texas Committee on Natural Resources v. United States, W.D.Tex., 1 Envir. Rpts—Cas. 1303, 1304 (1970). A few of the courts which have considered NEPA to date have made statements stressing the discretionary aspects of the Act. See, e.g., Pennsylvania Environmental Council v. Bartlett, M.D.Pa., 315 F. Supp. 238 (1970); Bucklein v. Volpe, N.D.Cal., 2 Envir. Rpts—Cas. 1082, 1083 (1970). The Commission and intervenors rely upon these statements quite heavily. However, their reliance is misplaced, since the courts in question were not referring to the procedural duties created by NEPA. Rather, they were concerned with the Act's substantive goals or with such peripheral matters as retroactive application of the Act.

The general interpretation of NEPA which we outline in text at page 1112 supra is fully supported by the scholarly commentary. See, e.g., Donovan, The Federal Government and Environmental Control: Administrative Reform on the Executive Level, 12 B.C.Ind. & Com.L.Rev. 541 (1971); Hanks & Hanks, An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969, 24 Rutg. L.Rev. 231 (1970); Sive, Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law, 70 Colum. L.Rev. 612, 643-650 (1970); Peterson, An Analysis of Title I of the National Environmental Policy Act of 1969, 1 Envir.L.Rptr. 50035 (1971); Yannacone, National Environmental Policy Act of 1969, 1 Envir.Law 8 (1970); Note, The National Environmental Policy Act: A Sheep in Wolf's Clothing?, 37 Brooklyn L.Rev. 139 (1970).

[14] In Case No. 24,871, petitioners attack four aspects of the Commission's rules, which are outlined in text. In Case No. 24,839, they challenge a particular application of the rules in the granting of a particular construction permit—that for the Calvert Cliffs Nuclear Power Plant. However, their challenge consists largely of an attack on the substance of one aspect of the rules also attacked in Case No. 24,871. Thus we are able to resolve both cases together, and our remand to the Commission for further rule making includes a remand for further consideration relating to the Calvert Cliffs Plant in Case No. 24,839. See Part V of this opinion, infra.

[15] 35 Fed.Reg. 5463 (April 2, 1970).

[16] 35 Fed.Reg. 8594 (June 3, 1970).

[17] 35 Fed.Reg. 18469 (December 4, 1970). The version of the rules finally adopted is now printed in 10 C.F.R. § 50, App. D, pp. 246-250 (1971).

the applicant applies for a license to operate the new facility, he must again submit an "environmental report" noting any factors which have changed since the original report. At each stage, the Commission's regulatory staff must take the applicant's report and prepare its own "detailed statement" of environmental costs, benefits and alternatives. The statement will then be circulated to other interested and responsible agencies and made available to the public. After comments are received from those sources, the staff must prepare a final "detailed statement" and make a final recommendation on the application for a construction permit or operating license.

Up to this point in the Appendix D rules petitioners have raised no challenge. However, they do attack four other, specific parts of the rules which, they say, violate the requirements of Section 102 of NEPA. Each of these parts in some way limits full consideration and individualized balancing of environmental values in the Commission's decision making process. (1) Although environmental factors must be considered by the agency's regulatory staff under the rules, such factors need not be considered by the hearing board conducting an independent review of staff recommendations,unless affirmatively raised by outside parties or staff members. (2) Another part of the procedural rules prohibits any such party from raising nonradiological environmental issues at any hearing if the notice for that hearing appeared in the Federal Register before March 4, 1971. (3) Moreover, the hearing board is prohibited from conducting an independent evaluation and balancing of certain environmental factors if other responsible agencies have already certified that their own environmental standards are satisfied by the proposed federal action. (4) Finally, the Commission's rules provide that when a construction permit for a facility has been issued before NEPA compliance was required and when an operating license has yet to be [**19] issued, the agency will not formally consider environmental factors or require modifications in the proposed facility until the time of the issuance of the operating license. Each of these parts of the Commission's rules will be described at greater length and evaluated under NEPA in the following sections of this opinion.

NEPA makes only one specific reference to consideration of environmental values in agency review processes. Section 102(2) (C) provides that copies of the staff's "detailed statement" and comments thereon "shall accompany the proposal through the existing agency review processes." The Atomic Energy Commission's rules may seem in technical compliance with the letter of that provision. They state:

"12. If any party to a proceeding * * * raises any [environmental] issue the Applicant's Environmental Report and the Detailed Statement will be offered in evidence. The atomic safety and licensing board will make findings of fact on, and resolve, the matters in controversy among the parties with regard to those issues. Depending on the resolution of those issues, the permit or license may be granted, denied, or appropriately conditioned to protect environmental values.

"13. When no party to a proceeding * * * raises any [environmental] issue such issues will not be considered by the atomic safety and licensing board. Under such circumstances, although the Applicant's Environmental Report, comments thereon, and the Detailed Statement will accompany the application through the Commission's review processes, they will not be received in evidence, and the Commission's responsibilities under the National Environmental Policy Act of 1969 will be carried out in toto outside the hearing process."[18]

The question here is whether the Commission is correct in thinking that its NEPA responsibilities may "be carried out in toto outside the hearing process"—whether it is enough that environmental data and evaluations merely "accompany" an application through the review process, but receive no consideration whatever from the hearing board.

We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act. What possible purpose could there be in the Section 102 (2) (C) requirement (that the "detailed statement" accompany proposals through agency review processes) if "accompany" means no more than physical proximity—mandating no more than the physical act of passing certain folders and papers, unopened, to reviewing officials along with other folders and papers? What possible purpose could there be in requiring the "detailed statement" to be before hearing boards, if the boards are free to ignore entirely the contents of the statement? NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy. The word "accompany" in Section 102(2) (C) must not be read so narrowly as to make the Act ludicrous. It must, rather, be read to indicate a congressional intent that environmental factors, as compiled in the "detailed statement," be considered through agency review processes.[19]

[18] 10 C.F.R. § 50, App. D, at 249.

[19] The guidelines issued by the Council on Environmental Quality emphasize the importance of consideration of alternatives to staff recommendations during the agency review process: "A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects." 36 Fed.Reg. at 7725. The Council also states that an objective of its guidelines is "to assist agencies in implementing not only the letter, but the spirit, of the Act." Id. at 7724.

Beyond Section 102(2) (C), NEPA requires that agencies consider the environmental impact of their actions "to the fullest extent possible." The Act is addressed to agencies as a whole, not only to their professional staffs. Compliance to the "fullest" possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action—at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs. Of course, consideration which is entirely duplicative is not necessarily required. But independent review of staff proposals by hearing boards is hardly a duplicative function. A truly independent review provides a crucial check on the staff's recommendations. The Commission's hearing boards automatically consider nonenvironmental factors, even though they have been previously studied by the staff. Clearly, the review process is an appropriate stage at which to balance conflicting factors against one another. And, just as clearly, it provides an important opportunity to reject or significantly modify the staff's recommended action. Environmental factors, therefore, should not be singled out and excluded, at this stage, from the proper balance of values envisioned by NEPA.

The Commission's regulations provide that in an uncontested proceeding the hearing board shall on its own "determine whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's regulatory staff has been adequate, to support affirmative findings on" various nonenvironmental factors.[20] NEPA requires at least as much automatic consideration of environmental factors. In uncontested hearings, the board need not necessarily go over the same ground covered in the "detailed statement." But it must at least examine the statement carefully to determine whether "the review * * * by the Commission's regulatory staff has been adequate." And it must independently consider the final balance among conflicting factors that is struck in the staff's recommendation.

The rationale of the Commission's limitation of environmental issues to hearings in which parties affirmatively raise those issues may have been one of economy. It may have been supposed that, whenever there are serious environmental costs overlooked or uncorrected by the staff, some party will intervene to bring those costs to the hearing board's attention. Of course, independent review of the "detailed statement" and independent balancing of factors in an uncontested hearing will take some time. If it is done properly, it will take a significant amount of time. But all of the NEPA procedures take time. Such administrative costs are not enough to undercut the Act's requirement that environmental protection be considered "to the fullest extent possible," see text at page 1114, supra. It is, moreover, unrealistic to assume that there will always be an intervenor with the information, energy and money required to challenge a staff recommendation which ignores environmental costs. NEPA establishes environmental protection as an integral part of the Atomic Energy Commission's basic mandate. The primary responsibility for fulfilling that mandate lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation.[21]

Congress passed the final version of NEPA in late 1969, and the Act went into full effect on January 1, 1970. Yet the Atomic Energy Commission's rules prohibit any consideration of environmental issues by its hearing boards at proceedings officially noticed before March 4, 1971.[22] This is 14 months after the effective date of NEPA. And the hearings affected may go on for as much as a year longer until final action is taken. The result is that major federal actions having a significant environmental impact may be taken by the Commission, without full NEPA compliance, more than two years after the Act's effective date. In view of the importance of environmental consideration during the agency review process, see Part II supra, such a time lag is shocking.

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[20] 10 C.F.R. § 2.104(b) (2) (1971).

[21] In recent years, the courts have become increasingly strict in requiring that federal agencies live up to their mandates to consider the public interest. They have become increasingly impatient with agencies which attempt to avoid or dilute their statutorily imposed role as protectors of public interest values beyond the narrow concerns of industries being regulated. See, e.g., Udall v. FPC, 387 U.S. 428, 87 S. Ct. 1712, 18 L. Ed. 2d 869 (1967); Environmental Defense Fund, Inc. v. Ruckelshaus, 142 U.S.App.D.C. 74, 439 F.2d 584 (1971); Moss v. C. A. B., 139 U.S.App.D.C. 150, 430 F.2d 891 (1970); Environmental Defense Fund, Inc. v. U. S. Dept. of H. E. & W., 138 U.S.App.D.C. 381, 428 F.2d 1083 (1970). In commenting on the Atomic Energy Commission's pre-NEPA duty to consider health and safety matters, the Supreme Court said "the responsibility for safeguarding that health and safety belongs under the statute to the Commission." Power Reactor Development Co. v. International Union of Elec., Radio and Mach. Workers, 367 U.S. 396, 404, 81 S. Ct. 1529, 1533, 6 L. Ed. 2d 924 (1961). The Second Circuit has made the same point regarding the Federal Power Commission: "In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." Scenic Hudson Preservation Conference v. FPC, 2 Cir., 354 F.2d 608, 620 (1965).

The Commission explained that its very long time lag was intended "to provide an orderly period of transition in the conduct of the Commission's regulatory proceedings and to avoid unreasonable delays in the construction and operation of nuclear power plants urgently needed to meet the national requirements for electric power."[23] Before this court, it has claimed authority for its action, arguing that "the statute did not lay down detailed guidelines and inflexible timetables for its implementation; and we find in it no bar to agency provisions which are designed to accommodate transitional implementation problems."[24]

Again, the Commission's approach to statutory interpretation is strange indeed—so strange that it seems to reveal a rather thoroughgoing reluctance to meet the NEPA procedural obligations in the agency review process, the stage at which deliberation is most open to public examination and subject to the participation of public intervenors. The Act, it is true, lacks an "inflexible timetable" for its implementation. But it does have a clear effective date, consistently enforced [**28] by reviewing courts up to now. Every federal court having faced the issues has held that the procedural requirements of NEPA must be met in order to uphold federal action taken after January 1, 1970.[25] The absence of a "timetable" for compliance has never been held sufficient, in itself, to put off the date on which a congressional mandate takes effect. The absence of a "timetable," rather, indicates that compliance is required forthwith.

The only part of the Act which even implies that implementation may be subject, in some cases, to some significant delay is Section 103. There, Congress provided that all agencies must review "their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance" with NEPA. Agencies finding some such insuperable difficulty are obliged to "propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act."

The Commission, however, cannot justify its time lag under these Section 103 provisions. Indeed, it has not attempted to do so; only intervenors have raised the argument. Section 103 could support a substantial delay only by an agency which in fact discovered an insuperable barrier to compliance with the Act and required time to formulate and propose the needed reformative measures. The actual review of existing statutory authority and regulations cannot be a particularly lengthy process [**30] for experienced counsel of a federal agency. Of course, the Atomic Energy Commission discovered no obstacle to NEPA implementation. Although it did not report its conclusion to the President until October 2, 1970, that nine-month delay (January to October) cannot justify so long a period of noncompliance with the Act. It certainly cannot justify a further delay of compliance until March 4, 1971.

No doubt the process formulating procedural rules to implement NEPA takes some time. Congress cannot have expected that federal agencies would immediately begin considering environmental issues on January 1, 1970. But the effective date of the Act does set a time for agencies to begin adopting rules and it demands that they strive, "to the fullest extent possible," to be prompt in the process. The Atomic Energy Commission has failed in this regard.[26] Consideration of environmental issues in the agency review process, for example, is quite clearly compelled by the Act.[27] The Commission cannot justify its 11-month delay in adopting rules on this point as part of a difficult, discretionary effort to decide whether or not its hearing boards should deal with environmental questions at all.

Even if the long delay had been necessary, however, the Commission would not be relieved of all NEPA responsibility to hold public hearings on the environmental con-

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[22] 10 C.F.R. § 50, App. D, at 249.

[23] 35 Fed.Reg. 18470 (December 4, 1970).

[24] Brief for respondents in No. 24,871 at 49.

[25] In some cases, the courts have had a difficult time determining whether particular federal actions were "taken" before or after January 1, 1970. But they have all started from the basic rule that any action taken after that date must comply with NEPA's procedural requirements. See Note, Retroactive Application of the National Environmental Policy Act of 1969, 69 Mich.L.Rev. 732 (1971), and cases cited therein. Clearly, any hearing held between January 1, 1970 and March 4, 1971 which culminates in the grant of a permit or license is a federal action taken after the Act's effective date.

[26] See text at page 1116 supra.

[27] As early as March 5, 1970, President Nixon stated in an executive order that NEPA requires consideration of environmental factors at public hearings. Executive Order 11514, 35 Fed.Reg. 4247 (March 5, 1970). See also Part II of this opinion.

sequences of actions taken between January 1, 1970 and final adoption of the rules. Although the Act's effective date may not require instant compliance, it must at least require that NEPA procedures, once established, be applied to consider prompt alterations in the plans or operations of facilities approved without compliance.[28] Yet the Commission's rules contain no such provision. Indeed, they do not even apply to the hearings still being conducted at the time of their adoption on December 3, 1970—or, for that matter, to hearings [**32] initiated in the following three months.

The delayed compliance date of March 4, 1971, then, cannot be justified by the

Commission's long drawn out rule making process.

Strangely, the Commission has principally relied on more pragmatic arguments. It seems an unfortunate affliction of large organizations to resist new procedures and to envision massive roadblocks to their adoption. Hence the Commission's talk of the need for an "orderly transition" to the NEPA procedures. It is difficult to credit the Commission's argument that several months were needed to work the consideration of environmental values into its review process. Before the enactment of NEPA, the Commission already had regulations requiring that hearings include health, safety and radiological matters.[29] The introduction of environmental matters cannot have presented a radically unsettling problem. And, in any event, the obvious sense of urgency on the part of Congress should make clear that a transition, however "orderly," must proceed at a pace faster than a funeral procession.

In the end, the Commission's long delay seems based upon what it believes to be a pressing national power crisis. Inclusion of environmental issues in pre-March 4, 1971 hearings might have held up the licensing of some power plants for a time. But the very purpose of NEPA was to tell federal agencies that environmental protection is as much a part of their responsibility as is protection and promotion of the industries they regulate. Whether or not the spectre of a national power crisis is as real as the Commission apparently believes, it must not be used to create a blackout of environmental consideration in the agency review process. NEPA compels a case-by-case examination and balancing of discrete factors. Perhaps there may be cases in which the need for rapid licensing of a particular facility would justify a strict time limit on a hearing board's review of environmental issues; but a blanket banning of such issues until March 4, 1971 is impermissible under NEPA.

The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action. However, the Atomic Energy Commission's rules specifically exclude from [**35] full consideration a wide variety of environmental issues. First, they provide that no party may raise and the Commission may not independently examine any problem of water quality—perhaps the most significant impact of nuclear power plants. Rather, the Commission indicates that it will defer totally to water quality standards devised and administered by state agencies and approved by the federal

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[28] In Part V of this opinion, we hold that the Commission must promptly consider the environmental impact of projects initially approved before January 1, 1970 but not yet granted an operating license. We hold that the Commission may not wait until construction is entirely completed and consider environmental factors only at the operating license hearings; rather, before environmental damage has been irreparably done by full construction of a facility, the Commission must consider alterations in the plans. Much the same principle—of making alterations while they still may be made at relatively small expense—applies to projects approved without NEPA compliance after the Act's effective date. A total reversal of the basic decision to construct a particular facility or take a particular action may then be difficult, since substantial resources may already have been committed to the project. Since NEPA must apply to the project in some fashion, however, it is essential that it apply as effectively as possible—requiring alterations in parts of the project to which resources have not yet been inalterably committed at great expense.

One District Court has dealt with the problem of instant compliance with NEPA. It suggested another measure which agencies should take while in the process of developing rules. It said: "The NEPA does not require the impossible. Nor would it require, in effect, a moratorium on all projects which had an environmental impact while awaiting compliance with § 102(2) (B). It would suffice if the statement pointed out this deficiency. The decisionmakers could then determine whether any purpose would be served in delaying the project while awaiting the development of such criteria." Environmental Defense Fund, Inc. v. Corps of Engineers, E.D.Ark., 325 F. Supp. 749, 758 (1971). Apparently, the Atomic Energy Commission did not even go this far toward considering the lack of a NEPA public hearing as a basis for delaying projects between the Act's effective date and adoption of the rules.

Of course, on the facts of these cases, we need not express any final view on the legal effect of the Commission's failure to comply with NEPA after the Act's effective date. Mere post hoc alterations in plans may not be enough, especially in view of the Commission's long delay in promulgating rules. Less than a year ago, this court was asked to review a refusal by the Atomic Energy Commission to consider environmental factors in granting a license. We held that the case was not yet ripe for review. But we stated: "If the Commission persists in excluding such evidence, it is courting the possibility that if error is found a court will reverse its final order, condemn its proceeding as so much waste motion, and order that the proceeding be conducted over again in way that realistically permits de novo consideration of the tendered evidence."

Thermal Ecology Must be Preserved v. AEC, 139 U.S.App.D.C. 366, 368, 433 F.2d 524, 526 (1970).

[29] See 10 C.F.R. § 20 (1971) for the standards which the Commission had developed to deal with radioactive emissions which might pose health or safety problems.

government under the Federal Water Pollution Control Act.[30] Secondly, the rules provide for similar abdication of NEPA authority to the standards of other agencies:

"With respect to those aspects of environmental quality for which environmental quality standards and requirements have been established by authorized Federal, State, and regional agencies, proof that the applicant is equipped to observe and agrees to observe such standards and requirements will be considered a satisfactory showing that there will not be a significant, adverse effect on the environment. Certification by the appropriate agency that there is reasonable assurance that the applicant for the permit or license will observe such standards and requirements will be considered dispositive for this purpose."[31] The most the Commission will do is include a condition in all construction permits and operating licenses requiring compliance with the water quality or other standards set by such agencies.[32] The upshot is that the NEPA procedures, viewed by the Commission as superfluous, will wither away in disuse, applied only to those environmental issues wholly unregulated by any other federal, state or regional body.

We believe the Commission's rule is in fundamental conflict with the basic purpose of the Act. NEPA mandates a case-by-case balancing judgment on the part of federal agencies. In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values. See text at page 1113 supra. The magnitude of possible benefits and possible costs may lie anywhere on a broad spectrum. Much will depend on the particular magnitudes involved in particular cases. In some cases, the benefits will be great enough to justify a certain quantum of environmental costs; in other cases, they will not be so great and the proposed action may have to be abandoned or significantly altered so as to bring the benefits and costs into a proper balance. The point of the individualized balancing analysis is to ensure that, with possible alterations, the optimally beneficial action is finally taken.

Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem: the magnitude of certain environmental costs. They simply determine whether those costs exceed an allowable amount. Their certification does not mean that they found no environmental damage whatever. In fact, there may be significant environmental damage (e.g., water pollution), but not quite enough to violate applicable (e.g., water quality) standards. Certifying agencies do not attempt to weigh that damage against the opposing benefits. Thus the balancing analysis remains to be done. It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action—the agency to which NEPA is specifically directed.

The Atomic Energy Commission, abdicating entirely to other agencies' certifications, neglects the mandated balancing analysis. Concerned members of the public are thereby precluded from raising a wide range of environmental issues in order to affect particular Commission decisions. And the special purpose of NEPA is subverted.

Arguing before this court, the Commission has made much of the special environmental expertise of the agencies which set environmental standards. NEPA did not overlook this consideration. Indeed, the Act is quite explicit in describing the attention which is to be given to the views and standards of other agencies. Section 102 (2) (C) provides:

> "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public."

Thus the Congress was surely cognizant of federal, state and local agencies "authorized to develop and enforce environmental standards." But it provided, in Section

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[30] 10 C.F.R. § 50, App. D, at 249. Appendix D does require that applicants' environmental reports and the Commission's "detailed statements" include "a discussion of the water quality aspects of the proposed action." Id. at 248. But, as is stated in text, it bars independent consideration of those matters by the Commission's reviewing boards at public hearings. It also bars the Commission from requiring—or even considering—any water protection measures not already required by the approving state agencies. See Note 31 infra.

The section of the Federal Water Pollution Control Act establishing a system of state agency certification is § 21, as amended in the Water Quality Improvement Act of 1970. 33 U.S.C.A. § 1171 (1970). In text below, this section is discussed as part of the Water Quality Improvement Act.

[31] 10 C.F.R. § 50, App. D, at 249.

[32] Ibid.

102(2) (C), only for full consultation. It most certainly did not authorize a total abdication to those agencies. Nor did it grant a license to disregard the main body of NEPA obligations. Of course, federal agencies such as the Atomic Energy Commission may have specific duties, under acts other than NEPA, to obey particular environmental standards. Section 104 of NEPA makes clear that such duties are not to be ignored:

"Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency."

On its face, Section 104 seems quite unextraordinary, intended only to see that the general procedural reforms achieved in NEPA do not wipe out the more specific environmental controls imposed by other statutes. Ironically, however, the Commission argues that Section 104 in fact allows other statutes to wipe out NEPA.

Since the Commission places great reliance on Section 104 to support its abdication to standard setting agencies, we should first note the section's obvious limitation. It deals only with deference to such agencies which is compelled by "specific statutory obligations." The Commission has brought to our attention one "specific statutory obligation": the Water Quality Improvement Act of 1970 (WQIA).[33] That Act prohibits federal licensing bodies, such as the Atomic Energy Commission, from issuing licenses for facilities which pollute "the navigable waters of the United States" unless they receive a certification from the appropriate agency that compliance with applicable water quality standards is reasonably assured. Thus Section 104 applies in some fashion to consideration of water quality matters. But it definitely cannot support—indeed, it is not even relevant to—the Commission's wholesale abdication to the standards and certifications of any and all federal, state and local agencies dealing with matters other than water quality.

As to water quality, Section 104 and WQIA clearly require obedience to standards set by other agencies. But obedience does not imply total abdication. Certainly, the language of Section 104 does not authorize an abdication. It does not suggest that other "specific statutory obligations" will entirely replace NEPA. Rather, it ensures that three sorts of "obligations" will not be undermined by NEPA: (1) the obligation to "comply" with certain standards, (2) the obligation to "coordinate" or "consult" with certain agencies, and (3) the obligation to "act, or refrain from acting contingent upon" a certification from certain agencies. WQIA imposes the third sort of obligation. It makes the granting of a license by the Commission "contingent upon" a water quality certification. But it does not require the Commission to grant a license once a certification has been issued. It does not preclude the Commission from demanding water pollution controls from its licensees which are more strict than those demanded by the applicable water quality standards of the certifying agency.[34] It is very important to understand [*1125] these facts about WQIA. For all that Section 104 [**43] of NEPA does is to reaffirm other "specific statutory obligations." Unless those obligations are plainly mutually exclusive with the requirements of NEPA, the specific mandate of NEPA must remain in force. In other words, Section 104 can operate to relieve an agency of its NEPA duties only if other "specific statutory obligations" clearly preclude performance of those duties.

Obedience to water quality certifications under WQIA is not mutually exclusive with the NEPA procedures. It does not preclude performance of the NEPA duties. Water quality certifications essentially establish a minimum condition for the granting of a license. But they need not end the matter. The Commission can then go on to perform the very different operation of balancing the overall benefits and costs of a particular proposed project, and consider alterations (above and beyond the applicable water quality standards) which would further reduce environmental damage. Because the Commission can still conduct the NEPA balancing analysis, consistent with WQIA, Section 104 does not exempt it from doing so. And it, therefore, must conduct the obligatory analysis under the prescribed procedures.

We believe the above result follows from the plain language of Section 104 of NEPA and WQIA. However, the Commission argues that we should delve beneath the

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[33] The relevant portion is 33 U.S.C.A. § 1171. See Note 30 supra.

[34] The relevant language in WQIA seems carefully to avoid any such restrictive implication. It provides that "each Federal agency shall insure compliance with applicable water quality standards U.S.C.A. § 1171(a). It also provides that "no license or permit shall be granted until the certification required by this section has been obtained or has been waived. No license or permit shall be granted if certification has been denied." 33 U.S.C.A. § 1171(b) (1). Nowhere does it indicate that certification must be the final and only protection against unjustified water pollution—a fully sufficient as well as a necessary condition for issuance of a federal license or permit.

We also take note of § 21(c) of WQIA, which states: "Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with applicable water quality standards. * * *" 33 U.S.C.A. § 1171(c).

plain language and adopt a significantly different interpretation. It relies entirely upon certain statements made by Senator Jackson and Senator Muskie, the sponsors of NEPA and WQIA respectively.[35] Those statements indicate that Section 104 was the product of a compromise intended to eliminate any conflict between the two bills then in the Senate. The overriding purpose was to prevent NEPA from eclipsing obedience to more specific standards under WQIA. Senator Muskie, distrustful of "self-policing by Federal agencies which pollute or license pollution," was particularly concerned that NEPA not undercut the independent role of standard setting agencies.[36] Most of his and Senator Jackson's comments stop short of suggesting that NEPA would have no application in water quality matters; their goal was to protect WQIA, not to undercut NEPA. Our interpretation of Section 104 is perfectly consistent with that purpose.

Yet the statements of the two Senators occasionally indicate they were willing to go farther, to permit agencies such as the Atomic Energy Commission to forego at least some NEPA procedures in consideration of water quality. Senator Jackson, for example, said, "The compromise worked out between the bills provides that the licensing agency will not have to make a detailed statement on water quality if the State or other appropriate agency has made a certification pursuant to [WQIA]."[37] [*1126] Perhaps Senator Jackson would have required some consideration and balancing of environmental costs—despite the lack of a formal detailed statement—but he did not spell out his views. No Senator, other than Senators Jackson and Muskie, addressed himself specifically to the problem during floor discussion. Nor did any member of the House of Representatives.[38] The section-by-section analysis of NEPA submitted to the Senate clearly stated the overriding purpose of Section 104: that "no agency may substitute the procedures outlined in this Act for more restrictive and specific procedures established by law governing its activities."[39] The report does not suggest there that NEPA procedures should be entirely abandoned, but rather that they should not be "substituted" for more specific standards. In one rather cryptic sentence, the analysis does muddy the waters somewhat, stating that "it is the intention that where there is no more effective procedure already established, the procedure of this act will be followed."[40] Notably, however, the sentence does not state that in the presence of "more effective procedures" the NEPA procedure will be abandoned entirely. It seems purposefully vague, quite possibly meaning that obedience to the certifications of standard setting agencies must alter, by supplementing, the normal "procedure of this act."

This rather meager legislative history in our view, cannot radically transform the purport of the plain words of Section 104. Had the Senate sponsors fully intended to allow a total abdication of NEPA responsibilities in water quality matters—rather than a supplementing of them by strict obedience to the specific standards of WQIA—the language of Section 104 could easily have been changed. As the Supreme Court often has said, the legislative history of a statute (particularly such relatively meager and vague history as we have here) cannot radically affect its interpretation if the language of the statute is clear. See, e.g., Packard Motor Car Co. v. NLRB, 330 U.S. 485, 67 S. Ct. 789, 91 L. Ed. 1040 (1947); Kuehner v. Irving Trust Co., 299 U.S. 445, 57 S. Ct. 298, 81 L. Ed. 340 (1937); Fairport, Painesville & Eastern R. Co. v. Meredith, 292 U.S. 589, 54 S. Ct. 826, 78 L. Ed. 1446 (1934); Wilbur v. United States ex rel. Vindicator Consolidated Gold Mining Co., 284 U.S. 231, 52 S. Ct. 113, 76 L. Ed. 261 (1931). In a recent case interpreting a veterans' act, the Court set down the principle which must govern our approach to the case before us:

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[35] The statements by Senators Jackson and Muskie were made, first, at the time the Senate originally considered WQIA. 115 Cong.Rec. (Part 21) at 29052-29056. Another relevant colloquy between the two Senators occurred when the Senate considered the Conference Report on NEPA. 115 Cong.Rec. (Part 30) at 40415-40425. Senator Muskie made a further statement at the time of final Senate approval of the Conference Report on WQIA. 116 Cong.Rec. (daily ed.) S4401 (March 24, 1970).

[36] 115 Cong.Rec. (Part 21) at 29053.

[37] Ibid. See also id. at 29056. Senator Jackson appears not to have ascribed major importance to the compromise. He said, "It is my understanding that there was never any conflict between this section [of WQIA] and the provisions of [NEPA]. If both bills were enacted in their present form, there would be a requirement for State certification, as well as a requirement that the licensing agency make environmental findings." Id. at 29053. He added, "The agreed-upon changes mentioned previously would change the language of some of these requirements, but their substance would remain relatively unchanged." Id. at 29055. Senator Muskie seemed to give greater emphasis to the supposed conflict between the two bills. See id. at 29053; 115 Cong.Rec. (Part 30) at 40425; 116 Cong.Rec. (daily ed.) at S4401.

[38] The Commission has called to our attention remarks made by Congressman Harsha. The Congressman did refer to a statement by Senator Muskie regarding NEPA, but it was a statement regarding application of the Act to established environmental control agencies, not regarding the relationship between NEPA and WQIA. 115 Cong.Rec. (Part 30) at 40927-40928.

[39] Id. at 40420.

[40] Ibid.

"Having concluded that the provisions of § 1 are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act.Since the State has placed such heavy reliance upon that history, however, we do deem it appropriate to point out that this history is at best inconclusive. It is true, as the State points out, that Representative Rankin, as Chairman of the Committee handling the bill on the floor of the House, expressed his view during the course of discussion of the bill on the floor that the 1941 Act would not apply to [the sort of case in question]. But such statements, even when they stand alone, have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute. United States v. Oregon, 366 U.S. 643, 648, 81 S. Ct. 1278, 1281, 6 L. Ed. 2d 575 (1961). (Footnotes omitted.) It is, after all, the plain language of the statute which all the members of both houses of Congress must approve or disapprove. The courts should not allow that language to be significantly undercut. In cases such as this one, the most we should do to interpret clear statutory wording is to see that the overriding purpose behind the wording supports its plain meaning. We have done that here. And we conclude that Section 104 of NEPA does not permit the sort of total abdication of responsibility practiced by the Atomic Energy Commission.

Petitioners' final attack is on the Commission's rules governing a particular set of nuclear facilities: those for which construction permits were granted without consideration of environmental issues, but for which operating licenses have yet to be issued. These facilities, still in varying stages of construction, include the one of most immediate concern to one of the petitioners: the Calvert Cliffs nuclear power plant on Chesapeake Bay in Maryland.

The Commission's rules recognize that the granting of a construction permit before NEPA's effective date does not justify bland inattention to environmental consequences until the operating license proceedings, perhaps far in the future. The rules require that measures be taken now for environmental protection. Specifically, the Commission has provided for three such measures during the preoperating license stage. First, it has required that a condition be added to all construction permits, "whenever issued," which would oblige the holders of the permits to observe all applicable environmental standards imposed by federal or state law. Second, it has required permit holders to submit their own environmental report on the facility under construction. And third, it has initiated procedures for the drafting of its staff's "detailed environmental statement" in advance of operating license proceedings.[41]

The one thing the Commission has refused to do is take any independent action based upon the material in the environmental reports and "detailed statements." Whatever environmental damage the reports and statements may reveal, the Commission will allow construction to proceed on the original plans. It will not even consider requiring alterations in those plans (beyond compliance with external standards which would be binding in any event), though the "detailed statements" must contain an analysis of possible alternatives and may suggest relatively inexpensive but highly beneficial changes. Moreover, the Commission has, as a blanket policy, refused to consider the possibility of temporarily halting construction in particular cases pending a full study of a facility's environmental impact. It has also refused to weigh the pros and cons of "backfitting" for particular facilities (alteration of already constructed portions of the facilities in order to incorporate new technological developments designed to protect the environment). Thus reports and statements will be produced, but nothing will be done with them. Once again, the Commission seems to believe that the mere drafting and filing of papers is enough to satisfy NEPA.

The Commission appears to recognize the severe limitation which its rules impose on environmental protection. Yet it argues that full NEPA consideration of alternatives and independent action would cause too much delay at the preoperating license stage. It justifies its rules as the most that is "practicable, in the light of environmental needs and 'other essential considerations of national policy'."[42] It cites, in particular, the "national power crisis" as a consideration of national policy militating against delay in construction of nuclear power facilities.

The Commission relies upon the flexible NEPA mandate to "use all practicable means consistent with other essential considerations of national policy." As we have previously pointed out, however, that mandate applies only to the substantive guidelines set forth in Section 101 of the Act. See page 1114 supra. The procedural duties, the duties to give full consideration to environmental protection, are subject to a much more strict standard of compliance. By now, the applicable principle should be absolutely clear.

NEPA requires that an agency must—to the fullest extent possible under its other statutory obligations—consider alternatives to its actions which would reduce en-

41.10 C.F.R. § 50, App. D, paras. 1, 14.

42.Brief for respondents in No. 24,871 at 59.

vironmental damage. That principle establishes that consideration of environmental matters must be more than a pro forma ritual. Clearly, it is pointless to "consider" environmental costs without also seriously considering action to avoid them. Such a full exercise of substantive discretion is required at every important, appropriate and nonduplicative stage of an agency's proceedings. See text at page 1114 supra.

The special importance of the pre-operating license stage is not difficult to fathom. In cases where environmental costs were not considered in granting a construction permit, it is very likely that the planned facility will include some features which do significant damage to the environment and which could not have survived a rigorous balancing of costs and benefits. At the later operating license proceedings, this environmental damage will have to be fully considered. But by that time the situation will have changed radically. Once a facility has been completely constructed, the economic cost of any alteration may be very great. In the language of NEPA, there is likely to be an "irreversible and irretrievable commitment of resources," which will inevitably restrict the Commission's options. Either the licensee will have to undergo a major expense in making alterations in a completed facility or the environmental harm will have to be tolerated. It is all too probable that the latter result would come to pass.

By refusing to consider requirement of alterations until construction is completed, the Commission may effectively foreclose the environmental protection desired by Congress. It may also foreclose rigorous consideration of environmental factors at the eventual operating license proceedings. If "irreversible and irretrievable commitment[s] of resources" have already been made, the license hearing (and any public intervention therein) may become a hollow exercise. This hardly amounts to consideration of environmental values "to the fullest extent possible."

A full NEPA consideration of alterations in the original plans of a facility, then, is both important and appropriate well before the operating license proceedings. It is not duplicative if environmental issues were not considered in granting the construction permit. And it need not be duplicated, absent new information or new developments, at the operating license stage. In order that the pre-operating license review be as effective as possible, the Commission should consider very seriously the requirement of a temporary halt in construction pending its review and the "backfitting" of technological innovations. For no action which might minimize environmental damage may be dismissed out of hand. Of course, final operation of the facility may be delayed thereby. But some delay is inherent whenever the NEPA consideration is conducted—whether before or at the license proceedings. It is far more consistent with the purposes of the Act to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible.

Thus we conclude that the Commission must go farther than it has in its present rules. It must consider action, as well as file reports and papers, at the pre-operating license stage. As the Commission candidly admits, such consideration does not amount to a retroactive application of NEPA. Although the projects in question may have been commenced and initially approved before January 1, 1970, the Act clearly applies to them since they must still pass muster before going into full operation. All we demand is that the environmental review be as full and fruitful as possible.

We hold that, in the four respects detailed above, the Commission must revise its rules governing consideration of environmental issues. We do not impose a harsh burden on the Commission. For we require only an exercise of substantive discretion which will protect the environment "to the fullest extent possible. "No less is required if the grand congressional purposes underlying NEPA are to become a reality.

Remanded for proceedings consistent with this opinion.

APPENDIX

Public Law 91-190

91st Congress, S. 1075

January 1, 1970

[43] The courts which have held NEPA to be nonretroactive have not faced situations like the one before us here—situations where there are two, distinct stages of federal approval, one occurring before the Act's effective date and one after that date. See Note, supra Note 25.

The guidelines issued by the Council on Environmental Quality urge agencies to employ NEPA procedures to minimize environmental damage, even when approval of particular projects was given before January 1, 1970: "To the maximum extent practicable the section 102(2) (C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of [NEPA] on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program." 36 Fed.Reg. at 7727.

An Act

To establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969."

PURPOSE

Sec. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future [**60] generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may-

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure theintegrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions [**62] significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the [**64] purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

DECISION IN SIERRA CLUB ET AL V. COLEMAN AND TIEMANN (NATIONAL ENVIRONMENTAL POLICY ACT; ENVIRONMENTAL IMPACT ASSESSMENT OF DARIEN GAP HIGHWAY THROUGH PANAMA AND COLUMBIA)*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB, NATIONAL AUDUBON SOCIETY, FRIENDS OF THE EARTH, INC., INTERNATIONAL ASSOCIATION OF GAME, FISH AND CONSERVATION COMMISSIONERS,	:	
Plaintiffs	:	
v.	:	Civil Action
	:	No. 75-1040
WILLIAM T. COLEMAN, JR., NORBERT T. TIEMANN,	:	
Defendants	:	

MEMORANDUM AND ORDER

This matter is before the Court, pursuant to Rule 65 of the Federal Rules of Civil Procedure, on plaintiffs' Motion For A Preliminary Injunction. Having considered the papers submitted in support thereof, the opposition thereto, and the arguments of counsel, the Court makes the following findings of fact and conclusions of law.

This case arises under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* The defendants, the Department of Transportation and the Federal Highway Administration, are currently engaged in the initial steps of construction of the "Darien Gap Highway" through Panama and Columbia.[1] Construction of a highway to link the Pan American Highway system of South America with the Inter-American Highway was authorized by Congress in 1970, P.L. 91-605, 23 U.S.C. § 216. The actual administration of the project was left to the Secretary of Transportation, 23 U.S.C. § 216(b). In April of 1974, well after the project was underway and well after the selection of the precise route of the highway had been made, the Federal Highway Administration (FHWA) prepared and circulated to certain parties a draft "Environmental Impact Assessment" relating to the construction of the highway. In December of 1974 FHWA issued a final "Assessment", very similar to the draft. The Sierra Club and three other environmental organizations have now brought this action seeking to enjoin any further action on the project by FHWA, claiming that the preparation and issuance of the "Assessment" satisfied neither the procedural nor the substantive re-

[1] Those two countries together bear one-third of the cost of the road; the United States bears two-thirds.

quirements of NEPA. For the reasons outlined below, the Court agrees, and is compelled to grant the preliminary injunction.

A number of courts have previously considered the requirements for a preliminary injunction in the case of an alleged deficiency in compliance with NEPA requirements. This Court agrees that "when ... federal statutes have been violated, it has been the longstanding rule that a court should not inquire into the traditional requirements for equitable relief". Atchison, Topeka, and Santa Fe Railway Co. v. Callaway, 392 F. Supp. 610, 623 (D.D.C., 1974). Accord, Lathan v. Volpe. 455 F.2d 1111, 1116 (9th Cir., 1971); Keith v. Volpe, 352 F. Supp. 1324, 1349 (C.D. Cal., 1972), aff'd., 506 F.2d 696 (9th Circ., 1974, cert. denied, 420 U.S. 908, 95 Sup. Ct. 826 (1975). In each of these NEPA cases the court took the position that it was not necessary to the granting of a preliminary injunction to balance the equities, and approved the issuance of an injunction based on deficiencies in compliance with NEPA requirements. These cases derive from the decision of the Supreme Court in United States v. City and Country of San Francisco, 310 U.S. 16, 60 S.Ct. 749 (1940), reh. denied 310 U.S. 657, 60 S. Ct 1071 (1940), in which the Supreme Court approved the granting of an injunction without a balancing of the equities in order to give effect to a declared policy of Congress, embodied in legislation.

In the present case, the Court finds three principal deficiencies in FHWA's compliance with the NEPA requirements. First, FHWA failed to circulate either its draft or final Assessment to the Environmental Protection Agency for its comments, as required by 42 U.S.C. §§ 1856h-7 and 4332(C). There is no question but that the environmental effects of major highway construction is within the expertise of EPA, and that agency might well have had valuable comments which could have affected FHWA's judgment as the Assessment was considered in the decision-making process in the selection of the highway's route. Indeed, EPA's response to the Assessment (when it finally learned of its existence) suggests a discussion by FHWA of the domestic consequences of the transmission of aftosa into the United States, the lack of which is one of the very deficiencies found by this Court (below) to require the granting of an injunction.[2]

The second major defect in the "Assessment" is a substantive one: the failure of that document to adequately discuss the problems of the transmission of aftosa, or "foot-and-mouth" disease. While there is in the document a recognition of the probable transmission of aftosa absent the most stringent of control programs, and a consequent discussion of the evolving plans for preventing transmission of the disease to North America, there is no discussion whatsoever of the environmental impact upon the United States of a breakdown of such a control program. Considering that, according to the undisputed record in this case, aftosa is the most serious existing livestock disease, which if it spread into the United States could result in the destruction of up to twenty-five percent of North American livestock and an economic loss of ten billion dollars, as well as the extinction of such endangered species as the American bison, it seems evident that an impact statement which fails to discuss this possibility is fatally deficient. No matter how well-planned the control program may be, there will always remain at least the possibility that it may not prove successful. Discussion of the consequences of failure is therefore essential, for otherwise the public, and particularly those most interested in such a possibility, will not be alerted to the problem and will not make the informed comments which FHWA is required to consider in its decision-making process.[3]

The third defect in the Assessment, again of a substantive nature, is its failure to adequately discuss possible alternatives to the route that has been chosen for the highway, as required by § 102(2)(C)(iii) of NEPA, 42 U.S.C. § 4332(C)(iii). While the statement does mention briefly the "no-build" alternative, without discussing its relative environmental impact, the bulk of the section of the final Assessment dealing with "Alternatives To The Proposed Project" is devoted to an analysis of why the short ("Atrato") route is preferable to the longer ("Choco") route from the point of view of the engineering and cost. Unfortunately, none of the discussion therein is addressed to the environmental impact of possible alternatives to the route actually selected (the Atrato route).[4] While, in light of the express Congressional mandate that a highway be built, it seems unnecessary for the statement to discuss possible non-land alternatives, it is indispensable for the statement to discuss at least the relative environmental impacts of other land routes, such as the Choco route, though they might cost more or be less feasible from an engineering perspective. Such a discussion of the environmental impact of alternate routes will also allow FHWA to discuss more fully the impact of the road upon the lives of the Choco and Cuna Indians, and the opportunities which alternate routes may present for avoiding the "cultural extinction" so casually predicted by the Assessment for those tribes as a result of the Atrato route.[5]

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[2] See Appendix J to plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' motion for a Preliminary Injunction.

[3] See also Appendix E to plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction.

[4] Exhibit A to defendants' Memorandum in Opposition to Motion For Preliminary Injunction, pp. 182-187.

[5] Exhibit A to defendants' Memorandum in Opposition to Motion For preliminary Injunction, p. 171

Finally, the defendants in their opposition to plaintiffs' motion make no claim that an environmental impact statement is not required, but rather contend that their document is the functional equivalent of an environmental impact statement as defined by NEPA. While it is unimportant whether this document is labelled "Statement" or "Assessment", the document in question is clearly not what NEPA demands. The law in this jurisdiction is clear: "... the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of statutory authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance". Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 146 U.S. App.D.C. 33, at 39, 449 F.2d 1109, at 1115 (1971) (emphasis in original). Here defendants have clearly not discharged those duties. Despite its elaborate table of contents and a generous ration of environmentally irrelevant "filler", the Assessment is not an adequate environmental impact statement, nor was the process which led to its preparation what NEPA contemplates. Indeed, it is clear that the decision to build the highway in the Atrato route was made well before the statement was begun,[6] thus ignoring Congress' intent that "decisions about federal actions ... be made only after responsible decision-makers had fully adverted to the environmental consequences of the actions, and had decided that the public benefits flowing from the actions outweighed their environmental costs.[7] Thus the harm with which the courts must be concerned in NEPA cases is not, strictly speaking, harm to the environment, but rather the failure of decision-makers to take environmental factors into account in the way that NEPA mandates". Jones v. District of Columbia Redevelopment Land Agency, 162 U.S. App. D.c. 366 at 376, 499 F. 2d 502 at 512 (1974).

It is therefore, by the Court, this 17th day of October 1975.

ORDERED that the Defendants, their agents, officers, servants, employees, and attorneys, and any person in active concert or participation with them are hereby enjoined from entering into any contract, obligating any funds, expending any funds, or taking any other action whatsoever in furtherance of construction of the Darien Gap Highway, pending final hearing and disposition of this action, or unless and until the Defendants have taken all action necessary to comply fully with the substantive and procedural requirements of the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852. 42 U.S.C. § 4321 *et seq.*; United States Department of Transportation Order 5610.1A October 4, 1974, revised, Order 5610.1B, 39 Fed. Reg. 35235 (September 20, 1974); and Federal Highway Administration Policy and Procedure Memorandum 90-1, September 7, 1972, revised effective November 29, 1974, 23 C.F.R. Parts 771, 790 and 795, 39 Fed. Reg. 41804 (December 2, 1974), including, but not limited to, the preparing (including any necessary studies), circulating for comment, making available to the public, and considering a detailed statement of the environmental impact of the Defendants' action to construct a highway through the Darien Gap region, and it is further

ORDERED that the United States marshal shall serve a copy of this order forthwith upon the Defendants.

JUDGE

[6] See 1968 Report of the Darien Subcommittee, Final Conclusions Regarding Location, Design and Construction of the Pan American Highway Through the "Darien Gap". In The Republics Of Panama and Columbia, Exhibit C to defendants' Memorandum in Opposition to Motion For Preliminary Injunction, Affidavit of Wesley S. Mendenhall, Jr.

[7] Footnote omitted.

MEMORANDUM AND ORDER IN

[September 23, 1976] (National Environmental Policy Act; Environmental Impact Assessment of Darien Gap Highway through Panama and Columbia)*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB, et al., — Plaintiffs,

v.

WILLIAM T. COLEMAN, et al., — Defendants

CIVIL ACTION NO. 75-1040

MEMORANDUM AND ORDER

This matter is now before the Court on plaintiffs' motion for an extension of the preliminary injunction heretofore entered in this case and defendants' opposition thereto. this case was last before the Court eleven months ago, at which time the Court found that defendants had failed to comply with the procedural and substantive requirements of the national Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq*., in their preparation of an environmental impact assessment relating to their construction of the Darien Gap Highway through Panama and Columbia. As a result, the Court enjoined further work on the project until such time as compliance with NEPA had been effected, 405 F. Supp. 53. Defendants have now complied with the procedural requirements of NEPA and produced a Final Environmental Impact Statement for the project, and now assert that they may proceed with the project. Plaintiffs content that the FEIS is defective in certain critical areas, and argue that the injunction should therefore be extended. After an examination of the FEIS in light of the parties' arguments, the Court concludes that the statement is indeed so deficient in certain basic respects that the injunction must be extended until those deficiencies are remedied.

When this matter was last before the Court, the earlier assessment was found to lack sufficient discussion of the problems of control of aftosa, or foot-and-mouth disease (FMD), of the environmental impact of possible alternative routes for the highway, and of the effects of the highway on the Cuna and Choco Indians inhabiting the area through which the highway is expected to be built. While the FEIS is in general a significant improvement over the earlier assessment, and while the discussion of those three topics has been modified to various degrees, the FEIS still fails to adequately examine the environmental impact of the proposed Darien Gap highway with regard to those mattes.

The premise form which any environmental impact statement must begin is the recognition that its goal is to provide a detailed discussion sufficient to allow the agency decision-maker to fully consider in his or her decisional calculus the possible environmental effects of various alternative paths the agency might choose to pursue with respect to a given project. See, Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (C.A.D.C., 1971); Scientists Institute For Public Information v. Atomic Energy Commission, 481 F.2D 1079 (C.A.D.C., 1973); Natural Resources Defense Council v. Morton, 458 F.2d 827 (C.A.D.C., 1972); Carolina Environmental Study Group v. United States, 510 F.2d 796 (C.A.D.C., 1975). These cases also establish that the degree of detail required in the analysis depends on the circumstances and nature of the project involved.

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*[The Court's Memorandum and Order of October 17, 1975, appear at 14 I.L.M. 1425 (1975).
[A memorandum issued by the U.s. council on Environmental Quality with regard to applying the environmental impact statement requirement to environmental impacts abroad appears at I.L.M. page 1427].

In the present case, the defendants propose to build the first major highway through a region until now almost wholly undisturbed by an encroachment of modern civilization, an area by all accounts constituting an ecosystem virtually unique to the world. A more paradigmatic example of the need for thorough and strict application of the requirements of NEPA could hardly be found, yet the defants' compliance continues to reflect a minimalist approach to those requirements. while this may be due to their failure to recognize NEPA's applicability for literally years during the earlier phases of the project, that failure does not justify any relaxation of those requirements now.

As was the case when this matter was first before the Court, the most significant environmental problem related to the proposed highway is the transmission of aftosa (FMD) into North America which will occur in the absence of stringent control measures along the highway and in Panama, Colombia, and other Central American nations. This problem, as well as the general background of the project, is more fully described in the Court's earlier opinion, 405 F. Supp. 53. The FEIS recognizes the potentially disastrous results of an outbreak of FMD in the United States alone, estimating that it might create a loss of $10 billion in domestic livestock in the first year alone, as well s possibly causing the extinction of certain endangered livestock species. yet the statement concludes that the "increased risk of such an outbreak due to the construction of the Darien Gap Highway is considered to be insignificant in light of the control programs now in existence in the U.S., Central America, Mexico and Panama and the control program now being developed in through the Darien Gap, a rational evaluation of the impact of the bridging of the gap by the highway on upper Central America and North America requires a clear understanding of the probable results of such a northward transmission of FMD. That understanding in turn requires an examination of the prospects for controlling the disease as it migrates north-ward, as well as of the actual impact of FMD in the affected areas. While the FEIS does adequately describe the devastation that might result form an epizootic (animal epidemic) of the disease in these areas, it entirely fails to consider the prospects for control of the disease in such areas. The Statement notes that substantial funds might be required to control the disease if any outbreaks should occur, but gives no indication of the magnitude of expenditures which would correspond to any of the various scenarios imaginable. Indeed, estimates by various commentators suggest that the funding now anticipated for aftosa control associated with the development of the highway may be too low by a factor of as much as one hundred or more. In order for the agency to give any meaningful consideration to the merit of the proposed project, it must know what the possible funding requirements associated with the project may be and whether such funds are likely to be available. without such knowledge the balancing mandated by NEPA cannot be seriously undertaken.

The second fundamental deficiency in the FEIS is its treatment of the impact of the project upon the lies of the cuna and Choco Indians living in the Darien Gap region. The initial environmental impact assessment before the Court predicted possible cultural extinction for these tribes. The current statement again treats their fate in a cursory and casual manner, and makes no attempt at serious anthropological or ethnographic analysis of the impact of secondary development resulting from the highway upon these people. It asserts that the Chocos in Panama "are adaptable and will probably become incorporated . . . into the national economy", whereas the Cuna "are more traditional and are expected to retain their cultural identity", FEISD at 6-27. Nowhere does the document deal with the highway's impact in significantly more dept. It asserts that the "Cuna will be little affected culturally by the influx of populations and the economic growth of the region as long as extensive forest habitat is maintained. Their traditional village life and strong community organization will resist change as it has always done". FEIS at 6-28. the FEIS then completely vitiates the predictive value of these generalizations by concluding that if "the colonists are permitted to cut trees without restraint, they will cause drastic alteration of the Cuna culture", and that the "extent of actual changes depends entirely upon the implementation of the proposed OAS land use plan". FEIS at 6-28. the statement does not seriously discuss the contents of that plan or its current status or the prospects for its approval or enforcement. With regard to the Chocos in Panama, the statement notes that they will be similarly affected in the few places where they have started to build villages, but the majority of the "transitory riverine choco, who build temporary shelters along stream banks, will simply move farther upstream when the pressures of population become too great". Id. This statement too is undermined by the qualification that the extent of the changes will be determined by the possible application of the OAS land use plan. With regard to consideration of the impact upon the two tribes in Colombia, the statement is limited to the following analysis: "The Cuna have lived as much as they do today for several centuries, and their traditional life and strong political organization and traditional solidarity have resisted first the Spaniards and then the Colombians, will continue to resist change. The Chocos will be little affected". FEIS at 6-31.

This treatment does not satisfy the requirements of NEPA. While even the certainty of cultural extinction for both tribes would not necessarily preclude approval of the project, NEPA requires that the agency make such a decision knowingly and with due regard for its environmental consequences. In light of the critical comments in response to the draft EIS, particularly those of Artuo Munoz of the Stanford University Center for Latin American Stud-

ies, FEIS at 12.10, and the predictable pressures for secondary development that will accompany completion of the highway, the FEIS simply does not provide the information which would be needed for such informed balancing and decision-making in this regard. The speculation and conjecture with which the document's discussion is replete are not justified by any limitations of available information sources or analytical tools, and do not satisfy the agency's obligations under NEPA.

Finally, the statement's discussion of possible alternatives to the Atrato route chosen in Colombia continues to be inadequate. When this matter was before the Court last October, the earlier assessment's treatment of alternative routes was found to be critically deficient. The comments made by the Court at that time are equally applicable to the current version, which is not significantly improved; the discussion is still devoted to an analysis of why the shooter (Atrato) route is preferable to the longer (Choco) route from the point of view of engineering and cost. Unfortunately, little of the discussion therein is addressed to the environmental impact of possible alternatives to the route actually selected (the Atrato route). Such a discussion of the environmental impacts of other land routes, such as the Choco route, is indispensable, though they might cost more or be less feasible form an engineering perspective. Accordingly, it is by the Court this 23rd day of September, 1976.

ORDERED, that plaintiffs' Motion To Continue In Effect The Existing Preliminary Injunction be, and hereby is, granted; and

FURTHER ORDERED, that defendants, their agents, officers, servants, employees, and attorneys, and any persons in active concert or participation with them, are hereby enjoined from entering into any contract, obligating any funds, expending any funds, or taking any other action whatsoever in furtherance of construction of the Darien Gap highway, except as specified by the Court's Order of December 23, 1975, pending final hearing and disposition of this action, or unless and until defendants have fully and adequately supplemented their Final Environmental Impact Statement, in the manner prescribed by law for the initial preparation of such statements, to remedy the deficiencies outlined in this memorandum. In preparing such a supplement, defendants may conduct any on-site studies that may be required to allow full and informed consideration of the issues involved.

IT IS SO ORDERED.

Signed

JUDGE

EUROPEAN COMMUNITIES: COUNCIL RESOLUTION ON EXTERNAL ASPECTS OF THE CREATION OF A 200-MILE FISHING ZONE*

[Approved by the Council by written procedure, November 3, 1976]

Council Resolution on Certain External Aspects of the Creation of a 200-Mile Fishing Zone in the Community with Effect from 01 January 1977.

With reference to its declaration of 27 July 1976 on the creation of a 200-mile fishing zone in the Community, the Council considers that the present circumstances, and particularly the unilateral steps taken or about to be taken by certain third countries, warrant immediate action by the Community to protect its legitimate interests in the maritime regions most threatened by the consequences of these steps to extend fishing zones, and that the measures to be adopted tot his end should be based on the guidelines which are emerging within the iii-rd United Nations Conference on the Law of the Sea.

It agrees that, as from 01 January 1977, member states shall, by means of concerted action, extend the limits of their fishing zones to 200 miles off their North Sea and North Atlantic coasts, without prejudice to similar action being taken for the other fishing zones within their jurisdiction such as the mediterranean.

It also agrees that, as form the same date, the exploitation of fishery resources in these zones by fishing vessels of third countries shall be governed by agreements between the Community and the third countries concerned.

It agrees, furthermore, on the need to ensure, by means of any appropriate Community agreements, that Community fishermen obtain fishing rights in the waters of third countries and that the existing rights are retained.

To this end, irrespective of the common action to be taken in the appropriate international bodies, it instructs the Commission to start negotiations forthwith with the third countries concerned in accordance with the Council's directives. These negotiations will be conducted with a view to concluding, in an initial phase, outline agreements regarding the general conditions to be applied in future for access to resources, both those situated in the fishing zones of these third countries and those in the fishing zones of the member states of the Community.

UNITED STATES: COUNCIL ON ENVIRONMENTAL QUALITY MEMORANDUM TO U.S. AGENCIES ON APPLYING THE ENVIRONMENTAL IMPACT STATEMENT REQUIREMENT TO ENVIRONMENTAL IMPACTS ABROAD* [September 24, 1976]

Introductory Note**

In the letter form former Council on Environmental Quality (CEQ) Chairman russell W. Peterson, and the memorandum that accompanies it, the Council interprets the National Environmental Policy Act (NEPA) to include impact statements for Federal actions having significant impact on the environment whether the impact is within the U.S., in other countries in which the activity is carried out or has an effect, or in areas, such as the high seas, outside the jurisdiction of any country.

Since 1970, when NEPA first went into force, it has been a controversial tool for requiring planning and evaluation of potential environmental impacts from Federal action. the requirement for these statements is found in the National Environmental Policy Act (42 USC 4321-4347). Section 102(2)(c) requires that all Federal agencies shall "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of human environment, a detailed statement . .. on the environmental impact of the proposed action". Additionally, NEPA calls for Federal agencies to "recognize the worldwide and long-range character of environmental problems" which gives further scope of this memorandum.

This memorandum, like NEPA itself, will not be without controversy. Some Federal agencies may well feel that the memorandum constitutes an "extension" rather than an "interpretation" of NEPA. For CEQ, it is an interpretation of something contemplated by the law as enacted. A recent U.S. District Court opinion stayed the construction of the Pan American Highway across the Darien Gap in Panama until an adequate environmental impact statement was filed by the Department of Transportation, the funding agency. [The opinion is reproduced at I.L.M. page 1417]. Among the deficiencies of the statement, according to the Court, was the failure to adequately consider the effects of the highway on Indians along the route—an effect wholly within another country.

In the U.S., the views of CEQ have special significance for judicial interpretation of the statute. This was the view of Justice Douglas sitting as a Circuit Justice in the case of Warm Springs Task Force vs. Gribble.[1] In ordering a stay of a Federal action until the Circuit Court of Appeals could hear an appeal, Justice Douglas said, "The Council on Environmental Quality, ultimately responsible for administration of the NEPA and most familiar with its requirements for Environmental Impact Statements, has taken the unequivocable position that the statement in this case is deficient, despite the contrary conclusions of the District Court. That agency determination is entitled to great weight". It remains to be seen what ultimate effect will be given to this memorandum but it does not represent an interpretation, which, as the memorandum itself indicates, has been followed in the past. The Atomic Energy Commission, the Department of State and other agencies have filed environmental impact statements for activities having a potential effect in other countries,[2] and the State Department has filed impact statements preparatory to the U.S. entering into negotiations on international agreements which could affect areas outside national jurisdiction (the Ocean Dumping Convention and the Law of the Sea Conference being two examples),[3] and AID has revised its own procedures to include a range of its activities in the NEPA process.[4] The AID regulations were issued in accordance with the stipulation and court order of a U.S. District Court in a case concerning the impact of pesticides on the environment [see 15 I.L.M. 679 (1976)].

September 24, 1976

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* [Reproduced from the letter and memorandum provided by the Council on Environmental Quality of the Executive Office of the President of the United States.

**[The Introductory Note was prepared for International Legal Materials by Robert E. Stein, Director, North American Office, International Institute for Environment and Development].

1 ERC 19737 (1974).

2 CEQ 5th Annual Report (1974) at 399-400.

3 Id at 392, 399; for a list of Agency Regulations see CEQ 7th Annual Report (1976) at 128-131.

4 Noted at 15 I.L.M. 984 (1976).

* [Reprinted from the text provided by the U.S. Department of State.

[The proposed regulation on a Community system for the conservation and management of fishery resources, submitted by the Commission to the Council on October 8, 1976, appears at I.1.M. page 1376.]

MEMORANDUM TO HEADS OF AGENCIES ON APPLYING THE EIS REQUIREMENT TO ENVIRONMENTAL IMPACTS ABROAD

In recent months the Council has been involved in discussions with several agencies concerning the application of the EIS requirement in NEPA to U.S. actions with significant environmental impacts abroad (the high seas, the atmosphere, and other areas outside the jurisdiction of any national; and other countries). We have noted different interpretations and practices among several agencies on this issue, and consequently have seen impact statements filed which reflect varying degrees of consideration of the impacts abroad of U.S. actions (whether the actions are taken or the decisions made in the United States or abroad).

In order to encourage a consistent application of NEPA to all major federal actions, the Council is issuing the attached Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad. In it, we advise that NEPA requires analysis and disclosure in environmental statements of significant impacts of federal actions on the human environment — in the United States, in other countries, and in areas outside the jurisdiction of any country.

We believe that by taking account of likely impacts abroad before deciding on a proposal for action, federal agencies can obtain the same benefits of NEPA review that accompany the development of projects or actions with domestic impacts. Moreover, we believe such analyses can be accomplished without imposing U.S. environmental standards on other countries, and without interfering with the execution of foreign policy. To the contrary, such analysis and disclosure can provide useful information to cooperating governments. Finally, if agencies undertake these analyses in cooperation with involved foreign governments, U.S. agencies can promote international protection as recommended in the Stockholm Declaration and elsewhere.

We recommend that agencies which take actions abroad and/or which take actions in the United States with potential significant environmental impacts abroad consult as necessary with the Council or the Council's staff concerning specific procedures, proposals or programs which may be affected.

Russel W. Peterson

Chairman

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MEMORANDUM ON THE APPLICATION OF THE EIS REQUIREMENT TO ENVIRONMENTAL IMPACTS ABROAD OF MAJOR FEDERAL ACTIONS

NEPA requires analysis of significant environmental impacts of proposed major federal actions on the quality of the human environment. The "human environment" is not limited to the United States, but includes other countries and areas outside the jurisdiction of any country (e.g., the high seas, the atmosphere). The Act contains no express or implied geographic limitation of environmental impacts to the United States or to any other area. Indeed, such a limitation would be inconsistent with the plain language of NEPA, its legislative purpose, the council's Guidelines, and judicial precedents.

In a statute which in other sections refer specifically to the national environment,[1] use of the term human environment in $102(2)(c) reflects an intent to cover environmental impacts beyond U.S. borders. This interpretation is consistent with NEPA's stated purpose, declared in the preamble to the Act, to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man". It is also consistent with Congress' recognition in Section 101 of "the profound impact of man's activity on the inter-relations of all components of the natural environment ... and ... the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man". Applying the EIS requirement to impacts abroad also implements the mandate in Section 102 to all agencies to "recognize the worldwide and long range character of environmental problems". In sum, the broad language of Section 102(2)(c) as well as the explicit congressional determination that our national environmental policy must have a global perspective gives Section 102(2)(c) a wide scope.

The legislative history of NEPA support the inclusion of impacts globally and in other countries within the scope of the EIS requirement. A 1968 "Congressional White Paper on a national Policy for the Environment", summarizing the joint Hoseu-Senate colloquium on national environmental policy that led to NEPA's introduction, and inserted into the record by Senator Jackson during debate, stated, "[a]lthough the influence of the U.S. policy will be limited outside its own borders, the global character of ecological relationships must be the guide for domestic activities".[2] Both the House and the Senate reports on NEPA, reflecting the testimony of numerous witnesses at the hearings, recognized the statue's global perspective.[3] Statements to the same effect were made during the floor debates, including an explanation by Senator Jackson of NEPA's statement of environmental policy:

> "What is involved [in NEPA] is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: That we will not intentionally initiate action which will do irreparable damage to the air, land and water which support life on earth".[4]

The House Merchant Marine and Fisheries Committee during oversight hearings specifically rejected the argument that NEPA should not be applied to actions occurring within the jurisdiction of another nation:

> "Stated most charitably, the committee disagrees with this interpretation of NEPA. The history of the act makes it quite clear that the global effects of environmental decisions are inevitably a part of the decision making process and must be considered in that context"[5]

The Council has consistently applied NEPA to U.S. international activities and has urged federal agencies to recognize the Act's global perspective. In its first Annual Report, for example, the Council pointed out that NEPA "directed all agencies of the Federal Government to recognize the worldwide and long-range character of environmental problems".[6] In 1971 the Council's Legal Advisory Committee specifically urged federal agencies to apply NEPA to their actions in foreign countries.[7] The Council's 1973 Guidelines require the assessment of "Both the national and international environment".[8] The Fifth Annual Report reviewed agencies' experience in applying the EIS process to U.S. actions abroad.[9] In 1976 the Council reported on one of the benefits of this experience—the growth of environmental impact assessment procedures in other countries.[10]

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2 115 Cong. Rec. 29082 (Oct. 8, 1969).

3 See, e.g., Sen. Rep. No. 91-296, 91st Cong., 1st Sess., at 17, 43-45 91969); H.R. Rep. No. 91-378, 91st Cong., 1st Sess., at 5, 7 91969).

4 115 Cong. Rec. 14347 (May 29, 1969); 115 Cong. Rec. 26575-16476 (Sept. 23, 1969); 115 Cong. Rec. 29056 (Oct. 8, 1969).

5 H.R. Rep. 92-316, 92nd Cong., 1st Sess., at 32-33 (1971).

6 CEQ, Environmental Quality - 1970, at 200 (1970).

7 Legal Advisory Committee Report to the President's Council on Environmental Quality, at 13-17 (December 1971).

8 40 C.F.R. Section 1500, 8(a) (3)(i) (1975)

9 CEQ, Environmental Quality - 1974, at 399-400 (1974).

10 CEQ, Environmental Quality - 1975, at 653-54 (1976).

Accordingly, some federal agencies have provided in their NEPA procedures for the preparation of environmental statements when agency actions cause significant environmental impacts beyond U.S. borders,[11] and impact statements have been prepared on U.S. Actions in foreign countries[12]. Moreover,the courts[13] and virtually every legal commentary addressing the subject[14] have supported the Council's belief that an environmental statement is required whenever U.S. actions would have significant environmental impacts on the U.S., on global resources, or on foreign countries.

The policies underlying NEPA reinforce the interpretation suggested by its language and legislative history, judicial precedents and administrative practice. Analysis and disclosure in an EIS of a significant environmental effects provide U.S. decisionmakers a fuller picture of the foreseeable environmental consequences of their decisions. Impact statements do not dictate actions on foreign soil or impose U.S. requirements on foreign countries; instead, they guide U.S. decisionmakers in determining U.S. policies and actions.

In addition, EIS provide information to cooperating governments which they then could use in making decisions bout projects within, or which may affect, their countries. Far from being an imposition, this information can enhance the value of U.S. assistance or participation. This full disclosure by the United States contributes to the integrity of cooperating governments' policy making, and thus lends support to international environmental cooperation as directed in §102 (2)(F),[15] the Stockholm Declaration, and other international agreements.[16]

To the extent national security or essential foreign policy considerations make controlled circulation of environmental statements necessary, NEPA provides sufficient procedural flexibility to accomplish this. Section 102(2)(C) provides exceptions to public circulation of documents by incorporating the Freedom of Information Act and its exemptions by reference. Environmental statements or portions of them have been classified, for example, when necessary to protect national security.[17] Presumably, if public examination of a proposed U.S. action in another country would jeopardize U.S. foreign policy in a given instance, circulation of the environmental statement could be restricted in accordance with these statutory procedures.[18] In general, however, Congress has mandated that environmental statements are public documents.

In summary, the Council believes that the impact statement requirement in §102(2)(C) of NEPA applies to all significant effects of proposed federal actions on the quality of the human environment — in the United States, in other countries. Accordingly, agency officials responsible for analyzing the potential environmental effects of proposed actions should fully assess the potential impacts outside the United States, as well as those within it; if any of these potential impacts are likely to be significant, an impact statement should be prepared.

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[11] See, e.g,. 38 Fed. Reg. 34135-46 (1973) (Coast) Guard); 37 Fed Reg. 19167-68 (1972) (Dept. of State); 41 Fed Reg. 26913-16919 (1976) (Agency for International Development).

[12] See, e.g., Dept. of Transportation, Draft EIS, Darien Final EIS, Alaska Natural Gas Transportation System (March 1975).

[13] In Wilderness Society v. Morton, 463 G. 2d 1261 (D.C. Cir. 1972),the court granted standing to Canadian intervenors concerned with the trans-Alaska Pipeline,holding that the intervenors; interest in the significant impacts of the pipeline in Canada were within the zone protected by Section 102(2)(c). In Sierra Club v. Coleman, 405 F. Supp. 53 (D.D.C. 1975), the court held *inter alia,* that DOT's impact assessment on portions of the Pan-American Highway was deficient because it failed to address the environmental impacts of alternative highway corridors through Panama and Columbia. Since the significant impacts of corridor alternatives lay exclusively in Panama and Colombia, the case necessarily olds that impacts in foreign national territory are within the scope of Section 102(2)(C).

Of course, significant, indirect as well as direct impacts must be considered. 40 C.F.R. Section 1500.8(a)(3)(ii) (1975); City of Davis v. Coleman, 521 F.2d 661, (9th Cir., 1975); see CEQ, Environmental Quality-1974, at 410-11 (1974).

[14] See, e.g., Committee on Environmental Law of the Section on International and Comparative Law of the American Bar Association, Opinion on the International Scope of NEPA (July 1971); Strausberg, the National Environmental Policy Act and the Agency for International Development, 7 Int'l Law. 46 91972); Robinson, Extraterritorial Environmental Protection Obligations of Foreign Affairs Agencies: The Unfulfilled Mandate of NEPA, 7 Int'l. Law. Pol. 257 (1974) Note, the Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement, 74 Mich. L. Rev. 349 (1975); Appelbaum, Controlling the Hazards of International Development, 5 Ecol. L.Q. 321 (1976).

[15] See H.R. Rep. 92-316, 92nd Cong., 1st Sess., at 33 (1971)

[16] See e.g., Convention Concerning the Protection of the World Cultural and Natural Heritage, November 23, 1972; Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, October 12, 1940.

[17] See e.g., U.S. Navy, Final EIS, Transit Satellite (June 1972).

[18] Thus, NEPA incorporates a procedure for ensuring that the execution of U.S. foreign policyand U.S. environmental policy are consistent. Of course, no agency has the authority to deviate from NEPA's requirements, on foreign policy or other grounds. Calvert Cliffs' Coordinating Comm. v. AEC, 449 F. 2d 2209 (D.C. Circ. 1971).

SCENIC HUDSON PRESERVATION CONFERENCE, TOWN OF CORTLANDT, TOWN OF PUTNAM VALLEY AND TOWN OF YORKTOWN, PETITIONERS, V. FEDERAL POWER COMMISSION, RESPONDENT, AND CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., INTERVENER

No. 106, Docket No. 29853

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

354 F.2d 608; 1965 U.S. App. LEXIS 3514; 1 ERC (BNA) 1084; 1 ELR 20292

October 8, 1965, Argued
December 29, 1965, Decided

CORE TERMS: transmission, underground, Federal Power Act, license, fish, reservoir, turbines, recreational, plant, water, public interest, storage, gas turbine, fishery, installation, kilowatt, overhead, peaking, aggrieved, licensing, scenic, beauty, route, eggs, river, staff, town, natural resources, striped bass, interconnection

JUDGES: Lumbard, Chief Judge and Waterman and Hays, Circuit Judges.

OPINION: HAYS, Circuit Judge:

In this proceeding the petitioners are the Scenic Hudson Preservation Conference, an unincorporated association consisting of a number of non-profit, conservationist organizations, and the Towns of Cortlandt, Putnam Valley and Yorktown. Petitioners ask us, pursuant to § 313(b) of the Federal Power Act, 16 U.S.C. § 825l(b), to set aside three orders of the respondent, the Federal Power Commission:[1]

(a) An order of March 9, 1965 granting a license to the intervener, the Consolidated Edison Company of New York, Inc., to construct a pumped storage hydroelectric project on the west side of the Hudson River at Storm King Mountain in Cornwall, New York;

(b) An order of May 6, 1965 denying petitioners' application for a rehearing of the March 9 order, and for the reopening of the proceeding to permit the introduction of additional evidence;

(c) An order of May 6, 1965 denying joint motions filed by the petitioners to expand the scope of supplemental hearings to include consideration of the practicality and cost of underground transmission lines, and of the feasibility [**2] of any type of fish protection device.

A pumped storage plant generates electric energy for use during peak load periods,[2] using hydroelectric units driven by water from a headwater pool or reservoir. The contemplated Storm King project would be the largest

[1] At oral argument petitioners made a motion to enlarge the record by including in it the supplemental hearings conducted before a Trial Examiner of the Federal Power Commission in May 1965. These hearings were limited to consideration of the routes of overhead transmission facilities and the design of fish protection devices. Petitioners allege that the May hearings divulge information which should have been developed and considered by the Commission at the time the license was granted. We are not being asked to review the October 4, 1965 order, setting forth the Commission's determination of the questions presented at the May hearings, but rather to consider evidence compiled at the May hearings as a convenient source of information from which inferences can be drawn about the completeness of the March 9 record. For this limited purpose we have granted petitioners' motion.

[2] Capacity for peak load periods is that part of a system's generating equipment which is operated intermittently for short periods during the hours of highest daily, weekly, or seasonal kilowatt demand.

of its kind in the world. Consolidated Edison has estimated its cost, including transmission facilities, at $162,000,000. The project would consist of three major components, a storage reservoir, a powerhouse, and transmission lines. The storage reservoir,[3] located over a thousand feet above the powerhouse, is to be connected to the powerhouse, located on the river front, by a tunnel 40 feet in diameter. The powerhouse, which is both a pumping and generating station, would be 800 feet long and contain eight pump generators.[4]

Transmission lines would run under the Hudson to the east bank and then underground for 1.6 miles to a switching station which Consolidated Edison would build at Nelsonville in the Town of Philipstown. Thereafter, overhead transmission lines would be placed on towers 100 to 150 feet high and these would require a path up to 125 feet wide[5] through Westchester and Putnam Counties for a distance of some 25 miles until they reached Consolidated Edison's main connections with New York City.[6]

During slack periods Consolidated Edison's conventional steam plants in New York City would provide electric power for the pumps at Storm King to force water up the mountain, through the tunnel, and into the upper reservoir. In peak periods water would be released to rush down the mountain and power the generators. Three kilowatts of power generated in New York City would be necessary to obtain two kilowatts from the Cornwall installation. When pumping the powerhouse would draw approximately 1,080,000 cubic feet of water per minute from the Hudson, and when generating would discharge up to 1,620,000 cubic feet of water per minute into the river. The installation would have a capacity of 2,000,000 kilowatts, but would be so constructed as to be capable of enlargement to a total of 3,000,000 kilowatts. The water in the upper reservoir may be regarded as the equivalent of stored electric energy; in effect, Consolidated Edison wishes to create a huge storage battery at Cornwall. See Federal Power Commission, National Power Survey 120-21 (1964).

The Storm King project has aroused grave concern among conservationist groups, adversely affected municipalities and various state and federal legislative units and administrative agencies.[7]

To be licensed by the Commission a prospective project must meet the statutory test of being "best adapted to a comprehensive plan for improving or developing a waterway," Federal Power Act § 10(a), 16 U.S.C. § 803(a). In framing the issue before it, the Federal Power Commission properly noted:

> "We must compare the Cornwall project with any alternatives that are available. If on this record Con Edison has available an alternative source for meeting its power needs which is better adapted to the development of the Hudson River for all beneficial uses, including scenic beauty, this application should be denied."

If the Commission is properly to discharge its duty in this regard, the

record on which it bases its determination must be complete. The petitioners and the public at large have a right to demand this completeness. It is our view, and we find, that the Commission has failed to compile a record which is sufficient to support its decision. The Commission has ignored certain relevant factors and failed to make a thorough study of possible alternatives to the Storm King project. While the courts have no authority to concern themselves with the policies of [**8] the Commission, it is their duty to see to it that the Commission's decisions receive that careful consideration which the statute contemplates. See Michigan Consolidated Gas [*613] Co. v. Federal Power Comm., 108 U.S.App.D.C. 409, 283 F.2d 204, 226, cert. denied, Panhandle Eastern Pipe Line

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[3] The project's reservoir would contain a surface area of 240 acres and a usable capacity of 25,000 acre-feet. A part of the space which it would occupy is now occupied by a reservoir providing part of the water supply for the Village of Cornwall. Another area consisting of approximately 70 acres of property within the Black Rock Forest, a private forest reserve of Harvard University, would also be inundated by the proposed reservoir. Consolidated Edison has offered appropriate compensation for the acreage which would be used.

[4] According to plans presented to the Federal Power Commission three pumping generator units would be installed and go into operation in mid-1967 and the remaining five in 1968.

[5] However, the path might be even wider at corners, transportation points, access points, or points of an unusual character.

[6] As has already been noted we are not now concerned with the order of October 4, 1965 in which the Commission established the exact route of the transmission lines and the width of the right-of-way.

[7] For bills introduced in Congress for the purpose of preserving the Hudson River and adjacent areas see House Introduction No. H.R. 3012, 3918; Senate Introduction No. S. 1386. Hearings were held on May 10 and 11, 1965 before the House of Representatives Subcommittee on Fisheries and Wildlife Conservation. House of Representatives, 89th Cong., 1st Sess., on Hudson River Spawning Grounds.

The New York Joint Legislative Committee on Natural Resources held hearings on November 19 and 20, 1964. See Preliminary Report on the Joint Legislative Committee on Natural Resources, On the Hudson River Valley and the Consolidated Edison Company Storm King Mountain Project (issued February 16, 1965) (hereinafter cited "Preliminary Report").

The Fish and Wildlife Service of the Department of the Interior and the New York State Conservation Department have expressed concern about the effect of the project on the fish life of the Hudson. See Part IV infra.

Numerous conservationist groups have interested themselves in the project, and many of them filed formal petitions to intervene before the Commission.

Co. v. Michigan Consol. Gas Co., 364 U.S. 913, 81 S. Ct. 276, 5 L. Ed. 2d 227 (1960). Petitioners' application, pursuant to § 313 (b), 16 U.S.C. § 825l(b), to adduce additional evidence is granted.[8] We set aside the three orders of the Commission to which the petition is addressed and remand the case for further proceedings in accordance with this opinion.

I. The Storm King project is to be located in an area of unique beauty and major historical significance. The highlands and gorge of the Hudson offer one of the finest pieces of river scenery in [**9] the world. The great German traveler Baedeker called it "finer than the Rhine." Petitioners' contention that the Commission must take these factors into consideration in evaluating the Storm King project is justified by the history of the Federal Power Act.

The Federal Water Power Act of 1920, 41 Stat. 1063 (1920) (now Federal Power Act, 16 U.S.C. § 791a et seq.), was the outgrowth of a widely supported effort on the part of conservationists to secure the enactment of a complete scheme of national regulation which would promote the comprehensive development of the nation's water resources. See Federal Power Comm. v. Union Electric Co., 381 U.S. 90, 98-99, 85 S. Ct. 1253, 14 L. Ed. 2d 239 (1965); First Iowa Hydro-Electric Coop. v. Federal Power Comm., 328 U.S. 152, 180, 66 S. Ct. 906, 90 L. Ed. 1143 (1946). See generally Cushman, The Independent Regulatory Commission 275-283 (1941); Pinchot, The Long Struggle for Effective Federal Water Power Legislation, 14 Geo.Wash.L.Rev. 9 (1945).[9] It "was passed for the purpose of developing and preserving to the people the water power resources of the country." United States ex rel. Chapman v. Federal Power Comm., 191 F.2d 796, 800 (4th Cir. [**10] 1951), aff'd, 345 U.S. 153, 73 S. Ct. 609, 97 L. Ed. 918 (1953).

Congress gave the Federal Power Commission sweeping authority and a specificplanning responsibility. First Iowa Hydro-Electric Coop. v. Federal [*614] Power Comm., 328 U.S. 152, 180-181, 66 S. Ct. 906, 919, 90 L. Ed. 1143 (1946) ("instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted"); National Hells Canyon Ass'n v. Federal Power Comm., 99 U.S.App.D.C. 149, 237 F.2d 777 (1956), cert. denied, 353 U.S. 924, 77 S. Ct. 681, 1 L. Ed. 2d 720, rehearing denied, 353 U.S. 978, 77 S. Ct. 1054, 1 L. Ed. 2d 1139 (1957).

Section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a), reads:

§ 803. Conditions of license generally.

All licenses issued under sections 792, 793, 795-818, and 820-823 of this title shall be on the following conditions:

(a) That the project adopted, * * * shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including [**12] recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval." (Emphasis added.)

"Recreational purposes" are expressly included among the beneficial public uses to which the statute refers. The phrase undoubtedly encompasses the conservation of natural resources, the maintenance of natural beauty, and

[8] The hearings to which the third order refers have already been held; however, the relief petitioners seek is provided by our determination as to the second order.

[9] The Supreme Court has noted that:

"The movement toward the enactment of the Act in 1920 may be said to have taken its keynote from President Roosevelt's veto of a bill which would have turned over to private interests important power sites on the Rainy River." Federal Power Comm. v. Union Electric Co., 381 U.S. 90, 98-99 n. 11, 85 S. Ct. 1253, 1258, 14 L. Ed. 2d 239 (1965).

President Roosevelt's veto message read:

"We are now at the beginning of great development in water power. Its use through electrical transmission is entering more and more largely into every element of the daily life of the people. Already the evils of monopoly are becoming manifest; already the experience of the past shows the necessity of caution in making unrestricted grants of this great power." 42 Cong.Rec. 4698 (1908).

See also President Roosevelt's veto of the James River bill, H.R. 17767, 60th Cong., 2d Sess. (1909), veto message, 43 Cong.Rec. 978 (1909); President Roosevelt's letter appointing the Inland Waterways Commission, 42 Cong.Rec. 6968 (1908), which read in part:

"Works designed to control our water-ways have thus far usually been undertaken for a single purpose, such as the improvement of navigation, the development of power, the irrigation of arid lands, the protection of lowlands from floods, or to supply water for domestic and manufacturing purposes. While the rights of the people to these and similar uses of water must be respected, the time has come for merging local projects and uses of the inland waters in a comprehensive plan designed for the benefit of the entire country. Such a plan should consider and include all the uses to which streams may be put, and should bring together and coordinate the points of view of all users of waters.
"[The plans of the Commission should be formulated] in the light of the widest knowledge of the country and the people, and from the most diverse points of view."

the preservation of historic sites.[10] See Namekagon Hydro Co. v. Federal Power Comm., 216 F.2d 509, 511-512 (7th Cir. 1954). All of these "beneficial uses," the Supreme Court has observed, "while unregulated, might well be contradictory rather than harmonious." Federal Power Comm. v. Union Electric Co., 381 U.S. 90, 98, 85 S. Ct. 1253, 1258, 14 L. Ed. 2d 239 (1965). In licensing a project, it is the duty of the Federal Power Commission properly to weigh each factor.

[**13]

In recent years the Commission has placed increasing emphasis on the right of the public to "out-door recreational resources." 1964 F.P.C. Report 69.Regulations issued in 1963, for the first time, required the inclusion of a recreation plan as part of a license application. F.P.C. Order No. 260-A, amending § 4.41 of Regulations under Federal Power Act, issued April 18, 1963, 29 F.P.C. 777, 28 Fed.Reg. 4092. The Commission has recognized generally that members of the public have rights in our recreational, historic and scenic resources under the Federal Power Act. Namekagon Hydro Co., 12 F.P.C. 203, 206 (1954) ("the Commission realizes that in many cases where unique and most special types of recreation are encountered a dollar evaluation is inadequate as the public interest must be considered and it cannot be evaluated adequately only in dollars and cents"). In affirming Namekagon the Seventh Circuit upheld the Commission's denial of a license, to an otherwise economically feasible project, because fishing, canoeing and the scenic attraction of a "beautiful stretch of water" were threatened. Namekagon Hydro Co. v. Federal Power Comm., 216 F.2d 509, 511-512 (7th Cir. 1954).

Commissioner [**14] Ross said in his dissent in the present case: "Itappears obvious that had this area of the 'Hudson [*615] Highlands' been declared a State or National park, that is, had the people in the area already spoken, we probably would have listened and might well have refused to license it."

II.

Respondent argues that "petitioners do not have standing to obtain review" because they "make no claim of any personal economic injury resulting from the Commission's action."

Section 313(b) of the Federal Power Act, 16 U.S.C. § 825l(b), reads:

"(b)Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located * * *."

The Commission takes a narrow view of the meaning of "aggrieved party" under the Act. The Supreme Court has observed that the law of standing is a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations * * *." United States ex rel. [**15] Chapman v. Federal Power Comm., 345 U.S. 153, 156, 73 S. Ct. 609, 612, 97 L. Ed. 918 (1953). Although a "case" or "controversy" which is otherwise lacking cannot be created by statute, a statute may create new interests or rights and thus give standing to one who would otherwise be barred by the lack of a "case" or "controversy." The "case" or "controversy" requirement of Article III, § 2 of the Constitution does not require that an "aggrieved" or "adversely affected" party have a personal economic interest. See State of Washington Dept. of Game v. Federal Power Comm., 207 F.2d 391 (9th Cir. 1953), cert. denied, 347 U.S. 936, 74 S. Ct. 626, 98 L. Ed. 1087 (1954); Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953); cf. Scripps-Howard Radio, Inc. v. Federal Communications Comm., 316 U.S. 4, 62 S. Ct. 875, 86 L. Ed. 1229 (1942); Federal Communications Comm. v. Sanders Bros. Radio Station, 309 U.S. 470, 642, 60 S. Ct. 693, 84 L. Ed. 869 (1940); International Union of Electrical, Radio and Machine Workers v. Underwood Corp., 219 F.2d 100, 103 (2d Cir. 1955); Associated Industries, Inc. v. Ickes, 134 F.2d 694 (2d Cir.), vacated as moot, 320 U.S. 707, 64 S. Ct. 74, 88 L. Ed. 414 (1943); Jaffe, [**16] Standing to Secure Judicial Review: Private Actions, 75 Harv.L.Rev. 255 (1961). Even in cases involving original standing to sue, the Supreme Court has not made economic injury a prerequisite where the plaintiffs have shown a direct personal interest. See, e.g., School District of Abington Township v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962); Zorach v. Clauson, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952).

In State of Washington Dept. of Game v. Federal Power Comm., 207 F.2d 391, 395 n. 11 (9th Cir. 1953), cert. denied, 347 U.S. 936, 74 S. Ct. 626, 98 L. Ed. 1087 (1954), the Washington State Sportsmen's Council, Inc., a non-profit organization of residents, the State of Wash-

[10] The clear intention of Congress to emphasize "recreational purposes" is indicated by the fact that subsection (a) was amended in 1935 by substituting the present language "plan for improving or developing * * * including recreational purposes" for "scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses." Senate Rep.No.621, 74th Cong., 1st Sess., page 45 stated that the amendment was intended to add "an express provision that the Commission may include consideration of recreational purposes."

ington, Department of Game, and the State of Washington, Department of Fisheries, opposed the construction of a dam because it threatened to destroy fish. The Federal Power Commission granted the license; the interveners applied for a rehearing which the Commission denied. Petitioners asked for review under § 313(b) and the court upheld their standing, noting:

"All are 'parties aggrieved' since they claim [**17] that the Cowlitz Project will destroy fish in [sic] which they, among others, are interested in protecting."

The Federal Power Act seeks to protect non-economic as well as economic interests.[11] Indeed, the Commission recognized this in framing the issue in this very case:

"The project is to be physically located in a general area of our nation [*616] steeped in the history of the American Revolution and of the colonial period. It is also a general area of great scenic beauty. The principal issue which must be decided is whether the project's effect on the scenic, historical and recreational values of the area are such that we should deny the application."

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be [**18] included in the class of "aggrieved" parties under § 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests. See State of Washington Dept. of Game v. Federal Power Comm., supra.

At an earlier point in these proceedings the Commission apparently accepted this view. Consolidated Edison strongly objected to the petitioners' standing, but the Commission did not deny their right to file an application for a rehearing under § 313(a) of the Act which also speaks in terms of "aggrieved parties."[12]

Moreover, petitioners have sufficient economic [**19] interest to establish their standing. The New York-New Jersey Trail Conference, one of the two conservation groups that organized Scenic Hudson, has some seventeen miles of trailways in the area of Storm King Mountain. Portions of these trails would be inundated by the construction of the project's reservoir.

The primary transmission lines are an integral part of the Storm King project. See Federal Power Act § 3(11), 16 U.S.C. § 796(11).[13] The towns that are co-petitioners with Scenic Hudson have standing because the transmission lines would cause a decrease in the proprietary value of publicly held land, reduce tax revenues collected from privately held land, and significantly interfere with long-range community planning. See City of Pittsburgh v. Federal Power Comm., 99 U.S.App.D.C. 113, 237 F.2d 741, 748 (1956). Yorktown, for example, fears that the transmission lines would run over municipal land selected for a school site, greatly decreasing its value and interfering with school construction. Putnam Valley faces similar interference with local planning and a substantial decrease in land tax revenues.[14]

[*617] We see no justification for the Commission's fear that our determination will encourage "literally thousands" to intervene and seek review in future proceedings. We rejected a similar contention in Associated Industries, Inc. v. Ickes, 134 F.2d 694, 707 (2d Cir.), vacated as moot, 320 U.S. 707, 64 S. Ct. 74, 88 L. Ed. 414 (1943), noting that "no such horrendous possibilities" exist. Our experience [**21] with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken.

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[11] See discussion in Part I, supra.

[12] Federal Power Act § 313(a), 16 U.S.C. § 825l(a), reads:

"§ 825 l. Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order."

[13] Federal Power Act § 3(11), 16 U.S.C. § 796(11) reads:

"'Project' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit." (Emphasis added.)

[**20]

[14] Permitting the Commission, for reasons of convenience and practicality, to limit the licensing proceeding and to hold for later determination the route of transmission lines, does not divest the petitioning towns of their standing. If we accepted the Commission's contrary argument we would be required to withdraw from the towns their right to challenge the entire integrated project.

Although the order of October 4, 1965 is not before us for review, we note that the Commission has conceded in its Supplemental Brief that Putnam Valley is in the same position as before the order and that the transmission route chosen "might be sufficient to cause aggrievement" to petitioner, Yorktown.

In any case, the Federal Power Act creates no absolute right of intervention; § 308(a), 16 U.S.C. § 825g(a), reads:

"In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest."

Since the right to seek review under § 313(a) and (b) is limited to a "party" to the Commission proceeding, the Commission has ample authority reasonably to limit those eligible to intervene or to seek review. See Alston Coal Co. v. Federal Power Comm., 137 F.2d 740, 742 (10th Cir. 1943). Representation of common interests by an organization such as Scenic Hudson serves to limit the number of those who might otherwise apply for intervention and serves to expedite the administrative process.

III

The Federal Power Act § 313(b), 16 U.S.C. [**22] § 825l(b), reads in part:

"(b) If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper."

The Commission in its opinion recognized that in connection with granting a license to Consolidated Edison it "must compare the Cornwall project with any alternatives that are available." There is no doubt that the Commission is under a statutory duty to give full consideration to alternative plans. See Michigan Consolidated Gas Co. v. Federal Power Comm., 108 U.S.App.D.C. 409, 283 F.2d 204, 224-226, cert. denied, Eastern Pipe Line Co. v. Michigan Consol. Gas Co., 364 U.S. 913, 81 S. Ct. 276, 5 L. Ed. 2d 227 (1960); City of Pittsburgh v. Federal Power Comm., 99 U.S.App.D.C. 113, 237 F.2d 741 (1956).

In City of Pittsburgh, three months after the hearings [**23] were closed, the petitioners attempted to present to the Commission memoranda supporting an alternative suggestion. The District of Columbia Circuit set aside the Commission's order and remanded the case with directions to reopen the record. It found that the Commission had improperly rejected as "untimely" evidence concerning the proposed alternative. The court stated that:

"The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the [original] proposal." City of Pittsburgh v. Federal Power [*618] Comm., 99 U.S.App.D.C. 113, 237 F.2d 741, 751 n. 28 (1956).

In the present case, the Commission heard oral argument on November 17, 1964, on the various exceptions to the Examiner's report. On January 7, 1965 the testimony of Mr. Alexander Lurkis, as to the feasibility of an alternative to the project, the use of gas turbines, was offered to the Commission by Hilltop Cooperative of Queens, a taxpayer and consumer group. The petition to [**24] intervene and present this new evidence was rejected on January 13, 1965 as not "timely." It was more than two months after the offer of this testimony, on March 9, 1965, that the Commission issued a license to Consolidated Edison. When Mr. Lurkis's testimony was subsequently reoffered by the petitioners on April 8, 1965, it was rejected because it represented "at best" a "disagreement between experts." On the other hand, we have found in the record no meaningful evidence which contradicts the proffered testimony supporting the gas turbine alternative.

Mr. Lurkis is a consulting engineer of thirty-nine years experience. He has served as Chief Engineer of the New York City Bureau of Gas and Electric, in charge of a staff of 400, and as Senior Engineer of the New York City Transit Authority, where he supervised the design and construction of power plants.[15] The New York Joint Legislative Committee on Natural Resources,[16] after holding hearings on the Storm King project on November 19 and 20, 1964, summarized Mr. Lurkis's testimony as follows:

"Mr. Alexander Lurkis * * * presented a detailed proposal for using gas turbines. This, he claimed, would meet the alleged peaking [**25] need of Con Ed and result in a saving for its customers of $132,000,000. The Committee has learned that similar gas turbine installations are now in use or proposed for use by a number of progressive electric utilities throughout the nation. In addition to meeting the alleged peak power needs and saving

[15] Mr. Lurkis has made numerous studies of utility adequacy including a survey of "blackouts" in New York during 1959 and 1961, which resulted in revisions of the Consolidated Edison system. He is a member of manyprofessional associations and has published numerous articles and presented many papers on electrical engineering subjects.

[16] A total of 107 witnesses were heard; the large majority objected to the project.

money for the ratepayer, the gas turbines proposed by Mr. Lurkis would have the following advantages:

1) Permit the company greater flexibility in meeting the power needs of its service area. Admittedly, technological developments in power production are changing and improving this field at such a rapid rate that it may well be entirely revolutionized in 10 to 15 years. There are obvious advantages in the gas turbine installations. Small installations can be added as needed to meet demand. This, in contrast to a single, giant, permanent installation such as Con Ed proposes at Storm King Mountain, which would tie the technology and investment of one company to a method of power production that might be obsolete in a few years.

2) Keep the power production facilities within New York City. This would not only avoid the desecration of the Hudson Gorge and Highlands, but, also would [**26] eliminate the great swathe of destruction down through Putnam and Westchester Counties and their beautiful suburban communities." Preliminary Report at 6.

The Committee report, issued on February 16, 1965, three weeks before the license to Consolidated Edison was granted, concluded:

"The whole situation involved in the Consolidated Edison Storm King [*619] Mountain project, and the protection of the Hudson River and its shores, requires further and extensive study and investigation.

* * *

This Committee goes on record as opposing Con Ed's application until there [**27] has been adequate study of the points indicated in this report." Preliminary Report at 8.

Mr. Lurkis's analysis was based on an intensive study of the Consolidated Edison system, and of its peaking needs projected year by year over a fifteen year period. He was prepared to make an economic comparison of a gas turbine system (including capital and fuel operating costs) and the Storm King pumped storage plant. Moreover, he was prepared to answer Consolidated Edison's objections to gas turbines by indicating:

(1) that gas turbines could meet Consolidated Edison's reserve needs;

(2) that the blackouts of 1959 and 1961 were caused by breakdowns in distribution, not by a lack of power;

(3) that gas turbines would avoid the hazards of weather damage to high transmission lines involved in the Storm King project;

(4) that since 3 kilowatts of power must be generated by steam plants in New York City in order to get 2 kilowatts of power from the Storm King project, gas turbines would be even more useful than the project in reducing air pollution;

(5) that noise from the turbines would be at acceptable industrial levels.

Other benefits envisioned from gas turbines were higher [**28] reliability, increased system flexibility, and possible savings in transmission line investment.[17]

Aside from self-serving general statements by officials of Consolidated Edison, the only testimony in the record bearing on the gas turbine alternative was offered by Ellery R. Fosdick. Fosdick's hastily prepared presentation considered turbines driven by steam and liquid fuel as well as gas; his direct [**29] testimony occupied less than ten pages of the record.[18] Fosdick's testimony was too scanty to meet the requirement of a full consideration of alternatives. Indeed, under the circumstances, we must conclude that there was no significant attempt to develop evidence as to the gas turbine alternative; at least, there is no such evidence in the record.

The Commission argues that petitioners made "no attempt to secure additional testimony." Yet the record indicates that more than two months before the license was granted the Commission summarily rejected the offer of Mr. [**30] Lurkis's testimony. It is not our present function to evaluate this evidence. Our focus is upon the action of the Commission. The fact that Lurkis's testimony was originally offered by a non-petitioner, Hilltop Cooperative, is irrelevant. A party acting as a "private attorney general" can raise issues that are not personal to it. See Associated Industries, Inc. v. Ickes, 134 F.2d 694, 705 (2d Cir.), vacated as moot, 320 U.S. 707, 64 S. Ct.

[17] Citing Federal Power Comm. v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 81 S. Ct. 435, 5 L. Ed. 2d 377 (1961) the Commission asserts that "serious policy questions" would be raised by the use of gas, for the generation of electrical energy. But the serious questions alluded to do not excuse the Commission's failure to develop and hear pertinent evidence on the alternative. As to the use of gas, the Supreme Court held in Transcontinental that "a flexible balancing process, in the course of which all factors are weighed prior to final determination," is needed in each case. Id. at 23, 81 S. Ct. at 447.

[18] Fosdick conceded that he had no firsthand knowledge of the Consolidated Edison system or its requirements. He had been unable to make a study of the economics of alternative methods of generating peaking power, nor had he made an examination of New York City power needs. His testimony on air pollution, which was favorable to Consolidated Edison, was addressed to a question on the "burning of kerosene" and not of natural gas, a non-pollutant.

74, 88 [*620] L. Ed. 414 (1943); Jaffe, Standing to Secure Judicial Review: Private Actions, 75 Harv.L.Rev. 255, 283 (1961) ("the right to attack an order resting on a record made by others, or no record at all, could be valuable").

Especially in a case of this type, where public interest and concern is so great, the Commission's refusal to receive the Lurkis testimony, as well as proffered information on fish protection devices and underground transmission facilities,[19] exhibits a disregard of the statute and of judicial mandates instructing the Commission to probe all feasible alternatives. Michigan Consolidated Gas Co. v. Federal Power Comm., 108 U.S.App.D.C. 409, 283 F.2d 204, 224, 226, cert. denied, 364 U.S. 913, 81 S. Ct. 276, 5 [**31] L. Ed. 2d 227 (1960); City of Pittsburgh v. Federal Power Comm., 99 U.S.App.D.C. 113, 237 F.2d 741 (1956).

IV

The Federal Power Commission argues that having intervened "petitioners cannot impose an affirmative burden on the Commission." But, as we have pointed out, Congress gave the Federal Power Commission a specific planning responsibility. See Federal Power Act § 10(a), 16 U.S.C. § 803(a). The totality of a project's immediate and long-range effects, and not merely the engineering and navigation aspects, are to be considered in a licensing proceeding. As Commissioner Ross said in his dissent:

"I do feel the public is entitled to know on the record that no stone has been left unturned. How much better it would be if the public is clearly advised under oath and cross examination that there truly is no alternative? The threadrunning through this case has been that the applicant is entitled to a license upon making a prima facie case. My own personal regulatory philosophy [**32] compels me to reject this approach. This Commission of its own motion, should always seek to insure that a full and adequate record is presented to it. A regulatory commission can insure continuing confidence in its decisions only when it has used its staff and its own expertise in manner not possible for the uninformed and poorly financed public. With our intimate knowledge of other systems and to a lesser extent of their plans, it should be possible to resolve all doubts as to alternative sources. This may have been done but the record doesn't speak. Let it do so."

In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

This court cannot and should not attempt to substitute its judgment for that of the Commission. But we must decide whether the Commission has correctly discharged its duties, including the proper fulfillment of its planning function in deciding that the "licensing of the project would [**33] be in the overall public interest." The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts. See Michigan Consolidated Gas Co. v. Federal Power Comm., 108 U.S.App.D.C. 409, 283 F.2d 204, 224, 226, cert. denied, 364 U.S. 913, 81 S. Ct. 276, 5 L. Ed. 2d 227 (1960); Isbrandtsen Co. v. United States, 96 F. Supp. 883, 892 (S.D.N.Y.1951), aff'd by an equally divided court, A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., 342 U.S. 950, 72 S. Ct. 623, 96 L. Ed. 706 (1952); Friendly, The Federal Administrative Agencies 144 (1962); Landis, The Administrative Process 36-46 (1938); cf. City of Pittsburgh v. Federal Power Comm., 99 U.S.App.D.C. 113, 237 F.2d 741 (1956).

[*621] In Michigan Consolidated Gas Co. v. Federal Power Comm., supra, 283 F.2d at 224, the Court of Appeals of the District of Columbia, in criticizing the Federal Power Commission for refusing to consider an alternative and for failing to take the initiative in seeking information, observed:

"Even assuming that under the Commission's rules Panhandle's rejection of the settlement rendered the proposal ineffective as a settlement [**34], it could not, and we believe should not, have precluded the Commission from considering the proposal on its merits. Indeed, the proposal appears prima facie to have merit enough to have required the Commission at some stage of the proceeding to consider it on its own initiative as an alternative to total abandonment." (Emphasis added.)

On rehearing the court added:

"In viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding.

Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors." Id. at 226.

[19] See Part IV infra.

Judge Frank, in response to a submission similar to the one made here, said:

"This is a somewhat surprising contention, to be contrasted with the following views of Commissioner Aitchison of the Interstate Commerce Commission concerning the obligations of administrative agencies: '* * * The [**35] agency does not do its duty when it merely decides upon a poor or non representative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in * * *. The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible * * *.'" Isbrandtsen Co. v. United States, 96 F. Supp. 883, 892 (S.D.N.Y.1951), affirmed by an equally divided court, A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., 342 U.S. 950, 72 S. Ct. 623, 96 L. Ed. 706 (1952). And Dean Landis said:

"For [the administrative] process to be successful in a particular field, it is imperative that controversies be decided as 'rightly' as possible, independently of the formal record the parties themselves produce. The ultimate test of the administrative [**36] is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making." Landis, The Administrative Process 39 (1938).

In addition to the Commission's failure to receive or develop evidence concerning the gas turbine alternative, there are other instances where the Commission should have acted affirmatively in order to make a complete record.

The Commission neither investigated the use of interconnected power as a possible alternative to the Storm King project, nor required Consolidated Edison to supply such information. The record sets forth Consolidated Edison's interconnection with a vast network of other utilities, but the Commission dismissed this alternative by noting that "Con Edison is relying fully upon such interconnections in estimating its future available capacity." However, only ten [*622] pages later in its opinion the Commission conceded:

"Of significant importance, in our opinion, is the absence in the record, or the inadequacy, of information in regard to Con Edison's future interconnection plans; its plans, if any, for upgrading existing transmission lines to higher [**37] voltages; and of its existing transmission line grid in this general area and its future plans."

Moreover, in its October 4, 1965 order, the Commission in explaining how Consolidated Edison would be able to send "substantial amounts" of Storm King power to upstate New York and New England power companies, each December, said:

"ample spinning reserve would be available during the winter from the interconnected companies in New Jersey and Pennsylvania, including the 'mine-mouth' plants. Thus, even at times of the greatest diversion of Cornwall power, Con Edison would have other power sources immediately available to it for its peak requirements."

If interconnecting power can replace the Storm King project in December, why was it not considered as a permanent alternative?

Commissioner Ross in his dissent said: "In my opinion, the only true alternative that would likely be as economic as the proposed project would be purchased peaking power. There are two possibly differing sources; one would be purchasing pumped storage or normal hydro peaking which may be in the process of development in New England; or secondly, purchasing steam peaking power [**38] from new large scale thermal stations in Pennsylvania or in Appalachia."

There is no evidence in the record to indicate that either the Commission or Consolidated Edison ever seriously considered this alternative.[20] Nor is there any evidence that a combination of devices, for example, gas turbine and interconnections, were considered. Indeed, the Commission stated in its brief that it is "of doubtful relevance to the present case whether there are practical alternatives to an appropriate use of water power by which Con Ed could meet its anticipated needs for peaking power with generally comparable economy." The failure of the Commission to inform itself of these alternatives cannot be reconciled with its planning responsibility under the Federal Power Act.

[**39]

[20] At page 39 of the record Mr. M. L. Waring, senior vice-president of Consolidated Edison, described the interconnection system but failed to answer the question: "Would this not be an economical substitute for the pumped storage project?" In later testimony to a similar question he responded: "Yes, [other sources of power] are available, but not in sufficient quantity."

But there was no evidence introduced as to the amount of power available.

In its March 9 opinion the Commission postponed a decision on the transmission route to be chosen until the May 1965 hearings were completed. Inquiry into the cost of putting lines underground was precluded because the May hearings were limited to the question of overhead transmission routes. The petitioners' April 26, 1965 motion to enlarge the scope of the May hearing was denied. The Commission insisted that the question of underground costs had been "extensively considered." We find almost nothing in the record to support this statement.[21]

[**40]

[*623] Consolidated Edison estimated the cost of underground transmission at seven to twelve times that of overhead lines. These estimates were questioned by the Commission's own staff, which pointed out that Consolidated Edison's estimates incorrectly assumed that the underground route would be the same as the overhead; in fact, an underground route along the New York Central right-of-way would be clearly less costly than the estimate, since there are no large differences of elevation requiring special pumping facilities and no new cross-country right-of-way would be necessary. Moreover, the staff noted that the estimates were based on Consolidated Edison's experience in New York, where excavation and other costs are higher. The Examiner noted the staff's reservations in his opinion, but since no alternative figures had been presented, he accepted those submitted by Consolidated Edison, as did the Commission.[10]

Consolidated Edison witnesses testified that the Storm King project would result in annual savings of $12,000,000 over a steam plant of equivalent capacity. Given these savings, the Commission should at least have inquired into the capital and annual cost of running segments of the transmission line underground in those areas where the overhead structures would cause the most serious scenic damage. We find no indication that the Commission seriously weighed the aesthetic advantages of underground transmission lines against the economic disadvantages.[11]

[**42]

At the time of its original hearings, there was sufficient evidence before the Commission concerning the danger to fish to warrant further inquiry. The evidence included a letter from Kenneth Holum, Assistant Secretary of the Department of the Interior, and a statement made for the record by Robert A. Cook, on behalf of the New York State Water Resources Commission in which Mr. Cook said: "The possibility still exists that extensive losses of eggs and/or young of valuable species might occur after installation of the proposed screening devices."

Just after the Commission closed its proceedings in November the hearings held by the New York State Legislative Committee on Natural Resources alerted many fisherman groups to the threat posed by the Storm King project. On December 24 and 30, January 8, and February 3 each of four groups, concerned with fishing, petitioned for the right to intervene and present evidence. They wished to show that the major spawning grounds for the distinct race of Hudson River striped bass was in the immediate vicinity of the Storm King project and not "much farther upstream" as inferred by Dr. Perlmutter, the one expert witness called by Consolidated Edison; [**43] to attempt to prove that, contrary to the impression given by Dr. Perlmutter, bass eggs and larvae float in the water, at the [*624] mercy of currents; that due to the location of the spawning ground and the Hudson's tidal flow, the eggs and larvae would be directly subject to the influence of the plant and would be threatened with destruction; that "no screening device presently feasible would adequately protect these early stages of fish life" and that their loss would ultimately destroy the economically valuable fisheries. Their evi-

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[21] The Commission contends that petitioners failed to raise the issue of underground transmission line costs, and the bearing of these costs on the licensing of the project, in their Application for Rehearing. But in listing Commission errors, petitioners said:

"finally it excluded from the consideration of * * * where to put the transmission lines the deeper questions of * * * what the cost would be of putting additional portions of the transmission lines underground."

The Philipstown Citizens Association, in its Application for Rehearing, specifically urged that the "Commission committed error in excluding further consideration of underground transmission at the remand hearings which started on May 4, 1965."

As we said earlier, the petitioners may raise issues which are not personal to them.

[22] Compare Federal Power Commission, National Power Survey 156 (1964). ("Efforts are frequently made to require utilities to place transmission circuits underground. In some circumstances buried cables are advantageous, but the usual cost is 5 to 10 times that of overhead circuits.") [**41]

[23] The Commission did state the underground costs would be prohibitive "except for short distances," but no substantiation of this position was offered nor was a definition of short distance given.

[24] Commissioner Ross remarked that "the tactics of [Consolidated Edison] were obviously dictated by the precedential effect of underground transmission." See testimony of senior vice-president Waring. "There are thousands of miles of transmission and distribution lines elsewhere in our territory and in the State of New York, where there is just as much or more reason to put the transmission lines underground as there is here."

This approach is unacceptable. Each case must be judged on its own merits. The area involved here is an area of "unique beauty," as Commissioner Ross noted in his dissenting opinion.

dence also indicated that in the case of shad, the young migrate from their spawning grounds, down past Cornwall, and being smaller than the meshes of the contemplated fish screens, would be subject to the hazards already described.[25] The Commission rejected all these petitions as "untimely," and seemingly placing great reliance on the testimony of Dr. Perlmutter, concluded:

"The project will not adversely affect the fish resources of the Hudson River provided adequate protective facilities are installed."

[**44]

Although an opportunity was made available at the May hearings for petitioners to submit evidence on protective designs, the question of the adequacy of any protective design was inexplicably excluded by the Commission.

Recent events illustrate other deficiencies in the Commission's record. In hearings before the House Subcommittee on Fisheries and Wildlife Studying the Hudson River Spawning Grounds, 89th Cong. 1st Sess., May 10, 11, 1965, Mr. James McBroom, representing the Department of the Interior, stated:

"Practical screening methods are known which could prevent young-of-the-year striped bass and shad from being caught up in the [Storm King] project's pumps, but practical means of protection of eggs and larvae stages have yet to be devised. Furthermore the location of the proposed plant appears from available evidence to be at or very near the crucial spot as to potential for harm to the overall production of eggs and larvae of the Hudson River striped bass. The cumulative effect of unmitigated loss of eggs and larvae of striped bass by this power project could have a serious effect on the Hudson River striped bass fishery and the dependent fisheries around [**45] Long Island and offshore."

Mr. E. L. Cheatum, representing the New York State Conservation Department, gave similar testimony. At the May hearings the testimony of Mr. Walburg and Mr. Wagner, witnesses for the Department of Interior, and Dr. Raney and Mr. Massmann, witnesses for Scenic Hudson, was substantially to the same effect. Indeed, the Commission in its October 4 order acknowledged that the protective device to which it had previously referred favorably (March 9 order) "may not be adequate to provide the protection required" (October 4 order).

On remand, the Commission should take the whole fisheries question into consideration before deciding whether the Storm King project is to be licensed.

The Commission should reexamine all questions on which we have found the record insufficient and all related matters. The Commission's renewed proceedings must include as a basic concern the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered. The record as it comes to us fails markedly to make out a case for the Storm King project on, among other [**46] matters, costs, public convenience and necessity, and absence [*625] of reasonable alternatives. Of course, the Commission should make every effort to expedite the new proceedings.

Petitioners' application, pursuant to Federal Power Act § 313(b), 16 U.S.C. § 825l (b), to adduce additional evidence concerning alternatives to the Storm King project and the cost and practicality of underground transmission facilities is granted.

The licensing order of March 9 and the two orders of May 6 are set aside, and the case remanded for further proceedings.

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[25] The Committee concluded:

"The Hudson River is a spawning ground for shad and striped bass. A multi-million dollar fishing industry, both commercial and sport, has been built on this process of nature. * * * The Joint Legislative Committee * * goes on record as being unalterably opposed to the granting of Con Ed's application, until such time as there is definite, impartial and conclusive proof that the project will not have an adverse effect on the fish life and spawning process upon which the fishing industry depends for its livelihood." Preliminary Report 7.

435 U.S. 519

VERMONT YANKEE NUCLEAR POWER CORP.

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

No. 76-419

SUPREME COURT OF THE UNITED STATES

435 U.S. 519; 98 S. Ct. 1197; 1978 U.S. LEXIS 21; 55 L. Ed.

2d 460; 11 ERC (BNA) 1439; 8 ELR 20288

November 28, 1977, Argued

April 3, 1978, Decided *

* Together with No. 76-528, Consumers Power Co. v.

Aeschliman et al., also on certiorari to the same court.

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISPOSITION: No. 76-419, 178 U. S. App. D. C. 336, 547 F.2d 633, and No. 76-528,

178 U. S. App. D. C. 325, 547 F.2d 622, reversed and remanded.

CORE TERMS: environmental, fuel, rulemaking, energy conservation, cycle, licensing, license, reactor, intervenors, plant, adjudicatory, staff, nuclear, threshold, waste, uranium, regulation, reprocessing, Administrative Procedure Act, agency action, interim, environmental impact statement, cost-benefit, inadequacy, discovery, reopen, environmental impact, administrative process, nuclear power plant, little doubt

SUMMARY: These cases presented questions as to the proper scope of judicial review of the Atomic Energy Commission's procedures with regard to the licensing of nuclear power plants. In one of the cases (No. 76-419), the Commission had granted a license to operate a nuclear power plant following a full, adjudicatory hearing in which it had excluded the issue of environmental effects of fuel reprocessing. Subsequently, after rulemaking proceedings which included notice and hearings, but which did not utilize full adjudicatory procedures, the Commission issued a "spent fuel cycle rule" and concluded that since the environmental effects of the uranium fuel cycle had been shown to be relatively insignificant, it was unnecessary to apply the rule to the licensee's reports submitted for the operating license prior to the rule's effective date or to final environmental statements for which draft environmental statements had been circulated for comment prior to the effective date. On appeal by certain intervenors from both the license and the rulemaking proceedings, the United States Court of Appeals for the District of Columbia Circuit overturned the rule and remanded the license determination for further proceedings, holding that in the absence of effective rulemaking proceedings, the Commission must deal with the environmental impact of fuel reprocessing and disposal in individual licensing proceedings, and that the rulemaking proceedings were inadequate (178 App DC

336, 547 F2d 633). In the other case (No. 76-528), the Commission had granted a permit for the construction of two nuclear reactors following extensive hearings, the examination of a report by the Advisory Committee on Reactor Safeguards, and the issuance of a final environmental impact statement.

Thereafter, revised guidelines were issued by the Council on Environmental Quality requiring consideration in impact statements of energy conservation as one of the alternatives to a proposed project. The Commission rejected a request by certain intervenors to reopen the permit proceedings in order to consider energy conservation alternatives, stating that a threshold test would have to be met by the intervenors before the Commission would consider such alternatives. On appeal by the intervenors from the grant of the permit, the United States Court of Appeals for the District of Columbia Circuit remanded the Commission's decision, holding that the environmental impact statement was fatally defective for failure to examine energy conservation as an alternative to the construction of the reactors, that the Commission's decision not to consider energy conservation on the basis of its threshold test was arbitrary and capricious, and that the Advisory's Committee report was inadequate and should have been sent back for further elucidation, understandable to a layman (178 App DC 325, 547 F2d 622).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Rehnquist, J., expressing the unanimous view of the seven participating members of the court, it was held that the Court of Appeals improperly engrafted its own notions of proper procedures upon the Commission and improperly intruded into the Commission's decisionmaking process, when it (1) overturned the spent fuel cycle rule in case No. 76-419 because of inadequate rulemaking proceedings, and (2) remanded the grant of the construction permit in case No. 76-528 on the basis of (a) the failure of the environmental impact statement to consider energy conservation as an alternative to the reactors, and (b) the failure of the Advisory Committee's report to elucidate, in a manner understandable to a layman, references made in the report

to other problems of nuclear energy than those directly related to the reactor project.

Blackmun and Powell, J.J., did not participate.

ADMINISTRATIVE LAW

rulemaking — procedure — judicial review —

Headnote:

In the exercise of their discretion, agencies are free to grant procedural rights in addition to the maximum procedural requirements of the Administrative Procedure Act (5 USCS 553) which Congress was willing to have the courts impose on agencies in conducting rulemaking procedures, but reviewing courts are generally not free to impose such additional rights if the agencies have not chosen to grant them.

ATOMIC ENERGY

Commission regulations and orders — judicial review —

Headnote:

In reviewing (1) a rule promulgated by the Atomic Energy Commission requiring quantitative evaluations of the environmental hazards of fuel reprocessing or disposal to be used in the cost-benefit analyses required before granting nuclear reactor operating licenses, and (2) an order of the Commission granting a power company a permit to construct two nuclear reactors, a Federal Court of Appeals improperly engrafts its own notions of proper procedures upon the Commission and improperly intrudes into the agency's decisionmaking process, where it (a) overturned the fuel reprocessing rule because of inadequate rulemaking procedures, even though there was little doubt that the Commission was in full compliance with all the applicable requirements of the Administrative Procedure Act (5 USCS 553), and (b) remanded the grant of the construction permit as arbitrary and capricious on the ground that the Commission had improperly rejected, on the basis of a threshold test, consideration in the environmental impact statement of energy conversation as an alternative to the construction of the reactors, and on the further ground that the Commission had improperly failed to send back a report on the proposed reactors prepared by the Advisory Committee on Reactor Safeguards for further elucidation, understandable to a layman, of references made in the report to general problems relating to nuclear energy.

APPEAL AND ERROR

dismissal of certiorari — mootness — agency proceedings —

Headnote:

A case is not rendered moot—so as to preclude the United States Supreme Court from reviewing the decision of a Federal Court of Appeals overturning a rule promulgated by the Atomic Energy Commission—by the Commission's promulgation in later proceedings of a new interim rule and its indication that it intends to complete the later proceedings looking toward the adoption of a final rule regardless of the outcome of the Supreme Court's review, and the writ of certiorari granted by the Supreme Court will not be dismissed as having been improvidently

granted, even though the question of the validity of the first rule would remain open on remand, where the Court of Appeals' decision raises significant questions about the standards of review, would serve as precedent in other reviews of agency action, and would continue to play a major role in the instant litigation regardless of the Commission's decisions to press ahead with further rulemaking proceedings.

ATOMIC ENERGY

reactor licensing proceedings — environmental issues —

Headnote:

Under the authority of the National Environmental Policy Act (42 USCS 4321 etseq.), the Atomic Energy Commission has authority to consider the environmental impact of spent fuel processes in environmental impact statements when licensing individual nuclear reactors.

ATOMIC ENERGY

Atomic Energy Commission procedures — judicial review —

Headnote:

Three proceedings, in which more than the minimum procedures specified in the Administrative Procedure Act (5 USCS 553) were provided, out of the many proceedings held by the Atomic Energy Commission, do not establish the type of long-standing and well-established practice from which it is possible that deviation might justify judicial intervention.

ADMINISTRATIVE LAW

rules of procedure — agency discretion —

Headnote:

Absent constitutional constraints or extremely compelling circumstances, administrative agencies are free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.

ADMINISTRATIVE LAW

agency discretion — judicial authority —

Headnote:

The discretion of administrative agencies and not that of courts is to be exercised in determining when procedural devices in addition to those specified in the Administrative Procedure Act (5 USCS 553) should be employed.

ADMINISTRATIVE LAW

rulemaking procedures — effect of National Environmental Policy Act —

Headnote:

The National Environmental Policy Act (42 USCS 4321 et seq.) cannot serve as the basis for a substantial revision of the carefully constructed rulemaking procedural specifications of the Administrative Procedure Act (5 USCS 553).

ATOMIC ENERGY

Commission rulemaking — procedures — judicial review —

Headnote:

Under the Administrative Procedure Act (5 USCS 553) and the National Environmental Policy Act (42 USCS 4321 et seq.), a Federal Court of Appeals cannot review and overturn an Atomic Energy Commission rulemaking proceeding on the basis of the procedural devices employed, or not employed, by the Commission, so long as the Commission has employed at least the statutory minima.

ADMINISTRATIVE LAW

judicial review — scope —

Headnote:

A Federal Court of Appeals must, in reviewing the validity of an agency decision about which there is a contemporaneous explanation, let that action stand or fall on the propriety of that finding, judged by the appropriate standard of review, and must not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are best or most likely to further some vague, undefined public goal.

HEALTH

statement — alternatives — feasibility —

Headnote:

Under the requirement of the National Environmental Policy Act (42 USCS 4322(c)) that a detailed statement be prepared by the responsible agency official on alternatives to the proposed action, the term "alternatives" is not self-defining, the concept of alternatives must be

bounded by some notion of feasibility, and the detailed statement of alternatives cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man.

HEALTH

National Environmental Policy Act — alternatives — agency mandate —

Headnote:

The concept of alternatives under the provision of the National Environmental Act (42 USCS 4322(c)) requiring a detailed statement to be prepared by the responsible agency official for agency action on alternatives to the proposed action, is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood.

HEALTH

environmental impact proceedings — intervenors' comments —

Headnote:

While the National Environmental Policy Act (42 USCS 4321 et seq.) places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful and alerts the agency as to the intervenors' positions and contentions; comments must be significant enough to step over a threshold requirement of materiality and cannot merely state that particular mistakes were made, but must show why the mistakes were of possible significance in the results.

ADMINISTRATIVE LAW

judicial review — agency judgment —

Headnote:

A court should not substitute its judgment for that of an agency as to the environmental consequences of its actions.

ATOMIC ENERGY

licensing proceedings — report on nuclear safety —

Headnote:

The function of publication of a report as to the safety of a proposed nuclear reactor, prepared by the Advisory Committee on Nuclear Safeguards pursuant to 42 USCS 2039 and 2232(b), is subsidiary to the report's main function of providing technical advice to the Atomic Energy Commission from a body of experts uniquely qualified to provide assistance, and a report cannot be faulted for not dealing with every facet of nuclear energy.

ATOMIC ENERGY

COURTS

nuclear energy policy — judicial review —

Headnote:

The fundamental policy questions with regard to nuclear energy appropriately resolved in Congress and in the state legislatures are not subject to reexamination in the federal courts under the guise of judicial review of agency action.

SYLLABUS: In No. 76-419, after extensive hearings before the Atomic Safety and Licensing Board (Licensing Board) and over respondents' objections, the Atomic Energy Commission (AEC) granted petitioner Vermont Yankee Nuclear Power Corp. a license to operate a nuclear power plant, and this ruling was affirmed by the Atomic Safety and Licensing Appeal Board (Appeal Board). Subsequently, the AEC, specifically referring to the Appeal Board's decision, instituted rulemaking proceedings to deal with the question of considering environmental effects associated with the uranium fuel cycle in the individual cost-benefit analyses for light-water-cooled nuclear power reactors. In these proceedings the Licensing Board was not to use full formal adjudicatory procedures. Eventually, as a result of these rulemaking proceedings, the AEC issued a so-called fuel cycle rule. At the same time the AEC approved the procedures used at the hearing; indicated that the record, including the Environmental Survey, provided an adequate data base for the rule adopted; and ruled that to the extent the rule differed from the Appeal Board's decision such decision had no further precedential significance, but that since the environmental effects of the uranium fuel cycle had been shown to be relatively insignificant, it was unnecessary to apply the rule to Vermont Yankee's environmental reports submitted prior to the rule's effective date or to the environmental statements circulated for comment prior to such date. Respondents appealed from both the AEC's adoption of the fuel cycle rule and its decision to grant Vermont Yankee's license. With respect to the license, the Court of Appeals first ruled that in the absence of effective rulemaking proceedings, the AEC must deal with the environmental impact of fuel reprocessing and disposal in individual licensing proceedings, and went on to hold that despite the fact that it appeared that the AEC employed all the procedures required by the Administrative Procedure Act (APA) in 5 U. S. C. § 553 (1976 ed.) and more, the rulemaking proceedings were inadequate and overturned the rule, [***3] and ac-

cordingly the AEC's determination with respect to the license was also remanded for further proceedings. In No. 76-528, after examination of a report of the Advisory Committee on Reactor Safeguards (ACRS) and extensive hearings, and over respondent intervenors' objections, the AEC granted petitioner Consumers Power Co. a permit to construct two nuclear reactors, and this ruling was affirmed by the Appeal Board. At about this time the Council on Environmental Quality revised its regulations governing the preparation of environmental impact statements so as to mention for the first time the necessity for considering energy conservation as one of the alternatives to a proposed project. In view of this development and a subsequent AEC ruling indicating that all evidence of energy conservation should not necessarily be barred at the threshold of AEC proceedings, one of the intervenors moved to reopen the permit proceedings so that energy conservation could be considered, but the AEC declined to reopen the proceedings. Respondents appealed from the granting of the construction permit.

The Court of Appeals held that the environmental impact statement for the construction of the reactors was fatally defective for failure to examine energy conservation as an alternative to plants of this size, and that the ACRS report was inadequate and should have been returned to the ACRS for further elucidation, understandable to a layman, and remanded the case for appropriate consideration of waste disposal and other unaddressed issues.

Held:

1. Generally speaking, 5 U. S. C. § 553 (1976 ed.) establishes the maximum procedural requirements that Congress was willing to have the courts impose upon federal agencies in conducting rulemaking proceedings, and while agencies are free to grant additional procedural rights in the exercise of their discretion, reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. And, even apart from the APA, the formulation of procedures should basically be left within the discretion of the agencies to which Congress has confided the responsibility for substantive judgments.

2. The Court of Appeals in these cases has seriously misread or misapplied such statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress, and moreover as to the Court of Appeals' decision with respect to agency action taken after full adjudicatory hearings, it improperly intruded into the agency's decision-making process.

(a) In No. 76-419, the AEC acted well within its statutory authority when it considered the environmental impact of the fuel processes when licensing nuclear reactors.

(b) Nothing in the APA, the National Environmental Policy Act of 1969 (NEPA), the circumstances of the case in No. 76-419, the nature of the issues being considered, past agency practice, or the statutory mandate under which the AEC operates permitted the Court of Appeals to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the AEC so long as the AEC used at least the statutory minima, a matter about which there is no doubt.

(c) As to whether the challenged rule in No. 76-419 finds sufficient justification in the administrative proceedings that it should be upheld by the reviewing court, the case is remanded so that the Court of Appeals may review the rule as the APA provides. [***6] The court should engage in this kind of review and not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.

(d) In No. 76-528, the Court of Appeals was wrong in holding that rejection of energy conservation on the basis of the "threshold test" was capricious and arbitrary as being inconsistent with the NEPA's basic mandate to the AEC, since the court's rationale basically misconceives not only the scope of the agency's statutory responsibility, but also the nature of the administrative process, the thrust of the agency's decision, and the type of issues the intervenors were trying to raise. The court seriously mischaracterized the AEC's "threshold test" as placing "heavy substantive burdens on intervenors." On the contrary the AEC's stated procedure as requiring a showing sufficient to require reasonable minds to inquire further is a procedure well within the agency's discretion.

(e) The Court of Appeals' holding in No. 76-528 that the Licensing Board should have returned the ACRS report to the ACRS for further elaboration is erroneous as being an unjustifiable intrusion into the administrative process, and there is nothing in the relevant statutes to justify what the court did.

COUNSEL: Thomas G. Dignan, Jr., argued the cause for petitioner in No. 76-419. With him on the briefs were G. Marshall Moriarty, William L. Patton, and R. K. Gad III. Charles A. Horsky argued the cause for petitioner in No. 76-528. With him on the briefs was Harold F. Reis.

Deputy Solicitor General Wallace argued the cause for the federal respondents in support of petitioners in both

cases pursuant to this Court's Rule 21 (4). On the briefs were Solicitor General McCree, Acting Assistant Attorney General Liotta, Harriet S. Shapiro, Edmund B. Clark, John J. Zimmerman, Peter L. Strauss, and Stephen F. Eilperin. Henry V. Nickel and George C. Freeman, Jr., filed a brief for respondents Baltimore Gas & Electric Co. et al. in support of petitioner in No. 76-419 pursuant to Rule 21 (4).

Richard E. Ayres argued the cause and filed briefs for respondents in No. 76-419. Myron M. Cherry argued the cause for the nonfederal respondents in No. 76-528. With him on the brief was Peter A. Flynn. +

+ Briefs of amici curiae urging reversal were filed by Cameron F. MacRae, Leonard M. Trosten, and Harry H. Voigt for Edison Electric Institute et al. in No. 76-419; by Leonard J. Theberge, John M. Cannon, Edward H. Dowd, and L. Manning Muntzing for Hans A. Bethe et al. in No. 76-528; and by Max Dean and David S. Heller for the U.S. Labor Party in No. 76-528.

Louis J. Lefkowitz, Attorney General of New York, Samuel A. Hirshowitz, First Assistant Attorney General, Philip Weinberg and John F. Shea III, Assistant Attorneys General; Cabanne Howard, Assistant Attorney General of Maine; and Ellyn Weiss, Assistant Attorney General of Massachusetts, filed a brief for 24 named States as amici curiae urging affirmance in both cases, joined by officials for their respective States as follows: William J. Baxley, Attorney General of Alabama, and Henry H. Caddell, Assistant Attorney General; Richard R. Wier, Jr., Attorney General of Delaware, and June D. MacArtor, Deputy Attorney General; Robert L. Shevin, Attorney General of Florida, and Marty Friedman, Assistant Attorney General; Arthur K. Bolton, Attorney General of Georgia, and Robert Bomar, Senior Assistant Attorney General; William J. Scott, Attorney General of Illinois, and Richard W. Cosby, Assistant Attorney General; Curt T. Schneider, Attorney General of Kansas, and William Griffin, Assistant Attorney General; Robert F. Stephens, Attorney General of Kentucky, and David Short, Assistant Attorney General; William J. Guste, Attorney General of Louisiana, and Richard M. Troy, Assistant Attorney General; Joseph E. Brennan, Attorney General of Maine; Francis B. Burch, Attorney General of Maryland, and Warren K. Rich, Assistant Attorney General; Francis X. Bellotti, Attorney General of Massachusetts; Frank J. Kelley, Attorney General of Michigan, and Stewart H. Freeman, Assistant Attorney General; Warren R. Spannaus, Attorney General of Minnesota, and Jocelyn F. Olson, Assistant Attorney General; John Ashcroft, Attorney General of Missouri, and Robert H. Lindholm, Assistant Attorney General; Toney Anaya, Attorney General of New Mexico, and James Huber, Assistant Attorney General; Rufus L. Edmisten, Attorney General of North Carolina, and Dan Oakley, Assistant Attorney General; William J. Brown, Attorney General of Ohio, and David Northrup, Assistant Attorney General; James A. Redden, Attorney General of Oregon, and Richard M. Sandvik, Assistant Attorney General; Robert P. Kane, Attorney General of Pennsylvania, and Douglas Blazey, Assistant Attorney General; John L. Hill, Attorney General of Texas, and Troy C. Webb and Paul G. Gosselink, Assistant Attorneys General; Robert B. Hansen, Attorney General of Utah, and William C. Quigley; M. Jerome Diamond, Attorney General of Vermont, and Benson D. Scotch, Assistant Attorney General; and Bronson C. LaFollette, Attorney General of Wisconsin, and John E. Kofron, Assistant Attorney General. George C. Deptula and James N. Barnes filed a brief for the Union of Concerned Scientists Fund, Inc., as amicus curiae urging affirmance in No. 76-419.

Ronald A. Zumbrun, Raymond M. Momboisse, Robert K. Best, Albert Ferri, Jr., and W. Hugh O'Riordan filed a brief for the Pacific Legal Foundation as amicus curiae in both cases.

JUDGES:

REHNQUIST, J., delivered the opinion of the Court, in which all other Members joined except BLACKMUN and POWELL, JJ., who took no part in the consideration or decision of the cases.

OPINION BY: REHNQUIST, J.

OPINION: MR. JUSTICE REHNQUIST delivered the opinion of the Court. In 1946, Congress enacted the Administrative Procedure Act, which as we have noted elsewhere was not only "a new, basic and comprehensive regulation of procedures in many agencies," Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), but was also a legislative enactment which settled "long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." Id., at 40. Section 4 of the Act, 5 U. S. C. § 553 (1976 ed.), dealing with rulemaking, [**1202] requires in subsection (b) that [*524] "notice of proposed rule making shall be published in the Federal Register . . . ," describes the contents of that notice, and goes on to require in subsection (c) that after the notice the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." Interpreting this provision of the Act in United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972), and United States v. Florida East Coast R. Co., 410 U.S. 224 (1973), we held that generally speaking this section of the Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting

rulemaking procedures.[1] Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare.

Even apart from the Administrative Procedure Act this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments. In FCC v. Schreiber, 381 U.S. 279, 290 (1965), the Court explicated [*525] this principle, describing it as "an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved." The Court there relied on its earlier case of FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940), where it had stated that a provision dealing with the conduct of business by the Federal Communications Commission delegated to the Commission the power to resolve "subordinate questions of procedure . . . [such as] the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions." It is in the light of this background of statutory and decisional law that we granted certiorari to review two judgments of the Court of Appeals for the District of Columbia Circuit because of our concern that they had seriously misread or misapplied this statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress. 429 U.S. 1090 (1977). We conclude that the Court of Appeals has done just that in these cases, and we therefore remand them to it for further proceedings. We also find it necessary to examine the Court of Appeals' decision with respect to agency action taken after full adjudicatory hearings. We again conclude that the court improperly intruded into the agency's decisionmaking process, making it necessary for us to reverse and remand with respect to this part of the cases also.

Under the Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U. S. C. § 2011 et seq., the Atomic Energy Commission[2] was given broad regulatory authority over the development of nuclear energy. Under the terms of the Act, a utility seeking to construct and operate a nuclear power plant must obtain a separate permit or license at both the construction and the operation stage of the project. See 42 U. S. C. §§ 2133, 2232, 2235, 2239. In order to obtain the construction permit, the utility must file a preliminary safety analysis report, an environmental report, and certain information regarding the antitrust implications of the proposed project. See 10 CFR §§ 2.101, 50.30 (f), 50.33a, 50.34 (a) (1977). This application then undergoes exhaustive review by the Commission's staff and by the Advisory Committee on Reactor Safeguards (ACRS), a group of distinguished experts in the field of atomic energy. Both groups submit to the Commission their own evaluations, which then become part of the record of the utility's application.[3] See 42 U. S. C. §§ 2039, 2232 (b). The Commission staff also undertakes the review required by the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 et seq., and prepares a draft environmental impact statement, which, after being circulated for comment, 10 CFR §§ 51.22-51.25 (1977), is revised and becomes a final environmental impact statement. § 51.26. Thereupon a three-member Atomic Safety and Licensing Board conducts a public adjudicatory hearing, 42 U. S. C. § 2241, and reaches a decision[4] which can be appealed to the Atomic Safety and Licensing Appeal Board, and currently, in the Commission's discretion, to the Commission itself. 10 CFR §§ 2.714, 2.721, 2.786, 2.787 (1977). The final agency decision may be appealed to the courts of appeals. 42 U. S. C. § 2239; 28 U. S. C. § 2342. The same sort of process occurs when the utility applies for a license to operate the plant, 10 CFR § 50.34 (b) (1977), except that a hearing need only be held in contested cases and may be limited to the matters in con-

[1] While there was division in this Court in United States v. Florida East Coast R. Co. with respect to the constitutionality of such an interpretation in a case involving ratemaking, which Mr. Justice Douglas and MR. JUSTICE STEWART felt was "adjudicatory" within the terms of the Act, the cases in the Court of Appeals for the District of Columbia Circuit which we review here involve rulemaking procedures in their most pristine sense.

[2] The licensing and regulatory functions of the Atomic Energy Commission (AEC) were transferred to the Nuclear Regulatory Commission (NRC) by the Energy Reorganization Act of 1974, 42 U. S. C. § 5801 et seq. (1970 ed., Supp. V). Hereinafter both the AEC and NRC will be referred to as the Commission.

[3] ACRS is required to review each construction permit application for the purpose of informing the Commission of the "hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards." 42 U. S. C. § 2039.

[4] The Licensing Board issues a permit if it concludes that there is reasonable assurance that the proposed plant can be constructed and operated without undue risk, 42 U. S. C. § 2241; 10 CFR § 50.35 (a) (1977), and that the environmental cost-benefit balance favors the issuance of a permit.

troversy. See 42 U. S. C. § 2239 (a); 10 CFR § 2.105 (1977); 10 CFR pt. 2, App. A, V (f) (1977).[5]

These cases arise from two separate decisions of the Court of Appeals for the District of Columbia Circuit. In the first, the court remanded a decision of the Commission to grant a license to petitioner Vermont Yankee Nuclear Power Corp. to operate a nuclear power plant. Natural Resources Defense Council v. NRC, 178 U. S. App. D. C. 336, 547 F.2d 633 (1976). In the second, the court remanded a decision of that same agency to grant a permit to petitioner Consumers Power Co. to construct two pressurized water nuclear reactors to generate electricity and steam. Aeschliman v. NRC, 178 U. S. App. D. C. 325, 547 F.2d 622 (1976).

In December 1967, after the mandatory adjudicatory hearing and necessary review, the Commission granted petitioner Vermont Yankee a permit to build a nuclear power plant in Vernon, Vt. See 4 A. E. C. 36 (1967). Thereafter, Vermont Yankee applied for an operating license. Respondent Natural Resources Defense Council (NRDC) objected to the granting [*528] of a license, however, and therefore a hearing on the application commenced on August 10, 1971. Excluded from consideration at the hearings, over NRDC's objection, was the issue of the environmental effects of operations to reprocess fuel or dispose of wastes resulting from the reprocessing operations.[6] This ruling was affirmed by the Appeal Board in June 1972.

In November 1972, however, the Commission, making specific reference to the Appeal Board's decision with respect to the Vermont Yankee license, instituted rulemaking proceedings "that would specifically deal with the question of consideration of environmental effects associated with the uranium fuel cycle in the individual cost-benefit analyses for light water cooled nuclear power reactors." App. 352. The notice of proposed rulemaking offered two alternatives, both predicated on a report prepared by the Commission's staff entitled Environmental Survey of the Nuclear Fuel Cycle. The first would have required no quantitative evaluation of the environmental hazards of fuel reprocessing or disposal because the Environmental Survey had found them to be slight. The second would have specified numerical values for the environmental impact of this part of the fuel cycle, which values would then be incorporated into a table, along with the other relevant factors, to determine the overall cost-benefit balance for each operating license. See id., at 356-357.

Much of the controversy in this case revolves around the procedures used in the rulemaking hearing which commenced in February 1973. In a supplemental notice of hearing the Commission indicated that while discovery or cross-examination would not be utilized, the Environmental Survey would be available to the public before the hearing along with the extensive background documents cited therein. All participants would be given a reasonable opportunity to present their position and could be represented by counsel if they so desired. Written and, time permitting, oral statements would be received and incorporated into the record. All persons giving oral statements would be subject to questioning by the Commission. At the conclusion of the hearing, a transcript would be made available to the public and the record would remain open for 30 days to allow the filing of supplemental written statements. See generally id., at 361-363. More than 40 individuals and organizations representing a wide variety of interests submitted written comments. On January 17, 1973, the Licensing Board held a planning session to schedule the appearance of witnesses and to discuss methods for compiling a record. The hearing was held on February 1 and 2, with participation by a number of groups, including the Commission's staff, the United States Environmental Protection Agency, a manufacturer of reactor equipment, a trade association from the [***19] nuclear industry, a group of electric utility companies, and a group called Consolidated National Intervenors which represented 79 groups and individuals including respondent NRDC.

After the hearing, the Commission's staff filed a supplemental document for the purpose of clarifying and revising the Environmental Survey. Then the Licensing Board forwarded its report to the Commission without rendering any decision. The Licensing [**1205] Board identified as the principal procedural question the propriety of declining to use full formal adjudicatory procedures. The major substantive issue was the technical adequacy of the Environmental Survey.

In April 1974, the Commission issued a rule which adopted the second of the two proposed alternatives described above. The Commission also approved the pro-

[5] When a license application is contested, the Licensing Board must find reasonable assurance that the plant can be operated without undue risk and will not be inimical to the common defense and security or to the health and safety of the public. See 42 U. S. C. § 2232 (a); 10 CFR § 50.57 (a) (1977). The Licensing Board's decision is subject to review similar to that afforded the Board's decision with respect to a construction permit

[6] The nuclear fission which takes place in light-water nuclear reactors apparently converts its principal fuel, uranium, into plutonium, which is itself highly radioactive but can be used as reactor fuel if separated from the remaining uranium and radioactive waste products. Fuel reprocessing refers to the process necessary to recapture usable plutonium. Waste disposal, at the present stage of technological development, refers to the storage of the very long lived and highly radioactive waste products until they detoxify sufficiently that they no longer present an environmental hazard. There are presently no physical or chemical steps which render this waste less toxic, other than simply the passage of time.

cedures used at the hearing,[7] and indicated that the record, including the Environmental Survey, provided an "adequate data base for the regulation adopted." Id., at 392. Finally, the Commission ruled that to the extent the rule differed from the Appeal Board decisions in Vermont Yankee "those decisions have no further precedential significance," id., at 386, but that since "the environmental effects of the uranium fuel cycle have been shown to be relatively insignificant, . . . it is unnecessary to apply the amendment to applicant's environmental reports submitted prior to its effective date or to Final Environmental Statements for which Draft Environmental Statements have been circulated for comment prior to the effective date," id., at 395.

Respondents appealed from both the Commission's adoption of the rule and its decision to grant Vermont Yankee's license to the Court of Appeals for the District of Columbia Circuit.

In January 1969, petitioner Consumers Power Co. applied for a permit to construct two nuclear reactors in Midland, [*531] Mich. Consumers Power's application was examined by the Commission's staff and the ACRS. The ACRS issued reports which discussed specific problems and recommended solutions. It also made reference to "other problems" of a more generic nature and suggested that efforts should be made to resolve them with respect to these as well as all other projects.[8] Two groups, one called Saginaw and another called Mapleton, intervened and opposed the application.[9] Saginaw filed with the Board a number of environmental contentions, directed over 300 interrogatories to the ACRS, attempted to depose the chairman of the ACRS, and requested discovery of various ACRS documents. The Licensing Board denied the various discovery requests directed to the ACRS. Hearings were then held on numerous radiological health and safety issues.[10] Thereafter, the Commission's staff issued a draft environmental impact statement. Saginaw submitted 119 environmental contentions which were both comments on the proposed draft statement and a statement of Saginaw's position in the upcoming hearings. The staff revised the statement and issued a final environmental statement in March 1972. Further hearings were then conducted during May and June 1972. Saginaw, however, choosing not to appear at or participate in these latter hearings, indicated that it had "no conventional findings of fact to set forth" and had not "chosen to search the record and respond to this proceeding by submitting citations of matters which we believe were proved or disproved." See App. 190 n. 9. But the Licensing Board, recognizing its obligations to "independently consider the final balance among conflicting environmental factors in the record," nevertheless treated as contested those issues "as to which intervenors introduced affirmative evidence or engaged in substantial cross examination." Id., at 205, 191.

At issue now are 17 of those 119 contentions which are claimed to raise questions of "energy conservation." The Licensing Board indicated that as far as appeared from the record, the demand for the plant was made up of normal industrial and residential use. Id., at 207. It went on to state that it was "beyond our province to inquire into whether the customary uses being made of electricity in our society are 'proper' or 'improper.'" Ibid. With respect to claims that Consumers Power stimulated demand by its advertising the Licensing Board indicated that "[no] evidence was offered on this point and absent some evidence that Applicant is creating abnormal demand, the

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[7] The Commission stated:

"In our view, the procedures adopted provide a more than adequate basis for formulation of the rule we adopted. All parties were fully heard. Nothing offered was excluded. The record does not indicate that any evidentiary material would have been received under different procedures. Nor did the proponent of the strict 'adjudicatory' approach make an offer of proof — or even remotely suggest — what substantive matters it would develop under different procedures. In addition, we note that 11 documents including the Survey were available to the parties several weeks before the hearing, and the Regulatory staff, though not requested to do so, made available various drafts and handwritten notes. Under all of the circumstances, we conclude that adjudicatory type procedures were not warranted here." App. 389-390 (footnote omitted).

[8] The ACRS report as quoted, 178 U. S. App. D. C., at 333, 547 F.2d, at 630, stated:

"Other problems related to large water reactors have been identified by the Regulatory Staff and the ACRS and cited in previous ACRS reports. The Committee believes that resolution of these items should apply equally to the Midland Plant Units 1 & 2.

"The Committee believes that the above items can be resolved during construction and that, if due consideration is given to these items, the nuclear units proposed for the Midland Plant can be constructed with reasonable assurance that they can be operated without undue risk to the health and safety of the public."

[9] Saginaw included the Saginaw Valley Nuclear Study Group, the Citizens Committee for Environmental Protection of Michigan, the United Automobile Workers International, and three other environmental groups. Mapleton included Nelson Aeschliman and five other residents of a community near the proposed plantsite. Mapleton did not raise any contentions relating to energy conservation.

[10] Pursuant to the regulations then in effect, the Licensing Board refused to consider most of the environmental issues in this first set of hearings. On the last day of those hearings, however, the Court of Appeals for the District of Columbia Circuit decided Calvert Cliffs' Coordinating Comm. v. AEC, 146 U. S. App. D. C. 33, 449 F.2d 1109 (1971), which invalidated the Commission's NEPA regulations. One effect of that decision was to require that environmental matters be considered in pending proceedings, including this one. Accordingly, the Commission revised its regulations and then undertook an extensive environmental review of the proposed nuclear plants, requiring Consumers Power to file a lengthy environmental report. Thereafter the Commission's staff prepared the draft environmental impact statement discussed in text.

Board did not consider the question." Id., at 207-208. The Licensing Board also failed to consider the environmental effects of fuel reprocessing or disposal of radioactive wastes. The Appeal Board ultimately affirmed the Licensing Board's grant of a construction permit and the Commission declined to further review the matter.

At just about the same time, the Council on Environmental Quality revised its regulations governing the preparation of environmental impact statements. 38 Fed. Reg. 20550 (1973). [***25] The regulations mentioned for the first time the necessity of considering in impact statements energy conservation as one of the alternatives to a proposed project. The new guidelines were to apply only to final impact statements filed after January 28, 1974. Id., at 20557. Thereafter, on November 6, 1973, more than a year after the record had been closed in the Consumers Power case and while that case was pending before the Court of Appeals, the Commission ruled in another case that while its statutory power to compel conservation was not clear, it did not follow that all evidence of energy conservation issues should therefore be barred at the threshold. In re Niagara Mohawk Power Corp., 6 A. E. C. 995 (1973). Saginaw then moved the Commission to clarify its ruling and reopen the Consumers Power proceedings.

In a lengthy opinion, the Commission declined to reopen the proceedings. The Commission first ruled it was required to consider only energy conservation alternatives which were "'reasonably available,'" would in their aggregate effect curtail demand for electricity to a level at which the proposed facility would not be needed, and were [***26] susceptible of a reasonable degree of proof. App. 332. It then determined, after a thorough examination of the record, that not all of Saginaw's contentions met these threshold tests. Id., at 334-340. It further determined [**1207] that the Board had been willing at all times to take evidence on the other contentions. Saginaw had simply failed to present any such evidence. The [*534] Commission further criticized Saginaw for its total disregard of even those minimal procedural formalities necessary to give the Board some idea of exactly what was at issue. The Commission emphasized that "[particularly] in these circumstances, Saginaw's complaint that it was not granted a hearing on alleged energy conservation issues comes with ill grace."[11] Id., at 342. And in response to Saginaw's contention that regardless of whether it properly raised the issues, the Licensing Board must consider all environmental issues, the Commission basically agreed, as did the Board itself, but further reasoned that the Board must have some workable procedural rules and these rules "in this setting must take into account that energy conservation is a novel and evolving concept. NEPA 'does not require a "crystal ball" inquiry.' Natural Resources Defense Council v. Morton, [148 U. S. App. D. C. 5, 15, 458 F.2d 827, 837 (1972)]. This consideration has led us to hold that we will not apply Niagara retroactively. As we gain experience on a case-by-case basis and hopefully, feasible energy conservation techniques emerge, the applicant, staff, and licensing boards will have obligations to develop an adequate record on these issues in appropriate cases, whether or not they are raised by

intervenors. "However, at this emergent stage of energy conservation principles, intervenors also have their responsibilities. They must state clear and reasonably specific energy conservation contentions in a timely fashion. Beyond that, they have a burden of coming forward with some [*535] affirmative showing if they wish to have these novel contentions explored further."[12] Id., at 344 (footnotes omitted). Respondents then challenged the granting of the construction permit in the Court of Appeals for the District of Columbia Circuit.

With respect to the challenge of Vermont Yankee's license, the court first ruled that in the absence of effective rulemaking proceedings,[13] the Commission must deal with the environmental impact of fuel reprocessing and disposal in individual licensing proceedings. 178 U. S. App. D. C., at 344, 547 F.2d, at 641. The court then examined the rulemaking proceedings and, despite the fact that it appeared that the agency employed all the procedures required by 5 U. S. C. § 553 (1976 ed.) and more, the court determined the proceedings to be inadequate and overturned the rule. Accordingly, the Commission's determination with respect to Vermont Yankee's license

[11] The Licensing Board had highlighted this same problem in its initial decision, noting "that the failure to propose proper findings and conclusions has greatly complicated the task of the Board and has made it virtually impossible in some instances to know whether particular issues are in fact contested." App. 190 n. 10. The Appeal Board was even less charitable, noting that that "[participation] in this manner, in our opinion, subverts the entire adjudicatory process." Id., at 257.

[12] In what was essentially dictum, the Commission also ruled, after considering the various relevant factors — such as the extent to which the new rule represents a departure from prior practice, the degree of reliance on past practice and consequent burdens imposed by retroactive application of the rule — that the rule enunciated in Niagara should not be applied retroactively to cases which had progressed to final order and issuance of construction permits before Niagara was decided. App. 337.

[13] In the Court of Appeals no one questioned the Commission's authority to deal with fuel cycle issues by informal rulemaking as opposed to adjudication. 178 U. S. App. D. C., at 345-346, 547 F.2d, at 642-643. Neither does anyone seriously question before this Court the Commission's authority in this respect.

was also remanded for further proceedings.[14] 178 U. S. App. D. C., at 358, 547 F.2d, at 655.

With respect to the permit to Consumers Power, the court first held that the environmental impact statement for construction of the Midland reactors was fatally defective for [*537] failure to examine energy conservation as an alternative to a plant of this size. 178 U. S. App. D. C., at 331, 547 F.2d, at 628. The court also thought the report by ACRS was inadequate, although it did not agree that discovery from individual ACRS members was the proper way to obtain further explication of the report.

Instead, the court held that the Commission should have sua sponte sent the report back to the ACRS for further elucidation of the "other problems" and their resolution. Id., at 335, 547 F.2d, at 632. Finally, the court ruled that the fuel cycle issues in this case were controlled by NRDC v. NRC, discussed above, and remanded for appropriate consideration of waste disposal and other unaddressed fuel cycle issues as described in that opinion. 178 U. S. App. D. C., at 335, 547 F.2d, at 632.

A Petitioner Vermont Yankee first argues that the Commission may grant a [**1209] license to operate a nuclear reactor without any consideration of waste disposal and fuel reprocessing. We find, however, that this issue is no longer presented by the record in this case. The Commission does not contend that it is not required to consider the environmental impact of the spent fuel processes when licensing nuclear power plants. Indeed, the Commission has publicly stated subsequent to the Court of Appeals' decision in the instant case that consideration of the environmental impact of the back end of the fuel cycle in "the environmental impact statements for individual LWR's [light-water power reactors] would represent a full and candid assessment of costs and benefits consistent with the legal requirements and spirit of NEPA." 41 Fed. Reg. 45849 (1976). Even prior to the Court of Appeals' decision the Commission implicitly agreed that it would consider the back end of the fuel cycle in all licensing proceedings: It indicated that it was not necessary to reopen prior licensing proceedings because "the environmental effects of the uranium fuel cycle have been shown to be relatively insignificant," and thus incorporation of those effects into the cost-benefit analysis would not change the results of such licensing proceedings. App. 395. Thus, at this stage of the proceedings the only question presented for review in this regard is whether the Commission may consider the environmental impact of the fuel processes when licensing nuclear reactors. In addition to the weight which normally attaches to the agency's determination of such a question, other reasons support the Commission's conclusion.

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[14] After the decision of the Court of Appeals the Commission promulgated a new interim rule pending issuance of a final rule. 42 Fed. Reg. 13803 (1977). See Vermont Yankee Nuclear Power Corp., 5 N. R. C. 717 (1977). The Commission then, at the request of the New England Coalition on Nuclear Pollution, applied the interim rule to Vermont Yankee and determined that the cost-benefit analysis was still in the plant's favor. Vermont Yankee Nuclear Power Corp., 6 N. R. C. 25 (1977). That decision is presently on appeal to the Court of Appeals for the First Circuit. The Commission has also indicated in its brief that it intends to complete the proceedings currently in progress looking toward the adoption of a final rule regardless of the outcome of this case. Brief for Federal Respondents 37 n. 36. Following oral argument, respondent NRDC, relying on the above facts, filed a suggestion of mootness and a motion to dismiss the writ of certiorari as improvidently granted. We hold that the case is not moot, and deny the motion to dismiss the writ of certiorari as improvidently granted.

Upon remand, the majority of the panel of the Court of Appeals is entirely free to agree or disagree with Judge Tamm's conclusion that the rule pertaining to the back end of the fuel cycle under which petitioner Vermont Yankee's license was considered is arbitrary and capricious within the meaning of § 10 (e) of the Administrative Procedure Act, 5 U. S. C. § 706 (1976 ed.), even though it may not hold, as it did in its previous opinion, that the rule is invalid because of the inadequacy of the agency procedures. Should it hold the rule invalid, it appears in all probability that the Commission will proceed to promulgate a rule resulting from rule-making proceedings currently in progress. Brief for Federal Respondents 37 n. 36. In all likelihood the Commission would then be required, under the compulsion of the court's order, to examine Vermont Yankee's license under that new rule.

If, on the other hand, a majority of the Court of Appeals should decide that it was unwilling to hold the rule in question arbitrary and capricious merely on the basis of § 10 (e) of the Administrative Procedure Act, Vermont Yankee would not necessarily be required to have its license reevaluated. So far as petitioner Vermont Yankee is concerned, there is certainly a case or controversy in this Court with respect to whether it must, by virtue of the Court of Appeals' decision, submit its license to the Commission for reevaluation and possible revocation under a new rule. It is true that we do not finally determine here the validity of the rule upon which the validity of Vermont Yankee's license in turn depends. Neither should anything we say today be taken as a limitation on the Court of Appeals' discretion to take due account, if appropriate, of any additions made to the record by the Commission or to consolidate this appeal with the appeal from the interim rulemaking proceeding which is already pending. But the fact that the question of the validity of the first rule remains open upon remand makes the controversy no less "live."

As we read the opinion of the Court of Appeals, its view that reviewing courts may in the absence of special circumstances justifying such a course of action impose additional procedural requirements on agency action raises questions of such significance in this area of the law as to warrant our granting certiorari and deciding the case. Since the vast majority of challenges to administrative agency action are brought to the Court of Appeals for the District of Columbia Circuit, the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals. Finally, this decision will continue to play a major role in the instant litigation regardless of the Commission's decision to press ahead with further rulemaking proceedings.

As we note in n. 15, infra, not only is the NRDC relying on the decision of the Court of Appeals as a device to force the agency to provide more procedures, but it is also challenging the interim rules promulgated by the agency in the Court of Appeals, alleging again the inadequacy of the procedures and citing the opinion of the Court of Appeals as binding precedent to that effect.

Vermont Yankee will produce annually well over 100 pounds of radioactive wastes, some of which will be highly toxic. The Commission itself, in a pamphlet published by its [*539] information office, clearly recognizes that these wastes "pose the most severe potential health hazard . . . ." U.S. Atomic Energy Commission, Radioactive Wastes 12 (1965). Many of these substances must be isolated for anywhere from 600 to hundreds of thousands of years. It is hard to argue that these wastes do not constitute "adverse environmental effects which cannot be avoided should the proposal be implemented," or that by operating nuclear power plants we are not making "irreversible and irretrievable commitments of resources." 42 U. S. C. §§ 4332 (2)(C)(ii), (v). As the Court of Appeals recognized, the environmental impact of the radioactive wastes produced by a nuclear power plant is analytically indistinguishable from the environmental effects of "the stack gases produced by a coal-burning power plant." 178 U. S. App. D. C., at 341, 547 F.2d, at 638. For these reasons we hold that the Commission acted well within its statutory authority when it considered the back end of the fuel cycle in individual licensing proceedings.

We next turn to the invalidation of the fuel cycle rule. But before determining whether the Court of Appeals reached a permissible result, we must determine exactly what result it did reach, and in this case that is no mean feat. Vermont Yankee argues that the court invalidated the rule because of the inadequacy of the procedures employed in the proceedings. Brief for Petitioner in No. 76-419, pp. 30-38. Respondents, on the other hand, labeling petitioner's view of the decision a "straw man," argue to this Court that the court merely held that the record was inadequate to enable the reviewing court to determine whether the agency had fulfilled its statutory obligation.

Brief for Respondents in No. 76-419, pp. 28-30, 40. But we unfortunately have not found the parties' characterization of the opinion to be entirely reliable; it appears here, as in Orloff v. Willoughby, 345 U.S. 83, 87 (1953), that "in this Court the parties changed positions as nimbly as if dancing a quadrille."[15]

After a thorough examination of the opinion itself, we conclude that while the matter is not entirely free from doubt, the majority of the Court of Appeals struck down the rule because of the perceived inadequacies of the procedures employed in the rulemaking proceedings. The court first determined the intervenors' primary argument to be "that the decision to preclude 'discovery or cross-examination' denied them a meaningful opportunity to participate in the proceedings as guaranteed by due process." 178 U. S. App. D. C., at 346, 547 F.2d, at 643. The court then went on to frame the issue for decision thus:

"Thus, we are called upon to decide whether the procedures provided by the agency were sufficient to ventilate the issues." Ibid., 547 F.2d, at 643.

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[15] Vermont Yankee's interpretation has been consistent throughout the litigation. That cannot be said of the other parties, however. The Government, Janus-like, initially took both positions. While the petition for certiorari was pending, a brief was filed on behalf of the United States and the Commission, with the former indicating that it believed the court had unanimously held the record to be inadequate, while the latter took Vermont Yankee's view of the matter. See Brief for Federal Respondents 5-9 (filed Jan. 10, 1977). When announcing its intention to undertake licensing of reactors pending the promulgation of an "interim" fuel cycle rule, however, the Commission said:
"[The] court found that the rule was inadequately supported by the record insofar as it treated two particular aspects of the fuel cycle — the impacts from reprocessing of spent fuel and the impacts from radioactive waste management." 41 Fed. Reg. 45850 (1976).

And even more recently, in opening another rulemaking proceeding to replace the rule overturned by the Court of Appeals, the Commission stated:

"The original procedures proved adequate for the development and illumination of a wide range of fuel cycle impact issues . . . .

". . . The court here indicated that the procedures previously employed could suffice, and indeed did for other issues.

. . . .

"Accordingly, notice is hereby given that the rules for the conduct of the reopened hearing and the authorities and responsibilities of the Hearing Board will be the same as originally applied in this matter (38 Fed. Reg. 49, January 3, 1973) except that specific provision is hereby made for the Hearing Board to entertain suggestions from participants as to questions which the Board should ask of witnesses for other participants." 42 Fed. Reg. 26988-26989 (1977).

Respondent NRDC likewise happily switches sides depending on the forum. As indicated above, it argues here that the Court of Appeals held only that the record was inadequate. Almost immediately after the Court of Appeals rendered its decision, however, NRDC filed a petition for rulemaking with the Commission which listed over 13 pages of procedural suggestions it thought "necessary to comply with the Court's order and with the mandate of [NEPA]." NRDC, Petition for Rulemaking, NRC Docket No. RM-50-3 (Aug. 10, 1976). These proposals include cross-examination, discovery, and subpoena power. Id., Attachment, Rules for Conduct of Hearing on Environmental Effects of the Uranium Fuel Cycle, paras. 5 (a), 9 (b), 11. NRDC likewise challenged the interim fuel cycle rule and suggested to the Court of Appeals that it hold the case pending our decision in this case because the interim rules were "defective due to the inadequacy of the procedures used in developing the rule . . . ." Motion to Hold Petition for Review in Abeyance 1, in NRDC v. NRC, No. 77-1448 (DC Cir., petition for review filed May 13, 1977; motion filed July 5, 1977). NRDC has likewise challenged the procedures being used in the final rulemaking proceeding as being "no more than a re-run of hearing procedures which were found inadequate [by the Court of Appeals]." x NRDC Petition for Reconsideration of the Ruling Reopening the Hearings on the Environmental Effects of the Uranium Fuel Cycle 10, NRC Docket No. RM-50-3 (June 6, 1977).

The court conceded that absent extraordinary circumstances it is improper for a reviewing court to prescribe the procedural format an agency must follow, but it likewise clearly thought it entirely appropriate to "scrutinize the record as a whole to insure that genuine opportunities to participate in a meaningful way were provided. . . ." Id., at 347, 547 F.2d, at 644. The court also refrained from actually ordering the agency to follow any specific procedures, id., at 356-357, 547 F.2d, at 653-654, but there is little doubt in our minds that the ineluctable mandate of the court's decision is that the procedures afforded during the hearings were inadequate. This conclusion is particularly buttressed by the fact that after the court examined the record, particularly the testimony of Dr. Pittman, and declared it insufficient, the court proceeded to discuss at some length the necessity for further procedural devices or a more "sensitive" application of those devices employed during the proceedings. Ibid. The exploration of the record and the statement regarding its insufficiency might initially lead one to conclude that the court was only examining the sufficiency of the evidence, but the remaining portions of the opinion dispel any doubt that this was certainly not the sole or even the principal basis of the decision. Accordingly, we feel compelled to address the opinion on its own terms, and we conclude that it was wrong. In prior opinions we have intimated that even in a rule-making proceeding when an agency is making a "'quasi-judicial'" determination by which a very small number of persons are "'exceptionally affected, in each case upon individual grounds,'"in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process.[16] United States v. Florida East Coast R. Co., 410 U.S., at 242, 245, quoting from Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 446 (1915). It might also be true, although we do not think the issue is presented in this case and accordingly do not decide it, that a totally unjustified departure from well-settled agency procedures of long standing might require judicial correction.[17]

But this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" FCC v. Schreiber, 381 U.S., at 290, quoting from FCC v. Pottsville Broadcasting Co., 309 U.S., at 143. Indeed, our cases could hardly be more explicit in this regard. The Court has, as we noted in FCC v. Schreiber, supra, at 290, and[18], upheld this principle in a variety of applications, n18 including that case where the District Court, instead of inquiring into the validity of the Federal Communications Commission's exercise of its rulemaking authority, devised procedures to be followed by the agency on the basis of its conception of how the public and private interest involved could best be served. Examining § 4 (j) of the Communications Act of 1934, the Court unanimously held that the Court of Appeals erred in upholding that action. And the basic reason for this decision was the Court of Appeals' serious departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.

We have continually repeated this theme through the years, most recently in FPC v. Transcontinental Gas Pipe

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[16] Respondent NRDC does not now argue that additional procedural devices were required under the Constitution. Since this was clearly a rulemaking proceeding in its purest form, we see nothing to support such a view. See United States v. Florida East Coast R. Co., 410 U.S. 224, 244-245 (1973); Bowles v. Willingham, 321 U.S. 503 (1944); Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915).

[17] NRDC argues that the agency has in the past provided more than the minimum procedures specified in @ 4 of the APA and therefore something more is required here, since "[agencies] are not free to alter their procedures on a whim, grossly constricting parties' procedural rights when it deems them an impediment or embarrassment to implementing its own views." Brief for Respondents in No. 76-419, p. 46. In support NRDC first argues that the Commission has considered other equally generic issues in adjudicatory proceedings. But NRDC conceded in the court below that the agency could promulgate rules regarding the fuel cycle in rulemaking proceedings. 178 U. S. App. D. C., at 346, 547 F.2d, at 643. Moreover, even here it concedes "that the Commission has in the past chosen to consider both environmental and safety issues that would ordinarily be addressed in adjudicatory licensing proceedings through 'generic' rulemaking, a practice with which the lower court did not take issue." Brief for Respondents in No. 76-419, p. 48. It now contends, however, that the Commission provided more procedural safeguards in those rulemaking proceedings than in the proceeding presently under review. In support it cites three previous proceedings where cross-examination was supposedly provided. Id., at 49 n. 69.
Pretermitting both the fact that the Court of Appeals in no way relied upon this argument in its decision and the question of whether courts can impose additional procedures even when an agency substantially departs from past practice, we find NRDC's argument without merit. In the first place, three proceedings out of the many held by NRC and its predecessor hardly establish the type of longstanding and well-established practice deviation from which might justify judicial intervention. It appears, moreover, that in fact the hearings cited by NRDC are not only not part of a longstanding practice but are themselves aberrational. Since 1970 the Commission has conducted a large number of rulemaking proceedings, some of which have involved matters of substantial importance, and almost none of which have involved cross-examination. See, e. g., Quality Assurance Criteria for Nuclear Power Plants, 35 Fed. Reg. 10499 (1970); General Design Criteria for Nuclear Power Plants, 36 Fed. Reg. 3255 (1971); Pre-Construction Permit Activities, 39 Fed. Reg. 14506 (1974); Environmental Protection — Licensing and Regulatory Policy and Procedures. Id., at 26279.

[18] See, e. g., CAB v. Hermann, 353 U.S. 322 (1957); Oklahoma Press Pub. Co.v. Walling, 327 U.S. 186 (1946); Wallace Corp. v. NLRB, 323 U.S. 248 (1944); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943); Utah Fuel Co. v.National Bituminous Coal Comm'n, 306 U.S. 56 (1939); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933).

Line Corp., 423 U.S. 326 (1976), decided just two Terms ago. In that case, in determining the proper scope of judicial review of agency action under the Natural Gas Act, we held that while a court may have occasion to remand an agency decision because of the inadequacy of the record, the agency should normally be allowed to "exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops." Id., at 333. We went on to emphasize:

"At least in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of ']propelling] the court into the domain which Congress has set aside exclusively for the administrative agency.' SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)." Ibid. Respondent NRDC argues that § 4 of the Administrative Procedure Act, 5 U. S. C. § 553 (1976 ed), merely establishes lower procedural bounds and that a court may routinely require more than the minimum when an agency's proposed rule addresses complex or technical factual issues or "Issues of Great Public Import." Brief for Respondents in No. 76-419, p. 49. We have, however, previously shown that our decisions reject this view. Supra, at 542 to this page. We also think the legislative history, even the part which it cites, does not bear out its contention. The Senate Report explains what eventually became § 4 thus:

"This subsection states . . . the minimum requirements of public rule making procedure short of statutory hearing. Under it agencies might in addition confer with industry advisory committees, consult organizations, hold informal 'hearings,' and the like. Considerations of practicality, necessity, and public interest . . . will naturally govern the agency's determination of the extent to which public proceedings should go. Matters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures." S. Rep. No. 752, 79th Cong., 1st Sess., 14-15 (1945).

The House Report is in complete accord:

"'[Uniformity] has been found possible and desirable for all classes of both equity and law actions in the courts . . . . It would seem to require no argument to demonstrate that the administrative agencies, exercising but a fraction of the judicial power may likewise operate under uniform rules of practice and procedure and that they may be required to remain within the terms of the law as to the exercise of both quasi-legislative and quasi-judicial power.'

. . . . "The bill is an outline of minimum essential rights and procedures. . . It affords private parties a means of knowing what their rights are and how they may protect them . . . . . .

". . . [The bill contains] the essentials of the different forms of administrative proceedings . . . ." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 9, 16-17 (1946).

And the Attorney General's Manual on the Administrative Procedure Act 31, 35 (1947), a contemporaneous interpretation previously given some deference by this Court because of the role played by the Department of Justice in drafting the legislation,[19] further confirms that view. In short, all of this leaves little doubt that Congress intended that the discretion of the agencies and not that of the courts be exercised in determining when extra procedural devices should be employed.

There are compelling reasons for construing § 4 in this manner. In the first place, if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the "best" or "correct" result, judicial review would be totally unpredictable. And the agencies, operating under this vague injunction to employ [*547] the "best" procedures and facing the threat of reversal if they did not, would undoubtedly adopt full adjudicatory procedures in every instance. Not only would this totally disrupt the statutory scheme, through which Congress enacted "a formula upon which opposing social and political forces have come to rest," Wong Yang Sung v. McGrath, 339 U.S., at 40, but all the inherent advantages of informal rulemaking would be totally lost.[20]

Secondly, it is obvious that the court in these cases reviewed the agency's choice of procedures on the basis of the record actually produced at the hearing, 178 U. S. App. D. C., at 347, 547 F.2d, at 644, and not on the basis of the information available to the agency when it made the decision to structure the proceedings in a certain way. This sort of Monday morning quarterbacking not only encourages but almost compels the agency to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings.

[19] See Power Reactor Co. v. Electricians, 367 U.S. 396, 408 (1961); United States v. Zucca, 351 U.S. 91, 96 (1956).

[20] See Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 375, 387-388 (1974).

Finally, and perhaps most importantly, this sort of review fundamentally misconceives the nature of the standard for judicial review of an agency rule. The court below uncritically assumed that additional procedures will automatically result in a more adequate record because it will give interested parties more of an opportunity to participate in and contribute to the proceedings. But informal rulemaking need not be based solely on the transcript of a hearing held before an agency. Indeed, the agency need not even hold a formal hearing. See 5 U. S. C. § 553 (c) (1976 ed.). Thus, the adequacy of the "record" in this type of proceeding is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes. If the agency is compelled to support the rule which it ultimately adopts with the type of record produced only after a full adjudicatory hearing, it simply will have no choice but to conducta full adjudicatory hearing prior to promulgating every rule. In sum, this sort of unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress. Respondent NRDC also argues that the fact that the Commission's inquiry was undertaken in the context of NEPA somehow permits a court to require procedures beyond those specified in § 4 of the APA when investigating factual issues through rulemaking. The Court of Appeals was apparently also of this view, indicating that agencies may be required to "develop new procedures to accomplish the innovative task of implementing NEPA through rulemaking." 178 U. S. App. D. C., at 356, 547 F.2d, at 653. But we search in vain for something in NEPA which would mandate such a result. We have before observed that "NEPA does not repeal by implication any other statute." Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 319 (1975). See also United States v. SCRAP, 412 U.S. 669, 694 (1973). In fact, just two Terms ago, we emphasized that the only procedural requirements imposed by NEPA are those stated in the plain language of the Act. Kleppe v. Sierra Club, 427 U.S. 390, 405-406 (1976). Thus, it is clear NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA. In short, nothing in the APA, NEPA, the circumstances of this case, the nature of the issues being considered, past agency practice, or the statutory mandate under which the Commission operates permitted the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least the statutory minima, a matter about which there is no doubt in this case.

There remains, of course, the question of whether the challenged rule finds sufficient justification in the administrative proceedings that it should be upheld by the reviewing court. Judge Tamm, concurring in the result reached by the majority of the Court of Appeals, thought that it did not. There are also intimations in the majority opinion which suggest that the judges who joined it likewise may have thought the administrative proceedings an insufficient basis upon which to predicate the rule in question. We accordingly remand so that the Court of Appeals may review the rule as the Administrative Procedure Act provides. We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must "stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration." Camp v. Pitts, 411 U.S. 138, 143 (1973). See also SEC v. Chenery Corp., 318 U.S. 80 (1943). The court should engage in this kind of review and not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.[21]

We now turn to the Court of Appeals' holding "that rejection of energy conservation on the basis of the 'threshold test' was capricious and arbitrary," 178 U. S. App. D. C., at 332, 547 F.2d, at 629, and again conclude the court was wrong. The Court of Appeals ruled that the Commission's "threshold test" for the presentation of energy conservation contentions was inconsistent with NEPA's basic mandate to the Commission. Id., at 330, 547 F.2d, at 627. The Commission, the court reasoned, is something more than an umpire who sits back and resolves adversary contentions at the hearing stage. Ibid., 547 F.2d, at 627. And when an intervenor's comments "bring 'sufficient attention to the issue to stimulate the Commission's consideration of it,'" the Commission must "undertake its own preliminary investigation of the proffered alternative sufficient to reach a rational judgment whether it is worthy of detailed consideration in the EIS. Moreover, the Commission must explain the basis for each conclusion that further consideration of a suggested alternative is unwarranted." Id., at 331, 547 F.2d, at 628, quoting from Indiana & Michigan Electric Co. v. FPC, 163 U. S. App. D. C. 334, 337, 502 F.2d 336, 339 (1974), cert. denied, 420 U.S. 946 (1975).

While the court's rationale is not entirely unappealing as an abstract proposition, as applied to this case we think

[21] Of course, the court must determine whether the agency complied with the procedures mandated by the relevant statutes. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 417 (1971). But, as we indicated above, there is little doubt that the agency was in full compliance with all the applicable requirements of the Administrative Procedure Act.

it basically misconceives not only the scope of the agency's statutory responsibility, but also the nature of the administrative process, the thrust of the agency's decision, and the type of issues the intervenors were trying to raise.

There is little doubt that under the Atomic Energy Act of 1954, state public utility commissions or similar bodies are empowered to make the initial decision regarding the need for power. 42 U. S. C. § 2021 (k). The Commission's prime area of concern in the licensing context, on the other hand, is national security, public health, and safety. §§ 2132, 2133, 2201. And it is clear that the need, as that term is conventionally used, for the power was thoroughly explored in the hearings. Even the Federal Power Commission, which regulates sales in interstate commerce, [***52] 16 U. S. C. § 824 et seq. (1976 ed.), agreed with Consumers Power's analysis of projected need. App. 207. NEPA, of course, has altered slightly the statutory balance, requiring "a detailed statement by the responsible official on . . . alternatives to the proposed action." 42 U. S. C. § 4332 (C). But, as should be obvious even upon a moment's reflection, the term "alternatives" is not self-defining. To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility. As the Court of Appeals for the District of Columbia Circuit has itself recognized:

"There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of 'alternatives' put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies — making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed." Natural Resources Defense Council v. Morton, 148 U. S. App. D. C. 5, 15-16, 458 F.2d 827, 837-838 (1972).

See also Life of the Land v. Brinegar, 485 F.2d 460 (CA9 1973), cert. denied, 416 U.S. 961 (1974). Common sense also teaches us that the "detailed statement of alternatives" cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man.

Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.

With these principles in mind we now turn to the notion of "energy conservation," an alternative the omission of which was thought by the Court of Appeals to have been "forcefully pointed out by Saginaw in its comments on the draft EIS." 178 U. S. App. D. C., at 328, 547 F.2d, at 625. Again, as the Commission pointed out, "the phrase 'energy conservation' has a deceptively simple ring in this context. Taken literally, the phrase suggests a virtually limitless range of possible actions and developments that might, in one way or another, ultimately reduce projected demands for electricity from a particular proposed plant." App. 331. Moreover, as a practical matter, it is hard to dispute the observation that it is largely the events of recent years that have emphasized not only the need but also a large variety of alternatives for energy conservation. Prior to the drastic oil shortages incurred by the United States in 1973, there was little serious thought in most Government circles of energy conservation alternatives. Indeed, the Council on Environmental Quality did not promulgate regulations which even remotely suggested the need to consider energy conservation in impact statements until August 1, 1973. See 40 CFR § 1500.8 (a) (4) (1977); 38 Fed. Reg. 20554 (1973). And even then the guidelines were not made applicable to draft and final statements filed with the Council before January 28, 1974. Id., at 20557, 21265. The Federal Power Commission likewise did not require consideration of energy conservation in applications to build hydroelectric facilities until June 19, 1973. 18 CFR pt. 2, App. A., § 8.2 (1977); 38 Fed. Reg. 15946, 15949 (1973). And these regulations were not made retroactive either. Id., at 15946. All this occurred over a year and a half after the draft environmental statement for Midland had been prepared, and over a year after the final environmental statement had been prepared and the hearings completed. We think these facts amply demonstrate that the concept of "alternatives" is an evolving one, requiring the agency to [*553] explore more or fewer alternatives as they become better known and understood. This was well understood by the Commission, which, unlike the Court of Appeals, recognized that the Licensing Board's decision had to be judged by the information then available to it. And judged in that light we have little doubt the Board's actions were well within the proper bounds of its statutory authority. Not only did the record before the agency give every indication that the project was actually needed, but also there was nothing before the Board to indicate to the contrary. We also think the court's criticism of the Commission's "threshold test" displays a lack of understanding of the historical setting within which the agency action took place and of the nature of the test itself. In the first place, while it is true that NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions. This is especially true when the intervenors are requesting the agency to embark upon an exploration of uncharted territory, as was the question of energy conservation in the

late 1960's and early 1970's.

"[Comments] must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results . .

." Portland Cement Assn. v. Ruckelshaus, 158 U. S. App. D. C. 308, 327, 486 F.2d 375, 394 (1973), cert. denied sub nom. Portland Cement Corp. v. Administrator, EPA, 417 U.S. 921 (1974).

Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making [*554] cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented." In fact, here the agency continually invited further clarification of Saginaw's contentions. Even without such clarification it indicated a willingness to receive evidence on the matters. But not only did Saginaw decline to further focus its contentions, it virtually declined to participate, indicating that it had "no conventional findings of fact to set forth" and that it had not "chosen to search the record and respond to this proceeding by submitting citations of matter which we believe were proved or disproved."

We also think the court seriously mischaracterized the Commission's "threshold test" as placing "heavy substantive burdens . . . on intervenors . . . ." 178 U. S. App. D. C., at 330, and n. 11, 547 F.2d, at 627, and n. 11. On the contrary, the Commission explicitly stated:

"We do not equate this burden with the civil litigation concept of a prima facie case, an unduly heavy burden in this setting. But the showing should be sufficient to require reasonable minds to inquire further." App. 344 n. 27.

We think this sort of agency procedure well within the agency's discretion.

In sum, to characterize the actions of the Commission as "arbitrary or capricious" in light of the facts then available to it as described at length above, is to deprive those words of any meaning. As we have said in the past:

"Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed]. . . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." ICC v. Jersey City, 322 U.S. 503, 514 (1944).

See also Northern Lines Merger Cases, 396 U.S. 491, 521 (1970). We have also made it clear that the role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review.

"Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions." Kleppe v. Sierra Club, 427 U.S., at 410 n. 21.

We think the Court of Appeals has forgotten that injunction here and accordingly its judgment in this respect must also be reversed.[22]

Finally, we turn to the Court of Appeals' holding that the Licensing Board should have returned the ACRS report to ACRS for further elaboration, understandable to a layman, of the reference to other problems.

The Court of Appeals reasoned that since one function of the report was "that all concerned may be apprised of the safety or possible hazard of the facilities," the report must be in terms understandable to a layman and replete with cross-references to previous reports in which the "other problems" are detailed. Not only that, but if the report does not so elaborate, and the Licensing Board fails to sua sponte return the report to ACRS for further development, the entire agency action, made after exhaustive studies, reviews, and 14 days of hearings, must be nullified. Again the Court of Appeals has unjustifi-

[22] The court also indicated at the end of the opinion in Aeschliman that since "this matter requires remand and reopening of the issues of energy conservation alternatives as well as recalculation of costs and benefits, we assume that the Commission will take into account the changed circumstances regarding Dow's [the principal customer for the plant's steam] need for process steam, and the intended continued operation of Dow's fossil-fuel generating facilities." 178 U. S. App. D. C., at 335, 547 F.2d, at 632. As we read the Court of Appeals opinion, however, this was not an independent basis for vacating and remanding the Commission's licensing decision. It also appears from the record that the Commission has reconsidered the changed circumstances and refused to reopen the proceedings at least three times, see App. 346-347, 348-349, 350-351, and possibly a fourth, see Brief for Nonfederal Respondents in No. 76-528, pp. 19-20, n. 8. We see no error in the Commission's actions in this respect.

ably intruded into the administrative process. It is true that Congress thought publication of the ACRS report served an important function. But the legislative history shows that the function of publication was subsidiary to its main function, that of providing technical advice from a body of experts uniquely qualified to provide assistance. See 42 U. S. C. § 2039; S. Rep. No. 296, 85th Cong., 1st Sess., 24 (1957); Joint Committee on Atomic Energy, A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities, 85th Cong., 1st Sess., 32-34 (Comm. Print 1957). The basic information to be conveyed to the public is not necessarily a full technical exposition of every facet of nuclear energy, but rather the ACRS's position, and reasons therefor, with respect to the safety of a proposed nuclear reactor. Accordingly, the ACRS cannot be faulted for not dealing with every facet of nuclear energy in every report it issues.

Of equal significance is the fact that the ACRS was not obfuscating its findings. The reports to which it referred were matters of public record, on file in the Commission's [*557] public-documents room. Indeed, all ACRS reports are on file there. Furthermore, we are informed that shortly after the Licensing Board's initial decision, ACRS prepared a list which identified its "generic safety concerns." In light of all this it is simply inconceivable that a reviewing court should find it necessary or permissible to order the Board to sua sponte return the report to [***62] ACRS. Our view is confirmed by the fact that the putative reason for the remand was that the public did not understand the report, and yet not one member of the supposedly uncomprehending public even asked that the report be remanded. This surely is, as petitioner Consumers Power claims, "judicial intervention run riot." Brief for Petitioner in No. 76-528, p. 37.

We also think it worth noting that we find absolutely nothing in the relevant statutes to justify what the court did here. The Commission very well might be able to remand a report for further clarification, but there is nothing to support a court's ordering the Commission to take that step or to support a court's requiring the ACRS to give a short explanation, understandable to a layman, of each generic safety concern. All this leads us to make one further observation of some relevance to this case. To say that the Court of Appeals' final reason for remanding is insubstantial at best is a gross understatement. Consumers Power first applied in 1969 for a construction permit — not even an operating license, just a construction permit. The proposed plant underwent an incredibly extensive review. The reports filed and reviewed literally fill books. The proceedings took years, and the actual hearings themselves over two weeks. To then nullify that effort seven years later because one report refers to other problems, which problems admittedly have been discussed at length in other reports available to the public, borders on the Kafkaesque. Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment. In the meantime courts should perform their appointed function. NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. See 42 U. S. C. § 4332. See also Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S., at 319. It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, Consolo v. FMC, 383 U.S. 607, 620 (1966), not simply because the court is unhappy with the result reached. And a single alleged oversight on a peripheral issue, urged by parties who never fully cooperated or indeed raised the issue below, must not be made the basis for overturning a decision properly made after an otherwise exhaustive proceeding.

Reversed and remanded.

MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

Section 3

Choice of Forum

AIR 1990 SUPREME COURT 1480

SABYASACHI MUKHERJI, C.J. K.N. SINGH,
S. RANGANATHAN A.M. AHMADI AND K.N. SAIKIA, J.J.

**Writ Petns. Nos. 268 and 281 of 1989 and 164 and 1551 of 1986,
D/-22-12-1989**

CHARAN LAL SAHU, PETITIONER V. UNION OF INDIA, Respondent

A N D

RAKESH SHROUTI, PETITIONER V. UNION OF INDIA AND OTHERS, Respondent

A N D

RAJKUMAR KESWANI, PETITIONER V. UNION OF INDIA AND OTHERS, Respondents

A N D

RASRIN SI AND OTHERS, PETITIONERS V. UNION OF INDIA AND OTHERS, Respondents

(A) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss. 3, 4, 9, 10 -Validity - Victims of gas leak - Claim for compensation - Representation - Taking over claims of victims by govt. - Not illegal.

Gas leak disaster - Claim for compensation by victims - Taking over by State.

Maxims - Parens patriae.

Constitution of India, Arts. 14, 226.

Conceptually and from the jurisprudential point of view, especially in the background of the preamble to the Constitution of India and the mandate of the Directive Principles, it was possible to authorise the Central Government to take over the claims of the victims of gas leak to fight against the multinational Corporation in respect of the claims. Because of the situation the victims were under disability in pursuing their claims in the circumstances of the situation fully and properly. On its plain terms the State has taken over the exclusive right to represent and act in place of every person who has made or is entitled to make a claim for all purposes connected with such claim in the same manner and to the same effect as such person. Whether such provision is valid or not in the background of the requirement of the Constitution and the Code of Civil Procedure, is another debate. But there is no prohibition or inhibition, conceptually or jurisprudentially for Indian state taking over the claims of the victims or for the State acting for the victims as the Act has sought to provide.

The Act in question was passed in recognition of the right of the sovereign to act as parens patriae. The Government of India in order to effectively safeguard the rights of the victims in the matter of the conduct of the case was entitled to act as parens patriae, which position was reinforced by the statutory provisions, namely, the Act. It has to be borne in mind that conceptually and jurisprudentially, the doctrine of parens patriae is not limited to representation of some of the victims outside the territories of the country. It is true that the doctrine has been so utilised in America so far. Where citizens of a

country are victims of a tragedy because of the negligence of any multi-national, a peculiar situation arises which calls for suitable effective machinery to articulate and effectuate the grievances and demands of the victims, for which the conventional adversary system would be totally inadequate. The State in discharge of its sovereign obligation must come forward. The Indian State because of its constitutional commitment is obliged to take upon itself the claims of the victims and to protect them in their hour of need. Parens patriae doctrine can be invoked by sovereign state within India, even if it be contended that it has not so far been invoked inside India in respect of claims for damages of victims suffered at the hands of the multinational. Therefore conceptually and jurisprudentially, there is no bar on the State to assume responsibilities analogous to parens patriae to discharge the State's obligations under the Constitution. What the Central Government has done in the instant case is an expression of its sovereign power. This power is plenary and inherent in every sovereign state to do all things which promote the health, peace, morals, education and good order of the people and tend to increase for the wealth and prosperity of the State. Sovereignty is difficult to define. By the nature of things, the State sovereignty in these matters cannot be limited. It has to be adjusted to the conditions touching the common welfare when covered by legislative enactments. This power is to the public what the law of necessity is to the individual. It is comprehended in the maxim salus populi suprema lex - regard for public welfare is the highest law. It is not a rule, it is an evolution. this power has always been as broad as public welfare and as strong as the arm of the State, this can only be measured by the legislative will of the people, subject to the fundamental rights and constitutional limitations. This is an emanation of sovereignty subject to as aforesaid. Indeed, it is the obligation of the State to assume such responsibility and protect its citizens. It has to be borne in mind, that conferment of power and the manner of its exercise are two different matters. The power to compromise and to conduct the proceedings are not uncanalised or arbitrary. These were clearly exercisable only in the ultimate interests of the victims. The possibility of abuse of a statute does not impart to it any element of invalidity.

It is true that victims or their representatives are sui generis and cannot as such due to age, mental capacity or other reason not, legally incapable for suing or pursuing the remedies for their rights yet they are at a tremendous disadvantage in the broader and comprehensive sense of the term. These victims cannot be considered to be any match to the multinational companies or the Government with whom in the conditions that the victims or their representatives were after the disaster physically, mentally, financially, economically and also because of the position of litigation would have to contend. In such a situation of predicament the victims can legitimately be considered to be disabled. They were in no position by themselves to look after their own interests effectively or purposefully. In that background, they are people who needed the State's protection and should come within the umbrella of State's sovereignty to assert, establish and maintain their rights against the wrongdoers in this mass disaster. In that perspective, it is jurisprudentially possible to apply the principle of parens patriae doctrine to the victims. But quite apart from that, it has to be borne in mind that in this case the State is acting on the basis of the Statute itself. For the authority of the Central Government to sue for and on behalf of or instead in place of the victims, no other theory, concept or any jurisprudential principle is required than the Act itself. The Act displaces the victims by operation of S. 3 of the Act and substitutes the Central Government in its place. The victims have been divested of their rights to sue and such claims and such rights have been vested in the Central Government. The victims have been divested because the victims were disabled. The disablement of the victims vis-a-vis their adversaries in this matter is a self-evident factor. If that is the position then, even if the strict application of the 'parens patriae' doctrine is not in order, as a concept it is a guide. The jurisdiction of the State's power cannot be circumscribed by the limitations of the traditional concept of parens patriae. Jurisprudentially, it could be utilised to suit or alter or adapt itself in the changed circumstances. In the situation in which the victims were, the State had to assume the role of a parent protecting the rights of the victims who must come within the protective umbrella of the State and the common sovereignty of the Indian people. The Act is an exercise of the sovereign power of the State. It is an appropriate evolution of the expression of sovereignty in the situation that had arisen. (Para 100)

Factually the Central Government does not own any share in UCIL. These are the statutory independent organizations, namely, Unit Trust of India and Life Insurance Corporation, who own 20 to 22% share in UCIL. The Government has certain amount of say and control in LIC and UTI. Hence, it cannot be said that there is any conflict of interest in the real sense of matter in respect of the claims of Bhopal gas leak disaster between the Central Government and the victims. Secondly, in a situation of this nature, the Central Government is the only authority which can pursue and effectively represent the victims. There is no other organization or Unit which can effectively represent the victims. Perhaps, theoretically, it might have been possible to constitute another independent statutory body by the Government under its control and supervision in whom the claim of the victims might have been vested and substituted and that Body could have been entrusted with the task of agitating or establishing the same claims in the same manner as the Central Government has done under the Act. But the fact that that has not been done does not in any way affect the position.

Per Ranganathan, J. (for himself and A.M. Ahmadi, J. Concurring) - In the instant case there are more illiterates than enlightened ones. There are very few of the claimants, capable of finding the financial wherewithal required for fighting the litigation. Very few of them are capable of prosecuting such a litigation in this country not to speak of the necessity to run to a foreign country. The financial position of UCIL was negligible compared to the magnitude of the claim that could arise and, though eventually the battle has to be pitched on our own soil, an initial as well as final recourse to legal proceedings in the United States was very much on the cards, indeed inevitable. In this situation, the legislature was perfectly justified in coming to the aid of the victims with this piece of legislation and in asking the Central Government to shoulder the responsibility by substituting itself in place of the victims for all purposes connected with the claims. Even if the Act had provided for a total substitution of the Government of India in place of the victims and had completely precluded them from exercising their rights in any manner, it could perhaps have still been contended that such deprivation was necessary in larger public interest.

Sections 3 and 4 thus combine together the interests of the weak, illiterate, helpless and poor victims as wells as the interests of those who could have managed for themselves, even without the help of this enactment. The combination thus envisaged enables the Government to fight the battle with the foreign adversary with the full aid and assistance of such of the victims or their legal advisers as are in a position to offer any such assistance. Though S. 3 denies the claimants the benefit of being eo nomine parties in such suits or proceedings, S. 4 preserves to them substantially all that they can achieve by proceeding on their own. In other words, while seeming to deprive the claimants of their right to take legal action on their own, it has preserved those rights, to be exercised indirectly. A conjoint reading of Ss. 3 and 4 would, therefore, show that there has been no real total deprivation of the right of the claimants to enforce their claim for damages in appropriate proceedings before any appropriate forum. There is only a restriction of this right which, in the circumstances, is totally reasonable and justified. The validity of the Act is, therefore, not liable to be challenged on this ground.

It is common knowledge that any authority given to conduct a litigation cannot be effective unless it is accompanied by an authority to withdraw or settle the same if the circumstances call for it. The vagaries of a litigation of this magnitude and intricacy could not be fully anticipated. There were possibilities that the litigation may have to be fought out to the bitter finish. There were possibilities that the UCC might be willing to adequately compensate the victims either on their own or at the insistence of the Governments concerned. The legislation, therefore, cannot be considered to be unreasonable merely because in addition to the right to institute a suit or other proceedings it also empowers the Government to withdraw the proceedings or enter into compromise.

(B) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss. 3, 4 - Gas leak disaster - Claim for compensation - Interim compensation to victims by Government - Not provided - Obligation of granting interim relief by Government is, however, inherent and must be the basis of properly construing the spirit of Act.

Interpretation of Statutes - Constructive intuition.

Per Sabyasachi Mukharji, C.J. (for himself and Saikia, J.) (K.N. Singh, J. agreeing with him) - It is true that there is no actual expression used in the Act itself which expressly postulates or indicates an obligation of granting interim relief or maintenance by the Central Government until the full amount of the dues of the victims is realised from the Union Carbide after adjudication or settlement and then deducting therefrom the interim relief paid to the victims. Such an obligation is, however, inherent and must be the basis of properly construing the spirit of the Act. This is the true basis and will be in consonance with the spirit of the Act. It must be, to use the well-known phrase 'the major inarticulate premise' upon which though not expressly stated, the Act proceeds. It is on this promise or premise that the State would be justified in taking upon itself the right and obligation to proceed and prosecute the claim and deny access to the courts of law to the victims on their own. If it is only so read, it can only be held to be constitutionally valid. It has to be borne in mind that the language of the Act does not militate against this construction but on the contrary, Ss. 9, 10 and the scheme of the Act suggest that the Act contains such an obligation. If it is so read, then only meat can be put into the skeleton of the Act making it meaningful and purposeful. The Act must, therefore, be so read. This approach to the interpretation of the Act can legitimately be called the 'constructive intuition' which is a permissible mode of viewing the Acts of Parliament. The freedom to search for 'the spirit of the Act' or the quantity of the mischief at which it is aimed (both synonymous for the intention of the parliament) opens up the possibility of liberal interpretation, "that delicate and important branch of judicial power, the concession of which is dangerous, the denial ruinous". Given this freedom it is a rare opportunity though never to be misused and challenge for the Judges to adopt and give meaning to the Act, articulate and inarticulate, and thus translate the intention of the Parliament and fulfill the object of the Act. After all, the Act was passed to give relief to the victims who, it was thought were unable to establish their own rights and fight for themselves. It is common knowledge that the victims were poor and impoverished. How could they survive the long ordeal of litigation and ultimate execution of the decree or the orders unless provisions be made for their sustenance and maintenance,

especially when they have been deprived of the right to fight for these claims themselves.

Per Ranganthan, J. (for himself and A.M. Ahmadi, J.) the validity of the Act does not depend upon its explicitly or implicitly providing for interim payments. In the first place,. it was, and perhaps still is, a moot question whether a plaintiff suing for damages in tort would be entitled to advance or interim payments in anticipation of a decree. That was, indeed, the main point on which the interim orders in this case were challenged before the Supreme Court and, in the context of the events that took place, remains undecided. May be there is a strong case for ordering interim payments in such a case but, in the absence of full and detailed consideration, it cannot be assumed that, left to themselves, the victims would have been entitled to a "normal and immediate" right to such payment. Secondly, even assuming such right exists, all that can be said is that the State, which put itself in the place of the victims, should have raised in the suit a demand for such interim compensation - which it did - and that it should distribute among the victims such interim compensation as it may receive from the defendants. To say that the Act would be bad if it does not provide for payment of such compensation by the Government irrespective of what may happen in the suit is to impose on the State an obligation higher than what flows from its being subrogated to the rights of the victims. The fact that the Act and the scheme thereunder envisage interim relief to the victims, the point is perhaps only academic.

(C) Constitution of India, Article 32 - Petition under - matters regarding claim for compensation in Bhopal Gas leak case - Order by Constitution Bench that matters would be listed before Constitution Bench for decision "on the sole question whether the Bhopal Gas Disaster (Processing of Claims) Act, 1985 is ultra vires" - Is a judicial order passed by Constitution Bench and not an administrative order.(para 87)

(D) Bhopal Gas Disaster (Processing of Claims), Act (1985), Pre., S. 9 - Scope -Act does not in any way circumscribe liability of Union Carbide Company, UCIL, or Government of India or Government of Madhya Pradesh.

The Act does not in any way circumscribe the liability of the UCC, UCIL, or even the Government of India or Government of Madhya Pradesh if they are jointly or severally liable. This Act also does not deal with any question of criminal liability of any of the parties concerned. On an appropriate reading of the relevant provisions of the Act, it is apparent that the criminal liability arising out of Bhopal Gas leak disaster is not the subject matter of this Act and cannot be said to have been in any way affected, abridged or modified by virtue of this Act. Thus the plea that the Act was bad as it abridged or took away the victims right to proceed criminally against the delinquent, be it UCC or UCIL or jointly or severally the Government of India, Government of Madhya Pradesh or the erstwhile Chief Minister of Madhya Pradesh, is on a wrong basis. Thee is no curtailment of any right with respect to any criminal liability. Criminal liability is not the subject-matter of the Act.

The Act does not in any way except to the extent indicated in the relevant provisions of the Act circumscribe or abridge the extent of the victims so far as the liability of the delinquents are concerned. Whatever are the rights of the victims and whatever claims arise out of the gas leak disaster for compensation, personal injury, loss of life and property, suffered or likely to be sustained or expenses to be incurred or any other loss are covered by the Act and the Central Government by operation of S. 3 of the Act has been given the exclusive right to represent the victims in their place and stead. By the Act, the extent of liability is not in any way abridged and, therefore, if in case of any industrial disaster like the Bhopal Gas leak disaster, there is right in victims to recover damages or compensation on the basis of absolute liability, then the same is not in any manner abridged or curtailed

Per Ranganathan, J. (for himself and A.M. Ahmadi, J. concurring) - The Act talks only of the civil liability of, and the proceedings against the UCC or UCIL or others for damages caused by the gas leak. It has nothing to say about the criminal liability of any of the parties involved. Clearly, therefore, the part of the settlement comprising a term requiring the withdrawal of the criminal prosecutions launched is outside the purview of the Act. The validity of the Act cannot, therefore, be impugned on the ground that it permits - and should not have permitted - the withdrawal of criminal proceedings against the delinquents.

(E) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss. 3,4 - Gas leak disaster - Claim for compensation - Ss. 3 and 4 giving exclusive right to act in place of persons who are entitled to make claim - Cannot be said to be only an enabling provisions - It does not give the right to victim to sue along with Central Government.

The plea that Ss. 3 and 4 was only an enabling provision for the Central Government and not depriving or disabling provisions for the victims would not be tenable. In order to make the provisions constitutionally valid, the concept of exclusiveness to the Central Government could not be eliminated. It does not give the right to victim to sue along with the Central Government

Per Ranganathan, J. (for himself and A.M. Ahmadi, J. Concurring) - The provisions of the Act, read by themselves, guarantee a complete and full protection to the rights of the claimants in every respect. Save only that

they cannot file a suit themselves, their right to acquire redress has not really been abridged by the provisions of the Act. Ss. 3 and 4 of the Act properly read, completely vindicate the objects and reasons which compelled Parliament to enact this piece of legislation. Far from abridging the rights of the claimants in any manner, these provisions are so worded as to enable the Government to prosecute the litigation with the maximum amount of resources, efficiency and competence at its command as well as with all the assistance and help that can be extended to it by such of those litigants, and claimants as are capable of playing more than a mere passive role in the litigation.

(F) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss. 3,4 - Gas leak disaster - Claim for compensation - Settlement - Procedure evolved for victims under Act - Is just, fair and reasonable and not violative of Art. 14.

Constitution of India, Art. 14.

The Act does provide a special procedure in respect of the rights of the victims and to that extent the Central Government takes upon itself the rights of the victims. In view of the enormity of the disaster the victims of the Bhopal gas leak disaster, as they were placed against the multi-national and a big Indian Corporation and in view of the presence of foreign contingency lawyers to whom the victims were exposed, the claimants and victims were exposed, the claimants and victims can legitimately be described as a class by themselves different and distinct, sufficiently separate and identifiable to be entitled to special treatment for effective, speedy, equitable and best advantageous settlement of their claims. There indubitably is differentiation. But this differentiation is based on a principle which has rational nexus with the aim intended to be achieved by this differentiation. The disaster being unique in its character and in the recorded history of industrial disasters situated as the victims were against a mighty multinational with the presence of foreign contingency lawyers looming on the scene, it could be said that there were sufficient grounds for such differentiation and different treatment. In treating the victims of the gas leak disaster differently and providing them a procedure, which was just, fair, reasonable and which was not unwarranted or unauthorized by the Constitution, Art. 14 is not breached. it cannot be said that by the procedure envisaged by the Act, the victims of the gas leak have been deprived and denied their rights and property to fight for compensation. It cannot be said that the procedure evolved under the Act for the victims is peculiar and disadvantageous and therefore violative of Art. 14.

In view of the background, the plight of the impoverished, the urgency of the victims need, the presence of the foreign contingency lawyers, the procedure of settlement in USA in mass action, the strength for the foreign multinationals, the nature of injuries and damages, the limited but significant right of participation of the victims as contemplated by S. 4 of the Act, the Act cannot be condemned as unreasonable.

Per Ranganathan, J. (for himself and A.M. Ahmadi, J. Concurring) - The power to conduct a litigation, particularly in a case of this type, must, to be effective, necessarily carry with it a power to settle it at any stage. It is impossible to provide statutorily any detailed catalogue of the situations that would justify a settlement or the basis or terms on which a settlement can be arrived at. The Act, moreover, cannot be said to have conferred any unguided or arbitrary discretion to the Union in conducting proceedings under the Act. Sufficient guidelines emerge from the Statement of Objects and Reasons of the Act which makes it clear that the aim and purpose of the Act is to secure speedy and effective redress to the victims of the gas leak and that all steps taken in pursuance of the Act should be for the implementation of the object. Whether this object has been achieved by a particular settlement will be a different question but it is altogether impossible to say that the Act itself is bad for the reason alleged.

(G) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss. 3,4 - Gas leak disaster - Claim for compensation - Representation of Claims of victims by Central Government - Principles of natural justice not violated.

Constitution of India, Art. 226.

The concept that where there is a conflict of interest, the person having the conflict should not be entrusted with the task of this nature, does not apply in the instant case. In the instant case, no question of violation of the principle of natural justice arises, and there is no scope for the application of the principle that no man should be a Judge in his own cause. The Central Government was not judging any claim, but was fighting and advancing the claims of the victims. In those circumstances, it cannot be said that there was any violation of the principles of natural justice and such entrustment to the Central Government of the right to ventilate for the victims was improper or bad. The adjudication would be done by the courts, and therefore there is no scope of the violation of any principle of natural justice.

The question whether there is scope for the Union of India being responsible or liable as a joint tort feasor is a difficult and different question. But even assuming that it was possible that the Central Government might be liable in a case of this nature, it was only proper that the Central Government should be able and authorized to represent the victims. In such a situation, there will be no scope of the violation of the principles of natural jus-

tice. The doctrine of necessity would be applicable in a situation of this nature. In the circumstances of the case, the Government of India is only capable to represent the victims as a party. The adjudication, however, of the claims would be done by the Court. In those circumstances the challenge on the ground of the violation of principles of natural justice would not be tenable. The principle of de facto validity will not be applicable. By the plea of the doctrine of bona fide representation of the interests of victims in all these proceedings would not also be attracted. The doctrine of bona fide representation would not be quite relevant.

(H) Constitution of India, Art. 226 - Natural justice - Power to give pre-decisional hearing not conferred by statutes - Administrative decisions after post decisional hearing would not be bad.

Administrative law - Post decisional hearing.

Natural justice - Post decisional hearing.

Post decisional hearing - Effect.

Audi alteram partem is a highly effective rule devised by the Courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the abuse or misuse of power. The rules of natural justice can operate only in areas not covered by any law validly made. The general principle as distinguished from an absolute rule of uniform application is that where a statute does not in terms exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. If the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected the administrative decision after post-decisional hearing was good.

(I) Bhopal Gas Disaster (Processing of Claims) Act (1985), pre, S. 4 - Gas leak disaster - Claims for compensation - Settlement - Opportunity of making representation should be given to victims before Court comes to any conclusion in respect of settlement.

Constitution of India, Art. 226.

In a case of gas leak disaster, when the victims have been given some say by S. 4 of the Act, in order to make that opportunity contemplated by S. 4 of the Act, meaningful and effective, it should be so read that the victims have to be given an opportunity of making their representation before the Court comes to any conclusion in respect of any settlement. How that opportunity should be given would depend upon the particular situation. Fair procedure should be followed in a representative mass tort action.

The purpose of the Act and the principles of natural justice lead to the interpretation of S. 4 of the Act that in case of a proposed or the time being in force, bind any person who is not named as party to the suit. In this case, indubitably the victims would be bound by the settlement though not named in the suit. If that is so, it would be a representative suit in terms of and for the purpose of R. 3-B of O. 23 of the Code. If the principles of this rule are the principles of natural justice then the principles behind it would be applicable; and also that S. 4 should be so construed in spite of the difficulties of the process of notice and other difficulties of making "informed decision making process cumbersome".

Per Ranganathan, J. (for himself and A.M. Ahmadi, J. Concurring) - It is not possible to bring the suits brought under the Act within the categories of representative action envisaged in the Code of Civil Procedure. The Act deals with a class of action which is sui generis and for which a special formula has been found and encapsuled in S. 4. The Act divests the individual claimants of their right to sue and vests it in the Union. In relation to suits in India, the Union is the sole plaintiff, none of the others are envisaged as plaintiff or respondents. The victims of the tragedy were so numerous that they were never defined at the stage of filing the plaint nor do they need to be defined at the stage of a settlement. The litigation is carried on by the State in its capacity, not exactly the same as but somewhat analogous to that of a "parens patriae". In the case of a litigation by a karta of a Hindu undivided family or by a guardian on behalf of a ward, who is non sui juris, for example, the junior members of the family of the wards, are not to be consulted before entering into a settlement. In such cases, the Court acts as guardian of such persons to scrutinise the settlement and satisfy itself that it is in the best interest of all concerned. If it is later discovered that there has been any fraud or collusion, it may be open to the junior members of the family or the wards to call the karta or guardian to account but, barring such a contingency, the settlement would be effective and binding. In the same way, the Union as "parens patriae" would have been a liberty to enter into such settlement as it considered best on its own and seek the Court's approval therefor.

The statute has provided that though the Union of India will be the dominus litus in the suit, the interests of all the victims and their claims should be safeguarded by giving them a voice in the proceedings to the extent indicated above. This provision of the statute is an adaptation of the principle of O.I,R.8 and of O.23, r.3-B of the Code of Civil Procedure in its application to the suits governed by it and, though the extent of participation allowed to the victims is somewhat differently enunciated in the legislation, substantially speaking, it does incorporate the principles of natural justice to the extent

possible in the circumstances. The statute cannot, therefore, be faulted, on the ground that it denies the victims an opportunity to present their view or places them at any disadvantage in the matter of having an effective voice in the matter of settling the suit by way of compromise.

(K) Bhopal Gas Disaster (Processing of Claims) act (1985), Pre, S. 4 - Gas leak disaster - Compensation - Settlement by Central Govt. - Notice to victims necessary.

Constitution of India, Art. 226.

S. 4 means and entails that before entering into any settlement by Central Govt. affecting the rights and claims of the victims some kind of notice or information should be given to the victims; it is not enough to say that the victims of gas leak must keep vigil and watch the proceeding for compensation. One assumption under which the Act is justified is that the victims were disabled to defend themselves in an action of this type. If that is so, then the Court cannot presume that the victims were a lot, capable and informed to be able to have comprehended or contemplated the settlement. In the aforesaid view of the matter, notice to the victims was necessary before the Central Govt. representing their claim reaches to settlement.

All the further particulars upon which the settlement had been entered into need not be given in the notice. It is not necessary that all other particulars for the basis of the proposed settlement should be disclosed in a suit of this nature before the final decision. Whatever data was already there have been disclosed, that would have been sufficient for the victims to be able to give their views, if they want to. Disclosure of further particulars are not warranted by the requirement of principles of natural justice. Indeed, such disclosure in this case before finality might jeopardize future action, if any, necessary so consistent with justice of the case.

(L) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre. Ss. 3,4,6 - Gas leak disaster - Compensation - disbursement - Supreme Court directed to issue notification under S. 6

Constitution of India, Art. 226

For disbursement of the compensation contemplated under the Act, a notification is directed to be issued under S.6(3) authorising the Commissioner or other officers to exercise all or any of the powers which the Central Government may exercise under S. 5 to enable the victims to place before the Commissioner or Deputy Commissioner any additional evidence that they would like to adduce. Further it is directed that in the Scheme categorisation to be done by the Deputy Commissioner should be appealable to an appropriate judicial authority and the scheme should be modified accordingly. The basis of categorisation and the actual categorisation should be justiciable and judicially reviewable - the provisions in the Act and the Scheme should be so read. The scheme is an integrated whole and it would not be proper to amend it piecemeal. In respect of categorisation and claim, the authorities must act on principles of natural justice and act quasi-judicially.

(M) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss.3,4 - Validity Gas leak disaster - Claim for compensation by victims - Act is constitutionally valid.

Constitution of India, Arts. 226, 14.

Post decisional hearing - Claim for compensation.

The Act is constitutionally valid. It proceeds on the hypothesis that until the claims of the victims are realised or obtained from the delinquents, namely, UCC and UCIL by settlement or by adjudication and until the proceedings in respect thereof continue the Central Government must pay interim compensation or maintenance for the victims. In entering upon the settlement in view of S. 4 of the Act, regard must be had to the views of the victims and for the purpose of giving regard to these, appropriate notices before arriving at any settlement, were necessary. In some cases, however, post-decisional notice might be sufficient but in the facts and the circumstances of this case, no useful purpose would be served by giving a post-decisional hearing and having regard to the fact that there are no further additional data and facts available with the victims which can be profitably and meaningfully presented to controvert the basis of the settlement and further having regard to the fact that the victims had their say or on their behalf their views had been agitated in these proceedings and will have further opportunity in the pending view proceedings.

The Act was conceived on the noble promise of giving relief and succour to the dumb, pale, meek and impoverished victims of a tragic industrial gas leak disaster, a concomitant evil in this industrial age of technological advancement and development. The act had kindled high hopes in the hearts of the weak and worn, wary and forlorn. The Act generated hope of humanity. The implementation of the Act must be with justice. Justice perhaps has been done to the victims situated as they were, but it is also true that justice has not appeared to have been done. That is a great infirmity. That is partly due to the fact that procedure was not strictly followed and also partly because of the atmosphere that was created in the country, attempts were made to shake the confidence of the people in the judicial process and also to undermine the credibility of the Supreme Court. This was unfortunate. This was perhaps due to misinformed public opin-

ion and also due to the fact that victims were not initially taken into confidence in reaching the settlement. This is a factor which emphasizes the need for adherence to the principles of natural justice. The credibility of judiciary is as important as the alleviation of the suffering of the victims, great as these were. It is hoped that these adjudications will restore that credibility. Principles of natural justice are integrally embedded in our constitutional framework and their prestine glory and primacy cannot and should not be allowed to be submerged by the exigencies of particular situations or cases. The Supreme Court must always assert primacy of adherence to the principles of natural justice in all adjudications. But at the same time, these must be applied in a particular manner in particular cases having regard to the particular circumstances. It is, therefore, necessary to reiterate that the promises made to the victims and hopes raised in their hearts and minds can only be redeemed in some measure if attempts are made vigorously to distribute the amount realised to the victims in accordance with the scheme as indicated above. That would be a redemption to a certain extent. It will also be necessary to reiterate that attempts should be made to formulate the principles of law guiding the Government and the authorities to permit carrying on of trade dealing with materials and things which have dangerous consequences within sufficient specific safe-guards especially in case of multi-national corporations trading in India. An awareness on these lines has dawned. Let action follow that awareness. It is also necessary to reiterate that the law relating to damages and payment of interim damages or compensation to the victims of this nature should be seriously and scientifically examined by the appropriate agencies.

(N) Constitution of India, Art. 32 - Industrial licence - Grant of, to industries dealing with materials which are of dangerous potentialities - Need for laying down certain norms and standards to be followed by the Govt., stated.

The Bhopal Gas Leak disaster and its aftermath emphasize the need for laying down certain norms and stands that the government to follow before granting permissions or licences for the running of industries dealing with materials which are of dangerous potentialities. The Government should, therefore, examine or have the problem examined by an expert committee as to what should be the conditions on which future licences and/or permission for running industries on Indian soil would be granted and for ensuring enforcement of those conditions, sufficient safety measures should be formulated and scheme of enforcement indicated. The Government should insist as a condition precedent to the grant of such licences or permissions, creation of a fund in anticipation by the industries to be available for payment of damages out of the said fund in cases of leakages or damages in case of accident or disaster flowing from negligent working of such industrial operations or failure to ensure measures preventing such occurrence. The Government should also ensure that the parties must agree to abide to pay such damages out of the said damages by procedure separately evolved for computation and payment of damages without exposing the victims or sufferers of the negligent act to the long and delayed procedure. Special procedure must be provided for and the industries must agree as a condition for the grant of licence to abide by such procedure or to abide by statutory arbitration. The basis for damages in case of leakages and accident should also be statutorily fixed taking into consideration the nature of damages inflicted, the consequences thereof and the ability and capacity of the parties to pay. Such should also provide for deterrent for punitive damages, the basis for which should be formulated by a proper expert committee or by the Government. For this purpose, the Government should have the matter examined by such body as it considers necessary and proper like the Law Commission or other competent bodies. This is vital for the future.

Per K.N. Singh, J. (Concurring): - In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Arts. 21, 48-A and 51(g), it is the duty of the State to take effective steps to protect the guaranteed constitutional rights. These rights must be integrated and illumined by the evolving international dimensions and stands, having regard to our sovereignty, as highlighted by Clauses 9 and 13 of U.N. Code of Conduct on Transnational Corporations. The evolving standards of international obligations need to be respected, maintaining dignity and sovereignty of our people, the State must take effective steps to safeguard the constitutional rights of citizens by enacting laws. The laws so made may provide for conditions for granting licence to Transnational Corporations, prescribing norms and standards for running industries on Indian soil ensuring the constitutional rights of our people relating to life, liberty, as well as safety to environment and ecology to enable the people to lead a healthy and clean life. A Transnational Corporation should be made liable and subservient to laws of our country and the liability should not be restricted to affiliate company only but the parent corporation should also be made liable for any damage caused to the human beings or ecology. The law must require transnational Corporation to agree to pay such damages as may be determined by the statutory agencies and forums constituted under it without exposing the victims to long drawn litigation. Under the existing civil law, damages are determined by the Civil Courts, after a long drawn litigation, which destroys the very purpose of awarding damages. In order to meet the situation to avoid delay and to ensure immediate relief to the victims it was suggested that the law made by the Parliament should provide for constitution of Tribunals regulated by special procedure for determining compensation to victims of industrial disaster or accident, appeal against

which may lie to the Supreme Court on limited ground of questions of law only after depositing the amount determined by the Tribunal. The law should also provide for interim relief to victims during the pendency of proceedings. These steps would minimise the misery and agony of victims of hazardous enterprises.

Industrial development in our country and the hazards involved therein pose a mandatory need to constitute a statutory "Industrial Disaster Fund", contributions to which may be made by the Government, the industries whether they are transnational corporations or domestic undertakings, public or private. The extent of contribution may be worked out having regard to the extent of hazardous nature of the enterprise and other allied matters. The Fund should be permanent in nature, so that money is readily available for providing immediate effective relief to the victims. This may avoid delay, as has happened in the instant case in providing effective relief to the victims. The Government and the Parliament should therefore take immediate steps for enacting laws, having regard to these suggestions, consistent with the international norms and guidelines as contained in the United Nations Code of Conduct on Transnational Corporations. (Paras 138, 146)

Per Ranganathan, J. (for himself and A.M. Ahamadi, J. Concurring). Before we gained independence, on account of our close association with Great Britain, we were governed of the common law principles. In the field of torts, under the common law of England, no action could be laid by the dependants or heirs of a person whose death was brought about by the tortious act of another on the maxim actio personalis moritur cum perona, although a person injured by a similar act could claim damages for the wrong done to him. In England this situation was remedied by the passing of the Fatal Accidents Act, 1845, popularly known as Lord Camphell's Act. Soon thereafter the Indian Legislature enacted the Fatal Accidents Act, 1855. This act is fashioned on the lines of the English Act of 1846. Even though the English Act has undergone a substantial change, our law has remained static and seems a trifle archaic. The magnitude of the gas leak disaster in which hundred lost their lives and thousands were maimed, not to speak of the damage to livestock, flora and fauna, business and property, is an eye opener. The nation must learn a lesson from this traumatic experience and evolve safeguards at least for the future. The time is ripe to take a fresh look at the out dated century old legislation which is out of tune with modern concepts. While it may be a matter for scientists and technicians to find solutions to avoid such large scale disasters, the law must provide an effective and speedy remedy to the victims of such torts. The Fatal Accidents Act, on account of its limited and restrictive application, is hardly suited to meet such a challenge. Therefore, the old antiquated Act should be drastically amended or fresh legislation should be enacted which should, inter alia, contain appropriate provisions in regard to the following matters: (i) the payment of a fixed minimum compensation on a "no-fault liability" basis (as under the Motor Vehicles Act), pending final adjudication of the claims by a prescribed forum; (ii) the creation of a special forum with specific power to grant interim relief in appropriate cases; (iii) the evolution of a procedure to be followed by such forum which will be conducive to the expeditious determination of claims and avoid the high degree of formalism that attaches to proceedings in regular courts: and (iv) a provision requiring industries and concerns engaged in hazardous activities to take out compulsory insurance against third party risks.

(O) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pte, Ss. 3,4, - Gas leak disaster - Claim for compensation - Representation by Government - Act is not invalid on ground that it has entrusted responsibility not only of carrying on but also entering into a settlement.

Per Ranganathan, J. (for himself and A.M. Ahmadi, J. Concurring) In case of compensation for Bhopal Gas leak disaster it cannot be alleged that the Union is itself a joint tort-feasor (sued as such by some of the victims) with an interest (adverse to the victims) in keeping down the amount of compensation payable to the minimum so as to reduce its own liability as a joint tort-feasor. The Union of India itself is one of the entities affected by the gas leak and has a claim for compensation from the UCC quite independent of the other victims. From this point of view, it is in the same position as the other victims and, in the litigation with the UCC, it has every interest in securing the maximum amount of compensation possible for itself and the other victims. It is, therefore, the best agency in the circumstances that could be looked up to for fighting the UCC on its own as well as on behalf of the victims. The suggestion that the Union is a joint tort-feasor has been stoutly resisted. But, even assuming that the Union has some liability in the matter, it cannot derive any benefit of advantage by entering into a low settlement with the UCC. The Act and Scheme thereunder have provided for an objective and quasi-judicial determination of the amount of damages payable to the victims of the tragedy. There is no basis for the fear that the officers of the Government may not be objective and may try to cut down the amounts of compensation, so as not to exceed the amount received from the UCC. It is common ground indeed, that the settlement with the UCC only puts an end to the claims against the UCC and UCIL and does not in any way affect the victims rights, if any, to proceed against the Union, the State of Madhya Pradesh or the ministers and officers thereof, if so advised. I the Union and these officers are joint tort-feasors, as alleged, the Union will not stand to gain by allowing the claims against the UCC to be settled for a low figure. On the contrary it will be interested in settling the claims against the UCC as high a figure as pos-

sible so that its own liability as a joint tort-feasor (if made out) can be correspondingly reduced. Therefore there is no vitiating element in the legislation insofar as it has entrusted the responsibility not only of carrying on but also of entering into a settlement, it thought fit.

(P) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss. 3,4 - gas leak disaster - Claim compensation - Claims processed and their aggregate is determined - Post decisional hearing to victims in the circumstances, not necessary.

Per Ranganathan, J. (A.M. Ahamadi, J. agreeing with him).

Post decisional hearing - Claims for compensation - Processed and determined - Hearing not necessary.

(Q) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre., Ss. 3,4 - Gas leak disaster - Claim for compensation - Settlement by Central Govt. before Supreme Court - No interference.

Per Ranganathan, J. (A.M. Ahmedi, J. agreeing with him) - It would be more correct and proper not to disturb the orders in AIR 1990 SC 273 on the ground that the rules of natural justice have not been complied with, particularly in view of the pendency of the review petition.

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SABYASACHI MUKHARJI, C.J.:- Is the Bhopal Gas Leak Disaster (Processing of Claims) Act,. 1985 (hereinafter referred to as 'the Act') constitutionally valid? That is the question.

2. The Act was passed as a sequel to a grim tragedy. On the night of 2nd December, 1984 occurred the most tragic industrial disaster in recorded human history in the city of Bhopal in the State of Madhya Pradesh in India. On that night there was massive escape of lethal gas from the MIC storage tank at Bhopal Plant of the Union Carbide (I) Ltd, (hereinafter referred to as 'UCIL') resulting in large scale death and untold disaster. A chemical plant owned and operated by UCIL was situated in the northern sector of the city of Bhopal. There were numerous hutments adjacent to it on its southern side, which were occupied by impoverished squatters. UCIL manufactured the pesticides Sevin and Temik, at the Bhopal plant, at the request of, it is stated by Judge John F. Keenan of the United States District Court in his judgement, and indubitably with the approval of the Govt. of India. UCIL was incorporated in 1984 under the appropriate Indian law. 50.99% of its shareholdings were owned by the Union Carbide Corporation (UCC), a New York Corporation, L.I.C. and the Unit Trust of India own 22% of the shares of U.C.I.L. a subsidiary of U.C.C.

3. Methyl Isocyanate (MIC), a highly toxic gas, is an ingredient in the production of both Sevin and Temik. On the night of the tragedy MIC leaked from the plant in substantial quantities. The exact reasons for and circumstances of such leakage have not yet been ascertained or clearly established. The results of the disaster were horrendous. Though no one is yet certain as to how many actually died as the immediate and direct result of the leakage, estimates attribute it to about 3000. Some suffered injuries the effects of which are described as carcinogenic and ontogenic by Ms. Indira Jaisingh, learned counsel; some suffered injuries serious and permanent and some mild and temporary. Livestock was killed, damaged and infected. Businesses were interrupted. Environment was polluted and the ecology affected, flora and fauna disturbed.

4. On 7th December, 1984, Chairman of UCC Mr. Warren Anderson came to Bhopal and was arrested. He was later released on bail. Between December 1984 and January 1985 suits were filed by several American lawyers in the courts in America on behalf of several victims. It has been stated that within a week after the disaster many American lawyers described by some as 'ambulance chasers', whose fees were stated to be based on a percentage of the contingency of obtaining damages or not, flew over to Bhopal and obtained Powers of Attorney to bring actions against UCC and UCIL. Some suits were also filed before the District Court of Bhopal by individual claimants against UCC (the American Company) and the UCIL.

5. On 29th March, 1985, the Act in question was passed. The Act was passed to secure that the claims arising out of or connected with the Bhopal gas leak disaster were dealt with speedily, effectively and equitably. On 8th April, 1985 by virtue of the Act the Union of India filed a complaint before the U.S. District Court, Southern District of New York. On 16th April, 1985 at the first pre-trial conference in the consolidated action transferred and assigned to the U.S. District Court, Southern District, New York, Judge Keenan gave the following directions:-

i) that a three member Executive Committee be formed to frame and develop issues in the case and prepare expeditiously for trial or settlement negotiations. The Committee was to comprise of one lawyer selected by the firm retained by the Union of India and two other lawyers chosen by lawyers retained by the individual plaintiffs.

ii) that as a matter of fundamental human decency, temporary relief was necessary for the victims and should be furnished in a systematic and coordinated fashion without unnecessary delay regardless of the posture of the litigation then pending.

7. On 24th September, 1985 in exercise of powers conferred by Section 9 of the Act, the Govt. of India framed the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985 (hereinafter called the Scheme).

8. On 12th May, 1986 an order was passed by Judge Keenan allowing the application of UCC on Forum non conveniens as indicated hereinafter. On 21st May 1986 there was a motion for fairness hearing on behalf of the private plaintiffs. On 26th June 1986 individual plaintiffs filed appeal before the US Court of Appeal for the second circuit challenging the order of Judge Keenan. By an order dated 28th May, 1986 Judge Keenan declined the motion for a fairness hearing. The request for fairness hearing was rejected at the instance of Union of India in view of the meagerness of the amount of proposed settlement. On 10th July, 1986 UCC filed an appeal before the US Court of Appeal for the Second Circuit. It challenged Union of India being entitled to American mode of discovery, but did not challenge the other two conditions imposed by Judge Keenan, it is stated. On 28th July, 1986 the Union of India filed cross-appeal before the US Court of Appeal praying that none of the conditions imposed by Judge Keenan should be disturbed. In this connection it would be pertinent to set out the conditions incorporated in the order of Judge Keenan, dated 12th May, 1986 whereby he had dismissed the case before him on the ground of forum non conveniens, as mentioned before. The conditions were following:-

1. that UCC shall consent to the jurisdiction of the courts of India and shall continue to waive defenses based o the statute of limitation,

2. that UCC shall agree to satisfy any judgement ren-

dered by an Indian court against it and if applicable, upheld on appeal, provided the judgement and affirmance "comport with minimal requirements of due process", and

3. that UCC shall be subject to discovery under the Federal Rules of Civil Procedure of the US after appropriate demand by the plaintiffs.

9. On 5th September, 1986 the Union of India filed a suit for damages in the District Court of Bhopal, being regular suit No. 1113/ 86. It is this suit, inter alia, and the orders passed therein which were settled by the orders of this Court dated 14th & 15th February, 1989, which will be referred to later. On 17th November, 1986 upon the application of the Union of India, the District Court Bhopal, granted a temporary injunction restraining the UCC from selling assets, paying dividends or buying back debts. On 27th November, 1986 the UCC gave an undertaking to preserve and maintain unencumbered assets to the extent of 3 billion US dollars.

10. On 30th November, 1986 the Distt. Court Bhopal lifted the injunction against the Carbide selling assets on the strength of the written undertaking by UCC to maintain unencumbered assets of 3 billion US dollars. On 16th December, 1986 UCC filed a written statement contending that they were not liable on the ground that they had nothing to do with the Indian Company; and that they were a different legal entity; and that they never exercised any control and that they were not liable in the suit. Thereafter, on 14th January, 1987 the Court of Appeal for the Second Circuit affirmed the decision of Judge Keenan but deleted the condition regarding the discovery under the American procedure granted in favour of the Union of India. It also suo motu set aside the condition that on the judgement of the Indian court complying with due process and the decree issued should be satisfied by UCC. It ruled that such a condition cannot be imposed as the situation was covered by the provisions of the Recognition of Foreign Country Money Judgements Act.

11. On 2nd April, 1987, the court made a written proposal to all parties for considering reconciliatory interim relief to the gas victims. In September, 1987, UCC and the Govt. of India sought time from the Court of Distt. Judge, Bhopal, to explore avenues for settlement. It has been asserted by the learned Attorney General that the possibility of settlement was there long before the full and final settlement was effected. He sought to draw our attention to the assertion that the persons concerned were aware that efforts were being made from time to time for settlement. However, in November 1987 both the Indian Govt. and the Union Carbide announced that settlement talks had failed and Judge Deo extended the time.

12. The Distt. Judge of Bhopal on 17th December, 1987 ordered interim relief amounting to Rs. 350 crores. Being aggrieved thereby the UCC filed a Civil Revision which was registered as Civil Revision Petition No. 26/ 88 and the same was heard. On or about 4th February, 1988, the Chief Judicial Magistrate of Bhopal ordered notice for warrant on Union Carbide, Hong Kong for the criminal case filed by CBI against Union Carbide. The charge sheet there was under sections 304, 324, 326, 429 of the Indian Penal Code read with section 35 IPC and the charge was against S/Shri Warren Anderson, Keshub Mahindra, Vijay Gokhale, J. Mukund, Dr. R.B. Roy Chowdhary, S.P. Chowdhary, K.V. Shetty, S.I. Qureshi and Union Carbide of U.S.A., Union Carbide of Hong Kong and Union Carbide having Calcutta address. It charged the Union Carbide by saying that MIC gas was stored and it was further stated that MIC had to be stored and handled in stainless steel which was not done. The charge sheet, inter alia, stated that a scientific Team headed by Dr. Varadarajan had concluded that the factors which had led to the toxic gas leakage causing its heavy toll existed in the unique properties of very high reactivity, volatility and inhalation toxicity of MIC. It was further stated in the charge sheet that the needless storage of large quantities of the material in very large size containers for inordinately long periods as well as insufficient caution in design, in choice of materials of construction and in provision of measuring and alarm instruments, together with the inadequate controls on systems of storage and on quality of stored materials as well as lack of necessary facilities for quick effective disposal of material exhibiting instability, led to the accident. It also charged that MIC was stored in a negligent manner and the local administration was not informed, inter alia, of the dangerous effect of the exposure of MIC or the gases produced by its reaction and the medical steps to be taken immediately. It was further stated that apart from the design defects the UCC did not take any adequate remedial action to prevent back flow of solution from VGS into RVVH and PVN lines. There were various other acts of criminal negligence alleged. The High Court passed an order staying the operation of the order dated 17-12-87 directing the defendant-applicant to deposit Rs. 3500 million within two months from the date of the said order. On 4th April, 1988 the judgement and order were passed by the High Court modifying the order of the Distt. Judge, and granting interim relief of Rs. 250 crores. The High Court held that under the substantive law of torts, the Court has jurisdiction to grant interim relief under Section 9 of the CPC. On 30th June, 1988 Judge Deo passed an order restraining the Union Carbide from settling with any individual gas leak plaintiffs. On 6th September, 1988 special leave was granted by this Court in the petition field by UCC against the grant of interim relief and Union of India was also granted special leave in the petition challenging the reduction of quantum of compensation from Rs. 350 crores to Rs.250 crores. Thereafter, these matters were heard in November-December 1988 by the

bench presided over by the learned Chief Justice of India and hearing continued also in January -February 1989 and ultimately on 14-15th February, 1989 the order culminating in the settlement was passed.

13. In judging the constitutional validity of the Act, the subsequent events, namely, how the Act has worked itself out, have to be looked into. It is, therefore, necessary to refer to the two orders of this Court. The proof of the cake is in its eating, it is said, and it is perhaps not possible to ignore the terms of the settlement reached on 14th and 15th February 1989 in considering the effect of the language used in the Act. Is that valid or proper - or has the Act been worked in any improper way? These questions do arise.

14. On 14th February, 1989 an order was passed in C.A. Nos. 3187-88 with S.L.P. (C) No. 13080/88. The parties thereto were UCC and the Union of India as well as Jana Swasthya Kendra, Bhopal, Zehraeli Gas Kand Sangharsh Morcha, Bhopal, MP. That order recited that having considered all the facts and the circumstances of the case placed before the Court, the material relating to the proceedings in the Courts in the United States of America, the offers and counter-offers made between the parties at different stages during the various proceedings, as well as the complex issues of law and fact raised and the submissions made thereon, and in particular the enormity of human suffering occasioned by the Bhopal gas disaster and the pressing urgency to provide immediate and substantial relief to victims of the disaster, the Court found that the case was pre-eminently fit for an overall settlement between the parties covering all litigations, claims, rights and liabilities relating to and arising out of the disaster and it was found just, equitable and reasonable to pass, inter alia, the following orders:-

> "(1) The Union Carbide Corporation shall pay a sum of U.S. Dollars 470 million (Four hundred and seventy millions) to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of Bhopal Gas disaster.

(2) The aforesaid sum shall be paid by the Union Carbide Corporation to the Union of India on or before 31st March, 1989.

(3) To enable the effectuation of the settlement, all civil proceedings related to an arising out of the Bhopal Gas disaster shall hereby stand transferred to this Court and shall stand concluded in terms of the settlement, and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending...."

15. A written memorandum was filed thereafter and the Court on 15th February, 1989 passed an order after giving due consideration thereto. The terms of settlement were as follows:

> "1. The parties acknowledge that the order dated February 14, 1989 disposes of in its entirety all proceedings in Suit No. 1113 of 1986. This settlement shall finally dispose of all past, present and future claims, causes of action and civil and criminal proceedings (of any nature whatsoever wherever pending) by all Indian citizens and all public and private entities with respect to all past, present or future deaths, personal injuries, health effects, compensation, losses, damages and civil and criminal complaints of any nature whatsoever against UCC. Union Carbide India Limited, Union Carbide Eastern, and all of their subsidiaries and affiliates as well as each of their present and former directors, officers, employees, agents, representatives, attorneys, advocates and solicitors arising out of, relating to or connected with the Bhopal gas leak disaster, including past, present and future claims, causes of action and proceedings against each other. All such claims and causes of action whether within or outside India of Indian citizens public or private entities are hereby extinguished, including without limitation each of the claims filed or to be filed under the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985, and all such civil proceedings in India are hereby transferred to this Court and are dismissed with prejudice, and all such criminal proceedings including contempt proceedings stand quashed and accused deemed to be acquitted.
>
> 2. Upon full payment in accordance with the Court's directions the undertaking given by UCC pursuant to the order dated Nov. 30, 1986 in the District Court, Bhopal stands discharged, and all orders passed in suit No. 1113 of 1986 and or in any Revision therefrom, also stand discharged."

16. It appears from the statement of objects & reasons of the Act that the Parliament recognized that the gas leak disaster involving the release, on 2nd and 3rd December 1984 of highly noxious and abnormally dangerous gas from a plant of UCIL, a subsidiary of UCC, was of an unprecedented nature, which resulted in loss of life and damage to property on an extensive scale, as mentioned before. It was stated that the victims who had managed to survive were still suffering from the adverse effects and the further complications which might arise in their cases, of course, could not be fully visualized. It was asserted by Ms. Indira Jaising that in case of some of the victims the injuries were carcinogenic and ontogenic and these might lead to further genetic complications and damages. The Central Government and the Govt of Madhya Pradesh and various agencies had to incur expenditure on a large scale for containing the disaster and mitigating or otherwise coping with the effects thereto. Accordingly, the Bhopal Gas Leak Disaster (Processing of Claims) Ordinance, 1985 was promulgated, which provided for the appointment of a Commissioner for the welfare of the victims of the disaster and for the formulation of the Scheme to provide for various matters necessary for processing of the claims and for the utilization by way of disbursal or otherwise

of amounts received in satisfaction of the claims.

17. Thereafter, the Act was passed which received the assent of the President on 29th March, 1985, Section 2(b) of the Act defines 'claim'. It says that "claim" means (i) a claim, arising out of, or connected with, the disaster, for compensation or damages for any loss of life or personal injury which has been, or is likely to be, suffered; (ii) a claim, arising out of, or connected with, the disaster, for any damage to property which has been, or is likely to be, sustained; (iii) a claim for expenses incurred or required to be incurred for containing the disaster or mitigating or otherwise coping with the effects of the disaster; (iv) any other claim (including any claim by way of loss of business or employment) arising out of, or connected with, the disaster. A "claimant" is defined as a person entitled to make a claim. It has been provided in the Explanation to Section 2 that for the purpose of clauses (b) and (c), where the death of a person has taken place as a result of the disaster, the claim for compensation or damages for the death of such person shall be for the benefit of the spouse, children (including a child in the womb) and other heirs of the deceased and they shall be deemed to be the claimants in respect thereof.

18. Section 3 is headed "power of Central Govt. to represent claimants". It provides as follows:-

> "3(1) Subject to the other provisions of this Act, the Central Government shall, and shall have the exclusive right to, represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such persons.

(2) In particular and without prejudice to the generality of the provisions of sub-section (1), the purposes referred to therein include-

(a) institution of any suit or other proceeding in or before any court or other authority (whether within or outside India) or withdrawal of any such suit or other proceeding, and (b) entering into a compromise.

(3) The provisions of sub-section (1) shall apply also in relation to claims in respect of which suits or other proceedings have been instituted in or before any court or other authority (whether within or outside India) before the commencement of this Act:

Provided that in the case of any such suit or other proceeding with respect to any claim pending immediately before the commencement of this Act in or before any court or other authority outside India, the Central Govt. shall represent, and act in place of, or along with, such claimant, if such court or other authority so permits."

19. Section 4 of the Act is headed as "Claimant's right to be represented by a legal practitioner". It provides as follows:-

> "Notwithstanding anything contained in Section 3, in representing, and acting in place of, any person in relation to any claim, the Central Government shall have due regard to any matters which such person may require to be urged with respect to his claim and shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim."

20. Section 5 deals with the powers of the Central Govt. and enjoins that for the purpose of discharging its functions under this Act, the Central Govt. shall have the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908. Section 6 provides for the appointment of a Commissioner and other officers and employees. Section 7 deals with powers to delegate. Section 8 deals with limitation, while Section 9 deals with the power to frame a Scheme. The Central Govt. was enjoined to frame a scheme which was to take into account, inter alia, the processing of the claims for securing their enforcement, creation of a fund for meeting expenses in connection with the administration of the Scheme and of the provisions of this Act and the amounts which the Central Govt. might, after due appropriation made by the Parliament by law in that behalf, credit to the fund referred to in clauses above and any other amounts which might be credited to such fund. Such scheme was enjoined, as soon as after it had been framed, to be laid before each House of Parliament. Section 10 deals with removal of doubts. Section 11 deals with the overriding effect and provides that the provisions of the Act and of any Scheme framed thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act or any instrument having effect by virtue of any enactment other than the Act.

21. A Scheme has been framed and was published on 24th September, 1985. Clause 3 of the said Scheme provides that the Deputy Commissioners appointed under Section 6 of the Act shall be the authorities for registration of Claims (including the receipt, scrutiny and proper categorisation of such claims under paragraph 5 of the Scheme) arising within the areas for their respective jurisdiction and they shall be assisted by such other officers as may be appointed by the Central Govt. under Section 6 of the Act for scrutiny and verification of the claims and other related matters. The Scheme also provides for the manner of filing claims. It enjoins that the Dy. Commissioner shall provide the required forms for filing the applications. It also provides for categorisation and registration of claims. Sub-clause (2) of Clause 5 enjoins that the claims received for registration shall be placed under different heads.

22. Sub-clause (3) of Clause 5 enjoins that on the consideration of claims made under paragraph 4 of the Scheme, if the Dy. Commissioner is of the opinion that the claims fall in any category different from the category mentioned by the claimant, he may decide the appropriate category after giving an opportunity to the claimant to be heard and also after taking into consideration any facts made available to him in this behalf. Sub-clause (5) of Clause 5 enjoins that if the claimant is not satisfied with the order of the Dy Commissioner, he may prefer an appeal against such order to the Commissioner, who shall decide the same.

23. Clause 9 of the Scheme provides for processing of Claims Account Fund, which the Central Govt. may, after due appropriation made by Parliament, credit to the said Fund. It provides that there shall also be a Claims and Relief Fund, which will include the amounts received in satisfaction of the claims and any other amounts made available to the Commissioner as donation or for relief purposes. Sub-clause (3) of clause 10 provides that the amount in the said Fund shall be applied by the Commissioner for disbursal of amounts in settlement of claims, or as relief, or apportionment of part of the Fund for disbursal of amounts in settlement of claims arising in future or for disbursal of amounts to the Govt. of Madhya Pradesh for the social and economic rehabilitation of the persons affected by the Bhopal gas leak disaster.

24. Clause 11 of the Scheme deals with the disbursal, apportionment of certain amounts, and sub-clause (2) thereof enjoins that the Central Govt. may determine the total amount of compensation to be apportioned for each category of claims and the quantum of compensation payable., in general, in relation to each type of injury or loss. Sub-clause (5) there to provides that in case of a dispute as to disbursal of the amounts received in satisfaction of claims, an appeal shall lie against the order of the Dy. Commissioner to the Additional Commissioner, who may decide the matter and make such disbursal as he may, for reasons to be recorded in writing, think fit. The other clauses are not relevant for our present purposes.

Counsel for different parties in all these matters have canvassed their submissions before us for the gas victims. Mr. R.K. Garg, Ms. Indira Jaising, and Mr. Kailash Vasudav have made various submissions challenging the validity of the Act on various grounds. They all have submitted that the Act should be read in the way they suggested and as a whole. Mr. Santi Bhushan, appearing for interveners on behalf of Bhopal Gas Peedit Mahila Udyog Sangathan and following him Mr. Prashant Bhushan have urged that the Act should be read in the manner canvassed by them and if the same is not so read then the same would be violative of the fundamental rights of the victims, and as such unconstitutional. The learned Attorney General assisted by Mr. Gopal Subramanium has on the other hand urged that the Act is valid and constitutional and that the settlement arrived at on 14th/15th February is proper and valid.

26. In order to appreciate the background Ms. Indira Jaising placed before us the proceedings of the Lok Sabha wherein Mr. Veerendra Patil, the Honourable Minister, stated on March 27, 1985 that the tragedy that had occurred in Bhopal on 2nd and 3rd December 1984 was unique and unprecedented in character and magnitude not only for our country but for the entire world. It was stated that one of the options available was to settle the case in Indian courts. The second one was to file the cases in American courts. Mr. Patil reiterated that the Government wanted to proceed against the parent company and also to appoint a Commission of Inquiry.

27. Mr. Garg in support of the proposition that the Act was unconstitutional, submitted that the Act must be examined on the touchstone of the fundamental rights on the basis of the test laid down by this Court in State of Madras v. V.G. Row, 1952 SCR 597: (AIR 1952 SC 196). There at page 607 of the report (SCR): (at p. 199 of AIR) this Court has reiterated that in considering the reasonableness of the law imposing restrictions on the fundamental rights, both the substantive and procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness. And the test of reasonableness, wherever prescribed, should be applied to each individual Statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. (The emphasis supplied). Chief Justice Patanjali Sastri reiterated that in evaluating such elusive factors and forming their own conception of what is reasonable, in the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision would play an important role.

28. Hence, whether by sections, 3, 4 & 11 the rights of the victims and the citizens to fight for their own causes and to assert their own grievances have been taken away validly and properly must be judged in the light of the prevailing conditions at the time, the nature of the right of the citizen, the purpose of the restrictions on their rights to sue for enforcement in the courts of law or for punishment for offences against his person or property, the urgency and extent of the evils sought to be remedied by the act, and the proportion of the impairment of the rights of the citizen with reference to the intended remedy prescribed. According to Mr. Garg, the present position calls for a comprehensive appreciation of the national and international background in which precious rights to life

and liberty were enshrined as fundamental rights and remedy for them was also guaranteed under Article 32 of the Constitution. He sought to urge that multinational corporations have assumed powers or potencies to override the political and economic independence of the sovereign nations which have been used to take away in the last four decades, much wealth out of the Third World. Now these are plundered much more than what was done to the erstwhile colonies by imperialist nations in the last three centuries of foreign rule. The role of courts in cases of conflict between rights of citizens and the vast economic powers claimed by multinational corporations to deny moral and legal liabilities for their corporate criminal activities should not be lost sight of. He, in this background, urged that these considerations assume immense importance to shape human rights jurisprudence under the Constitution, and for the Third World to regulate and control the power and economic interests of multinational corporations and the power of exploitation and domination by developed nations without submitting to due observance of the laws of the developing countries. It therefore appears that the production of, or carrying on trade in dangerous chemicals by multinational industries on the soil of Third World countries call for strictest enforcement of constitutional guarantees for enjoying human rights in free India, urged Mr. Garg. In this connection, our attention was drawn to the Charter of Universal Declaration of Human Rights. Art. 1 of the Universal Declaration of Human Rights, 1948 reiterates that all human-beings are born free and equal in dignity and rights. Art. 3 states that everyone has right to life, liberty and security of person. Art. 6 of the Declaration states that everyone has the right to recognition everywhere as a person before the law. Art. 7 states that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration of Human Rights and against any incitement to such discrimination. Art. 8 states that everyone has the right to an effective remedy by competent national Tribunal for acts violating fundamental rights guaranteed to him by the Constitution or by the law. It is, therefore, necessary to bear in mind that Indian citizens have a right to live which cannot be taken away by the union of India or the Government of a State, except by a procedure which is just, fair and reasonable. The right to life includes the right to protection of limb against mutilation and physical injuries, and does not mean merely the right to breathe but also includes the right to livelihood. It was urged that this right is available in all its dimensions till the last breath against all injuries to head, heart and mind or the lungs affecting the citizen or his next generation or of genetic disorders. The enforcement of the right to life or limb calls for adequate and appropriate reliefs enforceable in courts of law and of equity with sufficient power to offer adequate deterrence in all case of corporate criminal liability under strict liability, absolute liability, punitive liability and criminal prosecution and punishment to the delinquents. The damages awarded in civil jurisdiction must be commensurate to meet well defined demands of evolved human rights jurisprudence in modern world. It was, therefore, submitted that punishment in criminal jurisdiction for serious offences in modern world is independent of the claims enforced in civil jurisdiction and no immunity against it can be granted as part of settlement in any civil suit. If any Act authorizes or permits doing of the same, the same will be unwarranted by law and as such bad. The Constitution of India does not permit the same.

29. Our attention was drawn to Art. 21 of the Constitution and the principles of international law. Right to equality if guaranteed to every person under Art. 14 in all matters like the laws of procedure for enforcement of any legal or constitutional right in every jurisdiction, substantive law defining the rights expressly or by necessary implications, denial of any of these rights to any class of citizens in either field must have nexus with constitutionally permissible object and can never be arbitrary. Arbitrariness is, therefore, antithetical to the right of equality. In this connection, reliance was placed on the observations of this Court in D.P. Royappa v. State of Tamil Nadu, (1974) 2 SCR 348: (AIR 1974 SC 555); Maneka Gandhi v. Union of India, (1978) 2 SCR 621: (AIR 1978 SC 597) where it was held that the view that Arts. 19 and 21 constitute watertight compartments has been rightly overruled. Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at any point of time. They are all parts of an integrated scheme in the Constitution and must be preserved and cannot be destroyed arbitrarily. Reliance was placed on the observations in R.D. Shetty v. The I.A.A. of India, (1979 3 SCR 1014: (AIR 1979 SC 1628). Hence, the rights of the citizens to fight for remedies and enforce their rights flowing from the breach of obligation in respect of crime cannot be obliterated. The Act and Ss. 3, 4 and 11 of the Act in so far as these purport to do so and have so operated, are violative of Arts. 14, 19(1)(g) and 21 of the Constitution. The procedure envisaged by the said Sections deprives the just and legitimate rights of the victims to assert and obtain their just dues. The rights cannot be so destroyed. It was contended that under the law the victims had right to ventilate their rights.

30. It was further contended that Union of India was a joint tort-feasor along with UCC and UCIL. It had negligently permitted the establishment of such a factory without proper safeguards exposing the victims and citizens to great danger. Such a person or authority cannot be entrusted to represent the victims by denying the victims their rights to plead their own cases. It was submitted that the object of the Act was to fully protect people against the disaster of highly obnoxious gas and disaster of unprecedented nature. Such an object cannot be

achieved without enforcement of the criminal liability by criminal prosecution. Entering into settlement without reference to the victims was, therefore, bad and unconstitutional, it was urged. If an Act, it was submitted, permits such a settlement or deprivation of the rights of the victims, then the same is bad.

31. Before we deal with the various other contentions raised in this case, it is necessary to deal with the application for intervention and submission made on behalf of the Coal India in Writ Petition No. 268/89 wherein Mr. L.N. Sinha in his written submission had urged for the intervener that Art. 21 of the Constitution neither confers nor creates nor determines the dimensions nor the permissible limits of restrictions which appropriate legislation might impose on the right to life or liberty. He submitted that provisions for procedure are relevant in judicial or quasi judicial proceedings for enforcement of rights or obligations. With regards to alteration of rights, procedure is governed by the Constitution directly. He sought to intervene on behalf of Coal India and wanted these submissions to be taken into consideration. However, when this contention was sought to be urged before this Court on 25th April, 1989, after hearing all the parties, it appeared that there was no dispute between the parties in the instant writ petitions between the victims and the Government of India that the rights claimed in these cases are referable to Art. 21 of the Constitution. Therefore, no dispute really arises with regard to the contention of Coal India and we need not consider the submissions urged by Shri Sinha on behalf of the intervener in this case. It has been so recorded.

32. By the order dated 3rd March 1989, Writ Petitions Nos. 268/89 and 164/86 have been directed to be disposed of by this Bench. We have heard these two writ petitions along with the other writ petitions and other matters as indicated hereinbefore. The contentions are common. The contentions are common. These writ petitions question the validity of the Act and the settlement entered into pursuant to the Act. Writ Petition No. 164/86 is by one Shri Rakesh Shrouti who is an Indian citizen and claims to be a practicing advocate having his residence at Bhopal. He says that he and his family members were at Bhopal on 2nd/3rd December 1984 and suffered immensely as a result of the gas leak. He challenges the validity of the Act on various grounds. He contends that the Union of India should not have the exclusive right to represent the victims in suits against the Union Carbide and thereby deprive the victims of their right to sue and deny access to justice. He further challenges the right of the Union of India to represent the victims against Union Carbide because of conflict of interests. The conduct of the Union of India was also deprecated and it was further stated that such conduct did not inspire confidence. In the premises, the said petitioner sought a declaration under Art. 32 of the Constitution that the Act is void, inoperative and unenforceable as violative of Arts. 14, 19 and 21 of the Constitution. Similarly, the second writ petition, namely, Writ Petition No. 268 which is filed by Sh. Charan Lal Sahu, who is also a practicing Advocate on behalf of the victims and claims to have suffered damages as a result of the gas leak, challenges the Act. He further challenges the settlement entered into under the Act. He says that the said settlement was violative of principles of natural justice and the fundamental right of the said petitioner and other victims. It is his case that in so far as the Act permits such a course to be adopted, such a course was not permissible under the Constitution. He further asserts that the Union of India was negligent and a joint tort-feasor. In the premises, according to him, the Act is bad, the settlement is bad and these should be set aside.

33. In order to determine the question whether the Act in question is constitutionally valid or not in the light of Arts. 14, 19(1)(g) and 21 of the Constitution, it is necessary to find out what does the Act actually mean and provide for. The Act in question, as the Preamble to the Act states, was passed in order to confer powers on the Central Government to secure that the claims arising out of, or connected with, the Bhopal gas leak disaster are dealt with speedily, effectively, equitably and to the best advantage of the claimants and for matters incidental thereto. Therefore, securing the claims arising out of or connected with the Bhopal gas leak disaster is the object and purpose of the Act. We have noticed the proceedings of the Lok Sabha in connection with the enactment of the Act. Our attention was also drawn by the learned Attorney General to the proceedings of the Rajya Sabha wherein the Honourable Minister, Shri Virendra Patil explained that the Bill enabled the Government to assume exclusive right to represent and act, whether within or outside India in place of every person who had made or was entitled to make claim in relation to the disaster and to institute any suit or other proceedings or enter into any compromise as mentioned in the Act. The whole object of the Bill was to make procedural changes to the existing Indian law which would enable the Central Government to take up the responsibility of fighting litigation on behalf of the victims. The first point was that it sought to create a locus standi in the Central Government to file suits on behalf of the victims. The object of the statute, it was highlighted, was that because of the dimension of the tragedy covering thousands of people, large number of whom being poor, would not be able to go to the courts, it was necessary to create the locus standi in the Central Government to start the litigation for payment of compensation in the courts on their behalf. The second aspect of the Bill was that by creating this locus standi in the Central Government, the Central Government became competent to institute judicial proceedings for payment of compensation on behalf of the victims. The next aspect of the Bill was to make a distribution between those on whose behalf suits had already been filed and those on whose behalf proceedings had not yet

then been instituted. One of the Members emphasized that under Art. 21 of the Constitution, the personal liberty of every citizen was guaranteed and it has been widely interpreted as to what was the meaning of the expression 'personal liberty. It was emphasized that one could not take away the right of a person, the liberty of a person, to institute proceedings for his own benefit and for his protection. It is from this point of view that it was necessary, the member debated, to preserve the right of a claimant to have his own lawyers to represent him along with the Central Government in the proceedings under S. 4 of the Act, this made the Bill constitutionally valid.

34. Before we deal with the question of constitutionality, it has to be emphasized that the Act in question deals with the Bhopal gas leak disaster and it deals with the claims meaning thereby claims arising out of or connected with the disaster for compensation of damages for loss of life or any personal injury which has been or is likely to be caused and also claims arising out of or connected with the disaster for any damages to property or claims for expenses incurred or required to be incurred for containing the disaster or making or otherwise coping with the impact of the disaster and other incidental claims. The Act in question does not purport to deal with the criminal liability, if any, of the parties or persons concerned nor it deals with any of the consequences flowing from those. This position is clear from the provisions and the Preamble to the Act. Learned Attorney General also says that the Act does not cover criminal liability. The power that had been given to the Central Government is to represent the 'claims', meaning thereby the monetary claims. The monetary claims, as was argued on behalf of the victims, are damages flowing from the gas disaster. Such damages, Mr Garg and Ms. Jaising submitted, are based on strict liability, absolute liability and punitive liability. The Act does not, either expressly or impliedly, deal with the extent of the damages or liability. Neither S. 3 nor any other section deals with any consequences of criminal liability. The expression "the Central Government shall, and shall have the exclusive right to, represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such person", read as it is, means that Central Government is substituted and vested with the exclusive right to act in place of the victims, i.e., eliminating the victims, their heirs and their legal representatives, in respect of all such claims arising out of or connected with the Bhopal gas leak disaster. The right, therefore, embraces right to institute proceedings within or outside India along with right to institute any suit or other proceedings or to enter into compromise. Sub-section (1) of S. 3 of the Act, therefore, substitutes the Central Government in place of the victims. The victims, or their heirs and legal representatives, get their rights substituted in the Central Government along with the concomitant right to institute such proceedings, withdraw such proceedings or suit and also to enter into compromise. The victims of the heirs or the legal representatives of the victims are substituted and their rights are vested in the Central Government. This happens by operation of Section 3 which is the legislation in question. Sub-section (3) of Section 3 makes it clear that the provisions of sub-section (1) of Section 3 shall also apply in relation to claims in respect of which suits or other proceedings have been instituted in or before any Court or other authority (whether within or outside India) before the commencement of this Act, but makes a distinction in the case or any such suit or other proceeding with respect to any claim pending immediately before the commencement of this Act in or before any Court or other authority outside India, and provides that the Central Government shall represent, and act on place of, or along with, such claimant, if such Court or other authority so permits. Therefore, in cases where such suits or proceedings have been instituted before the commencement of the Act in any Court or before any authority outside India, the section by its own force will not come into force in substituting the Central Government in place of the victims on the behalf of their legal representatives, but the Central Government has been given the right to act in place of, or along with, such claimant, provided such Court or other authority so permits. It is to have adherence and conformity with the procedure of the countries or places outside India, where suits or proceedings are to be instituted or have been instituted. Therefore, the Central Government is authorized to act along with the claimants in respect of proceedings instituted outside India subject to the orders of such courts or the authorities. Is such a right valid or improper?

35. There is the concept known both in this country and abroad, called "parens patriae. Dr. B.K. Mukherjea in his 'Hindu Law of Religious and Charitable Trusts, Tagore Law Lectures, Fifth Edition, at p. 454, referring to the concept of parens patriae, has noted that in English law, the Crown as parents patriae is the constitutional protection of all property subject to charitable trusts, such trusts being essentially matters of public concern. Thus the position is that according to Indian concept parens patriae doctrine recognized King as the protector of all citizens and as parent. In Budhkaran Chaukhani v. Thakur Prosad Shah, AIR 1942 Cal 311 the position was explained by the Calcutta High Court at page 318 of the report. The same position was reiterated by the said High Court in Banku Behary v. Bank Behary Hasra, AIR 1943 Cal 203 at p. 205 of the report. The position was further elaborated and explained by the Madras High Court in Kumaraswami Mudalia v. Rajammal, AIR 1957 Mad 563 at p. 567 of the report. This Court also recognized the concept of parens partriae relying on the observation of Dr. Mukherjee aforesaid in Ram Saroop v. S.P. Sahi, (1959) 2 Supp SCR 583 at pp. 598 and 599: (AIR 1959 SC951 at pp. 958-959). In the "words and phrases" Permanent edition, Vol. 33 at p. 99,

it is stated that parens partriae is the inherent power and authority of a Legislature to provide protection to the person and property of persons non sui juris, such as minor, insane, and incompetent persons, but the words "parens partriae" meaning thereby 'the father of the country', were applied originally to the King and are used to designate the state referring to its sovereign power of guardianship over persons under disability, (Emphasis supplied). Parens partriae jurisdiction, it has been explained, is the right of sovereign and imposes a duty on sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term "parens patriae" differs from country to country, for instance, in England it is the King, in America it is the people, etc. The Government is within its duty to protect and to control persons under disability. Conceptually, the parens patriae theory is the obligation of the state to protect and take into custody the rights and the privileges of its citizens for discharging its obligations. Our Constitution makes it imperative for the State to secure to all its citizens the rights guaranteed by the Constitution and where the citizens are not in a position to assert and secure their rights, the State must come into the picture and protect and fight for the rights of the citizens. The preamble to the Constitution, read with the Directive Principles, Arts. 38, 39 and 39A enjoins the State to take up these responsibilities. It is the protective measure to which the social welfare state is committed. It is necessary for the State to ensure the fundamental rights in conjunction with the Directive Principles of State Policy to effectively discharge its obligation and for this purpose, if necessary, to deprive some rights and privileges of the individual victims or their heirs to protect their rights better and secure these further. Reference may be made to Alfred L. Snapp & Son, Inc. v. Puerto Rico, (1982) 458 US 592: 73 L Ed. 2d 995: 102 SCt 3260 in this connection. There it was held by the Supreme Court of the United States of America that Commonwealth of Puerto have standing to sue as parens patriae to enjoin apple growers' discrimination against Puerto Rico migrant farm workers. This case illustrates in some aspect the scope of 'parens patriae for Puerto Rican migrant farm-workers, and against Virginia apple growers, to enjoin discrimination against Puerto Ricans in favour of Jamaican workers in violation of the Wagner-Peyser Act, and the Immigration and Nationality Act. The District Court dismissed the action on the ground that the Commonwealth lacked standing to sue, but the Court of Appeal for the Fourth Circuit reversed it. On certiorari, the United States Supreme Court affirmed. In the opinion by White, J., joined by Surger, Chief Justice and Brennan, Marshall, Blackmum, Rennquist, Stevens, and O'Connor, JJ., it was held that Puerto Rico had a claim to represent its quasi-sovereign interests in federal Court at least which was as strong as that of any State, and that it had parens patriae standing to sue to secure its residents from the harmful effects of discrimination and to obtain full and equal participation in the federal employment service scheme established pursuant to the Wagner-Peyser Act and the Immigration and Nationality Act of 1952. Justice White referred to the meaning of the expression "parens patriae". According to Black's Law Dictionary, 5th Edition 1979, page 1003, it means literally 'parent of the country' and refers traditionally to the role of the State as a sovereign and guardian of persons under legal disability. Justice White at page 1003 of the report emphasized that the parens patriae action had its roots in the common-law concept of the "royal prerogative". The royal prerogative included the right or responsibility to take care of persons who were legally unable, on account of mental incapacity, whether it proceeds from nonage, idiocy, or lunacy to take proper care of themselves and their property. This prerogative of parens patriae is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature and is a most beneficent function. After discussing several cases Justice White observed at page 1007 of the report that in order to maintain an action, in parens patriae, the State must articulate an interest apart from the interests of particular parties, i.e. the State must be more than a nominal party. The State must express a quasi-sovereign interest. Again an instructive insight can be obtained from the observations of Justice Holmes of the American Supreme Court in the case of Georgia v. Tennessee Copper Co., (1970) 206 US 230: 51 L Ed. 1038: 27 S Ct 618, which was a case involving air pollution in Georgia caused by the discharge of noxious gases from the defendant's plant in Tennessee. Justice Holmes at page 1044 of the report describe the State's interest as follows:

> "This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power...

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests".

36. Therefore, conceptually and from the jurisprudential point of view, especially in the background of the preamble to the Constitution of India and the mandate of the Directive Principles, it was possible to authorize the Central Government to take over the claims of the victims to fight against the multinational Corporation in respect of the claims. Because of the situation the victims were under disability in pursuing their claims in the circumstances of the situation fully and properly. On its plain terms the State has taken over the exclusive right

to represent and act in place of every person who has made or is entitled to make a claim for all purposes connected with such claim in the same manner and to the same effect as such person. Whether such provision is valid or not in the background of the requirement of the Constitution and the Code of Civil Procedure, is another debate. But there is no prohibition or inhibition, in our opinion, conceptually or jurisprudentially for Indian State taking over the claims of the victims or for the State acting for the victims as the Act has sought to provide. The actual meaning of what the Act has provided and the validity thereof, however, will have to be examined in the light of the specific submissions advanced in this case.

37. Ms. Indira Jaising as mentioned hereinbefore on behalf of some other victims drew out attention to the background of the passing of the Act in question. She drew our attention to the fact that the Act was to meet a specific situation that has arisen after the tragic disaster and the dovent of American lawyers seeking to represent the victims in American courts. The Government's view, according to her, as was manifest from the Statement of Objects and Reasons, debates of the Parliament, etc. were that the interests of the victims would be best served if the Central Government was given the right to represent the victims in the courts of United States as they would otherwise be exploited by 'ambulance-chasers' working on contingency fees. The Government also proceeded initially on the hypothesis that US was the most convenient forum in which to sue UCC. The Government however feared that it might not have locus standi to represent the victims in the courts of the United States of America unless a law was passed to enable it to sue on behalf of the victims. The dominant object of the Act, therefore, according to her, was to give to the Government of India locus standi to sue on behalf of the victims in foreign jurisdiction, a standing which it otherwise would not have had. According to her, the Act was never intended to give exclusive rights to the Central Government to sue on behalf of the victims in India or abroad. She drew our attention to the Parliamentary debates as mentioned hereinbefore. She drew our attention to the expression 'parens patriae' as appearing in the Words and Phrases, Volume 31 p. 99. She contends that the Act was passed to provide locus standi only to represent in America. She drew our attention to the "American Constitutional Law by Laurence B. Tribe, 1978 Edition at paragraph 3.24, where it was stated that in its capacity as proprietor, a State may satisfy the requirement of injury to its own interests by an assertion of harm to the state as such. It was further stated by the learned author there that the State may sue under the federal anti-trust laws to redress wrongs suffered by it as the owner of a railroad and as the owner and operator of various public institutions. It was emphasized that in its quasi-sovereign capacity, the state has an interest, independent of and behind the titles of its citizens, in all the earth and air within its domain. It was sought to be suggested that in the instant Act no such right was either asserted or mentioned. The State also in its quasi-sovereign capacity is entitled to bring suit against a private individual to enjoin in a corporation not to discharge noxious gases from its out of State plant into the suing State's territory. Finally, it was emphasized that as 'parens patriae' on behalf of the citizens, where a State's capacity as parens patriae is not negated by the federal structure, the protection of the general health, comfort, and welfare of the State's inhabitants has been held to give the State itself a sufficient interest. Ms. Jaising sought to contend that to the extent that the Act was not confined to empowering the Government to sue on behalf of those who were not sui generis but extended also to representing those who are, this exercise of the power cannot be referable to the doctrine of 'parens patriae'. To the extent, it is not confined in enabling the Government to represent its citizens in foreign jurisdiction but empowered it to sue in local courts to the exclusion of the victims it cannot be said to be in exercise of doctrine of 'parens patriae', according to her. We are unable to agree. As we have indicated before conceptually and jurisprudentially there is no warrant in the background of the present Act, in the light of circumstances of the Act in question to confine the concept into such narrow field. The concept can be varied to enable the Government to represent the victims effectively in domestic forum if the situation so warrants. We also do not find any reason to confine the 'parens patriae' doctrine to only quasi-sovereign right of the State independent of and behind the title of the citizen, as we shall indicate later.

38. It was further contended that deprivation of the rights of the victims and denial of the rights of the victims or the rights of the heirs of the victims to access to justice was unwarranted and unconstitutional. She submitted that it has been asserted by the Government that the Act was passed pursuant to Entry 13 of the List I of the Seventh Schedule to the Constitution. It was therefore submitted that to the extent it was a law relating to civil procedure, it sets up a different procedure for the Bhopal gas victims and denies to them equality before law, violating Article 14 of the Constitution. Even assuming that due to the magnitude of the disaster, the number of claimants and their disability, they constituted a separate class and that it was permissible to enact a special legislation setting up a special procedure for them, the reasonableness of the procedure has still to be tested. Its reasonableness, according to her, will have to be judged on the touchstone of the existing Civil Procedure Code of 1908 and when so tested, it is found wanting in several respects. It was also contended by the Government that it was a legislation relating to "actionable wrongs" under Entry 8 of the Concurrent List of the Seventh Schedule. But so read, she said, it could only deal with the procedural aspects and not the substantive aspect of "actionable wrongs". If it does, then the reasonableness of a law must be judged with reference to the existing sub-

stantive law of actionable wrongs and so judged it is in violation of many constitutional rights as it takes away from the victims the right to sue for actionable wrongs, according to counsel for the victims. According to her, it fails to take into account the law of strict liability of ultra hazardous activity as clarified by this Court in M.C. Mehta's case (supra). She further submitted that it is a bad act as it fails to provide for the right to punitive damages and destruction of environment.

39. It was contended on behalf of the Central Government that the Act was passed to give effect to the directive principle as enshrined under Article 39-A of the Constitution of India. It was, on the other side, submitted that it is not permissible for the State to grant legal aid on pain of destroying rights that inhere in citizens or on pain of demanding that the citizens surrender their rights to the State. The Act in fact demands a surrender of rights of the citizens to the State. On the interpretation of the Act, Ms. Indira Jaising submitted that Sections 3 and 4 as noted above, give exclusive power to the Government to represent the victims and there is deprivation of the victims' right to sue for the wrongs done to them which is uncanalised and unguided and the expression "due regard" in Section 4 of the Act does not imply consent and as such violative of the rights of the victims. The right to be associated with the conduct of the suit is hedged in with so many conditions that it is illusory. According to her, a combined reading of Sections 3 and 4 of the Act lend to the conclusion that the victims are displaced by the Central Government which has constituted itself as the "surrogate" of the claimants, that they have no control over the proceedings, that they have no right to decide whether or not to compromise and if so on what terms and they have no right to be heard by the court before any such compromise is effected. Therefore, Section 3 read with Section 4, according to her, hands over to the Government all effective rights of the victims to sue and is a naked usurpation of power. It was submitted that in any event on a plain reading of the Act, Section 3 read with Section 4 did not grant the Government immunity from being sued as a joint tort-feasor.

40. It was further urged that Section 9 makes the Government the total arbiter in the matte of the registration, processing and recording of claims. Reference was made to Section 9(2)(a),(b) and (c) and disbursal of claims under Sections 9(2)(f) and 10. It was urged that the deputy Commissioner and Commissioner appointed under the act and the Scheme are subordinates and agents of the Central Government. They replace impartial and independent civil court by officers and subordinates of the Central Government. Clause 11 of the Scheme makes the Central Government according to counsel, judge in its own cause inasmuch as the Central Government could be and was in fact a joint tort-feasor. It was submitted that Sections 5 to 9 of the Act read with the Scheme do not set up a machinery which is constitutionally valid. The Act, it was urged, deprives the victims of their rights out of all proportion to the object sought to be achieved, namely, to sue in foreign jurisdiction or to represent those incapable of representing themselves. The said object could be achieved, according to counsel, by limiting the right to sue in foreign jurisdiction alone and in any event representing only those victims incapable of representing themselves. The victims who wish to sue for and on their own behalf must have power to sue, all proper and necessary parties including Government of India, Government of Madhya Pradesh, UCIL and Shri Arjun Singh to vindicate their right to life and liberty and their rights cannot and should not be curtailed, it was submitted. Hence, the Act goes well beyond its objects and imposes excessive restriction amounting to destruction of the right of the victims, according to counsel. In deciding whether any rights are affected, it is not the object of the Act that is relevant but its direct and inevitable effect on the rights of the victims that is material. Hence no matter how laudable the object of the Act is alleged to be by the Government of India, namely, that it is an Act to give effect to Directive Principles enshrined in Article 39A of the Constitution, the direct and inevitable effect of Section 3 according to counsel for the victims is to deprive the victims of the right to sue for and on their own behalf through counsel of their choice and instead empower the Central Government to sue for them.

41. The Act is, it was contended, unconstitutional because it deprives the victims of their right to life and personal liberty guaranteed by Article 21. The right to life and liberty includes the right to sue for violations of the right, it was urged. The right to life guaranteed by Article 21 must be interpreted to mean all that makes life livable, life in all its fullness. According to counsel, it includes the right to livelihood. Reference was made to the decision of Olga Tellis v. U.M.C. (1985 Supp. 2 SCR 51 at p. 78-83). This right, it was contended, is inseparable from the remedy. It was urged that personal liberty includes a wide range of freedoms to decide how to order one's affairs. Reference was made to Maneka Gandhi v. Union of India ()AIR 1978 SC 597) (supra). The right to life and liberty also includes the right to healthy environment free from hazardous pollutants. The right to life and liberty, it was submitted, is inseparable from the remedy to judicial vindication of the violation of that right - the right of access to justice must be deemed to be part of that right. Therefore, the importance is given to the right to file a suit for an actionable wrong. See Ganga Bai v. Vijay Kumar (1974) 3SCR 882 at p. 886: (AIR 1974 SC 1126 at p. 1128). According to counsel appearing for the victims, the Act read strictly infringes the right to life and personal liberty because the right to sue by the affected person for damages flowing from infringement of their rights is taken away. Thus, it was submitted, that not just some incidents of the right to life, but the right itself in all its fullness is taken away. Such deprivation, according with procedure established

by law inasmuch as the law which takes away the right, i.e., impugned Act is neither substantively nor procedurally just, fair or reasonable. A law which divests the victims of the right to sue to vindicate for life and personal liberty and vests the said right in the Central Government is not just, fair or reasonable. The victims are sui generis and able to decide for themselves how to vindicate their claims in accordance with law. There is, therefore, no reason shown to exist for divesting them of that right and vesting that on the Central Government.

42. All the counsel for the victims have emphasized that vesting of the right in Central Government is bad and unreasonable because there is conflict of interests between the Central Government and the victims. It was emphasized that the conflict of interest has already prejudiced the victims in the conduct of the case inasmuch as a compromise unacceptable to the victims has been entered into in accordance with the order of this Court of 14th/16th February, 1989 without hearing the victims. This conflict of interest will continue, it was emphasized, to adversely effect the victims inasmuch as Section 9 of the Act read with clauses 6, 10 and 11 of the Scheme empower the Central Government to process claims, determine the category into which these fall, determine the basis on which damages will be payable to each category and determine the amount of compensation payable to each claimant. Learned counsel urged that the right to a just, fair and reasonable procedure was itself a guaranteed fundamental right under Article 14 of the Constitution. This included right to natural justice. Reference was made to Olga Tellis's case (supra) and S.L. Kapoor v. Jagmohan (1981) 1 SCR 746 at pp. 753, 766: (AIR 1981 SC 136 at p. 141). The right to natural justice is included in Article 14. Union of India v. Tulsiram Patel (1985 Supp (2) SCR 131: (AIR 1985 SC 1416). Reference was also made to Maneka Gandhi's case (supra). It was contended by counsel that the right to natural justice is the right to be heard by Court at the pre-decisional stage, i.e., before any compromise is effected and accepted. Reference was made to the decision of this Court in Swadeshi Cotton Mills v. Union of India, (1981) 2 SCR 533: (AIR 1981 SC 818). It was submitted that natural justice is a highly effective tool devised by the Courts to ensure that a statutory authority arrives at a just decision. It was calculated to act as a healthy check on the abuse of power. Natural justice is not dispensable nor is it an empty formality. Denial of that right can and has led to the miscarriage of justice in this case. According to counsel, if the victims had been given an opportunity to be heard, they would, inter alia, have pointed out that the amount agreed to be paid by UCC was hopelessly inadequate and that UCC, its officer and agents ought not to be absolved of criminal liability, that the Central Government itself was liable to have been sued as a joint tort-feasor and, according to counsel, had agreed to submit to a decree if found liable under the order dated 31st December, 1985, that suits had been filed against the State of Madhya Pradesh, Shri Arjun Singh and UCIL which said suits cannot be deemed to have been settled by the compromise/order of 14th/15th February, 1989. It was also pointed out that Union of India was under a duty to sue UCIL, which it had failed and neglected to do. It was submitted that to the extent that the statute does not provide for a pre-decisional hearing on the fairness of the proposed settlement or compromise by Court, it is voided as offending natural justice hence Articles 14 and 21 of the Constitution. Alternatively, it was contended by the counsel that since the statute neither expressly nor by necessary implication bars the right to be heard by Court before any compromise is effected such a right to a pre-decisional hearing by Court must be read into Section 3(2)(b) of the Act. Admittedly, it does not expressly exclude the right to a hearing by Court prior to any settlement being entered into. Far from excluding such a right by necessary implication, having regard to the nature of the rights affected, i.e., the right to life and personal liberty, such a right to hearing must be read into the Act in order to ensure that justice is done to the victims, according to all the counsel. The Act sets up a procedure different from the ordinary procedure established by law, namely, Civil Procedure Code. But it was submitted that the act should be harmoniously read with the provisions of Civil Procedure Code and if it is not so read, then the Act in question would be unreasonable and unfair. In this connection, reliance was placed on the provisions of Order I, Rule 4, Order 23, Rule 1 proviso, Order 23, Rules 3-9 and Order 32, Rule 7 of CPC and it was submitted that these are not inconsistent with the Act. On the contrary these are necessary and complementary, intended to ensure that there is no miscarriage of justice. Hence these must be held to apply to the facts and circumstances of the case and the impugned Act must be read along with these provisions. Assuming that the said provisions do not 'directly apply then, provisions analogous to the said provisions must be read with Section 3(2)(b) to make the Act reasonable, it was submitted. It was urged that if these are not so read then the absence of such provisions would vest arbitrary and unguided powers in the Central Government making Section 3(2)(b) unconstitutional. The said provisions are intended to ensure the machinery of accountability to the victims and to provide to them an opportunity to be heard by court before any compromise is arrived at. In this connection, reference was made to Rule 23(3) of the Federal Rules of Civil Procedure in America which provides for a hearing to the victims before a compromise is effective. The victims as plaintiffs in an Indian court cannot be subjected to a procedure which is less fair than that provided by a US forum initially chosen by the Government of India, it was urged.

43. Counsel submitted that Section 6 of the Act is unreasonable because it replaces an independent and impartial Civil Court of competent jurisdiction by an Of-

ficer known as the Commissioner to be appointed by the Central Government. No qualification, according to counsel, had been prescribed for the appointment of a Commissioner and clause 5 of the Scheme framed under the Act vests in the Commissioner the judicial function of deciding appeals against the order of the Deputy Commissioner registering or refusing to register a claim. It was further submitted that clause 11(2) of the Scheme is unreasonable because it replaces an independent and impartial civil court of competent jurisdiction with the Central Government, which is a joint tort-feasor for the purpose of determining the total amount of compensation to be apportioned for each category of claims and the quantum of compensation payable for each type of injury of loss. It was submitted that the said function is a judicial function and if there is any conflict of interest between the victims and the Central Government, vesting such a power in the Central Government amounts to making it a judge in its own cause. It was urged that having regard to the fact that amount received in satisfaction of the claims is ostensibly pre-determined, namely, 470 million dollars unless the order of 14th/15th February is set aside which ought to be done, according to counsel, the Central Government would have a vested interest in ensuring that the amount of damages to be disbursed does not exceed the said amount. Even otherwise, according to counsel, the Government of India has been sued as a joint tort-feasor, and as they would have a vested interest in depressing the quantum of damages, payable to the victims. This would, according to counsel, result in a deliberate underestimation of the extent of injuries and compensation payable.

44. Clause 11(4) of the Scheme, according to counsel, is unreasonable inasmuch as it does not take into account the claims of the victims to punitive and exemplary damages and damages for loss and destruction of environment. Counsel submitted that in any event the expression "claims" in Section 2(b) cannot be interpreted to mean claims against the Central Government, the State of Madhya Pradesh, UCIL, which was not sued in suit No. 1113/86 and Shri Arjun Singh, all of whom have been sued as joint tort-feasors in relation to the liability arising out of the disaster. Counsel submitted that if Section 3 is to be held to be intra vires, the word "exclusive" should be severed from Section 3 and on the other hand, if Section 3 is held ultra vires, then victims who have already filed suits or those who had lodged claims should be entitled to continue their own suits as well as Suit No. 1113/86 as plaintiffs with leave under Order 1 rule 8. Counsel submitted that interim relief as decided by this Court can be paid to the victims even otherwise also, according to counsel, under clause 10(2)(b) of the Scheme.

45. Counsel submitted that the balance of $470 million after deducting interim relief as determined by this Court should be attached. In any event, it was submitted that, it be declared that the word "claim" in Section 2 does not include claims against Central Government or State of Madhya Pradesh or UCIL. Hence, it was urged that the rights of the victims to sue the Government of India, the State of Madhya Pradesh or UCIL would remain unaffected by the Act or by the compromise effected under the Act. Machinery to decide suit expeditiously has to be devised, it was submitted. Other suits filed against UCC, UCIL, state of Madhya Pradesh and Arjun Singh should be transferred to the Supreme Court for trial and disposal, according to counsel. It was submitted that the Court should fix the basis of damages payable to different categories, namely, death and disablement mentioned under clause 5(2) of the Scheme. Counsel submitted that this Court should set up a procedure which would ensure that an impartial judge assisted by medical experts and assessors would adjudicate the basis on which an individual claimant would fall into a particular category. It was also urged that this Court should quantify the amount of compensation payable to each category of claimant in clause 5(2) of the scheme. This decision cannot, it was submitted, be left to the Central Government as it purported to be done by clause 11(2) of the Scheme.

46. This Court must set up, it was urged, a trust with independent trustees to administer the trust and trustees to be accountable to this Court. An independent census should be carried out of number of claimants, nature and extent of injury caused to them, the category into which they fall. Apportionment of amounts should be set aside or invested for future claimants, that is the category in clause 5(2)(a) of the Scheme, which is, according to counsel, of utmost importance since the injuries are said to be carcinogenic and ontogenic and widely affecting persons yet unborn.

47. Shri Garg, further and on behalf of some of the victims counsel, urged before us that deprivation of the rights of the victims and vesting of those rights in the State is violative of the rights of the victims and cannot be justified or warranted by the Constitution. Neither Section 3 nor Section 4 of the Act gives any right to the victims; on the other hand, it is a complete denial of access to justice for the victims, according to him. This, according to counsel, is arbitrary. He also submitted that Section 4 of the Act, as it stands, gives no right to the victims and as such even assuming that in order to fight for the rights of the victims, it was necessary to substitute the victims even then in so far as the victims have been denied the right of say, in the conduct of the proceedings, this is disproportionate to the benefit conferred upon the victims. Denial of rights to the victims is so great and deprivation of the right to natural justice and access to justice is so tremendous that judged by the well settled principles by which yardsticks provisions like these should be judged in the constitutional framework of this country, the Act is violative of the fundamental rights of the victims. It was further submitted by him that all the

rights of the victims by the process of this Act, the right of the victims to enforce full liability against the multinational as well as against the Indian Companies, absolute liability and criminal liability have all been curtailed.

48. All the counsel submitted that in any event, the criminal liability cannot be subject matter of this Act. Therefore, the Government was not entitled to agree to any settlement on the ground that criminal prosecution would be withdrawn and this being a part of the consideration or inducement for settling the civil liability, he submitted that the settlement arrived at on the 14th/15th February, 1989 as recorded in the order of this Court is wholly unwarranted, unconstitutional and illegal.

49. Mr. Garg additionally further urged that by the procedure of the Act, each individual claim had to be first determined and the Government could only take over the aggregate of all individual claims and that could only be done by aggregating the individual claims of the victims. That was not done, according to him. Read in that fashion, according to Shri Garg, the conduct of the Government in implementing the act is wholly improper and unwarranted. It was submitted by him that the enforcement of the right of the victims without a just, fair and reasonable procedure which is vitally necessary for representing the citizens or victims was bad. It was further urged by him that the Bhopal gas victims have been singled out for hostile discrimination resulting in total denial of all procedures of approach to competent courts and tribunals. It was submitted that the Central Government was incompetent to represent the victims in the litigation or for enforcement of the claims. It was then submitted by him that the claims of the victims must be enforced fully against the Union Carbide Corporation carrying on commercial activities for profit resulting in unprecedented gas leak disaster responsible for a large number of amount of deaths and severe injuries to others. It was submitted that the liability of each party responsible, including the government of India, which is a joint tort-feasor along with the Union Carbide, has to be ascertained in appropriate proceedings. It was submitted on behalf of the victims that Union of India owned 22% of the shares in Union Carbide and, therefore, it was incompetent to represent the victims. There was conflict of interest between the Union of India and the Union carbide and so Central Government was incompetent. It is submitted that pecuniary interest howsoever small disqualifies a person to be a judge in his own cause. The settlement accepted by the Union of India, according to various counsel is vitiated by the pecuniary bias as holders of its shares to the extent of 22%.

50. It was submitted that the pleading in the court of the United States and in the Bhopal Court considered in the context of the settlement order of this Court accepted by the Union of India establish that the victims' individuality were sacrificed wantedly [sic] and callously and, therefore, there was violation, according to some of the victims, both in the Act and in its implementation of articles 14, 19(1)(g) and 21 of the Constitution.

51. The principles of the decision on this Court in N.C. Mehta v. Union of India, (1987) 1 SCR 819: (AIR 1987 SC 1086) must be so interpreted that complete justice is done and it in no way excludes the grant of punitive damages for wrongs justifying deterrents to ensure the safety of citizens in free India. No multinational corporation, according to Shri Garg, can claim the privilege of the protection of Indian law to earn profits without meeting fully the demands of civil and criminal justice administered in India with this Court functioning as the custodian. Shri Garg urged that the liability for damages, in India and the Third world countries, of the multinational companies cannot be less but must be more because the persons affected are often without remedy for reasons of inadequate facilities for protection of health or property. Therefore, the damages sustainable by Indian victims against the multinationals dealing with dangerous gases without proper security and other measures are far greater than damages suffered by the citizens of other advanced and developed countries. It is, therefore, necessary to ensure by damages and deterrent remedies that these multinationals are not tempted to shift dangerous manufacturing operations intended to advance their strategic objectives of profit and war to the Third World Countries with little respect for the right to life and dignity of the people of sovereign third world countries. The strictest enforcement of punitive liability also serves the interest of the American people. The act, therefore, according to Shri Garg, is clearly unconstitutional and therefore, void.

52. It was urged that the settlement is without jurisdiction. This Court was incompetent to grant immunity against criminal liabilities in the manner it has purported to do by its order dated 14th/15th February, 1989, it was strenuously suggested by counsel. It was further submitted that to hold the Act to be valid, the victims must be heard before the settlement and the act can only be valid if it is so interpreted. This is necessary further, according to Shri Garg, to lay down the scope of hearing. Shri Garg also drew our attention to the scheme of disbursement of relief to the victims. He submitted that the scheme of disbursement is unreasonable and discriminatory because there is no procedure which is just, fair and reasonable in accordance with the provisions of Civil Procedure Code. He further submitted that the Act does not lay down any guidelines for the conduct of the Union of India in advancing the claims of the victims. There were no essential legislative guidelines for determining the rights of the victims, the conduct of the proceedings on behalf of the victims and for the relief claimed. Denial of access to justice to the victims through an impartial judiciary is so great a denial that it can only be consistent with the situation which calls for such a drastic provision. The present circumstances were not such. He drew

our attention to the decisions of this Court in Basheshar v. Income tax Commr., AIR 1959 SC 149; in Re Special Courts Bill, (1979) 2 SCR 476: (AIR 1979 SC 478); A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602: (AIR 1988 SC 1531); Ram Krishna Dalmia v. Tendulkar, 1955 SCR 279: (AIR 1958 SC 538); Ambika Prasad v. State of U.P., (1980) 3 SCR 1159: (AIR 1980 SC 1762); and Hudhan Chowdhary v. State of Bihar, (1955) 1 SCR 1045: (AIR 1955 SC 191). Shri Garg further submitted that Article 21 must be read with Article 51 of the Constitution and other directive principles. He drew our attention to Lakshmi Kant Pandey v. Union of India, (1984) 2 SCR 795: (AIR 1984 SC 469); M/s. Mackinnon Machkenzie & Co. Ltd. v. Audrey D'Costa, (1987) 2 SCC 469: (AIR 1987 SC 1281); Sheela Barse v. Secy., Children Aid Society, (1987) 1 SCR 870: (AIR 1987 SC 656). Shri Garg submitted that in India, the national dimensions of human rights and the international dimensions are both congruent and their enforcement is guaranteed under Articles 32 and 226 to the extent these are enforceable against the State, these are also enforceable against transnational corporations inducted by the State on conditions of due observance of the Constitution and all laws of the land. Shri Garg submitted that in the background of an unprecedented disaster resulting in extensive damage to life and property and the destruction of the environment affecting large number of people and for the full protection of the interests of the victims and for complete satisfaction of all claims for compensation, the Act was passed empowering the Government of India to take necessary steps for processing of the claims and for utilization of disbursal of the amount received in satisfaction of the claims. The Central Government was given the exclusive right to represent the victims and to act in place of, in United States or in India, every citizen entitled to make a claim, Shri Garg urged that on a proper reading of section 8(1) of the Act read with Section 4, exclusion of all victims for all purpose is incomplete and the Act is bad. He submitted that the decree for adjudication of the Court must ascertain the magnitude of the damages and should be able to grant reliefs required by law under heads of strict liability, absolute liability and punitive liability.

53. Shri Garg submitted that it is necessary to consider that the Union of India is liable for the torts. In several decisions to which Shri Garg drew our attention, it has been clarified that Government is not liable only if the tortious act complained has been committed by its servants in exercise of its sovereign powers by which it is meant powers that can be lawfully exercised under sovereign rights only vide Nandram Heeralal v. Union of India, AIR 1978 Madh Pra 209 at p. 212. There is a real and marked distinction between the sovereign functions of the government and those which are non-sovereign and some of the functions that fall in the latter category are those connected with trade, commerce, business and industrial undertakings. Sovereign functions are such acts which are of such a nature as cannot be performed by a private individual or association unless powers are delegated by sovereign authority of State.

54. According to Shri Garg, the Union and the State Governments under the Constitution and as per laws of the Factories, Environment Control, etc. are bound to exercise control on the factories in public interest and public purpose. These functions are not sovereign functions, according to Shri Garg, and the Government in this case was guilty of negligence. In support of this, Shri Garg submitted that the offence of negligence on the part of the Government would be evident from the fact that-

a) the Government allowed the Union Carbide factory to be installed in the heart of the city;

b) the Government allowed habitation in the front of the factory knowing that the most dangerous and lethal gases were being used in the manufacturing processes;

c) the gas leakage from this factory was a common affair and it was agitated continuously by the people, journalists and it was agitated in the Vidhan Sabha right from 1980 to 1984. These features firmly proved, according to Shri Garg, the grossest negligence of the government. Shri Garg submitted that the gas victims had legal and moral right to sue the government and so it had full right to implead all the necessary and proper parties like Union Carbide, UCIL, and also the then Chief Minister Shri Arjun Singh of the State. He drew our attention to Order 2, R. 3 of the Civil Procedure Code. In suits on joint torts, according to Shri Garg, each of the joint tortfeasors is responsible for the injury sustained for the common acts and they can all be sued together. Shri Garg's main criticism has been that the most crucial question of corporate responsibility of the peoples' right to life and their right to guard it as enshrined in Article 21 of the Constitution were sought to be gagged by the act. Shri Garg tried to submit that this was an enabling Act only but not an Act which deprived the victims of their right to sue. He submitted that in this Act, there is denial of natural justice both in the institution under Section 3 and in the conduct of the suit under Section 4. It must be seen that justice is done to all (R. Viswanathan v. Rukh-ul-Mulk syed Abdul Wajid, (1963) 3 SCR 22: (AIR 1963 SC 1). It was urged that it was necessary to give a reasonable notice to the parties. He referred to M. Narayanan Nambiar v. State of Kerala, 1963 Supp. (2) SCR 724: (AIR 1963 SC 1116).

55 Shri Shanti Bhushan appearing for Bhopal Gas Peedit Mahila Udyog Sangathan submitted that if the Act is to be upheld, it has to be read down and construed in

the manner urged by him. It was submitted that when the Bhopal gas disaster took place, which was the worst industrial disaster in the world which resulted in the deaths of several thousands of people and caused serious injuries to lakhs of others, there arose a right to the victims to get not merely damages under the law of the torts but also arose clearly, by virtue of right to life guaranteed as fundamental right by Article 21 of the Constitution a right to get full protection of life and limb. This fundamental right also, according to Shri Shanti Bhushan, embodied within itself a right to have the claim adjudicated by the established courts of law. It is well settled that right of access to courts in respect of violation of their fundamental rights itself is a fundamental right which cannot be denied to the people. Shri Shanti Bhushan submitted that there may be some justification for the Act being passed. He said that the claim against the Union Carbide are covered by the Act. The claims of the victims against the Central Government or any other party who is also liable under tort to the victims is not covered by the Act. The second point that Shri Shanti Bhushan made was that the Act so far as it empowered the Central Government to represent and act in place of the victims is in respect of the civil liability arising out of disaster and not in respect of any right in respect of criminal liability. The Central Government, according to Shri Shanti Bhushan, cannot have any right or authority in relation to any offences which arose out of the disaster and which resulted in criminal liability. It was submitted that there cannot be any settlement or compromise in relation to non-compoundable criminal cases and in respect of compoundable criminal cases the legal right to compound these could only be possessed by the victims alone and the Central Government could not compound those offences on their behalf. It was submitted by Shri Shanti Bhushan that even this Court has no jurisdiction whatsoever to transfer any criminal proceedings to itself either under any provision of the Constitution or under any provision of the Criminal ProcedureCcode or under any other provision of law and, therefore, if the settlement in question was to be treated not as a compromise but as an order of the Court, it would be without jurisdiction and liable to be declared so on the principles laid down, according to Shri Bhushan, by this Court in Antulay's case (AIR 1988 SC 1531 (supra). Shri Shanti Bhushan submitted that even if under the Act, the Central Government is considered to be able to represent the victims and to pursue the litigation on their behalf and even to enter into compromise on their behalf, it would be a gross violation of the constitutional rights of the victims to enter into a settlement with the Union Carbide without giving the victims opportunities to express their views about the fairness or adequacy of the settlement before any court could permit such a settlement to be made.

56 Mr. Shanti Bhushan submitted that the suit which may be brought by the Central Government against Union Carbide under Section 3 of the Act would be a suit of the kind contemplated by the Explanation to Order 23, Rule 3 of the Code of Civil Procedure since the victims are not parties and yet the decree obtained in the suit would bind them. It was, therefore, urged by Shri Shanti Bhushan that the provisions of Section 3(1) of the Act merely empowers the Central Government to enter into a compromise but did not lay down the procedure which was to be followed for entering into any compromise. Therefore, there is nothing which is inconsistent with the provisions of Order 23, Rule 3-B of the CPC to which the provisions Section 11 of the Act be applied. If, however, by any stretch of argument the provisions of the Act could be construed so as to override the provisions of Order 23, Rule 3-B CPC, it was urged, the same would render the provisions of the Act violative of the victims' fundamental rights and the actions would be rendered unconstitutional. If it empowered the Central Government to compromise the victims' rights, without even having to apply the principles of natural justice, then it would be unconstitutional and as such bad. Mr. Shanti Bhushan, Ms. Jaising and Mr. Garg submitted that these procedures must be construed in accordance with the provisions contained in Order 23, Rule 3-B CPC and an opportunity must be given to those whose claims are being compromised to show to the court that the compromise is not fair and should not accordingly be permitted by the court. Such a hearing in terms, according to counsel, of Order 23, Rule 3-B CPC has to be before the compromise is entered into. It was then submitted that Section 3 of the Act only empowers the Central Government to represent and act in place of the victims and to institute suits on behalf of the victims or even to enter into compromise on behalf of the victims.

57 The Act does not create new causes of action; create special courts. The jurisdiction of the civil court to entertain suit would still arise out of Section 9 of the CPC and the substantive cause of action and the nature of the reliefs available would also continue to remain unchanged. The only difference produced by the provisions of the Act would be that instead of the suit being filed by the victims themselves the suit should be filed by the Central Government on their behalf.

58 Shri Shanti Bhushan then argued that the cause of action of each victim is separate and entitled him to bring a suit for separate amount according to the damages suffered by him. He submitted that even where the Central Government was empowered to file suits on behalf of all the victims it could have been asked for by the victims themselves, namely, a decree awarding various specified amounts to different victims whose names had to be disclosed. According to Shri Shanti Bhushan, even if all the details were not available at the time when the suit was filed, the details of the victims damages had to be procured and specified in the plaint before a proper decree could be passed in the suit. Even if the subject matter of

the suit had to be compromised between the Central Government and the Union Carbide the compromise had to indicate as to what amount would be payable to each victim, in addition to the total amount which was payable by Union Carbide, submitted Shri Shanti Bhushan. It was submitted that there was nothing in the Act which permitted the Central Government to enter into any general compromise with Union Carbide providing for the lump sum amount without disclosure as to how much amount is payable to each victim.

59 If the Act in question had not been enacted, the victims would have been entitled to not only sue Union Carbide themselves but also to enter into any compromise or settlement of their claims with the Union Carbide immediately. The provisions of the Act, according to Mr. Shanti Bhushan, deprive the victims of their legal right and such deprivation of their rights and creation of a corresponding right in the Central Government can be treated as reasonable only if the deprivation of their rights imposed a corresponding ability on the Central Government to continue to pay such interim relief to the victims as they might be entitled to till the time that the Central Government is able to obtain the whole amount of compensation from the Union Carbide. He submitted that the deprivation of the right of the victims to sue for their claims and denial of access to justice and to assert their claims and the substitution of the Central Government to carry on the litigation for or on their behalf can only be justified, if and only if the Central Government is enjoined to provide for such interim relief or continue to provide in the words of Judge Keenan, as a matter of fundamental human decency, such interim relief, necessary to enable the victims to fight the battle. Counsel submitted that the act must be so read. Shri Shanti Bhushan urged that if the Act is construed in such a manner that it did not create such an obligation on the Central Government, the Act cannot be upheld as a reasonable provision when it deprived the victims of their normal legal rights of immediately obtaining compensation from Union Carbide. He referred to Section 10(b) of the Act and clauses 10 and 11(1) of the Scheme to show that the legislative policy underlying the Bhopal Act clearly contemplated payment of interim relief to the victims from time to time till such time as the Central Government was able to recover from Union Carbide full amount of compensation from which the interim reliefs paid by the Central Government were to be deducted from the amount payable to them by way of final disbursal of the amounts recovered.

60 The settlement is bad, according to Shri Shanti Bhushan if part of the bargain was giving up of the criminal liability against UCIL and UCC. Shri Shanti Bhushan submitted that this Court should not hesitate to declare that the settlement is bad because the fight will go on and the victims should be provided reliefs and interim compensation by the Central Government to be reimbursed ultimately from the amount to be realized by the Central Government. This obligation was over and above the liability of the Central Government as a joint tortfeasor, according to Shri Shanti Bhushan.

61 Shri Kailash Vasdev, appearing for the petitioners in writ petition No. 1551/86 submitted that the Act displaced the claimants in the matter of their right to seek redressal and remedies of the actual injury and harm caused individually to the claimants. The Act in question by replacing the Central Government in place of the victims, by conferment of exclusive right to sue in place of victims, according to him, contravenes the procedure established by law. The right to sue for the wrong done to an individual was exclusive to the individual. It was submitted that under the civil law of the country, individuals have rights to enforce their claims and any deprivation would place them into a different category from the other litigants. The right to enter into compromise, it was further submitted, without consultation of the victims, if that is the construction of Section 3 read with Section 4 of the Act, then it is violative of procedure established by law. The procedure substituted if that be the construction of the Act, would be in violation of the principles of natural justice and as such bad. It was submitted that the concept of 'parens patriae' would not be applicable in these cases. It was submitted that traditionally, sovereigns can sue under the doctrine of 'parents patriae' only for violations of their "quasi-sovereign" interests. Such interests do not include the claims of individual citizens. It was submitted that the Act in question is different from the concept of parens patriae because there was no special need to be satisfied and a class action, according to Shri Vasdev, would have served the same purpose as a suit brought under the statute and ought to have been preferred because it safeguarded claimants' right to procedural due process. In addition, a suit brought under the statute would threaten the victims' substantive due process rights. It was further submitted that in order to sustain an action, it was necessary for the Government of India to have standing.

62 Counsel submitted that 'parens patriae' has received no judicial recognition in this country as a basis for recovery of money damages for injuries suffered by individuals. He may be right to that extent but the doctrine of parens partriae has been used in India in varying contexts and contingencies.

63 We are of the opinion that the Act in question was passed in recognition of the right of the sovereign to act as parens patriae as contended by the learned Attorney General. The Government of India in order to effectively safeguard the rights of the victims in the matter of the conduct of the case was entitled to act as parens patriae, which position was reinforced by the statutory provisions, namely, the Act. We have noted the several decisions referred to hereinbefore, namely, Bhudhkaran Chankhani

v. Thakur Prosad Shad (AIR 1942 Cal 311) (supra), Banku Behary v. Banku Behari Hazra (AIR 1943 Cal 203) (supra), Kumaraswami Mudaliar v. Rajammal (AIR 1951 Mad 563) (supra) and to the decision of this Court in Ram Saroop Dasji v. S.P. Sahi (AIR 1959 SC 951) (supra) and the decision of the American Supreme Court in Alfred Schnapp v. Puerto Rico (1982) 458 US 592 (supra). It has to be borne in mind that conceptually and jurisprudentially the doctrine of parens patriae is not limited to representation of some of the victims outside the territories of the country. It is true that the doctrine has been so utilized in America so far. In our opinion, learned Attorney General was right in contending that where citizens of a country are victims of a tragedy because of the negligence of any multinational, a peculiar situation arises which calls for suitable effective machinery to articulate and effectuate the grievances and demands of the victims, for which the conventional adversary system would be totally inadequate. The State in discharge of its sovereign obligation must come forward. The Indian state because of its constitutional commitment if obliged to take upon itself the claims of the victims and to protect them in their hour of need. Learned Attorney General was also right in submitting that the decisions of the Calcutta, Madras and U.S. Supreme Court clearly indicate that parens patriae doctrine can be invoked by sovereign state within India, even if it be contended that it has not so far been invoked inside India in respect of claims for damages of victims suffered at the hands of the multinational. In our opinion, conceptually and jurisprudentially, there is no bar on the State to assume responsibilities analogous to parens patriae to discharge the State's obligations under the Constitution. What the Central Government has done in the instant case seems to us to be an expression of its sovereign power. This power is plenary and inherent in every sovereign state to do all things which promote the health, peace, morals, education and good order of the people and tend to increase for the wealth and prosperity of the state. Sovereignty is difficult to define. (See in this connection, Weaver on Constitutional Law, p. 490). By the nature of things, the state sovereignty in these matters cannot be limited. It has to be adjusted to the conditions touching the common welfare when covered by legislative enactments. This power is to the public what the law of necessity is to the individual. It is comprehended in the maxim salus populi suprema lex regard for public welfare is the highest law. It is not a rule, it is an evolution. This power has always been as broad as public welfare and as strong as the arm of the state, this can only be measured by the legislative will of the people, subject to the fundamental rights and constitutional limitations. This is an emanation of sovereignty subject to as aforesaid.[sic] Indeed, it is the obligation of the State to assume such responsibility and protect its citizens. It has to be borne in mind, as was stressed by the learned Attorney General, that conferment of power and the manner of its exercise are two different matters. It was submitted that the power to conduct the suit and to compromise, if necessary, was vested in the Central Government for the purpose of the Act. The power to compromise and to conduct the proceedings are not uncanalised or arbitrary. These were clearly exercisable only in the ultimate interests of the victims. The possibility of abuse of a statute does not impart to it any element of invalidity. In this connection, the observations of Viscount Simonds in Belfast Corporation v. O.D. Cars (1960) AC 490 at 520-21) are relevant where it was emphasized that validity of a measure is not to be determined by its application to particular cases. This Court in Collector of Customs, Madras v. Sampathu Chetty, (1962) 3 SCR 786 at p. 825: (AIR 1962 SC 316) emphasized that the constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. It has to be borne in mind that if upon so judged it passes the test of reasonableness, then the possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid. See in this connection also the observations in P.J. Irani v. State of Madras (1962) 2 SCR 169 at p. 178 to 181: (AIR 1961 SC 1731 at pp. 1736, 1737) and D.K. Trivedi v. State of Gujarat 1986 (supp) SCC 20 at p. 60-61: (AIR 1986 SC 1323 at p. 1350).

64 Sections 3 and 4 of the Act should be read together as contended by the learned Attorney General, along with other provisions of the Act and in particular Sections 9 and 11 of the Act. These should be appreciated in the context of the object sought to be achieved by the Act as indicated in the Statement of Objects and Reasons and the Preamble to the Act. The Act was so designed that the victims of the disaster are fully protected and the claims of compensation or damages for loss of life or personal injuries or in respect of other matters arising out of or connected with the disaster are processed speedily, effectively, equitably and to the best advantage of the claimants. Section 3 of the Act is subject to other provisions of the Act which includes Sections 4 and 11. Section 4 of the Act opens with non obstante clause, vis-a-vis, Section 3 and, therefore, overrides Section 3. Learned Attorney General submitted that the right of the Central Government under section 3 of the Act was to represent the victims exclusively and act in the place of the victims. The Central Government, it was urged, in other words, is substituted in the place of the victims and is the dominus litus. Learned Attorney General submitted that the dominus litus carries with it the right to conduct the suit in the best manner as it deems fit, including, the right to withdraw and right to enter into compromise. The right to withdraw and the right to compromise conferred by Section 3(2) of the act cannot be exercised to defeat the rights of the victims. As to how the rights should be exercised is guided by the objects and reasons contained in the preamble, namely, to speedily and effectively process the claims of the victims and to protect their claims. The Act was passed replacing the

Ordinance at a time when many private plaintiffs had instituted complaints/suits in the American Courts. In such a situation, the Government of India acting in place of the victims necessarily should have right under the statute to act in all situations including the position of withdrawing the suit or to enter into compromise. Learned Attorney General submitted that if the UCC were to agree to pay a lump sum amount which would be just, fair and equitable, but insists on a condition that the proceedings should be completely withdrawn, then necessarily there should be power under the Act to so withdraw. According to him, therefore the act engrafted a provision empowering the Government to compromise. The provisions under Section 3(2)(b) of the Act to enter into compromise was consistent with the powers of dominus litis. In this connection, our attention was drawn to the definition of 'Dominus litis' in Black's Law Dictionary, Fifth Edition, p. 437, which states as follows:

> "'Dominus litis'. The master of the suit; i.e. the person who was really and directly interested in the suit as a party, as distinguished from his attorney or advocate. But the term is also applied to one who, though nor originally a party, has made himself such, by intervention or otherwise, and has assumed entire control and responsibility for one side and is treated by the Court as liable for costs. Virginia Electric & Power Co. v. Bowers 181 Va 542, 25 S.E. 2d 361.263".

65 Learned Attorney General sought to contend that the victims had not been excluded entirely either in the conduct of proceedings or in entering into compromise, and he referred to the proceedings in detail emphasizing the participation of some of the victims at some stage. He drew our attention to the fact that the victims had filed separate consolidated complaints in addition to the complaint filed by the government of India. Judge Keenan of the District Court of America had passed orders permitting the victims to be represented not only by the private Attorneys but also by the Government of India. Hence, it was submitted that it could not be contended that the victims had been excluded. Learned Attorney General further contended that pursuant to the orders passed by Judge Keenan imposing certain conditions against the Union Carbide and allowing the motion for forum non convenience of the UCC that the suit came back to India and was instituted before the District Court of Bhopal. In those circumstances, it was urged by the learned Attorney General that the private plaintiffs who went to America and who were represented by the contingency lawyers fully knew that they could also have joined in the said suit as they were before the American Court along with the Government of India. It was contended that in the proceedings at any point of time or stage including when the compromise was entered into, these private plaintiffs could have participated in the court proceedings and could have made their representation, if they so desired. Even in the Indian suits, these private parties have been permitted to continue as parties represented by separate counsel even though the Act empowers the Union to be the sole plaintiff. Learned Attorney General submitted that Section 4 of the Act clearly enabled the victims to exercise their right of participation in the proceedings. The Central Government was enjoined to have due regard to any matter which such person might require to be urged. Indeed, the learned Attorney General urged very strenuously that in the instant case, Zehreeli Gas Kand Sangharsh Morcha and Jana Swasthya Kendra (Bhopal) had filed before the District Judge, Bhopal, an application under Order 1 Rule 8 read with Order 1 Rule 10 and Section 151 of the CPC for their intervention on behalf of the victims. They had participated in the hearing before the learned District Judge, who referred to their intervention in the order. It was further emphasized that when the UCC went up in revision to the High Court of Madhya Pradesh at Jabalpur against the interim compensation ordered to be paid by the District Court, the intervener through its Advocate, Mr. Vibhuti Jha had participated in the proceedings. The aforesaid Association had also intervened in the civil appeals preferred pursuant to the special leave granted by this Court to the Union of India and Union Carbide against the judgement of the High Court for interim compensation. In those circumstances it was submitted that there did not exist any other gas victim intervening in the proceedings, claiming participation under Section 4. Hence, the right to compromise provided for by the Act could not be held to be violative of the principles of natural justice. According to the learned Attorney General, this Court first proposed the order to counsel in court and after they agreed thereto, dictated the order on 14th February, 1989. On 15th February, 1989 after the Memorandum of Settlement was filed pursuant to the orders of the court, further orders were passed. The said Association, namely, Zehreeli Gas Kand Sangharsh Morcha was present, according to the records, in the Court on both the dates and did not apparently object to the compromise. Mr. Charanlal Sahu, one of the petitioners in the writ petition, had watched the proceedings and after the Court had passed the order on 15th February, 1989 mentioned that he had filed a suit for Rs. 100 crores. Learned Attorney General submitted that Mr. Sahu neither protested against the settlement nor did he make any prayer to be heard. Shri Charan Lal Sahu, in the petition of opposition in one of these matters have prayed that a sum of Rs. 100 million should be paid over to him for himself as well as on behalf of those victims whom he claimed to represent. In the aforesaid background on the construction of the Section, it was urged by the learned Attorney General that Section 3 of the Act cannot be held to be unconstitutional. The same provided a just, fair and reasonable procedure and enabled the victims to participate in the proceedings at all stages - those who were capable and willing to do so. Our attention was drawn to the fact that Section 11 of the Act provides that the provisions of the act shall have effect notwithstanding anything inconsistent therewith contained in any other en-

actment other than the Act. It was, therefore, urged that the provisions of the Civil Procedure Code stood overriden in respect of the areas covered by the Act, namely, (a) representation, (b) powers of representation; and (c) compromise.

66 According to the learned Attorney General, the Act did not violate the principles of natural justice. The provisions of the CPC could not be read into the Act for Section 11 of the Act provides that the application of the provision of the Civil Procedure Code in so far as those were inconsistent with the Act should be construed as overridden in respect of areas covered by it. Furthermore, inasmuch as Section 4 had given a qualified right of participation to the victims, there cannot be any question of violation of the principles of natural justice. The scope of the application of the principles of natural justice cannot be judged by any strait-jacket formula. According to him, the extension of the principles of natural justice beyond what is provided by the act in Sections 3 & 4, was unwarranted and would deprive the provisions of the statute of their efficacy in relation to the achievement of 'speedy relief', which is the object intended to be achieved. He emphasized that the process of notice, consultation and exchange of information, informed decision-making process, the modalities of assessing a consensus of opinion would involve such time that the Government would be totally unable to act in the matter efficiently, effectively and purposefully on behalf of the victims for realization of the just dues of the victims. He further urged that the Civil Procedure Code before its amendment in 1976 did not have the provisions of Order I Rules 8(4), (5) & (6) and Explanations etc. nor Order XXIII Rules 3A and 3B. Before the amendment the High Court had taken a view against the requirement of hearing the parties represented in the suit under Order I, Rule 8 before it before settling or disposing of the suit. Our attention was drawn to the decision of the Calcutta High Court in Chintaharan Ghose v. Gujaraddi Sheik. AIR 1951 Cal 456 at pp. 457-459, wherein it was held by the learned single Judge that the plaintiff in a representative suit had right to compromise subject to the conditions that the suit was properly filed in terms of the provisions of that Rule and the settlement was agreed bona fide. Learned Attorney General in that context contended that when the suit was validly instituted, the plaintiff had a right to compromise the suit and there need not be any provision for notice to the parties represented before entering into any compromise. Reliance was placed on the decision of the Allahabad High Court in Ram Sarup v. Nanak Ram, AIR 1952 All 275, where it was held that a compromise entered into in a suit filed under Order I, Rule 8 of the CPC was binding on all persons as the plaintiffs who had instituted the suit in representative capacity had the authority to compromise. He further submitted that most, if not all, of the victims had given their power of attorney which were duly filed in favour of the Union of India. These powers of attorney have neither been impeached nor revoked or withdrawn. By virtue of the powers of attorney the Union of India, it was stated, had the authority to file the suits and to compromise the interests of the victims if so required. The Act in question itself contemplates settlement as we have noted, and a settlement would need a common spokesman.

It was submitted that the Government of India as the statutory representative discharged its duty and is in a centralized position of assessing the merits and demerits of any proposed course of action. So far as the act of compromise, abridging or curtailing the ambit of the rights of the victims, it was submitted that in respect of liabilities of UCC & UCIL, be it corporate, criminal or tortious, it was open to an individual to take a decision of enforcing the liability to its logical extent or stopping short of it and acceding to a compromise. Just as an individual can make an election in the matter of adjudication of liability so can a statutory representative make an election. Therefore, it is wholly wrong to contend, it was urged, that Section 3(ii) (b) is inconsistent with individual's right of election and at the same time it provides the centralized decision making processes to effectively adjudge and secure the common good. It was only a central agency like the Government of India, who could have a perspective of the totality of the claims and a vision of the problems of individual plaintiffs in enforcing these, it was urged. It was emphasized that it has to be borne in mind that a compromise is a legal act. In the present case, it is a part of the conduct of the suit. It is, therefore, imperative that the choice of compromise is made carefully, cautiously and with a measure of discretion, it was submitted. But if any claimant wished to be associated with the conduct of the suit, he would necessarily have been afforded an opportunity for that purpose, according to the learned Attorney General. In this connection, reference was made to Section 4 of the Act. On the other hand, an individual who did not participate in the conduct of the suit and who is unaware of the various intricacies of the case could hardly be expected to meaningfully partake in the legal act of settlement either in conducting the proceedings or entering into compromise, it was urged. In those circumstances, the learned Attorney General submitted that the orders of 14-15th February, 1989 and the Memorandum of Settlement were justified both under the Act and the Constitution. According to him, the terms of Settlement might be envisaged as pursuant to Section 3(ii)(b) of the Act, which was filed according to him pursuant to judicial direction. He sought more than once to emphasize, that the order was passed by the highest Court of the land in exercise of extraordinary jurisdiction vested in it under the Constitution.

68 Our attention was drawn to several decisions for the power of this Court under Articles 136 and 142 of the Constitution. Looked closely at the provisions of the act, it was contended that taking into consideration all the

factors, namely, possibilities of champerty, exploitation, unconscionable agreements and the need to represent the dead and the disabled, the course of events would reveal a methodical and systematic protection and vindication of rights to the largest possible extent. It was observed that the rights are indispensably valuable possessions, but the right is something which a man can stand on, something which must be demanded or insisted upon without embarrassment or shame. When rights are curtailed, permissibility of such a measure can be examined only upon the strength, urgency and the pre-eminence of rights and the largest good of the large number sought to be served by curtailment. Under the circumstances which were faced by the victims of Bhopal gas tragedy, the justifying basis, according to the learned Attorney General, or ground of human rights is that every person morally ought to have something to which he or she is entitled. It was emphasized that the Statute aimed at it. The Act provides for assumption of rights to sue with the aim of securing speedy, effective and equitable results to the best advantage of the claimants. The Act and the scheme, according to the learned Attorney General, sought to translate that profession into a system of faith and possible association when in doubt. Unless such a profession is shown to be unconscionable under the circumstances or strikes judicial conscience as a subversion of the objects of the Act, a declaredly fair, just and equitable exercise of a valid power would not be open to challenge. He disputed the submission that the right to represent victims postulated as contended mainly by the counsel on behalf of the petitioners, a predetermination of each individual claim as a sine qua non for proceeding with the action. Such a construction would deplete the case of its vigour, urgency and sense of purpose, he urged. In this case, with the first of the cases having been filed in U.S. Federal Court on December 7, 1984 a settlement would have been reached for a much smaller sum to the detriment of the victims. Learned Attorney General emphasized that this background has to be kept in mind while adjudging the validity of the Act and the appropriateness of the conduct of the suit in the settlement entered into.

69 He submitted that it has to be borne in mind that if the contentions of the petitioners are entertained, the rights theoretically might be upheld but the end of justice would stand sacrificed. It is in those circumstances that it was emphasized that the claimant is an individual and is the best person to speak about his injury. The knowledge in relation to his injury is relevant for the purpose of compensation, whose distribution and disbursement is the secondary stage. It is fallacious to suggest that the plaint was not based upon necessary data. He insisted that the figures mentioned in the plaint although tentative were not mentioned without examination or analysis.

70. It was further submitted by the learned Attorney General that while the Government of India had proceeded against the UCC, it had to represent the victims as a class and it was not possible to define each individual's right after careful scrutiny, nor was it necessary or possible to do so in a mass disaster case. The settlement was a substitute for adjudication since it involved a process of reparation and relief. The relief and reparation cannot be said to be irrelevant for the purpose of the Act. It was stated that the alleged liability of the Government of India kor any claim asserted against the joint tort feasors should not be allowed to be a constraint on the Government of India to protect the interests of its own citizens. Any counter-claim by UCC or any claim by a citizen against the Government cannot vitiate the action of the State in the collective interest of the victims, who are the citizens. Learned Attorney General submitted that any industrial activity, normally, has to be licensed. The mere regulation of any activity does not carry with it legally a presumption of liability for injury caused by the activity in the event of a mishap occurring in the course of such an activity. In any event, the learned Attorney General submitted that Government of India enjoys sovereign immunity in accordance with settled law. If this were not the case, the Sovereign will have to abandon all regulatory functions including the licensing of drivers of automobiles. Hence, we have to examine the question whether even on the assumption that there was negligence on the part of the Government of India in permitting licensing of the industry set up by the Union Carbide in Bhopal or permitting the factory to grow up, such permission or conduct of the Union of India was responsible for the damage which has been suffered as a result of Bhopal gas leakage. It is further to be examined whether such conduct was in discharge of the sovereign functions of the Government, and as such damages, if any, resulting therefrom are liable to be proceeded against the Government as a joint tort-feasor or not. In those circumstances, it was further asserted on behalf of the Union of India that though calculation of damages in a precise manner is a logical consequence of a suit in progress it cannot be said to be a condition precedent for the purpose of settling the matter. Learned Attorney General urged that the accountability to the victims should be through the court. He urged that the allegation that a large number of victims did not give consent to the settlement entered into is really of no relevance in the matter of a compromise in a mass tort action. It was highlighted that it is possible that those who do not need urgent relief or are uninformed of the issues in the case may choose to deny consent and may place the flow of relief in jeopardy. Thus, consent based upon individual subjective opinion can never be correlated to the proposal of an overall settlement in an urgent matter. Learned Attorney General urged further that if indeed consent were to be insisted upon as a mandatory requirement of a statute, it would not necessarily lead to an accurate reflection of the victims' opinion as opinions may be diverse. No individual would be in a position to relate him-

self to a lump sum figure and would not be able to define his expectations on a global criteria. In such circumstances the value of consent is very much diminished. It was urged that if at all consent was to be insisted it should not be an expression of the mind without supporting information and response. To make consent meaningful it is necessary that it must be assertion of a right to be exercised in a meaningful manner based on information and comprehension of collective welfare and individual good. In a matter of such dimensions the insistence upon consent will lead to a process of enquiry which might make effective consideration of any proposal impossible. For the purpose of affording consent, it would also be necessary that each individual not only assesses the damages to himself objectively and places his opinion in the realm of fair expectation, but would also have to do so in respect of others. The learned Attorney General advanced various reasons why it is difficult now or impossible to have the concurrence of all.

71 In answer to the criticism by the petitioners, it was explained on behalf of the Union of India that UCIL was not impleaded as a party in the suit because it would have militated against the pleas of multi-national enterprise liability and the entire theory of the case in the plaint. It was highlighted that the power to represent under the Act was exclusive, the power to compromise for the Government of India is without reference to the victims, yet it is a power guided by the sole object of the welfare of the victims. The presence and ultimately the careful imprimatur of the judicial process is the best safeguard to the victims. Leaned Attorney General insisted that hearing the parties after the settlement would also not serve any purpose. He urged that it can never be ascertained with certainty whether the victims or groups have authorized what was being allegedly spoken on their behalf; and that the victims would be unable to judge a proposal of this nature. A method of consensus need not be evolved like in America where every settlement made by contingency fee lawyers who are anxious to obtain their share automatically become adversaries of the victims and the court should therefore be satisfied. Here the court arrived at the figure and directed the parties to file a settlement on the basis of its order of February 14, 1989 and the intervenors were heard, it was urged. It was also urged that notice to the victims individually would have been a difficult exercise and analysis of their response time-consuming.

72. The learned Attorney General urged that neither the Central Government nor the State Government of Madhya Pradesh is liable for the claim of the victims. He asserted that, on the facts of the present case, there is and can be no liability on their part as joint tort-features. For the welfare of the community several socio-economic activities will have to be permitted by the Government. Many of these activities may have to be regulated by licensing provisions contained in Statutes made either by Parliament or by State Legislatures. Any injury caused to a person, to his life or liberty in the conduct of a licensed authority so as to make the said licensing authority or the government liable to damages would not be in conformity with jurisprudential principle. If in such circumstances, it was urged on behalf of the Government, the public exchequer is made liable it will cause great public injury and may result in drainage of the treasury. It would terrorise the welfare state from acting for development of the people, and will affect the sovereign governmental activities which are beneficial to the community not being adequately licensed and would thereby lead to public injury. In any event, it was urged on behalf of the Government, that such licensing authorities even assuming without admitting could be held to be liable as joint tort-feasors, it could be so held only on adequate allegations of negligence with full particulars and details of the alleged act or omission of the licensing authority alleged and its direct nexus to the injury caused to the victims. It had to be proved by cogent and adequate evidence. On some conjecture or surmise without any foundation on facts, Government's right to represent the victims cannot be challenged. It was asserted that even if the Government is considered to be liable as a joint tort-feasor, it will be entitled to claim sovereign immunity on the law as it now stands.

73. Reference was made to the decision of this Court in Kasturilal Ralia Ram Jain v. State of U.P. (1965) 1 SCR 375: (AIR 1965 SC 1039), where the conduct of some police officers in seizing gold in exercise of their statutory powers was held to be in discharge of the sovereign functions of the State and such activities enjoyed sovereign immunities. The liability of the Government of India under the Constitution has to be referred to Article 300, which takes us to Sections 15 and 18 of the Indian Independence Act, 1947, and Section 176(1) of the Government of India Act, 1935. Reference was also made to the observations of this Court in State of Rajasthan v. Mst. Vidhyawati, 1962 (2) Supp SCR 989: (AIR 1962 SC 933).

74. We have noted the shareholding of UCC. The circumstances that financial institutions held shares in the UCIL would not disqualify the Government of India from acting as parens partriae and in discharging of its statutory duties under the Act. The suit was filed only against UCIL. On the basis of the claim made by the Government of India, UCIL was not a necessary party. It was suing only the multi-national based on several legal grounds of liability of the UCC, inter alia, on the basis of enterprise liability. If the Government of India had instituted a suit against UCIL to a certain extent it would have weakened its case against UCC in view of the judgement of this Court in M.C. Mehta's Case, (AIR 1987 SC 1086) (supra). According to learned Attorney General, the Union of India in the present case was not proceeding on the basis of lesser liability of UCC predicated in

Mehta's case but on a different jurisprudential principle to make UCC strictly and absolutely liable for the entire damages.

75. The learned Attorney General submitted that even assuming for the purpose of argument without conceding that any objection can be raised for the Government of India representing the victims, to the present situation the doctrine of necessity applied. The UCC had to be sued before the American courts. The tragedy was treated as a national calamity, and the Government of India had the right, and indeed the duty, to take care of its citizens, in the exercise of its parens patriae jurisdiction or on principle analogous thereto. After having statutorily armed itself in recognition of such parens patriae right or on principles analogous thereto, it went to the American courts. No other person was properly designed for representing the victims as a foreign court had to recognize a right of representation. The Government of India was permitted to represent the victims before the American courts. Private plaintiffs were also represented by their attorneys. A Committee of three attorneys was formed before the case proceeded before Judge Keenan. It was highlighted that the order of Judge Keenan permitted the Government of India to represent the victims. If there was any remote conflict of interests between the Union of India and the victims from the theoretical point of view the doctrine of necessity would override the possible violation of the principles of natural justice - that no man should be Judge in his own case. Reference may be made to Halsbury's laws of England, Vol, 1 4th Ed., page 89, para 73, where it was pointed that if all the members of the only tribunal competent to determine a matter are subject to disqualification, they may be authorized and obliged to hear that matter by virtue of the operation of the common law doctrine of necessity. Reference was also made to De Smith's Judicial Review of Administrative Action (4th Edition pages 276-277). See also G.A. Flick - Natural Justice (1379, pages 138-141). Reference was also made to the observations of this Court in J. Mohapatra & Co. v. State of Orissa, (1984) 4 SCC 103: (AIR 1984 SC 1572), where at page 112 of the report the Court recognized the principle of necessity. It was submitted that these were situations where on the principle of doctrine of necessity a person interested was held not disqualified to adjudicate on his rights. The present is a case where the Government of India only represented the victims as a party and did not adjudicate between the victims and the UCC. It is the Court which would adjudicate the rights of the victims. The representation of the victims by the Government of India cannot be held to be bad, and there is and there was no scope of violation of any principle of natural justice. We are of the opinion in the facts and the circumstances of the case that this contention urged by Union of India is right. There was no scope of violation of the principle of natural justice on this score.

76. It was also urged that the doctrine of de facto representation will also apply to the facts and the circumstances of the present case. Reliance was placed on the decision of this Court in Gokaraju Rangaraju v. State of A.P., (1981) 3 SCR 474: (AIR 1981 SC 1473) where it was held that the doctrine of de facto representation envisages that acts performed within the scope of assumed official authority in the interest of public or third persons and not for one's own benefit, are generally to be treated as binding as if they were the acts of officers de jure. This doctrine is founded on good sense, sound policy and practical expediency. It is aimed at the prevention of public and private mischief and protection of public and private interest. It avoids endless confusion and needless chaos. Reference was made to the observation of this Court in Pushpadevi Jatia v. M.L. Wadhawan, (1987) 3 SCC 367 at pp. 389-390 and M/s. Beopar Sahayak (P) Ltd. v. Vishwa Nath, (1987) 3 SCC 693 at pp. 702 & 703: (AIR 1987 SC 2111). Apart from the aforesaid doctrine, doctrine of bona fide representation was sought to be resorted to in the circumstances. In this connection, reference was made to Dharampal Singh v. Director of Small Industries Services, AIR 1980 SC 1828, D.K. Mohammad Sulaiman v. N.C. Mohammad Ismail, (1966) 1 SCR 937: (AIR 1966 SC 792) and Malkarjun in Shigramappa Pasare v. Narhari Bin Shivappa, (1900) 27 Ind App 216 (PC).

77. It was further submitted that the initiation of criminal proceedings and then quashing thereof would not make the Act ultra vires so far as is concerned [sic]. Learned Attorney General submitted that the Act only authorized the Government of India to represent the victims to enforce their claims for damages under the Act. The Government as such had nothing to do with the quashing of the criminal liability of UCC or UCIL to the victims. He further submitted that quashing of criminal proceedings and it was not representing the victims in respect of the criminal proceedings was done by the Court in exercise of plenary powers under Articles 136 and 142 of the Constitution. In this connection, reference was made to State of U.P. v. Poosu, (1976) 3 SCR 1005: (AIR 1976 SC 1750), K.M. Nanavati v. State of Bombay, (1961) I SCR 497: (AIR 1961 SC 112). According to the learned Attorney General, there is also power in the Supreme Court to suggest a settlement and give relief as in Ram Gopal v. Smt. Sarubai, (1981) 4 SCC 505, India Mica & Micanite Industries Ltd. v. State of Bihar, (1982) 3 SCC 182.

78 Leaned Attorney General urged that the Supreme Court is empowered to act even outside a Statute and give relief in addition to what is contemplated by the latter in exercise of its plenary power. This court acts not only as a Court of Appeal but is also a Court of Equity. See Roshanlal Nuthiala v. Mohan Singh, (1975) 2 SCR 491: (AIR 1975 SC 824). During the course of hearing

of the petitions, he informed this Court that the Government of India and the State Government of Madhya Pradesh refuted and denied any liability, partial or total, of any sort in the Bhopal gas leak disaster, and this position is supported by the present state of law. It was, however, submitted that any claim against the Government of India for its alleged tortious liability was outside the purview of the Act and such claims, if any, are not extinguished by reason of the orders dated 14th & 15th February, 1989 of this Court.

79. Learned Attorney General further stated that the amount of $470 million which was secured as a result of the memorandum of settlement and the said orders of this Court would be meant exclusively for the benefit of the victims who have suffered on account of the Bhopal gas leak disaster. The Government of India would not seek any reimbursement on account of the expenditure incurred suo motu for relief and rehabilitation of the Bhopal victims nor will the Government or its instrumentality make any claim on its own arising from this disaster. He further assured this Court that in the event of disbursement of compensation being initiated either under the Act or under the orders of this Court, a notification would be instantaneously issued under Section 5(3) of the Act authorizing the Commissioner or any other officers to discharge functions and exercise all or any powers which the Central Government may exercise under Section 5 to enable the victims to place before the Commissioner or the Deputy Commissioner any additional evidence that they would like to be considered.

80. The Constitution Bench of this Court presided over by the learned Chief Justice has pronounced an order on 4th May, 1989 giving reasons for the orders passed on 14th-15th February, 1989. Inasmuch as good deal of criticism was advanced before this Court during the hearing of the arguments on behalf of the petitioners about the propriety and validity of the settlement dated 14th-15th February, 1989 even though the same was not directly in issue before us it is necessary to refer briefly to what the Constitution Bench has stated in the said order dated 4th May, 1989. After referring to the facts leading to the settlement, the Court has set out the brief reasons on the following points:-

(a) How did the Court arrive at the sum of 470 million US dollars for an overall settlement? (b) Why did the Court consider the sum of 470 million dollars as 'just, equitable and reasonable'? (c) Why did the Court not pronounce on certain important legal questions of far-reaching importance said to arise in **t**he appeals as to the principles of liability of monolithic, economically entrenched multinational companies operating with inherently dangerous technologies in the developing countries of the third world? These questions were said to be of great contemporary relevance to the democracies of the third world. This court recognized that there was another aspect of the review pertaining to the part of the settlement which terminated the criminal proceedings. The questions raised on the point in the review-petitions, the Court was of the view, prima facie merit consideration and, therefore, abstained from saying anything which might tend to pre-judge this issue one way or the other.

81 The basic consideration, the Court recorded, motivating the conclusion of the settlement was the compelling need for urgent relief, and the Court set out the law's delays only considering that there was a compelling duty both judicial and humane, to secure immediate relief to the victims. In doing so, the court did not enter upon any forbidden ground, the Court stated. The Court noted that indeed efforts had already been made in this direction by Judge Keenan and the learned District Judge of Bhopal. Even at the opening of the arguments in the appeals, the Court had suggested to learned counsel to reach a just and fair settlement. And when counsel met for rescheduling of the hearings the suggestion was reiterated. The Court recorded that the response of learned counsel was positive in attempting a settlement but they expressed a certain degree of uneasiness and skepticism at the prospects of success in view of their past experience of such negotiations when, as they stated, there had been uninformed and even irresponsible criticism of the attempts at settlement.

82 Learned Attorney General had made available to the Court the particulars of offers and counter-offers made on previous occasions and the history of settlement. In those circumstances, the Court examined the prima facie material as the basis of quantification of a sum which, having regard to all the circumstances including the prospect of delays inherent in the judicial process in India and thereafter in the matter of domestication of the decree in the U.S. for the purpose of execution and directed that 470 million US dollars, which upon immediate payment with interest over a reasonable period, pleading actual distribution amongst the claimants, would aggregate to nearly 500 million US dollars or its rupee equivalent of approximately Rs. 750 crores which the learned Attorney General had suggested, be made the basis of settlement, and both the parties accepted this direction.

83 The Court reiterated that the settlement proposals were considered on the premise that the Government had the exclusive statutory authority to represent and act on behalf of the victims and neither counsel had any reservation on this. The order was also made on the premise that the Act was a valid law. The Court declared that in the event the Act is declared void in the pending proceedings challenging its validity, the order dated 14th February, 1989 would require to be examined in the light of that decision. The Court also reiterated that if any material was placed before it from which a reasonable in-

ference was possible that the UCC had, at any time earlier, offered to pay any sum higher than an outright down payment of US 470 million dollars, this Court would straight away initiate suo motu action requiring the concerned parties to show cause why the order dated 14th February 1989 should not be set aside and the parties relegated to their original positions. The Court reiterated that the reasonableness of the sum was based not only in independent quantification but the idea of reasonableness for the present purpose was necessarily a broad and general estimate in the context of a settlement of the dispute and not on the basis of an accurate assessment by adjudication. The Court stated that the question was, how good or reasonable it was as a settlement, which would avoid delay, uncertainties and assure immediate payment. An estimate in the very nature of things, would not have the accuracy of an adjudication. The Court recorded the offers, counter-offers, reasons and the numbers of the persons treated and the claims already made. The Court found that from the order of the High Court and the admitted position on the plaintiff's side, a reasonable prima facie estimate of the number of fatal cases and serious personal injury cases, was possible to be made. The Court referred to the High Court's assessment and procedure to examine the task of assessing the quantum of interim compensation. The Court referred to M.C. Mehta's case (AIR 1987 SC 1086) reiterated by the High Court, bearing in mind the factors that if the suit proceeded to trial the plaintiff-Union of India would obtain judgement in respect of the claims relating to deaths and personal injuries in the following manner:- (a) Rs. 2 lakhs in each case of death; (b) Rs. 2 lakh in each case of total permanent disability, (c) Rs. 1 lakh in each case of permanent partial disablement; and (d) Rs. 50,000/- in each case of temporary partial disablement.

84. Half of these amounts were awarded as interim compensation by the High Court.

85. The figures adopted by the High Court in regard to the number of fatal cases and case of serious personal injuries did not appear to have been disputed by anybody before the High Court, this Court observed. From those figures, it came to the conclusion that the total number of fatal cases was about 3000 and of grievous and serious personal injuries, as verifiable from the records was 30,000. This Court also took into consideration that about 8 months after the occurrence a survey had been conducted for the purpose of identification of cases. These figures indicated less than 10,000. In those circumstances, as a rough and ready estimate, this Court took into consideration the prima facie findings of the High Court and estimated the number of fatal cases at 3000 where compensation could range from Rs. 1 lakh to Rs. 3 lakhs. This would account for Rs. 70 crores, nearly 3 times higher than what would have otherwise been awarded in comparable cases in motor vehicles accident claims.

86. The Court recognized the effect of death and reiterated that loss of precious human lives is irreparable. The law can only hope to compensate the estate of a person whose life was lost by the wrongful act of another only in the way the law was equipped to compensate i.e. by monetary compensation calculated on certain well-recognized principles. "Loss to the estate" which is the entitlement of the estate and the 'loss of dependency' estimated on the basis of capitalised present value awardable to the heirs and dependants, this Court considered, were the main components in the computation of compensation in fatal accident actions, but the High Court adopted a higher basis. The Court also took into account the personal injury cases, and stated that these apportionments were merely broad considerations generally guiding the idea of reasonableness of the overall basis of settlement, and reiterated that this exercise was not a pre-determination of the quantum of compensation amongst the claimants either individually or category-wide; and that the determination of the actual quantum compensation payable to the claimants has to be done by the authorities under the Act. These were the broad assessments and on that basis the Court made the assessment. The Court believed that this was a just and reasonable assessment based on the materials available at that time. So far as the other question, namely, the vital juristic principles of great contemporary relevance to the Third World generally, and to India in particular, touching problems emerging from the pursuit of such dangerous technologies for economic gains by multinations in this case, the Court recognized that these were great problems and reiterated that there was need to solve a national policy to protect national interests from such ultra hazardous pursuits of economic gain; ... that Jurists, technologists and other experts in Economics, environmentology, futurology, Sociology and public health should identify the areas of common concern to help in evolving proper criteria which might receive judicial recognition and legal protection. The Court reiterated that some of the problems were referred to in M.C. Mehta's case (AIR 1987 SC 1086) (supra). But in the present case, the compulsions of the needs for immediate relief to tens of thousand of suffering victims could not wait till these questions, vital though they be, were resolved in the course of judicial proceedings; and the tremendous suffering of thousands of persons compelled this Court to move into the direction of immediate relief which, this Court thought, should not be subordinated to the uncertain promises of the law, and when the assessment of fairness of amount was based on certain factors and assumptions not disputed even by the plaintiffs.

87. Before considering the questions of constitutional validity of the Act, in the context of the background of the facts and circumstances of this case and submissions made, it is necessary to refer to the order dated 3rd March, 1989 passed by the Constitutional Bench in respect of writ petitions Nos. 164/86 and 268/89, consisting of 5

learned Judges presided over by the Honourable the Chief Justice of India. The order stated that these matters would be listed on 8th March, 1989 before the Constitution Bench for decision "on the ... question whether the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 was ultra vires". This is a judicial order passed by the said Constitution Bench. This is not an administrative order. Thus, these matters are before this Court. The question, therefore arises: What are these matters? The aforesaid order specifically states that these matters were placed before this Bench on the sole question" whether the Act is ultra vires. Hence, these matters are not before this Bench for disposal of these writ petitions. If as a result of the determination, one way or the other, it is held, good and bad, and that some relief becomes necessary, the same cannot be given or an order cannot be passed in respect thereof, except declaring the Act or any portion of the Act, valid or invalid constitutionally as the decision might be.

88. In writ petition No. 268/89 there is consequential prayer to set aside the order dated 14/15th February, 1989. But since the order dated 3rd March, 1989 above only suggests that these matters have been placed before this Bench 'on the sole question' whether the Bhopal Act is ultra vires or not, it is not possible by virtue of that order to go into the question whether the settlement is valid or liable to be set aside as prayed for in the prayers in these applications.

89. The provisions of the Act have been noted and the rival contentions of the parties have been set out before. It is, however, necessary to reiterate that the Act does not in any way circumscribe the liability of the UCC, UCIL or even the Government of India or government of Madhya Pradesh if they are jointly or severally liable. This follows from the construction of the Act from the language that is apparent. The context and background do not indicate to the contrary. Counsel for the victims plead that that is so. The learned Attorney General accepts that position. The liability of the Government is, however, disputed. This Act also does not deal with any question of criminal liability of any of the parties concerned. On an appropriate reading of the relevant provisions of the Act, it is apparent that the criminal liability arising out of Bhopal gas leak disaster is not the subject-matter of this Act and cannot be said to have been in any way affected, abridged or modified by virtue of this Act. This was the contention of learned counsel on behalf of the victims. It is also the contention of the learned Attorney General. In our opinion, it is the correct analysis and consequence of the relevant provisions of the Act. Hence, the submissions made on behalf of some of the victims that the Act was bad as it abridged or took away the victims right to proceed criminally against the delinquent, be it UCC or UCIL or jointly or severally the Government of India, Government of Madhya Pradesh or Mr. Arjun Singh, the erstwhile Chief Minister of Madhya Pradesh, is on a wrong basis. There is no curtailment of any right with respect to any criminal liability. Criminal liability is not the subject-matter of the Act. By the terms of the Act and also on the concessions made by the learned Attorney General, if that be so, then can non-prosecution in criminal liability be a consideration or valid consideration for settlement of claims under the Act? This is a question which has been suggested and articulated by learned counsel appearing for the victims. On the other hand, it has been asserted by the learned counsel appearing for the victims. On the other hand, it has been asserted by the learned Attorney General that part of the order dated 14/15th February, 1989 dealing with criminal prosecution or the order of this Court was by virtue of the inherent power of this Court under Articles 136 and 142 of the Constitution. These, the learned Attorney General said, were in the exercise of plenary powers of this Court. These are not considerations which induced the parties to enter into settlement. For the purpose of determination of constitutional validity of the Act, it is however necessary to say that criminal liability of any of the delinquents or of the parties is not the subject-matter of this Act and the Act does not deal with whether claims or rights arising out of such criminal liability. This aspect is necessary to be reiterated on the question of validity of the Act.

90. We have set out the language and the purpose of the Act, and also noted the meaning of the expression 'claim' and find that the Act was to secure the claims connected with or arising out of the disaster so that these claims might be dealt with speedily, effectively, equitably and to the best advantage of the claimants. In our opinion, Clause (b) of Section 2 includes all claims of the victims arising out of and connected with the disaster for compensation and damages or loss of life or personal injury or loss to the business and flora and fauna. What, however, is the extent of liability, is another question. This Act does not purport to or even to deal with the extent of liability arising out of the said gas leak disaster. Hence, it would be improper or incorrect to contend as did Ms Jaising, Mr. Garg and other learned counsel appearing for the victims, that the Act circumscribed the liability - criminal, punitive or absolute of the parties in respect of the leakage. The Act provides for a method or procedure for the establishment and enforcement of that liability. Good deal of argument was advanced before this Court on the question that the settlement has abridged the liability and this Court has lost the chance of laying down the extent of liability arising out of disaster like the Bhopal gas leak disaster. Submissions were made that we should lay down clearly the extent of liability arising out of these types of disasters and we should further hold that Act abridged such liability and as such curtailed the rights of the victims and was bad on that score. As mentioned hereinbefore, this is an argument under a misconception. The Act does not in any way except to the extent indicated in the relevant provisions of the Act cir-

cumscribe or abridge the extent of the rights of the victims so far as the liability of the delinquents are concerned. Whatever are the rights of the victims and whatever claims arise out of the gas leak disaster for compensation, personal injury, loss of life and property, suffered or likely to be sustained or expenses to be incurred or any other loss are covered by the Act and the Central Government by operation of Section 3 of the Act has been given the exclusive right to represent the victims in their place and state. By the Act, the extent of liability is not in any way abridged and, therefore, if in case of any industrial disaster like the Bhopal gas leak disaster, there is right in victims to recover damages or compensation on the basis of absolute liability, then the same is not in any manner abridged or curtailed.

91. Over 120 years ago Rylands v. Fletcher (1868) 3 HL 330 was decided in England. There A, was the lessee of certain mines, B, was the owner of a mill standing on land adjoining that under which the mines were worked. B, desired to construct a reservoir, and employed competent persons, such as engineers and a contractor to construct it. A had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care had been taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passage and flooded A's mine. It was held by the House of Lords in England there where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned. In the background of the facts it was held that A was entitled to recover damages from B, in respect of the injury. The question of liability was highlighted by this Court in M.C. Mehta's case (supra) where a Constitution Bench of this Court had to deal with the rule of strict liability. This Court held that the rule in Rylands v. Fletcher (supra) laid down a principle that if a person who brings on his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. This rule applied only to non-natural user of the land and does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or in certain cases where there is a statutory authority. There, this Court observed that the rule in Rylands v. Fletcher (supra) evolved in the 19th century at a time when all the developments of science and technology had not taken place, and the same cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. In a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to be carried on as part of the developmental process, Courts should not feel inhibited by this rule merely because the new law does not recognize the rule of strict and absolute liability in case of an enterprise engaged in hazards and dangerous activity. This Court noted that law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. Law cannot afford to remain static. This Court reiterated there that if it is found necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, the Court should not hesitate to evolve such principle of liability merely because it has not been so done in England. According to this Court, an enterprise which is engaged in a hazardous or inherently dangerous industry which poses potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone. The enterprise must be held to be under the obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results to anyone on account of an accident in the operation of such activity resulting, for instance, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who were affected by the accident as part of the social cost for carrying on such activity, regardless of whether it is carried on carefully or not. Such liability is not subject to any of the exceptions which operate vis-avis the tortious principle of strict liability under the rule in Rylands v. Fletcher. If the enterprise is permitted to carry on a hazardous or dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such activity as an appropriate item of its overheads. The enterprise alone has the resources to discover and guard against hazards and to provide warning against potential hazards. This Court reiterated that the measure of compensation in these kinds of cases must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise. The deter-

mination of actual damages payable would depend upon various facts and circumstances of the particular case.

92. It was urged before us that there was an absolute and strict liability for an enterprise which was carrying on dangerous operations with gases in this country. It was further submitted that there was evidence on record that sufficient care and attention had not been given to safeguard against the dangers of leakage and protection in case of leakage. Indeed, the criminal prosecution that was launched against the Chairman of Union Carbide Shri Warren Anderson and others, as indicated before, charged them along with the defendants in the suit with delinquency in these matters and criminal negligence in conducting the toxic gas operations in Bhopal. As in the instant adjudication, this Court is not concerned with the determination of the actual extent of liability, we will proceed on the basis that the law enunciated by this court in M.C. Mehta's case (AIR 1987 SC 1086) (supra) is the decision upon the basis of which damages will be payable to the victims in this case. But then the practical question arises: What is the extent of actual damages payable, and how would the quantum of damages be computed? Indeed, in this connection, it may be appropriate to refer to the order passed by this Court on 3rd May, 1989 giving reasons why the settlement was arrived at the figure indicated. This Court had reiterated that it had proceeded on certain prima facie undisputed figures of death and substantially compensating personal injury. This Court has referred to the fact that the High Court had proceeded on the broader principle in M.C. Mehta's case (supra) and on the basis of the capacity of the enterprise because the compensation must have deterrent effect. On that basis the High Court had proceeded to estimate the damages on the basis of Rs. 2 lakhs for each case of death and of total permanent disability, Rs. 1 lakh for each case of partial permanent disability and Rs. 50,000/- for each case of temporary partial disability. In this connection, the controversy as to what would have been the damages if the action had proceeded, is another matter. Normally, in measuring civil liability, the law has attached more importance to the principle of compensation than that of punishment. Penal redress, however, involves both compensation to the person injured and punishment as deterrence. These problems were highlighted by the House of Lords in England in Rookes v. Barnard, 1964 AC 1129, which indicate the difference between aggravated and exemplary damages. Salmond on the Law of Torts, 15th Edition at p. 30 emphasizes that the function of damages is compensation rather than punishment, but punishment cannot always be ignored. There are views which are against exemplary damages on the ground that these infringe in principle the object of law of torts, namely, compensation and not punishment and these tend to impose something equivalent to a fine in criminal law without the safeguards by the criminal law. In Rookes v. Barnard (supra), the House of Lords in England recognized three classes of cases in which the award of exemplary damages was considered to be justifiable. Awards must not only, it is said, compensate the parties but also deter the wrong doers and others from similar conduct in future. The question of awarding exemplary or deterrent damages is said to have often confused civil and criminal functions of law. Though it is considered by many that it is a legitimate encroachment of punishment in the realm of civil liability, as it operates as a restraint on the transgression of law which is for the ultimate benefit of the society. Perhaps, in this case, had the action proceeded, one would have realized that the fall out of this gas disaster might have been formulation of a concept of damages, blending both civil and criminal liabilities. There are, however, serious difficulties in evolving such an actual concept of punitive damages in respect of a civil action which can be integrated and enforced by the judicial process. It would have raised serious problems of pleading, proof and discovery, and interesting and challenging as the task might have been, it is still very uncertain how far decision based on such a concept would have been a decision according to 'due process' of law acceptable by international standards. There were difficulties in that attempt. But as the provisions stand these considerations do not make the Act constitutionally invalid. These are matters on the validity of settlement. The Act, as such does not abridge or curtail damage or liability whatever that might be. So the challenge to the Act on the ground that there has been curtailment or deprivation of the rights of the victims which is unreasonable in the situation is unwarranted and cannot be sustained.

93. Mr. Garg tried to canvas before us the expanding of horizons of human rights. He contended that the conduct of the multinational corporations dealing with dangerous gases for the purpose of development specially in the conditions prevailing under the Third World countries requires close scrutiny and vigilance on the part of emerging nations. He submitted that unless courts are alert and active in preserving the rights of the individuals and in enforcing criminal and strict liability and in setting up norms compelling the Government to be more vigilant and enforcing the sovereign will of the people of India to oversee that such criminal activities which endanger even for the sake of developmental work economy and progress of the country, the health and happiness of the people and damage the future prospects of health, growth and effect and pollute the environment, should be curbed and, according to him, these could only be curbed by insisting through the legal adjudication, punitive and deterrent punishment in the form of damages. He also pleaded that norms should be set up indicating how these kinds of dangerous operations are to be permitted under conditions of vigilance and surveillance. While we appreciate the force of these arguments, and endorse his plea that norms and deterrence should be aspired for, it is difficult to correlate that aspect with the present problem in this decision.

94. We do reiterate, as mentioned in the Universal Declaration of Human Rights that people are born free and the dignity of the persons must be recognized and an effective remedy by competent Tribunal is one of the surest method of effective remedy. If, therefore, as a result of this tragedy new consciousness and awareness on the part of the people of this country to be more vigilant about measures and the necessity of ensuring more strict vigilance for permitting the operations of such dangerous and poisonous gases dawns, then perhaps the tragic experience of Bhopal would not go in vain.

95. The main question, however, canvassed by all learned Counsel for the victims was that so far as the Act takes away the right of the victims to fight or establish their own rights, it is a denial of access to justice, and it was contended that such denial is so great a deprivation of both human dignity and right to equality that it cannot be justified because it would be affecting right to life, which again cannot be deprived without a procedure established by law which is just, fair and reasonable.

96. On this aspect, Shri Shanti Bhushan tried to urge before us that Sections 3 and 4 of the Act, insofar as these enjoin and empower the Central Government to institute or prosecute proceedings was only an enabling provision for the Central Government and not depriving or disabling provisions for the victims. Ms. Jaisingh sought to urge in addition, that in order to make the provisions constitutionally valid, we should eliminate the concept of exclusiveness to the Central Government and give the victims right to sue along with the Central Government. We are unable to accept these submissions.

97. In our opinion, Sections 3 and 4 are categorical and clear. When the expression is explicit, the expression is conclusive, alike in what it says and in what it does not say. These give to the Central Government an exclusive right to act in place of the persons who are entitled to make claim or have already made claim. The expression 'exclusive' is explicit and significant. The exclusivity cannot be withheld down or watered down as suggested by counsel. The said expression must be given its full meaning and extent. This is corroborated by the use of the expression 'claim' for all purposes. If such duality of rights are given to the Central Government along with the victims in instituting or proceeding for the realization or the enforcement of the claims arising out of Bhopal gas leak disaster, then that would be so cumbersome that it would not be speedy, effective or equitable and would not be the best or more advantageous procedure for securing the claims arising out of the leakage. In that view of the matter and in view of the language used and the purpose intended to be achieved, we are unable to accept this aspect of the arguments advanced on behalf of the victims. It was then contended by the procedure envisaged by the Act, the victims have been deprived that denied their rights and property to fight for compensation. The victims, it has been asserted, have been denied access to justice. It is a great deprivation, it was urged. It was contended that the procedure evolved under the Act for the victims is peculiar and having good deal of disadvantages for the victims. Such special disadvantageous procedure and treatment is unequal treatment, it was suggested. It was, therefore, violative of Art. 14 of the Constitution, that is the argument advanced.

98. The Act does provide a special procedure in respect of the rights of the victims and to that extent the Central Government takes upon itself the rights of the victims. It is a special Act providing a special procedure for a kind of special class of victims. In view of the enormity of the disaster the victims of the Bhopal gas leak disaster, as they were placed against the multinational and a big Indian corporation and in view of the presence of foreign contingency lawyers to whom the victims were exposed, the claimants and victims can legitimately be described as a class by themselves different and distinct, sufficiently separate and identifiable to be entitled to special treatment for effective, speedy, equitable and best advantageous settlement of their claims. There indubitably is differentiation. But this differentiation is based on a principle which has rational nexus with the aim intended to be achieved by its differentiation. The disaster being unique in its character and in the recorded history of industrial disasters situated as the victims were against a mighty multinational with the presence of foreign contingency lawyers looming on the scene, in our opinion, there were sufficient grounds for such differentiation and different treatment. In treating the victims of the gas leak disaster differently and providing them a procedure, which was just, fair, reasonable and which was not unwarranted or unauthorized by the Constitution. Article 14 is not breached. We are, therefore, unable to accept this criticism of the Act.

99. The second aspect canvassed on behalf of the victims is that the procedure envisaged is unreasonable and as such not warranted by the situation and cannot be treated as a procedure which is just, fair and reasonable. The argument has to be judged by the yardstick, as mentioned hereinbefore, enunciated by this Court in State of Madras v. V.G. Rao (AIR 1952 SC 196) (supra). Hence, both the restrictions or limitations on the substantive and procedural rights in the impugned legislation will have to be judged from the point of view of the particular Statute in question. No abstract rule or standard of reasonableness can be applied. That question has to be judged having regard to the nature of the rights alleged to have been infringed in this case, the extent and urgency of the evil sought to be remedied, disproportionate imposition, prevailing conditions at the time, all these facts will have to be taken into consideration. Having considered the background, the plight of the impoverished, the urgency of the victims' need, the presence of the foreign contingency lawyers, the procedure of settlement in USA in

mass action, the strength for the foreign multinationals, the nature of injuries and damages, and the limited but significant right of participation of the victims as contemplated by S. 4 of the Act, the Act cannot be condemned as unreasonable.

100. In this connection, the concept of 'parens patriae' in jurisprudence may be examined. It was contended by the learned Attorney General that the State had taken upon itself this onus to effectively come in as parens patriae. We have noted the long line of Indian decisions where, though in different contexts, the concepts of State as the parent of people who are not quite able to or competent to fight for their rights or assert their rights, have been utilized. It was contended that the doctrine of parens patriae cannot be applicable to the victims. How the concept has been understood in this country as well as in America has been noted. Legal dictionaries have been referred to as noted before. It was asserted on behalf of the victims by learned Counsel that the concept of 'parens patriae' can never be invoked for the purpose of suits in domestic jurisdiction of any country. This can only be applied in respect of the claims out of the country in foreign jurisdiction. It was further contended that this concepts of 'parens patriae' can only be applied in case of persons who are under disability and would not be applicable in respect of those who are able to assert their own rights. It is true that victims or their representatives are sui generis and cannot as such due to age, mental capacity or other reason not, legally incapable for suing or pursuing the remedies for the rights yet they are at a tremendous disadvantage in the broader and comprehensive sense of the term. These victims cannot be considered to be any match to the multinational companies or the Government with whom in the conditions that the victims or their representatives were after the disaster physically, mentally, financially, economically and also because of the position of litigation would have to contend. In such a situation of predicament the victims can legitimately be considered to be disabled. They were in no position by themselves to look after their own interests effectively or purposefully. In that background, they are people who needed the State's protection and should come within the umbrella of State's sovereignty to assert, establish and maintain their rights against the wrong doers in this mass disaster. In that perspective, it is jurisprudentially possible to apply the principle of parens patriae doctrine to the victims. But quite apart from that, it has to be borne in mind that in this case the State is acting on the basis of the Statute itself. For the authority of the Central Government to sue for and on behalf of or instead in place of the victims, no other theory, concept or any jurisprudential principle is required than the Act itself. The Act empowers and substitutes the Central Government. It displaces the victims by operation of Section 3 of the Act and substitutes the Central Government in its place. The victims have been divested of their rights to sue and such claims and such rights have been vested in the Central Government. The victims have been divested because the victims were disabled. The disablement of the victims vis-a-vis their adversaries in this matter is a self-evident factor. If that is the position then, in our opinion, even if the strict application of the 'parens patriae' doctrine is not in order, as a concept it is a guide. The jurisdiction of the State's power cannot be circumscribed by the limitations of the traditional concept of parens patriae. Jurisprudentially, it could be utilized to suit or alter or adapt itself in the changed circumstances. In the situation in which the victims were, the State had to assume the role of a parent protecting the rights of the victims who must come within the protective umbrella of the State and the common sovereignty of the Indian people. As we have noted the Act is an exercise of the sovereign power of the State. It is an appropriate evolution of the expression of sovereignty in the situation that had arisen. We must recognize and accept it as such.

101. But this right and obligation of the State has another aspect. Shri Shanti Bhushan has argued and this argument has also been adopted by other learned Counsel appearing for the victims that with the assumption by the State of the jurisdiction and power as a parent to fight for the victims in the situation there is an incumbent obligation on the State, in the words of Judges Keenan, 'as a matter of fundamental human decency' to maintain the victims until the claims are established and realized from the foreign multinationals. The major inarticulate premise apparent from the Act and the scheme and the spirit of the Act is that so long as the rights of the victims are prosecuted the State must protect and preserve the victims. Otherwise the object of the Act would be defeated, its purpose frustrated. Therefore, continuance of the payments of the interim maintenance for the continued sustenance of the victims is an obligation arising out of State's assumption of the power and temporary deprivation of the rights of the victims and divestiture of the rights of the victims to fight for their own rights. This is the only reasonable interpretation which is just, fair and proper. Indeed, in the language of the Act there is support for this interpretation. Section 9 of the Act gives power to the Central Government to frame by notification, a scheme for carrying into effect the purposes of the Act. Sub-section (2) of Section 9 provides for the matters for which the scheme may provide. Amongst others, clause (d) of Section 9(2) provides for creation of a fund for meeting expenses in connection with the administration of the scheme and of the provisions of the Act; and clause (e) of Section 9(2) covers the amounts which the Central Government "may after due appropriation made by parliament by law in that behalf, credit to the fund referred to in clause (d) and any other amounts which may be credited to such fund". Clause (f) of Section 9(2) speaks of the utilization, by way of disbursal (including apportionment) or otherwise, of any amounts received in satisfaction of the claims.

These provisions are suggestive but not explicit. Clause (b) of Section 10 which provides that in disbursing under the scheme the amount received by way of compensation or damages in satisfaction of a claim as a result of the adjudication or settlement of the claim by a Court or other authority, deduction shall be made from such amount of the sums, if any, paid to the claimant by the Government before the disbursal of such amount. The scheme framed is also significant. Clause 10 of the Scheme provides for the claims and relief funds and includes disbursal of amounts as relief including interim relief to persons affected by the Bhopal gas leak disaster and Clause 11(1) stipulates that disbursal of any amounts under the scheme shall be made by the Deputy Commissioner to each claimant through credit in a bank or postal saving account, stressing that the legislative policy underlined the Bhopal Act contemplated payment of interim relief till such time as the Central Government was able to recover from the Union Carbide full amount of compensation from which the interim reliefs already paid were to be deducted from the amount payable to them for the final disbursal. The Act should be construed as creating an obligation on the Central Government to pay interim relief as the Act deprives the victims of formal and immediate right of obtaining compensation from the Union Carbide. Had the Act not been enacted, the victims could have and perhaps would have been entitled not only to sue the Union Carbide themselves, but also to enter into settlement or compromise of some sort with them. The provisions of the Act deprived the victims of that legal right and opportunity, and that deprivation is substantial deprivation because upon immediate relief depends often the survival of these victims. In that background, it is just and proper that this deprivation is only to be justified if the Act is read with the obligation of granting interim relief or maintenance by the Central Government until the full amount of the dues of the victims is realized from the Union Carbide after adjudication or settlement and then deducting therefrom the interim relief paid to the victims. As submitted by learned attorney General, it is true that there is no actual expression used in the Act itself which expressly postulates or indicates such a duty or obligation under the Act. Such an obligation is, however, inherent and must be the basis of properly construing the spirit of the Act. In our opinion, this is the true basis and will be in consonance with the spirit of the Act. It must be, to use the well-known phrase 'the major inarticulate premise' upon which though not expressly stated, the Act proceeds. It is on this promise or premise that the State would be justified in taking upon itself the right and obligation to proceed and prosecute the claim and deny access to the courts of law to the victims on their own. If it is only so read, it can only be held to be constitutionally valid. It has to be borne in mind that the language of the Act does not militate against this construction but on the contrary, Sections 9, 10 and the scheme of the Act suggest that the Act contains such an obligation. If it is so read, then only meat can be put into the skeleton of the act making it meaningful and purposeful. The Act must, therefore, be so read. This approach to the interpretation of the Act can legitimately be called the 'constructive intuition' which, in our opinion, is a permissible mode of viewing the Acts of Parliament. The freedom to search for 'the spirit of the Act' or the quantity of the mischief at which it is aimed (both synonymous for the intention of the Parliament) opens up the possibility of liberal interpretation "that delicate and important branch of judicial power, the concession of which is dangerous, the denial ruinous". Given this freedom it is a rare opportunity though never to be misused and challenge for the Judges to adopt and give meaning to the Act, articulate and inarticulate, and thus translate the intention of the parliament and fulfill the object of the Act. After all, the act was passed to give relief to the victims who, it was thought, were unable to establish their own rights and fight for themselves. It is common knowledge that the victims were poor and impoverished. How could they survive the long ordeal of litigation and ultimate execution of the decree or the orders unless provisions be made for their sustenance and maintenance, especially when they have been deprived of the right to fight for these claims themselves? We, therefore, read the Act accordingly.

102. It was, then, contended that the Central Government was not competent to represent the victims. This argument has been canvassed on various grounds. It has been urged that the Central Government owns 22% share in UCIL and as such there is a conflict of interest between the Central Government and the victims, and on that ground the former is disentitled to represent the latter in their battle against UCC and UCIL. A large number of authorities on this aspect were cited. However, it is not necessary in the view we have taken to deal with these because factually the Central Government does not own any share in UCIL. These are the statutory independent organizations, namely, Unit Trust of India and Life Insurance Corporation, who own 20 to 22% share in UCIL. The Government has certain amount of say and control in LIC and UTI. Hence, it cannot be said, in our opinion, that there is any conflict of interest in the real sense of matter in respect of the claims of Bhopal gas leak disaster between the Central Government and the victims. Secondly, in a situation of this nature, the Central Government is the only authority which can pursue and effectively represent the victims. There is no other organization or Unit which can effectively represent the victims. Perhaps, theoretical, it might have been possible to constitute another independent statutory body by the Government under its control and supervision in whom the claim of the victims might have been vested and substituted and that Body could have been entrusted with the task of agitating or establishing the same claims in the same manner as the Central Government has done under the Act. But the fact that has not been done, in our

opinion does not in any way affect the position. Apart from that, lastly, in our opinion, this concept that where there is a conflict of interest, the person having the conflict should not be entrusted with the task of this nature does not apply in the instant situation. In the instant case, no question of violation of the principle of natural justice arises, and there is no scope for the application of the principle that no man should be a Judge in his own cause. The Central Government was not judging any claim, but was fighting and advancing the claims of the victims. In those circumstances, it cannot be said that there was any violation of the principles of natural justice and such entrustment to the Central Government of the right to ventilate for the victims was improper or bad. The adjudication would be done by the Courts, and therefore there is no scope of the violation of any principle of natural justice.

103. Along with this submission, the argument was that the power and the right given to the Central Government to fight for the claims of the victims is unguided and uncanalised. This submission cannot be accepted. Leaned Attorney General is right that the power conferred on the Central Government is not uncanalised. The power is circumscribed by the purpose of the Act. If there is any improper exercise or transgression of the power then the exercise of that power can be called in question and set aside, but the Act cannot be said to be violative of the rights of the victims on that score. We have noted the relevant authorities on the question that how power should be exercised is different and separate from the question whether the power is valid or not. The next argument on behalf of the victims was that there was conflict of interest between the victims and the Government viewed from another aspect of the matter. It has been urged that the Central Government as well as the Government of Madhya Pradesh along with the erstwhile Chief Minister of the State of Madhya Pradesh Shri Arjun Singh were guilty of negligence, malfeasance and non feasance, and as such were liable for damages along with Union Carbide and UCIL. In other words, it has been said that the Government of India and the Government of Madhya Pradesh along with Mr. Arjun Singh are joint tort-feasors and joint wrong doers. Therefore, it was urged that there is conflict of interest in respect of the claims arising 'out of the gas leak disaster between the Government of India and the victims and in such a conflict, it is improper, rather illegal and unjust to vest in the Government of India the rights and claims of the victims. As noted before, the Act was passed in a particular background and, in our opinion, if read in that background, only covers claims against Union Carbide or UCIL. "Bhopal gas leak disaster" or "disaster" has been defined in clause (a) of Section 2 as the occurrence on the 2nd and 3rd days of December, 1984 which involved the release of highly noxious and abnormally dangerous gas from a plant in Bhopal (being a plant of the UCIL, a subsidiary of the UCC of U.S.A.) and which resulted in loss of life and damage to property on an extensive scale.

104. In this context, the Act has to be understood that it is in respect of the person responsible, being the person in-charge of the UCIL and the parent company UCC. This interpretation of the Act is further strengthened by the fact that a "claimant" has been defined in clause (c) of Section 2 as a person who is entitled to make a claim and the expression "person" in Section 2(e) includes the Government. Therefore, the Act proceeded on the assumption that the Government could be a claimant being a person as such. Furthermore, this construction and the perspective of the Act is strengthened if a reference is made to the debate both in Lok Sabha and Rajya Sabha to which references have been made.

105. The question whether there is scope for the Union of India being responsible or liable as a joint tort-feasor is a difficult and different question. But even assuming that it was possible that the Central Government might be liable in a case of this nature, the learned Attorney General was right in contending that it was only proper that the Central Government should be able and authorized to represent the victims. In such a situation, there will be no scope of the violation of the principles of natural justice. The doctrine of necessity would be applicable in a situation of this nature. The doctrine has been elaborated, in Halsbury's Laws of England; 4th Edition, p. 89, paragraph 75, where it was reiterated that even if all the members of the Tribunal competent to determine a matter were subject to disqualification, they might be authorized and obliged to hear that matter by virtue of the operation of the common law doctrine of necessity. An adjudicator who is subject to disqualification on the ground of bias or interest in the matter which he has to decide may in certain circumstances be required to adjudicate if there is no other person who is competent or authorized to be adjudicator or if a quorum cannot be formed without him or if no other competent Tribunal can be constituted. In the circumstances of the case, as mentioned hereinbefore, the Government of India is only capable to represent the victims as a party. The adjudication, however, of the claims would be done by the Court. In those circumstances, we are unable to accept the challenge on the ground of the violation of principles of natural justice on this score. The learned Attorney General, however, sought to advance, as we have indicated before, his contention on the ground of de facto validity. He referred to certain decisions. We are of the opinion that this principle will not be applicable. We are also not impressed by the plea of the doctrine of bona fide representation of the interests of victims in all these proceedings. We are of the opinion that the doctrine of bona fide representation would not be quite relevant and as such the decisions cited by the learned Attorney General need not be considered.

106. There is, however, one other aspect of the matter

which requires consideration. The victims can be divested of their rights i.e. these can be taken away from them provided those rights of the victims are ensured to be established and agitated by the Central Government following the procedure which would be just, fair and reasonable. Civil Procedure Code is the guide which guides civil proceedings in this country and in other countries procedure akin to Civil Procedure Code [sic]. Hence, these have been recognized and accepted as being in consonance with the fairness of the proceedings and in conformity with the principles of natural justice. Therefore, the procedure envisaged under the Act has to be judged whether it is so consistent. The Act, as indicated before, has provided the procedure under Sections 3 and 4. Section 11 provides that the provisions of the Act and of any Scheme framed thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act or any instrument having effect by virtue of any enactment other than the Act. Hence, if anything is inconsistent with the Act for the time being, it will not have force and the Act will override those provisions to the extent it does. The Act has not specifically contemplated any procedure to be followed in the action to be taken pursuant to the powers conferred under Section 3 except to the extent indicated in Section 4 of the Act. Section 5, however, authorizes the Central Government to have the powers of a Civil Court for the purpose of discharging the functions pursuant to the authority vested under Sections 3 and 4 of the Act. There is no question of Central Government acting as a Court in respect of the claims which it should enforce for or on behalf or instead of the victims of the Bhopal gas leak disaster. In this connection, it is necessary to note that it was submitted that the Act, so far as it deals with the claims of the victims should be read in conformity with Civil Procedure Code and/or with the principles of natural justice; and unless the provisions of the Act are so read it would be violative of Arts. 14 and 21 of the Constitution in the sense that there will be deprivation of rights to life and liberty without following a procedure which is just, fair and reasonable. That is the main submission and contention of the different counsel for the victims who have appeared. The different view points from which this contention has been canvassed have been noted before. On the other hand, on behalf of the Government, the learned Attorney General has canvassed before us that there were sufficient safeguards consistent with the principles of natural justice within this Act and beyond what has been provided for in a situation for which the Act was enacted, nothing more could be provided and further reading down the provisions of the Act in the manner suggested would defeat the purpose of the Act. The aforesaid Section 3 provides for the substitution of the Central Government with the right to represent and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim in respect of the disaster. The State has taken over the rights and claims of the victims in the exercise of sovereignty in order to discharge the constitutional obligations as the parent and guardian of the victims who in the situation as placed need the umbrella of protection. Thus, the State has the power and jurisdiction and for this purpose unless the Act is otherwise unreasonable or violative of the constitutional provisions, no question of giving a hearing to the parties for taking over these rights by the State arises. For legislation by the Parliament, no principle of natural justice is attracted provided such legislation is within the competence of the legislature, which indeed the present Act is within the competence of the parliament. We are in agreement with the submission of the learned Attorney General that Section 3 makes the Central Government the dominus litus and it has the carriage of the proceedings, but that does not solve the problem of what procedure the proceedings should be carried.

107. The next aspect is that Section 4 of the Act, which, according to the learned Attorney General gives limited rights to the victims in the sense that it obliges the Central Government to "have due regard to any matters which such person may require to be urged with respect to his claim and shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim". Therefore, it obliges the Central Government to have 'due regard' to any matters, and it was urged on behalf of the victims that this should be read in order to make the provisions constitutionally valid as providing that the victims will have a say in the conduct of the proceedings and as such must have an opportunity of knowing what is happening either by instructing or giving opinions to the Central Government and/or providing for such directions as to settlement and other matters. In other words, it was contended on behalf of the victims that the victims should be given notice of the proceedings and thereby an opportunity, if they so wanted, to advance their view; and that to make the provisions of Section 4 meaningful and effective unless notice was given to victim, disabled as he is, the assumption upon which the Act has been enacted, could not come and make suggestion in the proceedings. If the victims are not informed and given no opportunity, the purpose of Section 4 cannot be attained.

108. On the other hand, the learned Attorney general suggested that Section 4 has been complied with, and contended that the victims had notice of the proceedings. They had knowledge of the suit in America, and of the order passed by Judge Keenan. The private plaintiffs who had gone to America were represented by foreign contingency lawyers who knew fully well what they were doing and they had also joined the said suit along with the Government of India. Learned Attorney General submitted that Section 4 of the Act clearly enabled the victims to exercise their right of participation in the proceedings. According to him, there was exclusion of victims from the process of adjudication but a limited par-

ticipation was provided and beyond that participation no further participation was warranted and no further notice was justified either by the provisions of the Act as read with the constitutional requirements or under the general principles of natural justice. He submitted that the principles of natural justice cannot be put into straight-jacket and their application would depend upon the particular facts and the circumstances of a situation. According to the learned Attorney General, in the instant case, the legislature had formulated the area where natural justice could be applied, and up to what area or stage there would be association of the victims with the suit, beyond that no further application of any principle of natural justice was contemplated.

109. The fact that the provisions of the principles of natural justice have to be complied with is undisputed. This is well settled by the various decisions of the Court. The Indian Constitution mandates that clearly, otherwise the act and the actions would be violative of Article 14 of the Constitution and would also be destructive of Article 19(1)(g) and negate Article 21 of the Constitution by denying a procedure which is just, fair and reasonable. See in this connection, the observations of this Court in Maneka Gandhi's case (AIR 1978 SC 597) (supra) and Olga Tellis' case (AIR 1986 SC 180) (supra). Some of these aspects were noticed in the decision of this Court in Swadeshi Cotton Mills v. Union of India (AIR 1981 SC 818) (supra). That was a decision which dealt with the question of taking over of the industries under the Industries (Development and Regulation) Act, 1951). The question that arose was whether it was necessary to observe the rules of natural justice before issuing a notification under Section 18A(a) of the Act. It was held by the majority of Judges that in the facts of that case there had been non-compliance with the implied requirement of the audi alteram partem rule of natural justice at the pre-decisional stage. The order in that case could be struck down as invalid on that score but the Court found that in view of the concession that a hearing would be afforded to the company, the case was remitted to the Central Government to give a full, fair and effective hearing. It was held that the phrase 'natural justice' is not capable of static and precise definition. It could not be imprisoned in the straight-jacket of a cast-iron formula. Rules of natural justice are not embodied rules. Hence, it was not possible to make an exhaustive catalogue of such rules. This Court reiterated that audi alteram partem is a highly effective rule devised by the Courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the abuse or misuse of power. The rules of natural justice can operate only in areas not covered by any law validly made. The general principle as distinguished from an absolute rule of uniform application seems to be that where a statute does not in terms exclude this rule or prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits then such a statute would be construed as excluding the audi alteram partam rule at the pre-decisional stage. If the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected the administrative decision after post-decisional hearing was good.

110. The principles of natural justice have been examined by this Court in Union of India v. Tulsi Ram Patel (AIR 1985 SC 1416) (supra). It was reiterated, that the principles of natural justice are not the creation of Article 14 of the Constitution. Article 14 is not the begetter of the principles of natural justice but their constitutional guardian. The principles of natural justice consist, inter alia, of the requirement that no man should be condemned unheard. If, however, a legislation of a Statute expressly or by necessary implication excludes the application of any particular principle of natural justice then it requires close scrutiny by the Court.

111. It has been canvassed on behalf of the victims that the Code of Civil Procedure is an instant example of what is a just, fair and reasonable procedure, at least the principles embodied therein and the Act would be unreasonable if there is exclusion of the victims to vindicate properly their views and rights. This exclusion may amount to denial of justice. In any case, it has been suggested and in our opinion, there is good deal of force in this contention, that if a part of the claim for good reasons or bad is sought to be compromised or adjusted without at least considering the views of the victims that would be unreasonable deprivation of the rights of the victims. After all, it has to be borne in mind that injustice consists in the sense in the minds of the people affected by any act or inaction a feeling that their grievances, views or claims have gone unheeded or not considered. Such a feeling is in itself an injustice or a wrong. The law must be so construed and implemented that such a feeling does not generate among the people for whose benefit the law is made. Right to a hearing or representation before entering into a compromise seems to be embodied in the due process of law understood in the sense the term has been used in the constitutional jargon of this country though perhaps not originally intended. In this connection, reference may be made to the decision of the Court in Sangram Singh v. Election Tribunal, Kotah, (1955) 2 SCR 1: (AIR 1955 SC 425). The Representation of the People Act, 1951 contains Section 90 and the procedure of Election Tribunals under the Act was governed by the said provision. Sub-section (2) of Section 90 provides that "Subject to the provisions of this act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits". Justice Bose speaking for the Court said that it is procedure, something designed to facilitate justice and further its ends, and cannot be considered as a penal enactment for punishment or penalties; not a thing designed to trip people up rather than

help them. It was reiterated that our laws of procedure are grounded on the principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there may be exceptions and where they are clearly defined these must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle. At page 9 of the report, Justice Bose observed as under:

"But that a law of natural justice exists in the sense that a party must be heard in a Court of law, or at any rate be afforded an opportunity to appear and defend himself, unless there is express provision to the contrary, is, we think, beyond dispute. See the observations of the Privy Council in Balakrishna Udayar v. Vasudeva Ayyar, ILR 40 Mad 793, 800: (AIR 1971 PC 71) and especially in T.B. Barret v. African Products Ltd., AIR 1928 PC 261-261, where Lord Buckmaster said "no forms or procedure should ever be permitted to exclude the presentation of a litigant's defence". Also Hari Vishnu's case which we have just quoted.

In our opinion, Wallace, J. was right in Venkatasubbiah v. Lakshminarasimham, AIR 1925 Mad 1274, holding that "One cardinal principle to be observed in trials by a Court obviously is that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing", and that "it follows that a party should not be deprived of that right and in fact the Court has no option to refuse that right, unless the Code of Civil Procedure deprives him of it".

112. All civilized countries accept the right to be heard as part of the due process of law where questions affecting their rights, privileges or claims are considered or adjudicated.

113. In S.L. Kapoor v. Jagmohan, (1981) 1 SCR 746 at p. 765: (AIR 1981 SC 136 at pp. 146-147), Chinnappa Reddy, J. speaking for this Court observed that the concept that justice must not only be done but must manifestly be seen to be done is basic to our system. It has been reiterated that the principles of natural justice know of no exlusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary and it has been said that it ill comes from a person who has denied justice that the person who has been denied justice, is not prejudiced. Principles of natural justice must, therefore, be followed. That is the normal requirement.

114. In view of the principles settled by this Court and accepted all over the world, we are of the opinion that in a case of this magnitude and nature, when the victims have been given some say by Section 4 of the Act, in order to make that opportunity contemplated by Section 4 of the Act, meaningful and effective, it should be so read that the victims have to be given an opportunity of making their representation before the Court comes to any conclusion in respect of any settlement. How that opportunity should be given, would depend upon the particular situation. Fair procedure should be followed in a representative mass tort action. There are instances and some of these were also placed before us during the hearing of these matters indicating how the Courts regulate giving of the notice in respect of a mass action where large number of people's views have to be ascertained. Such procedure should be evolved by the Court when faced with such a situation.

115. The Act does not expressly exclude the application of the Code of Civil Procedure. Section 11 of the Act provides the overriding effect indicating that anything inconsistent with the provisions of the Act in other law including the Civil Procedure Code should be ignored and the Act should prevail. Our attention was drawn to the provisions of O.1, R. 8(4) of the Code. Strictly speaking, O.1, R.8 will not apply to a suit or a proceeding under the Act. It is not a case of one having common interest with others. Here the plaintiff, the Central Government has replaced and divested the victims.

116. Learned Attorney General submitted that as the provisions of the Code stood before 1976 Amendment, the High Courts had taken the view that hearing of the parties represented in the suit was not necessary, before compromise. Further reference was made to proviso to O. XXIII, R. 1. As in this case there is no question, in our opinion, of abandonment as such of the suit or part of the suit, the provisions of this Rule would also not strictly apply. However, Order XXIII, Rule 3B of the Code is an important and significant pointer and the principles behind the said provision would apply to this case. The said Rule 3B provides that no agreement or compromise in a representative suit shall be entered into without the leave of the Court expressly recorded in the proceedings; and sub-rule (2) of R. 3B enjoins that before granting such leave the Court shall give notice in such manner as it may think fit in a representative action. Representative suit, again, has been defined under Explanation to the said Rule vide clause (d) as any other suit in which the decree passed may, by virtue of the provisions of this Code or of any other law for the time being in force, bind any person who is not named as a party to the suit. In this case, indubitably the victims would be bound by the settlement though not named in the suit. This is a position conceded by all. If that is so, it would be a representative suit in terms of and for the purpose of R. 38, O. XXII of the Code. If the principles of this Rule are

the principles of natural justice then we are of the opinion that the principles behind it would be applicable; and also that Section 4 should be so construed in spite of the difficulties of the process of notice and other difficulties of making "informed decision making process cumbersome", as canvassed by the learned Attorney General.

117. In our opinion, the constitutional requirements, the language of the Section, the purpose of the Act and the principles of natural justice lead us to this interpretation of Section 4 of the Act that in case of a proposed or contemplated settlement, notice should be given to the victims who are affected or whose rights are to be affected to ascertain their views. Section 4 is significant. It enjoins the Central Government only to have "due regard to any matters which such person may require to be urged". So, the obligation is on the Central Government in the situation contemplated by Section 4 to have due regard to the views of the victims and that obligation cannot be discharged by the Central Government unless the victims are told that a settlement is proposed, intended or contemplated. It is not necessary that such views would require consent of all the victims. The Central Government as the representative of the victims must have the views of the victims and place such views before the court in such manner it considers necessary before a settlement is entered into. If the victims want to advert to certain aspect of the matter during the proceedings under the Act and settlement indeed is an important stage in the proceedings, opportunities must be given to the victims. Individual notices may not be necessary. The Court can, and in our opinion, should in such situation formulate modalities of giving notice and public notice can also be given inviting views of the victims by the help of mass media.

118. Our attention was drawn to similar situations in other lands where in mass disaster actions of the present type of mass calamity actions affecting a large number of people, notices have been given in different forms and it may be possible to invite the views of the victims by announcement in the media, Press, radio, and TV etc. intimating to the victims that a certain settlement is proposed or contemplated and inviting views of the victims within a stipulated period. And having regard to the views, the Central Government may proceed with the settlement of the action. Consent of all is not a precondition as we read the Act under Section 4. Hence, the difficulties suggested by the learned Attorney General in having the consent of all and unanimity do not really arise and should not deter us from construing the section as we have.

119. The next aspect of the matter is, whether in the aforesaid light Section 4 has been complied with. The fact that there was no specific notice given to the victims as such in this case is undisputed. Learned Attorney General, however, sought to canvass the view that the victims had notice and some of them had participated in the proceedings. We are, however, unable to accept the position that the victims had notice of the nature contemplated under the Act upon the underlying principle of Order XXIII, R.32 of the Code. It is not enough to say that the victims must keep vigil and watch the proceeding. One assumption under which the Act is justified is that the victims were disabled to defend themselves in an action of this type. If that is so, then the Court cannot presume that the victims were a lot capable and informed to be able to have comprehended or contemplated the settlement. In the aforesaid view of the matter, in our opinion, notice was necessary. The victims at large did not have the notice.

120. The question, however, is that the settlement had been arrived at after great deal of efforts to give immediate relief to the victims. We have noticed the order dated 4th May, 1989 passed by this Court indicating the reasons which impelled the Court to pass the orders on 14/15th February, 1989 in terms and manner as it did. It has been urged before us on behalf of some of the victims that justice has not been done to their views and claims in respect of the damages suffered by them. It appears to us by reading the reasons given by this Court on 4th May, 1989 that justice perhaps has been done but the question is, has justice appeared to have been done and more precisely, the question before this Court is: does the act envisage a procedure or contemplate a procedure which ensures not only that justice is done but justice appears to have been done. If the procedure does not ensure that justice appears to have been done, is it valid? Therefore, in our opinion, in the background of this question we must hold that Section 4 means and entails that before entering into any settlement affecting the rights and claims of the victims some kind of notice or information should be given to the victims, we need not now spell out the actual notice and the manner of its giving to be consistent with the mandate and purpose of Section 4 of the Act.

121. This Court in its order dated 4th May, 1989 has stated that in passing orders on 14th/15th February, 1989, this Court was impelled by the necessity of urgent relief to the victims rather than to depend upon the uncertain promise of law. The Act, as we have construed, requires notice to be given in what form and in what manner, it need not be spelled out, before entering into any settlement of the type with which we are concerned. It further appears that type of notice which is required to be given had not been given. The question, therefore, is what is to be done and what is the consequence? The Act would be bad if it is not construed in the light that notice before settlement under Section 4 of the Act was required to be given. Then arises the question of consequences of not giving the notice. In this adjudication, we are not strictly concerned with the validity or otherwise of the settlement, as we have indicated hereinbefore. But constitutional adjudication cannot be divorced from the reality

of a situation, or the impact of an adjudication. Constitutional deductions are never made in the vacuum. These deal with life's problems in the reality of a given situation. And no constitutional adjudication is also possible unless one is aware of the consequences of such an adjudication. One hesitates in matters of this type where large consequences follow one way or the other to put asunder what others have put together. It is well to remember, as did Justice Holmes, that time has upset many fighting faiths and one must always wager one's salvation upon some prophecy based upon imperfect knowledge. Our knowledge changes; our perception of truth also changes. It is true that notice was required to be given and notice has not been given. The notice which we have contemplated is a notice before the settlement or what is known in legal terminology as pre-decisional notice. But having regard to the urgency of the situation and having regard to the need for the victims for relief and help and having regard to the fact that so much effort has gone in finding a basis for the settlement, we, at one point of time, thought that a post-decisional hearing in the facts and circumstances of this case might be considered to be sufficient compliance with the requirements of principles of natural justice as embodied under Section 4 of the Act. The reasons that impelled this Court to pass the orders of 14th/15th February 1989 are significant and compelling. If notice was given, then what would have happened? It has been suggested on behalf of the victims by counsel that if the victims had been given an opportunity to be heard, then they would have perhaps pointed out, inter alia, that the amount agreed to be paid through the settlement was hopelessly inadequate. We have noted the evidence available to this Court which this Court has recorded in its order dated 4th May, 1989 to be the basis for the figure at which the settlement was arrived at. It is further suggested that if an opportunity had been given before the settlement, then the victims would have perhaps again pointed out that criminal liability could not be absolved in the manner in which this Court has done on the 14th/15th February, 1989. It was then contended that the Central Government was itself sued as a joint tort-feasor. The Central Government would still be liable to be proceeded in respect of any liability to the victims if such a liability is established; that liability is in no way abridged or affected by the Act of the settlement entered into. It was submitted on behalf of the victims that if an opportunity had been given, they would have perhaps pointed out that the suit against the Central Government, Government of Madhya Pradesh and UCIL could not have been settled by the compromise. It is further suggested that if given an opportunity, it would have been pointed out that UCIL should have also been sued. One of the important requirements of justice is that people affected by an action or inaction should have opportunity to have their say. That opportunity the victims have got when these applications were heard and they were heard after utmost publicity and they would have further opportunity when review application against the settlement would be heard.

122. On behalf of the victims, it was suggested that the basis of damages in view of the observations made by this Court in M.C. Mehta's case (AIR 1987 SC 1086) (supra) against the victims of UCC of UCIL would be much more than normal damages suffered in similar case against any other company or party which is financially not so solvent or capable. It was urged that it is time in order to make damages deterrent the damages must be computed on the basis of the capacity of a delinquent made liable to pay such damages and on the monetary capacity of the delinquent the quantum of the damages awarded would vary and not on the basis of actual consequences suffered by the victims. This is an uncertain premise of law. On the basis of evidence available and on the basis of the principles so far established, it is difficult to foresee any reasonable possibility of acceptance of this yardstick. And even if it is accepted, there are numerous difficulties of getting that view accepted internationally as a just basis in accordance with law. These, however, are within the realm of possibility.

123. It was contended further by Shri Garg, Shri Shanti Bhushan and Ms. Jaising that all the further particulars upon which the settlement had been entered into should have been given in the notice which was required to be given before a settlement was sanctified or accepted. We are unable to accept this position. It is not necessary that all other particulars for the basis of the proposed settlement should be disclosed in a suit of this nature before the final decision. Whatever data was already there have been disclosed, that, in our opinion, would have been sufficient for the victims to be able to give their views, if they want to. Disclosure of further particulars are not warranted by the requirement of principles of natural justice. Indeed, such disclosure in this case before finality might jeopardize future action, if any, necessary so consistent with justice of the case.

124. So on the materials available, the victims would have to express their views. The victims have not been able to show at all any other point or material which would go to impeach the validity of the settlement. Therefore, in our opinion, though settlement without notice is not quite proper, on the materials so far available, we are of the opinion that justice has been done to the victims but justice has not appeared to have been done. In view of the magnitude of the misery involved and the problems in this case, we are also of the opinion that the setting aside of the settlement on this ground in view of the facts and the circumstances of this case keeping the settlement in abeyance and giving notice to the victims for a post-decisional hearing would not be in the ultimate interest of justice. It is true that not giving notice was not proper because principles of natural justice are fundamental in the constitutional set up of this country. No man or no man's right should be affected without an opportunity to

ventilate his views. We are also conscious that justice is a psychological yearning, in which men seek acceptance of their view point by having an opportunity of vindication of their view point before the forum or the authority enjoined or obliged to take a decision affecting their right. Yet, in the particular situations, one has to bear in mind how an infraction of that should be sought to be removed in accordance with justice. In the facts and the circumstances of this case where sufficient opportunity is available when review application is heard on notice, as directed by Court, no further opportunity is necessary and it cannot be said that injustice has been done. "To do a great right" after all, it is permissible sometimes "to do a little wrong". In the facts and circumstances of the case, this is one of those rare occasions. Though entering into a settlement without the requirement notice is wrong. In the facts and the circumstances of this case, therefore, we are of the opinion, to direct that notice should be given now, would not result in dain (sic) justice in the situation. In the premises, no further consequential order is necessary by this Court, had it been necessary for this Bench to have passed such a consequential order, we would not have passed any such consequential order in respect of the same.

125. The sections and the scheme dealing with the determination of damages and distribution of the amount have also been assailed as indicated before. Our attention was drawn to the provisions of the Act dealing with the payment of compensation and the scheme framed therefor. It was submitted that Section 6 of the Act enjoins appointment by the Central Government of an officer known as the Commissioner for the welfare of the victims. It was submitted that this does not give sufficient judicial authority to the officer and would be really leaving the adjudication under the scheme by an officer of the executive nature. Learned Attorney General has, however, submitted that for disbursement of the compensation contemplated under the Act or under the orders of this Court, a notification would be issued under S.6(3) of the Act authorizing the Commissioner or other officers to exercise all or any of the powers which the Central Government may exercise under S.6 to enable the victims to place before the Commissioner or Deputy Commissioner any additional evidence that they would like to adduce. We direct so, and such appropriate notification be issued. We further direct that in the Scheme categorization to be done of the Deputy Commissioner should be appealable to an appropriate judicial authority and the Scheme should be modified accordingly. We reiterate that the basis of categorization and the actual categorization should be justifiable and judicially reviewable - the provisions in the Act and the Scheme should be so read. There were large numbers of submissions made on behalf of the victims about amending the scheme. Apart from and to the extent indicated above, in our opinion, it would be unsafe to tinker with the scheme piecemeal. We, however, make it clear that in respect of categorization and claim, the authorities must act on principles of natural justice and act quasi-judicially.

126. As mentioned hereinbefore, good deal of arguments were advanced before us as to whether the clause in the settlement that criminal proceedings would not be proceeded with and the same will remain quashed is valid or invalid. We have held that these are not part of the proceedings under the Act. So the orders on this aspect in the order of 14th/15th February, 1989 are not orders under the Act. Therefore, on the question of the validity of the Act, this aspect does not arise. Whether the settlement of criminal proceedings or quashing the criminal proceedings could be a valid consideration for settlement or whether if it was such a consideration or not is a matter which the Court reviewing the settlement has to decide.

127. In the premise, we hold that the Act is constitutionally valid in the manner we read it. It proceeds on the hypothesis that until the claims of the victims are realized or obtained from the delinquents, namely, UCC and UCIL by settlement or by adjudication and until the proceedings in respect thereof continue the Central Government must pay interim compensation or maintenance for the victims. In entering upon the settlement in view of Section 4 of the Act, regard must be had to the views of the victims and for the purpose of giving regard to these, appropriate notices before arriving at any settlement, were necessary. In some cases, however, post-decisional notice might be sufficient but in the facts and the circumstances of this case, no useful purpose would be served by giving a post-decisional hearing having regard to the circumstances mentioned in the order of this Court dated 4th May, 1989 and having regard to the fact that there are no further additional data and facts available with the victims which can be profitably and meaningfully presented to controvert the basis of the settlement and further having regard to the fact that the victims had their say or on their behalf their views had been agitated in these proceedings and will have further opportunity in the pending review proceedings. No further order on this aspect is necessary. The sections dealing with the payment of compensation and categorization would be implemented in the manner indicated before.

128. The Act was conceived on the noble promise of giving relief and succour to the dumb, pale, meek and impoverished victims of a tragic industrial gas leak disaster, a concomitant evil in this industrial age of technological advancement and development. The act had kindled high hopes in the hearts of the weak and worn, wary and forlorn. The Act generated hope of humanity. The implementation of the Act must be with justice. Justice perhaps has been done to the victims situated as they were, but it also true that justice has not appeared to have been done. That is a great infirmity. That is due partly to the fact that procedure was not strictly followed as we

have understood it and also partly because of the automsphere that was created in the country, attempts were made to shake the confidence of the people in the judicial process and also to undermine the credibility of this Court. This was unfortunate. This was perhaps due to misinformed public opinion and also due to the fact that victims were not initially taken into confidence in reaching the settlement. This is a factor which emphasizes the need for adherence to the principles of natural justice. The credibility of judiciary is as important as the alleviation of the suffering of the victims, great as these were. We hope these adjudications will restore that credibility. Principles of natural justice are integrally embedded in our constitutional framework and their pristine glory and primacy cannot and should not be allowed to be submerged by the exigencies of particular situations or cases. This Court must always assert primacy of adherence to the principles of natural justice in all adjudications. But at the same time, these must be applied in a particular manner in particular cases having regard to the particular circumstances. It is, therefore, necessary to reiterate that the promises made to the victims and hopes raised in their hearts and minds can only be redeemed in some measure if attempts are made vigorously to distribute the amount realized to the victims in accordance with the scheme as indicated above. That would be a redemption to a certain extent. It will also be necessary to reiterate that attempts should be made to formulate the principles of law guiding the Government and the authorities to permit carrying on of trade dealing with materials and things which have dangerous consequences within sufficient specific safe guards especially in case of multinational corporations trading in India. An awareness on these lines has dawned. Let action follow that awareness. It is also necessary to reiterate that the law relating to damages and payment of interim damages or compensation to the victims of this nature should be seriously and scientifically examined by the appropriate agencies.

129. The Bhopal Gas Leak disaster and its aftermath of that emphasize the need for laying down certain norms and standards that the Government to follow before granting permissions or licences for the running of industries dealing with materials which are of dangerous potentialities. The Government should, therefore, examine or have the problem examined by an expert committee as to what should be the conditions on which future licences and/or permission for running industries of Indian soil would be granted and for ensuring enforcement of those conditions, sufficient safety measure should be formulated and scheme of enforcement indicated. The Government should insist as a condition precedent to the grant of such licences or permissions, creation of a fund in anticipation by the industries to be available for payment of damages out of the said fund in case of leakages or damages in case of accident or disaster flowing from negligent working of such industrial operations or failure to ensure measures preventing such occurrence. The Government should also ensure that the parties must agree to abide to pay such damages out of the said damages by procedure separately evolved for computation and payment of damages without exposing the victims or sufferers of the negligent act to the long and delayed procedure. Special procedure must be provided for and the industries must agree as a condition for the grant of licence to abide by such procedure or to abide by statutory arbitration. The basis for damages in case of leakages and accident should also be statutorily fixed taking into consideration the nature of damages inflicted, the consequences thereof and the ability and capacity of the parties to pay. Such should also provide for deterrent or punitive damages, the basis for which should be formulated by a proper expert committee or by the Government. For this purpose, the Government should have the matter examined by such body as it considers necessary and proper like the Law Commission or other competent bodies. This is vital for the future.

130. This case has taken some time. It was argued extensively. We are grateful to counsel who have assisted in all these matters. We have reflected. We have taken some time in pronouncing our decision. We wanted time to lapse so that the heat of the moment may calm down and proper atmosphere restored. Justice, it has been said, is the constant and perpetual disposition to render every man his due. But what is a man's due in a particular situation and in a particular circumstance is a matter for appraisement and adjustment. It has been said that justice is balancing. The balances have always been the symbol for even-handed justice. But as said by Lord Denning in Jones v. National Coal Board Ltd., (1957) 2 QB 55, at p. 64, let the advocates one after the other put the weights into the scales the 'nicely calculated less or more' but the Judge at the end decides which way the balance tilts, be it ever so slightly. This is so in every case and every situation.

131. The applications are disposed of in the manner and with the direction, we have indicated above.

SINGH, J.:- 132. I have gone through the proposed judgement of my learned brother, Sabyasachi Mukarji, CJI. I agree with the same but I consider it necessary to express my opinion on certain aspects.

133. Five years ago between the night of December 2-3, 1984 one of the most tragic industrial disasters in the recorded history of mankind occurred in the city of Bhopal, in the State of Madhya Pradesh, as a result of which several persons died and thousands were disabled and physically incapacitated for life. The ecology in and around Bhopal was adversely affected and air, water and the atmosphere was polluted, its full extent has yet to be determined. Union Carbide India Limited (UCIL) a subsidiary of Union Carbide Corporation (a Transnational

Corporation of United States) has been manufacturing pesticides at its plant located in the city of Bhopal. In the process of manufacture of pesticide the UCIL has stored stock of Methyl Isocyanate commonly known as MIC a highly toxic gas. On the night of the tragedy, the MIC leaked from the plant in a substantial quantity causing death and misery to the people working in the plant and those residing around it. The unprecedented catastrophe demonstrated the dangers inherent in the production of hazardous chemicals even though for the purpose of industrial development. A number of civil suits for damages against the UCC were filed in the United States of America and also in this country. The cases filed in USA were referred back to the Indian courts by Judge Keenan details of which are contained in the judgement of my learned brother Mukharji CJI. Since those who suffered in the catastrophe were mostly poor, ignorant, illiterate and ill-equipped to pursue their claims for damages either before the courts in USA or in Indian Courts, the Parliament enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 (hereinafter referred to as 'the Act') conferring power on the Union of India to take over the conduct of litigation in this regard in place of the individual claimants. The facts and circumstances which led to the settlement of the claims before this Court have already been stated in detail in the judgement of Mukharji, CJI and, therefore, I need not refer to those facts and circumstances. The constitutional validity of the Act has been assailed before us in the present petitions. If the Act is declared unconstitutional, the settlement which was recorded in this Court, under which the UCC has already deposited a sum of Rs. 750 crores for meeting the claims of Bhopal Gas victims would fall and the amount of money which is already in deposit with the Registry of this Court would not be available for relief to the victims. Long and detailed arguments were advanced before us for a number of days and on an anxious consideration and having regard to the legal and constitutional aspects and especially the need for immediate help and relief to the victims of the gas disaster, which is already delayed, we have upheld the constitutional validity of the Act. Mukharji, CJI has rendered a detailed and elaborate judgement with which I respectfully agree. However, I consider it necessary to say few words with regard to the steps which should be taken by the Executive and the Legislature to prevent such tragedy in future, and to avoid the prolonged misery of victims of an industrial disaster.

134. We are a developing country, our national resources are to be developed in the field of science, technology, industry and agriculture. The need for industrial development has led to the establishment of a number of plants and factories by the domestic companies and undertakings as well as by Transnational Corporations. Many of these industries are engaged in hazardous or inherently dangerous activities which pose potential threat to life, health and safety of persons working in the factory, or residing in the surrounding areas. Though working of such factories and plants is regulated by a number of laws of our country, i.e. the Factories Act, Industrial Development and Regulation Act and Workmen's Compensation Act etc. there is no special legislation providing for compensation and damages to outsiders who may suffer on account of any industrial accident. As the law stands to-day, affected persons have to approach civil courts for obtaining compensation and damages. In civil courts, the determination of amount of compensation or damages as well as the liability of the enterprise has been bound by the shackles of conservative principles laid down by the House of Lords in Ryland v. Fletcher, (1868) 3 HL 330. The principles laid therein made it difficult to obtain adequate damages from the enterprise and that too only after the negligence of the enterprise was proved. This continued to be the position of law till a Constitution Bench of this Court in M.C. Mehta v. Union of India, (1987) 1 SCC 395: (AIR 1987 SC 1086), commonly known as Sriram Oleum Gas Leak case evolved principles and laid down new norms to deal adequately with the new problems arising in a highly industrialized economy. This Court made judicial innovation in laying down principles with regard to liability of enterprises carrying hazardous or inherently dangerous activities departing from the rule laid down in Ryland v. Fletcher. The Court held as under:

> "We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise must be held strictly liable for causing such harm as a part of the social cost of carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the en-

terprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards. We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in Rylands v. Fletcher."

The law so laid down made a landmark departure from the conservative principles with regard to the liability of an enterprise carrying on hazardous or inherently dangerous activities.

135. n the instant cases there is no dispute that UCIL a subsidiary of UCC was carrying on activity of manufacturing pesticide and in that process it had stored MIC a highly toxic and dangerous gas which leaked causing vast damage not only to human life but also to the flora and fauna and ecology in and around Bhopal. In view of this Courts decision in M.C. Mehta's case (AIR 1987 SC 1086), there is no scope for any doubt regarding the liability of the UCC for the damage caused to the human beings and nature in and around Bhopal. While entering into the settlement the UCC has accepted its liability and for that reason it has deposited a sum of Rs. 750 crores in this Court. The inadequacy of the amount of compensation under the settlement was assailed by the counsel for the petitioners but it is not necessary for us to express any opinion on that question as review petitions are pending before another Constitution Bench and more so, as in the present cases we are concerned only with the constitutional validity of the Act.

136. The Bhopal Gas tragedy has raised several important questions regarding the functioning of multi-nationals in third world countries. After the second World War Colonial Rule came to end in several parts of the globe, as a number of nations secured independence from foreign rule. The political dominion was over but the newly born nations were beset with various problems on account of lack of finances and development. A number of multi-nationals and transnational corporations offered their services to the underdeveloped and developing countries to provide finances and technical know-how by setting up their own industries in those countries on their own terms and brought problems with regard to the control over the functioning of the transnational corporations. Multi-national companies in many cases exploited the underdeveloped nations and in some cases they influenced political and economic policies of host countries which subverted the sovereignty of those countries. There has been complaints against the multinationals for adopting unfair and corrupt means to advance their interests in the host countries. Since this as a worldwide phenomena the United Nations took up the matter for consideration. The Economic and Social Council for the United Nations established a Commission on Transnational Corporations to conduct research on various political, economic and social aspects relating to transnational corporations. On a careful and detailed study the Commission submitted its Report in 1985 for evolving a Code of Conduct for Transnational Corporation. The Code was adopted in 1986 to which large number of countries of the world are signatories. Although it has not been fully finalized as yet. The Code presents a comprehensive instrument formulating the principles of Code of Conduct for transnational corporations carrying on their enterprises in under-developed and developing countries. The Code contains provisions regarding ownership and control designed to strike balance between the competing interests of the Transnational Corporations and the host countries. It extensively deals with the political, economic, financial, social and legal questions. The Code provides for disclosure of information to the host countries and it also provides guidelines for nationalization and compensation, obligations to international law and jurisdiction of Courts. The Code lays down provisions for settlement of disputes between the host States and an affiliate of a Transnational Corporation. It suggests that such disputes should be submitted to the national courts or authorities of host countries unless amicably settled between the parties. It provides for the choice of law and means for dispute settlement arising out of contracts. The Code has also laid down guidelines for the determination of settlement of disputes arising out of accident and disaster and also for liability of Transnational Corporations and the jurisdiction of the Courts. The Code is binding on the countries which formally accept it. It was stated before us that India has accepted the Code. If that be so, it is necessary that the Government should take effective measures to translate the provisions of the Code into specific actions and policies backed by appropriate legislation and enforcing machinery to prevent any accident or disaster and to secure the welfare of the victims of any industrial disaster.

137. In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48A and 51(g), it is the duty of the State to take effective steps to protect the guaranteed constitutional rights. These rights must be integrated and illumined by the evolving international dimensions and standards, having regard to our sovereignty, as highlighted by Clauses 9 and 13 of U.N. Code of Conduct of Transnational Corporations. The evolving standards of international obligations need to be respected, maintaining dignity and sovereignty of

our people, the State must take effective steps to safeguard the constitutional rights of citizens by enacting laws. The laws so made may provide for conditions for granting licence to Transnational Corporations, prescribing norms and standards for running industries on Indian soil ensuring the constitutional rights of our people relating to life, liberty, as well as safety to environment and ecology to enable the people to lead a healthy and clean life. A Transnational Corporation should be made liable and subservient to laws of our country and the liability should not be restricted to affiliate company only but the parent Corporation should also be made liable for any damage caused to the human beings or ecology. The law must require transnational corporations to agree to pay such damages as may be determined by the statutory agencies and forums constituted under it without exposing the victims to long drawn litigation. Under the existing civil law, damages are determined by the Civil Courts, after a long drawn litigation, which destroys the very purpose of awarding damages. In order to meet the situation to avoid delay and to ensure immediate relief to the victims we would suggest that the law made by the Parliament should provide for constitution of tribunals regulated by special procedure for determining compensation to victims of industrial disaster or accident, appeal against which may lie to this Court on limited ground of questions of law only after depositing the amount determined by the Tribunal. The law should also provide for interim relief to victims during the pendency of proceedings. These steps would minimize the misery and agony of victims of hazardous enterprises.

138. There is yet another aspect which needs consideration by the Government and the Parliament. Industrial development in our country and the hazards involved therein, pose a mandatory need to constitute a statutory "Industrial Disaster Fund", contributions to which may be made by the Government, the industries whether they are transnational corporations or domestic undertakings, public or private. The extent of contribution may be worked out having regard to the extent of hazardous nature of the enterprise and other allied matters. The Fund should be permanent in nature, so that money is readily available for providing immediate effective relief to the victims. This may avoid delay, as has happened in the instant case in providing effective relief to the victims. The Government and the Parliament should therefore take immediate steps for enacting laws, having regard to these suggestions, consistent with the international norms and guidelines contained in the United Nations Code of Conduct on Transnational Corporations.

139. With these observations, I agree with the order proposed by my learned brother, Sabhyasachi Mukarji, CJI.

140. RANGANATHAN, J.:- Five years ago, this country was shaken to its core by a national catastrophe, second in magnitude and disastrous effects only to the havoc wrought by the atomic explosions in Hiroshima and Nagasaki. Multitudes of illiterate and poverty-stricken people in and around Bhopal suffered damage to life and limb due to the escape of poisonous Methyl Isocyanate (MIC) gas from one of the storage tanks at the factory of the Union Carbide (India) Limited (UCIL) in Bhopal, a wholly owned subsidiary of the multinational plant, the Union Carbide Corporation (UCC). A number of civil suits claiming damages from the UCC were filed in the United States of America and similar litigation also followed in Indian courts. Fearing the possibilities of the exploitation of the situation by vested interests, the Government of India enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 ('the Act') to regulate the course of such litigation. Briefly speaking, it empowered the Union of India to take over the conduct of all litigation in this regard and conduct it in place of, or in association with, the individual claimants. It also enabled the Union to enter into a compromise with the UCC and UCIL and arrive at a settlement. The writ petitions before us have been filed challenging the constitutional validity of this statute on the ground that the divestiture of the claimants' individual rights to legal remedy against the multinational for the consequences of carrying on dangerous and hazardous activities on our soil violates the fundamental rights guaranteed under Arts. 14, 19 and 21 of the Constitution.

In consequence of certain proceedings before Judge Keenan of the U.S. district Courts, the venue of the litigation shifted to India. In the principal suit filed in India by the Union (Civil Suit No. 1113/86) orders were passed by the trial Court in Bhopal directing the UCC to deposit Rs. 370 crores (reduced to Rs. 250 crores by the Madhya Pradesh High Court) as interim payment to the gas victims pending the disposal of the suit. There were appeals to this Court in which the UCC contested the Court's jurisdiction to pass an order for an interim payment in a suit for money, while the Union pleaded that a much higher interim payment should have been granted. When the matter was being argued in this Court, a settlement was arrived at between the Union and the UCC under which a sum of Rs. 750 crores has been received by the Union in full settlement of all the claims of all victims of the gas leak against the UCC. The Union also agreed to withdraw certain prosecutions that had been initiated against the officials of the UCC and UCIL in this connection. This settlement received the imprimatur of this Court in its orders dated 14th and 15th February 1989.

It is unfortunate that, though the writ petitions before us were pending in this Court at that time, neither their contents nor the need of considering first the issue of the validity of the Act before thinking of a settlement in pursuance of its provisions seem to have been effectively brought to the notice of the Bench which put an end to all the litigations on this topic in terms of the settlement.

The settlement thus stood approved while the issue of validity of the Act under which it was effected stood undecided. When this was brought to the notice of the above Bench, it directed these write petitions to be listed before a different Bench to avoid any possible feeling that the same Bench may be coloured in its views on the issue by reason of the approval it had given to the fait accompli viz. the settlement. That is how these matters come before us.

The petitioners claiming to represent a section of the victims are firstly, against any settlement at all being arrived at with the UCC. According to them, it is more important to ensure by penal actio that multinational corporations do not play with the lives of people in developing and under developed countries than to be satisfied with mere compensation for injury and that the criminal prosecutions initiated in this case should have been pursued. Secondly, they are of the view that the amount for which the claims have been settled is a pittance, far below the amount of damages they would have been entitled to, on the principles of strict, absolute and punitive liability enunciated by this Court in Mehta's case, (1987) 1 SCR 819: (AIR 1978 SC 1086). Thirdly, their grievance is that no publicity at all was given, before this Court passed its order, to enable individual claimants or groups of them to put forward their suggestions or objections to the settlement proposed. Their interest were sealed, they say, without complying with elementary principles of natural justice. They contend that the provisions of an Act which has made such a settlement possible cannot be constitutionally valid.

The arguments before us ranged over a very wide ground, covered several issues and extended to several days. This Bench has been placed in somewhat of a predicament as it has to pronounce on the validity of the provisions of the Act in the context of an implementation of its provisions in a particular manner and, though we cannot (and do not) express any views regarding the merits of the settlement, we are asked to consider whether such settlement can be consistent with a correct and proper interpretation of the Act tested on the touchstone of the fundamental rights guaranteed under the Constitution. Mukharji, C.J., has outlined the issues, dealt elaborately with the contentions urged, and given expression to his conclusions in a learned, elaborate and detailed judgement which we have had the advantage of perusing in draft. Our learned brother K.N. Singh, J., has also highlighted certain aspects in his separate judgement. We are, in large measure, in agreement with them, but should like to say a few words on some of the issues in this case, particularly those in regard to which our approach has been somewhat different.

141. The issue regarding the validity of the Act turns principally on the construction of Sections 3 and 4 of the Act. We are inclined to hold that the fact that a settlement has been effected, or the circumstances in which or the amount for which the claims of the victims have been settled, do not have a bearing on this question of interpretation and have to be left out of account altogether except as providing a contextual background in which the question arises. Turning therefor to the statute and its implications, the position is this. Every person who suffered as a consequence of the gas leak had a right to claim compensation from the persons who, according to him, were liable in law for the injury caused to him and also a right to institute a suit or proceeding before any Court or authority with a view to enforce his right to claim damages. In the normal course of events, such a claimant who instituted a suit or proceeding would have been at complete liberty to withdraw the said suit or proceeding or enter into any compromise he may choose in that regard. Section 3 undoubtedly takes away this right of the claimant altogether: (a) except to the limited extents specified in the proviso to Section 3(3) and (b) subject to the provisions of Section 4, for this section clearly states that it is the Central Government and the Central Government alone which has the right to represent and act in place of the claimants, whether within or outside India, for all purposes in connection with the enforcement of his claims. We may first consider how far the main provision in Section 3 (leaving out of account the proviso as well as Section 4) is compatible with the Constitution.

The first question that arises is whether the legislature is justified in depriving the claimants of the right and privilege of enforcing their claims and prosecuting them in such manner as they deem fit and in compulsorily interposing or substituting the Government in their place. We think that, to this question, there can be only one answer. As pointed out by our learned brother, the situation was such that the victims of the tragedy needed to be protected against themselves as their adversary was a mighty multi-national corporation and proceedings to a considerable extent had been initiated in a foreign country, where the conduct of the cases was entrusted to foreign lawyers under a system of litigation which is unfamiliar to us here. In the stark reality of the situation, it cannot even be plausibly contended that the large number of victims of the gas leak disaster should have been left to tend for itself and merely provided with some legal aid or one type or another. It is necessary to remember that, having regard to the identity of the principal ground of claim of all the victims, even if a single victim was not diligent in conducting his suit or entered into a compromise or submitted to a decree judging the issues purely from his individual point of view, such a decision or decree could adversely affect the interests of the innumerable other victims as well. In fact, it appears that a settlement between one set of claimants and the adversary corporation was almost imminent and would perhaps have been through but for the timely intervention of the Government of India. The battles for the enforcement of

one's rights was bound to be not only prolonged but also very arduous and expensive and the decision of the legislature that the fight against the adversary should be consolidated and its conduct handed over to the Government of India - it may perhaps have been better if it had been handed over to an autonomous body independent of the Government but, as pointed out by our learned brother, the course adopted was also not objectionable - was perhaps the only decision that could have been taken in the circumstances. This is indeed a unique situation in which the victims, in order to realize to the best advantage their right against UCC, had to be helped out by transposing that right to be enforced by the Government.

We did not indeed understand any learned Counsel before us to say that the legislature erred in entrusting the Government of India with the responsibility of fighting for the victims. The only grievance is that in the process their right to take legal proceedings should not have been completely taken away and that they should also have had the liberty of participating in the proceedings right through. In fact, though the Act contemplates the Central Government to completely act in place of the victims, the Government of India has not in fact displaced them altogether. In all the proceedings pending in this country, as well as those before Judge Keenan, the Government of India has conducted the proceedings but the other victims or such of them as chose to associate themselves in these proceedings by becoming parties were not shut out from taking part in the proceedings. In fact, as the learned Attorney General pointed out, one of the groups of litigants did give great assistance to the trial Judge at Bhopal. But even if the provisions of Section 3 had been scrupulously observed and the names of all parties, other than the Central Government, had been got deleted from the array of parties in the suits and proceedings pending in this country, we do not think that the result would have been fatal to the interests of the litigants. On the contrary, it enabled the litigants to obtain the benefit of all legal expertise at the command of the Government of India in exercising their rights against the Union Carbide Corporation. Such representation can well be justified by resort to a principle analogous to, if not precisely the same as that of, "parens patriae". A victim of the tragedy is compelled to part with a valuable right of his in order that it might be more efficiently and satisfactorily exploited for his benefit than he himself is capable of. It is of course possible that there may be an affluent claimant or lawyer engaged by him, who may be capable of fighting the litigation better. It is possible that the Government of India as a litigant may or may not be able to pursue the litigation with as much determination or capability as such a litigant. But in a case of the present type one should not be confounded by such a possibility. There are more indigent litigants than affluent ones. There are more illiterates than enlightened ones. There are very few of the claimants, capable of finding the financial wherewithal required for fighting the litigation. Very few of them are capable of prosecuting such a litigation in this country not to speak of the necessity to run to a foreign country. The financial position of UCIL was negligible compared to the magnitude of the claim that could arise and, though eventually the battle had to be pitched on our own soil, an initial as well as final recourse to legal proceedings in the United States was very much on the cards, indeed inevitable. In this situation, the legislature was perfectly justified in coming to the aid of the victims with this piece of legislation and in asking the Central Government to shoulder the responsibility by substituting itself in place of the victims for all purposes connected with the claims. Even if the Act had provided for a total substitution of the Government of India in place of the victims and had completely precluded them from exercising their rights in any manner, it could perhaps have still be contended that such deprivation was necessary in larger public interest.

But the Act is not so draconian in its content. Actually, as we have said a little earlier, the grievance of the petitioners is not so much that the government was entrusted with the functions of a dominus litus in this litigation. Their contention is that the whole object and purpose of the litigation is to promote the interests of the claimants, to enable them to fight the UCC with greater strength and determination, to help them overcome limitations of time, money and legal assistance and to realize the best compensation possible consistent not only with the damage suffered by them but also consistent with national honour and prestige. It is suggested that the power conferred on the Government should be construed as one hedged in by this dominant object. A divestiture of the claimant's rights in this situation would be reasonable, it is said, only if the claimant's rights are supplemented by the Government and not supplanted by it.

Assuming the correctness of the argument, the provisions of the proviso to Section 3(3) and of Section 4 furnish an answer to this contention. While the provision contained in the main part of Section 3 may be sufficient to enable the Government of India to claim to represent the claimants and initiate and conduct suits or proceeding on their behalf, the locus standi of the Government of India in suits filed by other claimants before the commencement of the Act outside India would naturally depend upon the discretion of the Court enquiring into the matter. That is why the proviso to Section 3 makes the right of the Government of India to represent and act in place of the victims in such proceedings subject to the permission of the Court or authority where the proceedings are pending. It is of course open to such Court to permit the Central Government even to displace the claimants if its is satisfied that the authority of the Act is sufficient to enable it to do so. In the present case it is common ground that the proceedings before Judge Keenan were being prosecuted by the Central Government along with various individual claimants. Not only did Judge Keenan

permit the association of the Government of India in these proceedings but the Government of India did have a substantial voice in the course of those proceedings as well.

Again Section 4 mandates that, notwithstanding anything contained in Section 3, the Central Government, in representing and acting in place of any person in relation to any claim, shall have due regard to any matters which such person may require to be urged with respect to his claim. It also stipulates that if such person so desires, the Central Government shall permit, at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim. In other words, though, perhaps, strictly speaking, under Section 3 the Central Government can totally exclude the victim himself or his legal practitioner from taking part in the proceedings (except in pending suits outside India), Section 4 keeps the substance of the rights of the victims intact. It enables, and indeed obliges, the Government to receive assistance from individual claimants to the extent they are able to offer the same. If any of the victims of their legal advisers have any specific aspect which they would like to urge, the Central Government shall take it into account. Again if any individual claimant at his own expense retains a legal practitioner of his own choice such legal practitioner will have to be associated with the Government in the conduct of any suit or proceeding relating to his claim. Sections 3 and 4 thus combine together the interests of the weak, illiterate, helpless and poor victims as well as the interests of those who could have managed for themselves, even without the help of this enactment. The combination thus envisaged enables the Government to fight the battle with the foreign adversary with the full aid and assistance of such of the victims or their legal advisers as are in a position to offer any such assistance. Though Section 3 denies the claimants the benefit of being eo nominee parties in such suits or proceedings, Section 4 preserves to them substantially all that they can achieve by proceeding on their own. In other words, while seeming to deprive the claimants of their right to take legal action on their own, it has preserved those rights, to be exercised indirectly. A conjoint reading of Sections 3 and 4 would, in our opinion, therefore, show that there has been no real total deprivation of the rights of the claimants to enforce their claim for damages in appropriate proceedings before any appropriate forum. There is only a restriction of this right which, in the circumstances, is totally reasonable and justified. The validity of the Act is, therefore, not liable to be challenged on this ground.

The next angle from which the validity of the provision is attacked is that the provision enabling the Government to enter into a compromise is bad. The argument runs thus: The object of the legislation can be furthered only if it permits the Government to prosecute the litigation more effectively and not if it enables the Government to withdraw it or enter into a compromise. According to them, the Act fails the impecunious victims in this vital aspect. The authority conferred by the Act on the Government to enter into a settlement or compromise, it is said, amounts to an absolute negation of the rights of the claimants to compensation and is capable of being so exercised to render such rights totally valueless, as in fact, it is said, has happened.

It appears to us that this contention proceeds on a misapprehension. It is common knowledge that any authority given to conduct a litigation cannot be effective unless it is accompanied by an authority to withdraw or settle the same if the circumstances call for it. The vagaries of a litigation of this magnitude and intricacy could not be fully anticipated. There were possibilities that the litigation may have to be fought out to the bitter finish. There were possibilities that the UCC might be willing to adequately compensate the victims either on their own or at the insistence of the Governments concerned. There was also the possibility, which had already been in evidence before Judge Keenan, that the proceedings might ultimately have to end in a negotiated settlement. One notices that in most of the mass disaster cases reported, proceedings finally end in a compromise if only to avoid an indefinite prolongation of the agonies caused by such litigation. The legislation, therefore, cannot be considered to be unreasonable merely because in addition to the right to institute a suit or other proceedings it also empowers the Government to withdraw the proceedings or enter into a compromise.

Some misgivings were expressed, in the course of the hearing, of the legislative wisdom (and, hence the validity) of entrusting the carriage of these proceedings and, in particular, the power of settling it out of Court, to the Union of India. It was contended that the union is itself a joint tort-feasor (sued as such by some of the victims) with an interest (adverse to the victims) in keeping down the amount of compensation payable to the minimum so as to reduce its own liability as a joint tort-feasor. It seems to us that this contention is misconceived. As pointed out by Mukharji, C.J., the Union of India itself is one of the entities affected by the gas leak and has a claim for compensation from the UCC quite independent of the other victims. From this point of view, it is in the same position as the other victims and, in the litigation with the UCC, it has every interest in securing the maximum amount of compensation possible for itself and the other victims. It is, therefore, the best agency in the circumstances that could be looked up to for fighting the UCC on its own as well as on behalf of the victims. The suggestion that the Union is a joint tort-feasor has been stoutly resisted by the learned Attorney General. But, even assuming that the Union has some liability in the matter, we fail to see how it can derive any benefit or advantage by entering into a low settlement with the UCC. As is pointed out later in this judgement and by Mukharji, C.J., the Act and Scheme thereunder have pro-

vided for an objective and quasi-judicial determination of the amount of damages payable to the victims of the tragedy. There is no basis for the fear expressed during the hearing that the officers of the Government may not be objective and may try to cut down the amounts of compensation, so as not to exceed the amount received from the UCC. It is common ground and, indeed, the learned Attorney General fairly conceded, that the settlement with the UCC only puts an end to the claims against the UCC and UCIL and does not in any way affect the victims 'rights, if any, to proceed against the Union, the State of Madhya Pradesh or the Ministers and officers thereof, if so advised. If the Union and these officers are joint tort-feasors, as alleged, the Union will not stand to gain by allowing the claims against the UCC to be settled for a low figure. On the contrary it will be interested in settling the claims against the UCC at as high figure as possible so that its own liability as a joint tort-feasor (if made out) can be correspondingly reduced. We are, therefore, unable to see any vitiating element in the legislation insofar as it has entrusted the responsibility not only of carrying on but also of entering into a settlement, if thought fit.

Nor is there basis for the contention that the Act enables a settlement to be arrived at without a proper opportunity to the claimants to express their views on any proposals for settlement that may be mooted. The right of the claimant under Sec. 4 to put forward his suggestions or to be represented by a legal practitioner to put forth his own views in the conduct of the suit or other proceeding certainly extends to everything connected with the suit or other proceeding. If, in the course of the proceedings there should arise any question of compromise or settlement, it is open to the claimants to oppose the same and to urge the Central Government to have regard to specific aspects in arriving at a settlement. Equally it is open to any claimant to employ a legal practitioner to ventilate his opinions in regard to such proposals for settlement. The provisions of the Act, read by themselves, therefore, guarantee a complete and full protection to the rights of the claimants in every respect. Save only that they cannot file a suit themselves, their right to acquire redress has not really been abridged by the provisions of the Act. Sections 3 and 4 of the Act properly read, in our opinion, completely vindicate the objects and reasons which compelled Parliament to enact this piece of legislation. Far from abridging the rights of the claimants in any manner, these provisions are so worded as to enable the Government to prosecute the litigation with the maximum amount or resources, efficiency and competence at its command as well as with all the assistance and help that can be extended to it by such of those litigants and claimants as are capable of playing more than a mere passive role in the litigation.

But then, it is contended, the victims have had no opportunity of considering the settlement proposals mooted in this case before they were approved by the Court. This aspect is dealt with later.

One of the contentions before us was that the UCC and UCIL are accountable to the public for the damages caused by their industrial activities not only on a basis of strict liability but also on the basis that the damages to be awarded against them should include an element of punitive liability and that this has been lost sight of while approving of the proposed settlement. Reference was made in this context to M.C. Mehta's case (AIR 1987 SC 1086) (supra). Whether the settlement should have taken into account this factor is, in the first place, a moot question. Mukharaji, C.J. has pointed out - and we are inclined to agree - that this is an "uncertain province of the law" and it is premature to say whether this yardstick has been, or will be, accepted in this country, not to speak of its international acceptance which may be necessary should occasion arise for executing a decree based on such a yardstick in another country. Secondly, whether the settlement took this into account and, if not, whether it is bad for not having kept this basis in view are questions that touch the merits of the settlement with which we are not concerned. So we feel we should express no opinion here on this issue. It is too far-fetched, it seems to us, to contend that the provisions of the Act permitting the Union of India to enter into a compromise should be struck down as unconstitutional because they have been construed by the Union of India as enabling it to arrive at such settlement.

The argument is that the Act confers a discretionary and enabling power in the Union to arrive at a settlement but lays down no guidelines or indications as to the stage at which, or circumstances in which, a settlement can be reached or the type of settlement that can be arrived at; the power conferred should, therefore, be struck down as unguided, arbitrary and uncanalised. It is difficult to accept this contention. The power to conduct a litigation, particularly in a case of this type, must, to be effective, necessarily carry with it a power to settle it at any stage. It is impossible to provide statutorily any detailed catalogue of the situations that would justify a settlement or the basis or terms on which a settlement can be arrived at. The Act, moreover, cannot be said to have conferred any unguided or arbitrary discretion to the Union in conducting proceedings under the Act. Sufficient guidelines emerge from the Statement of Objects and Reasons of the Act which makes it clear that the aim and purpose of the Act is to secure speedy and effective redress to the victims of the gas leak and that all steps taken in pursuance of the Act should be for the implementation of the object. Whether this object has been achieved by a particular settlement will be a different question but it is altogether impossible to say that the Act itself is bad for the reason alleged. We, therefore, think it necessary to clarify, for our part, that we are not called upon to express any view on the observations in

Mehta's case (AIR 1987 SC 1086) and should not be understood as having done so.

Shri Shanti Bhushan, who supported the Union's stand as to the validity of the Act, however, made his support conditional on reading into its provisions an obligation on the part of the Union to make interim payments towards their maintenance and other needs consequent on the tragedy, until the suits filed on their behalf ultimately yield tangible results. That a modern welfare State is under an obligation to give succour and all kinds of assistance to people in distress cannot at all be gainsaid. In point of fact also, as pointed out by the learned Chief Justice, the provisions of the Act and Scheme thereunder envisage interim payments to the victims; so there is nothing objectionable in this Act on this aspect. However, our learned brother has accepted the argument addressed by Sri Shanti Bhushan which goes one step further viz. that the Act would be unconstitutional unless this is read as a major inarticulate premise" underlying the Act. We doubt whether this extension would be justified for the hypothesis underlying the argument is, in the words of Sri Shanti Bhushan, that had the victims been left to fend for themselves, they would have had an immediate and normal right of obtaining compensation from the Union Carbide" and, as the legislation has vested their rights in this regard in the Union, the Act should be construed as creating an obligation on the Central Government to provide interim relief. Though we would emphatically reiterate the plight of it subjects in such a situation is a matter of imperative obligation on the part of the State and not merely 'a matter of fundamental human decency' as Judge Keenan put it, we think that such obligation flows from its character as a welfare State and would exist irrespective of what the Statute may or may not provide. In our view the validity of the Act does not depend upon its explicitly or implicitly providing for interim payments. We say this for two reasons. In the first place, it was, and perhaps still is, a moot question whether a plaintiff suing for damages in tort would be entitled to advance or interim payments in anticipation of a decree. That was, indeed, the main point on which the interim orders in this case were challenged before this Court and, in the context of the events that took place, remains undecided. It may be mentioned here that no decided case was brought to our notice in which interim payment was ordered pending disposal of an action in tort in this country. May be there is a strong case for ordering interim payments in such a case but, in the absence of full and detailed consideration, it cannot be assumed that, left to themselves, the victims would have been entitled to a "normal and immediate" right to such payment. Secondly, even assuming such right exists, all that can be said is that the State, which put itself in the place of the victims, should have raised in the suit a demand for such interim compensation - which it did - and that it should distribute among the victims such interim compensation as it may receive from the defendants. To say that the Act would be bad if it does not provide for payment of such compensation by the Government irrespective of what may happen in the suit is to impose on the State an obligation higher than what flows from its being subrogated to the rights of the victims. As we agree that the Act and the Scheme thereunder envisage interim relief to the victims, the point is perhaps only academic. But we felt that we should mention this as we are not in full agreement with Mukharji, C.J., on this aspect of the case.

The next important aspect on which much debate took place before us was regarding the validity of the Act qua the procedure envisaged by it for a compromise or settlement. It was argued that if the suit is considered as a representative suit no compromise or settlement would be possible without notice in some appropriate manner to all the victims of the proposed settlement and an opportunity to them to ventilate their views thereon (vide Order XXIII, Rule 33, C.P.C.). The argument runs thus: S. 4 of the Act either incorporates the safeguards of these provisions in which event any settlement effected without compliance with the spirit, if not the letter, of these provisions would be ultra vires the Act. Or it does not, in which event, the provisions of Section 4 would be bad as making possible an arbitrary deprivation of the victims' rights being inconsistent with, and derogatory of, the basic rules established by the ordinary law of the land viz. the Code of Civil Procedure. We are inclined to take the view that it is not possible to bring the suits brought under the Act within the categories of representative action envisaged in the Code of Civil Procedure. The Act deals with a class of action which is sui generis and for which a special formula has been found and encapsuled in Section 4. The Act divests the individual claimants of their right to sue and vests it in the Union. In relation to suits in India, the Union is the sole plaintiff, none of the others are envisaged as plaintiffs or respondents. The victims of the tragedy were so numerous that they were never defined at the stage of filing the plaint nor do they need to be defined at the stage of a settlement. The litigation is carried on by the State in its capacity, not exactly the same as but somewhat analogous to that of a "parens patriae". In the case of a litigation by a karta of a Hindu undivided family or by a guardian on behalf of a ward, who is non-sui juris, for example, the junior members of the family or the wards, are not to be consulted before entering into a settlement. In such cases, the Court acts as guardian of such persons to scrutinise the settlement and satisfy itself that it is in the best interest of all concerned. If it is later discovered that there has been any fraud or collusion, it may be open to the junior members of the family or the wards to called the karta or guardian to account but, barring such a contingency, the settlement would be effective and binding. In the same way, the Union as "parens patriae" would have been at liberty to enter into such settlement as it considered best on its own and seek the Court's approval therefor.

However, realizing that the litigation is truly fought on behalf and for the benefit of innumerable, though not fully identified, victims the Act has considered it necessary to assign a definite role to the individual claimants and this is spelt out in Section 4. This Section directs-

(i) that the Union shall have due regard to any matters which such person may require to be urged with respect to his claim; and

(ii) that the Union shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim.

This provision adequately safeguards the interests of individual victims. It enables each one of them to bring to the notice of the Union any special features or circumstances which he would like to urge in respect of any matter and if any such features are brought to its notice the Union is obliged to take it into account. Again, the individual claimants are also at liberty to engage their own counsel to associate with the State counsel in conducting the proceedings. If the suits in this case had proceeded, in the normal course, either to the stage of a decree or even to one of settlement the claimants could have kept themselves abreast of the developments and the statutory provisions would have been more than adequate to ensure that the points of view of all the victims are presented to the Court. Even a settlement or compromise could not have been arrived at without the Court being apprised of the views of any of them who chose to do so. Advisedly, the statute has provided that though the Union of India will be the dominus litus in the suit, the interests of all the victims and their claims should be safeguarded by giving them a voice in the proceedings to the extent indicated above. This provision of the statute is an adaptation of the principle of O.I, R. 8 and of O. XXIII, R. 38 of the Code of Civil Procedure in its application to the suits governed by it and, though the extent of participation allowed to the victims is somewhat differently enunciated in the legislation, substantially speaking, it does incorporate the principles of natural justice to the extent possible in the circumstances. The statute cannot, therefore, be faulted, as has been pointed out earlier also, on the ground that it denies the victims an opportunity to present their views or places them at any disadvantage in the matter of having an effective voice in the matter of settling the suit by way of compromise.

The difficulty in this case has arisen, as we see it, because of a fortuitous circumstance viz. that the talks or compromise were mooted and approved in the course of the hearing of an appeal from an order for interim payments. Though compromise talks had been in the air right from the beginning of this episode, it is said that there was an element of surprise when they were put forward in Court in February, 1989. This is not quite correct. It has been pointed out that even when the issue regarding the interim relief was debated in the Courts below, attempts were made to settle the whole litigation. The claimants were aware of this and they could - perhaps should - have anticipated that similar attempts would be made in this Court also. Though certain parties had been associated with the conduct of the proceedings in the trial Court - and the trial Judge did handsomely acknowledge their contribution to the proceedings - they were apparently not alert enough to keep a watching brief in the Supreme Court, may be under the impression that the appeal here was concerned only with the quantum of interim relief. One set of parties was present in the Court but, apart from praying that he should be forthwith paid a share in the amount that would be deposited in Court by the UCC in pursuance of the settlement, no attempt appears to have been made to put forward a contention that the amount of settlement was inadequate or had not taken into account certain relevant considerations. The Union also appears to have been acting on the view that it could proceed ahead on its own both in its capacity as "parens patriae" as well as in view of the powers of attorney held by it from a very large number of the victims though the genuiness of this claim is now contested before us. There was a day's interval between the enunciation of the terms of the settlement and their approval by the Court. Perhaps the Court could have given some more publicity to the proposed settlement in the newspapers, radio and television and also permitted some time to lapse before approving it, if only to see whether there were any other points of view likely to emerge. Basically speaking, however, the Act has provided an adequate opportunity to the victims to speak out and if they or the counsel engaged by some of them in the trial Court had kept in touch with the proceedings in this Court, they would have most certainly made themselves heard. If a feeling has gained ground that their voice has not been fully heard, the fault was not with the statute but was rather due to the developments leading to the finalization of the settlement when the appeal against the interim order was being heard in this Court.

One of the points of view on which considerable emphasis was laid in the course of the arguments was that in a case of this type the offending parties should be dealt with strictly under the criminal law of the Land and that the inclusion, as part of the settlement, of a term requiring the withdrawal of the criminal prosecutions launched was totally unwarranted and vitiates the settlement. It has been pointed out by Mukharji, C.J., - and we agree - that the Act talks only of the civil liability of, and the proceedings against, the UCC or UCIL or others for damages caused by the gas leak. It has nothing to say about the criminal liability of any of the parties involved. Clearly, therefore, this part of the settlement comprises a term which is outside the purview of the Act. The validity of the Act cannot, therefore, be impugned on the ground that it permits - and should not have permitted -

the withdrawal of criminal proceedings against the delinquents. Whether in arriving at the settlement, this aspect could also have been taken into account and this term included in it, is a question concerning the validity of the settlement. This is a question outside the terms of reference to us and we, therefore, express no opinion in regard thereto.

145. A question was mooted before us as to whether the actual settlement - if not the statutory provision - is liable to be set aside on the grounds that the principles of natural justice have been flagrantly violated. The merits of the settlement as such are not an issue before us and nothing we say can or should fetter the hands of the Bench hearing a review petition which has already been filed, from passing such orders thereon as it considers appropriate.

Our learned brother, however, has, while observing that the question referred to us is limited to the validity of the Act alone and not the settlement, incidentally discussed this aspect of the case too. He has pointed out that justice has in fact been done and that all facts and aspects relevant for a settlement have been considered. He has pointed out that the grievance of the petitioners that the order to this Court did not give any basis for the settlement has since been sought to be met by the order passed on 4th May, 1989 giving detailed reasons. This shows that the Court had applied its mind fully to the terms of the settlement in the light of the data as well as all the circumstances placed before it and had been satisfied that the settlement proposed was a fair and reasonable one that could be approved. In actions of this type, the Court's approval is the true safety valve to prevent unfair settlements and the fact is that the highest Court of the land has given thought to the matter and seen it fit to place its seal of approval to the settlement. He has also pointed out that a post-decisional hearing in a matter like this will not be of much avail. He has further pointed out that a review petition has already been filed in the case and is listed for hearing. The Court has already given an assurance in its order of May 4, 1989, that it will only be too glad to consider any aspects that may have been overlooked in considering the terms of the settlement. Can it be said, in the circumstances, that there has been a failure of justice which compels us to set aside the settlement as totally violative of fundamental rights? Mukharji, C.J., has pointed out that the answer to this question should be in the negative. It was urged that there is a feeling that the maxim: "Justice must not only be done but must also appear to be done" has not been fully complied with and that perhaps, if greater publicity had attended the hearing, many other facts and aspects could have been highlighted resulting in a higher settlement or no settlement at all. That feeling can be fully ventilated and that deficiency can be adequately repaired, it has been pointed out by Mukharji, C.J., in the hearing on the review petition pending before this Court. Though we are prima facie inclined to agree with him that there are good reasons why the settlement should not be set aside on the ground that the principles of natural justice has been violated, quite apart from the practical complications that may arise as the result of such an order, we would not express any final opinion on the validity of the settlement but would leave it open to be agitated, to the extent permissible in law, in the review petition pending before this Court.

There is one more aspect which we may perhaps usefully refer to in this context. The scheme of the Act is that on the one hand the Union of India pursues the litigation against the UCC and UCIL: on the other all the victims of the tragedy are expected to file their claims before the prescribed authority and have their claims for compensation determined by such authority. Certain infirmities were pointed out on behalf of the petitioners in the statutory provisions enacted in this regard. Our learned brother had dealt with these aspects and given appropriate directions to ensure that the claims will be gone into by a quasi judicial authority (unfettered by executive prescriptions of the amounts of compensation by categorizing the nature of injuries) with an appeal to an officer who has judicial qualifications. In this manner the scheme under the Act provides for a proper determination of the compensation payable to the various claimants. Claims have already been filed and these are being scrutinised and processed. A correct picture as to whether the amount of compensation for which the claims have been settled is meager, adequate or excessive will emerge only at that stage when all the claims have been processed and their aggregate is determined. In these circumstances, we feel that no useful purpose will be served by a post-decisional hearing on the quantum of compensation to be considered adequate for settlement.

For these reasons, it would seem more correct and proper not to disturb the orders of 14-15 February, 1989 on the ground that the rule of natural justice have not been complied with, particularly in view of the pendency of the review petition.

146 Before we conclude, we would like to add a few words on the state of the law of torts in this country. Before we gained independence, on account of our close association with Great Britain, we were governed by the common law principles. In the field of torts, under the common law of England, no action could be laid by the dependants or heirs of a person whose death was brought about by the tortious act of another on the maxim actio personalis moritur cum persona, although a person injured by a similar Act could claim damages for the wrong done to him. In England this situation was remedied by the passing of the Fatal Accidents Act, 1846, popularly known as Lord Campbell's Act. Soon thereafter the Indian Legislature enacted the Fatal Accidens Act, 1855. This Act is fashioned on the lines of the English Act of

1846. Even though the English Act has undergone a substantial change, our law has remained static and seems a trifle archaic. The magnitude of the gas leak disaster in which hundreds lost their lives and thousands were maimed, not to speak of the damage to livestock, flora and fauna, business and property, is an eye opener. The nation must learn a lesson from this traumatic experience and evolve safeguards at least for the future. We are of the view that the time is ripe to take a fresh look at the outdated century old legislation which is out of tune with modern concepts.

While it may be a matter for scientists and technicians to find solutions to avoid such large scale disasters, the law must provide an effective and speedy remedy to the victims of such torts. The Fatal Accidents Act, on account of its limited and restrictive application, is hardly suited to meet such a challenge. We are, therefore, of the opinion that the old antiquated Act should be drastically amended or fresh legislation should be enacted which should, inter alia, contain appropriate provisions in regard to the following matters:

(i) The payment of a fixed minimum compensation on a "no-fault liability" basis (as under the Motor Vehicles Act), pending final Adjudication of the claims of a prescribed forum;

(ii) The creation of a special forum with specific power to grant interim relief in appropriate cases;

(iii)The evolution of a procedure to be followed by such forum which will be conducive to the expeditious determination of claims and avoid the his degree of formalism that attaches to proceedings in regular courts; and

(iv) A provision requiring industries and concerns engaged in hazardous activities to take out compulsory insurance against third party risks.

In addition to what we have said above, we should like to say that the suggestion made of our learned brother, K.N. Singh, J., for the creation of an Industrial Disaster Fund (by whatever name called) deserves serious consideration. We would also endorse high suggestion that the Central Government will be well advised if, in future, it insists on certain safeguards before permitting a transnational company to do business in this country. The necessity of such safeguards, at least in the following two directions, is highlighted in the present case:

(a) Shri Garg has alleged that the processes in the Bhopal Gas Plant were so much shrouded in secrecy that neither the composition of the deadly gas that escaped nor the proper antidote therefor were known to anyone in this country with the result that the steps taken to combat its effects were not only delayed but also totally inadequate and ineffective. It is necessary that this type of situation should be avoided. The Government should therefore insist, when granting license to a transnational company to establish its industry here, on a right to be informed of the nature of the processes involved so as to be able to take prompt action in the event of an accident.

(b) We have seen how the victims in this case have been considerably handicapped on account of the fact that the immediate tort-feasor was the subsidiary of a multi-national with its Indian assets totally inadequate to satisfy the claims arising out of the disaster. It is, therefore, necessary to evolve, either by international consensus or by unilateral legislation, steps to overcome these handicaps and to ensure (i) that foreign corporations seeking to establish an industry here, agree to submit to the jurisdiction of the Courts in India in respect of actions for tortious acts in this country; (ii) that the liability of such a corporation is not limited to such of its assets (or the assets of its affiliates) as may be found in this country, but that the victims are able to reach out to the assets of such concerns anywhere in the world; (iii) that any decree obtained in Indian Courts in compliance with due process of law is capable of being executed against the foreign corporation, its affiliates and their assets without further procedural hurdles, in those other countries.

147. Our brother, K.N. Singh, J., has in this context dealt at some length with the United Nations Code of Conduct for Multinational Corporations which awaits approval of various countries. We hope that calamities like the one which this country has suffered will serve as catalysts to expedite the acceptance of an international code on such matters in the near future.

148. With these observations, we agree with the order proposed by the learned Chief Justice.

Order accordingly.

AIR 1990 SUPREME COURT 273

(FROM: AIR 1988 NOC 50: 1988 MPIJ 540)

R.S. PATHAK, C.J.:E.S. VENKATA-RAMIAH, RANGANATH MISRA.
M.N. VENKATACHALIAH AND N.D. OJHA, JJ.

C.A. Nos. 3187 and 3188 of 1988 with
S.L.P. (Civil) No.13080 of 1988, I)/-14-15-2-1989,
5-4-1989 and 4,5-1989.

UNION CARBIDE CORPORATION — Appellant

v.

UNION OF INDIA AND OTHERS — Respondents

Torts - Compensation to victims of mass disaster - Quantification - Factors to be taken into consideration - Bhopal Gas Leak Disaster - Ordinary standards for determination of compensation for fatal accident actions discarded - U.S. Dollar 470 Millions (approximately Rs.750/= crores) awarded as damages after allocating sums to different categories of victims such as fatal cases, seriously injured etc. - Need for evolving national policy to protect national interest from such hazardous pursuit of economic gains also stressed by Supreme Court.

Bhopal Gas Leak - Compensation - Determination.

Damages were sought on behalf of victims of Bhopal Gas Leak mass disaster. The Supreme Court considered it a compelling duty, both judicial and human, to secure immediate relief to the victims. The Court examined the prima facie material as to the basis of quantification of a sum which, having regard to all the circumstances including the prospect of delays inherent in the judicial process in India and thereafter in the matter of domestication of the decree in the United States for the purpose of execution and directed that 470 million US dollars, which upon immediate payment and with interest over a reasonable period, pending actual distribution amongst the claimants, would aggregate very nearly to 500 million US dollars or its rupee equivalent of approximately Rs.750/= crores be made the basis of the settlement. In doing so one of the important considerations was the range disclosed by the offers and counter offers which was between 426 million US dollars made by the Carbide Company and 500 million US dollars made by the Attorney General of India. The Court also examined certain materials available on record including the figures mentioned in the pleadings, the estimate made by the High Court and also certain figures referred to in the course of the arguments. The ordinary standards for awarding the compensation in fatal accident actions were discarded which if applied would have limited the aggregate of compensation payable in fatal cases to a sum less than Rs.70/= crores in all. The Court estimated the number of fatal cases at 3000 where compensation could range from Rs.1 lakh to Rs.3 lakhs. This would account for Rs.70/=crores, nearly 3 times higher than what would, otherwise, be awarded in comparable cases in motor vehicles accident claims. A sum of Rs.500 crores approximately was thought of as allocable to the fatal cases and 42,000 cases of such serious personal injuries leaving behind in their trail total or partial incapacitation either of permanent or temporary character. It was considered that some outlays would have to be made for specialized institutional medical treatment for cases requiring such expert medical attention and for rehabilitation and after care. Rs.25/- crores for the creation of such facilities was envisaged. Such cases of claims apparently pertaining to serious cases of permanent or temporary disabilities but are cases of a less serious nature, comprising claims for minor injuries, loss of personal belongings, loss of live-stock etc., for which there was a general allocation of Rs.225/- crores. Moreover, the Court also took into consideration the general run of damages in comparable accident claim cases and in cases under workmen's compensation

laws. The broad allocations made are higher than those awarded or awardable in such claims.

(Paras 18, 20, 23, 28, 30, 32, 33, 35, 37)

The Supreme Court lastly observed that there is need to evolve a national policy to protect national interests from such ultra-hazardous pursuits of economic gains and that jurists, technologists and other experts in economics, environmentology, futurology, sociology and public health etc. should identify areas of common concern and help in evolving proper criteria which may receive judicial recognition and legal sanction. (Para 42)

Cases Referred: **Chronological Paras**

AIR 1987 SC 1086 28, 4—

Mr. Anil B. Dewan, Sr. Advocate, Mr. J.B. Dadachanji, Mr. A.K. Verma, Advocate with him, for Appellant: Mr. K. Parasaran, Attorney General, Mr. A. Nariarputhan, Miss A. Subhashini and Mr. C.I. Sahen, Advocates, with him, for Respondents.

ORDER D/ - 14th Feb. 1989

Having given our careful consideration for these several days to the facts and circumstances of the case placed before us by the parties in these proceedings, including the pleadings of the parties, the mass of da— placed before us, the material relating to the proceedings in the Courts in the United States of America, the offers and counter-offers made between the parties at different stages during the various proceedings, as well as the complex issues of law and fact raised before us and the submissions made thereon, and in particular the enormity of human suffering occasioned by the Bhopal Gas disaster and the pressing urgency to provide immediate and substantial relief to victims of the disaster, we are of opinion that the case is pre-eminently fit for an overall settlement between the parties covering all litigation claims, rights and liabilities related to and arising out of the disaster and we hold it just equitable and reasonable to pass the following order:

2. We order:

(1) The Union Carbide Corporation shall pay a sum of US Dollars 470 millions (Four hundred and seventy millions) to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal Gas disaster.

(2) The aforesaid sum shall be paid by the Union Carbide Corporation to the Union of India on or before 31 March, 1989.

(3) To enable the effectuation of the settlement, all civil proceedings related to and arising out of the Bhopal Gas disaster shall hereby stand transferred to this Court and shall stand concluded in terms of the settlement, and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending.

A memorandum of settlement shall be filed before us tomorrow setting forth all the details of the settlement to enable consequential directions, if any, to issue.

3. We may record that we are deeply indebted to learned counsel for the parties for the dedicated assistance and the sincere co-operation they have offered the Court during the hearing of the case and for the manifest reasonableness they have shown in accepting the terms of settlement suggested by this Court.

ORDER D/ - 15th Feb. 1989

4. Having heard learned counsel for the parties, and having taken into account the written memorandum filed by them, we make the following order further to our order dated 14 February, 1989 which shall be read with and subject to this order:

1. Union Carbide India Ltd., which is already a party in numerous suits filed in the District Court at Bhopal, and which have been stayed by an order dated 31 December, 1985 of the District Court, Bhopal, is joined as a necessary part in order to effectuate the terms and conditions of our order dated 14 February, 1989 as supplemented by this order.

2. Pursuant to the order passed on 14 February, 1989 the payment of the sum of U.S.$ 470 Millions (Four Hundred and Seventy Millions) directed by the Court to be paid on or before 31 March, 1989 will be made in the manner following:

(a) A sum of U.S. $425 Millions (Four Hundred and Twenty Five Millions) shall be paid on or before 23 March 1989 by Union Carbide Corporation to the Union of India, less U.S. $ 5 Millions already paid by the Union Carbide Corporation pursuant to the order dated 7 June, 1985 of Judge Keenan in the Court proceedings taken in the United States of America.

(b) Union Carbide India Ltd. will pay on or before 23 March, 1989 to the Union of India the rupee equivalent of U.S. $ 45 Millions (Forty Five Millions) at the exchange rate prevailing at the date of payment.

(c) The aforesaid payments shall be made to the Union of India as claimant and for the benefit of all

victims of the Bhopal Gas Disaster under the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985, and not as fines, penalties, or punitive damages.

3. Upon full payment of the sum referred to in paragraph 2 above:

(a) The Union of India and the State of Madhya Pradesh shall take all steps which may in future before necessary in order to implement and give effect to this order including but not limited to ensuring that any suits, claims or civil or criminal complaints which may be filed in future against any Corporation, Company or person referred to in this settlement are defended by them and disposed of in terms of this order.

(b) Any such suits, claims or civil or criminal proceedings filed or to be filed before any Court or authority are hereby enjoined and shall not be proceeded with before such Court or authority except for dismissal or quashing in terms of this order.

4. Upon full payment in accordance with the Court's directions:

(a) The undertaking given by Union Carbide Corporation pursuant to the order dated 30 November, 1986 in the District Court, Bhopal shall stand discharged, and all orders passed in Suit No.113 of 1986 and/or in revision therefrom shall also stand discharged.

(b) Any action for contempt initiated against counsel or parties relating to this case and arising out of proceedings in the Courts below shall be treated as dropped.

5. The amounts payable to the Union of India under these orders of the Court shall be deposited to the credit of the Registrar of this Court in a Bank under directions to be taken from this Court.

This order will be sufficient authority for the Registrar of the Supreme Court to have the amount transferred to his credit which is lying unutilized with the Indian Red Cross Society pursuant to the direction from the International Red Cross Society.

6. The terms of settlement filed by learned counsel for the parties today are taken on record and shall form part of our order and the record.

5. The case will be posted for reporting compliance on the first Tuesday of April, 1989.

Terms of Settlement Consequential to the

Directions and Orders passed by this

Honourable Court

1. The parties acknowledge that the order dated February 14, 1989 as supplemented by the order dated February 15, 1989 disposes of in its entirety all proceedings in Suit No.113 of 1986. This settlement shall finally dispose of all past, present and future claims, causes of action and civil and criminal proceedings (of any nature whatsoever wherever pending) by all India Citizens and all public and private entities with respect to all past, present and future deaths, personal injuries, health effects, compensation, losses, damages and civil and criminal complaints of any nature whatsoever against UCC, Union Carbide India Limited, Union Carbide Eastern, and all of their subsidiaries and affiliates as well as each of their present and former directors, officers, employees, agents representatives, attorneys, advocates and solicitors arising out of, relating to or connected with the Bhopal Gas Leak Disaster, including past, present and future claims, causes of action and proceedings against each other. All such claims and causes of action whether within or outside India of Indian citizens, public or private entities are hereby extinguished, including without limitation each of the claims filed or to be filed under the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme 1985, and all such civil proceedings in India are hereby transferred to this Court and are dismissed with prejudice, and all such criminal proceedings including contempt proceedings stand quashed and accused deemed to be acquitted.

2. Upon full payment in accordance with the Court's directions the undertaking given by UCC pursuant to the order dated November 30, 1986 in the District Court, Bhopal, stands discharged, and all orders passed in Suit No.113 of 1986 and/or in any Revision therefrom, also stand discharged.

ORDER D/ - 5th April, 1989

6. Having considered the circumstances that various proceedings are pending in the Court in relation to the Bhopal Gas Disaster which have an important bearing on the settlement between the Union of India and the Union Carbide Corporation embodied in an order dated February 14, 1989 read with other order dated February 15, 1989, including the Writ Petitions challenging the vires of the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Act, 1985 which question the right of the Union of India to the terms of our order dated February 24, 198— consequential orders, including orders on the affidavits of

John Macdonald dated Ma— 31, 1989 and C.P. Lal dated April 3, 19— filed by the Union Carbide Corporation and the Union Carbide India Ltd. respectively, these appeals and in the suit are deferred and it is ordered that the Union Carbide Corporation will continue to be subject to the jurisdiction of the Courts in India until further orders.

7. During the course of argument before us, it transpired that allegations have been made in some of the documents filed before us that attempts were made to settle the dispute between the Union Carbide Corporation and the Union of India in respect of compensation to be paid to the victims involved in the Bhopal Gas Disaster at U.S. 350 Million dollars and towards the expenses of the Government in the sum of U.S. 100 million dollars. It seems necessary that the Union of India and the Union Carbide Corporation should file respective affidavits indicating the precise terms of proposals made from time to time outside the Court in regard to the settlement of the claims. The affidavit of the Union of India shall contain specific details in regard to the quantum of compensation, the time frame for payment, and other particulars suggested in the proposals and mentioning specifically the persons concerned who suggested the quantum and particulars and/or were concerned in the negotiations, whether belonging to the Government or otherwise. The Union of India will keep ready in its possession all the relevant documents on the basis of which the averments are made in the affidavit filed by it, so that such documents may be produced as and when this Court calls upon the said Union of India to do so before it.

8. Three weeks are allowed to the Union of India and the Union Carbide Corporation for filing the aforesaid affidavits. The matters will now come up on May 2, 1989 for further orders.

ORDER D/ - 4th May, 1989

9. The Bhopal Gas Leak tragedy that occurred at midnight on 2nd December, 1984, by the escape of deadly chemical fumes from the appellant's pesticide-factory was a horrendous industrial mass disaster, unparalleled in its magnitude and devastation and remains a ghastly monument to the dehumanizing influence of inherently dangerous technologies. The tragedy took an immediate toll 6660 innocent human lives and left tens of thousands of innocent citizens of Bhopal physically impaired or affected in various degrees. What added grim poignance to the tragedy was that the industrial-enterprise was using Methyl Iso-cyanate, a lethal toxic poison, whose potentiality for destruction of life and biotic-communities was, apparently, matched only by the lack of a prepackage of relief procedures for management of any accident based on adequate scientific knowledge as to the ameliorative medical procedures for immediate neutralization of its effects.

10. It is unnecessary for the present purpose to refer, in any detail, to the somewhat meandering course of the legal proceedings for the recovery of compensation initiated against the multi-national company initially in the Courts in the United States of America and later in the District Court at Bhopal in Suit No.113 of 1986. It would suffice to refer t the order dated 4 April, 1988: (reported in AIR 1988 NOC 50) of the High Court of Madhya Pradesh which, in modification of the interlocutory order dated 17 December, 1987 made by the learned District Judge, granted an interim compensation of Rs.250 crores. Both the Union of India and the Union Carbide Corporation appealed against that order.

11. This Court by its order dated 14 February, 1989 made in those appeals directed that there be an overall settlement of the claims in the suit, for 470 million US dollars and termination of all civil and criminal proceedings. The opening words of the order said:

> "Having given our careful consideration for these several days to the facts and circumstances of the case placed before us by the parties in these proceedings, including the pleadings of the parties, the mass of data placed before us, the material relating to the proceedings n the Courts in the United States of America, the offers and counter-offers made between the parties at different stages during the various proceedings, as well as the complex issues of law and fact raised before us and the submissions made thereon, and in particular the enormity of human suffering occasioned by the Bhopal Gas Disaster and the pressing urgency to provide immediate and substantial relief to victims of the disaster, we are of opinion that the case is pre-eminently fit for an overall settlement between the parties covering all litigations, claims, rights and liabilities related to and arising out of the disaster ....." **(Emphasis supplied)**

12. It appears to us that the reasons that persuaded this Court to make the order for settlement should be set out, so that those who have sought a review might be able effectively to assist the Court in satisfactorily dealing with the prayer for a review. The statement of the reasons is not made with any sense of finality as to the infallibility of the decisions; but with an open mind to be able to appreciate any tenable and compelling legal or factual infirmities that may be brought out, calling for remedy in Review under Art.137 of the Constitution.

13. The points on which we propose to set out brief reasons are the following:

(a) How did this Court arrive at the sum of 470 million US dollars for an over-all settlement?

(b) Why did the Court consider this sum of 470 million US dollars as 'just, equitable and reasonable'?

(c) Why did the Court not pronounce on certain important legal questions of far reaching importance said to arise in the appeals as to the principles of liability of monolithic, economically entrenched multi-national companies operating with inherently dangerous technologies in the developing countries of the third world - questions said to be of great contemporary relevance to the democracies of the third-world?

14. There is yet another aspect of the Review pertaining to the part of the settlement which terminated the criminal proceedings. The questions raised on the point in the Review-petitions, prima facie, merit consideration and we should, therefore, abstain from saying anything which might tend to pre-judge this issue one way or the other.

15. The basis consideration motivating the conclusion of the settlement was the compelling need for urgent relief. The suffering of the victims has been intense and unrelieved. Thousands of persons who pursued their own occupations for an humble and honest living have been rendered destitute by this ghastly disaster. Even after — years of litigation, basic questions of fundamentals of the law as to liability of the Union Carbide Corporation and the quan— of damages are yet being debated. These of course, are important issues which need to be decided. But, when thousands of innocent citizens were in near destitute condition without adequate subsistantial needs of food and medicine and with every coming morning haunted by the spectre of death and continued agony, it would be heartless abstention, if — possibilities of immediate sources of relief were not explored. Considerations of excellence and niceties of legal principles were greatly over-shadowed by the pressing problems of very survival for a large number of victims.

16. The Law's delays are, indeed, proverbial. It has been the unfortunate — of judicial process that even ordinary case where evidence consists of a few documents and the oral testimony of a few witnesses require some years to realize the fruits of litigation. This is so even in cases of great and unquestionable urgency such as fatal accident actions brought by the dependents. These are hard realities. The present case is one where damages are sought on behalf of the victims in a mass disaster and, having regard to the complexities and the legal questions involved any person with an unbiased vision would —— the time consuming prospect for — course of the litigation in its sojourn through the various Courts, both in India and lately United States.

17. It is indeed a matter for national introspection that public response to the great tragedy which affected a large number of poor and helpless persons limited itself to the expression of understandable and against the industrial enterprise but did not channel itself in any effort to put together public supported relief fund so that the victims were not left in distress, till the final decision in the litigation. It is well known that during the recent drought in Gujarat, the devoted efforts of public spirited persons mitigated, in great measure, the loss of cattle-wealth in the near famine conditions that prevailed.

18. This Court, considered it a compelling duty, both judicial and humane, to secure immediate relief to the victims. In doing so, the Court did not enter upon any forbidden ground. Indeed, efforts had earlier been made in this direction by Judge Keenan in the United States and by the learned District Judge at Bhopal. What this Court did was in continuation of what had already been initiated. Even at the opening of the arguments in the appeals, the Court had suggested to learned counsel on both sides to reach a just and fair settlement. Again, when counsel met for re-scheduling of the hearings the suggestion was reiterated. The response of learned counsel on both sides was positive in attempting a settlement, but they expressed a certain degree of uneasiness and skepticism at the prospects of success in view of their past experience of such negotiations when, as they stated, there had been uninformed and even irresponsible criticism of the attempts at settlement. The learned Attorney General submitted that even the most bona fide, sincere and devoted efforts at settlement were likely to come in for motivated criticism.

19. The Court asked learned counsel to make available the particulars of offers and counter offers made on previous occasions for a mutual settlement. Learned counsel for both parties furnished particulars of the earlier offers made for an overall settlement and what had been considered as a reasonable basis in that behalf. The progress made by previous negotiations was graphically indicated and those documents form part of the record. Shri Nariman stated that his client would stand by its earlier offer of Three Hundred and Fifty Million US dollars and also submitted that his client had also offered to add appropriate interest, at the rates prevailing in the U.S.A., to the sum of 350 million US dollars which raised the figure to 426 million US dollars. Shri Nariman stated that his client was of the view that that amount was the highest it could go up to. In regard to this offer of 426 million US dollars the learned Attorney-General submitted that he could not accept this offer. He submitted that any sum less than 500 million US dollars would not be reasonable. Learned counsel for both parties stated

that they would leave it to the Court to decide what should be the figure of compensation. The range of choice for the Court in regard to the figure was, therefore, between the maximum of 426 million US dollars, offered by Shri Nariman and the minimum of 500 million US dollars suggested by the learned Attorney-General.

20. In these circumstances, the Court examined the prima facie material as to the basis of quantification of a sum which, having regard to all the circumstances including the prospect of delays inherent in the judicial process in India and thereafter in the matter of domestication of the decree in the United States for the purpose of execution and directed that 470 million US dollars, which upon immediate payment and with interest over a reasonable period, pending actual distribution amongst the claimants, would aggregate very nearly to 500 million US dollars or its rupee equivalent of approximately Rs. 750/- crores which the learned Attorney-General had suggested, be made the basis of the settlement. Both the parties accepted this direction.

21. The settlement proposals were considered on the premise that Government had the exclusive statutory authority to represent and act on behalf of the victims and neither counsel had any reservation as to this. The order was also made on the premise that the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Act, 1985 was a valid law. In the event the Act is declared void in the pending proceedings challenging its validity, the order dated 14 February, 1989 would require to be examined in the light of that decision.

22. We should make it clear that if any material is placed before this Court from which a reasonable inference is possible that the Union Carbide Corporation had, at any time earlier, offered to pay any sum higher than an out-right down payment of US $ 470 million dollars, this Court would straightway initiate suo motu action requiring the concerned parties to show cause why the order dated 14 February 1989 should not be set aside and the parties —— to their respective original position.

23. The next question is as to the basis on which this Court considered this sum to be a reasonable one. This is not independent of its qualification: the idea of reasonableness of the present purpose is necessarily a broad and general estimate in the context of a settlement of the dispute and — on the basis of an accurate assessment by adjudication. The question is how good or reasonable it is as a settlement, which would avoid delays, uncertainties and assure immediate payment. The estimate, in the very nature of things, cannot share the accuracy of an adjudication. Here again one of the important considerations was the range disclosed by the offers and counter offers which was between 426 million US dollars and 500 million US dollars. The Court also examined certain materials available on record including the figures mentioned in the pleadings, the estimate made by the High Court and also certain figures referred to in the course of the arguments.

24. There are a large number of claims under the Act. In the very nature of the situation, doubts that a sizeable number of them are either without any just basis or were otherwise exaggerated could not be ruled out. It was, therefore, thought not unreasonable to proceed on some prima facie undisputed figures of cases of death and of substantially compensable personal injuries. The particulars of the number of persons treated at the hospitals was an important indicator in that behalf. This Court had no reason to doubt the bona fides of the figures furnished by the plaintiff itself in the pleadings as to the number of persons suffering serious injuries.

25. From the order of the High Court and the admitted position on the plaintiff's own side, a reasonable, prima facie, estimate of the number of fatal cases and serious personal injury cases was possible to be made. The High Court said:

> "..... In the circumstances, leaving small margin for the possibility of some of the claims relating to death and personal injuries made by the multitude of claims before the Director of Claims of the State Government being spurious, there is no reason to doubt that the figure furnished by the plaintiff, Union of India in its amended plaint can be safely accepted for the purpose of granting the relief of interim payment of damages. It has been stated by the plaintiff-Union of India that a total number of 2660 persons suffered agonizing and excruciating deaths and between 30000 to 40000 sustained serious injuries as a result of the disaster ....." (Emphasis supplied)

26. There is no scope for any doubt that the cases referred to as those of 'serious injuries' include both types of cases of permanent total and partial disabilities of various degrees as also cases of temporary total or partial disabilities of different damages. The High Court relied upon the averments and claims in the amended pleadings of the plaintiff, the Union of India, to reach this prima facie finding.

27. Then, in assessing the quantum of interim compensation the High Court did not adopt the standards of compensation usually awarded in fatal-accidents-actions or personal injury-actions arising under the Motor Vehicles Act. It is well known that in fatal accident-actions where children are concerned, the compensation awardable is in conventional sums ranging from Rs.15,000/- to Rs.30,000/- in each case. In the

present case a large number of deaths was of children of very young age. Even in the case of adults, according to the general run of damages in comparable cases, the damages assessed on the usually multiplier-method in the case of income groups comparable to those of the deceased persons would be anywhere between Rs.80,000/- and Rs.100,000/-.

28. But the High Court discarded, and rightly, these ordinary standards which, if applied, would have limited the aggregate of compensation payable in fatal cases to a sum less than Rs.20/- crores in all. The High Court thought it should adopt the broader principle of M.C. Mehta v. Union of India, AIR 1987 SC 1086. Stressing the need to apply such a higher standard, the High Court said:

> "As mentioned earlier, the measure of damages payable by the alleged tort-feaser as per the nature of tort involved in the suit has to be correlated to the magnitude and the capacity of the enterprises because such compensation must have a deterrent effect ...." (Emphasis supplied)

Applying these higher standards of compensation, the High Court proceeded to assess damages in the following manner:

> "Bearing in mind, the above factors, in the opinion of this Court, it would not be unreasonable to assume that if the suit proceeded to trial the plaintiff-Union of India obtain judgement in respect of the claims relating to deaths and personal injuries at least in the following amounts: (a) Rs.2 lakhs in each case of death; (b) Rs. 2 lakhs in each case of total permanent disability, (c) Rs.1 lakh in each of permanent partial disablement; and (d) Rs.50,000/- in each case of temporary partial disablement." (Emphasis supplied)

Half of these amounts were awarded as interim compensation. An amount of Rs.250/- crores was awarded.

29. The figure adopted by the High Court in regard to the number of fatal cases and cases of serious personal injuries do not appear to have been disputed by anybody before the High Court. These data and estimates of the High Court had a particular significance in the settlement. Then again, it was not disputed before us that the total number of fatal cases was about 3000 and of grievous and serious personal injuries, as verifiable from the records of the hospitals of cases treated at Bhopal was in the neighbourhood of 30,000. It would not be unreasonable to expect that persons suffering serious and substantially compensatable injuries would have gone to hospitals for treatment. It would also appear that within about 6 months of the occurrence, a survey had been conducted for purposes of identification of cases of death and grievous and serious injuries for purposes of distribution of certain ex gratis payments sanctioned by Government. These figures were, it would appear, less than ten thousand.

30. In the circumstances, as a rough and ready estimate, this Court took into consideration the prima facie findings of the High Court and estimated the number of fatal cases at 3000 where compensation could range from Rs. 1 lakh to Rs. 3 lakhs. This would account for Rs. 70/- crores, nearly 3 times higher than what would otherwise be awarded in comparable cases in motor vehicles accident claims.

31. Death has an inexorable finality about it. Human lives that have been lost were precious and in that sense priceless and invaluable. But the law can compensate the estate of a person whose life is lost by the wrongful act of another only in the way the law is equipped to compensate i.e. by monetary compensations calculated on certain well recognized principles. "Loss to the estate" which is the entitlement of the estate and the 'loss of dependency' estimated on the basis of capitalised present-value awardable to the heirs and dependants are the main components in the computation of compensation in fatal accident actions. But the High Court in estimating the value of compensation had adopted a higher basis.

32. So far as personal injury cases are concerned, about 30000 was estimated as cases of permanent total or partial disability. Compensation ranging from Rs. 2 lakhs to Rs.50,000/- per individual according as the disability is total or partial and degrees of the latter was envisaged. This alone would account for Rs.250/- crores. In another 20,000 cases of temporary total or partial disability compensation ranging from Rs.1 lakh down to Rs.25000/- depending on the nature and extent of the injuries and extent and degree of the temporary incapacitation accounting for a further allocation of Rs.100/- crores, was envisaged. Again, there might be possibility of injuries of utmost severity in which case even Rs. 4 lakhs per individual might have to be considered. Rs. 80 crores, additionally for about 2000 of such cases were envisaged. A sum of Rs.500 crores approximately was thought of as allocable to the fatal cases and 42,000 cases of such serious personal injuries leaving behind in their trail total of partial incapacitation either of permanent or temporary character.

33. It was considered that some outlays would have to be made for specialized institutional medical treatment for cases requiring such expert medical attention and for rehabilitation and after care. Rs. 25/- crores for the creation of such facilities was envisaged.

34. That would leave another Rs.225/- crores. It is true that in assessing the interim compensation the High Court had taken into account only the cases of

injuries resulting in permanent or temporary disabilities total or partial and had not adverted to the large number of other claims, said to run into lakhs, filed by other claimants.

35. Such cases of claims do not, apparently, pertain to serious cases of permanent or temporary disabilities but are cases of a less serious nature, comprising claims for minor injuries, loss of personal belongings, loss of live-stock etc., for which there was a general allocation of Rs.225/- crores. If in respect of these claims allocations are made at Rs.20,000/-, Rs.15,000/- and Rs.10,000/- for about 50,000 persons or claims in each category accounting for about one and half lakhs more claims the sums required would be nearly Rs.225/- crores.

36. Looked at from another angle, if the corpus of Rs.750/- crores along with the current market rates of interest on corporate borrowings, of say 14% or 14_% is spent over a period of eight years it would make available Rs.150/- crores each year; or even if interest alone is taken, about Rs.105 to 110 crores per year could be spent, year-after-year, perpetually towards compensation and relief to the victims.

37. The court also took into consideration the general run of damages in comparable accident claim cases and in cases under workmens compensation laws. The broad allocations made are higher than those awarded or awardable in such claims. The apportionments are merely broad considerations generally guiding the idea of reasonableness of the overall basis of settlement. This exercise is not a pre-determination of the quantum of compensation amongst the claimants either individually or category wise. No individual claimant shall be entitled to claim a particular quantum of compensation even if this case is found to fall within and of the broad categories indicated above. The determination of the actual quantum of compensation payable to the claimants has to be done by the authorities under the Act, on the basis of the facts of each case and without reference to the hypothetical quantification made only for purposes of an overall view of the adequacy of the amount.

38. These are the broad and general assumptions underlying the concept of 'justness' of the determination of the quantum. If the total number of cases of death or of permanent, total or partial , disabilities or of what may be called 'catastrophic' injuries is shown to be so large that the basic assumptions underlying the settlement become wholly unrelated to the realities, the elements 'of justness' of the determination and of the 'truth' of its factual foundation would seriously be impaired. The 'justness' of the settlement is based on these assumptions of truth. Indeed, there might be different opinions, on the interpretation of laws or on questions of policy or even on what may be considered wise or unwise; but when one speaks of justice and truth, these words mean the same thing to all men whose judgement is uncommitted. Of Truth and Justice, Anato— France said:

> "Truth passes within herself a penetrative force unknown alike to error and falsehood to say truth and you must understand its meaning. For the beautiful words Truth and Justice need not be defined in order to be understood in their true sense. They bear within them a shining beauty and a heavenly light. I firmly believe in the triumph of truth and justice. That is what upholds me in time of trial ...."

39. As to the remaining question, it has been said that many vital juristic principles of great contemporary relevance to the Third World generally, and to India in particular, touching problems emerging from the pursuit of such dangerous technologies for economic gains by multi-nationals arose in this case. It is said that this is an instance of lost opportunity to this apex Court to give the law the new direction on vital issues emerging from the increasing dimensions of the economic exploitation of developing countries by economic forces of the rich ones. This case also, it is said, concerns the legal units to be envisaged, in the vital interests of the protection of the constitutional rights of the citizenry, and of the environment, on the permissibility of such ultra-hazardous technologies and to prescribe absolute and deterrent standards of liability if harm is caused by such enterprises. The prospect of exploitation of cheap labour and of captive-markets, it is said, induces multi-nationals to enter into the developing countries for such economic-exploitation and that this was eminently an appropriate case for a careful assessment of the legal and Constitutional safeguards stemming from these vital issues of great contemporary relevance.

40. These issues and certain cognate areas of even wider significance and the limits of the adjudicative disposition of some of their aspects are indeed questions of seminal importance. The culture of modern industrial technologies, which is sustained on processes of such pernicious potentialities, in the ultimate analysis, has thrown open vital and fundamental issues of technology-options. Associated problems of the adequacy of legal protection against such exploitative and hazardous industrial adventurism, and whether the citizens of the country are assured the protection of a legal system which could be said to be adequate in a comprehensive sense in such contexts arise. These, indeed, are issues of vital importance and this tragedy, and the conditions that enabled it happen, are of particular concern.

41. The chemical pesticide industry is a concomitant, and indeed, an integral part, of the Technology of

Chemical Farming. Some experts think that it is time to return from the high risk, resource-intensive, high-input, anti-ecological, monopolistic 'hard' technology which feeds, and is fed on, its self-assertive, attribute to a more human and humane, flexible, eco-conformable, "soft" technology with its systemic-wisdom and opportunities for human creativity and initiative "Wisdom demands" says Schumachher "a new orientation of science and technology towards the organic, the gentle, the non-violent, the elegant and beautiful". The other view stressing the spectacular success of agricultural production in the new era of chemical farming, with high-yielding strains, points to the breakthrough achieved by the Green Revolution with its effective response to, and successful management of, the great challenges of feeding the millions. This technology in agriculture has given a big impetus to enterprises of chemical fertilizers and pesticides. This, say its critics, has brought in its trail its own serious problems. The technology-opinions before scientists and planners have been difficult.

42. Indeed, there is also need to evolve a national policy to protect national interests from such ultra-hazardous pursuits of economic gains. Jurists, technologists and other experts in Economics, environmentology, futurology, sociology and health etc. should identify areas of common concern and help in evolving proper criteria which may receive judicial recognition and legal sanction.

43. One aspect of this matter was dealt with by this Court in M.C. Mehta v. Union of India (AIR 1987 SC 1086) (supra) which marked a significant stage in the development of the law. But, at the hearing there was more than a mere hinge in the submissions of the Union Carbide that in this case the law was altered with only the Union Carbide Corporation in mind, and was altered to its disadvantage even before the case had reached this Court. The criticism of the Mehta principle, perhaps, ignores the emerging postulates of tortious liability whose principal focus is the social-limits on economic adventurism. There are certain things that a civilized society simply cannot permit to be done to its members, even if they are compensated for their resulting losses. We may note a passage in "Theories of Compensation" (R.F. Goodin: Oxford Journal of Legal Studies, 1989, p.57.).

> "It would, however, be wrong to presume that as a society can do anything we like to people, just so long as we compensate them for their losses. Such a proposition would mistake part of the policy universe for the whole. The set of policies to which it points ... policies that are 'permissible, but only with compensation ...' is bound on the one side by a set of policies that are 'permissible, even without compensation' and on the other side by a set of policies that are 'impermissible, even with compensation'."

44. But, in the present case, the compulsions of the need for immediate relief, tens of thousands of suffering victims could not, in our opinion, wait till these questions, vital though they be, are resolved in the due course of judicial proceedings. The tremendous suffering of thousands of persons compelled us to move into the direction of immediate relief which, we thought, should not be subordinated to the uncertain promises of the law, and when the assessment of fairness of the amount was based on certain factors and assumptions not disputed even by the plaintiff.

45. A few words in conclusion. A settlement has been recorded upon material and in circumstances which persuaded the Court that it was a just settlement. This is not to say that this Court will shut out any important material and compelling circumstances which might impose a duty on it to exercise the powers of review. Like all other human institutions, this court is human and fallible. What appears to the court to be just and reasonable in that particular context and setting need not necessarily appear to others in the same way. Which view is right, in the ultimate analysis, is to be judged by what it does to relieve the undeserved suffering of thousands of innocent citizens of this country. As a learned author said (Wallace Mendelson: Supreme Court Statecraft - The Role of Law and Men.)

> "In this imperfect legal setting we expect judges to clear their endless dockets, uphold the Rule of Law, and yet not utterly disregard our need for the discretionary justice in Plato's philosopher king. Judges must be sometimes cautious and sometimes b——. Judges must respect both the traditions of the past and the convenience of the present ....."

But the course of the decisions of court cannot be reached or altered or determined in agitational pressures. If a decision is wrong the process of correction must be in a manner recognized by law. Here, many persons and social action groups claim to speak for the victims, quite a few in different voices. The factual allegations on which they rest that approach are conflicting in some areas and it becomes difficult to distinguish truth from falsehood and half-truth, and to distinguish as to who speaks for whom.

46. However, all of those who invoked the corrective-processes in accordance with law shall be heard and the court will do what the law and the course of justice requires. The matter concerns the interests of a large number of victims of a mass disaster. The Court directed the settlement with the earned hope that it would do them good and bring them immediate relief, for tomorrow might be too late for many of them. But the case equally concerns the credibility of, and the public confidence in the judicial process, owing to the pre-settlement procedures being limited to the main contestants in the appeal the benefit of some contrary

or supplementary information or material having a crucial bearing on the fundamental assumption basic to the settlement, have been denied to the court and that, as a result, serious miscarriage of justice, violating the constitutional and legal rights of the person affected, have been occasioned, it will be the endeavour of this Court to undo any such injustice. By that, we reiterate, must be by procedure recognized by law. Those who trust this Court will not have cause for despair.

Order accordingly.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (IN CHAMBERS)

No. 1994 N 1212

Royal Courts of Justice, Strand, London W.C.2.

Tuesday, 11th april, 1995

Before:

MR. JAMES STEWART, Q.C.

(Sitting as a Deputy Judge of the High Court)

B E T W E E N:

ENGLEBERT NGCOBO — (First Plaintiff)

and

ALBERT DLAMINI — (Second Plaintiff)

and

MAKHALADI ANASTASIA CELE

(suing as the adminsitratirix of the

Estate of PETER ZIBONELE CELE) — (Third Defendant)

- and -

THOR CHEMICALS HOLDINGS LTD — (First Defendant)

and

THOR CHEMICALS (UK) LTD. — (Second Defendant)

and

DESMOND JOHN COWLEY — (Third Defendant)

MR. ROBIN STEWART, Q.C. and MR. JAMES CAMERON (instructed by Messrs. Leigh Day & Co.)

appeared on behalf of the Plaintiffs.

MR. SIMON HAWKESWORTH, Q.C. and MR. FRANCIS TREASURE (instructed by Messrs Vaudrey Osborne & Mellor) appeared on behalf of the Defendants.

Transcribed from the shorthand Notes
of Messrs. Harry Counsell & Co., 61 Carey Street,
London WC2A 2JG. Tel: 071.242.9346

JUDGEMENT

(As Approved)

THE JUDGE: By their summons dated the 19th January 1995 the three Defendants to this action, Thor Chemicals Holdings Limited, Thor Chemicals (UK) Ltd. and Desmond John Cowley, seek a stay of these proceedings on the ground that England is not an appropriate forum for the trial of this action, and South Africa is clearly or distinctly a more appropriate forum.

Two other grounds for a stay no longer fall to be determined. At the outset of this hearing, I gave leave for the action to be re-constituted with the widow/administratrix of the first Plaintiff henceforth to be the first Plaintiff, which cured an allegation of lack of the first Plaintiffs' capacity to sue. Ground three, which alleged that the Plaintiff's claims are not doubly actionable, is no longer pursued.

The factual background to this claim is as follows. Englebert Ngcobo, Albert Dlamini and Peter Zibonele Cele were all temporary workers at the Cato Ridge plant of Thor Chemicals, South Africa (Proprietary) Ltd. in Natal, South Africa. This company is a wholly owned subsidiary of the first Defendant. The third Defendant is and was at all material times the director of the first Defendant and a director of the second Defendant. The second Defendant was a wholly owned subsidiary of the first Defendant. The Plaintiffs allege that this company was responsible for the Group's Margate operation.

The South African plant, inter alia, manufactured and reprocessed mercury compounds. Mr. Ngcobo worked there from April 1991 until the 24th January 1992; Mr. Dlamini from October 1991 until a date in March 1992 and Mr. Cele from August 1991 until the 31st January 1992.

There is no dispute that all three in the course of their employment were exposed to hazardous and unsafe quantities of mercury, mercury vapour and/or mercury compounds. This caused Mr.Ngcobo to be ill on the 22nd February 1992; he was hospitalized on the 26th February 1992; he remained in hospital until his death on the 11th February 1995. He was then 55 years of age. His widow now sues on behalf of his dependents and his estate as the first Plaintiff. The second Plaintiff, who is now 27 years of age, became ill in early April 1992; he was hospitalized on the 16th April 1992 and continues to suffer from a major disability. Mr. Cele became ill in early February 1992; he was hospitalized on the 3rd March 1992 and died on the 1st July 1993 at the age of 22. His mother now sues on behalf of his dependants and his estate as third Plaintiff.

None of these Plaintiffs could have sued the employer, Thor South Africa (Proprietary) Ltd, in South Africa by reason of the provisions of section 7 of the (South African) Workmen's Compensation Act 1941. This prohibits actions by an employee against his employer for injuries sustained at work. Instead, irrespective of fault, an employee is entitled to claim Workmen's Compensation form the Commissioner who administers a Workmen's Compensation Fund. Each of these workmen availed themselves of that entitlement: Mr. Ngcobo received the equivalent of £4,685, Mr. Dlamini an amount which is not known, and Mr. Cele the equivalent of £4,358. The Commissioner is empowered under Section 43 of the same Act to pay an increased amount of compensation if there is negligence on the part of the employer which is causally connected with the exposure (see page 86 of the trial bundle before me).

No information has been available to me in this hearing as to whether an application under Section 43 has been made and, if so, potentially the sort of figure which could reasonably be expected to be awarded.

Notwithstanding the prohibition under Section 7, Section 8 of the same Act expressly permits a workman to sue a third part tortfeasor such as these Defendants in South Africa in respect of injuries sustained at work. It has not been argued in these proceedings that an action in South Africa would not lie against these Defendants for events in South Africa. Mr. Hawkesworth, Q.C. on behalf of these Defendants has undertaken to me that these Defendants would submit to jurisdiction in South Africa. However, as the Plaintiffs' case is that negligence by all three Defendants in England as well as South Africa caused the exposure to mercury, they have brought their claims in England against all three Defendants whose domiciliary forum is England.

The Plaintiffs in their re-amended Statement of Claim make the following allegations:

1. That the first and second Plaintiffs had a mercury processing plant in Margate, England, which was set up by the third Defendant together with a plant foreman/production manager called Bill Smith, both of whom were servants of the first and second Defendants.

2. Between 1981 and 1987 inspectors form the Health and Safety Executive in England reported high levels of mercury in the air and in the urine of the workforce in the Margate plant.

3. In about 1987, the mercury processing operation at Margate was closed down, having been moved in two stages in 1985 and 1987 to the South African subsidiary at Cato Ridge.

4. That all three Defendants were responsible for the research, design, set-up and commissioning of the South

African plant and that Bill Smith was sent out to South Africa by the Defendants to assist in the setting up process and in the supervision of plant workers, including Messrs. Ngcobo, Dlamini and Cele.

5. That all the Defendants and Mr. Smith were well aware of the potential hazards to health and safety by exposure to high levels of mercury.

6. That it was Mr. Smith's job to ensure that the workers were aware of these hazards in order to ensure: (a) that safe working practices were in place; (b) that adequate and properly maintained safety equipment was used; (c) that workers were properly trained in safety; and (d) that the health and safety of workers was properly monitored.

7. That the negligence of all three Defendants has caused the exposure of the three temporary workers to hazardous levels of mercury.

In all, some twenty-five particulars of negligence are pleaded which allege in broad terms the following:

(a) that an unsafe system of work was transferred from Margate to South Africa identical to that which was known by the Defendants to be unsafe; that Bill Smith was incompetent; and that all three Defendants are vicariously liable for his negligence and that tortious liability therefore exists in England;

(b) that in South Africa torts were committed for which all three Defendants, in England, are vicariously liable;

(c) that the Defendants installed plant in South Africa which could not be operated safely; the compressor was incapable of decontaminating the air and the design of the protective hoods and air supply was faulty, so that the air breathed in was heavily contaminated with mercury;

(d) that there were unsafe working practices, including a failure to monitor mercury urine levels. This should be viewed in the light of their knowledge of the sort of level which was hazardous in Margate.

In summary, therefore, the Plaintiffs allege that the Defendants' liability arises out of research and development in England, the export of unsafe plant and processes from England to South Africa and the commissioning in South Africa of processes, plant and practices which to their knowledge were hazardous. This caused, it is said, the workmen to be subjected to severe chronic exposure to hazardous levels of mercury and mercuric compounds over a substantial period of time, which in turn caused personal injury and loss. The defence I am told will be that the Cato Ridge plant was sabotaged causing a sudden explosion in the absence of negligence by anyone, but certainly not on the part of these Defendants.

Relevant Law as to Forum Conveniens

The leading case on forum conveniens is Spiliada Maritime Corporation v Cansulex Ltd. [1987] 1 AC 460. The relevant principles are enunciated in the speech of Lord Goff and I summarise them as follows:

(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum having competent jurisdiction in which the case may be tried more suitably in the interests of all the parties and in the interests of justice (474D-476C).

(b) The burden of proof rests on the Defendant to persuade the court to exercise its discretion to grant a stay. The standard of proof is to show there is another forum which is "clearly or more distinctly more appropriate" than the English forum (477B).

(c) In determining (b) above, proper regard is to be paid to the fact that jurisdiction has been founded in England as of right (477E).

(d) In determining whether there exists some other forum which is clearly more appropriate, the court will first look to see what factors there are which point in the direction of another forum. The natural forum is that with which the action has the most "real and substantial connection". Connecting factors will include: (i) factors of convenience, expense and expense such as availability of witnesses (477G, 478A-B); (ii) the law governing the relevant transaction; (iii) where the parties reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum which prima facie is clearly more appropriate for the trial of the action it will ordinarily refuse a stay (478B-C).

(f) If, however, the court concludes at that stage that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.

In this inquiry the court should consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact that if established objectively by cogent evidence the Plaintiff will not obtain justice in the foreign jurisdiction. The bur-

den here shifts to the plaintiff (478C-D).

(g) As to the extent to which a legitimate personal or juridical advantage may be relevant, the mere fact that the Plaintiff has such an advantage in proceedings in England cannot be decisive; the fundamental principle is where the case may be tried suitably for the interests of all the parties and for the ends of justice (482B, 478E and 482E).

Thus damages on a higher scale, a more appropriate procedure of discovery, a power to award interest as a general rule in England should not deter a court from granting a stay simply because the Plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the appropriate available forum.

Since the Spiliada case in 1987, there have been a number of cases in which the principles therein set out have been applied. In Banco Atlantico v BBME (1990) 2 L1.L.R. 504 the plaintiff Spanish bank sued the defendant English bank as endorsers or guarantors of promissory notes which had been given in payment for the purchase of half the shares in the Spanish corporation pursuant to a written agreement made in Spain. The proper law of the contract was Spanish. Leggatt J. granted a stay; the Court of Appeal reversed him. Bingham L.J. at p.508 said the following:

> "Do BBME have to show that Sharjah is clearly a more appropriate forum than this for the determination of those issues having regard to the interests of all parties and the achievement of justice?

"In considering this question it is necessary to remember that Banco have established jurisdiction here, in the form of BBME's incorporation, as of right. Very clear and weighty grounds must be shown for refusing to exercise jurisdiction. A balance of convenience in favour of the foreign forum is not enough. The interests of justice are paramount."

At p.510 Bingham L.J. went on to say:

> "Although the judge described BBME's connection with this forum as 'not a fragile one', it is in truth very solid indeed. It must be rare that a corporation resists suit in its domiciliary forum. Rarely would this Court refuse jurisdiction in such case. In my judgement very clear and weighty grounds for doing so were not shown."

Chief Justice Gleeson, in an Australian case, Goliath Portland Cement Co. Ltd. v Bengtell [1994] 33 New South Wales Law reports page 414 at page 419 G said the following:

> "The place where a large corporation has its headquarters is a reasonable place in which to commence an action against it; it would only be in unusual circumstances that it could be described as clearly inappropriate."

It is pointed out that the trend of modern conventions is to sue a defendant in his domiciliary forum.

Professor Stern's book on the Conflict of Laws, page 151 was quoted to me.

The Application of these Principles to the Factual Issues in the Present Case.

The Defendants' Submissions.

The following submissions were made to me by Mr. Simon Hawkesworth, Q.C. on behalf of the Defendants based on affidavits sworn on these Defendants' behalf.

1. The nationality of the three workers was at the material time South African.

2. The location of the exposure was Natal, South Africa; their employer was a South African company, regulated by the health and safety laws of South Africa.

3. Insofar therefore as any torts were committed, they were committed in South Africa.

4. The links with England are tenuous and insubstantial and will not in any event, even if proved, result in the action being substantially less inconvenient or expensive to try here.

5. There is no evidence that the first Defendant exercised any operational control over the plant in South Africa or that the third Defendant was acting in South Africa on behalf of the first Defendant. The annual report of the first Defendant holding company for the year ending 31st December 1993 shows that the first Defendant did not trade. It is not suggested by the Plaintiffs (paragraph 14 of the Statement of Claim was deleted by amendment) that the first Defendant is liable for the actions of the South African company. The only basis upon which vicarious liability is alleged is that the first Defendant is vicariously liable for the acts and/or omissions of the third Defendant and/or Smith.

6. There is no reliable evidence that either the third Defendant or Smith when in South Africa were working for the first Defendant: they were working for Thor South Africa (Proprietary) Ltd.

7. There is no evidence that the second Defendant had any responsibility for the running of the Margate plant.

8. Transferred from Margate to South Africa were customers which created a fifteen per cent. uplift in production. The plant transferred was insignificant and was merely absorbed into the works already in full operation.

9. The operation in Margate was not intrinsically unsafe. Improvement notices were served by the Health & Safety Executive relating to such things as changing facilities and hygiene. Had the system been unsafe, as the Plaintiffs allege, it would have been shut down.

10. The Margate evidence is therefore peripheral to the main issue. It is remote in time from the exposure in South Africa. Decisions made in 1987 cannot be other than marginally relevant, if at all, to what took place in South Africa in 1992.

11. Smith's evidence at page 233 of the bundle to the inquiry held by the South African Department in 1993 was equivocal upon the issue of whether when in South Africa he was working for the South African company or the first Defendant. Mr. Cowley's most recent affidavit is to the effect that Smith was working for the South African company.

12. The fact that there have been two previous hearings on the subject-matter of this case, i.e. the inquiry plus a criminal trial (see page 205), is a compelling factor in favour of South Africa being the most convenient forum. The evidence has twice been rehearsed. The Defendants have a full team of lawyers in South Africa.

13. The Plaintiffs' concentration upon Margate is a cosmetic exercise. The exposure took place in South Africa; South Africa is the natural forum for the Plaintiffs as well as the Defendants. There are no connecting factors in the real and substantial sense to displace South Africa as the natural forum. The Plaintiffs are latching on an English element to a South African issue.

14. There is nothing to prevent the first and/or the second Defendant being sued in South Africa. The only reason the Plaintiffs are suing here is to get higher damages and because they have got legal aid.

15. Mr. Hawkesworth's and Mr. Treasure's searches have not revealed any case where foreign nationals working for a foreign company having an accident in their own country arising out of employment in their own country ever having successfully sued in England.

16. The Plaintiffs have available the evidence of Mr. Murphy from the South African Manpower Commission as to the working conditions and the practices in South Africa. This is of far greater significance, it is said, than any HSE findings in Margate years before the South African exposure. Either the working practices in South Africa gave rise to this exposure or they did not. The Margate evidence, it is said, will not assist.

17. Insofar as there is evidence that the third Defendant was responsible for the setting up of the plant in South Africa, he lives in both South Africa and England; his domicile in England is not established.

18. Professor Davies' report of the 15th April 1992 relied on by the Plantiffs shows at page 263 of the bundle: "All environmental measurements have been made in house" and at page 264: "All estimations of mercury in urine have been carried out in-house." This demonstrates the South African nature of the evidence relied upon in support of this claim.

19. A comparison between the pleaded case and the affidavit of Mr. Meeran, the solicitor acting for the Plaintiffs (pages 128-130 with pages 157-158) demonstrates the tenuous nature of the link between the breaches of duty in England and damage in South Africa. In substance, the vast majority of allegations, it is said, are of negligence in South Africa and therefore the closest connections with the torts pleaded is South Africa.

20. In the premises, the Plaintiffs' choice of England as a forum in which to sue was not reasonable, given the Plaintiffs' right to compensation in South Africa already exercised, their right to obtain increased compensation under Section 43, and the fact of admissions of negligence by the South African company in the criminal trial (p.205). The mere fact that compensation may be less in South Africa is of little, if any, relevance. Their system is not to be criticised, it is said, simply because it is different and because South Africa has a no fault compensation scheme which may not compensate victims as fully as in the United Kingdom.

21. The Defendants would submit to South African jurisdiction and can be sued in South Africa pursuant to Section 8.

22. The disadvantage to the Defendants of being sued in England is the converse of the Plaintiffs' advantage: it is not a level playing field. The Plaintiffs have legal aid without fear of any order for costs against them.

23. The practical difficulties and the costs and expense to the Defendants of the matter being tried in England would be immense: the Defendants would have to call approximately ten witnesses from South Af-

rica (see page 335). They may also call Professor Fraser from Cape Town University in support of the sabotage theory. All three Plaintiffs will have to be brought from South Africa. Experts may have to visit South Africa to inspect the site, the plant and the equipment. Witnesses as to quantum will be required to come from or visit South Africa. Evidence as to dependants and their extent will have to be investigated in South Africa and given in England. The cultural and linguistic difficulties of a trial in England will be immense. Defence witnesses will be reluctant to come to England and their attendance cannot be compelled.

24. The relevant law to be applied, it is submitted by Mr. Hawkesworth, would be South African law. The substantive cause of action arose in South Africa. The flexibility spoken of in Boys v Chaplin [1971] AC 356 should militate in favour of South African law being applied in England both as to liability and quantum. English law was not devised to deal with South African extended families.

25. The Defendants may wish to join the doctors who treated the workmen and the South African Manpower Commission as third parties; that can only realistically be done in South Africa.

26. If the Defendants prove the appropriate forum is clearly or distinctly South Africa, the Plaintiffs have failed to discharge the burden upon them of showing that a stay should nevertheless not be granted. The juridical or personal advantage to the Plaintiffs of greater damages or legal aid should not be decisive. The South African company has, in any event, resolved to pay the three workers or their personal representatives some of the wages which they would have earned.

Legal aid is not a relevant juridical advantage. Insofar as it is a relevant personal advantage, the court must be guided by the principles set out in Lord Goff's speech in Spiliada. There is nothing inherent in the South African system which prevents these Plaintiffs obtaining justice. The Plaintiffs have already received substantial justice in their own country and may not have exhausted their remedies under Section 43 of the South African Act.

I have dealt at some length with the cogent and power submissions of Mr. Hawkesworth, although I have little doubt that I have not done them justice. It can be seen, however, that the Defendants mounted a formidable argument in favour of a stay.

The Plaintiffs' Submissions.

The following submissions were made on the Plaintiffs' behalf. To an extent, they have already been referred to under the heading "The Plaintiffs' Claim".

1. The Plaintiffs cannot sue their employer in South Africa. In order to obtain adequate compensation, they have to sue these Defendants.

2. The domiciliary forum of all three Defendants is England; jurisdiction is founded here as of right.

3. It is not for the Defendants to dictate how the Plaintiffs should conduct their case. The court must determine this application on the basis of the case as pleaded; it is not trying the action. Many of the Defendants' submissions relate to the merits of the claim and to the evidence. Furthermore, the plant has been revamped, and only the compressor is available for inspection.

4. The first Defendant is registered in England. Page 1 of the exhibit annexed to Mr. Meeran's third affidavit is the first Defendant's Directors' Report in which reference is made to the directors' "plan to develop the activities of the group". This demonstrates the operational control of the first Defendant over the activities of the whole group and justifies the first Defendant being sued.

5. The third Defendant is the chairman of the first and second Defendants and the majority shareholder of the first Defendant, having a controlling interest. In reality, he is the group. He is British and has a home in England (see page 198). The Plaintiffs were not to know (if it be the case) that the second Defendant did not control Margate. The letter from the HSE to Mr. Murphy of the Department of Manpower in South Africa refers to Thor Chemicals (UK) Ltd. operating the Margate site.

6. The Margate evidence is crucial to the Plaintiffs' case: it demonstrates that the third Defendant knew the problems. Mr. Smith was employed at Margate and was incompetent. The evidence of the Margate workers will demonstrate the degree of his incompetence.

7. Mr. Smith was sent out by the third Defendant to South Africa, thereby the first Defendant became vicariously liable for what he did. Crucial to the Plaintiffs' case is the allegation that plant and a system of work which was hazardous and unsafe were transferred from Margate to Cato Ridge.

8. Paragraphs 30 and 31 of Mr. Moore's affidavit sworn on behalf of the Defendants demonstrate the link between the plant from Margate and Cato Ridge.

9. Mr. Smith (page 231A plus), in his evidence to the inquiry, admitted in terms that when in South Africa

he was employed by the United Kingdom company, not Thor South Africa, and that when there he was responsible for "putting up the plant" (page 234). He further admitted that the three workmen worked there under his supervision (page 237).

10. Other evidence shows the link between the UK companies and South Africa. Mr. Stephen van der Vyver, the managing director of Thor South Africa Ltd. said in a video interview that the South African company's technology and process came from the UK (page 131). The third Defendant said in his evidence to the inquiry that he was involved in the design of the plant (page 238). Mr. Moore's affidavit refers at page 323 to the same thing. The first Defendant's prospectus refers at page 240 to research and development being carried out "in the United Kingdom". Professor Davies of the South African Centre for Occupational Health (pages 261-268) inspected the plant in South Africa and speaks of "the transfer of hazardous processes" and "the systematic transfer of a hazardous process from one country to another".

11. Dr. Magos, a toxicologist who was reporting to the Plaintiffs, refers to the condition of this occupational exposure being imported from the United Kingdom and to the faulty design of hoods, causing the workmen to breathe in contaminated air.

12. Dr. Clarkson, another toxicologist, refers to the symptoms being attributable to "chronic" rather than acute exposure.

13. The Margate witnesses are therefore crucial, it is said, in proving the case against these Defendants: if they were not available as witnesses in South Africa, the first Defendant could escape liability on the basis that the South African company alone was responsible. These witnesses may not be compellable as witnesses in South Africa, whereas the Defendants will have no difficulty commanding employees of subsidiary companies to come to the United Kingdom.

14. The case, it is said, will turn on expert evidence. If the toxicology evidence shows the exposure must have been chronic rather than acute, then the Defendants' South African witnesses cannot avail them. The Plaintiffs' toxicologists all rely on the fact that all three workers did not become ill at exactly the same time, which militates against acute exposure being responsible. England is just as convenient as a venue for the trial as South Africa so far as expert evidence is concerned.

15. The Defendants have not disclosed any available direct evidence to establish their sabotage theory and insofar as it is viable Mr. Cowley, the third Defendant, is an important witness: he lives much of the time in the United Kingdom.

16. The relevant law will be English law both as to quantum and liability (see Boys v Chaplin [supra], Johnson v Coventry Churchill [1992] 3 All E.R. 14.

17. The Defendants' assertion that they may well wish to join doctors and the Department of Manpower is a complete red herring. The reference to delay in the medical reports at page 265 is not capable of establishing negligence and, in any event, if a *novus actus interveniens* were established it would be a complete defence.

18. Even if the Defendants succeed in showing that clearly the more appropriate forum is South Africa, the Plaintiffs cannot obtain justice there because they will not get legal aid, nor can the union fund their claim. In effect, the Plaintiffs can sue in England or not at all. The Plaintiffs will therefore not obtain justice in a foreign jurisdiction, which is a paramount consideration.

Again, I have little doubt I have not done justice to Mr. Robin Stewart, Q.C.'s powerful submissions in this most difficult case.

It will be seen that the central issue here is whether or not there was a chronic long-term exposure or an acute exposure, as the Defendants submit, arising out of sabotage.

Conclusion

The conclusion which I have reached is that the Defendants have failed to satisfy me that this case would be tried more suitably in the interests of all the parties and the ends of justice in South Africa and that South Africa is clearly or more distinctly the more appropriate forum. The Plaintiffs have, in my judgement, formidable evidence available to demonstrate a nexus between negligence in England and the damage which occurred in South Africa. I accept Mr. Stewart's submission that at the end of the day the toxicologists will play a major role in this case upon liability and that South Africa is not a clearly more appropriate forum for their evidence than England. If I granted a stay, the Plaintiffs may have difficulty in mounting their case in South Africa insofar as it relates to negligence in England, and there is a grave danger that justice would not be done.

These Plaintiffs have sued these Defendants here as of right and I do not find the matters put before me by Mr. Hawkesworth are sufficiently powerful or grave and weighty to discharge the burden upon him of satisfying me that South Africa is clearly or distinctly the more appropriate forum. Furthermore, I am persuaded that the trial judge would probably decide to apply English

rather than South African law. I also doubt whether the Defendants would have sought to join doctors or the Manpower Commission even if this case were tried in South Africa. Whether or not the evidence demonstrates that Mr. Smith was acting on behalf of the first Defendant will be a matter for evidence at the trial. There is, however, in my judgment a strongly arguable case that he was.

The third Defendant was, on his own admission, involved in the setting up of the plant in South Africa and this jurisdiction is just as convenient for him as South Africa.

I recognise that there are many advantages in having the matter tried in South Africa, but I do not consider that the ends of justice would be better served by this action being tried in South Africa. I therefore reject the Defendants' application for a stay.

I have been specifically asked by counsel to indicate whether, had I ruled in favour of the Defendants and ordered a stay, I would nevertheless have ruled that justice requires that a stay should not be granted, in particular on the basis that the Plaintiffs have legal aid here which, in all probability, would not be available in South Africa. The burden in such circumstances would have shifted to the Plaintiffs. I am not satisfied that in that event the Plaintiffs have discharged the burden upon them. These Plaintiffs have already received some compensation in South Africa under Section 7 of the Workmen's Compensation Act and may not have exhausted their remedies under Section 43 of the same Act. It is pointed out by Mr. Hawkesworth in accordance with the ratio in the Abidin Daver [1984] AC 398 that in exercising its discretion it is not normally appropriate for the court to compare the quality of justice obtainable in a foreign court which adopts a different procedural system with that obtainable in a similar case and conducted in an English court.

In Spiliada Lord Goff stated that injustice could not be said to be done if a party were in effect compelled to accept one of the well recognised systems of procedural law in the appropriate foreign forum. In Dicey & Moins 12th edition chapter 12, page 395, it is pointed out that there may be cases where there is a risk that justice will not be obtained in a foreign court for ideological or political reasons, or because of the inexperience or inefficiency of the judiciary or excessive delay in the conduct of the business of the court, or the unavailability of appropriate remedies; but a would-be plaintiff in the English court who wishes to resist a stay of English proceedings on such a ground must assert it candidly and support the allegation with positive and cogent evidence.

The evidence as to the unavailability of legal aid in South Africa is couched by Mr. Gauntlett, the Plaintiffs' expert, in these terms. In his first affidavit he says:

"I have considerable doubt whether the Plaintiffs would obtain legal aid in South Africa to pursue claims here [i.e. South Africa] against the three English defendants. I consider in particular that there would be little prospect that legal aid could be provided in relation to the considerable costs which must relate to the engagement of expert witnesses in the respects detailed by Mr. Meeran in this affidavit."

In his second affidavit, Mr. Gauntlett refers to the prospect of the Plaintiffs' obtaining South African legal aid to pursue their claim as: "not at all good".

Mr. Gauntlett refers to the extent of the funding that would be required and the grossly over-burdened and under-funded state of legal aid in South Africa, exacerbated by a new constitutional right to legal representation and the demands placed upon funding by the opening up of new and extensive areas of constitutional litigation. Even if it were right that these Plaintiffs would not obtain legal aid in South Africa, I cannot see that Lord Goff ever envisaged that a plaintiff's impecuniosity would of itself constitute a basis for refusing a stay. I agree with Mr. Hawkesworth that the Plaintiffs are inviting me to extend the principles for the refusal of a stay beyond those envisaged by Lord Goff. There is, in my judgment, nothing inherent in the system in South Africa which prevents these Plaintiffs obtaining justice. The mere fact that higher damages may be awarded here would not deter me from granting a stay and there is no sufficient evidence before me that substantial justice would not be done in South Africa. However, for the reasons already given, the Defendants have failed to discharge the burden upon them and accordingly this application for a stay is refused.

MR. CAMERON: May it please you, my Lord, I wish to make a few submissions on costs. Following your judgement, we would of course ask for the Defendants to pay the Plaintiffs' costs, but we would like to hand these considerations on how that is to be done. We would firstly like to submit that costs should be paid forthwith. There is a very realistic prospect that there will be come large gap of time before this matter is ultimately concluded and whilst it is possible for certain matters to be paid by the Legal Aid Board, that would put the Legal Aid Board out of funds for a period of time. We would suggest that this is an appropriate case in which to order that costs be paid forthwith, given that reality: that there will be some gap of time before the matter is resolved.

THE JUDGE: If that was to happen, what would be the prospects if I was to be reversed on appeal of the Legal Aid Board paying back to the Defendants the costs which have been paid over? Is that something which you have come across in your experience, Mr. Cameron?

MR. CAMERON: It is not something I have come

across. I do not know whether there is any experience behind me to give you the answer to that. I anticipate there will be some argument on appeal,but perhaps when that matter is resolved we can think of an appropriate period by which costs should be paid.

THE JUDGE: Was I right in my judgment that whatever I decided in this case it was going to the Court of Appeal in any event?

MR. TREASURE: My Lord, I think it falls to me to answer that question. I anticipate, subject to taking instructions on the precise form of the judgment, that there will be an appeal.

THE JUDGE: I am not surprised. It has been a very difficult case and I would welcome the judgment of the Court of Appeal to see whether they agree with me or not.

MR. TREASURE: My Lord, I think I can say that it is 99 per cent certain that there will be an appeal.

THE JUDGE: I can understand that and the reasons for it. I am sorry, Mr. Cameron, I interrupted you.

MR. CAMERON: It may well be that when that is confirmed that the forthwith part of the costs order can be clarified and we will know whether we are talking about something immediately or following the application for leave.

THE JUDGE: It is not as though the Plaintiffs are being kept out of funds as a result of my ruling, is it?

MR. CAMERON: Not at this stage, no. It is a question of looking forward over a period of time and understanding that the Legal Aid Board would be themselves out of funds if money is not paid on account.

THE JUDGE: I am inclined to think, Mr. Cameron, that the Legal Aid Board can bear that with such fortitude that it can muster.

MR. CAMERON: My next point is that we would ask that the costs be paid on theindemnity basis. This arises out of the discretion accorded to your Lordship under Order 62/12, which is in Volume 1 of the White Book, page 1071.

> "(2) On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have be unreasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party ...."

Then:

> ".... in these rules the term 'the indemnity basis' in relation to the taxation of costs shall be construed accordingly."

THE JUDGE: The other order is an order for taxation on the standard basis and that would prejudice you in what respect?

MR. CAMERON: In these respects. When taxation is ordered on the standard basis ultimately there is a very high probability that a percentage of those costs will be taken out of the statutory charge and the court has discretion under the exceptional circumstances or where appropriate to order costs on an indemnity basis in order to avoid an unfairness to the plaintiffs. The unfairness arises because the Legal Aid Board obviously must pay out monies which are owed, if you like, to the Plaintiffs but also they tax those on a different basis than those contributed by the party paying the costs. In the experience of those who deal with this type of case, there tends to be a difference of between five and twenty per cent, in the overall costs which eventually are paid. That is taken from the statutory charge.

THE JUDGE: Can we just look at the general note because I was aware of the distinction but I just wanted to know its application in this particular case.

MR. CAMERON: I have a couple of authorities which may assist.

THE JUDGE: What you would say is that this is a most unusual case.

MR. CAMERON: It is a most unusual case.

THE JUDGE: A lot of expense has been incurred in having experts and so on.

MR. CAMERON: That is right. Your Lordship will appreciate from the materials that were before you that an awful lot of information had to be gathered - a lot of exceptional information had to be gathered and experts had to be consulted, South African counsel had to be consulted. There are one or two matters to which I would like to come which will add to our argument that this should be one of those cases where indemnity costs are awarded.

We do have exceptional circumstances here and the discretion is afforded to your Lordship to grant costs on an indemnity basis. There is no allegation that the Defendants have behaved improperly or there is some misconduct: that has nothing to do with the argument I am advancing.

THE JUDGE: It would have been surprising if they had not applied for a stay in the circumstances.

MR. CAMERON: It is certainly not surprising; however, there are a number of matterswhich have led to additional costs and expense. For example, there is a whole line of argument on double actionability which was ultimately dropped. Your Lordship will be familiar with the Plaintiffs' submissions: there was a large chunk of the Plaintiffs' submissions which went right at the death dealing with double actionability. There was an awful lot of expert evidence just on the nature of the double actionability test.

THE JUDGE: Does the difference between costs on an indemnity basis and the standard basis affect the fees of the persons involved in the case?

MR. CAMERON: I do not think so. I do not see how it would. It certainly will not affect the Defendants' opportunity to make the usual argument about whether it is a reasonable cost incurred: they are entirely protected in that way before the Taxing Master. There is no difference. The only issue of substance, apart from the odd point which I might want to make about how the case has proceeded, is the statutory charge. There is a strong probability that ultimately the statutory charge would be called upon to pay a proportion of the Plaintiffs' costs. If the Plaintiffs are ultimately successful, they will lose, on our estimate, between five and twenty per cent of the costs of this action, which will come off the overall damages.

THE JUDGE: You would say in the context of this case that that may be a disproportionateamount because the dependency must in any event relate to the income earned by workers in South Africa.

MR. CAMERON: Correct.

THE JUDGE: All of whom were black workers in South Africa.

MR. CAMERON: On very low wages.

THE JUDGE: Working for a low wage.

MR. CAMERON: That is right. In fact, the levels of compensation which will be paid out for that measure of damages will be, by our experience, relatively low and therefore they will suffer an additional disadvantage by having to pay out relatively high costs for this jurisdiction in order to obtain their remedy.

There are other matters. I do not make the case that there has been any misconduct by the Defendants, which would be a clear reason for awarding indemnity costs.

THE JUDGE: Quite the reverse applies. They were justified in taking the action they did.

MR. CAMERON: It was the right point on which to focus the difference between the parties and it was always the understanding of the Plaintiffs' advisers that this would be a crucial stage.

THE JUDGE: The statutory charge would be a charge on any damages received by the Legal Aid Board.

MR. CAMERON: That is right.

THE JUDGE: That is even in the event of their being successful in the trial of the action.

MR. CAMERON: Yes.

THE JUDGE: They would not be able to get that from the Defendants.

MR. CAMERON: Because the costs are effectively dealt with in a different way - the costs which come from the Plaintiffs' side will simply come out of the Legal Aid Fund but not all of those costs can be available.

THE JUDGE: Which are the ones that cannot?

MR. CAMERON: There are various things to which I can take your Lordship.

THE JUDGE: Is this opposed, Mr. Treasure?

MR. TREASURE: It most certainly is, my Lord, yes.

THE JUDGE: How unusual an animal, in your experience, Mr. Cameron, is the award of costs on an indemnity basis as opposed to the standard basis? I have been sitting as a deputy judge for a few years and I do not remember awarding indemnity costs.

MR. CAMERON: There is a judgment here which may be helpful and perhaps I can deal with that.

THE JUDGE: Yes, of course.

MR. CAMERON: It bears on jurisdiction.

THE JUDGE: Would you just allow me to read the note? The test is one of reasonableness. There is a reference to a case in 1956. It is that of a sensible solicitor, "What in the light of his then knowledge was reasonable in the interests of his client. Any step taken on the advice of a properly instructed counsel should rarely be disallowed.y

MR. CAMERON: There is clearly a range of circumstances. Mr. Justice Gage in this case to which I have referred your Lordship, Casey v East Anglian Regional Health Authority cites the case of Bowen-Jones v Bowen-Jones [1986] 3 AER. He says: "It is sufficient simply to refer to the headnote in which it is said that the court will normally order costs on the standard basis and

will only order costs on an indemnity basis 'in exceptional circumstances'."

In the field of personal injury/environmental claims cross over, as we have here, quite frequently these sorts of orders are made for precisely these reasons. Those instructing me have had several examples in the last few years where personal injury cases brought by a particular infant or ward of court or those that are essentially going to suffer the same costs reduction because of the various things that are not going to be recoverable by the plaintiff, the court has awarded indemnity costs. Indeed, in Casey, for different reasons than we have here in this case but under this general heading of exceptional circumstances, costs on the indemnity basis were ordered. That is at pages 48 and 49 of the judgment. (Same handed) I was quoting a moment ago from page 49 at line 10. This is where the exceptional circumstances test is set out.

Line 22 is perhaps the most helpful: "The award of such costs remains within the discretion of the judge, but in my judgment there must be some exceptional circumstances .... for the court to make such an order. In my judgement there are such exceptional circumstances in this case. Having been referred by Mr. Francis to a passage in the report of Mr. Watson, I am not satisfied that there was any reasonable prospect of the second defendants maintaining their claim or allegation that the third defendant's conduct acted as a novus actus interveniens. It seems to me there was no such reasonable prospect and in the circumstances in my judgment Mr. Francis' submission that his clients were put to unnecessary costs is well founded. Accordingly, upon that basis I propose to make an order that indemnity costs be paid by the second defendant."

It is our case that, at the very least, on the whole issue of double actionability there were very significant costs spent on that issue which need not have been spent. Indeed, M. Meeran writes in terms on the 2nd December to the Defendants' solicitors. I will hand a copy of that to your Lordship.

THE JUDGE: Is that the test? Have I simply got to look at those areas which you say would not qualify for legal aid on the standard basis?

MR. CAMERON: I would suggest that there are two points here. The major point is that these are exceptional circumstances and tremendous costs were spent at an early stage and because of the way they will ultimately be taxed there is a very high probability that the Plaintiffs will suffer, if they are ultimately successful, in their damages in order to account for irrecoverable costs, whereas they would not if indemnity costs were ordered.

THE JUDGE: I am just trying to establish which area of the costs would not be recoverable.

MR. CAMERON: I have a note, so let me go through it. "On a standard basis inter partes and legal aid taxation there are a number of items that in practice are always taxed as recoverable against the Legal Aid Fund (on the standard basis) as appropriate remuneration for the work done on the case but which are not held to be recoverable against the paying party (on the same standard basis). Some of these items are set out in the (now withdrawn) Supreme Court Taxing Office practice direction ...."

THE JUDGE: Do you say that they would be recoverable against the Legal Aid Fund?

MR. CAMERON: Yes.

THE JUDGE: They would then have a charge, you say.

MR. CAMERON: That is right. There is a reference here to an old Court Taxing Office Practise Direction. ".... No.3 of the 10 June 1986 and included 'work done in connection with the continuation or extension of or other general considerations relating to Legal Aid, as distinct from the purposes of the action' and 'work done in compliance with the requirements or the specific authority of the Law Society .... which in the circumstances of the particular case it is unreasonable to recover from the paying party'. Although this Practice Direction has now been withdrawn, its spirit is firmly maintained, in practice, by the Taxing Masters, who will almost invariably disallow against the paying party, but allow against the Legal Aid Fund ...."

THE JUDGE: The paying party here is the Defendants.

MR. CAMERON: The Defendants, yes. "... each and every item of correspondence and each and every telephone call between solicitors and the Legal Aid Office - despite the fact that many of these letters and telephone calls are simply requests for authority to take certain steps and associated extensions of Certificates etc.", and there are other items which are not recoverable on this basis. It is the difference between what the paying party pays and what the Legal Aid Board pays. I see that as the difference.

Those instructing me remind me the crucial costs which are not recoverable here are the liaison with the Legal Aid Board to satisfy the requirements that they set up in order to proceed with the case. The other items which are routine matters such as time spent with the client or next friend, certain items of advice from or conferences/ consultations with counsel, costs (in whole or in part) of some of the experts' reports, costs relating to lines of enquiry which it was perfectly proper to pursue but in the end did not result in evidence being served or called.

THE JUDGE: "Costs (in whole or in part) of some ex-

pert reports."

MR. CAMERON: Yes. It is suggested that there are some costs which will not be recovered; for example, if you amend an expert's report or go back for further work that further work may not be recoverable. It is estimated, as I have said, that between five and twenty per cent of the total costs of the case may not be recoverable and that would therefore represent a substantial reduction in the actual damages awarded to the Plaintiffs for the same reasons I discussed before. The statutory charge would bite into the level of damages if they are to succeed.

This is simply a point of experience in these sorts of cases, taking into account the particular and rather exceptional circumstances of this case. Therefore, without even touching upon the minor issue which I have raised, namely, various points in the Defendants' case which have fallen out of the picture, namely, double actionability, one or two of the tit for tat summonses and these items which perhaps it would be perfectly proper to ask to be included in the argument for indemnity costs, the principal point is the one relating to the statutory charge and the ultimate loss the Plaintiffs will suffer because of the way these things are taxed.

THE JUDGE: There is no suggestion, sofar as I am aware, that your solicitor was anything other than sensible or that counsel's advice was glaringly wrong.

MR. CAMERON: Certainly not. I leave those remarks to you when you are exercising your discretion under Order 62 in these exceptional circumstances. Of course, I must ask for certificates for leading and junior counsel.

There is a somewhat unusual request, but perhaps it is one which is particularly appropriate in this case. That is that your Lordship's judgment be made public. There is a tremendous interest in this case and there is a number of parties - journalists, the union in South Africa and various others - who wish to be able to study the judgment and make comment on it in an informed way. That is something which requires your Lordship's permission.

THE JUDGE: Yes, I am most grateful, Mr. Cameron. Thank you very much. Now, Mr. Treasure, first of all I need not worry you on the costs to be paid forthwith.

MR. TREASURE: My Lord, I am most grateful. So far as the question of indemnity costs is concerned, in my experience it is extremely rare that one would get an order for indemnity costs and one is normally looking at the sort of situation where one can point to the other side having behaved improperly in some way and it is at that stage that you make your application, and even then you will be very lucky if you get it. I do not think I have ever managed to obtain such an order, although I have often asked.

I cannot be a great deal more help than that, my Lord, because the application has caught me by surprise. There is some commentary in the White Book at page 1050 on the circumstances in which such an order might be appropriate. It is opposite the reference 62/3/3: "The effect of this rule ...." Your Lordship sees that.

THE JUDGE: The Rule in question is —?

MR. TREASURE: It is 3/4. It is Order 62, Rule 3, paragraph 4 on page 1048, starting: "The amount of his costs."

THE JUDGE: This is costs on the standard basis.

MR. TREASURE: "The amount of his costs shall be on the standard basis ...." and then at the end of the Rule: ".... unless it appears to the court to be appropriate for the costs to be taxed on the indemnity basis." My Lord, that is the source of the power to award indemnity costs.

My Lord, there is no guidance in the Rules as to the circumstances in which indemnity costs are appropriate, but if one then looks at the note at 62/3/3 there is some assistance. There is a reference in the second paragraph to examples of cases and there is a reference to a case there. I am afraid that case is not before the court. "In Bowen-Jones v Bowen-Jones Mr. Justice Knox considered the two bases of taxation of costs as set out in r.12 and declined to review the basis on which orders for taxation should be made in favour of successful litigants, stating: 'It seems to me that there has been a rationalisation of the different bases of taxation ...." I do not think that is of much assistance to your Lordship. Then there is the example in the paragraph after that. Perhaps the last paragraph is the one that gives such guidance as there is, the paragraph starting: "The person who takes advantage" rule should be altered, but for no doubt very good reasons the rule is not altered.

THE JUDGE: I think what is being said in this case is that to the extent to which the

solicitors have been in touch with the Legal Aid Board has been far greater than normal because of the complexities of foreign experts, double actionability and goodness knows what which if someone had slipped on a pavement in Batley would not apply.

MR. TREASURE: My Lord, it is clearly a complicated case and there are going to be a lotof costs involved. There is nothing particularly exceptional about that, but what I really say is that there is no authority before the court to suggest that in those circumstances the order for costs should be anything other than on the standard basis. If my learned friend wishes to persuade your Lordship to make this exceptional order, then he really ought to bring some authority to that effect, or if he is arguing

on first principles then he ought to put the authorities before the court so that your Lordship can see what the principles are.

THE JUDGE: I must say, I have never before awarded costs on the indemnity basis; I have always ordered costs on the standard basis. That was the reason that I asked for guidance on the relevant criteria to determine between the two.

MR. TREASURE: I am sorry, my Lord, I cannot give your Lordship any more assistance. In fairness to my learned friend, the shortfall is not simply, as I understand it, in one area. If we take the standard basis where it is not legal aid, you get a substantial shortfall, of the order of twenty per cent or costs that are awarded against the other side as compared with the amount of costs that are actually allowed between solicitor and client. That is an entirely standard feature of litigation and there is nothing whatsoever exceptional about that. The fact that in the legal aid case a shortfall arises not from the difference between the solicitor and own client basis of taxation but the difference between standard basis and legal aid basis is neither here nor there.

My Lord, so far as the question of costs is concerned, there are three possible orders. Firstly, the Plaintiffs' costs of the summons in any event.

THE JUDGE: On a standard basis?

MR. TREASURE: On a standard basis. Plaintiffs' costs in any event would mean that win or lose the trial the Plaintiffs get the costs of the summons. The costs of the summons could be costs in cause, and that could be either Plaintiffs' costs or Defendants' costs, obviously, so whoever gets the costs will depend upon the result of the claim. Or costs could be reserved. My Lord, as I understand it, my learned friend will contend that, "The summons was brought, we have won it and therefore we should have our costs. Costs should follow the event."

My Lord, the argument in relation to costs in cause would go as follows. If you have an interlocutory application case which is an entirely proper one - and it seems to be common ground that the application brought by the Defendants was entirely proper ——

THE JUDGE: And it was almost inevitable when the action was brought in this country.

MR. TREASURE: Yes. On that basis, it was an entirely proper application to make. As your Lordship says, it is really an incident of the claim being brought and therefore the costs of making the application should lie where the costs of the claim lie.

THE JUDGE: You say costs in cause.

MR. TREASURE: Costs in cause would be an appropriate order. The third possibility, that of costs reserved is one which I would urge you for these reasons. As far as costs reserved are concerned, your Lordship has taken into account the relevance of the Margate evidence - and that is clearly a matter that weighs, as I understand it, considerably with your Lordship - and the expert evidence on the question of whether or not it was a chronic or an acute incident. It may turn out that the arguments that have been put before your Lordship, which your Lordship has accepted at this comparatively early stage of the trial, may turn out to be false ones.

THE JUDGE: The goal posts may move.

MR. TREASURE: Yes, the Defendants may produce their expert evidence, the Plaintiffsmay consider that that is sufficiently strong and worrying to decide that they themselves need to call the evidence from South Africa. So it may well be that the assumptions which your Lordship has made - and understandably made on the basis of the evidence in front of you - proves to be falsified by subsequent events. Your Lordship will forgive me for saying so, but it may well turn out that the decision to which your Lordship has come has been made on a false premise. It may be that the premise is subsequently proved to be false and then, looking back with the benefit of hindsight, one would say that the decision would not have been reached had the full facts been known.

THE JUDGE: It would have been open to you to put affidavits in front of me from people in South Africa to deal with the points that have been raised, would it not? Or would that just have incurred more costs?

MR. TREASURE: My Lord, there is this problem for the Defendants. I am told that they have already incurred £30,000 worth of costs and I suggest it is rather more than that by now, knowing perfectly well that not a penny of those costs are going to be recoverable and therefore there is every incentive on the Defendants not to incur huge sums of money investigating facts and instructing experts at this stage. I understand that the Plaintiffs' bill of costs is of the order of £100,000. Your Lordship will see that the Defendants are extremely reluctant to incur that sort of sum knowing that whatever happens none of it is going to be recoverable. So, my Lord, there is therefore considerable restraint on the Defendants in those circumstances. There are also time constraints in that, as the Defendants saw the application, it was going to be decided on a comparatively simple basis. Your Lordship will recall that the first affidavit of Mr. Moore was comparatively short and did not recite the evidence at any length.

THE JUDGE: No-one seemed to envisage this case taking as long as it has - I do not know whether I am re-

sponsible for that - but it was much more difficult than originally envisaged. But the estimate was always a little optimistic.

MR. TREASURE: My Lord, it was optimistic once Mr. Meeran's second affidavit was sworn. Once it was sworn it became apparent that large amounts of evidence were being adduced and we were going to have to go through it, but prior to that the Defendants had not foreseen that such large amounts of evidence would be adduced and therefore, given the financial limitations upon them, they did not investigate the expert issues more than was necessary.

THE JUDGE: I was extremely grateful for the detailed and cogent submissions that were made on both sides.

MR. TREASURE: I wish I had had a hand in them, my Lord.

THE JUDGE: I see the point. Costs reserved is pretty unusual in these circumstances, is it not? You have said that in your experience indemnity costs would be unusual, but are you going to put your hand up and say that in these circumstances costs reserved is unusual?

MR. TREASURE: They are not quite so memorable.

THE JUDGE: Do you say the fact that these are South African plaintiffs who, even if they succeed, will not receive a substantial amount of damages is irrelevant to my decision as to whether to award costs on the indemnity basis? Do you say that is something I cannot properly take into account or do you say you do not know because you have not had chance to research the authorities?

MR. TREASURE: All I can say, without having researched the authorities, is that in my experience I have never heard of costs being awarded on that basis.

THE JUDGE: Mr. Hawkesworth was saying - as you are saying - that there has never been a case like this, insofar as I have held the proper forum for a case involving an accident in South Africa to South African workmen employed in South Africa is recoverable in England. To that extent, it is extremely unusual. I suppose there can hardly be any precedent.

MR. TREASURE: My Lord, it is unusual of its kind but it is not at all unusual, I would submit, for there to be a case where a comparatively large sum of costs is going to be expended by reference to the amount at stake and for there, accordingly, to be a substantial shortfall overall in relation to amounts the Plaintiff will recover.

THE JUDGE: It may be beyond twenty per cent in the circumstances of this case.

MR. TREASURE: My Lord, I have not had the opportunity to take instructions from those who will be able to assist on what the likely amount of the deduction would be.

THE JUDGE: Can I make my observations for the benefit of the Taxing Master if I was to order that costs be on the standard basis?

MR. TREASURE: Your Lordship has not been invited to. The Taxing Master has discretion and expertise in deciding what is and what is not proper.

THE JUDGE: He has not tried it.

MR. CAMERON: My Lord, I apologise for interrupting my learned friend, but I only seek to find a practical solution to a practical problem, which is why I did not advance any arguments of a more emotive kind on the indemnity costs but simply to deal with the problem we see coming in the way that the judge saw coming in the Casey case, which is the one I have handed up to your Lordship, and indeed in many others of this ilk recently. That is simply it. I could not say whether it is possible to append some note to the costs order which would help the Taxing Master. I do not know of that being done, but in effect that is what we are seeking to achieve through the indemnity costs order rather than make some statement of a moral nature.

THE JUDGE: I am not intending to make any statement of a moral nature, it is just that I cannot see any costs which have not been reasonably incurred. That is all I was going to say.

MR. TREASURE: My Lord, one knows that in the County Court there are specific rules which do entitle the courts to make orders as to specific items of costs where they think it is appropriate. I simply cannot say if there is an equivalent order in the White Book. If your Lordship is being invited to make an order and your Lordship would presumably wish to be referred to the authority that would enable you to do so. Until your Lordship has seen the bill of costs, it is difficult to know what is or is not reasonable. I would urge your Lordship to leave it to the vast experience of the Taxing Master.

The case to which my learned friend has referred, Casey, the learned judge clearly thought that the circumstances were exceptional. My Lord, it is at page 49, line 22: "The award of such costs remains within the discretion of the judge, but in my judgment there must be some exceptional circumstances (as set out in Bowen-Jones) for the court to make such an order. In my judgment there are such exceptional circumstances in this case. Having been referred by Mr. Francis to a passage in the report of Mr. Watson, I am not satisfied that there was any reasonable prospect of the second defendants main-

taining their claim or allegation that the third defendant's conduct acted as a novus actus interveniens. It seems to me that there was no such reasonable prospect and in the circumstances in my judgment Mr. Francis' submission that his clients were put to unnecessary costs is well founded."

So what there was, in effect, there was a finding that it was entirely unreasonable that the party against whom the order for indemnity costs had been made to act as it had done. There is no such allegation in this case. This case is certainly not an authority for the proposition that an order for indemnity costs is appropriate and, in the absence of any other such authority, I would invite your Lordship not to make that order.

My Lord, as far as the question of reserving costs is concerned, it may turn out that had your Lordship seen all the evidence that will emerge at trial your Lordship would come to a different decision and so, although I accept that it is not an order which is made very often, it may on the facts of this case be appropriate.

That is what I say about costs. My Lord, there are two further applications to be made and perhaps your Lordship would like to deal with that issue now. My learned friend has something else to say.

MR. CAMERON: Those instructing me have furnished me with two other authorities on indemnity costs which may be of assistance.

THE JUDGE: Have these been disclosed to Mr. Treasure?

MR. CAMERON: They have not, my Lord, which is an unfairness for him.

THE JUDGE: He is put at a disadvantage.

MR. CAMERON: He is put at a disadvantage. It is simply a way of explaining Order 62, Rule 12 with some broad language to set out the point which I have already made, that there is a range of possibilities that can justify an order for indemnity costs other than the extreme of misconduct by a party. But, as I say, I do not want to put them forward other than to say that they exist and if your Lordship wishes or my learned friend wants to have a look at them we will be happy to do that. The point has already been made. There are further authorities.

THE JUDGE: I am grateful. Do you wish me to rule on the matters so far?

MR. TREASURE: My Lord, I have not addressed you on the question of publicity. The Defendants happen to know that there is another case which is comparable to this one - it is not quite the same, as I understand it - it is an English national who was injured abroad in some uranium mine in Namibia, as I understand it, and he sought to bring proceedings over here against RTZ as the holding company. My learned friend will correct me because he knows a great deal more about the case than I do. That case, as I understand it, was decided against the plaintiff. The Plaintiffs' counsel refused to agree to that being used as an authority before your Lordship because it was in chambers. It is therefore a little rich, if I may say so, for them, having objected to any publicity for a case in which they are involved and which they lost, now to seek publicity for a case in which they are involved and which they have now won. My Lord, I would respectfully suggest that it might be better if the case is going to be appealed - I understand the other case is also going to be appealed - that any publicity await the outcome of the appeals.

THE JUDGE: What you mention now is water under the bridge, is it not? I suppose each factor of the case turns on its own facts, but where is the prejudice which the Defendants will suffer if I was to order that the judgment I have made in this case be made public? You are not suggesting that what I have said is going to influence any other judge sitting in the same jurisdiction, are you?

MR. TREASURE: That is dangerous ground.

THE JUDGE: It might be of some persuasive authority but very little else.

MR. TREASURE: I should be very hesitant to comment on that, my Lord.

THE JUDGE: If you are talking in terms of jurors, there may be more force in what you have said.

MR. TREASURE: It is of little persuasive legal authority, then that is a reason for not publishing it.

THE JUDGE: What is the basis upon which you want it disclosed?

MR. CAMERON: So that there is informed comment where informed comment is desired to be made. The judgment is of interest to quite a wide —

THE JUDGE: Why did you refuse the —

MR. CAMERON: I actually do not know the story at all.

THE JUDGE: The other case in which you were involved.

MR. CAMERON: I am not familiar with the story behind this.

MR. TREASURE: My Lord, if I can assist, I under-

stand Mr. Hawkesworth asked Mr.

Stewart if that case could be relied upon - there was a transcript - and it was refused on the basis that it was a chambers decision and not given in open court. I was informed in very authoritative terms by Mr. Hawkesworth that it was not an authority which could be referred to.

MR. CAMERON: We have another explanation. I do not know what the situation was that lay between the two sides, all I know is that there were different factors in that case and it is something which arose in the context of the provision of legal aid in this case and whether the Legal Aid Board had been informed about the judgment that we lost. It does not form any part of my understanding as to why this should be made public.

MR. TREASURE: My Lord, the public interest would be ultimately satisfied, I suggest, by the knowledge that the Defendants' application for a stay has failed and been dismissed. There would be no objection to that. Again, I do not know what my clients' instructions will be because I have had no notice of this.

THE JUDGE: This is only an interlocutory stage; it is not as if I am trying the action. It is simply a ruling on whether the trial should be held here or in South Africa.

MR. TREASURE: My Lord, I am not sure if disclosing interim decisions or interim findings is going to be helpful or not.

MR. CAMERON: My Lord, there is one final point. We have had a couple of requests

from people to see the judgment, but there are two other points I wish to make that I left out. One, I need to ask for legal aid taxation and, two, I need to have the order which you granted to amend returned to us.

THE JUDGE: You want the order to amend ——

MR. CAMERON: To join the ——

THE JUDGE: To reconstitute the Plaintiffs' action.

MR. CAMERON: Exactly, yes.

THE JUDGE: The costs in respect of that?

MR. CAMERON: No, simply to have the order. The summons issued in respect of that needs to be returned to us.

RULING ON COSTS

THE JUDGE: I order the Defendants pay the Plaintiffs' costs on a standard basis. There will be certificates for both leading and junior counsel. I permit the judgment to be made public. There will be a legal aid taxation order and I make an order returning the summons relating to the re-constitution of the first Plaintiff.

MR. TREASURE: My Lord, there are two further matters arising. One is, what is to happen to this claim pending the appeal which is 99 per cent certain will take place? The concern of the Defendants is this. They have not as yet started to prepare the case in full, far from it. Your Lordship will see from the figures that I have quoted the respective amounts of preparation and what remains for the Defendants yet to do by way of preparation. Your Lordship will appreciate that if the action continues there will have to be a defence filed and that will clearly have to be a very substantial defence. There will be undoubtedly requests for further and better particulars, certainly a request for a statement of claim and no doubt a request for further and better particulars of the defence. They will be very detailed.

So far as the Defendants are concerned, they will want to know exactly what the Plaintiffs say was wrong with the process, with the system that was being carried out and how this contributed to the poisoning. At the moment it is pleaded in extremely general terms. There may or may not be a reply. There will have to be discovery. Discovery is likely to be extremely expensive, in particular the Plaintiffs will be interested in all the documents relating to what went on at Margate and in relation to the documents at the South African plant. There is likely to be a very large number of documents and the discovery process will be extremely expensive. There will be, no doubt, interrogatories dealing with matters by way of requests for further and better particulars, witness statements and expert reports.

Your Lordship can see in the light of the figures I have quoted there will be a further £50-100,000 worth of costs being incurred by the Defendants between now and the hearing of any appeal. I hope I am not being unrealistic.

THE JUDGE: Between now and the hearing of the appeal?

MR. TREASURE: My Lord, it depends at what pace the action proceeds and so far the

Plaintiffs have been extremely speedy and chasing the Defendants along, and they will no doubt proceed equally speedily from here on.

THE JUDGE: I suppose you say costs are going to have to be incurred somewhere in any event, either in South Africa or here. Why do all these costs have to be incurred? How long is the whole thing going to take?

MR. TREASURE: Unfortunately, it is likely to take some time.

THE JUDGE: This is only a first instance decision in chambers. The appeal will come on within six months, will it not? But then perhaps the number of transcripts that I have had to sign might indicate that that is not the case. Will this appeal not come on within six months?

MR. TREASURE: I rather suspect it will not, unless it is expedited. If it is expedited then, yes, it probably will come on within six months; if it is not expedited it might take longer than that.

THE JUDGE: Are there any reasons which you can advance as to why it should be expedited?

MR. TREASURE: There are reasons that can be advanced. The Court of Appeal has very strict guidelines on what can and cannot be expedited because of the consequences on other cases. Cases such as family cases do receive priority.

THE JUDGE: The only thing I was thinking of was the second Plaintiff. I am not sure what his state of health is.

MR. TREASURE: I do not think he is at risk of death. I assume his condition is now stable.

THE JUDGE: I am sorry, I interrupted you. You were saying that there were going to be a lot of costs between now and the hearing of the appeal.

MR. TREASURE: My Lord, yes.

THE JUDGE: This is going to what application, Mr. Treasure?

MR. TREASURE: My Lord, for a stay of the action pending appeal. The concern on the part of the Defendants is that all these further costs will be incurred and whatever happens on the appeal those costs will be unrecoverable. My Lord, this is another consequence of the fact that the Plaintiffs are legally aided.

THE JUDGE: What you are saying is this is a discrete issue which I have decided, where the forum should be. The appeal should be on the basis of the evidence which was available before me.

MR. TREASURE: Yes.

THE JUDGE: Is the appeal a re-hearing? You are entitled to put in more evidence.

MR. TREASURE: My Lord, the power to admit further evidence is comparatively restricted. In an appeal against a final decision it is very restricted: you have to show that it is credible; you have to show that it is relevant; you have to show that it would not have been available at the trial.

THE JUDGE: I have had quite a lot of appeals from the Master where I have had new affidavits put in. Are the criteria different?

MR. TREASURE: The criteria are different, yes. It is very rare for there to be any

objection to fresh material when the matter comes before the judge from the Master. If there is an appeal to the Court of Appeal in interlocutory cases the guidelines are a little different. It is not the evidence for the appeal that is going to be expensive, it is the evidence in the procedural sense that will be required if the action continues in the meantime, which will be irrecoverable.

THE JUDGE: What might happen is that the Court of Appeal might order a stay, then it goes to South Africa and a large measure of the work that has been done, you would say, would be thrown away.

MR. TREASURE: Yes. In those circumstances, if it went to South Africa, the likelihood is, the Defendants would suggest, that they do not sue these corporate Defendants, they would probably sue Mr. Cowley and the officers in South African company. The South African company, of course, they cannot sue under Section 7, but the officers are third parties and can be sued. So the likelihood is, if the action proceeded in South Africa it would be on a different basis. It would be comparatively cheaper. All the evidence about the Margate workers would be dropped. All the pleadings and the interrogatories and the further and better particulars in this action would be largely wasted. That is assuming that the case was to proceed in South Africa.

THE JUDGE: You say that there is no guarantee that the Court of Appeal will agree with me. It is one of those cases which could go either way.

MR. TREASURE: Yes. It could go either way and the prospects of a successful appeal are very far from unrealistic. It is a very complicated area and in those circumstances there is every risk that an awful lot of costs will be wasted which, in no circumstances, would be recoverable - not the costs of the appeal but the continuing progress of the case.

THE JUDGE: So you want a stay of these proceedings pending the appeal.

MR. TREASURE: My Lord, I say that that is the price the Plaintiffs pay for having the

benefit of legal aid: because they have this immunity against paying costs, the consequence is if there is an appeal of this sort then it is proper to order that the action be stayed in the meantime.

THE JUDGE: What do you say, Mr. Cameron?

MR. CAMERON: I am afraid it is all too speculative. We do not know many of these

things my learned friend wants to put before your Lordship as a reason for staying the action, but we do know that we cannot proceed in South Africa in any event. There is no question of there being a case which would suddenly materialize in South Africa. There may be some points in my learned friend's presentation that point to expediting the appeal, but they certainly do not point to staying the action at this stage. There is no defence at the moment; there are possibilities that the evidence will go in some sense stale if we do not press on with the case at this stage. If my learned friend is saying that he will make an application for leave to appeal that we can agree that there are grounds for expediting the appeal for these reasons that he has advanced. But there is no justification for holding up the proper course of the proceedings, given that the Plaintiffs have won the application.

This is not simply a severable item. Large elements of the Plaintiffs' claim have been reviewed in this case in order for it to proceed. Indeed that justifies a lot of the evidence which was brought forward. It was helpful to your Lordship to understand that this is a real case. We can now proceed and it is up to the Defendants to seek leave to impede that process once more through their appeal and not through any other device.

THE JUDGE: Can they apply to the Court of Appeal for expedition?

MR. CAMERON: Yes. Indeed, it would go together with the draft order: they can ask for leave to appeal and that it be expedited and then give reasons for so expediting can be attached.

THE JUDGE: Rather than my giving an order that the appeal be expedited, you can go

before the Court of Appeal and ask them for an order.

MR. CAMERON: That is correct, if that is what he wishes to do.

THE JUDGE: So I can give leave for an application.

MR. CAMERON: My learned friend has not decided whether or not he is going to seek

leave. He has to talk to the client. So it does not arise at this stage.

MR. TREASURE: I will be asking for leave to appeal today.

THE JUDGE: I cannot think of any reason why I should not give you leave to appeal in the unusual circumstances of this case. I shall give leave to appeal.

MR. CAMERON: In any event, there is no justification for granting a stay of the action in those circumstances, given that for example, in Spiliada it is clearly said that the judge who hears the hearing on stay has a discretion and there will be very few points to aim at for the Defendants in this case. Nothing will require further evidence to be gathered. There is plenty of material before this court and therefore the Court of Appeal on which to determine these points of law. There cannot be any reason for postponing the progress of the case simply because there might be one or two other points that can be presented in evidence before the Court of Appeal.

THE JUDGE: Is that not an argument in his favour rather than yours? You are saying there is nothing of importance which is going to happen between now and the appeal. In those circumstances, why should I not order a stay?

MR. CAMERON: Because the case has an ordinary pattern to follow based upon my learned friend's application for leave, but it does not need to stop the flow of the case. There are still matters which would help define the issues further between the parties not yet served on the defence and which ought to follow this stage of the proceedings which the Plaintiffs have won. There is no need to add another pressure on the case than the one which already exists because of my friend's application for leave. It is an application for a stay twice over. The only issue is whether or not my learned friend wants to raise matters in order to justify leave.

THE JUDGE: What he has said is that a lot of costs would be thrown away if the appeal is allowed. Do you concede that or not?

MR. CAMERON: There is no need for me to concede that because we all know that there are going to be issues raised before the Court of Appeal which have already been aired and that the Plaintiffs can expect the Defendants to produce a defence now, given that their case is properly set in motion. There is no reason, if you like, to apply a double stay to these proceedings. I do not see that the Defendants are at all prejudiced by having to contend with a properly constituted claim against them. They have had their chance with the stay, they have lost and off we go.

RULING ON LEAVE TO APPEAL

THE JUDGE: I give leave to appeal to the Court of Appeal and the application for a stay pending the appeal is refused. Are there any other orders?

MR. TREASURE: My Lord, I am just thinking this one

through. It may be that the

Defendants will wish to make an application for a stay to the Court of Appeal. I wonder if your Lordship would grant a short stay to enable that to be made.

THE JUDGE: Yes, I will grant a stay of 28 days for that purpose.

MR. TREASURE: I am most grateful. There is one further matter outstanding, which is the Defendants' second summons relating to the affidavit of Mr. Meeran. Your Lordship will remember that Mr. Hawkesworth did ask at the end of his submissions that paragraphs 92 and 93 be deleted.

THE JUDGE: Yes, and then what happened was that an affidavit was put in proving

sources, but some still remain which related to a rather emotive way in which criticisms were levelled at the Defendants' side. Is that the passage?

MR. TREASURE: My Lord, yes.

THE JUDGE: Which is the passage?

MR. TREASURE: My Lord, so far as the passages where no source of information is given, the sources have now been given and therefore, subject to the question of costs, those problems have been dealt with.

THE JUDGE: They can be dealt with on the application for costs before the Taxing Master.

MR. TREASURE: My Lord, no. That is a matter for the court to deal with.

THE JUDGE: What you say is insofar as it became necessary for you to ask for sources you should be allowed those costs in any event.

MR. TREASURE: Yes. The application falls into two parts. There are those parts in Mr. Meeran's second affidavit which were, if I can use shorthand, "unsourced" and the second part of the application related to those paragraphs in the affidavit which made allegations against both myself and ——

THE JUDGE: Where are they?

MR. TREASURE: My Lord, they appear at paragraphs 92 to 93 at page 170 of the bundle.

THE JUDGE: Is this based upon Mr. Kemp's opinion? No, Mr. Kemp is the Defendants' expert.

MR. TREASURE: My Lord, he was, yes.

THE JUDGE: You did not really think I was going to take much notice of that, did you?

MR. TREASURE: My Lord, no, and I would not be too worried about it if it was not for what is said at paragraph 92 about the Defendants' attitude to the South African operation. Your Lordship sees there: "I am informed by a former Margate worker that when discussing the prospective South African plant, managers of the first and second Defendants in England used phrases such as 'niggers are expendable''. 'It's great out there. You pay them 50p an hour and they're quite happy with it. If anyone kicks up, you just fire them'." My Lord, in the context of a claim of three original workers, two of whom are dead and one seriously injured, that is an extremely serious allegation to make.

THE JUDGE: And in the context that no claim for exemplary damages is made.

MR. TREASURE: My Lord, yes. If your Lordship then looks at paragraph 94 your Lordship sees: "This point was regrettably repeated by the Defendants' counsel, Mr. Treasure, at the last hearing."

THE JUDGE: I say without reservation that these paragraphs have been not of the slightest assistance to me. Any suggestion by the Defendants' legal team that you have been in any way involved in a racist attitude is wholly ignored for these purposes, but where does it leave us on the question of costs?

MR. TREASURE: My Lord, the order that I would seek is that those paragraphs be struck out on the grounds that they are vexatious, scandalous and irrelevant.

THE JUDGE: You want the costs of those in any event.

MR. TREASURE: Yes.

THE JUDGE: Let us see what Mr. Cameron says. You are not attributing to Mr. Treasure expressions like, "Niggers are expendable", are you, Mr. Cameron?

MR. CAMERON: Certainly not, my Lord. As my learned counsel said, in some senses some of the exchanges of affidavits have generated more heat than light and there is no doubt that at some point differences did arise and offence was taken. I do not think it goes to the heart of the legal case and it does not form part of the judgment in the case. It has not involved significant additional costs and I think it would be best if it was just left lying. There are, of course, counter accusations and the same points are made in a counter affidavit about unsourced information coming from the Defendants' side. It would be possible to open this up for probably another half an hour or so while we go through all of that material.

THE JUDGE: There is a lot of evidence which is pleaded on both sides.

MR. CAMERON: Exactly. There were concerns from each side to get as much before the Court to help the court decide ——

THE JUDGE: There is no reason why I cannot delete these paragraphs without dealing with costs.

MR. TREASURE: My Lord, I invite you to delete these paragraphs and then consider the question of costs.

MR. CAMERON: My Lord, I would prefer to let them lie and move on with the Plaintiffs' costs awarded as it currently stands and to not take individual points and try and award a notional figure for the inconvenience suffered by either party. I think there is a balance here which needs to be preserved.

THE JUDGE: I have some sympathy Mr. Treasure and indeed with you. Paragraphs of this type do not greatly assist the court when it comes to making a decision and I direct that the paragraphs be deleted. However, in the overall costs I cannot see that the paragraphs sounding off about attitudes of mind by the Defendants will greatly have added to the costs.

MR. TREASURE: Your Lordship will forgive me. This is a matter that affects me personally and I therefore say what I say with considerable diffidence.

THE JUDGE: Yes, I understand.

MR. TREASURE: I have to say that I am extremely offended. A great deal of time was wasted in dealing with it. My Lord, the question was raised in correspondence as to who was responsible for those allegations and the response came back that they were quire proper and the Defendants' representatives should have been more careful, so there has never been any offer to withdraw those allegations or to consent to their being struck out.

THE JUDGE: Are you inviting me to impose a penalty? If you are, then I am being asked to make a determination as to whether they are justified or not. At present I am quite happy to proceed on the basis that they are wholly unjustified and therefore should be deleted. I would prefer in the circumstances not to go any further.

MR. TREASURE: In those circumstances, I do not pursue my application for costs.

MR. CAMERON: There are counter points of view. Offence was taken. Those instructing me were offended. That is a fact. I did not wish to open this up.

THE JUDGE: I make the order which I do in the spirit of trying to diffuse the atmosphere. I think it is better that those paragraphs no longer remain in the affidavits. Is there anything else?

MR. TREASURE: My Lord, I am most grateful for your patience this afternoon.

THE JUDGE: I am most grateful to everybody for the considerable assistance I have been given.

Section 4

Public Trust Doctrine

(1997) 1 SUPREME COURT CASES 388

(BEFORE KULDIP SINGH AND S. SAGHIR AHMAD, JJ.)

M.C. MEHTA — PETITIONER

v.

KAMAL NATH AND OTHERS — RESPONDENTS

Writ Petition (C) No.182 of 1996, decided on December 13, 1996

Constitution of India - Arts. 21 and 32 - Ecology - Public Trust doctrine - Is part of the Indian law - It extends to natural resources such as rivers, forests, seashores, air etc, for the purpose of protecting the ecosystem - Lease granted by State Government of riparian forest land for commercial purpose to a private company having a Motel located at the bank of river Beas - Motel management interfering with natural flow of river by blocking natural relief/pill channel of the river - Held, State Govt. committed breach of public trust - Prior approval granted by Govt. of India, Ministry of Environment and Forest and lease granted in favour of the Motel quashed - Polluter Pays Principle applicable - Accordingly the polluter company liable to compensate by way of cost for restitution of environment and ecology of the area - Other directions issued - Doctrines - Public Trust.

A news item appeared in Indian Express stating that a private company Span Motels Pvt. Ltd., in which the family of Kamal Nath (a former Minister for Environment and Forests) had direct link, had built a club at the bank of River Beas by encroaching land including substantial forest land which was later regularized and leased out to the company when Kamal Nath was the Minister. It was stated that the Motel used earth-movers and bulldozers to turn the course of the river. The effort on the part of the Motel was to create a new channel by diverting the river-flow. According to the news item three private companies were engaged to reclaim huge tracts of land around the Motel. The main allegation in the news item was that the course of the river was being diverted to save the Motel from future floods. The Supreme Court took notice of the news item because the facts disclosed therein, if true, would be a serious act of environmental-degradation on the part of the Motel. Disposing of the writ petition

Held:

The notion that the public has a right to expect certain lands and natural areas to retain their natural characteristic is finding its way into the law of the land. The ancient Roman Empire developed a legal theory known as the "Doctrine of the Public Trust". The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources of the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. Though the public trust doctrine under the English common law extended only to certain traditional uses such as navigation, commerce and fishing, the American Courts in recent cases expanded the concept of the public trust doctrine. The observations of the Supreme Court of California in Mono Lake case clearly show the judicial concern in protecting all ecologically important lands, for example fresh water, wetlands or riparian forests. The observations therein to the effect that the protection of ecological values is among the purposes of public trust, may give rise to an argument that the ecology and the environment protection is a relevant factor to determine which lands, waters or airs are protected by the public trust doctrine. The Courts in United States are finally beginning to adopt this reasoning and are expanding the public trust to encompass new types of lands and waters. There is no reason why the public trust doctrine should not be expanded to include all ecosystems operating in our natural resources. Our legal system - based on English common law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal

duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership. Thus the Public Trust doctrine is a part of the law of the land. (Paras 23 to 25, 33, 34 and 39).

> "Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention".
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> Michigan Law Review, Vol.68, part 1, p.473, related on
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> Illinois Central Railroad Co. v. People of the State of Illinois, 146 US 387: 36 L Ed. 1018 (1892); Could v. Greylock Reservation Commission, 350 Mass 410 (1966); Sacco v. Development of Public Works, 532 Mass 670, Robbins v. Dept. of Public Works, 244 NE 2d 577; National Audubon Society v. Superior Court of Alpine County (Mono Lake case), 33 Cal 3d 419; Philips Petroleum Co. v. Mississippi, 108 SCt 791 (1988), relied on
>
> Priewev v. Wisconsin State Land and Improvement Co., 93 Wis 534 (1896); Crawford County Lever and Drainage Distt. No.1, 182 Wis 404; City of Milwaukee v. State, 193 Wis 423; State v. Public Service Commission, 275 Wis 112, referred to
>
> Marks v. Whitney, 6 Cal 3d 251; United Plainsmen v. N.D. State Water Cons. Comm'n, 247 NW 2d 457 (ND 1976), cited

The issues presented in this case illustrate the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources. (Para 35)

In the present case, large area of the bank of River Beas which is part of protected forest has been given on a lease purely for commercial purposes to the Motels. The area being ecologically fragile and full of scenic beauty should not have been permitted to be converted into private ownership and for commercial gains. Therefore, the Himachal Pradesh Government committed patent breach of public trust by leasing the ecologically fragile land to the Motel management. The lease transactions are in patent breach of the trust held by the State Government. (Paras36 and 22)

Further, the admissions by the Motel management in various letters written to the Government, the counter-affidavits filed by the various government officers and the report placed on record by the Board clearly show that the Motel management has by their illegal constructions and callous interference with the natural flow of River Beas has degraded the environment. The Motel interfered with the natural flow of the river by trying to block the natural relief/spill channel of the river. It is now settled by the Supreme Court that one who pollutes the environment must pay to reverse the damage caused by his acts. (Paras 21 and 38)

> Vellore Citizens'e Forum v. Union of India, (1996) 5 SCC 647: IT (1996) 7 SC 375, followed
>
> Indian Council for Enviro-Legal Action v. Union of India, (1966) 3 SCC 212: IT (1966) 2 SC 196, cited

Therefore, the Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The pollution caused by various constructions made by the Motel in the riverbed and the banks of River Beas has to be removed and reversed. NEERI is directed through its Director to inspect the area, if necessary, and give an assessment of the cost which is likely to be incurred for reversing the damage caused by the Motel to the environment and ecology of the area. NEERI may take into consideration the report by the Board in this respect. The Motel through its management shall show cause why pollution fine in addition be not imposed on the Motel. The Motel shall construct a boundary wall at a distance of not more than 4 metres from the cluster of rooms (main building of the Motel) towards the river basin. The boundary wall shall be on the area of the Motel which is covered by the lease. The Motel shall not encroach/cover/utilize any part of the river basin. The boundary wall shall separate the Motel building from the river basin. The river bank and the river basin shall be left open for the public use. The Motel shall not discharge untreated effluents into the river. The Himachal Pradesh Pollution Control Board is directed to inspect the pollution control devices/treatment plants set up by the Motel. If the effluent/waste discharged by the Motel is not conforming to the prescribed standards, action in accordance with law be taken against the Motel. The Himachal Pradesh Pollution Control Board shall not permit the discharge of untreated effluent into River Beas. The Board shall inspect all the hotels/institutions/factories in Kullu-Manali area and in case any of them are discharging untreated effluent/waste into the river, the Board shall take action in accordance with law. The

Motel shall show cause on 18-12-1996 why pollution fine and damages be not imposed as directed by us. NEERI shall send its report to the Court by 17-12-1996. To be listed on 18-12-1996. (Para 39).

R-M/17231/C

Advocates who appeared in this case:In person, for the Petitioner:

H.N. Salve, Senior Advocate (M.S. Vashisht, Rajiv Dutta, Shiv Pujan Singh, J.S. Attri and L.R. Rath, Advocats, with him) for the Respondents.

Chronological list of cases cited

1. (1996) 5 SCC 647: JT (1996) 7 SC 375, Vellore Citizens' Welfare Forum v. Union of India. 413g

2. (1996) 3 SSC 212: KT (1996) 2 SC 196, Indian Council for Enviro-Legal Action v. Union of India414c-d

3. 532 Mass 670, Sacco v. Development of Public Works 409e-f

4. 350 Mass 410 (1996), Gould v. Greylock Reservation Commission 408f

5. 275 Wis 112, State v. Public Service Commission 410a

6. 247 NW 2d 457 (ND 1976) United Plainsmen v. N.D. State Water Cons. Comm'n 412c-d

7. 244 NE 2d 577, Robbins v. Deptt. of Public Works 409g

8. 146 US 387: 36L Ed 1018 (1892), Illinois Central Railroad Co. v. People of the State of Illinois 408b, 408d-e

9. 193 Wis 423, City of Milwaukee v. State 410a

10. 182 Wis 404, Crawford County Lever and Drainage Distt. No.1 410a

11. 108 SCt 791 (1988), Philips Petroleum Co. V Mississippi 412g, 412g-h

12. 93 Wis 534 (1896), Priewev v. Wisconsin State Land and Improvement Co. 410a

13. 33 Cal 3d 419, National Audubon Society v. Superior Court of Alpine County 410d-e, 412e-f, 412f

14. 6 Cal 3d 251, Marks v. Whitney 411b-c, 411g

The Judgement of the Court was delivered by

KULDIP SINGH, J. - This Court took notice of the news item appearing in the Indian Express dated 25-2-1996 under the caption - "Kamal Nath dares the mighty Beas to keep his dreams afloat". The relevant part of the news item is as under:

"Kamal Nath's family has direct links with a private company, Span Motels Private Limited, which owns a resort - Span Resorts - for tourists in Kullu-Manali Valley. The problem is with another ambitious venture floated by the same company - Span Club.

The club represents Kamal Nath's dream of having a house on the bank of the Beas in the shadow of the snow-capped Zanskar Range. The club was built after encroaching upon 27.12 bighas of land, including substantial forest land, in 1990. The land was later regularized and leased out to the company on 11.4.1994. The regularization was done when Mr. Kamal Nath was Minister of Environment and Forests ... The swollen Beas changed its course and engulfed the Span Club and the adjoining lawns, washing it away.

For almost five months now, the Span Resorts management has been moving bulldozers and earth-movers to turn the course of the Beas for a second time.

The heavy earth-mover has been used to block the flow of the river just 500 metres upstream. The bulldozers are creating a new channel to divert the river to at least one kilometre downstream. The tractor-trolleys move earth and boulders to shore up the embankment surrounding Span Resorts for laying a lawn. According to the Span Resorts management, the entire reclaiming operation should be over by March 31 and is likely to cost over a crore of rupees.

Three private companies - one each from Chandigarh, Mandi and Kullu - have moved in one heavy earth-mover (hired at the rate of Rs 2000 per hour), four earth-movers and four bulldozers (rates varying from Rs 650 to Rs 850 each per hour) and 35 tractor trolleys. A security ring has been thrown all around. ... Another worrying thought is that of the river eating into the mountains, leading to landslides which are an occasional occurrence in this area. Last September, these caused floods in the Beas and property estimated to be worth Rs 105 crores was destroyed. ... Once they succeed in diverting the river, the Span management plans to go in for landscaping the reclaimed land. But as of today, they are not so sure. Even they confess the river may just return.

'Mr. Kamal Nath was here for a short while two-three months ago. He came, saw what was going on and left. I suppose he know what he is doing', says another executive.

The District Administration pleads helplessness. Rivers and forest land, officials point out, are not under their jurisdiction. Only the Kullu Conservator of Forests or the District Forest Officer can intervene in this case.

But who is going to bell the country's former Environment and Forests Minister?

Interestingly, a query faxed to Kamal Nath for his views on these developments fetched a reply from Mr. S. Mukerji, President of the Span Motels Private Limited.

Admitting that the Nath family had 'business interests' in the company since 1981, he said, 'the company is managed by a team of professional managers and Mr. Kamal Nath is not involved in the management activity of the company'

'The Board comprises professionals, some of whom are friends and relatives of the Nath family', Mr. Mukerji said. He expressed surprise that a reference had been made to Rangri and Chakki villagers 'since these villagers are at least 2/3 kilometres away and not even on the river side'.

He said the Span Club was 'not for the exclusive use of any one individual'. We would like to emphasize that we are only "restoring the rive" to its original and natural course and are restoring our land and of those of neighbouring villagers similarly affected by the flood.'

He maintained that 'Mr. Kamal Nath has definitely not been to Span Resorts in the last two months and in fact, to the best of my knowledge, has not travelled to Kullu Valley for quite some time now. In any case, we had never 'blocked' any channel in the vicinity of Span.'"

2. Mr. Kamal Nath filed one-page counter-affidavit dated 8-6-1996. Paras 1 and 3 of the counter are under:

> "I say that I have been wrongly arrayed as a respondent in the above petition inasmuch as I have no right, title or interest in the property known as 'Span Resorts' owned by 'Span Motels Private Limited'.

I further say that the allegations made in the press reports based on which this Honourable Court was pleased to issue notice are highly exaggerated, erroneous, mala fide, mischievous and have been published only to harm and malign the reputation of this respondent."

3. On behalf of Span Motels Private Limited (the Motel), Mr. Banwari Lal Mathur, its Executive Director, filed counter-affidavit. Paras 2 and 3 of the counter are as under:

> "I say that Mr. Kamal Nath who has been arrayed as Respondent 1 in the above writ petition has no right, title or interest in the property known as SPAN RESORTS owned by Span Motels Pvt. Ltd. or in the lands leased out to the said company by the State of Himachal Pradesh.

I say that the shareholding of SPAN MOTELS PVT. LTD. is as under:

Share holding	**No. of Shares**	**% held**
Mrs. Leela Nath	32,560	42
EMC Projects Pvt. Ltd.	14,700	19
SHAKA Properties Pvt. Ltd	15,000	19
SHAKA Estate & Finance Pvt. Ltd	15,000	19
Capt. Alok Chandola	250	01
	77,510	**100**

4. It was not disputed before us by Mr. Harish Salve, learned counsel appearing for Mr. Kamal Nath, that almost all the shares in the Motel are owned by the family of Mr. Kamal Nath. We do not wish to comment on the averment made on oath by Mr. Kamal Nath that he has "no right, title or interest in the property known as Span Resorts owned by Span Motels Private Limited@.

5. Mr. B.L. Mathur filed an additional counter-affidavit dated 30-7-1996 on behalf of the Motel. The counter-affidavit mentioned above states that government land measuring 40 bighas 3 biswas situated alongside Kullu-Manali Road on the bank of River Beas was granted on lease to the Motel for a period of 99 years with effect from 1-10-1972 to 1-10-2071. The lessee was granted permission to enter and occupy the said area for the purpose of putting up a Motel and for installing ancillaries in due course as may be subsequently approved by the lessor. We may refer to paras 6 and 7 of the lease deed dated 29-9-1972 which are as under:

5. Mr. B.L. Mathur filed an additional counter-affidavit dated 30-7-1996 on behalf of the Motel. The counter-affidavit mentioned above states that government land measuring 40 bighas 3 biswas situated alongside Kullu-Manali Road on the bank of River Beas was granted on lease to the Motel for a period of 99 years with effect from 1-10-1972 to 1-10-2071. The lessee was granted permission to enter and occupy the said area for the purpose of putting a Motel and for installing ancillaries in due course as may be subsequently approved by the lessor. We may refer to paras 6 and 7 of the lease deed dated 29-9-1972 which are as under:

> "The lessee shall not dig deep pits of trenches in the said land, which may lead to the danger of erosion and shall make good the lessor defects caused by their acts of defaults within one month of notice by the lessor.
>
> In the event of said land being required by lesser for any other purpose, whatsoever the lessor will be entitled to terminate this lease at any time by giving six months' notice in writing to the lessee and the lessee shall not be entitled to any compensation whatsoever on account of such termination."

6. The current management (Shri Kamal Nath's family) took over the Motel in the year 1981. Fresh lease was signed on 29-11-1981. The new lease was for the same period from 1972 to 2071. Paras 4 and 5 of the additional affidavit are as under:

> "I say that the Motel commenced operations in 1975. There are over 800 trees in this area of 40 bighas. The Motel has two clusters with 8 dwelling units of 3 rooms each. The rooms are nowhere near the river - the distance between the cluster of rooms and the beginning of the river basin is about 10 metres - actually the river is another 30 metres therefrom. Thus, the effective distance between the edge of the river and the cluster of rooms is 40 metres.
>
> I say that in the peak of the flood, the river did not come closer than 10 metres to the rooms and did not, therefore, pose any danger to the rooms, particularly there are no problems qua rooms as the rooms are on a higher level - at least 5-7 metres at their closest point."

Along with the additional affidavit the correspondence between the Motel and the Government has been annexed. In a letter dated 19-10-1988 addressed to the Chief Minister, Himachal Pradesh, the Motel gave details of the flood-damage during the year 1988 and finally requested the Government for the following steps:

> "Further it is imperative that the Government take immediate steps to stop erosion of the land under lease to us. It would appear that strong concrete blackened retaining walls will be necessary to be placed at appropriate points to protect the landmass around us."

7. The Motel addressed letter dated 30-8-1989 to the Divisional Forest Officer, Kullu. The relevant part of the letter is as under:

> "When we acquired our land on lease, there were no clear demarcations of the surrounding areas and boundaries. There has existed a stretch of waste and 'banjar' (Class III) forest land in a longitudinal strip along the river bank admeasuring about 22.2 bighas, contiguous and adjacent to our leased land. Over the years, and especially after the severe floor erosion last year, we have built extensive stone, cemented and wire-mesh-crated embankments all along the river banks at considerable expense and cost. We have also gradually and painstakingly developed this entire waste and 'banjar' area, beautified and landscaped it, planted ornamental, fruiting and varied forest trees extensively such that it blends with our estate and with the surrounding flora and environment in a harmonious manner. A revenue map along with all Revenue Department records covering this entire area, is forwarded enclosed herewith for your reference and perusal.
>
> We are aware that in accordance with the Forest Conservation Act of 1980, the use of forest land by private agency even for natural development and afforestation scheme, requires alternative matching compensatory afforestation land areas to be surrendered by the concerned party, after due approval of the Government. In view of this statutory precondition, we wish to submit that we can immediately surrender to the Government nearly 28 bighas and 13 biswas of private agricultural cultivated land located at Village MAIHACH, (Burua), MANALI, in exchange for the above-mentioned 22.2 bighas of Class III banjar forest land adjoining our land in Village Baragran Bihal, which we request for transfer to our company in lieu of the land we are willing to surrender. The specific revenue maps and records concerning this area of land at Village Majhach, are also enclosed herewith for your kind perusal."

It is obvious from the contents of the letter quoted above that the Motel had encroached upon an additional area of 22.2 bighas adjoining to the leasehold area. Apart from that the Motel had built extensive stone, cemented and wire-mesh-crated embankments all along the river banks. The Motel was keen to have the encroached land by way of exchange/lease. A request to that effect was repeated in the letter dated 12-9-1989 addressed to the Divisional Forest Officer, Kullu. The Motel again repeated its request for lease of the additional land by the letter dated 9-7-1991. The said letter further stated as under:

> "We would also like to mention that the banjar land adjoining our hotel, referred to in para 1 above, lies along the bank of River Beas which erodes to every year. About ten years ago almost 4 bighas of this land were washed away and the on flowing water has posed a serious threat to our hotel buildings and adjoining area. To protect our property we were compelled to erect deep protection embankments along the banjar land in question at huge cost the details of which will be sent to you shortly. If our proposal is accepted for the exchange of land it will become possible for us to take further steps to protect this land."

8. The Divisional Forest Officer, Kullu sent reply dated 12-1-1993 which stated as under:

> "In this connection it is intimated that at present we are not having funds to put crates and spurs along the river side near your hotel to check the soil erosion, as indicated in your letter referred to above. In order to protect your property from the damage, you can carry out such works at your level, subject to the condition that the ownership of the land would vest with Forest Department and the Department would not be liable to pay any amount incurred for the purpose by you at a later stage and you would not claim any right on government property."

The above-quoted letter can be of no consequence because much before the said letter the Motel had built extensive stone, cemented and wire-mesh-crated embankments all along the river bank. This is obvious from the contents of the letter dated 30-8-1989 (quoted above).

9. The Motel addressed a letter dated 21-6-1993 to the Chief Secretary, Himachal Pradesh wherein it is clearly stated that the adjoining land measuring 22 bighas and 3 biswas had been reclaimed by the Motel. The relevant part of the letter is as under:

> "Adjoining our Resort and contiguous to our leased land is a stretch of Class III - banjar forest land in a longitudinal strip along the river bank admeasuring 22 bighas and 3 biswas. This was a stony piece of land ———————— washed away and reduced in size by river erosion year by year. This land was reclaimed by us and protected by an embankment and filling from the river side."

The said letter further states as under:

> "Similarly on the river side part of our leased land there used to be floods and erosion every year. If we would have let this continue, the leased land would have also got reduced every year. In order to protect our leased land and to save damage to our hotel property, we at our own considerable expense and cost built stone and wire-mesh-crated embankment all along the river bank. This not only protected our hotel land but also the forest land .....
>
> In 1988 there were severe floods when every portion of leased land got washed away. It became imperative for us at considerable expense to build an embankment on the river front along the leased property. In order to build an embankment on the river front along the leased property the washed away area and part of the river bank had to be filled at huge cost. Once the river bed and the washed away area was filled, the choice before us was either to put soil on it and grow grass and trees to secure it or let it remain unsecured and aesthetically displeasing. We chose the former. As a result of land-filling and embankment our leased area when measured will obviously show an increase. This increase is not an encroachment but reclamation with the objective of protecting the leased property."

10. In the letter dated 7-8-1993 addressed to the Divisional Forest Officer, the Motel again asked for lease of adjoining area. The relevant part of the letter is as under:

> "We had explained in our previous letters dated 21-6-1993 and 23-7-1993 (copies of which have been sent to you with our letter dated 5-8-1993) the circumstances under which we had to spend enormous sum of money in protecting and reclaiming the forest land adjoining our Resort. It had become necessary for us to undertake this reclamation and protection work by filling the land from the river bed, constructing embankments, retaining walls and crating etc. in order to protect the land leased by the Government to our Span Resort and property thereon but we were unable to complete the entire work as we were restrained from carrying on with the work under undue allegations of encroachment on the forest land ...
>
> In order to expedite the process of commencing protection work on an urgent basis on the forest land, we propose that the forest land be given to us on long lease coterminous with the lease of the land granted by the Government for our Span Resorts. This could be done by a supplementary lease as it is imperative to save the land under the original lease.
>
> All we have done is to reclaim and protect the land from erosion by constructing crates, retaining walls and embankments along River Beas by investing huge amounts which unfortunately have all been washed away due to floods and now requires reconstruction to save the forest land and our adjoining property from total destruction."

11. The Government of India, Ministry of Environment and Forests by the letter dated 24-11-1993 addressed to the Secretary, Forest, Government of Humachal Pradesh, Shimla conveyed its prior approval in terms of Section 2 of the Forest (Conservation) Act, 1980 for leasing to the Motel 27 bighas and 12 biswas of forest land adjoining to the land already on lease with the Motel. A lease deed dated 11-4-1994 regarding the said land was executed between the Himachal Government and the Motel. The additional affidavit filed by the Motel refers to the prior approval granted by the Government of India as under:

> "In the Ministry of Environment and Forests, the proposal was cleared by the Secretary and forwarded to the Forest Advisory Committee bypassing the Minister concerned. The Forest Advisory Committee cleared the proposal subject to severe restrictions - and also certain restrictions which are not normally imposed in such cases. The proposal was then cleared at the level of the Prime Minister and by a letter of 24-11-1993, approval was communicated to the State Government and SMPL."

12. It may be mentioned that Mr. Kamal Nath was the Minister-in-charge, Department f Environment and Forests at the relevant time. What is sought to be conveyed by the above-quoted paragraph is that Mr. Kamal Nath did not deal with the file. The correspondence between the Motel and the Humachal Government referred to and quoted by us shows that from 1988 the Motel had been writing to the Government for the exchange/lease of the additional forest land. It is only in November 1993 when Mr. Kamal Nath was the Minister, in charge of the Department that the clearance was given by the Government of India and the lease was granted. Surely it cannot be a coincidence.

13. This Court took notice of the news item - quoted above - because the facts disclosed therein, if true, would be a serious act of environmental-degradation on the part of the Motel. It is not disputed that in September 1995 the swollen Beas engulfed some part of the land in possession of the Motel. The news item stated that the Motel used earth-movers and bulldozers to turn the course of the river. The effort on the part of the Motel was to create a new channel by diverting the river-flow. According to the news item three private companies were engaged to reclaim huge tracts of land around the Motel. The main allegation in the news item was that the course

of the river was being diverted to save the Motel from future floods. In the counter-affidavit filed by the Motel, the allegations in the news item have been dealt with in the following manner:

"(l) If the works were not conducted by the Company, it would in future eventually cause damage to both banks of the river, under natural flow conditions.

(m) By dredging the river, depth has been provided to the river channel thus enhancing its capacity to cope with large volume of water.(n) The wire crates have been put on both banks of the river. This has been done to strengthen and protect the banks from erosion and NOT as any form of river diversion. It is not necessary to divert the river because simply providing greater depth and removing debris deposits enhances the capacity of the river to accommodate greater water flow.

(o) I further state that the nearly 200 metres of wire crates which have been put on the left bank of the river (the river bank on the opposite side of SPAN) is in the interest of the community and nearby residents/villages. This left bank crating protects the hillside where RANGRI, CHAKKI and NAGGAR are located.

(s) After the floods, it was observed, that the boulders and rubble deposits were obstructing and hindering the flow of the river and thus, it was the common concern of the Company as well as of the Panchayat of Village BARAGRAN BIHAL to carry out dredging measures to provide free flow of the river water.

(t) Accordingly alleviation measures conducted by the Company and the villagers of BARAGRAN BIHAL were as under:

(i) Dredging of debris deposit: Debris deposits in river basis which had collected due to the floods were removed by dredging. This deepens the channel and thus allows larger flow of water.

(ii) Strengthening of both banks with wire crates: Wire crates are the common method of protection of bank erosion. Accordingly wire crates were put along the opposite side (left bank) to protect the landslide of the hillside wire on which Village RANGRI is perched, Wire crating was also put on the Resort side of the river (right bank) to strengthen and protect the bank against erosion. All the wire crating runs along the river flow and not as an obstruction or for any diversion.

(w) It is further submitted that whereas the report mischievously refers to villagers of Rangri, Chakki and Naggar nowhere does it take into account the very real problems of villagers of Baragran Bihal which is located immediately on the right bank near the SPAN Resort who were seriously affected by the floods. Chakki, Rangri and Naggar villages have not at all been affected by the floods and there is no remove possibility of these villages being affected due to the flood-protection works conducted by the Company."

In the additional affidavit filed by the Motel the facts pleaded are as under:

(ii) it had become necessary for them to undertake this reclamation and protection work by filling the land from river bed, constructing embankments, retaining walls and crates, etc. in order to protect the land leased by the Government to the Resort and the property thereon.

(vii) The forest land which is susceptible to heavy river erosion by floods involves high cost for its protection from getting washed away every year and would be protected by construction of embankments and filling from the river side by the Company ... local community of Kullu and Manali and surrounding villages will benefit."

14. Mr. G.D. Check, Under Secretary (Revenue), Government of Himachal Pradesh in the counter-affidavit filed in this Court stated as under:

"(iii) That subsequently, a piece of land measuring 21-09 bighas was encroached by M/s Span Motels. On coming to the notice of the Government of such encroachment, the Government of Himachal Pradesh in Revenue Department took action and reportedly got the encroached land vacated, and the possession of which has been taken over by the Forest Department.

That on 21-22 July, 1992, the then Chief Secretary to the Government of Himachal Pradesh visited the site who drew the inference that M/s Span Motels Ltd. were still using the encroached land. The copy of note on inspection of the then Chief Secretary is annexed as R-1.

That immediately on receipt of the recommendations of the then Chief Secretary (Annexure R-1), the Department of Forest started working at the site but in the meantime, it was decided to lease out a piece of land measuring 27-12 bighas which includes the said encroached land measuring 21-09 bighas. The lease granted by the Government of Himachal Pradesh in Revenue Department vide letter No. Rev. D(G)6-53/93, dated 5-4-1994 is annexed as Annexure R-11 after obtaining the approval of Government of India, Minister of Environment and Forest, New Delhi vide letter No.9-116/93-ROC, dated 24-

11-1993 (copy annexed as Annexure R-III) for the purpose of protecting earlier leased land.

That the developmental activities which was being undertaken by M/s Span Motels Ltd. came to the knowledge of the Government from the news item which appeared in the Press and field officers of all the departments concerned took an exercise to carry out the inspection and reported the matter to the Government."

15. C.P. Sujaya, Financial Commissioner-cum-Secretary (Irrigation and Public Health), Government of Himachal Pradesh in her counter-affidavit filed in this Court, inter alia, stated as under:

> "Admitted to the extent that the Span Resorts managment had deployed heavy earth-moving machinery to reclaim their land and to divert/channelize the course of river to its course which it was following prior to 1995 floods by dredging and raising of earthen and wire-crated embankments.
>
> The flow of river has been changed/diverted by dredging/raising of wire-crated embankments and creating channel from a point u/s of Span Resorts. The approximate length of channel is about 1000 metres.
>
> Admitted to the extent that Villages Rangri and Chakki are located on left bank of River Beas. However, channelization of river has been done slightly away from the toe of foothills except for the last about 500 metres where it is running along the foothills.
>
> The hill on which Villages Rangri and Chakki are situated consists of small boulders embedded in sandy strata and is quite fragile/unstable in nature. Therefore, this reach of river is prone to landslides in the normal course also. However, it is feared that flow of river along the foothills may hasten/aggravate the process of landslides. The Span Management has provided wire-crated embankment in a reach of about 90 metres on left bank and about 270 metres on right bank to channelize the flow and also to reclaim part of land on right bank of River Beas.
>
> Admitted to the extent that the diversion/ channelization of river has been done to restore it to its course of pre-1995 floods and in doing so, by raising the earthen and wire-crated embankments, some land of villagers situated on right bank of River Beas has also been reclaimed along with land of Span Resort."

16. This Court by the order dated 6-5-1996 directed the Central Pollution Control Board (the Board) through its Member Secretary to inspect the environments around the area in possession of the Motel and file a report. This Court further ordered as under:

> "Meanwhile we direct that no construction of any type or no interference in any manner with the flow of the river or with the embankment of the river shall be made by the Span Management."

17. Pursuant to this Court's order dated 6-5-1996 the Board filed its report along with the affidavit of Dr. S.P. Chakrabarti, Member Secretary of the Board. It is stated in the affidavit that a team comprising Dr. Bharat Singh, Former Vice-Chancellor and Professor Emeritus, University of Roorkee, Dr. S.K. Ghosh, Senior Scientist and former Head, Division of Plant Pathology (NF), Kerala Forest Research Institute, Preechi, Trichur and Dr. S.P. Chakrabarti, Member Secretary, Board was constituted. The team inspected the area and prepared the report. Para 4.2 of the report gives details of the construction done by the Motel prior to 1995 floods. The relevant part of the paragraph is as under:

> "To protect the newly-acquired land, SMPL took a number of measures which include construction of the following as shown in F.2:
>
> (a) 8 nos. studs of concrete blocks 8 m long and 20 m apart on the eastern face of the club island on the upstream side,
>
> (b) 150 m long stepped wall also on the eastern face of club island on the downstream side,
>
> (c) A 2 m high bar of concrete blocks at the entry at the spill channel, and
>
> (d) Additional 8 nos. studs also 8 m long and 20 m apart on the right bank of River Beas in front of the restaurant of the SMPL.

While (a) & (b) were aimed at protecting the club island from the main current, (c) was to discourage larger inflow into the spill channel. Item (d) was meant to protect the main resort land of SMPL if heavy flow comes into the spill channel.

The works executed in 1993 were bank protection works, and were not of a nature so as to change the regime or the course of river. A medium flood again occurred in 1994. Partly due to the protection works, no appreciable damage occurred during this flood. The main current still continues on the left bank."

18. The happening of events in the vicinity of the Motel during the 1995 flood and the steps taken by the Motel have been stated in the report as under:

> "A big slip occurred on the hillside on the left bank, at a distance about 200 m upstream from the point where division into main and spill channels was occurring, on the afternoon of September 4, 1995. This partially blocked the main left side channel which was relatively narrow at this location. This presumably triggered the major change of course in the river, diverting the major portion of the flow into spill channel towards the right and almost over the entire land area of the club island. The entire club building and the plantation as well as the protection works built in

1993 were washed away. Heavy debris was deposited on this land. Damage occurred on the right bank also but the buildings of the main SMPL resort remained more or less unaffected. A large hotel and many buildings on the right bank, almost adjacent to SMPL in the downstream were also washed away. The bar of blocks at the upstream end of the spill channel as well as most of the studs on this channel were also washed away. Some remnants of five downstream studs could be seen at the time of the visit. After the passage of 1995 flood, SMPL have taken further steps to protect their property as shown in Fig. 3. These are as follows:

1. The left side channel (the main channel), which had become less active, has been dredged to increase its capacity. Wire crate revetments (A, B & C) on both banks of this channel have been made to direct the flow through this channel. These revetments and earth restoration work done would curtail the entry of water into the right side relief/spill channel which had developed into the main channel during the flood. A relatively small channel (the relief/spill channel) still exists and carries very little flow. Bulk of the flow is now going into the left bank channel.

On the left bank, there are steep unstable slopes at higher elevations left after the slides during the flood. These are likely to slip in any case, and if so happens,, may block the left channel again. This land belongs to some villagers from Rangri. The left bank channel is again sub-dividing into two streams (D) and the small stream is flowing close to the toe of the hills for a distance of about 500 to 600 m before it turns towards midstream. Some of the dredged material is piled on the right bank and some on the divide between the main channel and the subsidiary channel on the left. Slips can be seen in this reach of 500-600 m even now, and erosion at toe may aggravate sliding tendency. SMPL has also put 190 m wire crates (C) as protection against erosion of this bank, which may be helpful up to moderate flood conditions.

The dredging and channelization of the left bank channel, though aimed at protecting SMPL land, should normally keep high intensity of flow away from both banks in moderate floods. This should thus not be a cause of concern. In high floods, the water would spill or spread beyond this channel. Due to restriction of entry in the right relief/spill channel, though the works may not withstand a high flood, there may be a tendency for more flow towards the left bank. However, the river is presently in a highly unstable regime after the 1995 extraordinary floods, and it is difficult to predict its behaviour if another high flood occurs in the near future."

The conclusion given by the inspecting team in the report are as under:

"6.4 M/s Span Motels Private Limited had taken some flood-control measures at the immediate upstream by construction of wire crates (Fig. 3) on both sides (A, B and C) and also dredged the main channel of the river by blasting the big boulders and removing the debris. The flood-control measures, taken by them on the right bank of the main channel and at the mount of relief channel after the 1993 flood, were also washed off. There is no sign of any boundary of the premises of the newly-acquired land.

6.5 The mouth of the natural relief/spill channel has been blocked by construction of wire crate and dumping of boulders (A & B). The area has almost been levelled. Although a little discharge was observed due to seepage through boulders and flowing through the remnants of the relief channel to the downstream, the channel is blocked by a stonewall across the channel (F) at the downstream of M/s SMPL by a private property owner who has even constructed two wells (E) on the bed of the channel. This indicates the intention of the occupiers of the right bank properties in the concerned stretch in favour of filing up of the natural spill/relief channel.

6.6 M/s Span Motels has not consulted any Flood Control Expert as it appeared from the way of construction of the wire crate. No proper revetment was done which crating. As such, these cratings may not last long.

6.7 In the process of channelizing the main course, the main stream has been divided into two, one of which goes very near to the left bank (G) because of which fresh land slip in future is not ruled out.

6.8 The relief channel is supposed to be the government land. Construction of any sort to block the natural flow of water is illegal and no permission has been taken from the department concerned.

6.9 The lease agreement of 1994 had the clause for protection of the land but it should have been done not by blocking the flood spill/relief channel.

6.10 Relief channel is the shortest path between the two bends. Any future slip on left bank due to training of discharge at its foot may cause flood on the right bank where the leasehold land (1994) exists.

6.11 No new construction should be allowed in this flood-prone area except flood-protection measures. No economic activity should be undertaken in the aforementioned stretch.

6.12 Since newly-acquired land of M/s SMPL is located on the flood plain sandwiched between the main channel and the relief/spill channel, the land may be de-leased and the Forest Department take care of plantation in the area after adequate flood-control measures are taken by the Irrigation Department. This is necessitated in view of the fact that the left bank opposite SMPL is very steep (almost vertical) and is subjected to potential threat of land slip to block the channel and cause change of course of the river flow again.

6.13 Even if land slips occur, the impact will be local, limited only to the stretch of beas River near SMPL.

6.14 The river is presently in a highly unstable regime after 1995 extraordinary floods, and it is diffi-

> cult to predict its behaviour if another high flood occurs in the near future. A long-term planning for flood control in Kullu Valley needs to be taken up immediately with the advice of an organization having expertise in the field, and permanent measures shall be taken to protect the area so that recurrence of such a heavy flood is mitigated permanently."

19. On a careful examination of the counter-affidavits filed by the parties, the report placed on record by the Board and other material placed on record, the following facts are established:

1. The leasehold area in possession of the Motel is a part of the protected forest land owned by the State Government.

2. The forest land measuring 27 bighas and 12 biswas leased to the Motel by the lease deed dated 11-4-1994 is situated on the right bank of the river and is separated from the Motel by a natural relief/spill channel of the river.

3. A wooden bridge on the spill channel connects the main Motel land and the land acquired under the 1994 lease deed.

4. 22.2 bighas out of the land leased to the Motel in 1994 was encroached upon by the Motel in the years 1988/89.

5. Prior to the 1995 floods the Motel constructed 8 studs of concrete, blocks 8 m long and 20 m apart on the upstream bank of the river, 150 m long stepped wall on the downstream side of the river and 2 m high bar of concrete blocks at the entry of the spill channel and additions 8 studs 8 m long and 20 m apart on the right bank of River Beas in front of the restaurant of the Motel.

6. After the 1995 floods the Motel has dredged the left side channel (the main channel) of the river to increase its capacity. Wire crate revetments on both banks of the main channel of river have been made to direct the flow through the said channel. This has been done with a view to curtail the entry of water into the right side relief/spill channel.

7. The Motel has constructed 190 m wire crates on the bank of the river (upstream). The dredged material is piled up on the banks of the river. The dredging and channelizing of the left bank has been done on a large scale with a view to keep high intensity of flow away from the Motel.

8. The dredging of the main channel of river was done by blasting the gib boulders and removing the debris.

9. The mouth of the natural relief/spill channel has been blocked by wire crates and dumping of boulders.

10. The construction work was not done under expert advice.

11. The construction work undertaken by the Motel for channelizing the main course has divided the main stream into two, one of which goes very near to the left bank because of which, according to the report, fresh land slip in future cannot be ruled out.

20. The report further indicates that the relief channel being part of the natural flow of the river no construction of any sort could be made to block the said flow. According to the report no permission whatsoever was sought for the construction done by the Mote. The Board in its report has further opined that the clause in the lease agreement for protection of land did not permit the Motel to block the flood spill/relief channel of the river. The report categorically states that no new construction should be allowed in this flood-prone area and no economic activities should be permitted in the said stretch. It has been finally recommended by the inspection team that the land acquired by the Motel under the 1994 lease deed is located on the flood plain, sandwiched between the main channel and the relief/spill channel and as such it should be de-leased so that the Forest Department may take care of the plantation in the area and also preserve the ecologically fragile area of River Beas.

21. Mr. Harish Salve vehemently contended that whatever construction activity was done by the Motel on the land under its possession and on the area around, if any, was done with a view to protect the leasehold land from floods. According to him the Divisional Forest Officer by the letter dated 12-1-1993 - quoted above - permitted the Motel to carry out the necessary works subject to the conditions that the department would not be liable to pay any amount incurred for the said purpose by the Motel. We do not agree. It is obvious from the correspondence between the Motel and the Government, referred to by us, that much before the letter of the Divisional Forest Officer dated 12-1-1993, the Motel had made various constructions on the surrounding area and on the banks of the river. In the letter dated 30-8-1989 addressed to the Divisional Forest Officer, Kullu - quoted above - the Motel management admitted that "over the years, and especially after the severe flood erosion last year, we have built extensive stone, cemented and wire-mesh-crated embankments all along the river banks at considerable and cost. We have also gradually and painstakingly developed this entire waste and banjar area". The "Banjar area" referred to in the letter was the adjoining area admeasuring 22.2 bighas which was not on lease with the Motel at that time. The admissions by the Motel management in various letters written to the Government, the counter-affidavits filed by the various government officers and the report placed on record by the Board clearly show that the motel management has by their illegal constructions and callous interference with the natu-

ral flow of River Beas has degraded the environment. We have no hesitation in holding that the Motel interfered with the natural flow of the river by trying to block the natural relief/spill channel of the river.

22. The forest lands which have been given on lease to the Motel by the State Government are situated at the bank of River Beas. Beas is a young and dynamic river. It runs through Kullu Valley between the mountain ranges of the Dhauladhar in the right bank and the Chandrakheni in the left. The river is fast-flowing, carrying large boulders, at the times of flood. When water velocity is not sufficient to carry the boulders, those are deposited in the channel often blocking the flow of water. Under such circumstances the river stream changes its course, remaining within the valley but swinging from one bank to the other. The right bank of River Beas where the Motel is located mostly comes under forest, the left bank consists of plateaus, having steep bank facing the river, where fruit orchards and cereal cultivation are predominant. The area being ecologically fragile and full of scenic beauty should not have been permitted to be converted into private ownership and for commercial gains.

23. The notion that the public has a right to expect certain lands and natural areas to retain their natural characteristic is finding its way into the law of the land. The need to protect the environment and ecology has been summed up by David B. Hunter (University of Michigan) in an article titled An ecological perspective on property: A call for judicial protection of the public's interest in environmentally critical resources published in Harvard Environmental Law Review, Vol.12 1988, p.311 is in the following words:

> "Another major ecological tenet is that the world is finite. The earth can support only so many people and only so much human activity before limits are reached. This lesson was driven home by the oil crisis of the 1970s as well as by the pesticide scare of the 1960s. The current deterioration of the ozone layer is another vivid example of the complex, unpredictable and potentially catastrophic effects posed by our disregard of the environmental limits to economic growth. The absolute finiteness of the environment, when coupled with human dependency on the environment, leads to the unquestionable result that human activities will at some point be constrained.
>
> '[H]uman activity finds in the natural world its external limits. In Short, the environment imposes constraints on our freedom; these constraints are not the product of value choices but of the scientific imperative of the environment's limitations. Reliance on improving technology can delay temporarily, but not forever, the inevitable constraints. There is a limit to the capacity of the environment to service ... growth, both in providing raw materials and in assimilating by-product wastes due to consumption. The largesse of technology can only postpone or disguise the inevitable.'

Professor Barbara Ward has written of this ecological imperative in particularly vivid language:

> 'We can forget moral imperatives. But today the morals of respect and care and modesty come to us in a form we cannot evade. We cannot cheat on DNA. We cannot get round photosynthesis. We cannot say I am not going to give a damn about phytoplankton. All these tiny mechanisms provide the preconditions of our planetary life. To say we do not care is to say in the most literal sense that "we choose death".'

There is a commonly-recognized link between laws and social values, but to ecologists a balance between laws and values is not alone sufficient to ensure a stable relationship between humans and their environment. Laws and values must also contend with the constraints imposed by the outside environment. Unfortunately, current legal doctrine rarely accounts for such constraints, and thus environmental stability is threatened.

Historically, we have changed the environment to fit our conceptions of property. We have fenced, plowed and paved. The environment has proven malleable and to a large extent still is. But there is a limit to this malleability, and certain types of ecologically important resources - for example, wetlands and riparian forests - can no longer be destroyed without enormous long-term effects on environmental and therefore social stability. To ecologists, the need for preserving sensitive resources does not reflect value choices but rather is the necessary result of objective observations of the laws of nature.

In sum, ecologists view the environmental sciences as providing us with certain laws of nature. These laws, just like our own laws, restrict our freedom of conduct and choice. Unlike our laws, the laws of nature cannot be changed by legislative fiat; they are imposed on us by the natural world. An understanding of the laws of nature must therefore inform all of our social institutions."

24. The ancient Roman Empire developed a legal theory known as the "Doctrine of the Public Trust" It was founded on the ideas that certain common properties such as rivers, seashore, forests and the air were held by Government in trusteeship for the free and unimpeded use of the general public. Our contemporary concern about "the environment" bear a very close conceptual relationship to this legal doctrine. Under the Roman law these resources were either owned by no one (res nullious) or by every one in common (res communious). Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation or fishing. Resources that were suitable for these uses were deemed to be held in trust by the

Crown for the benefit of the public. Joseph L. Sax, Professor of Law, University of Michigan - proponent of the Modern Public Trust Doctrine - in an erudite article "Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", Michigan Law Review, Vol.68, Part I p.473, has given the historical background of the Public Trust Doctrine as under:

> "The source of modern public trust law is found in a concept that received much attention in Roman and English law - the nature of property rights in rivers, the sea, and the seashore. That history has been given considerable attention in the legal literature, need not be repeated in detail here. But two points should be emphasized. First, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public: accordingly, property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties - such as the seashore, highways, and running water - 'perpetual use was dedicated to the public', it has never been clear whether the public had an enforceable right to prevent infringement of those interests. Although the State apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government."

25. The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. According to Professor Sax the Public Trust Doctrin imposes the following restrictions on governmental authority:

> "Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses."

26. The American law on the subject is primarily based on the decision of the United States Supreme Court in Illinois Central Railroad Co. v. People of the State of Illinois[1]. In the year 1869 the Illinois Legislature made a substantial grant of submerged lands - a mile strip along the shores of Lake Michigan extending one mile out from the shoreline - to the Illinois Central Railroad. In 1873, the Legislature changed its mind and repeated the 1869 grant. The State of Illinois sued to quit title. The Court while accepting the stand of the State of Illinois held that the title of the State in the land in dispute was a title different in character from that which the State held in lands intended for sale. It was different from the title which the United States held in public lands which were open to pre-emption and sale. It was a title held in trust - for the people of the State that they may enjoy the navigation of the water, carry on commerce over them and have liberty of fishing therein free from obstruction or interference of private parties. The abdication of the general control of the State over lands in dispute was not consistent with the exercise of the trust which required the Government of the State to preserve such waters for the use of the public. According to Professor Sax the Court in Illinois Central "articulated a principle that has become the central substantive thought in public trust litigation. When a State holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties".

27. In Gould v. Greylock Reservation Commission[2] the Supreme Judicial Court of Massachusetts took the first major step in developing the doctrine applicable to changes in the use of land dedicated to the public interest. In 1886 a group of citizens interested in preserving Mount Greylock as an unspoiled natural forest, promoted the creation of an association for the purpose of laying out a public park on it. The State ultimately acquired about 9000 acres, and the legislature enacted a statute creating the Greylock Reservation Commission. In the year 1953, the legislature enacted a statute creating an Authority to construct and operate on Mount Greylock an Aerial Tramway and certain other facilities and it authorized the Commission to lease to the Authority any portion of the Mount Greylock Reservation. Before the project commenced, five citizens brought an action against both the Greylock Reservation Commission and the Tramway Authority. The plaintiffs brought the suit as beneficiaries of the public trust. The Court held both the lease and the management agreement invalid on the ground that they were in excess of the statutory grant of the authority. The crucial passage in the judgement of the Court is as under:

> "The profit-sharing feature and some aspects of the project itself strongly suggest a commercial enterprise. In addition to the absence of any clear or express statutory authorization of as broad a delegation of responsibility by the Authority as is given by the management agreement, we find no express grant to the Authority or power to permit use of public lands and of the Authority's borrowed funds for what seems, in part at least, a commercial venture for private profit."

Professor Sax's comments on the above-quoted para-

graph from Gould decision are as under:

> "It hardly seems surprising, then, that the court questioned why a State should subordinate a public park, serving a useful purpose as relatively undeveloped land, to the demands of private investors for building such a commercial facility. The court, faced with such a situation, could hardly have been expected to have treated the case as if it involved nothing but formal legal issues concerning the State's authority to change the use of a certain tract of land ... Gould, like Illinois Centra, was concerned with the most overt sort of imposition on the public interest: commercial interests had obtained advantages which infringed directly on public uses and promoted private profits. But the Massachusetts court has also confronted a more pervasive, if more subtle, problem - that concerning projects which clearly have some public justification. Such cases arise when, for example a highway department seeks to take a piece of parkland or to fill a wetland."

28. In Sacco v. Development of Public Works[3], the Massachusetts Court restrained the Department of Public Works from filling a great pond as part of its plan to relocate part of State Highway. The Department purported to act under the legislative authority. The court found the statutory power inadequate and held as under:

> "the improvement of public lands contemplated by this section does not include the widening of a State highway. It seems rather that the improvement of public lands which the legislature provided for ... is to preserve such lands so that they may be enjoyed by the people for recreational purposes."

29. In Robbins v. Deptt. of Public Works[4], the Supreme Judicial Court of Massachusetts restrained the Public Works Department from acquiring Fowl Meadows, "wetlands of considerable natural beauty ... often used for nature study and recreation" for highway use.

30. Professor Sax in the article (Michigan Law Review) refers to Priewev v. Wisconsin State Land and Improvement Co.[5], Craford County Lever and Drainage Distt. No. 1[6], City of Milwaukee v. State[7], State v. Public Service Commission[8] and opines that "the Supreme Court of Wisconsin has probably made a more conscientious effort to rise above rhetoric and to work out a reasonable meaning for the public trust doctrine than have the courts of any other State".

31. Professor Sax stated the scope of the public trust doctrine in the following words:

> "If any of the analysis in this Article makes sense, it is clear that the judicial techniques developed in public trust cases need not be limited either to these few conventional interests or to questions of disposition of public properties. Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffused public interests need protection against tightly organized groups with clear and immediate goals. Thus, it seems that the delicate mixture of procedural and substantive protections which the courts have applied in conventional public trust cases would be equally applicable and equally appropriate in controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining of wetland filing on private lands in a State where governmental permits are required."

32. We may at this stage refer to the judgement of the Supreme Court of California in National Audubon Society v. Superior Court of Alpine County[9]. The case is popularly known as "the Mono Lake case". Mono Lake is the second largest lake in California. The lake is saline. It contains no fish but supports a large population of brine shrimp which feed vast numbers of nesting and migrating birds. Islands in the lake protect a large breeding colony of California gulls, and the lake itself serves as a haven on the migration route for thousands of birds. Towers and spires of tura (sic) on the north and south shores are matters of geological interest and a tourist attraction. In 1940, the Division of Water Resources granted the Department of Water and Power of the City of Los Angeles a permit to appropriate virtually the entire flow of 4 of the 5 streams flowing into the lake. As a result of these diversions, the level of the lake dropped, the surface area diminished, the gulls were abandoning the lake and the scenic beauty and the ecological values of Mono Lake were imperilled. The plaintiffs environmentalist - using the public trust doctrine - filed a law suit against Los Angeles Water Diversions. The case eventually came to the California Supreme Court, on a Federal Trial Judge's request for clarification of the State's public trust doctrine. The Court explained the concept of public trust doctrine in the following words:

> "'By the law of nature these things are common to mankind - the air, running water, the sea and consequently the shores of the sea.' (Institutes of Justinian 2.1.1) From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns 'all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people.'"

The Court explained the purpose of the public trust as under:

> "The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways. As we observed in Marks v. Whitney[10], '[p]ublic trust easements (were) traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the State, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.

> We went on, however, to hold that the traditional triad of uses - navigation, commerce and fishing - did not limit the public interest in the trust res. In language of special importance to the present setting, we stated that '[t]he public uses to which tidelands are subject are sufficiently flexible to encompass caging public needs. In administering the trust the State is not burdened with an outmoded classification favouring one mode of utilization over another. There is a growing public recognition that one of the important public uses of the tidelands - a use encompassed within the tidelands trust - is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favourably affect the scenery and climate of the area.'
>
> Mono Lake is a navigable waterway. It supports a small local industry which harvests brine shrimp for sale as fish food, which endeavour probably qualifies the lake as a 'fishery' under the traditional public trust cases. The principal values plaintiffs seek to protect, however, are recreational and ecological - the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. Under Marks v. Whitney[11], it is clear that protection of these values is among the purposes of the public trust."

The Court summed up the powers of the State as trustee in the following words:

> "Thus, the public trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust ..."

The Supreme Court of California, inter alia, reached the following conclusion:

> "The State has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this State shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. (See Johnson, 14 U.C. Davis L. Rev. 233, 256-571; Robie, Some Reflections on Environmental Considerations in Water Rights Administration, 2 Ecology L.Q. 695, 710-711 (1972); Comment, 33 Hastings L.J. 653, 654.) As a matter of practical necessity the State may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the State must bear in mind its duty as trustee to consider the effect of the taking on the public trust (see United Plainsmen v. N.D. State Water Cons. Common[12] at pp. 462-463, and to preserve, so far as consistent with the public interest, the uses protected by the trust."

The Court finally came to the conclusion that the plaintiffs could rely on the public trust doctrine in seeking reconsideration of the allocation of the waters of the Mono basin.

33. It is no doubt correct that the public trust doctrine under the English common law extended only to certain traditional uses such as navigation, commerce and fishing. But the American Courts in recent cases have expanded the concept of the public trust doctrine. The observations of the Supreme Court of California in Mono Lake case clearly show the judicial concern in protecting all ecologically important lands, for example fresh water, wetlands or riparian forests. The observations of the Court in Mono Lake case to the effect that the protection of ecological values is among the purposes of public trust, may give rise to an argument that the ecology and the environment protection is a relevant factor to determine which lands, waters or airs are protected by the public trust doctrine. The Courts in United States are finally beginning to adopt this reasoning and are expanding the public trust to encompass new types of lands and waters. In Phillips Petroleum Co. v. Mississippi[13] the United States Supreme Court upheld Mississippi's extension of public trust doctrine to lands underlying non-navigable tidal areas. The majority judgement adopted ecological concepts to determine which lands can be considered tide lands. Phillips Petroleum case assumes importance because the Supreme Court expanded the public trust doctrine to identify the tide lands not on commercial considerations but on ecological concepts. We see no reason why the public trust doctrine should not be expanded to include all ecosystems operating in our natural resources.

34. Our legal system - based on English common law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.

35. We are fully aware that the issues presented in this case illustrate the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the courts. If

there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources,the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources.36. Coming to the facts of the present case, large area of the bank of River Beas which is part of protected forest has been given on a lease purely for commercial purposes to the Motels. We have no hesitation in holding that the Himachal Pradesh Government committed patent breach of public trust by leasing the ecologically fragile land to the Motel management. Both the lease transactions are patent breach of the trust held by the State Government. The second lease granted in the year 1994 was virtually of the land which is a part of the riverbed. Even the Board in its report has recommended de-leasing of the said area.

37. This Court in Vellore Citizens' Welfare Forum v. Union of India[14] explained the "Precautionary Principle" and "Polluters Pays Principle" as under: (SCC pp.658-59, paras 11-13).

> "Some of the salient principles of 'Sustainable Development', as culled out from Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Obligation to Assist and Cooperate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that 'the Precautionary Principle' and 'the Polluter Pays Principle' are essential features of 'Sustainable Development'. The 'Precautionary Principle' - in the context of the municipal law - means:

(i) Environmental measures - by the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The 'onus of proof' is on the actor or the developer/ industrialist to show that his action is environmentally benign.

'The Polluter Pays Principle' has been held to be a sound principle by this Court in Indian Council for Enviro-Legal Action v. Union of India[15]. The Court observed: (SCC p.246, para 65)'... we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country'.

The Court ruled that: (SCC p.246, para 65)

> '... Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on'.

Consequently the polluting industries are 'absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas'. The 'Polluter Pays Principle' as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

The Precautionary Principle and the Polluter Pays Principle have been accepted as part of the law of the land."

38. It is thus settled by this Court that one who pollutes the environment must pay to reverse the damage caused by his acts.

39. We, therefore, order and direct as under:

1. The public trust doctrine, as discussed by us in this judgement is a part of the law of the land.

2. The prior approval granted by the Government of India, Ministry of Environment and Forest by the letter dated 24-11-1993 and the lease deed dated 11-4-1994 in favour of the Motel are quashed. The lease granted to the Motel by the said lease deed in respect of 27 bighas and 12 biswas of area, is cancelled and set aside. The Himachal Pradesh Government shall take over the area and restore it to its original-natural conditions.

3. The Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The pollution caused by various constructions made by the Motel in the riverbed and the banks of River Beas has to be removed and reversed. We direct NEERI through its Director to inspect the area, if necessary, and give an assessment of the cost which is likely to be incurred for reversing the damage caused by the Motel to

the environment and ecology of the area. NEERI may take into consideration the report by the Board in this respect.

4. The Motel through its management shall show cause why pollution fine in addition be not imposed on the Motel.

5. The Motel shall construct a boundary wall at a distance of not more than 4 metres from the cluster of rooms (main building of the Motel) towards the river basin. The boundary wall shall be on the area of the Motel which is covered by the lease dated 29-9-1981. The Motel shall not encroach/cover/utilize any part of the river basin. The boundary wall shall separate the Motel building from the river basin. The river bank and the river basin shall be left open for the public use.

6. The Motel shall not discharge untreated effluents into the river. We direct the Himachal Pradesh Pollution Control Board to inspect the pollution control devices/ treatment plants set up by the Motel. If the effluent/ waste discharged by the Motel is not conforming to the prescribed standards, action in accordance with law be taken against the Motel.

7. The Himachal Pradesh Pollution Control Board shall not permit the discharge of untreated effluent into River Beas. The Board shall inspect all the hotels/institutions/ factories in Kullu-Manali area and in case any of them are discharging untreated effluent/waste into the river, the Board shall take action in accordance with law.

8. The Motel shall show cause on 18-12-1996 why pollution fine and damages be not imposed as directed by us. NEERI shall send its report by 17-12-1996. To be listed on 18-12-1996.

40. The writ petition is disposed of except for limited purpose indicated above.

AIR 1985 SUPREME COURT 652

P.N. BHAGWATI, AMERENDRA NATH SEN
AND RANGANATH MISRA JJ

Writ Petns. Nos. 8209 and 8821 of 1983 D. 12-3-1985

RURAL LITIGATION AND ENTITLEMENT KENDRA DEHRADUN AND OTHERS, PETITIONS

v.

STATE OF U.P. AND OTHERS, RESPONDENTS

And(A) Constitution of India, Art. 32 - Writ petition - Imbalance to ecology and hazard to healthy environment due to working on lime-stone quarries - Supreme Court ordered their closure (Ecological balance - Preservation (Public health - Hazard to) (Minor minerals - Close down of mining operations on count of public health)

(Paras 7, 10, 12)

(B) Constitution of India, Art. 32 - Writ petition - Advocates fee - Advocate of a party rendering valuable assistance to court in hearing petition - Supreme Court directed the Union Government and State Government, respondents to petition, to pay him 5,000 each as additional remuneration and not in lieu of costs. (i) Supreme Court Rules (1966) Sch. 2 - (ii) Advocates Act (1961) Ss.29, 30. Advocate - Remuneration for rendering valuable assistance to court). (Para 15)

ORDER:- This case has been argued at great length before us not only because a large number of lessees of lime-stone quarries are involved and each of them has painstakingly and exhaustively canvassed his factual as well as legal points of view but also because this is the first case of its kind in the country involving issues relating to environment and ecological balance and the questions arising for consideration are of grave moment and significance not only to the people residing in the Mussoorie Hill range forming part of the Himalayas but also in their implications to the welfare of the generality of people living in the country. It brings into sharp focus the conflict between development and conservation and serves to emphasize the need for reconciling the two in the larger interest of the country. But since having regard to the voluminous material placed before us and the momentous issues raised for decision, it is not possible for us to prepare a full and detailed judgement immediately and at the same time, on account of interim order made by us, mining operations carried out through blasting have been stopped and the ends of justice require that the lessees of lime-stone quarries should know, without any unnecessary delay, as to where they stand in regard to their lime-stone quarries, we propose to pass our order on the writ petitions. The reasons for the order will be set out in the judgement to follow later.

2. We had by an Order dated 11th August 1983 appointed a Committee consisting of Sh. D.N. Bhargav, Controller General, Indian Bureau of Mines, Nagpur Shri M.S. Kahlon, Director General of Mines Safety and Col. P. Mishra, Head of the Indian Photo Interpretation Institute (National Remote Sensing Agency for the purpose of inspecting the lime-stone quarries mentioned in the writ petition as also in the list submitted by the Government of Utta Pradesh. This Committee which we shall hereinafter for the sake of convenience refer to as to Bhargav Committee, submitted three reports after inspecting most of the lime-stone quarries and divided the lime-stone quarries into three groups. The lime-stone quarries comprised in category A were those where in the opinion of the Bhargav Committee the adverse impact of the mining operations was relatively less pronounced: category B comprised those lime-stone quarries where in the opinion of the Bhargav Committee the adverse impact of mining operations was relatively more pronounced and category C covered those lime-stone quarries which had been directed to be closed down by the Bhargav Committee under the

orders made by us on account of de——— regarding safety and hazards of more serious nature.

3. It seems that the Government of India also appointed a Working Group on Mining of Lime-stone Quarries in Dehradun area some time in 1983. The Working Group was also headed by the same Sh. D.N. Bhargav who was a member of the Bhargav Committee appointed by us. There were five other members of the Working Group along with Shri D.N. Bhargav and one of them was Dr. S. Mudgal who was at the relevant time Director in the Department of Environment, Government of India and who placed the report of the Working Group before the Court along with his affidavit. The Working Group in its report submitted in September 1983 made a review of lime-stone quarry leases for continuance or discontinuance of mining operations and after a detailed consideration of various aspects recommended that the lime-stone quarries should be divided into two categories, namely category 1 and category 2: category 1 comprising lime-stone quarries considered suitable for continuance of mining operations and category 2 comprising lime-stone quarries which were considered unsuitable for further mining.

4. It is interesting to note that the lime-stone quarries comprised in category A of the Bhargav Committee Report were the same lime-stone quarries which were classified in category 1 by the Working Group and the lime-stone quarries in categories B and C of the Bhargav Committee Report were classified in category 2 of the Report of the Working Group. It will thus be seen that both the Bhargav Committee and the Working Group were unanimous in their view that the lime-stone quarries classified in category A by the Bhargav Committee Report and category 1 by the Working Group were suitable for continuance of mining operations. So far as the lime-stone quarries in category C of the Bhargav Committee Report are concerned, they were regarded by both the Bhargav Committee and the Working Group as unsuitable for continuance of mining operations and both were of the view that they should be closed down. The only difference between the Bhargav Committee and the Working Group was in regard to limestone quarries classified in category B. The Bhargav Committee Report took the view that these lime-stone quarries need not be closed down, but it did observe that the adverse impact of mining operations in these lime-stone quarries was more pronounced while the Working Group definitely took the view that these lime-stone quarries were not suitable for further mining.

5. While making this Order we are not going into the various ramifications of the arguments advanced before us but we may observe straightway that we do not propose to rely on the Report of Prof. K.S. Valdia, who was one of the members of the Expert Committee appointed by us by our Order dated 2nd September 1983, as modified by the Order dated 25th October 1983. This Committee consisted of Prof. K.S. Valdia Shri Hukum Singh and Shri D.N. Kaul and it was appointed to enquire and investigate into the question of disturbance of ecology and pollution and affectation of air, water and environment by reason of quarrying operations or stone crushers or lime-stone kilns. Shri D.N. Kaul and Shri Hukum Singh submitted a joint report in regard to the various aspects while Prof. K.S. Valdia submitted a separate report. Prof. K.S. Valdia's Report was confined largely to the geological aspect and in the report he placed considerable reliance on the Main Boundary Thrust (hereinafter shortly referred to as M.B.T.) and he took the view that the lime-stone quarries which were dangerously close to the M.B.T. should be closed down, because they were in this sensitive and vulnerable belt. We shall examine this Report in detail when we give our reasons but we may straightway point out that we do not think it safe to direct continuance or discontinuance of mining operations in lime-stone quarries on the basis of the M.B..T. We are therefore not basing our conclusions on the Report of Prof. K.S. Valdia but while doing so we may add that we do not for a moment wish to express any doubt on the correctness of his Report.

6. We shall also examine in detail the question as to whether lime stone deposits act as aquiferous or not. But there can be no gainsaying that lime-stone quarrying and excavation of the lime-stone deposits do seem to affect the perennial water springs. The environmental disturbance has however to be weighed in the balance against the need of lime-stone quarrying for industrial purposes in the country and we have taken this aspect into account while making this order.

7. We are clearly of the view that so far as the lime-stone quarries classified in category C in the Bhargav Committee Report are concerned which have already been closed down under the directions of the Bhargav Committee should not be allowed to be operated. If the leases of these lime-stone quarries have obtained any stay order from any court permitting them to continue the mining operations, such stay order will stand dissolved and if there are any subsisting leases in respect of any of these lime-stone quarries they shall stand terminated without any liability against the State of Uttar Pradesh. If there are any suits or writ petitions for continuance of expired or unexpired leases in respect of any of these lime-stone quarries pending, they will stand dismissed.

8. We would also give the same directive in regard to the lime-stone quarries in the Sahasradhara Block even though they are placed in category B by the Phargav Committee. So far as these stone quarries in Sahasradhara Block are concerned, we agree with the Report made by the Working Group and we direct that these lime-stone quarries should not be allowed to be operated and should be closed down forthwith. We would

also direct, agreeing with the Report made by the Working Group that the lime-stone quarries placed in category 2 by the Working Group other than those which are placed in categories B and C by the Bhargav Committee should also not be allowed to be operated and should be closed down save and except for the lime-stone quarries covered by mining leases No.s 31, 36 and 37 for which we would give the same direction as we are giving in the succeeding paragraphs in regard to the lime-stone quarries classified as category B in the Bhargav Committee Report. If there are any subsisting leases in respect of any of these limestone quarries they will forthwith come to an end and if any suits or writ petitions for continuance of expired or unexpired leases in respect of any of these lime-stone quarries are pending, they too will stand dismissed.

9. So far as the lime-stone quarries classified as category A in the Bhargav Committee Report and of category A in the Working Group Report are concerned, we would divide them into two classes, one class consisting of these lime-stone quarries which are within the city limits of Mussoorie and the other consisting of those which are outside the city limits. We take the view that the lime-stone quarries falling within category A of the Bhargav Committee Report and for category A of the Working Group Report and falling outside the city limits of Mussoorie, should be allowed to be operated subject of course to the observance of the requirements of the Mines Act 1952, the Metalliferous Mines Regulations, 1961 and other relevant statutes, rules and regulations. Of course when we say this, we must make it clear that we are not holding that if the leases in respect of these lime-stone quarries have expired and suits or writ petitions for renewal of the leases are pending in the courts, such leases should be automatically renewed. It will be for the appropriate courts to decide whether such leases should be renewed or not having regard to the law and facts of each case. So far as the lime-stone quarries classified in category A in the Bhargav Committee Report and/or category 1 in the Working Group Report and falling within the city limits of Mussorie are concerned, we would give the same direction which we are giving in the next succeeding paragraph in regard to the lime-stone quarries classified as category B in the Bhargav Committee Report.

10. That takes us to the lime-stone quarries classified as category B in the Bhargav Committee Report and category 2 in the Working Group Report. We do not propose to clear these lime-stone quarries for continuance of mining operations for to close them down permanently without further injury. We accordingly appoint a high powered Committee consisting of Mr. D. Bandyopadyay, Secretary, Ministry for Rural Development as Chairman and Shri H.S. Ahuja, Director General, Mines Safety Dhanbad, Bihar, Shri D.N. Bhargav, Controller General, Indian Bureau of Mines, New Secretariat Building, Nagpur and two experts to be nominated by the Department of Environment, Government of India within four weeks from the date of this Order. The lessees of the lime-stone quarries classified as category A in Bhargav Committee Report and/or category 1 and the Working Group Report and falling within the city limits of Mussoorie as also the lessees of the lime-stone quarries classified as category B in the Bhargav Committee Report will be at liberty to submit a full and detailed scheme for mining their lime-stone quarries to this Committee thereinafter called the Bandypathyay Committee and if any such scheme or schemes are submitted the Bandyopathyay Committee will proceed to examine the same without any unnecessary delay and submit a report to this Court whether in its opinion the particular lime-stone quarry can be allowed to be operated in accordance with the scheme and if so, subject to what conditions and it cannot be allowed to be operated, the reasons for taking that view. The Bandyopadhyay Committee in making its report will take into account the various aspects which we had directed the Bhargav Committee and the Kaul Committee to consider while making their respective reports including the circumstances that the particular lime-stone quarry may or may not be within the limits of Mussoorie and also give an opportunity to the concerned lessee to be heard, even though it be briefly. The Bandyopadhyay Committee will also consider while making its report whether any violations of the provisions of the Mines Act 1952, the Metalliferous Mines Regulations, 1961 and other relevant statutes, rules and regulations were committed by the lessee submitted the scheme or schemes and if so, what were the nature, extent and frequency of such violations and their possible hazards. The Bandyopadhyay Committee will also insist on a broad plan of exploitation coupled with detailed mining management plans to be submitted along with the scheme or schemes and take care to ensure that the lime-stone deposits are exploited in a scientific and systematic manner and if necessary, even by law or more leases coming together and combining the areas of the lime-stone quarries to be exploited by them. It should also be the concern of the Bandyopadhyay Committee while considering the scheme or schemes submitted to it and making its report, to ensure that the lime-stone on exploitation, is specifically utilized only in special industries having regard to its quality and is not wasted by being utilized in industries for which high grade lime-stone is not required. The necessary funds for the purpose of meeting the expenses which may have to be incurred by the members of the Bandyyopadhyay Committee will be provided by the State of Uttar Pradesh including their travelling and other allowances appropriate to their office. The State of Uttar Pradesh will also provide to the members of the Bandyopadhyay Committee necessary transport and other facilities for the purpose of enabling them to discharge their functions under this Order. If any notices are to be served by the Bandyopadhyay Committee the District Administration

of Dehradun will provide the necessary assistance for serving of such notices on the lessees or other interested parties. The Bandyopadhyay Committee will also be entitled before expressing its opinion on the scheme or schemes submitted to it, to hear the petitioner, the interventionists in this case and such other persons or organizations as may be interested in maintenance and preservation of healthy environment and ecological balance. The Indian Bureau of Mines will provide secretarial facilities to the Bandyopadhyay Committee in each case will be considered by the Court and a decision will then be taken whether the lime-stone quarry or quarries in respect of which the report has been made should be allowed to be operated or not. But until these lime-stone quarries will not be allowed to be operated or worked and the District Authorities of Dehradun will take prompt and active steps for the purpose of ensuring that these lime-stone quarries are not operated or worked and no mining activity is carried on even candlestinely. This order made by us will supersede any stay or any other interim order obtained by the lessee of any of these lime-stone quarries permitting him to carry on mining operations and notwithstanding such stay order or other interim order or subsisting lease, the lessees shall not be entitled to carry on any mining activity whatsoever in any of these lime-stone quarries and shall desist from doing so. The lessees of these lime-stone quarries will also not in the meanwhile be permitted to rectify the defects pointed out in the orders issued by the District Mining Authorities but they may include the proposal for such rectification in the scheme or schemes which they may submit to the Pandyopadhyay Committee. We may however make it clear that non rectification of the defects pursuant to the notices issued by the District Mining Authorities shall not be taken advantage of by the State of Uttar Pradesh as a ground for terminating the lease or leases.

11. We may point out that so far as the lime-stone quarries at S1. Nos. 17 to 20 in category B in the Bhargav Committee Report are concerned we are informed that they have already been closed down and no further direction therefore is necessary to be given in regard to them save and except in regard to removal of the lime-stone, dolomite and marble chips which may already have been mined and which may be lying at the site for which we are giving separate directions in one of the succeeding paragraphs in this Order.

12. The consequence of this Order made by us would be that the lessees of lime-stone quarries which have been directed to be closed down permanently under this Order or which may be directed to be closed down permanently after consideration of the report of the Bandopadhyay Committee, would be thrown out of business in which they have invested large sums of money and expanded considerable time and effort. This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affection of air, water and environment. However, in order to mitigate their hardship, we would direct the Government of India and the State of Uttar Pradesh that whenever any other area in the State of Uttar Pradesh is thrown open for grant of lime-stone or dolomite quarrying, the lessees who are displaced as a result of this order shall be afforded priority in grant of lease of such area and intimation that such area is available for grant of lease shall be given to the lessees who are displaced so that they can apply for grant of lease of such area and on the basis of such application, priority may be given to them subject, of course, to their otherwise being found fit and eligible. We have no doubt that while throwing open new areas for grant of lease for lime stone or dolomite quarrying, the Government of India and the State of Uttar Pradesh will take int account the considerations to which we have adverted in this order.

13. We are conscious that as a result of this order made by us, the workmen employed in the lime stone quarries which have been directed to be closed down permanently under this Order or which may be directed to be closed down permanently after consideration of the report of the Bandyopadhyay Committee, will be thrown out of employment and even those workmen who are employed in the lime stone quarries which have been directed to be closed down temporarily pending submission of scheme or schemes by the lessees and consideration of such scheme or schemes by the Bandyopadhyay Committee, will be without work for the time being. But the lime-stone quarries which have been or which may be directed to be closed down permanently will have to be reclaimed and afforestation and soil conservation programme will have to be taken up in respect of such lime stone quarries and we would therefore direct that immediate steps shall be taken for reclamation of the areas forming part of such lime stone quarries with the help of the already available Eco-Task Force of the Department of Environment. Government of India and the workmen who are thrown out of employment in consequence of this Order shall, as far as practicable and in the shortest possible time, be provided employment in the afforestation and soil conservation programme to be taken up in this area.

14. There are several applications before us for removal of lime stone, dolomite and marble chips mined from the quarries and being at the site and these applications also are being disposed of by this Order. So far as lime stone quarries classified as category A in the Bhargav Committee Report and/or category A in the Working Group Report and falling outside the city limits of Mussorie are concerned, we have permitted the lessees of these lime stone quarries to carry on mining operations and hence they must be allowed to remove what-

ever minerals are lying at the site of these lime stone quarries without any restriction whatsoever, save and except those prescribed by any statutes, rules or regulations and subject to payment of royalty. So far as the other lime stone quarries are concerned, whether comprised in category A of Bhargav Committee Report or category 1 of the Working Group Report and falling within the city limits of Mussoorie or falling within category B or category C of the Bhargav Committee Report or category 2 of the Working Group Report, there is a serious dispute between the lessees of these lime stone quarries on the one hand and the petitioners and the State of Uttar Pradesh on the other as to what is the exact quantity of minerals mined by the lessees and lying at the side. We had made an order on 15th December 1983 requiring the District Magistrate Dehradun to depute some officer either of his Department or of the Mining Department to visit the site of these lime stone quarries for the purpose of assessing the exact quantity of lime stone lying there and to report in this connection. The District Magistrate, Dehradun deputed the Sub-Divisional Magistrates of Mussoorie and Dehradun and Tehsildar (Quarry) Dehradun to inspect the 20 lime stone quarries comprised in category C of the Bhargav Committee Report which had been ordered to be closed down under the directions of the Bhargav Committee and an affidavit was filed on behalf of the District Magistrate Dehradun, by Kedar Singh Arya Tehsildar (Quarry) Dehradun, annexing a chart showing the details of the minerals mined by the lessees of those lime stone quarries and lying at the site. Thereafter, when again the case came up for hearing before us on 5th January 1984, we, in order to allay any apprehensions on the part of the lessees that the District Authorities had not done their job correctly in assessing the quantity of minerals lying at the site, appointed a Committee of two officers, namely, Shri D. Bandophadyay and Director of Geology (Mines) Lucknow for the purpose of visiting the lime stone quarries which had been directed to be closed down and to assess the quantity of minerals lying on the site of those limestone quarries after giving notice to the concerned lessees as also to the District Magistrate Dehradun and the representatives of the petitioners. Pursuant to this order made by us, Shri D. Bandhopadhyay and the Director of Geology (Mines) Lucknow visited the lime stone quarries comprised in category C of the Bhargav Committee Report and directed to be closed down and assessed the quantity of minerals lying at the site of each of those lime stone quarries. The quantity of minerals lying at the site, according to Shri D. Bandophadyay and the Director of Geology (Mines), was very much less than what was claimed by the lessees and it does appear that though these lime stone quarries were directed to be closed down, illegal mining was being carried on clandestinely, because otherwise it is difficult to understand how the figures of the quantity of minerals lying at the site as assessed in December 1983 by the District Authorities became inflated when Shri D. Bandophadyay and Director of Geology (Mines) made their assessment in January 1984 and thereafter the figures again got inflated if the quantity now claimed by the lessees as lying on the site is correct. We do not, however, propose to go into the question as to what was the precise quantity of minerals mined by the lessees of these limestone quarries and lying at the site at the time when these lime stone quarries were closed down under the directions of the Bhargav Committee. We would permit the lessees of these lime stone quarries to remove whatever minerals are found lying at the site or its vicinity, provided of course such minerals are covered by their respective leases and/or quarry permits. Such removal will be carried out and completed by the lessees within four weeks from the date of this Order and it shall be done in the presence of an officer not below the rank of Deputy Collector to be nominated by the District Magistrate. Dehradun, a gazetted officer from the Mines Department nominated by the Director of Mines and a public spirit individual in Dehradun, other than Mr. Avdesh Kaushal, to be nominated by Shri D. Bandopadhyay. These nominations shall be made within one week from today and they may be changed from time to time depending on the exigencies of the situation. Notice of intended removal of minerals lying at the site shall be given by the lessees to the District Magistrate Dehradun, Director of Mines Dehradun and the person nominated by Shri D. Bandophadyay. No part of the minerals lying at the site shall be removed by the lessees except in the presence of the above mentioned three persons. The lessees will on the expiry of the period of four weeks submit a report to this Court setting out the precise quantities of minerals removed by them from the site pursuant to this Order made by us. The lessees shall not be entitled to remove any minerals after the expiration of the period of four weeks.

15. Before we close we wish to express our sense of appreciation for the very commendable assistance rendered to us by Shri Pramod Dayal, learned advocate appearing on behalf of some of the lessees. He undertook the responsibility of arranging the various affidavits and written submissions in a proper and systematic manner and we must confess that but for the extremely able assistance rendered by him, it would not have been possible for us to complete the hearing of this case satisfactorily and to pass this order within such a short time. We would direct that the Government of India and the State of Uttar Pradesh should each pay a sum of Rs.5,000/= to Shri Pramod Dayal for the work done by him. We may point out that the payment to Shri Pramod Dayal is not in lieu of costs but is an additional remuneration which we are directing to be paid in recognition of the very valuable assistance rendered by him to the Court.

PLD 1994 SUPREME COURT 102

PRESENT: SALEEM AKHTAR, J

IN RE: HUMAN RIGHTS CASE (ENVIRONMENT POLLUTION IN BALOCHISTAN)

HUMAN RIGHTS CASE NO. 31-K/92(Q), DECIDED ON 27TH SEPTEMBER 1992.

CONSTITUTION OF PAKISTAN (1973)

——Arts.184(3) & 9— Public Interest Litigation—— Environmental hazard and pollution in Balochistan—— Supreme Court, having noticed a news item in a daily newspaper that nuclear or industrial waste was to be dumped in Balochistan which was violative of Art.9 of the Constitution, ordered the office to enquire from Chief Secretary of Balochistan whether coastal land of Balochistan or any area within the territorial waters of Pakistan had been or was being allotted to any person and if any allotment had been made or applicants had applied for allotment, their full particulars be supplied-Plots having been allotted by Balochistan Development Authority, Supreme Court ordered that no one will apply for allotment of plot for dumping, nuclear or industrial waste—Supreme Court further gave the guidelines for allotment of plots in the area.

ORDER

I have noticed a news item reported by APP published in 'Dawn' dated 3-7-1992 entitled "N-Waste to be dumped in Balochistan".

In the report apprehension has been expressed that business tycoons are making attempts to purchase coastal area of Balochistan and convert it into dumping ground for waste material which may be a big hazard to the developing ports of Guwadar, Pasni, Ormara and Jiwani. The coast land of Balochistan is about 450 miles long. To dump waste materials including nuclear waste from the developed countries would not only be hazard to the health of the people but also to the environment and the marine life in the region.

In my view, if nuclear waste is dumped on the coastal land of Balochistan, it is bound to create environmental hazard and pollution. This act will violate Article 9. It is, therefore, necessary to first enquire from the Chief Secretary, Balochistan whether coastal land of Balochistan or any area within the territorial water of Pakistan has been or is being allotted to any person. If any allotment has been made or applicants have applied for allotment, then full particulars should be supplied.

A letter may also be written to the Editor 'Dawn' referring to the news item requesting him to supply further particulars or give the name and address of the reporter of APP from whom necessary information may be obtained.

(Sd.)

Justice Saleem Akhtar

ORDER

In compliance with the notice issued on 9th July 1992, the Chief Secretary had made inquiries from various departments, namely, from the Commissioner of Makran, Commissioner of Kalat Division and also from the Board of Revenue who had submitted their reports which were forwarded to this Court. From the reports submitted, it seems that besides the land allotted to the Pakistan Navy and Maritime Agency for defence purposes, 112 ship-breaking plots measuring 336 acres in Gadani Beach, Lasbella District have been allotted to ship breakers for ship-breaking purposes by the Balochistan Development Authority. Furthermore, land measuring 29.2.2 acres has been allotted to one Muhammad Anwar son of Qadire Bukhsh for agriculture purposes. The Chief Secretary

while giving details has stated that the allotment of land for ship-breaking was made by the Balochistan Development Authority while the plot measuring 29.2.2 acres was allotted by the Chief Minister on the recommendation of Balochistan Development Authority.

The officials present have reported that no plot has been allotted to any party for dumping nuclear waste. The Commissioner, Makran Division has pointed out that the law enforcing agencies on the high seas are always on the alert and can locate any vessel from a distance of more than 500 miles.

It may be noted that no one will apply for allotment of land for dumping nuclear or industrial waste. This would be a clandestine act in the garb of a legal and proper business activity. The authorities are therefore not only to be vigilant in checking the vessels but regularly check that the allottees are not engaged in dumping industrial or nuclear waste of any nature on the land or in the sea or destroying it by any device.

It seems that the plots have been allotted by Balochistan Development Authority and all the relevant terms and conditions will be available with them. In these circumstances, the following interim order is passed:

(1) The Balochistan Development Authority should submit to the Assistant Registrar, Supreme Court, Karachi, a list of persons to whom land on the coastal area of Balochistan have been allotted giving their name and full address along with copies of the letters of allotment, lease or license which may have been issued in their favour.

(2) The Government of Balochistan and the Balochistan Development Authority are directed that if any application for allotment of coastal land is pending or in future any party applies for allotment of such land then full particulars of such applicants shall be supplied to the Assistant Registrar, Supreme Court of Pakistan, Karachi before making any allotment to any such party.

(3) The Government functionaries, particularly the authorities which are charged with the duty to allot the land on coastal area should insert a condition in the allotment letter/license/lease that the allottee/tenant shall not use the land for dumping, treating, burying or destroying by any device waste of any nature including industrial or nuclear waste in any form. The Balochistan Development Authority should also obtain similar undertaking from all the allottee to whom the allotment has been made for ship-breaking, agriculture or any other purpose whatsoever.

Before parting with the order I record my appreciation for the officials present who have shown their interest and keenness in tackling the problem. Such eagerness coupled with public awareness can eliminate much of the problems creating health hazard to the citizens.

A copy of this order be sent to all the officers present and the Balochistan Development Authority, Quetta.

Order accordingly

1994 S C M R 2061

(SUPREME COURT OF PAKISTAN)

PRESENT: MUHAMMAD RAFIQ TARAR AND SALEEM AKHTAR, JJ

GENERAL SECRETARY, WEST PAKISTAN SALT MINERS LABOUR UNION (CBA) KHEWRAL, JHELUM — PETITIONER

v.

THE DIRECTOR, INDUSTRIES AND MINERAL DEVELOPMENT, PUNJAB, LAHORE — RESPONDENT

Human Rights Case No. 120 of 1993, decided on 12th July, 994

(a) **Constitution of Pakistan (1973)**—

—Arts. 184(3), 9 & 14—Human rights case—Constitutional petition——Maintainability—Petitioners seeking enforcement of the residents to have clear and unpolluted water, their apprehension being that in case the miners were allowed to continue their activities, which were extended in the water catchment area, the watercourse, reservoir and the pipelines would get contaminated—-Held, water which was necessary for existence of life, if polluted, or contaminated, would cause serious threat to human existence and in such a situation, persons exposed to such danger were entitled to claim that their fundamental rights of life guaranteed to them by the Constitution had been violated—Case for enforcement of fundamental rights by giving directions or passing any orders by Supreme Court restraining the parties and Authorities from committing such violation or to perform statutory duties was made out and petition under Art. 184(3) of Constitution of Pakistan was maintained.

The claim of the petitioners in the present case though formed in general terms basically seeks enforcement of the right of right of the residents to have clean and unpolluted water. Their apprehension is that in case the miners are allowed to continued their activities, which are extended in the water catchment area, the watercourse, reservoir and the pipelines will get contaminated . (p. 2068)A

With the passage of time, population has grown and number of mining leases in the catchment areas has increased, but the water source remains the same and water catchment area has been reduced. The mining operations in this area pose serious danger of cracks, punctures and leakage in the rocks and ravines which may lead to contamination or drying up of the springs. These are well-known and acknowledged dangers to the water source and have been mentioned in the report submitted by the Committee. In such a situation when the water catchment area seems to have been reduced to its minimum, the mining activities have completely surrounded the water catchment area and are extending nearer to the source spring, it seems necessary to immediately take measures to protect the water sources and springs. It is fortunate that so far as major mishap has occurred, but the more mining activities increase and the catchment area is reduced, the danger of bursting, leaking and contamination also increases. In this situation, if the petitioners complain, are they not justified to seek protection of their right to have clean water free from contamination and pollution. Article 9 of the Constitution provides that “no person shall be deprived of life or liberty save in accordance with law”. The word `life’ has to be given an extended meaning and cannot be restricted to vegetative life or mere animal existence. In hilly areas where access to water is scarce, difficult are limited, the right to have water free from pollution and contamination is a right to life itself. This does not mean that persons residing in other parts of the country where water is available in abundance, do not have such right. The right to have unpolluted water is the right of every person wherever he lives.

The word ‘life’ in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it. Under the

Constitution, Article 14 provides that the dignity of man, and, subject to law, the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under article 14 is unparalleled and could be found only in few Constitutions of the world. The Constitution guarantees dignity of man and also right of 'life' under Article 9 and if both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment.

In cases where life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people, the Court in exercise of its jurisdiction under Article 184(3) of the Constitution may grant relief to the extent of stopping the function of factories which create pollution and environmental degradation

Water has been considered source of life in this world. Without water there can be no life. History bears testimony that due to famine and scarcity of water, civilization have vanished, green lands have turned into deserts and arid zones completely destroying the life not only of human beings, but animal life as well. Therefore, water, which is necessary for existence of life, if polluted, or contaminated, will cause serious threat to human existence. In such a situation, persons exposed to such dangers are entitled to claim that their fundamental right of life guaranteed to them by the Constitution has been violated and there is a case for enforcement of fundamental rights by giving directions or passing any orders to restrain the parties and authorities from committing such violations or to perform their statutory duties. The petition was found sustainable.

Shehla Zia v. WAPDA PLD 1994 SC 693; M.C. Mehta v. Union of India AIR 1988 SC 1115 and M.C. Mehta v. Union of India AIR 1988 SC 1037 ref.

(b) **Constitution of Pakistan (1973)**

—Art. 194 (3)—Scope and extent of jurisdiction of Supreme Court under Art. 184(3) of the Constitution of Pakistan.

The scope and extent of the jurisdiction exercised by Supreme Court under Article 184(3) under which, in cases where questions of public importance with reference to the enforcement of fundamental rights is involved, direction or order of the nature as mentioned in Article 199 can be given or passed.

In human rights cases/public interest litigation under Article 184(3), the procedural trappings and restrictions of being an aggrieved persons and other similar technical objections cannot bar the jurisdiction of the Court. Supreme Court has vast power under Article 184(3) to investigate into questions of fact as well as independently by recording evidence, appointing commissions or any other reasonable and legal manner to ascertain the correct position. Article 184(3) provides that the Supreme Court has the power to make an order of the nature mentioned in Article 199. This is a guideline for exercise of jurisdiction under this provision without restrictions and restraints imposed on the High Court. The fact that the order or direction should be in the nature mentioned in Article 199, enlarges the scope of granting relief which may not be exactly as provided under Article 199, but may be similar to it or in the same nature and the relief so granted by the Supreme Court can be moulded according to the facts and circumstances of each case.

(c) **Constitution of Pakistan (1973)**

—Arts. 184(3), 9 & 14—Human rights case—Petitioners seeking enforcement of the right of residents to have clean and unpolluted water, their apprehensions being that in case the miners were allowed to continue their activities, which were extended in the water catchment areas, the watercourse, reservoir, and the pipelines would get contaminated—Supreme Court while entertaining the petition filed under Article 184(3) of the Constitution of Pakistan issued a number of directions to the concerned departments and directed the miners to shift within four months, the location of the mouth of the specified mine at a safe distance from the stream and small reservoir in such a manner that they were not polluted by mine debris, carbonised material and water spilling out from the mines to the satisfaction of the Commission appointed by the Supreme Court for the purposes.

Petitioner in person.

Sardar M. Aslam, Advocate Supreme Court for Pakistan Mineral Development Corporation.

M. Munir Piracha, Advocate Supreme Court for the Punjab Coal Co.

Syed Niaz Ali Shah, Addl, A.G., b. for the Government of Punjab.

Date of hearing: 12 April, 1994.

JUDGEMENT

SALEEM AKHTAR, J,—This petition under Article 184(3) of the Constitution was filed complaining against the pollution of water supply source to the residents and mine workers of Khewra. They claim to be settled there for generations and the water supply was arranged by Pakistan Mineral Development Corporation (PMDC) through a pipeline connecting the spring and taking water to the reservoir. It has been alleged that although water

catchment area was reserved and no lease for coal mines was to be granted, the authorities concerned particularly the Director, Industries and Mineral Development, Government of Punjab, granted lease and reduced the water catchment area. The result was that the poisonous water coming out of the mines pollutes the water reservoir and it is a health hazard. It was further alleged that the allotment and grant of lease to the miners in the water catchment area is illegal and mala fide. It has been prayed that such leases may be cancelled and the residents may be saved from the health hazard created by the miners and the authorities concerned. The case was processed in the office and prima facie it was established that if the operation of coal mines is granted in the water catchment area, it is likely to pollute the water resources, which may be contaminated with the water flowing out of the mine holes during operation. Consequently, cognizance was taken under Article 184(3) of the Constitution and notice was issued to PMDC, Director, Industries and Mineral Development, Government of Punjab through Advocate-General and M/s. Punjab Coal Company (PCC). In pursuance of the notice the petitioner submitted its detailed note supported by documents. Similarly, PMDC and respondent No. 1 submitted their replies. PCC and M/s A Majeed & Co., to whom leases were granted, also filed their replies. In the present case the main contestant seems to be PCC.

2. The history of these coal mines particularly in the water catchment area goes back to the early part of the century when during British days the water catchment area was reserved and grant of mining lease was prohibited. PMDC has filed a copy of the letter No. 78 C & dated 31-1-1911 from Mr. R.A. Munt, ICS, Financial Secretary to the Government of Punjab addressed to the Commissioner, N.I. Salt, Revenue, which reads as follows:-

> "In reply to your letter No. 2576 dated 22nd October, regarding the coal mining operations in the Salt Range in the Jhelum District, I am directed to say that the Lieutenant Governor agrees to the proposals contained in paragraph 4 of your letter under reply. I am to add, however, that His Honour understands that the preservation of the Khewra Water Supply is real ground for the reservation of this area which lies to the north of the Mayo Salt Mine."

Other related letters referred and subsequent correspondent in this regard have not been filed, but none of the official respondents appearing have disputed this letter. From this letter it seems that even at that time for the preservation of the Khewra water supply an area was separately reserved while granting lease for mining purposes. Initially the area of the water catchment was alleged to be 4161 acres which was declared as restricted area. PMDC has filed a plan in which the original water catchment area has been shown. It also mentions the present water catchment area, which has been reduced to 545.09 acres. A visual inspection of this document clearly gives an idea that the original water catchment area was much larger than it exists now. It would have been at least six to seven times more than the present area. The location of PCC (No. 27A) is also shown whereas the area of M/s A. Majeed & Co has also been mentioned. It seems that after the year 1950 the mining leases were granted in the original catchment area, which has been reduced to about 1/8th of its original measurement as claimed by the petition and PMDC. It was in the year 1981 that a small area now measuring 545.09 acres was absolutely forbidden for allotment for mining purposes. In this regard reference has been made to the report of a high-powered committee constituted in the year 1981 to dispose of the application of M/s. Rasco & Co. for grant of prospecting license for coal near 'Nali', District Jhelum. The Committee was constituted by the Secretary, Industries and Mineral Development and consisted of:-

(1) Director of Industries Mineral Development, Punjab, Lahore.

(2) Deputy Commissioner, Jhelum.

(3) Chief Inspector of Mines, Punjab, Lahore.

(4) Superintending Engineer, Public Health Engineering, Circle B. Rawalpindi.

(5) Representative of Pakistan Mineral Development corporation.

(6) Assistant Commissioner, Pind Dadan Khan.

the committee was authorised to co-opt any other member. The terms of reference were:-

(i) Whether or not this is a catchment area for water supply of Khewra Town and Dandot?

(ii) Whether there is a natural spring in the area for supply of water to these towns?

(iii) Whether mining would in any way affect or contaminate the water?

(iv) Whether alternative water supply schemes for Khewra etc. have been implemented and are on ground?

(v) Also the reaction of the local pollution regarding mining in the area?

The committee after visiting the site observed that the area fell within the reserved water catchment zone and referred to the decision of the Mines Committee of 22-2-1981 that no further mining concession should be granted within this particular area forming the water catchment zone for the water supply scheme PMDC a scheme mainly serving the population of Khewra Town.

It further reported as follows:-

"The major spring located in this area is called `Mitha Pattan'. It is a collection of many smaller springs originating from within this area. The `Mitha Pattan' spring has an outlet of about 21ac gallons per day.

According to the assessment of Superintendent Engineer, Public Health Engineering Circle No. II, Rawalpindi this source of water caters to at least 60% to 70% of the needs of Khewra Town. The other two sources of water are the water supply scheme of Municipal Committee, Khewra and one outlet from the Imperial Chemical Industries' waterworks. The municipal water supply scheme is catering for only up to 15% of the needs of the local population while the outlet from the waterworks of Imperial Chemical Industries contributes only to the extent of 5% in this regard.

It was also brought out by the Superintending Engineer, Public Health Engineering Department and conceded by the Chairman, Town Committee, Khewra that the water available from the municipality's water supply scheme is not of good quality. As such, the only major source of drinking water for Khewra Town is the Mitha Pattan spring located in the area in question."

As regards water contamination and pollution the Committee after referring to the structural behavior of the area as explained by the geological map, observed:

"This map clearly indicates that contours in the area form a cup-shaped valley, in which the water from smaller springs is joined into a main spring, i.e. `Mitha Pattan'.

A number of lithological units are exposed at different spots. Hill cocks of Sakesar Limestone which are regarded as a cap-rock for coal deposits are also visible in this area for which M/s Rasco & Company has applied. However, these hillocks are irregular and highly disturbed. There are a number of visible 'faults', fractures and joints in the area. The relevant geological data indicate that the 'Patella Shales' which is the coal bearing formation in the range, is very close to the springs. Any sub-surface and underground mining activity in this area will pose the following two threats to the water reservoir:

(1) Water may leak through the mines which, in turn, can dry the springs.

(2) pollute the water in the catchment area.

During the proceedings of the meeting of the Committee, a specific reference was made to a past incident involving the installation of a mining tunnel by the Pakistan Mineral Development Corporation near Pir Jehnia, District Chakwal. The terrain was similar to the area under discussion. While driving the tunnels, the underground water zone of the locality was punctured. This adversely affected the water source in the area."

The Committee also seriously took note of the fact that the water rights of the miners which stand established since 1911, should always be taken into consideration. The Committee recommended that:

"The area, declared restricted by the Mines Committee in 1981, should continue to enjoy this status. The Committee also recommends that demarcation of past leases granted in the adjoining areas be re-checked so as to ensure that no one violates the boundaries of this restricted area."

This report gives a clear picture of geological, geographical and historical background of the present controversy. The claim of the petitioners though formed in general terms basically seeks enforcement of the right of the residents to have clean and unpolluted water. Their apprehension is that in case the miners are allowed to continue their activities, which are extended in the water catchment area, the water source, reservoir and the pipelines will get contaminated.

3. In its reply, PCC besides taking preliminary legal objection regarding maintainability, has pleaded that the lease was granted to it in the year 1950 for 30 years and it has been renewed on 1-11-1980 for another 20 years. It has also been stated that the leased area stretches to the north separated by a deep and considerably wide ravine from other mining area allocated to as many as 18 different companies carrying out the same business in similar circumstances and conditions. This area is outside the alleged catchment area declared by the Ministry of Industry. The water reservoir collects water solely from natural spring. The natural spring and the water reservoir both are situated at a higher point from the mining area of PCC and are separated by a huge and deep ravine. The mining activities cannot affect the natural spring or reservoir. The water collected in reservoir is supplied to the workers colony through two pipes, one of which stands disconnected by PMDC. Sometimes water downstream overflows which is not used by anybody. On a similar complaint that due to the mining activity of PCC, water reservoir is contaminated and that mining activity might disturb natural springs, the matter was considered by respondent No. 1 on an appeal from the order of the Leasing Authority where it was held that according to the demarcation by the Committee comprising representatives of PCC, PMDC and the Directorate, mine 27-A falls outside the restricted area, but within 50 metres from the boundary within the leased area of PCC. The Leasing Authority had granted land for working of this mine subject to three conditions which included installation of second pipeline by PMDC, cost of which would be borne equally by PMDC and PCC, the water reservoir was to be enlarged and that a retaining wall would be constructed by PCC near the mouth of mine 27-A. The PCC has entirely relied

upon this order and claim that retaining wall has been constructed, but the petitioners allege that the water overflowing from the mines which is admittedly a poisonous water and a health hazard, is contaminating the water reservoir. M/s. A. Majeed & Co. has also submitted reply denying the claim made by the petitioners. Apart from stating that Mitha Pattan is the water source and the reservoir is situated at such a place that a question of contamination does not arise, it further stresses that huge investments have been made on the working of the mines, due to operation of mines many workers and their families are settled and are earning their livelihood. Furthermore there are various Government authorities authorised to see that the miners work in a proper and legal manner and further that water source is not contaminated.

4. We have heard all the parties present. Mr. Munir Piracha, learned ASC for PCC contended that the facts of the case do not warrant any action under Article 184(3) as the petitioners have not shown that any fundamental right has been violated and that a question of public importance is involved with reference to the enforcement of the fundamental rights. The petitioners' complaint is about the contamination of the water reservoir. During arguments it was also contended that if the mining operation is continued, the water resources of Mitha Pattan will be polluted, destroyed or dried up. From the statements, background and the records which have been produced and have not been disputed or rebutted, the picture clearly emerges that the petitioner and the other workers numbering 35000 reside in an area in Khewra who are mostly engaged in the mining work. Almost from about a century the residents of the area were provided water through Mitha Pattan, which receives water from several small springs in the area and it serves as a reservoir for supply of water to the residents of that area. The location and geographical position of these springs and Mitha attan seems to have been taken into consideration as far back as in the 1911 when it was felt necessary that the water catchment area which is the source to supply water to the residents should not be touched, endangered, injured or impaired by mining activities. Mining activities were, therefore, prohibited in that area and this state continued up to the present time with the difference that the total area was reduced and mining leases were frequently granted in the water catchment area. The area which at one time is claimed to be more than 4000 acres, has been reduced to 545.9 acres which the Mining Committee by its decision dated 22-2-1981 declared restricted water area and all types of mining activities were completely prohibited. Letters and instances have been referred to show that this policy was enforced with vigour and strictness and applications for mining leases and licenses in the water catchment area were not granted. However, the irony of situation is that with the passage of time, population has grown and number of mining leases in the catchment areas has increased, but the water source remains the same and the water catchment area has been reduced. The mining operations in this area pose serious danger of cracks, punctures and leakage in the rocks and ravines which may lead to contamination or drying up of the springs. These are well-known and acknowledged dangers to the water source and have been mentioned in the report submitted by the Committee. In such a situation when the water catchment area seems to have been reduced to its minimum, the mining activities have completely surrounded the water catchment area and are extending to the source spring, it seems necessary to immediately take measures to protect the water sources and springs. It is fortunate that so far no major mishap has occurred, but the more mining activities increase and the catchment area is reduced, the danger of bursting, leaking and contamination also increases. In this situation, if the petitioners complain, are they not justified to seek protection of their right to have clean water free from contamination and pollution. Article 9 of the Constitution provides that "no person shall be deprived of life or liberty save in accordance with law". The word `life' has to be given an extended meaning and cannot be restricted to vegetative life or mere animal existence. In hilly areas where access to water is scarce, difficult or limited, the right to have water free from pollution and contamination is a right to life itself. This does not mean that persons residing in other parts of the country where water is available in abundance do not have such right. The right to have unpolluted water is the right of every person wherever he lives. Recently in Shehla, Zia v. WAPDA (H.R. Case No. 15-K/1992=PLD 1994 SC 693) while dealing with Article 9, one of us (Saleem Akhtar, J.) observed as follows:-

"The word `life' in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it. Under our Constitution, Article 14 provides that the dignity of man and subject to law the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and could be found only in few Constitutions of the world. The Constitution guarantees dignity of man and also right to `life' under Article 9 and if both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment."

It was further observed:-

"In M.C. Mehta v. Union of India (AIR 1988 SC 1115) and M.C. Mehta v. Union of India (AIR 19889 SC 1037) the court on petition filed by a citizen taking note of the fact that the municipal sewage and industrial effluents from tanneries were being thrown in River Ganges whereby it was completely polluted, the tanneries were closed down. These judgements go a long way to show that in cases where life of citizens is degraded, the quality

of life is adversely affected and health hazards are creating affected a large number of people, the Court in exercise of its jurisdiction under Article 184(3) of the Constitution may grant relief to the extent of stopping the functioning of factories which create pollution and environmental degradation."

The petitioners' demand here is the barest minimum. Water has been considered source of life in this world. Without water there can be no life. History bears testimony that due to famine and scarcity of water, civilizations have vanished, green lands have turned into deserts and arid zones completely destroying the life not only of human beings, but animal life as well. Therefore, water, which is necessary for existence of life, if polluted, or contaminated, will cause serious threat to human existence. In such a situation, persons exposed to such danger are entitled to claim that their fundamental right of life guaranteed to them by the Constitution has been violated and there is a case for enforcement of fundamental rights by giving directions or passing any orders to restrain the parties and authorities from committing such violations or to perform their statutory duties. In our view the petition is maintainable.

5. The next contention of the learned counsel is that the question whether mining activity could possibly pollute or diminish the supply, is a question of fact and two authorities have recorded findings on it, therefore, such question cannot be raised before and determined by this Court. In dealing with this contention, one has to keep in mind the scope and extent of the jurisdiction exercised by this Court under Article 184(3) under which, in cases where question of public importance with reference to the enforcement of fundamental rights is involved, direction or order of the nature as mentioned in Article 199 can be given or passed. Article 184(3) reads as follows:-

"184.(1)&(2).....

(3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by chapter 1 of Part II is involved, have the power to make an order of the nature mentioned in the said Article."

It is well-settled that in human rights cases/public interest litigation under Article 184(3), the procedural trappings and restrictions, precondition of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the Court. This Court has vast power under Article 184(3) to investigate into questions of fact as well independently by recording evidence, appointing commission or any other reasonable and legal manner to ascertain the correct position. Article 184(3) provides that this Court has the power to make order of the nature mentioned in Article 199. This is a guideline for exercise of jurisdiction under this provision without restrictions and restraints imposed on the High Court. The fact that the order or direction should be in the nature mentioned in Article 199, enlarges the scope of granting relief which may not be exactly as provided under Article 199, but may be similar to it or in the same nature and the relief so granted by this Court can be moulded according to the facts and circumstances of each case. While raising this contention the learned counsel has referred to the order passed by the Secretary, Government of the Punjab, referred to above in appeal from the order of the Licensing Authority. The appellate authority has confirmed the order of the Licensing Authority with certain restrictions and safeguards provided in it. The location of mine 27A is not disputed being completely adjacent to the present water catchment area. Another salient point which emerges is that it is within 50 metres from the boundary within the lease area of P.C.C. From the plans produced, it is clear that the mouth of the mine is right on the boundary line of the catchment area which is a reduced area to the barest minimum. If it could not have posed any danger to the water source, why was it found necessary by both the authorities to impose a condition that a retaining wall be constructed by P.C.C. This by itself admits that the very existence of mine 27A and its mouth in the prohibited area does pose a serious danger and threat to the water catchment area and reservoir. P.C.C. has not filed its lease deed. However, M/s A. Majeed & Co. have filed a lease deed and the standard form of lease is the same in almost every case. Clause (12) of the lease deed prohibits mining operation or workings to be carried on in or under the said land at any point within a distance of 50 yards from the boundaries of the said land except with the consent in writing of the Licensing Authority. P.C.C. could not have carried out mining work within 50 metes from the boundary. It is an admitted position as is obvious from the order of the Secretary, Government of the Punjab, Industries and Mineral Development that P.C.C. is operating and working within 50 meters from the boundary. It is very close to the boundary of the catchment area. The object of keeping distance of 50 metres from the boundary wall is to provide safeguard to the adjoining land. There is nothing on record to show that the authorities concerned have at any time applied their mind or passed any specific order in writing permitting P.C.C. to carry out operation or mining work within 50 meters from the boundary. The general permission granted and the order of the Leasing Authority do not refer to such special permission as required by the lease deed nor can the permission to carry out mining operation amount to such a permission. Such a permission should be specific in nature with reference to the distance of 50 metres from the boundary. General permission granted and relied upon can be of no avail to P.C.C. It is therefore clearly established that P.C.C. is carrying on mining work adjacent to the catchment area and within the radius of 50 metres from the boundary. It is strange that the respondent did

not object to P.C.C. to open the mine mouth adjacent to the water catchment area. As the lease in this prohibited area had been granted, it was the duty of the respondent to ensure that the lessee does not open the mine mouth so near the boundary. Conscious of the fact that P.C.C.'s mining operation would cause pollution, the Leasing Authority ordered for joint inspection by PMDC and P.C.C. to ensure that no further pollution is caused. But this arrangement did not work. It has been contended that as P.C.C.'s mine is located about one thousand yards downstream from the water tank/reservoir, which is approximately at a height of 200 ft. from the b ed of the stream, there can be no possibility of causing pollution. This contention completely overlooks the fact that about 300/400 yards from the mine mouth of P.C.C. there exists an open reservoir built by PMDC in which overflown water from the big water reservoir is collected and distributed to the residents through a pipeline. This small reservoir is polluted by the mine debris and poisonous water as stated in the inspection report of the Mineral Development Officer prepared in January 1992. It concludes as follows:-

> "It is in the fitness of things and also in the interest of the public that the lease firm (appellant) may be advised to set up a device which should protect the falling debris into the stream and they may also be allowed to work in the said mine by giving such assurance. Whereas M/s. Pakistan Mineral Development Corporation may also be advised to take further steps for protection of water pipeline from main water tank and abandon the small water reservoir as it has a little area to settle down the heavier material which is mixed in the stream channel."

This report has been relied upon by the concerned authorities, but they do not seem to have taken any effective steps to stop pollution of stream and small reservoir except that three conditions were imposed which have remained effective.

6. In view of the above discussion:-

(i) P.C.C. is directed to shift within four months, the location of the mouth of mine No. 27A at a safe distance from the stream and small reservoir in such a manner that they are not polluted by mine debris, carbonised material and water spilled out from the mines to the satisfaction of the Commission consisting of the following members:-

(a) Dr. Parvez Hasan, Advocate, Lahore (Chairman).

(b) Dr. Tariq Banuri.

(c) Director, Industries and Mineral Development, Lahore.

(d) A member nominated by PMDC.

(e) A member co-opted by the aforestated members of the Commission.

The Commission shall have power of inspection, recording evidence, examining witnesses including the powers as provided by Order XXVI of the Civil Procedure Code. If, on the report of the Commission, it transpires that shifting of the mine mouth is not possible, then the case shall be placed before the Court for further consideration including the question whether the operation of mine No. 27A should be completely stopped;

(ii) PMDC is directed to instal a second pipeline connecting the top level reservoir;

(iii) PMDC will enlarge the top level water reservoir and construct wall of reservoir cost of which will be shared equally by PMDC and P.C.C.;

(iv) P.C.C. and all the miners operating adjacent to the water catchment area shall take such measures to the satisfaction of the Commission which may prevent pollution of the water source reservoir, stream below and water catchment area;

(v) respondent No. 1 and all authorities empowered and authorised to grant, renew or extend the mining lease or license, are ordered:-

(a) not to grant any fresh lease/license/permission to carry out mining work in the area which prior to 1981 was water catchment area;

(b) not to renew or extend the existing lease/license of the mines mentioned in the Schedule to the judgement without prior permission of this Court;

(vi) PMDC and P.C.C. shall bear the cost of the Commission expenses and initially Rs. 10,000 shall be deposited by each of them with the Court within two weeks.

All the parties concerned including the persons mentioned in the Schedule and members of the Commission be informed of this judgement. The Commission shall submit its report within six weeks

SCHEDULE

S. No.	NAME OF PARTY	DATE OF GRANT	VALID UP TO
1.	M/s Punjab Coal Co.	1-11-1950	1-11-2000
2.	M/s Fazal Din & Co.	1-11-1950	31-10-2005
3.	M/s A. Majid & Co.	11-11-1950	31-10-2000
4.	Mr. Saleem Jamal	15-1-1953	9-11-2013
5.	M/s Rehman Aslam Colleries	13-10-1960	12-2-2008
6.	P.M.D.C.	1-7-1962	30-6-1992
7.	Punjab Min. Dev. Corp.	28-8-1962	23-9-2000
8.	Ch. Noor Alam	1964	8-5-2005
9.	Malik Ali Shah	31-5-1968	1-12-1997
10.	Al-Madad Coal Co.	31-5-1968	22-6-2008
11.	M/s Bilal Mineral Associates	27-3-1975	6-3-2002
12.	Malik Abdur Rashid	9-5-1978	7-1999
13.	Col Anayyat Hussein	16-12-1981	1-2000

order accordingly

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT NO. 423 OF 1996

NIAZ MOHAMED JAN MOHAMED — PLAINTIFF

v.

1. COMMISSIONER OF LANDS

2. MUNICIPAL COUNCIL OF MOMBASA

3. NANDLAL JIVRAJ SHAH)

4. VIMAL NANDLAL SHAH T/A JIVACO AGENCIES)

5. MEHUL N. SHAH) DEFENDANTS

RULING

NIAZ MOHAMED JAN MOHAMED (hereinafter referred to as NIAZ) has at all times material to this suit been the Registered Proprietor of all that freehold property measuring approximately 3.63 Acres, known as Plot No. 32 Section I Mainland North in Kisauni/Nyali area within Mombasa Municipality.

During the construction of the New Nyali Bridge in 1979, it became necessary to construct a new access road to Kisauni and Nyali Estate. When that road was surveyed it traversed Plot No. 32, as it must have, other plots, and therefore the Land Acquisition Act had to be invoked to acquire the areas traversed by that road. As respects Plot No. 32, it was considered that an area of approximately 0.37 of an Acre would be covered by the road and therefore machinery was put in place to acquire that portion.

The Acquisition was carried out through the Commissioner of Lands who published Kenya Gazette Notices on 18.5.1979. On 13.12.1979, he registered against the Title a "Notice of taking possession and vesting of land in the Government" under Section 19(1) of the Land Acquisition Act and asked Niaz to surrender the documents of Title to the Registrar of Titles Mombasa for rectification. The Notice was copied to amongst others The Municipal Council of Mombasa. The Director of Surveys, the Chief Engineer (Roads) Ministry of Works with a caption that

> "Construction of road will start with immediate effect".

And so it did and was completed in due course and handed over by the contractors. It was then opened for use by the public.

Niaz thereafter enjoyed a road frontage and direct access to that road until November 1995 when it is alleged the Commissioner of Lands, with the connivance, consent or knowledge of the Municipal Council of Mombasa created a new leasehold Title from a small portion which remained uncovered by the tarmac road, measuring approximately 0.14 Acres and allocated this to NANDLAL JIVRAJ SHAH, VIMAL NANDLAL SHAH and MEHUL SHAH all Trading as JIVACO AGENCIES (hereinafter referred to as JIVACO). The Title issued was given LR No. 9665 Sec.I MN and Grant No. CR 28028. The 99 year tenure commenced on 1.11.95.

Niaz was piqued about this discovery. He saw not only a deliberate attempt to interfere with his easement rights of access to the new road and its road reserve, but also a callous attempt to unlawfully alienate public land to private developers. The threats by the new allottees to commence development or alienate the plot to other persons despite protestations by Niaz, compelled him to come to court.

He filed suit on 8.8.96 against the Commissioner of Lands (Commissioner) and JIVACO. He also joined the Mombasa Municipal Council (The Council) which is the Local Authority within whose jurisdiction the Kisauni/Nyali Road falls and holds the Road together with the Road reserve thereto in trust for the Public, and must have known about the alienation of the portion of land. He prays for judgment and five orders in that suit:

(i) A declaration that the creation and grant of allocation by the Commissioner and/or the Council of Title No. LR No. 9665 Sec.I MN to Jivaco in 1995 is null and void.

(ii) A declaration that the lease of 99 years granted to Jivaco by the Commissioner and/or the Council of Title No. 9665 Sec.I MN is null and void.

(iii) An order that Jivaco do deliver up the Title No. 9665 to the Commissioner for cancellation.

(iv) An order that the land comprised in Title No. 9665 Sec.I MN do remain a road or road reserve.

(v) An injunction to permanently restrain the defendants jointly and/or severally from selling or developing the said parcel by themselves or their agents or in any other manner from dealing with the land No. 9665 Sec.I MN."

Contemporaneously with the main suit, Niaz filed a Chamber Summons under Order 39 rule 1, 3 & 9 of the Civil Procedure Rules and Section 3A of the Act seeking a temporary order

> "That Jivaco by themselves or by their agents or servants or any person whatsoever acting on their behalf be restrained from developing, erecting structure or structures, selling, assigning or transferring or in any other manner whatsoever dealing in or with or interfering, wasting or alienating plot No. LR No. 9665 Sec.I MN until the hearing and final determination of this suit or further orders from the court".

This is the application that was argued before me on 19.9.96 and 20.9.96.

I was satisfied on the outset that the Commissioner was served with the plaint, summons to enter appearance, chamber summons and affidavit but never bothered to respond thereto or attend court on the hearing date either personally or through the Attorney General. The Council was also served and entered appearance and filed its defence. But it made no response to the application by filing any grounds of opposition or any affidavits in reply. Their Counsel Mr. Iha attended court on the hearing date and was given an opportunity to address the court on any aspect of the application despite the non-filing of grounds of opposition and/or replying affidavit. Counsel declined the opportunity however and stated that he did not wish to make any submissions in respect of the application. He left the court room. That left Mr. Asige for Niaz and Mr. Gikandi for Jivaco to battle it out.

As I perceive it, Mr. Asige's case is two-proned: that Niaz has private rights to protect and, intertwined with these rights are also public rights which ought to be protected.

The private rights of Niaz arose because after the acquisition of the land and the construction of the road, Niaz became a frontager to that road and acquired absolute easement rights over the new road. He has a right to remain such frontager which has its advantages because the portion of his land was not acquired for any other purpose but for construction of a road. He ought to have direct access to the road through this portion but he will not be able to do so since a Title has been created between him and the road and there is no way of knowing what kind of construction or development will be put up there. This may well affect the value of his property. Hence the need to protect these rights, the infringement of which will lead to irreparable loss and damage. Intertwined with these rights is a public right which Niaz as a member of the public and in his own right as a user of the road feels he ought to protect. In Mr. Asige's submission, it is clear that the portion now the subject matter of the suit was acquired solely for construction of the new Kisauni/Nyali access road. If the entire stretch of acquired land was not utilised, then any remaining portions still comprised the said Road and its Road - reserve. He cited the Public Roads and Roads of Access Act Cap 399 Section 2(c)

"Public Road means

(a) ....

(b) ....

(c) all roads and thorough fares hereafter reserved for public use.

and also the Streets Adoption Act Cap 406 Section 3(1) where 'street' means inter alia

> "... a highway ... road ... footway ... passage or any lands reserved therefor, within the area of Local Authority, used or intended to be used as a means of access to two or more premises or areas of land in

> different occupation whether the public have a right of way over it or not ...."

On these two premises, submitted Mr. Asige, the area acquired became a Public road or street. Under the Local Government Act Cap 265, such areas are under the general control of the local Authority within which they are situated, in this case. The Mombasa Municipal Council. Under Section 182(1) of the Act the Council exercises trusteeship rights and has no right of alienation in breach of that trust. It is the breach of this trust that is intended to be contested in the main suit. It will also be contended that the Commissioner of Lands was part of this larger scheme of alienating road reserves by abusing the provisions of the Land Acquisition Act by compulsorily acquiring land for a specific purpose only to turn round and dish it out to individuals. It will therefore be contended that due to this abuse of the law the allocations made to Jivaco are a nullity ab initio and ought to be so declared by the court. This abuse is even more glaring considering that the new plot created traverses the new tarmac road and according to a survey map annexed to the application two of the beacons stand on the built-up tarmac road. It would mean that in exercise of their new rights Jivaco can build on top of the tarmac road if they wanted to. In Mr. Asige's submission Niaz has fulfilled all the tests set out in the Giella Vs Cassman Brown case including the balance of convenience even if it came to considering the matter on that basis. This is because no development has commenced yet and it would be more convenient to prevent its commencement than to wait until the finalisation of the case when it may become necessary to demolish any construction. He invited the court to follow the legal reasoning adopted in NBI HCCC 688/96, BETH KALIA & Others -Vs- ROBERT MUTISO LELI (UR) where it was recently held by my brother Mbito J., on the facts of that case, that the President through the Commissioner of Lands could not lawfully alienate suit premises which had been previously alienated and had only been surrendered to the Commissioner to hold in trust for the residents of the area.

Mr. Gikandi relied on the grounds of opposition filed on 29.8.96 and basically contended that the suit did not establish any prima facie case, was frivolous, vexatious and an abuse of the court process; the plaintiff can be compensated in damages and that the balance of convenience is not in favour of granting the injunction. He also relied on the affidavit sworn by Mehul Shah for Jivaco and submitted the Jivaco were bona fide purchasers or allottees of the property without notice of any encumbrance. He further submitted that after the compulsory Acquisition as provided for under the Land Acquisition Act the land vested in the Government free from encumbrances. "Vesting" according to the definition provided by Strouds Judicial Dictionary which Mr. Gikandi cited

> "Having a right to immediate or future possession and enjoyment".

The property having vested in the Government therefore and there being no challenge to the compulsory acquisition since 1979, there cannot be any challenge now because the land subsequently fell to be dealt with by the Government under the Government Lands Act. This means that after utilising the acquired portion of 0.36 Acres the remaining portion of 0.14 Acres became "unalienated Government Land" and the Government could deal with it in any way it wished under Section 3 of the Act. The remaining portion in Mr. Gikandi's submission was not a road or a road reserve as alleged. It has now become a Registered parcel of land under the Registration of Titles Act Cap 281 which makes it unchallengeable save for fraud or misrepresentation. Jivaco was not part of this fraud or misrepresentation if any is found to exist.

In his further submission, the Public Roads and Roads of Access Act and the Streets Adoption Act have no application. The Acts are merely for creating Road Boards and providing how one can apply to have a road or street registered or adopted. There is no evidence to show that the disputed portion was registered by the Council as a street or road and therefore there is no prima facie proof that it fell on a road reserve.

As for the issue of damages Mr. Gikandi says there is an averment in the Affidavit of his client that Niaz had approached Jivaco for sale of the land to him and he must therefore have his own interest and not the Public's in filing this suit. That is why he delayed in filing the suit since he found out the new Registration in June 1996 until September 1996 when the suit was filed. Niaz's rights of access have also not been interfered with since there are other approaches to his property. He cannot suffer irreparable loss.

On the allegation that Jivaco's Title or part of it stands on the tarmaced road, Mr. Gikandi submitted that it was not for Jivaco to ascertain where the beacons were. If any mistakes were made in placing them then these may be explained as human errors. Jivaco does not intend to build on the road. Considering therefore that Jivaco have a Title and now wish to commence development, they should not be stopped from doing so. Finally Mr. Gikandi submitted that Niaz has not even given an undertaking as to damages if the injunction is ultimately found to have been wrongly issued.

On this Mr. Asige submitted that it was for the court to consider whether to require, and if so, the nature of an undertaking to be given in the event of an injunction being granted and confirmed that his client was ready to adhere to any terms set by the court in that respect.

The parameters within which I must consider this application are clearly set in the Giella Case cited above. I must be satisfied that the applicant has a prima facie case

with a probability of success and that he would suffer irreparable injury which is uncompensable in damages; and if I am in doubt then I have to consider the balance of convenience. In considering the first test I must also bear in mind that at this stage I have not heard any evidence on the case and that I am relying on Affidavit evidence. The matter of conclusive proof shall await evidence at the main hearing.

I have considered the submissions made on both sides and it seems to me that if it can be proved that the disputed portion of land was part of land compulsorily and specifically acquired for the purpose of construction of a Road and still remains as a road reserve, then the applicant would be entitled to say that his rights of access to the road through this portion are being interfered with.

There is no right of compulsory acquisition of land by the Government for purposes other than those provided for in the Constitution of Kenya under Section 75:

> "No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except where the following conditions are satisfied:-

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit, and

(b) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property.

That spirit is carried forward in the Land Acquisition Act itself in Section 6.

"6(1) where the Minister is satisfied that any land is required for the purpose of public body and that -

(a) the acquisition of the land is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and

(b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land and so certifies in writing to the Commissioner, he may in writing direct the Commissioner to acquire the land compulsorily under this part."

If it were not so, and taken to its logical conclusion, a loophole would be created for any Government which does not mean well for its citizens, to compulsorily acquire whole sections of a city or town or other developed property on the pretext of public good, compensate the owners of the property acquired with taxpayers' money and then turn round and dish out those properties to favoured citizens of its choice or the enemies of the state: Parliament could not have intended such preposterous consequences.

I am not persuaded by the argument that upon compulsory acquisition of land and the consequent vesting of that land in the Government, then the land falls to be used by the Government in any manner it desires. There is plainly no such *Carte Blance* intended in the provisions of the law cited above. The land must be used, subsequent to the acquisition, for a lawful purpose, and as I see it, the only lawful purpose is the one for which it was acquired.

I am persuaded that the land in issue was acquired for a specific purpose which is consonant with the Constitution and the Land Acquisition Act, namely for the construction of a Public Road. It matters not that the entire portion acquired was not used for that purpose. Unutilised portions in my view would remain as road reserves. And if it was the case that it was found unnecessary after all to have acquired the portions for the expressed purpose, does equity not require that the portions be surrendered back to the person or persons from whom the land was compulsorily acquired? The law itself in Section 23 of the Land Acquisition Act appears to imply such equity although it relates to withdrawal of acquisition before possession is taken. Perhaps it is a question that may be answered when the matter comes up for full hearing.

I am persuaded by the argument that since the acquisition was done for the purpose of making a Public Road, the road thus made remained a Public Road or street and vested in the Local Authority, The Municipal Council of Mombasa, to hold in trust for the public in accordance with the law. Needless to say this included the portion usually utilised for the tarmaced road and the remaining portions which form part of the road reserve.

Finally I am persuaded by the argument that as such trust land, neither the Local Authority nor the Government could alienate the land under the Government Lands Act.

On the above premises, the plaintiff/applicant was entitled to assume that the unutilised portion would remain a road reserve and he would continue to enjoy all the rights and privileges of a frontager to the road and enjoy the resultant easement of direct access to that road. I find on a prima facie basis that the plaintiff had such right and ought to be protected until this case is determined. It i no answer to the prayer sought, that the applicant may be compensated in damages. No amount of

money can compensate the infringement of such right or atone for transgressions against the law, if this turns out to have been the case.These considerations alone would entitle the applicant to the grant of the orders sought.

But objections were raised on the grounds that the plaintiff has no *locus standi* to protect the public rights he purports to in alleging that a public road was unlawfully alienated. No authority was cited for this proposition. But I suppose allusion was being made to Section 61 of the Civil Procedure Act where in cases of Public Nuisance, it is only the Attorney General or two or more persons having the consent in writing of the Attorney General" who may institute a suit though no special damage has been caused, for a declaration and injunction or other suitable reliefs.

"A Public or common Nuisance is an act which interferes with the enjoyment of a right which all members of the community are entitled to, such as the right to fresh air, to travel on the highways etc. The remedy for a public nuisance .... is by indictment information or injunction at the suit of the Attorney General" - see Concise Law Dictionary -Osborn.

What if the Attorney General is the cause of the nuisance?

As I said in this courts case HCCC 1/96 BABU OMAR & OTHERS -Vs- EDWARD MWARANIA & ANOTHER (U.R.)

> "There is nothing in the statutes relating to Local Authorities to exclude the courts ordinary jurisdiction to restrain Ultra Vires acts or nuisance or to prevent breaches of trust. No authority has been cited to me to the contrary and I am not aware of one ..... The applicants are members of the public. They reside and pay their rates to the Mombasa Municipal Council. They would be entitled to vote here. And they have a right to question the propriety or otherwise of the dealings by the Council of the Public land which the Council holds in trust for the public. They may well be right that the Council is alienating a Public Road Reserve, contrary to the law".

I would apply the same principles here in granting the orders sought even on this limb of the application.

I am satisfied that the first two tests in Giella -Vs- Cassman Brown case have been satisfied and I need not therefore consider the balance of convenience. If I was to consider it, I would nevertheless hold in favour of the applicant. No evidence has been tendered or submission made that any development of the portion in dispute has commenced. It would obviate heavier losses if the injunction was granted at this stage rather than waiting until the end of the case and after considerable expense has been incurred to order a demolition. Such damage as may be suffered by the Respondents if the injunction ultimately turns out to have been erroneous in law and fact can be sufficiently covered by an order, which I now make, that the applicant do provide and file within the next SEVEN days, an undertaking that he will bear such damages as may be assessed by the court, consequent upon the grant of this injunction.

Subject to this qualification the application is granted with costs.

Dated at Mombasa this 9th day of October 1996.

P.N. Waki
JUDGE
9.10.96

9/10/96

Coram: Waki, J.
C/C - Mutua
Asige for plaintiff/applicant
Gikandi for defendant/respondent
Ruling delivered, signed and dated in open court.

P.N. Waki
JUDGE
9.10.96

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2959 OF 1996

ABDIKADIR SHEIKH HASSAN & 4 OTHERS — PLAINTIFF

v.

KENYA WILDLIFE SERVICE — DEFENDANT

RULING

By this application filed on 19th August, 1996, the plaintiffs seek orders restraining the defendant from removing, dislocating and/or distreslocating or in any other way moving a rare and endangered animal called "the Hirola" from its natural habitat in Arawale to the Tsavo National Park or any other place or destination on the grounds inter alia that it is a gift to the people of the area and should be left there. The defendant however contends that the injunction should not be granted and/or should be lifted as inter alia the application was seeking to curtail the respondent from carrying out its express statutory mandate.

The principles on which the court acts in such applications are now well settled. According to the case of Giella vs. Cassman Brown and Co. Ltd. [1973] EA 358, in dealing with such applications, first the applicant should show prima facie case with a likelihood of success. Secondly, it should be shown that the applicant is likely to suffer an injury which cannot be adequately compensated by damages if the injunction is not granted. Finally that if there is some doubt, the court should act on balance of convenience.

On the first principle on which the court acts, it is observed that according to common law and/or customary law of the inhabitants of this country, those entitled to the use of the land are also entitled to the fruits thereof which include the fauna and flora unless this has been negated by law. A perusal of the constitution, which is the supreme law of this country, only shows that minerals and oils are excluded from the ownership of those entitled to use of any given land. See Section 115(1) of the constitution. A perusal of the Wildlife (Conservation and Management) Act as amended by Act 16 of 1989 shows that the defendant by virtue of S. 3A and in particular 3A (d) (e) (f) when read together or separately hereby entitle the respondent to conserve the wild animals in their natural state. It does not entitle it to translocate them. It would therefore appear that the respondent would be acting outside its powers if it were to move any animals or plants away from their natural habitat without the express consent of those entitled to the fruits of the earth on which the animals live. Consequently in this court's view, as the respondent is trying to deplete through translocation the applicants heritage of fruits of the land of which they are entitled to through the County Council trust, they are entitled to maintain this suit and have shown a prima facie case with a likelihood of success.

On injury and/or balance of convenience, I need not really be labour the point. If the animals are removed to a new habitat which they are not used to, it is not known if they would survive so as to be returned to their natural habitat if the case is successful. On the other hand if they are conserved at their natural habitat until the suit is heard, they would still be available for translocation to the proposed new habitat if it is found that the case is misconceived.

In view of the above findings, I am satisfied that the applicants have made out a case for grant of an injunction. I therefore hereby grant prayers 4 and 5 of the chamber summons filed herein on 19th August, 1996 in so far as they relate to translocation of the Hirolas from their natural habitat of Arawale nature reserve of Garissa District. The costs hereof shall be in the cause. Orders accordingly.

Dated at Nairobi this 29th day of August, 1996.

G. P. MBITO
JUDGE

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: AKIWUMI, TUNOI & PALL, JJ.A.)
CIVIL APPEAL NO. 252 OF 1996

BETWEEN

THE COMMISSIONER OF LANDS
THE MINISTER FOR LANDS AND SETTLEMENT — APPELLANTS
AND
COASTAL AQUACULTURE LIMITED — RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Justice Ringera) dated 21st March, 1996

in

MOMBASA H.C.MISC. APPLL. NO.55 of 1994)

JUDGEMENT OF AKIWUMI, J.A.

This appeal is from the judgment of Ringera, J. in which, he granted an order prohibiting the Commissioner of Lands from continuing with an inquiry into compensation to be paid in respect of land acquired under the Land Acquisition Act.

The background to all this is as follows. In 1993, the Commissioner of Lands whom I shall henceforth refer to as "the Commissioner", caused to be published Gazette Notice No.3590 dated 22nd July, 1993, under the heading "Intention to Acquire Land", that in pursuance of section 6(2) of the Land Acquisition Act which I shall henceforth, refer to as "the Act", he was giving notice that the Government intended to acquire land which belonged to Coastal Aquaculture Ltd, the respondent herein, "for Tana River Delta Wetlands". The Commissioner also caused to be published another Gazette Notice No.3591 of the same date, giving notice of the date when an inquiry would be held to hear claims to compensation by those affected by the acquisition of the same land, which was the respondent. But before the inquiry could begin, the respondent through its advocate, Mr. Ghalia, in his letter of 30th July, 1993, to the Commissioner, and copied to the Attorney General, charged that not only, was Gazette Notice No.3591 defective because the date stated therein for the hearing of the inquiry did not comply with section 9 (1) of the Act, but also that Gazette Notice No.3590 giving notice of the intention to compulsorily acquire the respondent's land, was, having regard to section 6 (1) of the Act, defective in that it did not state either the public body for which the acquisition was being made, or the public purpose to be served by the acquisition. Mr. Ghalia therefore, requested the Commissioner to publish fresh Gazette Notices which satisfied the provisions of the Act. The Commissioner, however, merely published a CORRIGENDUM Gazette Notice No.3982 dated 9th August, 1993, giving a new date for the hearing of the inquiry. The Commissioner did nothing about the complaint made that Gazette notice No.3590 was defective. He did not even reply to Mr. Ghalia's letter of 30th July, 1993. On 12th, 18th and 30th August, 1993, Mr. Ghalia wrote to the Commissioner with copies to the Attorney General, inter alia, complaining about the illegality of the first two notices. In the last two letters, he threatened to sue if fresh notices which complied with the Act were not gazetted. The Commissioner, as was now beginning to be his custom, did not only, ignore these letters, but would also not condescend to reply to them. Not surprisingly, Mr. Ghalia applied to the High Court in Mombasa for leave to apply for an order of prohibition to restrain the Commissioner from commencing and or continuing with the inquiry into

claims to compensation under the Act as notified in the three Gazette Notices, inter alia, on the ground that the Gazette Notices Nos. 3590, 3591 and 3982 above mentioned, were defective as they failed to set out the public body for which the respondent's land was being compulsorily acquired and the public purpose for which the acquisition was intended.

Good sense seems at last, to have prevailed, for by a consent letter dated 22nd September, 1993, signed by Mr. Ghalia for the respondent and by the then Deputy Chief Litigation Counsel of the Attorney General's Chambers for the Commissioner, and addressed to the Registrar of the High Court in Mombasa, and filed in that court on 23rd September, 1993, it was agreed that the intended inquiry be discontinued forthwith; that the Commissioner regazette the compulsory acquisition notices by "fresh valid Legal Notices issued and served in accordance with law", and which can only mean that at least, the Commissioner had conceded that the attacks on the legal validity of the Gazette Notices Nos.3590, 3591 and 3982 were valid; and this also speaks volumes, that the Commissioner should pay to the respondent Shs.5,000/= by way of costs. A question which I would like to pose at this stage is whether, if Gazette Notices under section 6 are valid, an inquiry thereunder can be discontinued or whether this can only be done where the Notices are invalid? Section 23(1) of the Act empowers the Minister at any time before possession is taken of any land compulsorily "acquired under this Act", to revoke his direction to the Commissioner to acquire the land. But apart from this, I see nothing in the Act whereby, an inquiry which can only be as to claims to compensation, can be prematurely brought to an end, except where it is for instance, based on an invalid notice. It is, however, important to note now that section 23(1) of the Act also illustrates that acquisition takes place upon the Minister's direction to the Commissioner and no further prescribed steps for this purpose are laid down to be taken by the Commissioner. In other words, acquisition takes place upon the Commissioner receiving the Minister's directions to acquire. I shall refer to this again later in this judgment.

However, it seems that good sense did not prevail for long, for some forty three days after the filing of the consent letter, the Commissioner caused to be published in a SPECIAL ISSUE of the Official Gazette, Gazette Notices No.s 5689 and 5690. The first one which was headed "INTENTION TO ACQUIRE LAND", was exactly, word for word as that of Gazette Notice No. 3590 dated 22nd July, 1993. It simply again stated that the Commissioner IN PURSUANCE of section 6(2) of the Land Acquisition Act, was giving notice that the Government intended to acquire the respondent's land "for Tana River Delta Wetlands". The inquiry then began, according to the record of proceedings made one J.B.K. Mwaniki, Chief Valuer of the Ministry of Lands and Settlement, who appeared to head a team of four Valuers, and who described himself in that record as Chairman of the Inquiry, on 30th December, 1993. According to the record of proceedings, Mr. Mwaniki first explained to Mr. Ghalia that the respondent's land was being acquired in accordance with section 6 of the Act. The first sign of trouble then surfaced after Mr. Mwaniki had refused to allow the proceedings to be tape recorded. The relevant parts of the record of proceedings are as follows:

> "Mr. Ghalia
>
> Raised a preliminary matter which he claimed to be important (underlining supplied). Was the Commissioner of Lands to undertake the Inquiry?
>
> I showed Mr. Ghalia and his clients the two letters from the Hon. Minister.
>
> - one directing the Commissioner of Lands to acquire the land.
>
> - the other authorizing the four valuers to conduct the Inquiry.".

So far so good, for under section 6(1) of the Act, the Minister after certifying to the Commissioner that a given land is required for the purpose of a public body and that it is for the public good and was for those reasons justified, may then in writing direct the Commissioner to acquire the land compulsorily. Secondly, although sub-sections (3) to (5) of section 9 of the Act clearly vest in the Commissioner the power to hold an Inquiry, the word "Commissioner" is so defined under section 2 of the Act to include "any person authorized by the Minister in writing in any particular case to exercise the powers conferred on the Commissioner by this Act". Since the written authority of the Minister was not made part of the record of proceedings of the Inquiry or produced in the proceedings in the superior court, one may not assume particularly, because of further excerpts from the record of proceedings of the Inquiry which appear hereinafter, that it was in order so that Mr. Mwaniki and the three other valuers can be said to have been properly authorized by the Minister to exercise the powers of the Commissioner in holding the Inquiry. Apart from the fact that appointing four persons to hold such an Inquiry would present its own problems, the one that immediately arose whether Mr. Mwaniki had been authorized by the Minister not merely to be a member of the team to carry out the Inquiry, but whether he had been authorized by the Minister to be the Chairman of the Inquiry.

The following excerpts from Mr. Mwaniki's very own record of proceedings illustrate the dilemma that he found himself in concerning his assumed role as Chairman of the Inquiry and indeed, concerning the basic question of who was undertaking the Inquiry, after Mr. Ghalia had raised his preliminary point already referred to:

> "At this point I advised Mr. Ghalia that the Commissioner of Lands was chairing and conducting the Inquiry. (underlining supplied)
>
> Mr. Ghalia was satisfied with the Hon. Minister's letters.
>
> Mr. Ghalia asked if the Attorney General was going to be represented.
>
> I informed Mr. Ghalia that the Commissioner of Lands was chairing the Inquiry (underlining supplied) and NOT the Attorney General. Mr. Ghalia gave the impression that he had been talking to Attorney General.
>
> At this point the Chairman was called by the Commissioner of Lands.
>
> When the Chairman resumed he informed those assembled that there were new developments. I informed Mr. Ghalia that the Attorney General had instructed that the Inquiry be adjourned to a later date. (underlining supplied) Reasons - Mr. Ole Keiwua who was to attend was due to unforeseen official duties engaged elsewhere.
>
> Mr. Ghalia insisted to know if the Inquiry was being adjourned because of the Attorney General's absence.
>
> I informed him that since the Attorney General has instructed we adjourn, we have to." (underlining supplied).

From Mr. Mwaniki's own lips as it were, which is the only cogent evidence on the issue, it is clear and undisputed that he was not the Chairman of the Inquiry even though he described himself as such. And if as Mr. Mwaniki stated, that "the Commissioner of Lands was chairing and conducting the Inquiry", then again, on the face of the record, Mr. Mwaniki has shown that he himself, and for that matter, his other three valuer colleagues, had no jurisdiction to begin and to hear the inquiry as they did and that what they did was null and void. And for that matter, it does not matter that Mr. Ghalia had said that he was satisfied with the Minister's letter which was not, and has not been, produced. It is only when the Commissioner is not carrying out the Inquiry himself, that others may be appointed by the Minister to do so. Mr. Mwaniki himself has set at naught the Minister's authority if that is what it was intended to be, and he and his team of valuers should not have started and gone on with the Inquiry.

The foregoing excepts from Mr. Mwaniki's record of proceedings also show the lack of control that Mr. Mwaniki had over the proceedings. He was taking instructions which he should not have, if he were really the Chairman of the Inquiry, from the Commissioner and from the Attorney General. Anyway, the Inquiry which had no basis for the reasons I have already given, went on for some four days, on 30th December, 1993, 28th February, 1994, 1st March, 1994 and 3rd March, 1994. On the last day, Mr. Mwaniki was served with ex parte orders obtained by the respondent granting leave to prohibit, by way of judicial review, the continuation of the Inquiry and interim stay of the proceedings of the Inquiry. As already noted, the questioning of the validity of the Inquiry occurred at its inception. It is also true that Mr. Mwaniki was served with the ex parte orders after the Inquiry had been on for some days, but that makes no difference to the validity of Inquiry if it was invalid right from the beginning. In other words, the respondent's continued participation for four days in the Inquiry even after Mr. Mwaniki as already shown, had disclaimed his jurisdiction to be the Chairman of the Inquiry or to conduct it, does not amount to a waiver or estoppel that can legitimate action which is ultra vires. To quote from Wade's Administrative Law (4th Edition) p.222:

> "... The primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power that [sic] it legitimately possess. Once again, the principle of ultra vires must prevail when it comes into conflict with the ordinary rule of law.".

The non compliance of the relevant requirement of the Act in the light of the record of proceedings as regards the jurisdiction of Mr. Mwaniki and his fellow valuers, to conduct the Inquiry which was raised on the very first day of the Inquiry was one of the grounds in support of the amended Notice of Motion for judicial review which came before Ringera, J. for hearing on 18th January, 1996. It was put this way:

> "It was only upon answering to the summons under Gazette Notice Number 5690 of 1993 that the applicants realized that the purported inquiry under the chairmanship of Mr. Mwaniki was irregular as -
>
> (i) ...
>
> (ii) ...
>
> (iii) the inquiry was being conducted without proper jurisdiction and irrationally."

As I have already stated, the lack of jurisdiction on the part of Mr. Mwaniki and his team to conduct the Inquiry, which is based on Mr. Mwaniki's own disclaimer, is there for all to see on the face of Mr. Mwaniki's own certified record of proceedings of the Inquiry.

In Rex v Croke (1774) 1 Cowp.26, it was held that where:

> "... by statute, a special authority is delegated to particular persons, affecting the property of individuals, it must be strictly pursued; and appear to be so on the face of their proceedings".

Applying the following dictum of Lord Mansfield in that

case to the present one:

> "This is a special authority delegated by the Act of Parliament to particular persons to take away a man's property and estate against his will; therefore it will be strictly pursued, and must appear to be so upon the face of the order."

The analogy that can be drawn is this. In Kenya where the statutory power to compulsorily acquire a person's land against his will is first derived from the carefully worded provisions of the Constitution itself; where land is a most sensitive issue; and where in effect, the land in question has already been compulsorily acquired, though not taken possession of, by the time the interested party is notified so as to make his claim for compensation, there is all the more reason to ensure that all procedures related to compulsory acquisition must not only be strictly pursued, but must also appear to be so on the face of the Inquiry.

The other aspect of the lack of jurisdiction to hold the Inquiry and which was more substantially argued before Ringera, J., was whether the Gazette Notice No. 5689 of 4th November, 1993, which gave notice of the Government's intention to compulsorily acquire the respondent's land, was sufficient to grant jurisdiction for the holding of the Inquiry.

It was argued on behalf of the respondent that the Gazette Notice was invalid because it did not set out the conditions which must be satisfied before the respondent's land could be compulsorily acquired as laid down in section 75 of the Constitution read together with section 6 of the Act, namely, that the acquisition was for a public body for any of the public interests or benefits enumerated in section 75(1)(a) of the Constitution, and that this justified the hardship that the compulsory acquisition would cause the respondent. Section 75(1)(c) of the Constitution which provided for the promulgation of detailed legal provisions for the implementation of the constitutional provisions, namely, the compulsory acquisition of property, claim for compensation and matters related thereto, led to the enactment of the Act. Section 6 of the Act which is headed "Acquisition of Land" is the one that is relevant. Its marginal note is "Notice of Acquisition". This section has been fully set out in the Judgment of Ringera, J. and I will only summarise it here. It is firstly, according to section 6(1) of the Act, that where the Minister is satisfied that land is required for a public body, that this is necessary for a stated public purpose and that this justifies the hardship that a compulsory acquisition of the land will entail, and has so certified all this in writing to the Commissioner, the Minister may then direct the Commissioner in writing to compulsorily acquire the land. Secondly, and according to section 6(2) of the Act, after the Commissioner has received the Minister's direction, he shall cause a notice to the effect that the Government intends to acquire the land, to be published in the Gazette. But a notice does not quite reflect what the actual position is. It gives the wrong impression which is more in line with section 3 of the Act whereby, if the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6 of the Act, the Commissioner may cause notice thereof to be published in the Gazette, that the Government only intends to acquire the land. The notice published under section 6(2) of the Act, does not reflect, as would appear to be supported by the Minister's certificate and written direction to the Commissioner, that the land has, to all intents and purposes, already been acquired. Apart from anything else, the subsequent sections of the Act show that all that then remains to be done after the publication of the notice of intention to acquire land, only concerned the assessment and payment of compensation for the compulsory acquisition; the revocation of a directive to acquire land before actual possession is taken; the taking possession of such land; and the right of appeal to the High Court to challenge the amount of compensation awarded. It was further submitted on behalf of the respondent, that the drastic and exceptional powers granted to the Commissioner on the say so of the Minister, and I may add, a process in which the person to be affected has absolutely no part to play, are such that at least, when it comes to the process of claim to compensation, the affected party should be informed in the notice which the Commissioner caused to be published of the Government's intention to acquire land, of the reasons and conditions which justify the compulsory acquisition such as the public body for which the land had been acquired and the public purpose for the acquisition.

On behalf of the Commissioner, it was submitted that even though section 6(1) of the Act lays down the reasons for and conditions which must first be satisfied before land is compulsorily acquired, section 6(2) of the Act which only provides that the Commissioner shall, upon receiving the Minister's direction to acquire land, cause to be published in the Gazette a notice that "the Government intends to acquire the land", does not require such notice to contain any other information such as the name of the public body for which the land had been acquired and the public purpose which the acquisition was intended to promote.

After hearing arguments Ringera, J. concluded in the following excerpt from his judgment as regards the validity of General Notices Nos.5689 and 5690 and which deserves to be quoted in extenso as follows:-

> "As regards the adequacy and validity of the notice published under section 6(2) I have come to the judgment that notice should reflect the Minister's certificate to the Commissioner under section 6(1), and must accordingly include the identity of the public body for whom the land is acquired and the

> public interest in respect of which it is acquired. It is only when a notice contains such information that a person affected thereby can fairly be expected to seize his right to challenge the legality of the acquisition. That is because the test of the legality of the acquisition is whether the land is required for a public body for a public benefit and such purpose is so necessary that it justifies hardship to the owner. Those details must be contained in the notice itself for the prima facie validity of the acquisition must be judged on the content of the notice. The test must be satisfied at the outset and not with the aid of subsequent evidence. I do not understand Re KISIMA (supra) to hold that information subsequently gleaned from material before the court can cure the defects apparent on the face of the notice. I understand the case to hold that failure to specify the public body for whom the land is acquired and the purpose of the acquisition are the defects which persuaded the court that the applicant therein had established a prima facie case that the Commissioner of Lands lacked jurisdiction to proceed with compulsory acquisition. The learned judge also made the additional observation that if the affidavit evidence before him was to be accepted the persons for whose benefit the land was intended to be acquired were not a public body. In the result, I find and hold that Gazette notice number 5689 of 4th November, 1993 is defective and invalid for the reason that it did not identify the public body for whom the land was being acquired and the public purpose to be served by such acquisition. The words "Tana River Delta Wetlands" cannot but be a geographical-cum-ecological description. They are not the name of any public body or descriptive of the public purpose of the acquisition. They are accordingly incompetent to satisfy the requirements of the law. That being the position, it follows that Gazette notice number 5690 of 4th November, 1993 notifying interested parties of the holding of an inquiry into claims for compensation was also invalid. As the jurisdiction of the Commissioner of Lands to hold the inquiry was conditional on publication of valid notices of the acquisition and of the inquiry, I must, and do conclude, that the Commissioner lacked jurisdiction to commence or continue the inquiry under section 9(3) of the Land Acquisition Act. I am accordingly inclined to order that prohibition do issue as prayed".

It is this decision that has prompted the present appeal.

The submissions made in this appeal are really the same that were made before Ringera, J. and I agree entirely with his judgment and only have the following additional points to make.

I recall again the dictum of Lord Mansfield in Rex v Croke earlier referred to, and would add that where as in this appeal, the person affected, namely, the respondent had absolutely no say in the making of the original decision by the Minister which was conveyed to the Commissioner and the Minister's written direction to the Commissioner to acquire the land and which merely on the say so of the Minister, had been so acquired by the Commissioner, it is more than desirable indeed, mandatory, that the respondent be given a fair chance and opportunity of challenging the decision and actions of the Minister and the Commissioner, by furnishing the respondent in the notice of intention to acquire and which notice, as I have noted, is misleading in nature, not only, with the information that the Commissioner had received the Minister's direction to acquire the land but also, of the public body for which the land had been acquired, the public purpose therefor, and that all this was justified under the given circumstances. This is particularly so where it is the notice of the compulsory acquisition which for the first time, informs the affected party of what had happened to his land and also sets in motion the claim to compensation process. It is also not sufficient, indeed, well nigh uncandid, when the evidence at the Inquiry showed that the land had been acquired for the Tana and Athi Rivers Development Authority, a statutory body corporate created by section 3 of its Act with perpetual succession and a common seal and capable in its corporate name of suing and being sued, acquiring property and borrowing and lending money in its corporate name etc, to say that the public body for which the land had been acquired had been sufficiently identified in the Gazette Notice No.5689 merely because it gave notice that "Government intends to acquire the land". Furthermore, section 8(a) of the Tana and Athi Rivers Development Authority Act which established the Authority, has as one of its functions which distinguishes it from the Government:

> "to advise the Government generally and the Ministries set out in the Schedule ... on all matters affecting the development of the Area including the apportionment of water resources".

To conclude on this particular issue, "public body" is defined in section 2 of the Tana and Athi Rivers Development Authority Act to mean:

> "the Government" or "any authority, board or other body which has or performs ... functions of a public nature, or which engages or is about to engage in the exploitation of natural resources...".

It is clear that the Tana and Athi Rivers Development Authority is such a body with functions of a public nature and it should have been specified as the public body for which the Government intended to acquire the land. As Ringera, J. said, applying Re Kisima Farm Ltd (1978) KLR 36:

> "The test must be satisfied at the outset and not with the aid of subsequent evidence".

In this case, the subsequent evidence has only succeeded in showing the notice of intention to acquire land to be less than candid.

As regards the public purpose for which the land had

been acquired, merely stating in Gazette Notice No.5689 that the Government intended to acquire the land "for Tana River Delta Wetlands" and which mischievously gives the impression that it is a public body, is simply not good enough. If it is meant to be the public purpose for which the land has been acquired, that too, is simply not good enough. It would even have been sufficient if the notice in this regard, had only said that the land had been required "for the development of the Tana River Delta Wetlands". A more patriotic purpose would have been as the Tana and Athi Rivers Development Authority more wordily put it in its Madaraka Day Congratulatory Advertisement in the Sunday Standard of 1st June, 1997, "for promoting environmental conservation for the sustainable development" of the Tana River Delta Wetlands. Or better still, as was contained in the Kenya Wildlife Service, Press Release on World Wetlands Day 1997, published in the Sunday Standard of 2nd February, 1997, for "ENSURING A SUSTAINABLE FUTURE FOR WETLANDS AND THE COMMUNITY". Merely stating "for Tana River Delta Wetlands" as Ringera, J. observed, "cannot but be a geographical-cum-ecological description", and which I may add, is neither a public body nor a public benefit.

I would now like to revert briefly to Re Kisima which was an application for leave to issue an order of prohibition, and in which it was held that the existence of a right of appeal did not constitute a bar to an application for an order of prohibition. The position has been well stated in Constitutional and Administrative Law by E.C.S. Wade and A.W. Bradley, Tenth Edition p 638 as follows:

> "This supervision does not seek to provide a fresh decision on the merits but to ensure that the body in question has observed the limits which are a condition of its power to make binding decisions. According to a famous dictum in R. v. Nat Bell Liquors,
>
> 'That supervision goes to two points: one is the area of the inferior judgment and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.''
>
> Thus all tribunals and like bodies are subject in English law to control by the High Court on jurisdictional grounds, whether or not there is a statutory right of appeal from their decisions".

The reasons for the granting of leave by Hancox, J. as he then was, in Re Kisima are in my view, correct as stated in his following observations:

> "I would comment that there appear to me to be defects in the expression of the Commissioner of Lands' intention in the respective Gazette notices. For instance, section 6 requires that the Minister shall be satisfied that the land in question is required for the purpose of a public body. No public body and no particular purpose is specified in Gazette Notice 3678. Moreover, if the affidavit of Mr. Powys is to be accepted, the Minister in question informed him that the land was "for the members of the Meru tribe". I agree with Mr. Couldrey that this would not be a public body or purpose envisaged by the definition in the Act. In the circumstances (and leaving aside for the moment alleged inaccuracies in the acreage of the parcel of land ...) this prima facie seems to constitute an absence of jurisdiction to acquire the land, and, consequently, an absence of jurisdiction in the Commissioner of Lands to act in pursuance of a direction given in that behalf".

I am of the view that Ringera, J. was quite right in following and adopting Re Kisima. But he is not the only Judge who has adopted the reasoning in Re Kisima. A week after delivering his judgment in Re Kisima, Hancox, J. had before him a similar application for leave to apply for an order of prohibition in the case of In the Matter of an Application by Marania Limited for Leave to apply for Orders of Prohibition and Centiorari and In the Matter of the Constitution of Kenya and In the Matter of the Land Acquisition Act (Cap 295) Miscellaneous Civil Application No. 68 of 1978 (unreported). In his ruling with respect to the application for leave to apply for the order of prohibition, Hancox, J. followed his judgment in Re Kisima. Two years later, Simpson, J. as he then was, considered Re Kisima in the case of Reginald Destro, Donald Destro & Others v Attorney General H.C.C.C. No. 2414 of 1979 (unreported). The matter before Simpson, J. concerned the validity of the Minister's certificate required under section 6(1) of the Act in respect of which, he held that there was no error on the face of it. His attention had, however, been drawn to Re Kisima and this is what he had to say about it:

> "Mr. Dobry said he relied on Hancox, J.'s rulings in Civil Application 62 of 1978 - Kisima Farms Ltd and 68 of 1978 - Marania Ltd., both applications for prerogative writs relating to land acquisition. In both cases the Gazette Notices expressing the Commissioner of Lands' intention were defective in that not only was no public body but also no particular purpose was specified. The land in question was in fact required for resettlement of certain members of the Meru tribe clearly not a public body".

In both Re Kisima and Marania the wording of the Gazette Notices of intention to acquire land namely, Nos. 3678 of 1977 and 3682 of 1977 respectively, were as follows:-

> "In pursuance of section 6(2) of the Land Acquisition Act, 1968, I hereby give notice that the Government intends to acquire the following land for a public purpose".

This may have been the previous practice, so what. That which is wrong and contrary to law, should not be condoned particularly, as earlier shown, that this had been conceded by the Commissioner in the letter of consent

dated 22nd September, 1993, already referred to. I can only add that Ringera, J. was right at the conclusion he came to that the order of prohibition sought should be granted.

The role of marginal notes in legislation deserves a brief comment. Marginal notes are often found at the side of sections in an Act. They purport to summarize the effect of the sections, and have sometimes been used as an aid to construction. Whilst it is true that marginal notes are not part of the Act, some help might be derived from them to show what the sections to which they relate, are dealing with. In respect of the whole of section 6 of the Act, the marginal note is "Notice of acquisition" signifying the importance of the notice of acquisition and what it should contain which are the conditions for the compulsory acquisition as set out in section 6(1). In the case of Bushell v Hammond (1904) 2KB 563, at 567, Collins M.R. in his leading judgment stated that in order to understand subsection 4 of the Licensing Act, 1902:

> "... we must look at the whole of the section of which it forms part, and some help will be derived from the side note (though of course it is not part of the statute), which shows that the section is dealing with the control of parties over the structure of the licensed premises".

In Stephens v Cuckfield R. D. C. (1960) 2 Q.B. 373, at 383 C.A. at 383, Upjohn L.J. in the judgment of the court, had this to say about the role of a marginal note:

> "While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it was aimed with the note in mind".

In the case of Mugo v R (1966) E.A. 124 at 128 Rudd Ag. C.J. in the judgment of the court, first referred to the discontinued old English Parliamentary tradition whereby, bills submitted to parliament were engrossed without punctuation or marginal notes on the roll but which nevertheless, had led some English judges to disregard marginal notes when construing sections of an Act. He, however, and in a departure from this line of thought, then went on to refer to cases including Bushnell (supra) where it had been held in England that marginal notes can show what a section was intended to cover, to support the taking into consideration of the marginal note in construing the section of the Evidence Act which was involved in the appeal then before the court. Newbold, V.P. as he then was, put the position in Kenya more clearly in the Court of Appeal case of Visram & Karsan v Bhatt (1965) E.A. 789 at 794. He put it this way:

> "While in Britain the courts will not normally have regard to marginal notes for assistance in construing the terms of a section, this due to the historical reason that prior to 1850 marginal notes did not form part of the bill as presented to Parliament and they were only added after the legislation had been passed. It could not, therefore, at least as regards the earlier legislation, be said that the marginal note played any part in disclosing the intention of the legislature. The position in Kenya is very different. Marginal notes always form part of the bill as presented to Parliament for enactment. Indeed, there are a number of enactments, including the Acts amending the present Constitution of Kenya, in which marginal notes have been the subject of amendment by legislation. Further, a constitutional document (the Royal Instructions) prior to independence specifically required that a marginal note should appear on each section of a bill as presented to the legislature".

To the foregoing can be added the authoritative words of Garth Thornton who had unrivalled and distinguished career in legislative drafting in East Africa. Garth Thornton was Chief Parliamentary Draftsman of Tanzania for many years and was one time, Deputy Legal Secretary of the East African Common Services Organization. In his latter office he was responsible for the drafting of East African legislation which were debated by the Central Legislative Assembly of the East African Common Services and which when passed by that Assembly, had the force of law in the constituent East African Countries of Kenya, Uganda and Tanzania. He defines "marginal notes" in his book "Legislative Drafting" as follows:

> "The object of a marginal note is to give a concise indication of the contents of a section. A reader has only to glance quickly through the marginal notes in order to understand the framework and the scope of an Act and also to enable him to direct his attention quickly to the part of an Act which he is looking for.
>
> To achieve this object, a marginal note must be terse and it must be accurate. It must describe, but it should not attempt to summarize. It should inform the reader of the subject of a section. It cannot hope to tell him what the section says about that subject.
>
> Like a signpost, a marginal note must be brief and to the point, and it must be pointing where it says it is pointing".

Section 6(1) of the Act lays down the conditions which must be fulfilled before land can be compulsorily acquired and goes on to provide that where these exist, the Minister upon so certifying to the Commission, can then direct the Commissioner in writing to acquire the land. Subsection 6(2) then goes on to state that upon section 75 of the Constitution and section 6(1) of the Act would not have gone to the trouble of publicly proclaiming the conditions which must exist before the Minister directs the Commissioner to compulsorily acquire the land in question. The modern approach to the constitution of legislation which supports the view I have just expressed, is to be found in the following statement of the law which appears in de Smith's Judicial Review of Administrative Action, Fourth Edition, by J. M. Evans p.98:

> "In the past English courts have tended to favour a formal, linguistic and textual analysis of legislation in an attempt to discover the "true meaning" of statutory provisions. The principal shortcomings of this approach are the assumptions that every word and phrase has a true, single meaning and that, despite the draftsman's detailed elaborations, the text is capable of producing an answer to every conceivable factual situation to which the legislation may have to be applied. On the other hand, a "purposive" approach, often associated with the mischief rule enunciated in Heydon's case, aimed at giving effect to the intention of Parliament, unrealistically assumes that every statutory formula embodies an intention that can be ascribed to Parliament as a whole, or to the collective will of a majority of either House or to the draftsman. In many cases, of course, the approaches converge to produce the same result; but in so far as they diverge, courts have recently tended to move away from a purely linguistic analysis, and have been prepared to blend it with an approach to interpretation that takes account of the historical context of the legislation, and the extent to which a literal reading would do violence to the legislative intention inferred both from other provisions of the measures and from accepted notions of good government and administration".

I had when dealing earlier with the issue whether Mr. Mwaniki and his colleagues had jurisdiction to undertake the Inquiry, concluded that in view of Mr. Mwaniki's answer to the pertinent question put to him by Mr. Ghalia, whereby, he had asserted that the Inquiry was being undertaken by the Commissioner, he Mr. Mwaniki had denied that he and his colleagues had any jurisdiction to undertake the Inquiry. As is apparent on the face of the record, Mr. Mwaniki and Co. had acted ultra vires which is a matter which could not be condoned or corrected merely because the respondent had taken part in the Inquiry for four days before successfully seeking leave to apply for an order of prohibition in respect of the Inquiry and a stay of its proceedings.

With regard to the scope of the lack of jurisdiction of a tribunal which Mr. Mwaniki's Inquiry was, and which under the circumstances, applies to it, and which may give rise to an order of prohibition, de Smith's (ibid., p.396) under the heading "Lack of Jurisdiction", correctly summarized the position as follows and which Ringera, J. adopted:

> "Jurisdiction may be lacking if the tribunal is improperly constituted; or if essential preliminary requirements have been disregarded; or if the proceedings are otherwise improperly instituted; or if the tribunal is incompetent to adjudicate in respect of the parties, the subject matter or the locality in question; or if the tribunal, although having jurisdiction in the first place, proceeds to entertain matters or make orders beyond its competence".

Having regard to the foregoing summary, I would say that Mr. Mwaniki's Inquiry lacked jurisdiction for more than one of the reasons set out in the summary. On this issue, my attention was also drawn to the judgment of Sheridan, J. in the case of Masaka Growers v Mumpiwakoma Growers (1968) E.A. 258, in support of the proposition that the respondent having taken part in the Inquiry for some four days, had waived his right to challenge the jurisdiction of the Inquiry. The pertinent part of that judgment at 261 et seq., is as follows:

> "Prohibition lies only for excess or absence of jurisdiction. It does not lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings: 11 HALSBURY'S LAWS (3rd Edn.), p.114. I do not agree with counsel for the applicants' submission that it lies as of right as there is no defect of jurisdiction apparent on the face of the proceedings: HALSBURY (ibid., p. 115). It is a discretionary remedy and the Court may decline to interpose, by reason of the conduct of the party. Counsel relies on Farquharson v. Morgan ([1894] 1 Q.B. 552) as authority for the proposition that that acquiescence in the exercise of jurisdiction by the inferior court is no bar to the issue of prohibition, but in that case there was a total absence of jurisdiction apparent on the face of the proceedings, which is not the case here.
>
> On the other hand, in Mouflet v. Washburn ([1886], 54 L.T. 16). SIR JAMES HANNEN, following ERLE, J., in Jones v James (1850), I L.M. & P. 65), decided that the defendant, by once appearing before the county court judge, had waived the right of examining into the process by which he had been summoned to appear, and that a subsequent application by such defendant for a writ of prohibition to prevent the judge of the county court from proceeding in such suit must be refused. A court may also decline to interpose if there is a doubt in fact or law whether the inferior tribunal is exceeding its jurisdiction or acting without jurisdiction: 11 HALSBURY'S LAWS (3rd Edn.) p.116. I entertain such a doubt".

I, on my part, have no such hesitation. Moreover, this is a case where from Mr. Mwaniki's own lips fell his disclaimer of jurisdiction thus making it apparent on the face of the proceedings, that there was a total lack of jurisdiction. I therefore hold that Masaka Growers is not applicable in the present appeal.

Finally, Ringera, J. Having considered the conduct of the Commissioner in the saga of the acquisition of the respondent's land, quite rightly, I think, came to the following conclusion:-

> "I cannot help feeling in these circumstances, that either the author of the notices was downright incompetent or he was mischievous".

I am inclined to the view that the latter criticism seems more apt. But what is worse, is that behaviour like that by a high government official only helps to bring the Government that he serves into disrepute.

In the result, I will dismiss the appeal with costs for the respondent. As Tunoi and Pall, JJ.A. agree, it is so ordered.

Dated and delivered at Nairobi this 27th day of June, 1997.

A. M. AKIWUMI
JUDGE OF APPEAL

JUDGEMENT OF TUNOI, J.A.

There is no need to repeat the facts which are related in detail in the judgment of Akiwumi, J.A. which I have had the advantage of reading in draft. I am in complete agreement with his reasoning and conclusions.

It is, I think, settled law that an ORDER OF PROHIBITION is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferiour tribunal, or a wrong decision on the merits of the proceedings - See HALSBURY'S LAWS OF ENGLAND, 4th Edition, Vol. 1 at pg. 37 Paragraph 128 and the decision of this court in Kenya National Examinations Council v Republic, Ex-parte: Geoffrey Gathenji Njoroge & Others. Civil Appeal No. 266 of 1996 (unreported).

Prohibition lies where there is a lack of jurisdiction and the proceedings in question are incomplete. A person against whom a non-existent jurisdiction is invoked may move at once for prohibition, without waiting until the tribunal decides for itself whether it has jurisdiction or not. I may also add that the existence of a right of appeal to the courts from a tribunal does not deprive the courts of power to grant an order of prohibition to restrain the tribunal from acting outside its jurisdiction. Nor, is the applicant for such an order obliged to have first exhausted other prescribed remedies of redress before having recourse to the courts of law: Judicial Review of Administration Action (2nd Edition) by Professor S.A. de Smith at page 436.

Suffice it to say, there cannot be a comprehensive list of acts in respect of which prohibition will issue, but to put it in the words of Atkin L J in the English case R v Electricity Commissioners, ex parte London Electricity Joint Committee Co. (1920) Ltd. [1924] 1 KB 171, 204, 205, prohibition may issue wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having a duty to act judicially exceeds its legal authority. An inferior tribunal is such an body of persons and it has a duty to act judicially. Such an inferior tribunal exceeds its legal authority when there is want or excess of jurisdiction or when it acts in breach of the rules of natural justice. For example, where the tribunal is without competence by reason of the status of the parties or the nature of the subject-matter there is a total want of jurisdiction. In such a case prohibition will issue if there remains something to be done which the court can prohibit.

In this instance, the Commissioner of Lands (the Commissioner), and the appellant herein, is the tribunal charged with the legal authority to determine questions affecting the respondent's rights as far as compulsory acquisition of its land and compensation for it are concerned. He derives his powers from the Land Acquisition Act (the Act). His jurisdiction being limited by the Act, he can do only those things which the Act has empowered him to do. His powers are expressed and cannot be implied. The respondent took objection to the Commissioner's want of jurisdiction immediately, and applied for the remedy of prohibition at once. The learned judge after hearing in detail rival submissions by the parties granted it. In the circumstances, I think, the order of prohibition was properly sought and granted.

In the case before us, it would appear that Ringera, J. issued the order of prohibition for two main reasons. Firstly, because Gazette Notices Numbers 5689 and 5690 of 4th November, 1993 were defective and invalid for the reason that they did not identify and neither did they disclose the public purpose to be served by such acquisition. Secondly, because there was a violation of the rules of natural justice by the Commissioner while conducting inquiry as to compensation under section 9(1) of the Act.

The respondent is the registered proprietor of the two pieces of land known as Plot Numbers 17600 and 17601/2 both in Tana River District measuring 4,386.4 and 5,181.6 hectares respectively. The respondent averred in the affidavit in support of the application for judicial review that it had planned a major acquacultural development on these plots and had before these proceedings already spent considerable sums of money upon capital and other developments. By Legal Notices Numbers 5689 and 5690 both dated 4th November, 1993, the Commissioner evinced an intention to cumpulsorily acquire the said two plots.

The Gazette Notices read as follows:-

"GAZETTE NOTICE NO. 5689

THE LAND ACQUISITION ACT
(Cap. 295)

INTENTION TO ACQUIRE LAND

IN PURSUANCE of section 6 (2) of the Land Acquisition Act, I give notice that the Government intends to acquire the following land for Tana River Delta Wetlands:

SCHEDULE

Plot No.	Locality	Approx. Area to be Acquired in Hectares
17600	Tana River District	4,386.4
17601/2	Tana River District	5,181.6

A plan of the affected land may be inspected at Ardhi House, 3rd Floor, Nairobi, during office hours.

Dated the 4th November, 1993.

WILSON GACANJA

Commissioner of Lands."

"GAZETTE NOTICE NO. 5690

THE LAND ACQUISITION ACT
(Cap. 295)

Inquiry

IN PURSUANCE of section 9 (1) of the Land Acquisition Act, I give notice that an inquiry shall be held on 30th December, 1993, at Ardhi House boardroom, 4th Floor, Nairobi, at 10 a.m. for hearing claims to compensation by persons interested in the following land:

SCHEDULE

Plot No.	Locality	Approx. Area to be Acquired in Hectares
17600	Tana River District	4,386.4
17601/2	Tana River District	5,181.6

Every person interested in the said land is required to deliver to me, not later than the date of the inquiry, a written claim to compensation.

Dated the 4th November, 1993.
WILSON GACANJA
Commissioner of Lands."

It was the respondent's submissions in the superior court as well as in this court that both these notices were defective and invalid in that "Tana River Delta Wetlands" for whom the plots were to be compulsorily acquired was neither a public body nor a purpose specified in section 6(1) of the Act.

The learned judge in a considered judgment held inter alia:-

> "As regards the adequacy and validity of the notice published under Section 6(2) I have come to the judgment that that notice should reflect the Minister's certificate to the Commissioner under Section 6 (1), and must accordingly include the identity of the public body for whom the land is acquired (emphasis mine) and the public interest in respect of which it is acquired. It is only when a notice contains such information that a person affected thereby can fairly be expected to seize his right to challenge the legality of the acquisition. That is because the test of the legality of the acquisition is whether the land is required for a public body for a public benefit and such purpose is so necessary that it justifies hardship to the owner. Those details must be contained in the notice itself for the prima facie (emphasis mine) validity of the acquisition must be judged on the content of the notice. The test must be satisfied at the outset and not with the aid of subsequent evidence."

The learned judge rejected the contention of counsel for the Commissioner that additional evidence and information subsequently gleaned from the material before the court can cure the defects apparent on the faces of the notices. The learned judge held that the notices did not identify the public body for whom the lands were being acquired and the public purpose to be served by such acquisition. He found the words "Tana River Delta Wetlands" to be a mere geographical-cum-ecological description. In the result, he granted the motion taken by the respondent and issued an order of prohibition directed to the Commissioner prohibiting him from continuing with an inquiry into claims for compensation under the Act pursuant to Gazette Notices Number 5689 and 5690. That provoked this appeal.

By its memorandum of appeal the Commissioner has averred that the learned judge erred in finding that the Notice under Section 6(2) must include the identity of the public body for whom the land is acquired. Mrs. Onyango, Deputy Litigation Counsel for the Commissioner, submitted that "Tana River Delta Wetlands" was not a geographical-cum-ecological description but was a public body for purposes of compulsory acquisition. The word "Wetlands", she averred, was an international term of art indicative of a water catchment area. A casual glance at the Notices shows that they had not specified the public body for which the plots in question were required. Further, no particular purpose for their compulsory acquisition was

stated. With these omissions, where is the basis for the Minister to conclude that the two plots are required for the purposes of a public body?

In this regard, it is worthy of note that the Commissioner had been notified by the respondent's then counsel that Gazette Notices Numbers 3590 and 3591 were defective since "Tana River Delta Wetlands" was not a public body nor a purpose specified in Section 6(1)(a) of the Act. Realising this grave error or omission he consented in Mombasa Miscellaneous Civil Application No. 201 to discontinue the inquiry under those Gazette Notices and to regazette the compulsory acquisition sought in the said Notices by fresh valid Legal Notices to be issued and served in accordance with the law. This, the Commissioner did not do. He instead published fresh invalid notices expressed in terms identical with the earlier rejected notices. I agree with the learned judge that the Commissioner or the author of the second bunch of notices was either downright incompetent or mischievous.

Compulsory acquisition of land is a serious matter causing hardship to the owner or proprietor of the land to be acquired. The Constitution recognises this by the enactment of section 75 thereof. Sub-section (1)(b) provides mandatorily that the necessity for compulsory acquisition of land should be such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property.

In the instant case, it is plainly clear that the Commissioner by the four Gazette Notices consciously and deliberately did not want to reveal the identity of the public body or persons to benefit from the compulsory acquisition of the plots the subject matter of this case. Moreover, he has not shown that the taking of possession or acquisition of these plots was necessary in the interest of public purposes as enumerated in Section 75 (1)(a) of the Constitution. I say so because nothing would have been simpler for him than to state in the Notices that the compulsory acquisition was for the Tana and Athi Rivers Development Authority for the development of the Wetlands or any other related public purpose. It was apparent during the proceedings in the superior court and in this appeal that the Commissioner is not so sure for what public body or purpose he wanted to compulsorily acquire these plots. He is still groping about in the dark for the reason and the purpose why he wants to compulsorily acquire them. As was said in Re: Kisima Farm Ltd [1978] KLR 36 which was correctly applied by the learned judge, Section 6 of the Act requires that the Minister be satisfied that the land to be compulsorily acquired is required for the purpose of a public body and where no public body or particular purpose as envisaged in the Act are shown in the notices the omission would constitute an absence of jurisdiction to acquire the land, and, consequently, an absence of jurisdiction in the Commissioner to act in pursuance of direction given in that behalf.

Certainly Tana and Athi Rivers Development Authority is not the only public body or authority charged with the management of Wetlands in Kenya. In 1971, in the Iranian City of Ramsar, a handful of countries signed an international treaty, the Convention on Wetlands, with the purpose of promoting the conservation and sustainable use of the habitat. Kenya became a signatory to the Convention in 1990. By a press release issued on 2nd February, 1997 during the World Wetlands Day, Kenya Wildlife Service claimed that it was appointed the implementing agency. Nothing was heard of the Tana and Athi Rivers Authority.

In my opinion, the Constitution and the enabling Act intended that the compulsory acquisition be treated with caution and the seriousness it deserves. The notices should comply with the relevant provisions of the Constitution and the enabling Act. The inquiry should also be conducted properly and according to law. In the result, I find that the Notices were defective and invalid, and; consequently, the inquiry was outside the area of jurisdiction of the Commissioner. Jurisdiction was wanting.

As to the complaint that there was a breach of the audi alteram partem rule, one only needs to look at the record of inquiry on 30th December, 1993 and on 28th February, 1994. The Chairman, Mr. Mwaniki, conducted the inquiry in a combative mood. He was extremely impatient. He had a duty to hear the respondent and/or its counsel on the objections. He did not hear them. Instead, he materially contributed to the errors giving rise to the application for judicial review. There was in my opinion a violation of the audi alteram partem rule.

I am satisfied that the learned judge came to a correct decision and his judgment cannot be faulted. I would dismiss this appeal with costs to the respondent.

Dated and delivered at Nairobi this 27th day of June, 1997.

P.K. TUNOI
JUDGE OF APPEAL

JUDGEMENT OF PALL J.A.

I have had the advantage of reading the draft judgment prepared by Akiwumi J.A. I agree with it. Still I think

that I should express my brief view in my own words as it is a matter of public importance. Two questions arise for the decision in this appeal namely:-

1. whether the Gazette Notices No.5689 and 5690 of 4th November, 1993 are defective and invalid and whether they are so incurably defective that the Commissioner of Lands or whosoever conducted inquiry under s.9(3) of the Land Acquisition Act (the Act) lacked jurisdiction and

2. whether the persons who embarked upon the said enquiry were authorised to do so.

There is no dispute that under s.75(1) of the Constitution of Kenya no property of any description can be compulsorily taken possession of and no interest in or right over property of any description can be compulsorily acquired unless the following conditions are satisfied:-

(a) The taking of possession or acquisition is necessary for one of the public purposes therein mentioned (b) the necessity is such as to afford reasonable justification for the causing of hardship that may result to any person having interest in or right over that property, and (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

There is also little doubt that the above mentioned constitutional requirements led to the enactment of the said Land Acquisition Act.

Under s.6(1) of the Act where the Minister is satisfied that any land is required for the purposes of a public body and that it is necessary for the accomplishment of one of the public purposes therein set out and that the necessity thereof is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land and so certifies in writing to the Commissioner of Lands, he may in writing direct the Commissioner to acquire the land compulsorily.

Under s.6(2) of the Act on receiving a direction under S.6(1) the Commissioner shall cause a notice that the Government intends to acquire the land to be published in the Gazette and shall serve a copy of the notice on every person who appears to him to be interested in the land.

By a special issue of the Kenya Gazette dated 5.11.1993, the Commissioner of Lands published the said Gazette Notices No.5689 and 5690 both dated 4th November, 1993.

Gazette Notice No.5689 reads as follows:

"Land Acquisition Act

(Cap. 295)

Intention To Acquire Land.

IN PURSUANCE of section 6(2) of the Land Acquisition Act, I give notice that the Government intends to acquire the following land for Tana River Delta Wetlands:

SCHEDULE

Plot No.	Locality	Approx. Area to be Acquired in Hectares
17600	Tana River District	4,386.4
17601/2	Tana River District	5,181.6

A plan of the affected land may be inspected at Ardhi House, 3d Floor, Nairobi during office hours.

Dated 4th November, 1993.

WILSON GACANJA
Commissioner of Lands"

By the other notice the Commissioner notified that an inquiry shall be held on 30th December, 1993 at Ardhi House boardroom 4th Floor Nairobi at 10 a.m. for hearing claims to compensation by persons interested in the aforesaid two plots.

The inquiry commenced but on the fourth day of inquiry, the exparte respondent Coastal Aquaculture Ltd applied for leave to apply for judicial review seeking an order of prohibition directed against the Commissioner of Lands and or Mr. Mwaniki the Chairman of Inquiry prohibiting him from commencing or continuing with the inquiry pursuant to the said Gazette notices. Additionally or alternatively an order of mandamus was sought in order to compel the Commissioner of Lands to conduct the Inquiry in accordance with the provisions of the Act and the rules of natural justice. Some other consequential orders were also sought but they are not necessary to be set out for the purposes of this appeal. The application for leave was followed by a notice of motion under Order 53 r 3(1) of the Civil Procedure Rules.

Ringera J. heard the notice of motion and held that the Commissioner of Lands lacked jurisdiction to commence or continue with the inquiry and that Gazette Notice No.5689 and 5690 were defective and invalid as they did not identify the public body for whom the land was being acquired and the public purpose to be served by such acquisition. That decision of the learned Judge is

subject matter of this appeal.

I agree with the learned Judge that for a successful compulsory acquisition, the requirements of the Constitution and of the Act must be strictly complied with and that if there is full compliance with the law, compulsory acquisition cannot be interfered with.

I also agree with the learned Judge that s.75 of the Constitution provides protection and safeguards to the owner of the land sought to be compulsorily acquired against and arbitrary acquisition of his property. Before the Minister decides to compulsorily acquire a land he must be satisfied that (a) the land is required for the purposes of a public body (b) the acquisition is necessary in the interest of one of the public purposes specified in s.75(1)(a) of the Constitution and (c) the necessity for the acquisition outweighs the hardship to the owner. The Minister, if satisfied about these preconditions, so certifies in writing to the Commissioner and directs him to acquire the land compulsorily. The Commissioner then publishes the Gazette Notice under s.6(2) of the Act and serves a copy of the notice on every person who appears to him to be interested in the lands. Upon publication of the notice the process of acquisition is virtually complete apart from assessment and payment of compensation and the right of appeal under s.75(2) of the Constitution.

The person having interest in the land, is entitled to the right of direct access to the High Court in order to challenge the legality of the taking possession by the Commissioner or acquisition of his land, if he so wishes. Unless the notice or acquisition reflects the necessary ingredients of the Minister's certificate, the person interested in the land has no means of knowing whether the Minister's direction to acquire the land compulsorily is justified or not. I, therefore, agree with the learned Judge that in order to give concrete meaning to the aforesaid constitutional safeguards and protection, the notice of acquisition under s.6(2) of the Act must reflect the material contents of the Minister's certificate. In other words the Gazette notice must disclose the name of the public body for whom the land is being acquired and the public purpose for which it is being acquired. If it fails to do so, it is ultra vires the provisions of the Constitution and the Act. Consequently the Commissioner or the other person or persons appointed by the Minister to conduct the inquiry under s.9(3) of the Act shall not have jurisdiction to inquire. I am of the view that Re Kisima Farm Ltd (1978) K.L.R. 36 is good law.

The Gazette Notice No.5689 in the instant case merely stated that the land was being acquired "for Tana River Delta Wetlands". That description alone cannot identify the public body and the purpose for which the land was being acquired.

There was subsequent evidence in the course of the enquiry that the land was required for the development and conversation of the Tana River Delta Wetlands by the Tana and Athi Rivers Development Authority (TARDA). But as Ringera J following Hancox J, as he then was, in Re Kisima case (supra) said "the test must be satisfied at the outset and not with the aid of subsequent evidence". I therefore agree that the Gazette notice or acquisition must of necessity disclose necessary information to justify the compulsory acquisition of land. As neither of the aforesaid notices contained that information, I agree with the learned Judge that they are defective and inoperative. In the case of an invalid and materially defective notice of acquisition, the Commissioner cannot hold inquiry under section 9(1) of the Act for the hearing of the claims to compensation by persons interested in the land. He has no jurisdiction to do so.

Our Act is similar in most respects to the English Acquisition of Land (Authorisation Procedure) Act 1946. Halsbury's Laws of England 3rd Edition volume 10 at p.38 says:

> "Advertisement following the prescribed form must..... describe the land and must state the order that has been made....., the purpose for which the land is required, the place where a copy of the order and map may be inspected and the time (not less than 21 days from the publication for and the manner of making objections (underscoring provided)".

Having come to the conclusion that the Commissioner did not have jurisdiction to hold the inquiry under the Act, I do not consider it necessary to discuss whether the person or persons who embarked upon the inquiry under s.9(3) of the Act were authorised to do so. Whether or not they were properly authorised by the Minister to exercise the powers conferred upon the Commissioner in accordance with s.2 of the Act, if the Gazette notices were defective no such inquiry can be possibly held.

Finally I do not see any merit in the appeal and the same is dismissed with costs.

Dated and delivered at Nairobi this 27th day of June 1997.

G. S. PALL
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

Section 5

Precautionary Principle

R v SECRETARY OF STATE FOR TRADE AND INDUSTRY EX PARTE DUDDRIDGE

(UNITED KINGDOM QUEEN'S BENCH DIVISION, FARQUHARSON LJ AND SMITH J, 4 OCTOBER 1994)

THE JUDGEMENTS

The following Judgements were given:

SMITH J: This is an application for judicial review of the decision of the Secretary of State for Trade and Industry whereby he declined to issue regulations to the National Grid Company plc and/or other licence holders under the Electricity Act 1989 so as to restrict the electromagnetic fields from electric cables which are being laid or are to be laid as part of the national grid. The application is brought on behalf of 3 children who live in South Woodford, an area of North East London where the National Grid Company is presently laying a new high voltage underground cable between Tottenham and Redbridge. The applicants allege that the non-ionising radiation which will be emitted from these new cables when commissioned, which will enter their homes and schools, will be of such a level as will or might expose them to a risk of developing leukaemia. They say that the Secretary of State should issue regulations which would remove any such risk.

By their application they seek an order to compel him to issue regulations, guidelines or some other directive to licence holders so as to ensure that the electromagnetic fields from electric cables to be laid as part of the national grid do not exceed (i) 0.2 micro-teslas at the nearest point of houses adjoining the cables; or (ii) some other level at which, on current research, there is no evidence to suggest or otherwise hypothesise any possible risk to the health of those exposed to such fields. Alternatively, they seek an order of mandamus to oblige the Secretary of State to advise the Crown to issue such regulations, guidelines of other form of directive. In the further alternative, they seek a declaration that, in refusing to issue such regulations, guidelines or directives, the Secretary of State has failed to comply with his duty under s 3 of the Electricity Act 1989.

Leave to move for judicial review was granted by Schiemann J who also made an order for expedition. Also before the Court is the National Grid Company plc, who appear as a Party Directly Affected.

Behind this application lies the concern of residents of South Woodford, particularly those who are the parents of young children, who saw a BBC Panorama television programme transmitted on 31 January 1994. The programme discussed a number of epidemiological studies which examine the possible connection between exposure to high levels of non-ionising radiation in the electromagnetic fields (EMFs) created by high voltage electric cables and the incidence of childhood leukaemia. To the non-expert, some of these studies might appear to suggest that children who have substantial exposure to EMFs from high voltage cables passing near their homes face a three to fourfold (or even possible sixfold) increased risk of developing leukemia. However, as has been readily accepted by counsel appearing for the applicants, the study of the effects of EMFs by epidemiology is fraught with difficulty and the results of these studies, when expertly evaluated, do not allow, let alone require, any such positive or alarming conclusions to be drawn.

Understandably, the programme caused anxiety in the minds of the residents and parents of South Woodford. Some of them formed an action group and on 15 February 1994 wrote to the National Grid Company seeking information, inter alia, about the levels of radiation which would be emitted from the cables then being laid near their homes, when those cables were energised. On 27 February, the National Grid Company provided the information requested from which the action group perceived that their children would indeed be exposed to levels of non-ionising radiation well in excess of the average domestic level. The action group took the view that their children might be at risk of leukaemia if the cables were commissioned in the manner intended.

The action group had by this time taken legal advice and on 15 March 1994 their solicitor wrote to the Secretary of State asking him to lay down regulations to cover the alleged danger to health arising from the installation of these cables. They urged him to take 'a precautionary view' of the risk of damage to health. They warned him that, if he refused, they would commence an application for judicial review. On the same day their solicitor wrote to the National Grid Company, asking it to take voluntary measures to reduce the levels of EMF exposure or

alternatively to stop work until the issue had been resolved. No reply was received from the company. On 28 April, the of State replied to his letter saying that he had never regarded it as necessary or appropriate to take specific measures to limit EMFs to protect the public from the possibility of a very small risk of cancer. He had reconsidered the matter in the light of the group's recent letter and application for judicial review. He adhered to his previous opinion and would oppose the application.

Hence this application comes before the court. However, it is important to make clear at the outset that it is not the function of this court to decide whether there is in fact an increased risk of leukaemia from exposure to high levels of EMFs. Still less is it for the Court to decide whether these applicants will be at any such increased risk. This court appreciates that the parents of these children are deeply concerned about these issues and it is not through any lack of sympathy with that concern that the court must decline to decide them. The only issue before the court is whether the Secretary of State, in declining to take specific measures to limit the level of EMFs, has acted unlawfully.

Before summarising the arguments advanced by the parties, it is necessary to set out the statutory framework in order to examine the Secretary of State's duty and the extent of his discretion. Section 3(3) of the Electricity Act 1989 (the 1989 Act) provides that:

> Subject to subsections (1) and (2) above, the Secretary of State...shall...have a duty to exercise the functions assigned to him by this Part in the manner in which he considers is best calculated
>
> .....
>
> (a) to protect the public from dangers arising from the generation, transmission or supply of electricity.

One of the functions assigned to the Secretary of State is the power to make regulations relating to supply and safety under s 29 of the 1989 Act. Section 29(1) provides that:

> The Secretary of State may make such regulations as he thinks fit for the purpose of-
>
> .....
>
> (b) protecting the public from dangers arising from the generation, transmission or supply of electricity, from the use of electricity supplied or from the installation, maintenance or use of any electric line or electrical plant; and
>
> (c) without prejudice to the generality of (b) above, eliminating or reducing the risks of personal injury, or damage to property or interference with its use, arising as mentioned in that paragraph.

The Electricity Supply Regulations 1988 (as amended in 1990, 1992 and 1994) were made under prior legislation but, by virtue of para 3 of Sch 17 to the 1989 Act, take effect as if made under s 29 of that Act. The 1988 Regulations as amended do not contain specific measures to limit EMFs.

It is clear that the statutory scheme requires the Secretary of State to judge whether there exist any dangers' or risks of personal injury and whether he ought to exercise his power to make regulations under s 29. The provisions confer a wide discretion upon him. In order to make that judgement, he must of necessity rely upon advice given to him by experts.

The applicants argue that, in considering the issue whether there exist any dangers or risks of personal injury from EMFs, the Secretary of State has approached the matter in the wrong way. They submit that he has asked himself whether there is evidence that exposure to EMFs does in fact give rise to a risk of childhood leukaemia. Because, as we shall see, the scientific evidence does not establish that is such a risk, he has concluded that he need not use his power under s 29 of the 1989 Act to regulate exposure to EMFs. They say the proper approach would be to ask himself whether there is any evidence of a possible risk even though the scientific evidence is presently unclear and does not prove the causal connection. They submit that if he had asked the question in that way, pitching the threshold for action at a lower level of scientific proof, the answer would have been 'yes' and he would then have been obliged to make regulations. They say that he is required to apply that lower threshold either as an obligation of European Community law or under the policy of the present Government, as set out in a White Paper of 1990 entitled 'This Common Inheritance'. As something of an after-thought and in reliance upon an Australian authority to which I shall later refer, they submit that as a matter of common sense, the Secretary of State was bound to apply the lower threshold for action. They say that this error of approach leaves his decision not to issue regulations open to challenge by judicial review.

The basis of the Applicant's argument in favour of the lower threshold of scientific proof, is that, either under Community law or under the policy of the White Paper or as a matter of common sense, the Secretary of State is obliged to apply what is known as the precautionary principle, when considering whether he is to take action under s 29 for the protection of human health.

There is, at present, no comprehensive and authoritative definition of the precautionary principle. It is an expression which has in recent years been used in a number of international declarations, conventions and treaties, to some of which the United Kingdom is a party. These include the Treaty of European Union, the Maastrict

Treaty. In none of these documents is the principle comprehensively defined, although often the document describes what the principle is intended to mean in the context of the subject matter concerned.

The applicants referred us first to the description of the principle adopted by Australia's 1992 Inter-Governmental Agreement on the Environment, which states that:

> where there are threats of serious of irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the Precautionary Principle, public and private decisions should be guided by:
>
> (i) careful 'evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
>
> (ii) an assessment of the risk-weighted consequences of various options.

Second, we were referred to a passage in the report of a decision of Stein J in the Land and Environment Court of New South Wales in the case of *Leatch v National Parks and Wildlife Service and Shoalhaven City Council 81 LGERA 270.* After noting that reference is made to the precautionary principle in almost every recent international environment agreement and after quoting several slightly different formulations of the principle from a variety of sources including the Intergovernmental Agreement cited above, at page 282, Stein J said:

In my opinion the precautionary principle is a statement of commonsense and has already been applied by decision makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists, concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision makers should be cautious.

It appears to me, from both of those formulations, that the principle is primarily intended to avoid long term harm to the environment itself rather than damage to human health from transitory environmental conditions. However, as we shall see, in some circumstances, the principle has been declared to be applicable for the purpose of safeguarding human health. Although it does not appear to me that either formulation of the principle supports their contention, the applicants submit that the principle requires that precautionary action be taken where the mere possibility exists of a risk of serious harm to the environment or to human health. Where this possible risk exists, a cost-benefit analysis must be undertaken so as to determine what action would be appropriate. Thus, application of the principle in this case would require the Secretary of State to conduct a cost-benefit analysis to ascertain what action could be taken and at what cost so as to reduce any possible risk to health from exposure to EMFs. This would have to be done, even though the scientific evidence does not show that the risk to health actually exists. The Secretary of State has not done this and, say the applicants, this failure vitiates the exercise of his discretion and renders his decision open to challenge.

In response, the Secretary of State argues that he has given careful consideration to his duties under the Electricity Act. He has considered the scientific evidence available and has taken advice from a special Advisory Group of the National Radiological Protection Board (NRPB) under the chairmanship of the very eminent epidemiologist Sir Richard Doll. This Group comprises highly qualified scientists who have exhaustively considered whether there is any evidence of adverse health effects from exposure to EMFs. In reliance upon their advice, which he has accepted, the Secretary of State has concluded that it is neither necessary nor appropriate to take the specific measures contended for by the applicants. As to the precautionary principle, the Secretary of State says that he is under no obligation of EC law to apply it. In so far as the present Government adopted as policy a version of the precautionary principle in their 1990 White Paper, the Secretary of State claims that he has acted in accordance with that policy. He also contends, in response to the applicants' third contention, that he is not required to apply the precautionary principle to his consideration of s 29 a matter of common sense.

The National Grid Company supports the submissions of the Secretary of state. I turn now to consider briefly the nature and content of the scientific evidence of the connection between exposure to EMFs and the incidence of childhood leukaemia.

The possibility of the existence of a connection between childhood cancer and EMFs was first raised in 1979. Since that time eleven epidemiological studies have been published, most of which suggest the possibility of a link between exposure to EMFs and leukaemia. It is common ground that the early studies were unsatisfactory, in that the methodology was seriously flawed. There are real difficulties in measuring or assessing the extent of the subjects' exposure. The more recent studies, which emanate from Scandinavia, are said to be more reliable in that the methodology is improved, but the numbers of cases studied are very small and many of the results do not carry statistical significance. More research is needed and is presently in progress.

It is not necessary for the purposes of this judgement to examine the epidemiological studies themselves. They have been expertly evaluated by two experts on behalf of the applicants. The conclusions of the Advisory Group,

who have also examined the studies and reports of experimental work, are set out in various reports from which it is only necessary to quote brief extracts.

At para 17 of this affirmation dated 8 June 1994, Dr. J.A. Dennis, a former member of the NRPB who has advised the applicants in the present proceedings, summarises the combined effect of the epidemiology so far published in this way: 'The totality of the scientific evidence points to the weak possibility that prolonged exposure to power frequency magnetic fields, while not a direct causal factor in inducing human leukaemias, may enhance the risks of these cancers especially in young children when acting in conjunction with other social and environmental factors. The degree of this enhancement for prolonged exposure to fields in excess of 100 to 300 nanoteslas may be about 1.5 to 4.'

Pausing there, it is necessary to explain that the nanotesla and the microtesla are the usual units of measurement of EMFs. A microtesla is equivalent to 1000 nanotesla. Ordinary domestic exposure is said to be in the range of 30 to 150 nanotesla. The children of South Woodford will, according to the figures provided by the national Grid Company, be exposed to fields well in excess of 300 nanotesla, possibly as much as 3,740 nanotesla or 3.74 microtesla. Dr. Dennis also expressed the opinion that:

> ....if there is a real risk of enhancement of the incidence of human leukaemias by prolonged exposure to magnetic fields, it is not possible to say that there are threshold levels below or above which the enhancement would not occur. Such epidemiological evidence as exists indicates that the enhancement increases progressively with the intensity of the field.

He concluded:

> The question as to what level magnetic fields should be reduced must depend on a detailed cost-benefit analysis. In view of the wide range of sources of magnetic fields and their benefits to society it will probably to be possible to determine a simple value [sic].

In his review of the epidemiological studies published to date, Professor Scott Davies, the other expert relied on by the applicants, concludes by saying: 'Thus on balance it is my judgement that at present it is not possible to conclude with certainty that residential EMF exposure causes leukaemia in childhood. In other words, I do not believe that a causal relationship has yet been established. Nevertheless it is also my judgement that the most important criteria of causation... have largely been met: strength of association, temporality, biological gradient and to a fair degree consistency. Thus, in my judgement that such exposures may increase the risk of childhood leukaemia cannot be dismissed, given the current evidence. Furthermore, it is my opinion that the epidemiological evidence to date is more consistent with the possibility that residential EMF exposure increases the risk of childhood leukaemia than with the possibility that there is no association between the two.'

Those two expressions of opinion summarise the applicants' case that there is an increased risk of developing cancer from exposure to EMFs. Neither opinion, it will be observed, suggests that a causal link has yet been established between EMFs and cancer. Neither supports the applicants' claim for the limitation of EMFs to 0.2 microtesla or indeed any particular level.

The Advisory Group of the NRPB which has advised the Secretary of State has reached slightly different conclusions. The Group has reported on several occasions during the past 2 years. In 1992, after reviewing the experimental and epidemiological data concerning the possibility that electromagnetic fields might be a cause of cancer, the Group concluded that:

> the epidemiological findings...provided no good evidence of a cancer risk, to either children or adults, from normal levels of power frequency electromagnetic fields. The experimental evidence strongly suggested that these radiations did not harm genetic material and so would not initiate cancer. The only possibility was that they might act as promoters, that is, they might increase the growth of potentially malignant cells. The epidemiological evidence for such an effect was however, weak, with the least weak evidence pointing to the possibility of causing tumours of the brain. In the absence of unambiguous experimental evidence to suggest that exposure to these EMFs was likely to be carcinogenic, the findings could be regarded only as sufficient to justify formulating a hypothesis for testing by further investigation.

In March 1993 the Advisory Group published a summary of its views on the studies published since their 1992 Report. They considered three new studies relating to occupational exposure to EMFs but said that these produced conflicting and inconclusive results. Two recently published Scandinavian residential studies were also reviewed. The Group considered:

> ....that these studies were well controlled and substantially better than those that previously reported associations with childhood cancer. However, the new studies report few cases. They do not establish that exposure to electromagnetic fields is a cause of cancer, although they provide weak evidence to suggest the possibility exists. The risks would however be small. In the absence of any convincing experimental support, the Group stresses the urgent need for epidemiological studies based on objective measurements of exposure to electromagnetic fields and the need to investigate further the basis for any interactions of environmental levels of electromagnetic fields within the body.

They concluded:

> The views of the Advisory Group have been noted in the formulation of restrictions on human exposure to EMFs developed by the Board (that is the NRPB), although at present epidemiological studies do not provide an effective basis for quantitative restrictions on exposure to electromagnetic fields.

Later that year, in the 1993 Board statement, The Group said:

> It can be concluded from these reviews that there is no clear evidence of adverse health effects at the levels of electromagnetic fields to which people are normally exposed. In particular, the epidemiological data do not provide a basis for restricting human exposure to electromagnetic fields and radiation....

In 1994 the Group's most recent conclusion was that:

> The studies do not establish that exposure to electromagnetic fields is a cause of cancer but, taken together, they do provide some evidence to suggest that the possibility exists in the case of childhood leukaemia. The number of affected children is however very small.
>
> Experimental studies to date have failed to establish any biological plausible mechanism whereby carcinogenic processes can be influenced by exposure to the low levels of EMFs to which the majority of people are exposed.

They continue:

> Thus at present, there is no persuasive biological evidence that ELF (extremely low frequency) electromagnetic fields can influence any of the accepted stages of carcinogenesis. There is no clear basis from which to derive a meaningful assessment of risk, nor is there any indication of how any putative risk might vary with exposure.

The Group stresses the urgent need for large and statistically robust studies based on objective measurements of exposure.

It will be seen that there is not a great difference of opinion between the experts who have provided advice to the Secretary of State and the experts who have advised the applicants in these proceedings. The NRPB Advisory Group accepts that there is a possibility of a connection between EMFs and childhood leukaemia. They see the need for further research. But they regard the connection as biologically implausible and they see no basis for placing a quantitative restriction on human exposure to EMFs. The applicants accept that unless the Secretary of State is bound to apply the precautionary principle, his acceptance of the advice that there is no basis on which to restrict human exposure to EMFs and the consequent exercise of his discretion to decline to issue regulations or other directives cannot be impugned by judicial review. Still less, in the light of the advice, could there be any basis for criticising his refusal to restrict exposure to O2 microtesla or indeed to any other specific level.

The Applicants submit however, that if the Secretary of State is under a duty to take account of the precautionary principle when considering his duties under the 1989 Act, the basis for its application is laid, even on the advice given by the NRPB. That is so because the NRPB has advised that there is a possibility that there exists an increased risk of leukaemia from exposure to EMFs. That submission appears to me to be correct, especially now that the Secretary of State is aware of the levels of EMFs to which these applicants will be exposed when the Tottenham to Redbridge cable is energised. No challenge was offered to the applicants' calculation, based on National Grid Company data, that some residents could be exposed to as much as 3.74 microtesla or 3740 nanotesla. The effects of this level of exposure are not known but the exposure is significantly greater than the ordinary domestic levels of exposure, of up to 150 nanotesla. I am prepared to accept that, if the Secretary of State is shown to be under a legal obligation to apply the precautionary principle to legislation concerned with health and the environment, the possibility of harm raised by the existing state of scientific knowledge is such as would oblige him to apply it in considering whether to issue regulations to restrict exposure to EMFs. He would at least in my view be obliged to conduct the cost-benefit analysis necessary for the proper application of the principle. The Secretary of State accepts that he has not considered the precautionary principle, except to the limited extent required by the policy set out in the 1990 White Paper. If he were to be under an obligation to apply the principle, I would be in favour of granting relief limited to requiring the Secretary of State to reconsider the need for the regulation of EMFs in the light of that principle.

Before turning to consider whether the Secretary of State is obliged by EEC law to apply the precautionary principle, it is convenient to deal with the applicants' other submissions.

The 1990 White Paper 'This Common Inheritance' Cm 1200 was presented to Parliament as a statement of Britain's environmental strategy by several Secretaries of State including those for the Environment, Health and Trade and Industry. It explained that the foundation of Government policy was the ethical imperative of stewardship which should underlie all environmental policies. Mankind, as custodian of the planet, has a duty to look after the world prudently and conscientiously. This entailed a responsibility to future generations to preserve and enhance the environment. It continued at para 1.15: 'In order to fulfil this responsibility of stewardship, the Government has based the policies and proposals in this White paper on a number of supporting principles. First,

we must base our policies on fact not fantasy, and use the best evidence and analysis available. Second, given the environmental risks, we must act responsibly and be prepared to take precautionary action where it is justified. Third, we must inform public debate and public concern by ensuring publication of the facts. Fourth, we must work for progress just as hard in the international arena as we do at home. And fifth, we must take care to choose the best instruments to achieve our goals.' It continued:

> We must act on the facts and on the most accurate interpretation of them, using the best scientific and economic information.
>
> That does not mean we must sit back and wait until we have 100% evidence about everything. Where the state of our planet is at stake, the risks can be so high and the costs of corrective action so great, that prevention is better and cheaper than cure. We must analyse the possible benefits and costs both of action and inaction. Where there are significant risks of damage to the environment, the government will be prepared to limit the use of potentially dangerous materials or the spread of potentially dangerous pollutants, even where scientific knowledge is not conclusive, if the balance of likely costs and benefits justifies it. This precautionary principle applies particularly where there are good grounds for judging either that action taken promptly at comparatively low cost may avoid more costly damage later, or that irreversible effects may follow if action is delayed.

As with the precautionary principle itself, it appears to me that this policy is intended to protect the environment itself and is not intended to apply to damage to health caused by environmental factors unless those factors are or might in themselves be damaging to the environment in the long term. However, the Secretary of State has accepted that the policy does apply to cases such as the present and he claims that he has acted in accordance with it.

The applicants submit that the White Paper has misunderstood the precautionary principle. They observe that it seeks to set the threshold for action where a significant risk of damage arises, whereas, say the applicants, the precautionary principle requires action as soon as any possible risk is demonstrated. As I have already said, there is no single authoritative definition of the principle and the none of formulations we have seen is couched in the very wide terms contended for by the applicants. In any event, this argument appears to me to be of no relevance. If the Government announces a policy which it intends to adopt without being under any obligation to do so, it must be entitled to define the limits of that policy in any way it wishes. If the Government says it will apply a precautionary policy when it perceives a significant risk of harm, it must, in my view, be entitled to apply that threshold for action. The Secretary of State says that he has considered the need for regulations in the light of this policy and has concluded that such are neither necessary nor appropriate. In my judgement, on the basis of the advice he has received, his conclusion that there is no significant risk of developing cancer from exposure to EMFs cannot be impugned as wholly unreasonable or perverse.

The applicants' third submission, that the Secretary of State should apply the precautionary principle as a matter of common sense and reasonableness was not argued with any great vigour by Mr. Beloff QC who appeared for the applicants. It did not feature in either the original or amended versions of his most helpful skeleton argument. I think it is not unfair to him to suggest that it occurred to him as a possible argument as he read to the Court the above citation from the judgement of Stein J in Leatch. Even if Stein J were purporting to make a general statement that the precautionary principle is of universal application on the ground that it comprises common sense, his statement would not be binding on this court although it would, of course, command respect. However, Stein J's reference to the principle as a statement of common sense was made in the context of his refusal to decide whether the principle (as enunciated in the 1992 Convention on Biological Diversity, which Australia had ratified and the scope of which was directly relevant to the case in point) had been imported into domestic law. He said he need not decide that issue as the precautionary principle was a statement of common sense. But the statute under consideration, the National Parks and Wildlife Act 1974 (NSW) permitted the Court to take into consideration any other matter which the court considers relevant. It is clear from the judgement that Stein J regarded the precautionary principle or what I have stated this may entail to be relevant to the issues of preservation of fauna which were then under consideration. He had the power to take it into account and he chose to do so. The decision is of no relevance in English law and in any event gives no support for the proposition that or any other decision-maker is obliged to take the principle into account in all decisions involving environmental or health considerations. I find the proposition that the Secretary of State's decision may be impugned on Wednesbury grounds, because he has failed to apply the principle under the dictates of commonsense to be a startling proposition and I have no hesitation in rejecting it.

It follows that this application can only succeed if the applicants satisfy the court that the Secretary of State is under a duty imposed by EC law to apply the precautionary principle.

The applicants' argument is based on art 130r of the EC Treaty as amended by the Treaty of European Unity, the Maastrict Treaty, which came into effect in November 1993. They submit that art 130r is binding on Member States and that the Secretary of State must therefore con-

sider his powers and duties under the 1989 Act in the light of the duties imposed by art 130r. It is common ground that some articles of the Treaty have direct effect and confer personal rights on individual citizens of the Community. Other articles impose an immediate duty of compliance upon Member States. Others impose no obligation at all unless and until the Community, acting through its institutions, promulgates a measure which imposes a binding obligation on Member States. It is necessary therefore to construe art 130r so as to decide into which category it falls. Article 130r, as amended, provides:

1. Community policy on the environment shall contribute to pursuit of the following objectives.

- preserving, protecting and improving the quality of the environment;

- protecting human health;

- prudent and rational utilisation of natural resources;

- promoting measures at international level to deal with regional or worldwide environmental problems.

2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies.

In this context, harmonisation measures answering these requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures for non-economic environmental reasons, subject to a Community inspection procedure.

3. In preparing its policy on the environment, the Community shall take account of:

- available scientific and technical data;

- environmental conditions in the various regions of the Community;

- the potential benefits and costs of action or lack of action;

- the economic and social development of the Community as a whole and the balanced development of its regions.

4. Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third Parties concerned, which shall be negotiated and concluded in accordance with Article 228.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.

In order properly to construe the effect of art 130r, it must be read together with art 130s and art 130t. Article 130s provides:

1. The Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 130r.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 100a, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee shall adopt:

- provisions primarily of a financial nature;

- measures concerning town and country planning, land use with the exception of waste management and measures of a general nature and the management of water resources;

- measures significantly affecting a Member State's choice between difference energy sources and the general structure of its energy supply.

The Council may, under the conditions laid down in the preceding subparagraph, define those matters referred to in this paragraph on which decisions are to be taken by a qualified majority.

3. In other areas, general action programmes seeking out priority objectives to be attained shall be adopted by the Council, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee.

The Council, acting under the terms of paragraph 1 or paragraph 2, according to the case, shall adopt the measures necessary for the implementation of these programmes.

4. Without prejudice to certain measures of a Community nature, the Member States shall finance and imple-

ment the environment policy.

4. Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, the Council shall, in the act adopting that measure, lay down appropriate provisions in the form of:

- temporary derogations and/or

- financial support from the Cohesion Fund...

Further, art 130t provides:

The protective measures adopted pursuant to Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission.

Finally, art 130r should be read subject to art 3b of the Treaty which contains what is known as the Subsidiarity clause and provides:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

My initial reaction to these provisions is that if the applicants submission be right that art 130r imposes an immediate obligation upon Member States, it would follow that since November 1993, Secretaries of State in several government departments and their counterparts in every other country within the Community, have been obliged to apply the precautionary principle to a wide range of legislation. That would entail the need to conduct cost-benefit analyses in respect of every known risk of damage to the environment and every known risk to human health from the environment. They would then be obliged to legislate in every case in which the cost-benefit analysis showed that action would be reasonable. All this would be obligatory as a matter of national initiative, in the absence of any definition of the precautionary principle and before any formulation of a coherent policy on the environment. I find quite remarkable the proposition that each state should be obliged to act alone on the basis of so general a statement of objectives and considerations.

Mr. Richards for the Secretary of State submits that when Article 130r is examined in context and in particular in the light of arts 130s and 130t, it can be seen that it lays down principles upon which Community policy on the environment will be based. It does not impose any immediate obligation on Member States to act in a particular way. For the reasons which follow, I accept Mr. Richard's submission.

First, it seems to me that the ordinary sense of the words of the Article itself shows that it is intended that a policy for the environment will be formulated at some future time. Paragraph 1 provides the objectives; para 2 is mainly concerned with the principles which will underlie the policy; and para 3 described some of the factors which must be taken into account.

Second, examination of art 130s reveals that it is the clear intention that the policy envisaged in art 130r shall be brought into effect by the introduction of measures by the various Community institutions. The Council will decide what action is to be taken. The Council, after consultation will adopt general action programmes setting out priority objectives. Some of those measures may well be binding on Member States, who will, in general, have to pay the costs of implementation. Whether the measure will be binding on Member States will depend upon the nature of the measure. Article 189, which describes the binding force of each type of measure, provides:

> In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

In my judgement it is plain from that recital of the varying effects of different types of measure that it is not intended that a statement of policy or, still less, a statement of the principles which will underlie a policy should in itself create an obligation upon a Member State to take specific action. It seems to me that in accepting the

provisions of Article 130r, a Member State has done no more than to indicate in advance its consent in principle to the formulation of a policy governed by the objectives there stated and to the introduction of measures designed to implement that policy. The status of the precautionary principle would appear to be no more than one of the principles which will underlie the policy when it is formulated.

Unless by other argument, the Applicants are able to cast doubt on the construction of art 130r contended for by Mr. Richards, I would not be prepared to hold that art 130r creates any obligation upon the Secretary of State to apply the precautionary principle to his consideration of his duties under s 3 of the 1989 Act.

The applicants have raised a number of other arguments in support of their contention. First they rely on art 5 of the Treaty of Rome which provides:

> Member States shall take all appropriate measures, whether general or particular to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

Mr. Beloff submits that this Article has been relied upon in a variety of situations to enforce compliance with Community obligations. He cited or referred to a number of cases but in my view they do not support his contention. The various cases (which include Case 45/76 Comet (1976) ECR 2043, Case 68/88 Commission v Greece (1989) ECR 2965 and Case C-2/90 *Commission v Belgium (1993)* 1 CMLR 365), to the detail of which I do not propose to refer, are merely examples of the way in which Article 5 has been relied upon to enforce an established obligation of EC law. None of them assists in determining whether a particular Treaty provision imposes a binding obligation. I conclude that art 5 is of no assistance to the applicants. It begs, but does not answer, the question as to whether art 130r creates an obligation on Member States.

A similar objection must be taken to Mr. Beloff's argument that s 2(2) of the European Communities Act 1972 imposes on the Secretary of State a duty to apply the precautionary principe. In my view, s 2(2) does no such thing. It empowers the Queen by Order in Council and Ministers or departments by regulation to implement Community obligations or to enable Treaty rights of the United Kingdom or its citizens to be enjoyed. It also provides that in the exercise of any statutory power or duty, including the power or duty to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligations and rights as mentioned. Section 2(2) empowers, enables and permits. It does not impose any duty and it does not assist in determining whether art 130r imposes obligations upon Member States.

Next, Mr. Beloff seeks to rely on the well-established principle that there is a duty upon the national courts of member states to interpret a national statute so as to accord with relevant Community law; see *Garland v British Rail (1983)* 2 AC 751, (1982) 2 All ER 402. Mr. Beloff seeks to extend this proposition to establish a duty on the Secretary of State to take the precautionary principle into account in considering the 1989 Act.

The argument comprises two propositions. The first is that there is a duty to interpret a national statute so as to accord with EC law. In fact, Garland dealt with the duty of the courts in that regard. Even assuming that there is a corresponding duty on Ministers to interpret their statutory powers and duties so as to accord with EC law, it does not follow that there is a duty to interpret national statutes in accordance with community policy as opposed to a Community obligation. In Garland, the European Court of Justice had held, on a reference from the House of Lords, that Article 119 of the Treaty conferred directly enforceable Community rights on individual citizens. Thus, it dealt with an obligation of Community law, not a statement of policy, still less a statement of principles to underlie a future policy.

The second proposition is that there is nothing which would prevent the Secretary of State from taking the precautionary principle into account when he considers his duties under the 1989 Act. Application of the principle to the 1989 Act would not in any way distort the Secretary of State's powers and duties to protect the public from harm. That proposition seems to me to be correct but the fact that the Secretary of State could, if he wished, lawfully apply the precautionary principle to the 1989, Act does not impose upon him a duty to do so.

Mr. Beloff has, as it appears to me, enunciated two correct propositions. However, in my judgement, the two propositions do not logically connect so as to impose a duty on the Secretary of State to apply the principles enunciated in art 130r. There is no obligation unless art 130r itself imposes one. We are back to the same question, but we have not been provided with an answer.

Next Mr. Beloff sought to rely on *Commission v Belgium (1993)* 1 CMLR 365 (the *Walloon Waste* case). In that case Belgium had forbidden the importation of waste into Wallonia. The Commission alleged inter alia that this was a breach of art 30, which prohibits restriction on the free movement of goods. Belgium argued that the restriction was justified on environmental and health grounds. At page 397, the Court held that:

> The principle that environmental damage should as a priority be rectified at source - a principle laid down by Article 130r(2) EEC for action by the Community relating to the environment - means that it is for each region, commune or other local entity to take appropriate measures to receive, process and dispose of its own waste. Consequently waste should be disposed of as close as possible to the place where it is produced in order to keep the transport of waste to the minimum practicable.

The Court held that Belgium's actions were consistent with the policy of art 130r. That decision does not in any way assist Mr Beloff to show that Belgium was under a duty to apply art 130r. It only established that if Belgium chose to do so and thereby contravened the requirement of art 30 not to restrict the movement of goods, that contravention would be justified.

Mr. Beloff also relied on the case of *London Borough's Transport Committee v Freight Transport Association Limited (1991)* 3 All ER 915, (1991) 1 WLR 828 in support of the proposition that art 130r imposed an obligation to act upon Member States. The reference to art 130r in Lord Templeman's speech, with whom all four other Lords of Appeal agreed, was a reference to the pre-Maastrict version of the Article, but nothing turns upon the differences between the two. Under their statutory power, one of the objects of which was the protection of the environment of Greater London, the appellants had made an order prohibiting the driving of goods vehicles over a certain weight in certain restricted streets during prescribed hours unless a permit had been issued. From 1 January 1988, all permits issues contained a condition requiring that the vehicle be fitted with an air brake noise level suppressor. The respondents argued that this condition was unlawful as being incompatible with certain Council Directives governing technical aspects of braking devices and permissible sound levels of vehicles.

The House of Lords held that the condition did not prohibit the use of vehicles on grounds relating to their braking devices or to their permissible sound levels. Therefore it did not conflict with the directives of those topics. It sought to regulate traffic in certain places and at certain hours for the purpose of protecting the environment. As such it was consistent with Community policy on the protection of the environment. Thus it was lawful under Community law.

The passage upon which Mr. Beloff relied is found at page 838E of the latter report where Lord Templeman says: ....the Council has issued 140 Directives prescribing technical requirements and safety and environmental standards for vehicles, their components and spare parts, so that national requirements and standards shall not infringe Article 30 or obstruct the free flow of goods and services throughout the Community. But paragraph 4 of Article 130r (which is predecessor of Arcticle 3b which now embodies the principle of subsidiarity) recognises that London's environmental traffic problems cannot be solved, although they can be ameliorated by Council Directives to control every vehicle at all times throughout the Community.

The attainment of the Community object of preserving, protecting and improving the quality of the environment requires action at the level of individual member states.

Pausing there it is upon that sentence Mr. Beloff relies as demonstrating that art 130r is intended to impose an obligation upon member states to act. The fallacy of his argument is clearly seen by continuing with Lord Templeman's speech. He goes on:

> A vehicle which complies with all the...technical requirements and standards of Directives issued by the Council…and is therefore entitled to be used...throughout the Community is not hereby entitled to be driven on every road, on every day, at every hour throughout the community. In the interests of the environment, the traffic authorities of Santiago de Compostela may ban all or some Community vehicles from medieval streets. The traffic authorities of Greater London may ban all or some Community vehicles from residential streets at night.

From this passage, it is clear that Lord Templeman was not suggesting that Article 130r imposed a duty upon Member States to protect their environment by regulating traffic or indeed by any other means. He was saying that art 130r permitted them to do so if they chose.

In my judgement, none of the cases cited to us by Mr. Beloff gives any support for the essential proposition that art 130r imposes upon Member States an immediate obligation to apply the precautionary principle in considering legislation relating to the environment or human health.

The Secretary of States's submissions are given support by the Resolution of the European Parliament passed on 5 May 1994 entitled 'Resolution on Combating the Harmful Effects of Non-ionising Radiation'. The Resolution took into account the precautionary principle included in art 130r; it recognised that the reports of harmful effects of EMFs were scientifically unconfirmed; it recognised the difficulties of interpretation of epidemiological studies and of establishing a relationship between dose and effect so as to quantify the effects of exposure. It then called upon the Commission to propose measures for the various technologies generating EMFs seeking to limit the exposure of workers and the public to such radiation. It expressed the view that corridors must be recommended for high tension transmission lines, within which there should be a ban on dwellings. It considered that any proposal to set up new transmission lines must be subjected to environmental impact assessment and

calls on the Commission to provide for this requirement in the next amendment of the relevant Directive. It called on the Council to issue recommendations to Member States with a view to the introduction of measures to protect the population in areas crossed by high tension lines. The premise upon which this resolution rests is that the development of Community policy in this field requires the adoption of specific measures to that end. No one suggests that a resolution of the European Parliament is itself binding upon Member States. That the European Parliament should have passed such a resolution is consistent with the Secretary of State's submission that art 130r does not impose an obligation to act of its own initiative before such time as regulations or directives are issued by the Council.

Mr. Richards submits that the status of the precautionary principle in art 130r is well summarised in a book edited by Tim O'Riordan and James Cameron (junior counsel for the applicants) entitled 'Interpreting the Precautionary Principle' to which we were introduced by Mr. Beloff. In a chapter written by Nigel Haigh, whose credentials are not stated but who we understand is not a lawyer, we find at page 237:

> Now that the Maastricht Treaty is ratified the precautionary principle will apply to a British Minister when, as a member of the Council, he contributes to the formulation of EC policy by agreeing the form of words in an item of EC legislation. The principle applies to Community policy and does not apply to any aspects of purely national policy which are not part of EC policy.

Mr. Beloff described Mr. Richards' reference to that passage as teasing. Perhaps it was. Certainly the book carries no great authority. The passage is of interest only in that it demonstrates the conclusion which an interested commentator had reached when considering the question other than in the course of litigation.

I have so far said nothing of the submissions of Mr. Newman, Leading Counsel for the National Grid Company, save that they supported those made on behalf of the Secretary of State.

Mr. Newman's first submission was to the effect that any proposal would be unrealistic which required the National Grid Company to abandon an installation which had cost $25 million and possibly even to shut down substantial sections of the national grid. His second was that any restriction upon the use of an electric cable which was already installed would be unlawful as being contrary to the principle of EC law that regulations should not have retrospective effect. In view of the conclusions which I have reached, it is not necessary for me to deal in detail with these submissions. I say only that I am not at present convinced that they are correct. In the field of health and safety, if the existence of danger is sufficiently well established, regulations have been made which have had far-reaching and very costly effects upon operators in the industries affected. The example of asbestos springs to mind. However, given the uncertain state of scientific knowledge about the effect of EMFs, it would be sterile to debate whether regulations could lawfully be imposed which applied to existing installations.

Of greater interest and assistance to the Court was Mr. Newman's reference to the recent judgement of the European Court of Justice in the case of Peralta, Case C-379/92, as yet unreported. Mr. Peralta, an Italian national and Master of a ship flying the Italian flag, had been prosecuted for discharging caustic soda into the sea outside Italian territorial waters. The relevant provision of Italian law prohibited the discharge of such substances within territorial waters by ships of any flag and also prohibited such discharges by Italian ships on the high seas. Mr. Peralta sought to argue that the relevant provision of Italian law was inconsistent with the principles of prevention referred to in art 130r and could therefore be challenged. In rejecting this submission on two grounds, the Court said at para 37, in respect of its second reason:

> Furthermore Article 130r confines itself to defining the general objectives of the Community in environmental matters. The responsibility for deciding upon the action to be taken is entrusted to the Council by Article 130s. Article 130t specifies, in addition, that the protective measures adopted in common pursuant to Article 130s shall not prevent any member state from maintaining or introducing more stringent protective measures compatible with the Treaty.

This statement of the effect of art 130r is entirely consistent with and supportive of the arguments advanced by the Secretary of State in the present case. Mr. Beloff contended that Peralta's case was concerned with the question of whether: art 130r had such qualities as made it directly effective as an EC provision in the Italian Courts and not with the question of whether it imposed an obligation on Member States. It appears to me that para 57 answers both questions in the negative and provides direct support to the Secretary of State's submissions.

Finally, Mr. Newman relied upon art 35, the subsidiarity provision, as supporting the contention that art 130r does not impose an obligation on Member States to legislate in the light of the precautionary principle or any other principle set out in the Article. Mr. Newman submits that the Community policy on the environment is not or will not be an area which is reserved for the exclusive competence of the Community. Thus, under the principle of subsidiarity, it is open to Member States to take such steps by way of legislation as they think right in connection with environmental and health issues until such time as the Community, acting through its institutions, pro-

duces a harmonising measure, such as a directive or regulations to give effect to the Community policy on the environment, which by that time will have been formulated. Mr. Richards expressly associated himself with Mr. Newman's submissions on this point. This proposition appears to me to be correct. It makes sense of the rather difficult language of art 3b and it is consistent with the Secretary of State's other submissions which I have already indicated I regard as being well-founded.

For the several reasons which I have outlined, I have reached the clear conclusion that art 130r does not impose an obligation upon the Secretary of State to consider his duties under the 1989 Act in the light of the precautionary principle. It follows that the applicants have failed to show any ground upon which the Secretary of State's refusal to issue regulations may be impugned. It will not therefore be necessary to consider any form of relief.

FARQUHARSON I.J.: I agree and, for the reasons given in the judgement just delivered, this motion is dismissed.

PLD 1994 SUPREME COURT 693

PRESENT: NASIM HASAN SHAH, C.J.,
SALEEM AKHTAR AND MANZOOR HUSSAIN SIAL, JJ

MS. SHEHLA ZIA AND OTHERS — PETITIONERS

v.

WAPDA — RESPONDENT

HUMAN RIGHTS CASE NO. 15-K OF 1992,
HEARD ON 12 FEBRUARY, 1994.

(Environmental pollution — Installation of Grid Station/cutting of trees)

(a) **Constitution of Pakistan (1973) —-**

— Arts. 184(3), 9 & 14 — Public interest litigation — Human rights — Apprehension of citizens of the area against construction of grid station by authority — Supreme Court, on receipt of letter from citizens in that respect, found that the letter raised two questions namely whether any Government agency had a right to endanger the life of citizens by its actions without the latter's consent and whether zoning laws vest rights in citizens which would not be withdrawn or altered without the citizen's consent — Citizens, under Art.9 of the Constitution of Pakistan were entitled to protection of law from being exposed to hazards of electro magnetic field or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations — Article 184 of the Constitution, therefore, could be invoked because a large number of citizens throughout the country could not make such representation and may not like to make it due to ignorance, poverty and disability — Considering the gravity of the matter which could involve and affect the life and health of the citizens at large, notice was issued by Supreme Court to the Authority — Trend of opinion of scientists and scholars was that likelihood of adverse effects of electromagnetic fields on human health could not be ruled out — Subject being highly technical, Supreme Court declined to give definite finding particularly when the experts and technical evidence produced was inconclusive — Supreme Court observed that under such circumstances the balance should be struck between the rights of the citizens and also the plans which were executed by the Authority for the welfare, economic progress and prosperity of the country and if there were threat of serious damage, effective measures should be taken to control it and it should not be postponed merely on the ground that the scientific research and studies were uncertain and not conclusive — With the consent of both the parties Court appointed Commission to examine the plan and the proposals/schemes of the Authority in the light of complaint made by the citizens and submit its report and if necessary to suggest any alteration or addition which may be economically possible for construction and location of the grid station — Supreme Court further directed that Government should establish an Authority or Commission manned by internationally known and recognized scientists having no bias and prejudice, to be members of the Commission whose opinion or permission should be obtained before any new grid station was allowed to be constructed — Authority, therefore, was directed by the Supreme Court that in future, it would issue public notice in newspapers, radio and television inviting objections and finalise the plan after considering the objections, if any, by affording public hearing to the persons filing objections — Such procedure was directed to be adopted and continued till such time that the Government constituted any Commission or Authority as directed by the Court.

In the present case, citizens having apprehension against construction of a grid station in residential area sent a letter to the Supreme Court for consideration as a human rights case raising two questions; namely, whether any Government agency has a right to endanger the life of citizens by its actions without the latter's consent; and secondly, whether zoning laws vest rights in citizens

which cannot be withdrawn or altered without the citizens' consent. Considering the gravity of the matter which may involve and affect the life and health of the citizens at large, notice was issued to the Authority.

So far no definite conclusions have been drawn by the scientists and scholars, but the trend is in support of the fact that there may be likelihood of adverse effects of electromagnetic fields on human health. It is for this reason that in all the developed countries special care is being taken to establish organizations for carrying on further research on the subject. The studies are, therefore, not certain but internationally there seems to be a consensus that the lurking danger which in an indefinite manner has been found in individual incidents and studies cannot be ignored.

In the present-day controversies where every day new avenues are opened, researches are made and new progress is being reported in the electrical fields, it would be advisable for Authority to employ better resources and personnel engaged in research and study to keep themselves upto-date in scientific and technical knowledge and adopt all such measures which are necessary for safety from adverse effects of magnetic and electrical fields.

There is a state of uncertainty and in such a situation the authorities should observe the rules of prudence and precaution. The rule of prudence is to adopt such measure which may avert the so-called danger, if it occurs. The rule of precautionary policy is to first consider the welfare and safety of the human beings and the environment and then to pick up a policy and execute the plan which is more suited to obviate the possible danger or make such alternate precautionary measures which may ensure safety. To stick to a particular plan on the basis of old studies or inclusive research cannot be said to be a policy of prudence and precaution.

It is highly technical subject upon which the Court declined to give a definite finding particularly when the experts and the technical evidence produced is inconclusive. In these circumstances the balance should be struck between the rights of the citizens and also the plan which are executed by the power authorities for welfare, economic progress and prosperity of the country.

If there are threats of serious danger, effective measures should be taken to control it and it should not be postponed merely on the ground that scientific research and studies are uncertain and not conclusive. Prevention is better than cure. Pakistan is a developing country. It cannot afford the researches and studies made in developed countries on scientific problems. However, the researches and their conclusions with reference to specific cases are available, the information and knowledge is at hand and Pakistan should take benefit out of it.

It is reasonable to take preventive and precautionary measures straightaway instead of maintaining the *status quo* because there is no conclusive findings on the effect of electromagnetic fields on human life. One should not wait for conclusive finding as it may take ages to find it out and, therefore, measures should be taken to avert any possible danger and for that reason one should not go to scrap the entire scheme but could make such adjustments, alterations or additions which may ensure safety and security or at least minimise the possible hazards.

The issue raised involves the welfare and safety of the citizens at large because the network of high tension wires is spread throughout the country. One cannot ignore that energy is essential for present-day life, industry, commerce and day-to-day affairs. The more energy is produced and distributed, the more progress and economic development become possible. Therefore, a method should be devised to strike balance between economic progress and prosperity and to minimise possible hazards. In fact a policy of sustainable development should be adopted. It will thus require a deep study into the planning and the methods adopted by Authority for construction of the grid station. Certain modes can be adopted by which high tension frequency can be decreased. This is purely scientific approach which has to be dealt with and decided by the technical and scientific persons involved in it. It is for this reason that both the parties have agreed that NESPAK should be appointed as a Commissioner to examine the plan and the proposals/schemes of Authority in the light of the complaint made by the citizens and submit its report and if necessary to suggest any alteration or addition which may be economically possible for constructing a grid station. The location should also be examined and report submitted at the earliest possible time.

In all the developed countries great importance has been given to energy production. Pakistan's need is greater as it is bound to affect the economic development, but in the quest of economic development one has to adopt such measures which may not create hazards to life, destroy the environment and pollute the atmosphere.

While making such a plan, no public hearing is given to the citizens nor any opportunity is afforded to the residents who are likely to be affected by the high tension wires running near their locality. It is only a one-sided affair with the Authority which prepares and executes is plan. Although the Authority and the Government may have been keeping in mind the likely dangers to the citizens' health and property, no due importance is given to seeking opinion or objections from the residents of the locality where the grid station is constructed or from where the high tension wires run.

It would, therefore, be proper for the Government to establish an Authority or Commission manned by interna-

tionally known and recognized scientists having no bias and prejudice to be members of such Commission whose opinion or permission should be obtained before any new grid station is allowed to be constructed. Such Commission should also examine the existing grid stations and the distribution lines from the point of view of health hazards and environmental pollution. If such a step is taken by the Government in time, much of the problem in future can be avoided.

Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word "life" is very significant as it covers all facts of human existence. the word "life" has not been defined in the Constitution but it does not mean nor can be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. A person is entitled to protection of law from being exposed to hazards of electromagnetic fields or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations. Under the common law a person whose right of easement, property or health is adversely affected by any act of omission or commission of a third person in the neighbourhood or at a far-off place, is entitled to seek an injunction and also claim damages but the Constitutional rights are higher than the legal rights conferred by law be it municipal law or the common law. Such a danger as depicted, the possibility of which cannot be excluded, is bound to affect a large number of people who may suffer from it unknowingly because of lack of awareness, information and education and also because such sufferance is silent and fatal and most of the people who would be residing near, under or at a dangerous distance of the grid station or such installation do not know that they are facing any risk or are likely to suffer by such risk. Therefore, Article 184 can be invoked because a large number of citizens throughout the country cannot make such representation and may not like to make it due to ignorance, poverty and disability. Only some conscientious citizens aware of their rights and the possibility of danger come forward.

The word "life" in terms of Article 9 of the Constitution is so wide that the danger and encroachment complained of would impinge on the fundamental rights of a citizen. In this view of the matter the petition under Article 184 (3) of the Constitution of Pakistan, 1973 is maintainable.

The word "life" in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it.

Article 14 provides that the dignity of man and subject to law the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and could be found only in few Constitutions of the world.

Where life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people the Court in exercise of its jurisdiction under Article 184 (3) of the Constitution may grant relief to the extent of stopping the functioning of units which create pollution and environmental degradation.

In these circumstances, before passing any final order, with the consent of both the parties a Court appointed Commissioner is to examine and study the scheme, planning device and technique employed by Authority and report whether there was any likelihood of any hazard or adverse effect on health of the residents of the locality. Commissioner might also suggest variation in the plan for minimizing the alleged danger. Authority was to submit all the plans, scheme and relevant information to the Commissioner. The citizens will be at liberty to send to the Commissioner necessary documents and material as they desire. These documents were to reach Commissioner within two weeks. Commissioner was authorised to call for such documents of information from Authority and the citizens which in its opinion was necessary to complete its report. The report should be submitted within four weeks from the receipt of the order after which further proceedings were to be taken. Authority was further directed that in future prior to installing or constructing any grid station and/or transmission line, it would issue public notice in newspapers, radio and television inviting objections and to finalise the plan after considering the objections, if any, by affording public hearing to the persons filing objections. This procedure shall be adopted and continued by Authority till such time as the Government constitutes any Commission or Authority as suggested.

The News International, September 18, 1991 entitled 'Technotalk' by Roger Coghill; Newsweek, July 10, 1989; Magazine 'Nature', Vol. 349 entitled 'Killing Field', 14th February, 1991 entitled 'E.M.F. — Cancer Link Still Murky, Electronics World & Wireless World, February 1990, American Journal of Epidemiology, Vol.138, p.467; Villanora Law Review, Vol.36, p.129 in 1991; Electromagnetic (EM) Radiation - A Threat to Human Health by Brig. (Rtd.) Muhammad Yasin; Oxford Dictionary; Black's Law Dictionary; Kharak Singh v. State of U.P. AIR 1963 SC 1295; Munn v Illinois (1876) 94 US 11(..) Francis Corali v. Union Territory of Delhi AIR 1981 SC 746; Olga Tellis and Others v. Bombay Municipal Corporation AIR 1986 SC 847; Rural Litigation and Entitlement Kendra and others v. State of U.P. and others AIR 1985 SC 652; AIR 1987 SC 359, AIR 1987 SC 2426; AIR 1988 SC 2187; AIR 1989 SC 594; Shri Sachidanand Pandey and another v. The State of

West Bengal and others AIR 1987 SC 1109; M.C. Mehta v. Union of India AIR 1988 SC 1115 and M.C. Mehta v. Union of India AIR 1988 SC 1037 ref.

(b) **International agreement—-**

——Value——International agreement between the nations if signed by any country is always subject to ratification, but same can be enforced as a law only when legislation is made by the country though its Legislature—— Without framing a law in terms of the international agreement the covenants of such agreement cannot be implemented as a law nor do they bind down any party—— Such agreement, however, has a persuasive value and commands respect.

(c) **Constitution of Pakistan (1973)——**

——Art.9—— Word "life" in Art. 9 of the Constitution covers all facets of human existence.

Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with the law. The word "life" is very significant as it covers all facets of human existence. The word "life" has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity legally and constitutionally.

The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it.

Oxford Dictionary; Black's Law Dictionary, Kharak Singh v. State of U.P. AIR 1963 SC 1295; Munn v. Illinois (1876) 94 US 113 at page 142; Francis Corali v. Union Territory of Delhi AIR 1981 SC 746; Olga Tellis and others v. Bombay Municipal Corporation AIR 1986 SC 180; State of Himachal Pradesh and another v. Umed Ram Sharma and others AIR 1986 SC 847; Rural Litigation and Entitlement Kendra and others v. State of U.P. and others AIR 1985 SC 652; AIR 1987 SC 359 AIR 1987 SC 2426; AIR 1988 SC 2187; AIR 1989 SC 594; Shri Sachidanand Pandey and another v. The State of West Bengal and others AIR 1987 SC 1109; M.C. Mehta v. Union of India AIR 1988 SC 1115 and M.C. Mehta v. Union of India AIR 1988 SC 1037 ref.

(d) **Constitution of Pakistan (1973)—**

—Art. 14—Fundamental right to preserve and protect the dignity of man under Art. 14 is unparalleled and could be found only in few Constitutions of the world.

Article 14 provides that the dignity of man and subject to law the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and could be found only in few Constitutions of the world.

(e) **Constitution of Pakistan (1973)—-**

—Art. 184(3)—Public interest litigation—Pollution and environmental degradation—Where life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people. Supreme Court in exercise of its jurisdiction under Art. 184(3) of the Constitution of Pakistan may grant relief to the extent of stopping the functioning of such units which create pollution and environmental degradation.

Dr. Parvez Hasan for Petitioners.

Tarik Malik, Project Director, WAPDA for Respondent.

Date of hearing: 12 February 1994.

ORDER

SALEEM AKHTAR, J.—Four residents of Street No.35, F-6/1, F-6/1, Islamabad. A letter to this effect was written to the Chairman on 15-1-1992 conveying the complaint and apprehensions of the residents of the area in respect of construction of a grid station allegedly located in the green-belt of a residential locality. They pointed out that the electromagnetic field by the presence of the high voltage transmission lines at the grid station would pose a serious health hazard to the residents of the area particularly the children, the infirm and the Dhobi-ghat families that live in the immediate vicinity. The presence of electrical installations and transmission lines would also be highly dangerous to the citizens particularly the children who play outside in the area. It would damage the greenbelt and affect the environment. It was also alleged that it violates the principles of planning in Islamabad where the green belts are considered an essential component of the city for environmental and aesthetic reasons. They also referred to the various attempts made by them from July 1991 protesting about the construction of the grid station, but no satisfactory step had been taken. This letter was sent to this Court by Dr. Tariq Banuri of LUCN for consideration as a human rights case raising two questions; namely, whether any Government agency has a right to endanger the life of citizens by its actions without the latter's consent; and secondly, whether zoning laws vest rights in citizens which cannot be withdrawn or altered without the citizens' consent. Considering the gravity of the matter which may involve and affect the life and health of the citizens at large, notice was issued to the respondents who appeared and explained that the site of grid station

was not designated as open space/green area as stated in the layout plan of the area. It was further stated that the site had been earmarked in an incidental space which was previously left unutilised along the bank of nallah and was not designated as open space or green area. It was about 6-10 feet in depression from the houses located in the vicinity of the grid station site. The grid station site starts at least 40 feet away from the residences in the area and construction of grid station does not obstruct the view of the residents. It was further stated that the fear of health hazard due to vicinity of high voltage of 132 K.V. transmission lines and grid station is totally unfounded. Similar 132 KV grid stations have been established in the densely populated area of Rawalpindi, Lahore, Multan and Faisalabad, but no such health hazard has been reported. It was also claimed that not a single complaint has been received even from the people working in these grid stations and living right in the premises of the grid stations. The installations are made in such a way that the safety of personnel and property is ensured. It was further stated that electromagnetic effects of extra high voltage lines of voltage above 5000 KV on the human and animal lives and vegetation is under study in the developed countries, but the reports of results of such studies are controversial. In support of the contentions, CDA submitted extract from the opinion of Dr. M. Mohsin Mubarak, Director, Health Services, which reads as follows:-

> "The fears of the residents about the effects of high voltage transmission lines are also not considered dangerous for the nearby residents. Even a small electric point with 220 volts current or a sui Gas installation in the kitchen can prove to be extremely dangerous if specific precautions are not undertaken and maintained. The high tension wires are not likely to harm the residents if due protection criteria are properly planned and executed. The concept of dangerous and offensive trades and civil defence is not that the candle should not be lit. A candle must be lit to remove darkness and make the things more productive but care must be also be taken not to let the candle burn everything around."

The comments of Government of Pakistan, Ministry of Water and Power recommending the construction of grid station were also filed in which the following points were noted on the effect of electrical light and wiring on health of human beings;—

(c) Although the studies of effects of electric lines and wiring on the health of human beings are being carried out by different agencies/institutions of the world, there are no established and conclusive findings about any serious effects of electric lines/wiring on the health of human beings.

(d) The effects of electricity can be considered on account of its fields namely the electric field and the magnetic field and in this regard, extracts of section 8.11 and 8.13 of Transmission Line Reference Book of Electric and Magnetic fields on people and animals are enclosed which indicate that there is no restriction on permissible duration of working if the electric field intensity is up to 5KV/m whereas in the case under consideration the elect field intensity would certainly be lesser than 0.KV/m which value as indicated in the said extract is for a location at a distance of 20m from a 525 KV Line.

The nearest present live conductor is of only 132KV and that too would be at a distance of more than 20m from the nearest house's boundary wall as shown in the enclosed map. This clearly shows that the nearby houses fall in a quite safe zone. As regards the magnetic fields, the intensity of the magnetic field at ground level close to transmission line varies from 0.1 to 0.5 gauss which values are less than those in industrial environments especially in proximity to low voltage conductors carrying currents as mentioned in the above extracts. In view of the above details, there should be no concern about the health of residents of nearby houses.

(e) The apprehension that the grid station would generate and transmit excessive heat to houses is unfounded as the main equipment i.e. power transformers are properly cooled by circulation of oil inside transformer tanks and by means of cooling fans"

These opinion of the WAPDA and CDA are based on Transmission Lines. Reference Book, 345 KV and above/2nd Edition, extract of which had been filed and relevant parts of which are reproduced as follows:-

> "Although health complaints by substation workers in the USSR were reported (40.41), medical examination of linemen in the USA (38.39), in Sweden (19) and in Canada (56.58), failed to find health problems ascribable to electric fields. As a result of unclear findings and research in progress, no rules for electric-field intensity inside and outside the transmission corridor have been universally established. In some cases, design rules have been established to allow construction of EHV transmission lines to proceed with the maximum possible guaranteed protection of people from possible health risks.
>
> Many studies of magnetic-field effects on laboratory items have been performed. A good general review and discussion is offered by Sheppard and Eisenbud (59). Magnetic fields have been reported to affect blood composition, growth, behaviour, immune systems and neural functions. However, at present there is a lack of conclusive evidence, and a very confusing picture results from the wide variation in field strengths, frequency, exposure durations used in different studies."

WAPDA also submitted extracts from A.B.B. literature regarding insulation and coordination/standard clear-

ances data based on LEC specification in which minimum clearance for 500 KV equipments and installation has been given 1,100 ft. and 1,300 ft. for phase-to-phase air clearance and phase-to-phase earth air clearance.

2. The petitioners were also asked to furnish material in support of their claim. They have filed news clippings from magazines, research articles, and opinion of scientists to show that electromagnetic radiation is the wave produced by magnetism of an electrical current and that electromagnetic fields can affect human beings. The first item is a clipping from the magazine "The News International, September 18, 1991, entitled "Technotalk". It refers to a book 'Electropollution — How to protect yourself against it' by Roger Coghill. It has been observed that "now researchers are asking whether it is more than coincidence that the increase in diseases like cancer, ME, multiple sclerosis, hyperactivity in children, allergies and even AIDS have occurred alongside enormous growth in the production and use of electricity". It further states that "the first warning sign came from the USA in 1979 when Dr. Nancy Weheimer and Dr. Ed Leeper found that children living next to overhead electricity lines were more likely to develop leukaemia. Since then, further studies have shown links with brain tumours, depression and suicide".

One US researcher found that electrical utility workers were 13 times more likely to develop brain tumour than the rest of the population. A Midlands doctor discovered a higher than average rate of depression and suicide in people living near electric power cables.

Photo copy of an article published in Newsweek, July 10, 1989, entitled 'An Electromagnetic Storm' has been filed. In this article the apprehensions and problems considered by the scientists have been discussed and reference has been made to the researchers in this field in which, finally it was concluded as follows:-

> The question is whether we know enough to embark on a complete overhaul of the electronic environment. Avoiding electric blankets and sitting at arm's length from one's VDT screen (their fields fall off sharply after about two feet) seem only prudent. But drastic steps to reduce people's involuntary exposures might prove futile. For while research clearly demonstrates that electromagnetic fields can affect such process as bone growth, communication among brain cells, even the activity of white blood cells, it also shows that weak fields sometimes have greater effects than strong ones. Only through painstaking study will anyone begin to know where the real danger lies. On one point, at least, Brodeur and many of those he criticizes seem to agree: we're not quite sure what we're up against, and we need urgently to find out."

3. An article published in the magazine 'Nature', Volume 349, 14 February 1991 entitled 'EMF - Cancer Linked Still Murky' refers to a study made by epidemiologist John Peters from the University of Southern California, who released his preliminary results from a case control study of 232 young leukaemia victims. The results implied that leukaemia reasons are co-related to electromagnetic field (EMF) exposures and that they are not dependent on how exposure is estimated.

4. In an article from Electronics World & Wireless World, February 1990 entitled 'Killing Fields', the author has discussed and produced a large number of case studies from which it was observed that at least there was a two-fold increase in adult leukaemia link to fields from wires near human beings. It was further observed that if one accepts a casual link to power line electromagnetic fields as much as 10-15% of all childhood cancer cases might be attributed to such fields. There has been a growing concern and research in the US and seven American States have adopted rights of way, but no such step has been taken in UK. The case studies also showed that:-

> "Among recent residential studies, GP Dr. Stephen Perry published correlations between the magnetic-field exposure of people living in multi-story blocks (or nine storeys or more). Wolverhamption with the incidence of heart disease and depression. Magnetic field strengths measured in all 43 blocks with a sing rising cable showed very significantly higher readings (p 0.0002) in those apartments categorised as `near' the cable, averaging 0.315 T (highest: 0.377 T) against 0.161 T (lowest: 0.148 T) in the `distant' apartments. In line with these measures, significantly more `.... myocardial infraction, hypertension, isshaemic heart disease and depression....' was reported in those living near the cable."

Other articles in the same magazine were entitled "Killing Fields, the Epidemiological Evidence" and "Killing Fields, the Politics" in which the suggestion was made that "until results of this research become available more a moratorium should be placed on all new buildings or routing of power lines which causes 50 Hz fields in houses to exceed every cautiously set limit".

In an information sent by Mark Chernaik, Environmental Law US to Brig. (Rtd.) Muhammad Yasin, Projects Coordinator, Sustainable Development Policy Institute (SDPI), it is stated that "when electric current passes through high voltage transmission lines (HVTLs), it produces electric and magnetic fields. Although both can affect biological systems, the greatest concern is the health impacts of magnetic fields. A magnetic field can be either static or fluctuating. Magnetic fields from HVTLs fluctuates because the electric currents within HVLTs are alternating currents (AC) which reverse direction 50 to 60 times per second (50 to 60 Hz). Magnetic fields pass nearly unimpeded through building materials and earth". It refers to four recent epidemiological studies which show that the people exposed to relatively strong static and fluctuating magnetic fields

have higher rates of leukaemia as compared to general population. It gives the figures that the rate of leukaemia was higher in over 1,70,000 children who lived within 300 meters of HVTLs in Sweden from 1960-85. Children who were exposed to fluctuating magnetic fields greater than 0.20 Ut were 2.7 times more likely to have contracted leukaemia and children who were exposed to greater than 0.3 Ut were 3.08 times more likely to have contracted leukaemia than other children (Reference: Feychting, M. & Anlbon. A (October 1993) "Magnetic Fields and Cancer in Children Resideing in Swedish Higher Voltage Power Lines". American Journal of Epidemiology, Bol.138, p.467). It also refers to an article "Childhood Cancer in Relation to Modified Residential Wire Code Environmental Health Perspectives, Vol.10, pp.76-80 in which studies were carried out in respect of cancer in children living in the Danver area of US and it was reported that children living in homes within 20 meters of HVTLs or primary distribution lines were 1.9 times more likely to have contracted cancer in general and 2.8 times more likely to have contracted leukaemia in particular than children living in homes with relatively moderate or low exposure to magnetic fields. Likewise reference has been made to the study relating to leukaemia in workers who maintain and repair telephone lines in US and the rate of cancer in Norwegian electrical workers who were exposed to magnetic fields. It also states that power company challenged the existence of link between leukaemia and exposure to magnetic fields on the basis that there is no biological mechanism which can explain the link. It has been stated that "there is a plausible (but still unproven) biological explanation for the link between leukaemia and exposure to magnetic fields". It also suggests methods to reduce magnetic fields from HVTLs.

5. Dr. Tariq Banuri has also made a statement and given his opinion as an expert on Environmental Economics and a student of Social Management. According to him:-

"(a) The earlier consensus on the limited degree of the harmful effects of radiation does not exist. While at this point the expert evidence is not conclusive, regarding its impact the burden of proof has shifted from individuals to the organization. As a result, courts in the US have recommended more stringent safety standards.

(b) Given the absence of proper safeguards and standards in Pakistan's research, it is unlikely that studies done in Pakistan would help decide the issue. Perforce, we would have to rely on the results of cross-country studies, or on those of studies conducted in industrialised countries. We should not regard the results in other countries as inappropriate for our purposes. These are the only results we are likely to be able to use in the foreseeable future.

(c) Even in the latter countries, until such time as the matter gets resolved, the profession is likely to place greater weight on the critical and more recent studies than would be warranted by their frequency or number. In other words, a single study showing additional harmful consequences has more weight than hundreds of studies that argue that there is no change."

According to him precautionary principles should be adopted and there should be a balance in existing situation, developments and the environmental hazards.

6. The petitioners have also relied on an article entitled "Regulatory and Judicial Responses to the Possibility of Biological Hazards from Electromagnetic Fields generated by Power Lines" by Sherry Young, Assistant Professor of Law, Claude W. Pettit, College of Law Ohio Northern University, B.A. Michigan State University, Harvard Law School published in Villanova Law Review, Vol.36, p.129 in 1991. It is an exhaustive and informative article which deals with the current state of knowledge about the biological effect of exposure to electromagnetic fields, the responses of the legal system to the possibility of biological hazards, evaluations and the proposals for regulatory response. It refers to various studies made in USA, Sweden and Canada about ELF exposure and cancer in children and adults. After referring to the various studies and the results arrived at the author has summed up as follows:-

> "While the implications of these studies justify additional research, it would be both difficult and futule to base any significant regulation of electric transmission and distribution systems on rather limited data currently available. At best, various experiments have demonstrated that particular cells or animals have shown particular responses to exposure to ELF fields of particular frequencies and intensities for specific durations. The mechanism by which those effects occur are not known. It is also unknown whether the changes that have been observed are in fact harmful to the organisms involved, whether they would be harmful if they occurred in humans, or whether exposure to ELF fields results in numerous biological effects that in fact cancels each other out. Additionally, it is unknown whether humans or other animals are able to adapt to exposure, either immediately or after some threshold period of adjustment. It is known that in some of the experiments demonstrating biological effects, the effects disappeared upon increased, as well as decreased, exposure. Therefore, it is impossible to conclude that any given level of exposure will be harmless, no matter how precisely its frequency, intensity and duration are regulated, nor can it be established that any given level of exposure is definitely harmful. Consequently, it is impossible at this time to prescribe alterations in electric transmission and distribution systems that are likely to significantly reduce the risks, if any, of exposure to ELF fields.

At present, the scientific evidence regarding the possibility of adverse biological effects from exposure to power-frequency fields, as well as the possibility of reducing or eliminating such effects, is inconclusive. The remaining question is how the legal system, including both the judiciary and the various regulatory agencies, should respond to this scientific uncertainty."

The research project known as the New York Power Line Projects (HYPLP) was established to investigate independently and without any bias on several projects particularly for considering the implication of Wythmer and Leeper study which suggested association between proximity to power lines and childhood leukaemia. The author has summarised the conclusion of this project as follows:-

> "The panel concluded that they had documented biological effects of electric and magnetic fields and that several of those findings were worthy of further consideration because of their possible implications for human health. The panel was not able, however, to identify any adverse health effects. Although the replication of the Wyrthemer and Leeper study basically confirmed the study's finding of an association between power line configurations and childhood cancer, the panel was unable to offer any recommendation based on this and other epidemiological studies because of methodological difficulties with quantifying magnetic field exposure levels and the lack of any established casual relationship between weak magnetic fields and cancer." Finally the panel recommended further research in the following areas: (1) The possible association between cancer and exposure to magnetic fields, and effects of exposure on learning ability. (2) The possible existence of thresholds for biological effects; and (3) methods of power delivery for use that would reduce magnetic fields."

After this report a staff task force was appointed by the Chairman of the New York Public Service Commission to evaluate the report of NYPLP and develop recommendations for consideration by it. The task force noted that "the researchers had not determined whether the effects that had been established would persist at lower field intensities or whether there was threshold below which the effects disappeared." "Nonetheless the task force found that the results were disturbing enough to require additional epidemiological studies preferably in New York." The recommendations made by NYPLP were endorsed by the task force.

7. Dr. Mirza Arshad Ali Baig who was at that time Director-General of Planning and Development and Industrialization of Pakistan Council of Scientific and Industrial Research to a query made by Dr. Tariq Banuri has given his opinion as follows:-

> "The information that is so far available, with me suggests that transmission lines give rise to magnetic fields which have extremely high intensity compared with naturally occurring fields. This is particularly the case with sources operating at power frequencies of 50 or 60 Hz where magnetic fields of very high magnitude compared with the natural are common. Any one near the transmission lines is, therefore, exposed to excessive magnetic field.
>
> Magnetic fields give rise to induced electric fields and currents which in turn interact with the blood flow as well as living tissues. Such tissues which are vulnerable to electrical excitation e.g. visio-sensory stimulation that generate magneto-phosphenes are likely to be affected on long term exposure and under high intensity of the field.
>
> So far there is no direct evidence of effects of exposure to magnetic fields but there are indications that an excess in the incidence of cancer among children and adults is associated with very weak (0.1 to 1 mT) 50 or 60 Kg magnetic flux densities such as those directly under high tension wires, welding acres, induction heaters and a number of home appliances. The ill-effects have just started surfacing up because of availability of some health facilities and institutions where ailments of many kinds are being reported. In Pakistan these effects may easily be attributed to anything other than scientific. Instead of waiting for abnormal cases to be reported in our situation it is perhaps imperative that we go for sustainable development and discourage installation of transmission lines over the residential areas anywhere."

The opinion of Dr. Muhammad Hanif, Officer Incharge, Environmental. Research and Pollution Control Section of Pakistan Council of Scientific and Industrial Research, Lahore dated 10-7-1991, after referring to various studies and research made in USA, concluded as follows:-

> "According to my conclusion, I draw from the literature so far read by me, there is going to be proved ill-health effects on human beings associated especially with the high voltage transmission. However, for a while setting aside the question of the ill-health effects, of high energy concentrated electrical waves, there remains a constant concern about the safety factor. The high structures especially to be installed for the transmission of electricity and the high voltage current passing though these transmission lines continue to pose constant danger to the people and the property of the area under their direct hit in case, these structures collapse due to any cause."

A document research paper entitled Electromagnetic (EH) Radiation — A Threat to Human Health, by Brig. (Rtd.) Muhammad Yasin of Sustain Development Policy Institute has also been relied upon by the petitioners. The author has referred to some reported research conclusions as follows:-

(i) The risk of dying from acute myliod leukaemia is increased by 2.6 if you work in electrical occupation especially if you are a telecommunication engineer or radio amature.

(ii) Service personnel exposed to non-ionising radiation are seven times more than unexposed colleagues likely to develop cancer of the blood forming organs and lymphatic tissues and are likely to develop thyroid tumours.

(iii) 10 to 15 per cent. of all childhood cancer cases might be attributable for power frequency fields found in homes (23/115 V 50 - 60 Hz). The risk of childhood cancer more than double in homes where the average 60 Hz magnetic field is over 300 MT."

He has also referred to studies in Sweden on effect of high tension power lines on the health of children and detected higher risk of leukaemia. This study also indicated that prolonged exposure to electromagnetic fields has links of leukaemia in adults. His conclusion and recommendations are to create awareness, to adopt safety standards prescribed by developed countries and undertake studies and research.

8. From the aforestated material produced on record which contains up to date studies and research it seems that so far no definite conclusions have been drawn by the scientists and scholars, but the trend is in support of the fact that there may be likelihood of adverse effects of electromagnetic fields on human health. It is for this reason that in all the developed countries special care is being taken to establish organizations for carrying on further research on the subject. The studies are, therefore, not certain, but internationally there seems to be a consensus that the lurking danger which in an indefinite manner has been found in individual incidents and studies cannot be ignored. WAPDA on the other hand insists on executing the plan which according to it is completely safe and risk free. The material placed by WAPDA is based on studies carried out two decades back. The other statement is based on their personal observation of their workers who are working in grid stations, and further, that from the locality no such complaint has been made as in the present case. The research and opinion relied upon by WAPDA is not the latest one nor from authentic sources because they are merely relying upon old opinions.

In the present-day controversies where every day new avenues are opened new researches are made and new progress is being reported in the electrical fields, it would be advisable for WAPDA to employ better resources and personnel engaged in research and study to keep themselves up-to-date in scientific and technical knowledge and adopt all such measures which are necessary for safety from adverse effect of magnetic and electric fields. On the other hand the materials placed by the petitioners are the latest researches carried out to examine the magnetic fields 'effect on health and also about the possible dangers that may be caused to human beings. In the absence of any definite conclusion that electromagnetic fields do not cause childhood leukaemia and adult cancer and in the presence of studies the subject requires further research and the conclusions drawn earlier in favour of the power company are doubtful-safest course seems to be to adopt a method by which danger, if any, may be avoided. At this stage it is not possible to give a definite finding on the claims of either side. There is a state of uncertainty and in such a situation the authorities should observe the rules of prudence and precaution. The rule of prudence is to adopt such measures which may avert the so-called danger, if it occurs. The rule of precautionary policy is to first consider the welfare and safety of the human beings and the environment and then to pick up a policy and execute the plan which is more suited to obviate the possible dangers or make such alternate precautionary measures which may ensure safety. To stick to a particular plan on the basis of old studies or inconclusive research cannot be said to be a policy of prudence and precaution. There are instances in American studies that the power authorities have been asked to alter and mould their programme and planning in such a way that ehe intensity and the velocity is kept at the lowest level. It is highly technical subject upon which the Court would not like to give a definite finding particularly when the experts and the technical evidence produced is inconclusive. In these circumstances the balance should be struck between the rights of the citizens and also the plan which are executed by the power authorities for welfare, economic progress and prosperity of the country.

9. Dr. Parvez Hasan, learned counsel for the petitioners contended that the Rio Declaration on Environment and Development has recommended the precautionary approach contained in principle No. 15, which reads as follows:-

> "Principle 15. —In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

The concern for protecting environment was first internationally recognised when the declaration of United Nations Conference on the Human Environment was adopted at the Stockholm on 16-6-1972. Thereafter it had taken two decades to create awareness and consensus among the countries when in 1992 Rio Declaration was adopted. Pakistan is a signatory to this declaration and according to Dr. Parvez Hasan although it has not been ratified or enacted, the principle so adopted has its own sanctity and it should be implemented, if not in letter, at least in spirit. An international agreement between the nations if signed by any country is always subject to ratification, but it can be enforced as a law only when legislation is made by the country through its legisla-

ture. Without framing a law in terms of the international agreement the covenants of such agreement cannot be implemented as a law nor do they bind down any party. This is the legal position of such documents, but the fact remains that they have a persuasive value and command respect. The Rio Declaration is the product of hectic discussion among the leaders of the nations of the world and it was after negotiations between the developed and the developing countries that an almost consensus declaration had been sorted out. Environment is an international problem having to frontiers creating transboundary effects. In this field every nation has to cooperate and contribute and for this reason the Rio Declaration would serve as a great binding force and to create discipline among the nations while dealing with environmental problems. Coming back to the present subject, it would not be out of place to mention that Principle No. 15 envisages rule of precaution and prudence. According to it if there are threats of serious damage, effective measures should be taken to control it and it should not be postponed merely on the ground that scientific research and studies are uncertain and not conclusive. It enshrines the principle that prevention is better than cure. It is a cautious approach to avert a catastrophe at the earliest stage. Pakistan is a developing country. It cannot afford the researches and studies made in developed countries on scientific problems particularly the subject at hand. However, the researches and their conclusions with reference to specific cases are available, the information and knowledge is at hand and we should take benefit out of it. In this background if we consider the problem faced by us in this case, it seems reasonable to take preventive and precautionary measures straightaway instead of maintaining status quo because there is no conclusive finding on the effect of electromagnetic fields on human life. One should not wait for conclusive finding as it may take ages to find it out and, therefore, measures should be taken to avert any possible danger and for that reason one should not go to scrap the entire scheme but could make such adjustments, alterations or additions which may ensure safety and security or at least minimise the possible hazards.

10. The issue raised in this petition involves the welfare and safety of the citizens at large because the network of high tension wires is spread throughout the country. One cannot ignore that energy is essential for present-day life, industry, commerce and day-to-pay affairs. The more energy is produced and distributed, the more progress and economic development become possible. Therefore, a method should be devised to strike balance between economic progress and prosperity and to minimise possible hazards. In fact a policy of sustainable development should be adopted. It will thus require a deep study into the planning and the methods adopted by WAPDA for construction of the grid station. The studies in USA referred to above have suggested that certain modes can be adopted by which high tension frequency can be decreased. This is purely scientific approach which has to be dealt with and decided by the technical and scientific persons involved in it. It is for this reason that both the parties have agreed that NESPAK should be appointed as a Commissioner to examine the plan and the proposals/schemes of WAPDA in the light of the complaint made by the petitioners and submit its report and if necessary to suggest any alteration or addition which may be economically possible for constructing a grid station. The location should also be examined and report submitted at the earliest possible time.

11. At this stage it may be pointed out that in all the developed countries great importance has been given to energy production. Our need is greater as it is bound to affect our economic development, but in the quest of economic development one has to adopt such measures which may not create hazards to life, destroy the environment and pollute the atmosphere. From the comments filed by WAPDA it seems that they in consultation with the Ministry of Water and Power have prepared a plan for constructing grid station for distribution of power. While making such a plan, no public hearing is given to the citizens nor any opportunity is afforded to the residents who are likely to be affected by the high tension wires running near their locality. It is only a one-sided affair with the Authority which prepares and executes its plan. Although WAPDA and the Government may have been keeping in mind the likely dangers to the citizens health and property, no due importance is given to seek opinion or objections from the residents of the locality where the grid station is constructed or from where the high tension wires run. In USA Public Service Commission has been appointed for the purpose of regulating and formulating the plans and permission for establishing a grid station. It hears objections and decides them before giving permission to construct such a power station. No such procedure has been adopted in our country. Being a developing country we will need many such grid stations and lines for transmission of power. It would, therefore, be proper for the Government to establish an Authority or Commission manned by internationally known and recognised scientists having no bias and prejudice to be members of such Commission whose opinion or permission should be obtained before any new grid station is allowed to be constructed. Such Commission should also examine the existing grid stations and the distribution lines from the point of view of health hazards and environmental pollution. If such a step is taken by the Government in time, much of the problem in future can be avoided.

12. The learned counsel for the respondent has raised the objection that the facts of the case do not justify intervention under Article 184 of the Constitution. The main thrust was that the grid station and the transmission line are being constructed after a proper study of the problem taking into consideration the risk factors,

the economic factors and also necessity and requirement in a particular area. It is after due consideration that planning is made and is being executed according to rules. After taking such steps possibility of health hazards is ruled out and there is no question of affecting property and health of a number of citizens nor any fundamental right is violated which may warrant interference under Article 184. So far as the first part of the contention regarding health hazards is concerned, sufficient discussion has been made in the earlier part of the judgement and need not be repeated. So far the fundamental rights are concerned, one has not to go too far to find the reply.

Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word 'life' is very significant as it covers all facts of human existence. The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. For the purposes of present controversy suffice to say that a person is entitled to protection of the law from being exposed to hazards of electromagnetic fields or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations. Under the common law a person whose right of easement, property or health is adversely affected by any act of omission or commission of a third person in the neighbourhood or at a far off place, is entitled to seek an injunction and also claim damages, but the Constitutional rights are higher than the legal rights conferred by law be it municipal law or the common law. Such a danger as depicted, the possibility of which cannot be excluded, is bound to affect a large number of people who may suffer from it unknowingly because of lack of awareness, information and education and also because such sufferance is silent and fatal and most of the people who would be residing near, under or at a dangerous distance of the grid station or such installation do not know that they are facing any risk or are likely to suffer by such risk. Therefore, Article 184 can be invoked because a large number of citizens throughout the country cannot make such representation and may not like to make it due to ignorance, poverty and disability. Only some conscientious citizens aware of their rights and the possibility of danger come forward and this has happened so in the present case.

13. According to Oxford dictionary, 'life' means "state of all functional activity and continual change peculiar to organised matter and specially to the portion of it constituting an animal or plant before death and animate existence."

In Black's Law Dictionary, 'life' means "that state of animals, humans, and plant or of an organised being, in which its natural functions and motions are performed, or in which its organs are capable of performing their functions. The interval between birth and death. The sum of the forces by which death is resisted..... 'Life' protected by the Federation Constitution includes all personal rights and their enjoyment of the faculties, acquiring useful knowledge, the right to marry, establish a home and bring up children, freedom of worship, conscience, contract occupation, speech, assembly and press".

The Constitutional Law in America provides an extensive and wide meaning to the word 'life' which includes all such rights which are necessary and essential for leading a free, proper, comfortable and clean life. The requirement of acquiring knowledge, to establish home, the freedoms as contemplated by the Constitution, the personal rights and their enjoyment are nothing but part of life. A person is entitled to enjoy his personal rights and to be protected from encroachments on such personal rights, freedom and liberties. Any action taken which may create hazards of life will be encroaching upon the personal rights of a citizen to enjoy the life according to law. In the present case this is the complaint the petitioners have made. In our view the word 'life' constitutionally is so wide that the danger and encroachment complained of world impinge fundamental rights of a citizen. In this view of the matter the petition is maintainable.

14. Dr. Parvez Hasan, learned counsel has referred to various judgements of the Indian Supreme Court in which the term 'life' has been explained with reference to public interest litigation. In Kharak Singh v. State of UP (AIR 1963 SC 1295) for interpreting the word 'life' used in Article 21 of the Indian Constitution reliance was placed on the judgement of Field, J. in Munn v. Illinois (1876) 94 US 113 at page 142 where it was observed that 'life' means not merely the right to the continuance of a person's animal existence but a right to the possession of each of his organs—his arms and legs etc." In Francis Corali v. Union Territory of Delhi (AIR 1981 SC 746) Bhagvati, J. observed that right to life includes right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading and writing in diverse form". Same view has been expressed in Olga Tellis and others v. Bombay Municipal corporation (AIR 1986 SC 180) and State of Himachal Pradesh and another v. Umed Ram Sharma and others (AIR 1986 SC 847). In the first case right to life under the Constitution was held to mean right to livelihood. In the latter case the definition has been extended to include the 'quality of life' and not mere physical existence. It was observed that 'for residents of hilly areas, access to road is access to life itself'. Thus, apart from the wide meaning given by US Courts, the Indian

Supreme Court seems to give a wider meaning which includes the quality of life, adequate nutrition, clothing and shelter and cannot be restricted merely to physical existence. The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it. Under our Constitution, Article 14 provides that the dignity of man and subject to law the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and could be found only in few Constitutions of the world. The Constitution guarantees dignity of man and also right to 'life' under Article 9 and if both are read together, questions will arise whether a person can be said to have dignity of man if his right to life is below bare necessity like without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment. Such questions will arise for consideration which can be dilated upon in more detail in a proper proceeding involving such specific questions.

15. Dr. Parvez Hasan has also referred to several judgements of the Indian Supreme Court in which issues relating to environment and ecological balance were raised and relief was granted as the industrial activity causing pollution had degraded the quality of life. In Rural Litigation & Entitlement Kendra and others v. State of UP and others (AIR 1985 SC 652) mining operation carried out through blasting was stopped and directions were issued to regulate it. The same case came up for further consideration and concern was shown for the preservation and protection of environment and ecology. However, considering the defence need and for earning foreign exchange some queries were allowed to be operated in a limited manner subject to strict control and regulations. These judgements are reported in AIR 1987 SC 359 and 2426 and AIR 1988 SC 2187 and AIR 1989 SC 594. In Shri Sachidanand Pandey and another v. The State of West Bengal and others (AIR 1987 SC 1109) part of land of zoological garden was given to Taj Group of Hotels to build a five-star hotel. This transaction was challenged in the High Court without success. The appeal was dismissed. Taking note of the fact that society's interaction with nature is so extensive that "environmental question has assumed proportion affecting all humanity", it was observed that:-

> "Obviously, if the Government is alive to the various considerations requiring thought and deliberation and has arrived at a conscious decision after taking them into account, it may not be for this Court to interfere in the absence of mala fides. On the other hand, if relevant considerations are not borne in mind and irrelevant considerations influence the decision, the Court may interfere in order to prevent a likelihood of prejudice to the public."

In M.C. Mehta v. Union of India (AIR 1988 SC 1115) and M.C. Mehta v. Union of India (AIR 1988 SC 1037) the Court on petition filed by a citizen taking note of the fact that the municipal sewage and industrial effluents from tanneries were being thrown in River Ganges whereby it was completely polluted, the tanneries were closed down. These judgements go a long way to show that in cases where life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people, the Court in exercise of its jurisdiction under Article 184(3) of the Constitution may grant relief to the extent of stopping the functioning of factories which create pollution and environmental degradation.

16. In the problem at hand the likelihood of any hazard to life by magnetic field effect cannot be ignored. At the same time the need for constructing grid stations which are necessary for industrial and economic development cannot be lost sight of. From the material produced by the parties it seems that while planning and deciding to construct the grid station WAPDA and the Government Department acted in a routine manner without taking into consideration the latest research and planning in the field nor any thought seems to have been given to the hazards it may cause to human health. In these circumstances, before passing any final order, with the consent of both the parties we appoint NESPAK as Commissioner to examine and study the scheme, planning, device and technique employed by WAPDA and report whether there is any likelihood of any hazard or adverse effect on health of the residents of the locality. NESPAK may also suggest variation in the plan for minimizing the alleged danger. WAPDA shall submit all the plans, scheme and relevant information to NESPAK. The petitioners will be at liberty to send NESPAK necessary documents and material as they desire. These documents should reach NESPAK within two weeks. NESPAK is authorised to call for such documents or information from WAPDA and the petitioners which in their opinion is necessary to complete their report. The report should be submitted within four weeks from the receipt of the order after which further proceeding shall be taken. WAPDA is further directed that in future prior to installing or constructing any grid station and/or transmission line, they would issue public notice in newspapers, radio and television inviting objections and to finalise the plan after considering the objections, if any, by affording public hearing to the persons filing objections. This procedure shall be adopted and continued by WAPDA till such time the Government constitutes any commission or authority as suggested above.

LAND AND EVIRONMENT COURT OF NEW SOUTH WALES

GREENPEACE AUSTRALIA LTD

v.

REDBANK POWER COMPANY PTY LTD AND SINGLETON COUNCIL

PEARLMAN CJ OF LAND AND ENVIRONMENT COURT

5-8, 9, 12-13 September, 10 November 1994

Development consent – Power station – Objector appeal – Impact of air emissions – "Greenhouse" effect – Precautionary principle – Balancing of planning and environmental issues – Appeal dismissed – Land and Environment Court Act 1979 (NSIV), s 98 – Intergovernmental Agreement on the Environment (1992), cl 3.5.1.

Section 98 of the Environmental Planning and Assessment Act 1979 (NSW) provides a third party objector right of appeal to the Land and Environment Court against development consent for designated development for the purposes of the Act. It includes power stations.

In May 1992 the governments of the Commonwealth, the States and Territories and the Australian Local Government Association signed an Intergovernmental Agreement on the Environment which provides, amongst other things, for the establishment of a National Environmental Protection Agency (NEPA). The NEPA is to be ministerial council chaired by the Commonwealth and having the authority to set national environmental protection measures. Clause 3.5.1 contains a definition, in the following terms, of what is commonly called the "precautionary principle".

"Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and

an assessment of the risk-weighted consequences of various options".

In March 1994 Singleton Council granted Redbank Power Company Pty Ltd development consent for the construction of a Power station and ancillary facilities at Warkworth in the Hunter Valley. Greenpeace Australia Ltd objected pursuant to s 98 of the Environmental Planning and Assessment Act 1979 contending that the impact of air emissions from the project would unacceptably exacerbate the "greenhouse effect" in the earth's atmosphere and that the Court should apply the precautionary principle and refuse development consent for the proposal.

Held:

The application of the precautionary principle dictated that a cautious approach should be adopted in evaluation the various relevant factors in determining whether or not development consent should be granted, but it did not require that the greenhouse issue should outweigh all other issues.

Leatch v National Parks & Wildlife Service (1993) 81 LGERA 270, referred to.

Balancing all relevant planning and environmental factors the proposal should, subject to several conditions, be allowed to proceed.

APPEAL

This was a third party objector appeal under s 98 of the Environmental Planning and Assessment Act 1979 against a grant of development consent for a power station and ancillary facilities. The facts are set out in the judgement.

J B Simpkins, for the applicant.

B J Preston, for the first respondent (Redbank Power Company Pty Ltd)

J R Connors (solicitor), for the second respondent (Singleton Council).

Judgement Reserved

10 November 1994

PEARLMAN J.

INTRODUCTION

This is an appeal by Greenpeace Australia Ltd (Greenpeace) brought under s

98 of the Environmental Planning and Assessment Act 1979 (NSW) against a development consent granted to first respondent, Redbank Power Company Pty Ltd (Redbank) by the second respondent, Singleton Council (the Council).

The development application which is the subject of these proceedings No. 183/93, was lodged with the Council together with an amended environmental impact statement on 8 November 1993. In the development application, the development is described as "generating works involving the construction of a 120 MWe nominal rated fluidised-bed combustion power plant", and is said to involve the construction of a "power station and ancillary (sic) facilities including overland pipes carrying slurry and water".

The power plant is to be located at Warkworth, in the Hunter Valley, between Jerrys Plains Road (MR 213) and long Point Road adjacent to the Workworth Mine. Land use is controlled by the Singleton and Patrick Plains Planning Scheme Ordinance, under which the land on which the plant is to be sited is zoned non-urban 1(a), and the slurry pipelines are within land zoned non-urban 1(a) and non-urban 1(b). The development falls within the definition of "generating works" in the planning scheme ordinance. Generating works within those zones are innominate column IV uses, and may be carried out with consent.

By notice dated 23 March 1994 the Council notified Redbank of the determination of the development application by the grant of consent subject to a number of conditions. On 15 April 1994, Greenpeace commenced these proceedings. Its statement of issues filed in the proceedings is as follows:

"The impact of the proposed development on the environment

Particulars

The emission of carbon dioxide from the proposed development and its contribution to the human enhanced greenhouse effect.

The need for the development

Particulars

The absence of any current need for the increased capacity for generating electric power

the availability of alternative means of addressing future energy needs which have lower or zero emissions of carbon dioxide".

The proposed development (the project)

The environmental impact statement proposes the development of a fluidised-bed combustion power plant. It is intended to utilise coal washery tailing as fuel, replacing a current method of tailing disposal.

Tailing is a waste product which results from the mining and washing of coal. The tailing, mixed with water, emerges from the washing as a slurry. The present method of disposal of that slurry is to pipe it to specially constructed tailing dams. The slurry is deposited into these dams and considerable time, sometimes years, is required to allow the solid material to settle out.

Tailing is to be supplied to the project directly from the coal washery plants at the Warkworth and Lemington mines. It is to be transferred by a slurry pipeline to the site. Tailing from dams may also be used to supplement the fuel stockpile when required.

The energy produced by the project is intended to be sold under a 30 year contract to Shortland Electricity. The project is to produce 120 MW of which the net output (approximately 100MW), enough to supply approximately 100,000 homes, will be sold.

The gaseous emissions from the boiler stacks of the project will include primarily water vapour and carbon dioxide and small amounts of oxides of sulphur, oxides of nitrogen and carbon monoxide. The project would also emit small particles containing metals and fluorides.

Greenpeace's concern in this appeal is with the carbon dioxide (CO_2) which will be emitted by the project when it is fully operational. Carbon dioxide is a natural product of combustion of fossil fuels, and is a contributor to the enhanced greenhouse effect, to which I will return in more detail later in this judgement.

Sulphur dioxide (SO_2) is one of the contributors to a prob-

lem known as acid rain. Acid rain forms when SO_2 reacts with atmospheric water vapour to create sulphuric acid. In the project, SO_2 emission is proposed to be controlled through the introduction of limestone directly into the fluidised-bed combustor. The limestone breaks down into calcium oxide which reacts with the SO_2 to form calcium sulphate, dry material which collects together with ash. A significant feature of the fluidised-bed combustion design is that SO_2 is captured directly during the combustion.

As to nitrous oxides (NOx) the boilers are designed to operate at a relatively low combustion temperature (900°C) which is lower than that of conventional coal fired boilers (1100C). Nitrous oxide emissions will be controlled by maintaining a limited range of fuel-to-air ratios, low excess air and combustion gas times and an oxidising environment. In these conditions and with lower combustion temperature, it is not possible for significant amount of NO_x to form.

Particulates are to be removed from the flue gases by use of fabric filter baghouses. These filters are expected to lead an overall removal rate of 99 per cent of particulate materials. Flouride contained in the flue gases would also be removed through a reaction with dust contained in the filter which converts the gaseous flouride into a particulate flouride and traps those particles in the filter.

The section 90 considerations

The project raised a number of relevant matters for consideration under s 90 of the Environmental Planning and Assessment Act. These include air emissions, noise, water, flora and fauna, visual amenity, social and economic impact.

All these matters were addressed in the development application and environmental impact statement and were considered by the Council in its assessment of the development application.

About 75 submissions were received from individuals and groups. The concerns which they raised were addressed by Redbank and considered in the Council's assessment. Copies of those submissions and Redbank's responses to them were tendered in evidence.

The Council sought and took into consideration advice on the proposed development from 12 government authorities, and obtained advice from an independent consultant.

However, the only issue which is raised in this appeal is the impact of air emissions from the project. The task of the Court, then, is to consider that impact as well as all other relevant factors in determining whether or not to grant development consent.The greenhouse effect and governmental responseIt is necessary to outline briefly the policy background concerning the greenhouse effect.

Earth's atmosphere, while composed mainly of nitrogen and oxygen, also contains a number of trace gases such as (CO_2) methane (CH_4) and ozone. Over the past 200 years the global concentrations of a number of these gases have increased due to human activities such as the burning of fossil fuels, deforestation and large scale farming. The naturally occurring gases, together with synthetic chemicals such as cholorofluorocarbons (CFC's), have the capacity to absorb radiation and there is concern that their increased concentrations in the atmosphere is resulting in a change in global temperatures.

The Environment Protection Authority in its report entitled "New South Wales State of Environment 1993" (exhibit 9) discussed global warming. It stated at p 5 of that report that CO_2 has been estimated to account for over half of the global warming phenomenon…". The report continued as follows:"…Australia's CO_2 emissions represent approximately 1.4 per cent of the world total. However, on a per capita basis it is estimated that Australia is the world's fourth-largest contributor…"

The report went on to discuss other major greenhouse gases – CH_4, nitrous oxide and CFCs – as well as the question of CO_2 sinks (that is, absorbers of CO_2), the two major natural ones of which are the ocean and forests.

Due to the intrinsically global nature of the problems associated with human enhanced greenhouse effect, an international instrument was created in an attempt to coordinate a response. The United Nations Framework convention on climate change (exhibit 10 the Framework Convention) was opened for signature in May 1992. Australia ratified the Framework Convention and it entered into force on 21 March 1994. Article 2 of the Framework Convention states as its objective the following:"The ultimate objective of this Convention… is to achieve… stabilisation of greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system…"

To that end, the parties to the Framework Convention made certain commitments in Art 4A. These commitments include, among others:"1(f) [To take climatic change consideration into account, to the extent feasible, in their relevant social, economic and environmental policies and actions…

2 (a)[To] adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs…"

While the Australian Government is now bound to act generally in accordance with its international obligations under the Framework Convention, there is no national legislation yet in place aimed at specifically implementing any of its obligations. What there is, however, is the Intergovernmental Agreement on the Environment (exhibit 11, the Intergovernmental Agreement). This document (entered into by the Federal Government, all State and Territory Governments, and the Australian Local Government Association) is designed to enable a co-operative national approach to the environment".

The Intergovernmental Agreement contains general provisions related to its operation and principles to be applied by the parties. In a number of schedules, it deals with specific areas of environmental policy and management. Schedule 5 is entitled "Climate Change". This schedule discusses the need for Australia to be part of an international response to the problem of greenhouse-enhanced climate change and details the creation of a National Greenhouse Response Strategy. It also adopts an interim planning target in the following terms:"To stabilise greenhouse gas emissions… based on 1988 levels, by the year 2000, and reducing these emissions by 20% by the year 2005… subject to Australia not implementing response measures that would have net adverse economic impacts nationally or on Australia's trade competitiveness, in the absence of similar action by major greenhouse gas producing countries".

In accordance with Sch 5 of the Intergovernmental Agreement, the National Greenhouse Response Strategy (exhibit H) was produced and endorsed by the Council of Australian Governments in December 1992. The key elements of the National Greenhouse Response Strategy are stated to include amongst other things:a set of general principles underlying all response measures; a set of sectoral objectives and sectoral strategies;

a phased plan of action

The first phase response measures will concentrate on "no-regrets" actions. No-regrets actions are those that address the problem of the enhanced greenhouse effect while producing a net benefit (or, at least no net loss). First phase response measures will also include a number of "insurance" measures to reduce uncertainties about climate change impacts and the viability of response measures, chiefly involving research and review studies.

The phased approach is discussed in greater detail in appendix C to the National Greenhouse Response Strategy. At p 88 the National Greenhouse Response Strategy states:"Adoption of more interventionist response measure than the no-regrets and insurance measures in the first phase could have net adverse economic impacts nationally or on Australia's trade competitiveness, especially in the absence of similar action by our major trading partners and competitors. Governments agree that it is too early at this time to determine the extent to which action beyond no-regrets measures will be required".

To this end, first phase measures will be designed to cause "minimal disruption to the wider community, any single industry sector, or any particular geographical region".

The National Greenhouse Response Strategy contains specific sectoral strategies, starting with the energy supply sector. The strategy outlined includes improving the efficiency of the market, developing cost-competitive energy generation with lower greenhouse gas emissions and co-ordinating supply side and demand side action.

The National Greenhouse Strategy provides that strategy for the energy sector is designed to achieve the following objective:"limit greenhouse gas emissions arising from energy production and distribution wherever economically efficient by minimising greenhouse gas emissions per unit of each type of energy supplied to end users, and by promoting alternative energy sources that have the potential to lower greenhouse gas emissions per unit of energy supplied".

There is an important aspect to note in relation to both the Intergovernmental Agreement on the Environment and the National Greenhouse Response Strategy. In both documents the Australian Local Government Association is represented as a party. However, both documents expressly recognise that local government authorities cannot be bound to observe the terms of either (Intergovernmental Agreement cl 1.11 or National Greenhouse Response Strategy p5).Greenpeace's caseIn the light of this background, Mr. Simpkins, counsel for Greenpeace, submitted that significant weight should be attached to the greenhouse issue in the Court's consideration of the factors to be taken into account in determining whether or not to grant consent to the proposed development. He outlined the matters which should lead to significant weight being so attached.There is a host of documents which study, review and record the impact of CO_2 emission in relation to the greenhouse effect. Apart from the documents I have already mentioned, Mr. Simpkins relied upon a number of reports prepared by the Intergovernmental Panel on Climate Change which were tendered as exhibit 5 and which, he submitted, from the scientific basis upon which the international community and social governments should make policy decisions.All these documents demonstrate, so Mr. Simpkins submitted, that there is considerable international and national concern about the enhanced greenhouse effect.While there is no scientific certainty about the enhanced greenhouse effect, there is a widespread concern that it is likely to have a major impact upon health, agriculture, ecosystems, sea levels, rainfall, and snow cover.

The energy sector is a major contributor to the enhanced greenhouse effect.

Greenhouse response measures are still being developed and when developed are likely to be relevant to the project.

The National Greenhouse Response Strategy contains an objective to which the energy sector is required to conform which is designed to limit greenhouse gas emissions by, first, minimising those emissions, and secondly promoting alternative energy sources.Mr. Simpkins submitted that the grant of development consent in this case would be inconsistent with that objective.The proposed contract between Redbank and Shortland Electricity for the supply of electricity for 30 years would have the effect of rendering Redbank immune from any further response measures that may be adopted, unless there was legislative intervention or adverse financial consequences.Mr. Simpkins' submission was that attaching significant weight to the greenhouse issue in this case would necessarily lead to a refusal of consent, unless it could be shown that the emission of CO_2 was no worse than CO_2 emission from existing sources, and that there was a demonstrated demand for further energy supply.It was Greenpeace's case that the evidence showed that CO_2 emissions from the proposed development would increase the total quantity of CO_2 emitted, and that there is no demand for further energy supply. It was thus contended that the Court should take into account the development of the response measures contemplated by the National Greenhouse Response Strategy and the precautionary principle, and as a consequence refuse to grant consent to the proposed development

Redbank's case was that, in weighting up the factors to be taken into account in determining whether or not to grant consent, the Court ought to take into account two significant matters:The principal reason for the project is to implement an environmentally responsible method of tailing disposal; and

the fluidised-bed combustion system which is to be operated in the project has the environmentally beneficial effect of reducing SO_4 and NO_x emissions in comparison with conventional power stations.

In 1991, the Office of Energy released a consultant's report entitled "Coal Washery Rejects for Power Generation" (exhibit J). The purpose of the report, as outlined in its preface, was to examine whether "…combustion of reject electricity for electricity generation represents an economically and environmentally attractive solution" to two problems – first, the problem of loss of energy potential due to the inefficiency of coal washing systems, and secondly, the problem of tailing disposal.

In examining the characteristics of coal industry reject (which comprises coarse reject and tailing), the report noted a number of problems associated with tailing disposal. In the author's opinion, "with the exception of municipal sewage, coal washery tailing would constitute Australia's largest water-borne waste disposal problem". One of the problems is the large land area required for tailing dams. The report noted the potential of coal reject-fired power plants to reduce land requirements and estimated that, by the turn of the century, the adoption of 1400 MW of coal reject-fired power generation capacity instead of a similar quantity of major coal-fired capacity should reduce the net area of land alienated in New South Wales by 600 hectares annually.

The report recognised other problems associated with tailing disposal. Tailing is the impermeable to water, and tailing dams do not dry out. A solid-looking crust forms on the dam which prevents further evaporation, but is not strong enough to take any substantial weight, such as that of heavy machinery. Another problem is the acidification of water as a result of oxidation of pyrite and other sulphur compounds contained in the tailing. In order to prevent the escape of acidified water into the surrounding soils, tailing dams have been designed with impermeable walls. They may however, overflow or the walls may be breached, discharging waters with a high acid content and containing high concentration of toxic heavy meal ions.

The report also noted that, in 1989-1990, reject represented one-quarter of all coal mined in New South Wales, and in the Hunter Valley, tailing can frequently account for as much as 50 per cent of total reject.

It also asserted that the disposal of ash from a coal reject-fired power station would present fewer problems that unburnt reject, principally because ash is more hospitable to plant life.

Redbank said that this report was the catalyst for the development application which it has made. The report recommended the utilisation of coal reject-fired power plants, which is what is contemplated by the development application.

As to improved SO_2 and NO_x emissions, Redbank relied on the improved control that the fluidised-bed combustion system permits and which I have already described, namely that limestone is injected directly into the bed combustor so that SO_2 is captured before it is emitted into the atmosphere, and that the relatively low combustion level results in relatively low NO_x emission.The expert evidence Redbank call two expert witnesses to give evidence.

The first of them Mr. Thor Hibbeler, whose expert report was exhibit M. He is a consulting engineer in the employ of National Power Company of Oakland, Cali-

fornia, which is one of the joint ventures involved in Redbank, and he has had considerable environmental consulting experience. Mr. Hibbeler was responsible for the preparation of the environmental impact statement and wrote portions of it.

In his report, Mr. Hibbeler gave evidence that the use of fluidised-bed boilers to combust tailing fuel will result in low levels of SO_2 and NO_x and that the use of tailing as a fuel would have land use benefit as well as a more efficient use of energy resources. He also noted the fact that the project would emit CO_2 and produced calculations to show the CO_2 emission rate between 1,250 and 1,290 kg/MWh.

Mr. Hibbeler was cross-examined about his knowledge of the problems arising from tailing disposal at the Warkworth and Lemington mines and while he know only a little about specific problems at these particular sites he remained firm in his conviction that the utilisation of tailing as fuel in the project would have an environmentally beneficial effect at those mines and remained as the justification for the project in the broader context of the coal industry in the Hunter Valley.

The second expert was Mr. Roy Alper.

Mr. Alper is the co-founder and executive vice president of National Power Company, and has had extensive experience in electricity resource planning and policy. His report was tendered in evidence as exhibit N.

In his report, Mr. Alper gave his opinion that the project is an example of ecologically sustainable development, and that it will be consistent with the National Greenhouse Response Strategy. In addition, he dealt with the need for the project. He noted the fact that the need for new generating capacity in New South Wales is likely to arise between 1998 and 2005, and that the project is not likely to start operation before 1997 or 1998. He conceded that this might be a few years in advance of a precise date of need for new capacity, but was of the opinion that in view of the small size of the project, and its extended life of 30 years, its timing was reasonable. He pointed out that Redbank's "primary mission" is not the production of power, but the utilisation of tailing in order to reduce its environmental consequences and to recover energy value lost in discarded tailing. He explained that his company had been approached by the consultant to the Office of Energy in New South Wales when that consultant was investigating alternative methods of tailing disposal for the report entitled "Coal Washery Rejects for Power Generation" and that his company had had extensive subsequent consultations with the Office of Energy and the Department of Mineral Resources.

In cross-examination, Mr. Alper admitted that he had no direct knowledge of the Warkworth and Lemington mines, and that his conclusions as to the impact of the project and its need were based on his general understanding of the problems associated with tailing disposal.

Two experts were called by Greenpeace.

The first of these, Mr. Edward Johnstone, was not of great assistance to the Court for a number of reasons. First, he was hostile and argumentative in the witness box, which reduced the credibility of his evidence. Mr. Simpkins conceded in his submissions that there was an "element of tension" when Mr. Johnstone was being cross-examined. Secondly, Mr. Johnstone's expert report (exhibit 2) was made up of three pages of expert comment, and 11 pages of curriculum vitae, which raised some doubt on its face as to whether it was truly a report of expert testimony. When one turns to the report itself, it appears merely to be expert opinion in contradiction of the evidence of both Mr. Hibbeler and Mr. Alper, and a large part of it merely criticises Mr. Alper's reference to problems occurring in the United States.

There was thus little in Mr. Johnstone's evidence which is of any real assistance. This is exacerbated by the fact that Mr. Johnstone admitted, in cross-examination that he had not been specifically involved in any projects in the Hunter Valley concerned with tailing disposal, although he had been involved in an environmental impact assessment for coal washery reject emplacement at Hexam. His main involvement in the Hunter Valley had been with water systems in various mines in that location, over a period about 14 years ending in 1986, which meant that he was not able to recall specifics.

The last expert to be called was Dr. George Wilkenfeld, who has had extensive experience in energy analysis, public policy and administration and urban and environmental studies. He has also had a wide experience in consulting in the planning, supply or use of energy and related services. His report became exhibit 3.

Dr. Wilkenfeld's report set out, as background, the public policy issues of ecologically sustainable development and the greenhouse effect, and discussed the National and international responses to this issue, through the National Greenhouse Response Strategy and the Framework Convention. His main concern, in the light of this background (which I have earlier generally described) was whether there is a need for the project, and the project's impact on greenhouse gas emissions. With the qualification that his analysis depended upon a large number of assumptions, Dr. Wilkenfeld made the following points:Electricity generation in New South Wales is dominated by fossil fuels, coal plants account for nearly 78 per cent of installed capacity;

there is at present an excess capacity of 56 per cent; New South Wales will probably not need new electricity gen-

eration before 2005, and there will be an impact from energy efficiency programmes in place following the National Greenhouse Response Strategy.

the net output of electricity from the project will displace existing power station output as long as there is excess capacity;

when the excess capacity is absorbed (that is, by 2005 or thereabouts), the project will have the effect of deferring or displacing other means of supplying energy services since Redbank's contract with Shortland Electricity will continue in operation until about 2026;

the other means of energy supply which are likely to come into operation after 2005 include such means as more modern conventional coal plants; advanced coal plants; gas-fired combined cycle plants; the substitution of natural gas for electricity at the point of use; gas co-generation; the substitution of renewable energy forms in electricity generation; and substitution of renewable energy forms for electricity at point of use.

Annexed to Dr. Wilkenfeld's report is a report furnished to the Office of Energy by IPC Worldwide PTY Ltd assessing greenhouse gas emissions for the project. In order to assess whether the project will increase or decrease the overall greenhouse gas emissions released by the New South Wales energy sector, IPC Worldwide made three estimates:The amount of CO_2 likely to emitted from the project;

The amount of CO_2 likely to be emitted from existing power stations which the project is likely to displace;

The amount of CO_2 and CH_4 emission which is likely to avoided because the project will not need to mine the extra coal which would be necessary to supply existing power stations to produce an equivalent quantity of electricity.

The result of IPC Worldwide analysis was that the project was "most likely' to emit 19 per cent more greenhouse gas emissions than an equivalent production from existing coal-fired power stations. This would result in a net increase in overall CO_2 emissions from power stations in New South Wales of approximately 0.47 per cent.

These results are indicative only, because there are many uncertainties in the assumption and information upon which they are based. For example, IPC Worldwide accepted a figure of 1,302 kg/MWh furnished by Redbank as representing the amount of CO_2 emission from the project. Dr. Wilkenfeld believed this to be an underestimate, and thought a figure of 1,380 kg/MWh would be more accurate. Mr. Hibbeler gave evidence of refinements in the calculations of fuel composition, leading to an estimate of the amount of CO_2 emission of between 1,250 and 1,290 kg/MWh.

ConclusionThe evidence establishes that the project will emit CO_2 which is a greenhouse gas, and will contribute to the enhanced greenhouse effect, a matter of national and international concern. Greenpeace contended that this issue, the greenhouse issue, should outweigh all other factors to be taken into account in assessment of the project and it should lead to a refusal of consent.

I accept that there is national and international concern with the enhanced greenhouse effect, and with the energy sector's contribution to it. I also note that responses designed to mitigate that effects are still in the process of development. I take into account the objective of the energy strategies which the National Greenhouse Response Strategy enunciates and which I have earlier quoted. But these matters, and the greenhouse issue generally, must be considered in the light of the policy background.

The Framework Convention, the Intergovernmental Agreement on the Environmental and the National Greenhouse Response Strategy outline policy objectives and responses to the problem of enhanced greenhouse effect, but they stop short of expressly prohibiting any energy development which would emit greenhouse gases. They are policy documents only, and they expressly provide that they do not bind local government. There is nothing in those documents, or any other background documents which were tendered in evidence, which requires the Court to refuse to grant consent or which would prohibit the development of power stations per se. Whether they should be prohibited is, of course, a matter of government policy and it is not for the Court to impose such a prohibition. It is for State and national governments to take into account the competing economic and environmental issues raised by the enhanced greenhouse effect to set policy in the light of those issues. Thus far, governmental policy has been to set first phase responses, and more response measures are intended to be developed over time by national and international policy-makers.

It is important also to bear in mind that the Framework Convention, the Intergovernmental Agreement on the Environment and the National Greenhouse Response Strategy do not constrain individual action. There are as yet no specific directives or obligations cast upon individual operators in the energy field. This may come as a result of the development of further response measures but thus far the response to the enhanced greenhouse effect is in the realm of governmental policy.

Another important matter to note is the uncertainty in the evidence about the effect of CO_2 emission from the project. In absolute terms, the project will emit CO_2. But what impact that will have on warming, within the

State or nationally or internationally, is very uncertain. Redbank argued that the cumulative effect of the CO_2 emission from the project is likely to be minimal. IPC Worldwide calculated that the project would constitute a net increase in overall CO_2 emission from State power stations of approximately 0.47 per cent. Dr. Wilkenfeld thought that the project would most likely result in greenhouse gas emissions of between 11.8 and 27.9 million tonnes of CO_2 equivalent over its 30 year life, figures which he considered significant in comparison with total electricity system emissions of 45 million tonnes annually.

Greenpeace's contention was that scientific uncertainty should not be used as a reason for ignoring the environmental impact of CO_2 emission. In other words the Court should take into account the "precautionary principle". That principle has been the subject of several formulations, but the relevant one for this case is set out cl 3.5.1 of the Intergovernmental Agreement on the Environment in the following terms:"Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.In the application for precautionary principle, public and private decisions should be guided by:careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and an assessment of the risk-weighted consequences of various options".

There are, however, instances of scientific uncertainty on both sides of the issues in this case. For example, Redbank has contended that tailing dams pose environmental problems, whilst Greenpeace has denied that there are serious environmental problems surrounding current methods of tailing disposal. On the other hand, Greenpeace has asserted that CO_2 emission from the project will have serious environmental consequences, whilst Redbank has asserted that there is considerable uncertainty about its consequences. The important point about the application of the precautionary principle in this case is that "decision-makers should be cautious: (per Stein J in Leatch v National Parks & Wildlife Service (1993) 81 LGERA 270 at 282). The application of the precautionary principle dictates that a cautious approach should be adopted in evaluating the various relevant factors in determining whether or not to grant consent; it does not require that the greenhouse issue should outweigh all other issues.

Greenpeace's further submission was that there was no need for the project. The evidence establishes that there is an excess capacity in the energy system which is likely to last until early into the next century. However, the establishment of the project in that circumstance will have the effect of displacing existing power supply, and the expert opinion was generally that this is likely to be energy supplied by the older and less efficient coal-fired power stations. It is possible to conclude that the absence of any current need for an increase in power supply is not a significant factor.

As to future need, it was Greenpeace's argument, based on Dr. Wilkenfeld's expert opinion, that, in the long term, when the excess capacity is taken up, the project will displace development of alternative means supplying energy services which may produce zero or near zero greenhouse gas emissions of. But Dr. Wilkenfeld conceded, in cross-examination, that the existence of the project in the long term would not impede the implementation of alternative energy sources.

All these matters lead, my opinion, to a conclusion that the greenhouse issue should not outweigh all other factors relevant to a determination of whether or not to grant consent, but must be taken into account in the Court's overall assessment of the project. What, then, are the other factors which the Court must take into account in reaching its determination ?

Redbank pointed to the beneficial environmental effects of the project. It will use tailing as fuel, thereby avoiding the detrimental environmental effects of tailing disposal in dams. It will produce lower emissions of SO2 and NOx in comparison with the coal-fired power stations which it is likely to displace.

There are other beneficial effects as well. The project will reduce the amount of land sterilised by tailing dams. It will convert a waste product into a usable one. It will permit more efficient use of energy resources by recovering coal currently discarded in tailing.

Greenpeace contended that Redbank had not demonstrated a need to utilise the tailing at either Warkworth or Lemington mines. Mr. Simpkins relied on environmental management plans and annual reports of both mines, as well as report to Lemington Mine from Coffey & Partners International (exhibit 7) to show that tailing disposal had not been flagged as a problems at either mine. I am satisfied, however, from the evidence of Mr. Hibbeler and Mr. Alper, and from the report of the consultant to the Office of Energy, that there are problem generally perceived in the coal industry in relation to tailing disposal. In any event, the fact that neither the Warkworth mine nor the Lemington mine has adverted to any of those problems cannot lead to a conclusion that the project will not have the environmental benefits it has claimed.

There was no challenge by Greenpeace in relation to any other s 90 considerations. The project was comprehensively assessed by the Council, governmental and other authorities were consulted, and objections addressed.

In taking all these matters into account, I have concluded that the development application should be approved. The question remains as to the conditions which should be imposed on the grant of consent. Conditions Greenpeace tendered a set of draft conditions (a copy of which is attached marked "B" at 162) which it contended should be imposed if the Court were minded to grant development consent. There were 14 of them; they were unnumbered, but for ease of reference, I have inserted numbers consecutively from 1 to 14.The Council, in granting development consent, imposed 47 conditions (the Council conditions). Most of these were not in contention, and I propose to adopt them unaltered. However, three of them, number 16, 22 and 47, were directly challenged by Greenpeace in that it proposed conditions dealing with the subject of these three and suggested alternatives to them.In considering the conditions which Greenpeace has proposed (the draft conditions, it is necessary to bear in mind the general requirement for validity of conditions. It is well established in this Court that the tests of validity enunciated in Newbury District Council v Secretary of State for Environment [1981] AC 758 apply. Those tests require conditions, first, to be for a planning purpose or to relate to a planning purpose; secondly, to fairly and reasonably relate to the subject development, and thirdly, to be such that a reasonable planning authority could properly have imposed. Moreover, subject to some statutory exceptions presently irrelevant, conditions must be final and certain (Mison v Municipal Council [1991] 23 NSWLR 734;73 LGRA 349).It will be seen that draft conditions 1 and 14 are directed to essentially the same subject, namely meeting the interim target for greenhouse emissions enunciated in the National Greenhouse Response Strategy. Mr. Simpkins submitted that one or other of these conditions should be imposed because Redbank would be immune to future response measures. Indeed, Dr. Wilkenfeld admitted in cross-examination that the existence of Redbank would have no effect on the implementation of alternative energy sources. In addition, condition 1 may well be beyond the power of this Court to impose; and condition 14 is uncertain in its requirement for evidence to show whether or not Australia has met the National Greenhouse Response Strategy interim target.Draft conditions 2, 3, 9 and 12 are designed to mitigate the effect of greenhouse gas emission from the project by requiring the planting of trees to establish a greenhouse sink, and they are suggested as a substitute for condition 47 imposed by the Council. There was no evidence to establish the number of trees required, the number tonnes of CO2 to be sequestrated by such trees, nor the precise area of planting that would be required. In the absence of some precision as to these matters, these conditions cannot be said, in my opinion, to fairly and reasonable relate to the subject development, as one of the Newbury tests requires. Moreover, each of them raises some doubt as to enforceability – how could it be determined, for example, whether trees have been planted and sustained to maturity, or that the (X) 2 omitted from the project is thereby permanently removed from the atmosphere? However, Council Condition 47 as drafted seems to me to be very uncertain. A tree-planting programme may be beneficial for a number of reasons. It may have environmental benefits, it may improve visual aspect, it may constitute a greenhouse sink. I have therefore decided impose a condition requiring a tree-planting programme the reasonable satisfaction of the appropriate council officer in accordance s91(3A) of the Environmental Planning and Assessment Act.Draft conditions 4 and 5 were designed, I think, to limit the effect of CO_2 emission by limiting the life of the project requiring to lapse if not commenced within two years. They are a response to condition 22 of the Council's conditions. I can see no advantage in imposing either of these conditions. The evidence was that the project depended on a long-term contract with Shortland Electricity. Its design and capacity were based on that contract, and the project has been assessed in the light of the environmental impact statement which specifies that design and to which Redbank is required to conform by condition 1 of the Council's conditions. Nor was there any evidence to establish when alternative energy sources might be commercially available, so as to set the time limitations that these conditions propose. In those circumstances, I reject them.Draft condition 6 is a response to condition 16 of the Council's conditions. I do not think, however, that the draft condition would operate any more effectively than condition 16 to limit the fuel source to tailing from the Warkworth and Lemington mines. Condition 16 requires Council approval before tailing may be obtained from any other mine, and is, in my opinion, a satisfactory condition to impose.Draft conditions 7 and 8 are designed to impose a limit on the emissions from the project. The difficulty with draft condition 7 is that it sets a limit which, as I have earlier pointed out, is uncertain, and would therefore be unreasonable to impose and difficult to enforce. Condition 8 is superfluous, because condition 1 of the Council's conditions requires Redbank to conform to the matters specified in the environmental impact statement. Draft condition 10 would, in my opinion, be an unreasonable condition to impose in the absence of any precise evidence as to any alternative tailing disposal methods likely to available. It is, furthermore, uncertain in its application, there being no precise parameters act for a determination of what are "prudent and feasible alternatives to disposal".Draft condition 11 is unnecessary. No doubt the project may never come into operation if Redbank fails to conclude a contract with Shortland Electricity. In any event, there is no necessity to require such a contract before development consent operates because the project must be developed in accordance with the environmental impact statement (according to the Council's condition 1) and Redbank's commercial arrangement for disposal of the electricity which it will generate will not have any effect on design or capacity if the plant is built according to the environ-

mental impact statement. Moreover, condition 22 limits the life of the project to 30 years, so that it is unnecessary to impose this condition in order to achieve that time limit.Draft condition 13 is not, in my opinion, fairly and reasonably related to the project, and it accordingly fails one of the Newbury tests. It would, moreover, be unreasonable to impose. Demand side measures are, as the National Greenhouse Response Strategy clearly shows, a matter of government policy and not the responsibility of an individual operator within the energy sector. This condition is also likely to be unenforceable in requiring reduction of CO2 emission by 1.26 million tonnes per year.For all these reasons, I propose to impose the Council conditions.Orders

In accordance with the foregoing, my orders are as follows:

The appeal is dismissed.

Development consent is granted to the construction and operation of a 120 megawatt power plant on land being part of lots 1-3 DP247820 and lots 4-5 DP 247820 at Long Point Road and Jerrys Plains Road, Warkworth, and to the construction of an ancillary slurry pipeline over adjacent land as specified in development application No.183/93, and subject to the conditions annexed hereto and marked "A".

The exhibits may be returned.

I make no order as to costs"ANNEXURE 'A'"Greenpeace Australia Limited v Redbank Power Company Limited Singleton CouncilScope of Development

The development being carried out generally in accordance with the amended Environmental Impact Statement prepared by the National Power Company and ESI Energy Inc dated November 1993 and the additional clarification contained in the responses to comments prepared by the National Power Company and ESI Energy Inc dated 21 February 1994.Approval of Mine Subsidence Board

The approval of the Mine Subsidence Board to the proposed buildings, structures and pipelines being obtained prior to the release of any building permit.Environmental Protection Authority

The Applicant shall obtain (before construction commences) and comply with Environment Protection Authority approval under the Pollution Control Act 1970 (NSW) and shall obtain and comply with any licences required under the Environment Administration Act 1991 (NSW).Upgrading of intersection of Jerrys Plains Road (MR 213) and Long Point Road

The existing intersection of Jerrys Plains Road and Long Point Road is to be upgraded to type "ARE" Auxiliary Right Tura Lanc RTA Road Design Guidelines, 1991 (Type "B" AUSTROADS). Plans are to be submitted to the RTA for approval prior to the commencement of work.

Entries to the site off Long Point Road

The entries are to be the sites off Long Point Road are to be constructed as a Type Autoroads intersection. Widening of Long Point Road

Long Point road is to be upgraded to 6.0m wide bitumen sealed road with 1.2m shoulders from the existing upgraded pavement approximately under the transmission line easement to the Jerrys Plains Road (MR 213).Floodlighting of Intersections

Both the MR213/Long Point Road Intersection are to be floodlit with the provision of two street lights at each intersection (with the MR 213/Long Point Road Intersection being lit to traffic route lighting standard).A pavement is to be made to Council equivalent to the capitalised contribution for their ongoing running for a five year period, based on a quotation to be provided by Shortland Electricity.Contribution of Maintenance of Jerrys Plains Road (MR 213)

An annual contribution of 55,000 (1994 dollars) is to be paid to Council for the maintenance of the Jerrys Plains Road and Long Point Road. The Contribution is to be CP1 indexed and is to be reviewed at five yearly intervals.No direct access of the Jerrys Plains Road (MR 213)

All vehicular access to the development is to be obtained from Long Point Road. There is to be no vehicular access from the Jerrys Plain Road (MR 213)Intersection of Jerrys Plains Road and the Warkworth Mine

Should truck haulage to the Redbank Project from the Warkworth Mine be the mines intersection with Jerrys Plains Road then that intersection is to be upgraded to a suitable standard as determined by Council's Subdivision and Design Engineer. Plans are to be submitted to the RTA for approval prior to the commencement of work.Off Street Parking and Access

The access to the carpark should be a minimum of 6m wide with sufficient splay to accommodate turning vehicles. Carparking should be sufficient to accommodate all employee and visitor parking on site.

The access to the plant should be a minimum of 8m wide with sufficient splay to accommodate turning articulated vehicles with the ingress/egress separated by the median.

All parking driveways shall be constructed of 200mm consolidated surface quality gravel, 2 coat bitumen sealed

or 25mm asphaltic concrete or alternatively of 50mm (minimum) reinforced concrete, to be drained and linemarked to Council's usual standards. Where driveways are used by heavy vehicles the specification is to be appropriate for their estimated volume and loaded weight.Payment of Development Work Supervision Fee

Payment of the appropriate Development Works Supervision Fee, for which an invoice will be forwarded by Council upon completion of all required supervision. Such fee will be based on a rate of 540.00 per hour or part thereof for time spent assessing detailed design plans and inspecting works on site.Council to Approve Plans for Intersection of the Development with Long Point Road

Engineering plans are to be submitted for the proposed intersection of the development with Long Point Road for approval by Council's Subdivision and Development Engineer.Truck Deliveries

All truck deliveries to site are to occur via the Jerrys Plains Road (MR 213) and Long Point Road. No trucks are to access the site via Gouldeswille Road except for emergencies and during construction of the Jerrys Plains and Long Point Roads improvements.

Directional Signposting

Directional Signposting to the site is to be provided on the intersection of Long Point Road and Jerrys Plains Road (MR 213). No direction signposting is to be provided on the intersection of Gouldesville Road and the Jerrys Plains Road (MR 213).Fuel Source

At least the majority the fuel burnt the power plant in any one year after commercial operation, on a dry tonnes basis, is to be coal washery tailings obtained either directly from the Warkworth and/or Lemington mine washeries or indirectly from tailings storage dams on the Warkworth and/or Lemington mine leases. Coal washery tailings are not to be obtained from mines other than the Warkworth and Lemington Mines without the further approval of Council.Start Up and Supplementary Fuel

Start up and supplementary fuel, other than diesel, is to be obtained only from Warkworth Mine. Alternative sources may be utilised in emergency situations with the approval of the Director Environmental Services.

Project Sitting

The plant is to be sited on site 2, the centre site, as recommended in EIS.Fauna Survey and Assessment

Further fauna survey and assessment is to be undertaken by the applicant, if required, by the National Parks Wildlife Service.Cultural Heritage

The applicant shall undertake at its own expense and comply with the requirement of the National Parks and Wildlife Service regarding works affecting Aboriginal sites in the area of proposed development.Stormwater Treatment

First flush stormwater runoff from the parking area, driveway vehicular maneuvering areas is to be directed through oil and silt arresters of sufficient capacity to contain oil and silt from that area prior to being discharged.Life of Consent

This consent shall expire thirty (30) years after commencement of commercial operation of the project. Extension of the consent beyond its expiration shall require the review and approval of Singleton Council.Limestone injection

Limestone injection is to be used to control SO2 and SO2 is not more than 126 grams per second (g/s) or such other standard as may be determined by the Environment Protection Authority, whichever is the least (most strict).Flue gas cleaning

The flue gas from the boilers is to be cleaned of particulate/dust by fabric filter baghouses in accordance with the requirements of the Environment Protection Authority.Stock Height

The height of the stack is to be in accordance with the requirements of the Environment Protection Authority.Continuous monitoring of stock emissions

There is to be continuous monitoring of sulphur dioxide, oxides of nitrogen and opacity in the stack and other pollutants is required by the Environment Protection Authority.

Provision for monitoring of ambient ground level concentrations of pollutants

The applicant is to establish and maintain ambient pollution monitoring stations, the number and location of such stations to be determined by the Environment Protection Authority.Data on Stock Emissions and Ambient Air Quality to be publicly Available

Monitoring data on stuck emissions and ambient air quality is to be made available to council at the same time that it is lodged with the Environment Protection Authority.Appointment of Environmental Officer

The applicant is to appoint an Environmental Officer to be responsible for all monitoring and environmental controls. This officer is to be the principal point of contract between the Council and other regulatory authorities.Use of Water Carts

Water carts are to be used to minimise dust during construction activities.Use of water spray

Water sprays or equivalent are to be used to reduce dust emissions from supplemental and start up fuel stockpiles.Community Consultative Committee

The applicant is to set up a community consultative committee prior to the commissioning of the plans. The committee is to consist of representatives of Council, the Environment Protection Authority, the power plant and two community representatives approved by Council. The committee is to meet as required by Council.

The committee is to consider any impact which the power plant may have on residences and the local environment as a result of the operations.

Removal of Ash

Any proposal to transfer ash by road on a regular basis is to require the separate approval of Council.Arrangement for Rehabilitation of Ash Emplacement

Satisfactory arrangements are to be made with the Department of Mineral Resources and Warkworth Mine for the final rehabilitation of ash emplacement.Monitoring of Ash Leachate, Drainage Water Quality and Soil Properties in the Ash Disposal Areas

The applicant is to test and/or monitor ash leachate, drainage water quality and soil properties in the ash disposal areas in accordance with the requirements for the Environment Protection Authority.Accumulating Fund for Decomposing of the Plant and Site Rehabilitation

An accumulating fund is to be established beginning with the 16th year after commencement of commercial operation to provide sufficient funds for the decommissioning of the plant and site rehabilitation at the end of its economic life. The anticipated cost of decommissioning and site rehabilitation in then current Australian dollars is to be documented in the first annual report after the 16th year together with the necessary fixed annual contribution necessary to cover this cost. A reasonable and conservative estimate should be made as to the anticipated average interest rate on the earnings in the fund for the remaining life of the project. This interest rate should also be disclosed in the forementioned annual report. Subsequent annual reports are to include a statement as to the accumulated earnings of the fund.

The Council, on request of the applicant with its agreement, may vary this condition at any time during the life of the project having regard to current circumstances and projections provided that the broad intent of this condition to ensure plant decommissioning and site rehabilitation at the end of the project life is maintained.Streams Diversion

The diversion works for Sandy Hollow Creek and the Eastern Tributary are to incorporate the following:

All diversion channels shall incorporate suitable drop structures to ensure that flow velocities are non-corrosive;

All diversion channels shall be stabilised;

Or such other requirements as determined by the Department of Water Resources.Approval of the Department of Water Resources

The approval of the Department of Water Resources is to be obtained for the proposed stream diversions under Part 3A of the Rivers and Foreshores Improvement Act 1948 (NSW), prior to work commencing.Erosion and Sediment Control Plan

An erosion and sediment control plan for the site is to be prepared prior to work commencing. This is to include both the disturbance phase and surface water management from the operational plant.Stormy Pipeline

The slurry pipeline that crosses the Wollombi Brook is to be constructed such that the pipe is located beneath the maximum anticipated scour depth and shall have shutoff (isolation) valves installed at each end of the crossing, which valves shall be under the sole control of Redbank and normally locked open.

Identification markers shall be placed at road and creeck crossing points to identify the existence of the pipeline.Disposal of Water into the Hunter River

Any disposal of reject water from the evaporative cooling process into the Hunter River is to require the approval of the Environment Protection Authority and the Department of Water Resources. Singleton Council is to be provided with copies of the application made in those authorities so that it may have the opportunity to comment prior to the issue of any licence approvals.Disposal of Water into the Warkworth Mine

A copy of those portions of an agreement of covenant between the applicant and Warkworth Mine and its successors in title which specifies the water return and acceptance obligations of the parties in relation to the power plants filtrate water from tailing dewatering, ash conditioning water and any other process water is to be lodged with Council's Director Environmental Services prior to the release of building plans.Submission of a Final Water Balance

The applicant is to submit a final anticipated water balance for the development to Council's Director Environ-

mental Services prior to the release of building plans. The water balance is to indicate anticipated and disposal points and volumes for all reject water including filtrate, ash conditioning water and other process waters.Sending of Evaporation Pond

An evaporation pond is to be used to evaporate concentrated brine, the pond is to be isolated from ground water to prevent contamination.Disposal Arrangements for Deposited Salts

The applicant is to advise Council of the disposal arrangements for any deposited salts.Lapsing of Consent

Consent for the development lapses after five (5) years if substantial commencement of construction has not occurred unless an extension of consent is granted by Council.Tree Planting

The applicant shall submit and implement a tree planting programme to the reasonable satisfaction of the Director Environmental Services.

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"ANNEXTURE `B`Greenpeace Australia Ltd v Redbank Power Company Pty Ltd & Singleton Council

DRAFT CONDITIONS FOR REDBANK POWER STATION.90(3)

That any contract for the supply of power by Redbank to Shortland include a provision that if at the year 2000 the most recent projection submitted by the Australian government pursuant to Article 12 of the Framework Convention on Climate Change indicates that Australia has not achieved a return of anthropogenic carbon dioxide emissions to 1990 levels then Shortland Electricity may terminate that contract without penalty on one years notice.

(a) That Redbank plants and maintain to maturity enough trees of the genous Eucalyptus to fix 37.8 million tonnes of Carbon dioxide;

That such trees be maintained or disposed of only in such a manner that ensures permanent sequestration of the carbon fixed by those trees from the atmosphere;

That Redbank provide security in the amount of ($10 million) to Shortland Council for the satisfactory completion of parts (a) and (b) of this condition.

Redbank plant and maintain to maturity 340 151ha of trees species to be specified by the Director of National Parks and Wildlife and in proportions to be specified by the Director of National Parks and Wildlife and that Redbank prior to the end of the fifth year after the granting of this consent enter a conservation agreement pursuant to the National Parks and Wildlife Act 1974 (NSW) that ensures those trees are at no time subject to clearing felling or forestry operations but are maintained in perpetuity.

This consent shall expire ten years after commencement of commercial operation of the project. Extension of the consent beyond its expiration shall require the review and approval of the Court.

Consent for this development lapses after two years if substantial commencement of construction has not occurred unless an extension of consent is granted by the Court.

A part from start up fuel the fuel for the plant is to be coal washery tailings obtained either directly from the Warkworth and/or Lemington mine washeries or indirectly from tailings storage dams on the Warkworth and/or Lemington mine leases.

The power station shall not produce more than 1290 tonnes of carbon dioxide per megawatt hour of energy sent out or such lesser amount as may be determined, from time to time, by the Office of Energy.

The power station shall at all times meet the emission levels indicated in the columns entitled "Stack mass flow rate" and "Stack design concentration" of Table 4.1-3 of the Amended Environmental Impact Statement.

s91(3A)

That Redbank undertake a tree planting programme approved by the Director of the National Parks and Wildlife that will ensure an amount of 37.8 million tonnes carbon dioxide is fixed during the life of the development consent and that the carbon fixed by the trees plated is permanently removed from the atmosphere.

s91AA

That the operation of the consent be deferred until Redbank satisfies the Court that there are no prudent and feasible alternatives to the disposal other than by of incineration of coal tailing waste produced by Warkworth and Lemington mines. Evidence to satisfy the Court of this condition must be supplied within 12 months.

That the operation of consent be deferred until Redbank satisfies the Court that it has entered into a contract with Shortland Electricity for the supply of power throughout the thirty year period of the development consent. Evidence to satisfy the Court of this condition must be supplied within 12 months.

That the operation of the consent be deferred until

Redbank satisfies the Court that:

it can undertake a tree planting programme that will ensure 37.8 million tonnes of carbon dioxide is fixed in perpetuity during the life of the development consent.

has the financial capacity to complete the tree planting programme outlined in (a).

Evidence to satisfy the Court of this condition must be supplied within 12 months.

That the operation consent be deferred until Redbank satisfies the Court that it will undertake a programme of demand side energy efficiency within New South Wales that will reduce New South Wales electricity system carbon dioxide emissions by 1.26 million tonnes per year within 5 years of the date of consent and thence throughout the remainder of the life of the consent. Evidence to satisfy the Court of this condition must be supplied within 12 months.

That the operation of the consent be deferred until Redbank satisfies the Court that Australia will be able to meet the greenhouse gas emission targets set in the National Greenhouse Response Strategy. Evidence to satisfy the Court of this condition must be supplied within 12 months.Appeal dismissed

Solicitor for the applicant: Environmental Defender's Office.Solicitor for the first respondent (Redbank Power Company Pty Ltd): Mallesons Stephens JaquesSolicitor for the second respondent (Singleton Council): Fitzgerald White Talbot & Co.TFMN

(LAND AND ENVIRONMENT COURT OF
NEW SOUTH WALES)

NICHOLLS

v.

DIRECTOR-GENERAL OF NATIONAL PARKS AND WILDLIFE SERVICE AND OTHERS

Talbot J

1-11, 16-26 August, 29 September 1994

Fauna Protection - Licence to take or kill protected fauna - Logging - Third party objector appeal against grant of licence - Fauna impact statement - Adequacy - Factors to be taken into account - Role of fauna impact statement - Realistic appraisal of application required - National Parks and Wildlife Act 1974 (NSW), ss 92B, 92C, 92D, 92a, 120

Section 92B of the national Parks and Wildlife Act 1974(NSW) provides that only the Director-General of National Parks and Wildlife may issue a general licence to take or kill endangered fauna. Subsection (2) provides that an application for such a licence must be accompanied by a fauna impact statement prepared in accordance with a 92D Subsection (5) provides for the invitation of public submissions. Under subs (6) the Director-General, in considering an application, must take into account any fauna impact statement or environmental impact statement or any submissions received within time under subs (5). Section 92C provides a right of appeal to the Land and Environment Court by an applicant for licence to which s 92B applies or by any person who made a submission under subs (5) thereof. Section 92D sets out the requirements for a fauna impact statement and specifies that the designated descriptions, assessments and details be "to the fullest extent reasonably practicable". Section 120 enables licences to be issued to take or kill any protected fauna in the course of carrying out specified development or activities.

The applicant appealed by way of third party objector appeal under s 92c of the *National Parks and Wildlife Act 1974* against the decision of the Director-General of National Parks and Wildlife to grant a licence under s 120 of that Act to the Forestry Commission of New South Wales to take or kill any protected fauna in the course of carrying out forestry operations within the Wingham Management Area. The fauna impact statement which accompanied the licence application listed twenty-four species of endangered fauna. In a lengthy merit hearing many expert witnesses gave evidence and much scientific documentary material was tendered. The applicant's case was directed in particular to alleged imperfections in the fauna impact statement.

Held: (1) The statutory fauna impact statement is only one of a number of tools to be used in determining whether or not a general licence under s 120 of *National Parks and Wildlife Act 1974* to take or kill protected fauna should be issued by the Director-General and the applicant's attack in the present matter failed to take account of the ongoing opportunities for inspection, survey and assessment which could lead to responsive changes to the conditions of the subject licence.

(2) The applicant's detailed attack on the subject fauna impact statement confused the words "to the fullest extent reasonably practicable" in s 92D of the *National Parks and Wildlife Act* with a non-specified requirement to do all things that were physically possible.

(3) On the whole of the evidence the fauna impact statement did include to the fullest extent reasonably practicable the information required by s 92D of the *National Parks and Wildlife Act.*

(Leatch v National Parks and Wildlife Service and Shoalhaven City Council (1993) 81 LGERA 270 and *Schaffer Corporation Ltd v Hawkesbury City Council* (1992) 77 LGRA 21, referred to.

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(4) It was acceptable to allow logging to take place pursuant to a licence under s 120 of the *National Parks and Wildlife Act 1974* to take or kill protected fauna subject to conditions specifying the particular fauna and taking into account the need for ongoing survey research and assessment to enable the Director-General to be kept up to date so that the conditions could be varied or the licence revoked according to the evolving circumstances

.APPEAL

This was a third party objector appeal under s 92c of the *National Parks and Wildlife Act 1974* against the granting of a licence under s 120 of that Act to take or kill protected fauna. The facts are set out in the judgement.

D R Parry and S Russel (agent), for the applicant.

R A Conti QC and T S Hale, for the first respondent (Director-General of National Parks and Wildlife).

N A Hemmings QC (solicitor) and G J Bartley, for the second respondent (Forestry Commission of New South Wales).

P D McClellan QC, for the third respondent (Minister for Planning).

Judgement reserved

29 September 1994

TALBOT J.

INTRODUCTION

These proceedings are by way of appeal against the decision of the Director-General of the National Parks and Wildlife Service (the Service) to grant a licence to the Forestry Commission of New South Wales (Forestry Commission) to take or kill any protected fauna in the course of carrying out forestry operations within the Wingham Management Area. The application for the licence included an application to take or kill endangered fauna.

The Ministry for planning has already determined that logging operations may be carried on. The Minister and Director-General made their respective determinations after considering an environmental impact statement and a fauna impact statement, public submissions (including one from the applicant) following exhibition of the proposal and further submissions from public authorities and reports from the respective department heads.

LEGISLATIVE FRAMEWORK

The Timber Industry (Interim Protection) Act 1992 (NSW) suspended the application of Pt *5 of the Environmental Planning and Assessment Act 1979 (NSW)* in respect of logging operations being carried out in specific forests which included the Wingham Management Area. Pursuant to s 9 of the Act the Minister for Planning is the determining authority in respect of logging operations and may make his determination unconditionally or subject to conditions. The Minister for Planning is not to make his determination until an environmental impact statement has been obtained and exhibited by the Forestry Commission and a report has been obtained from the Director of Planning.

The Forestry Commission is not required to comply with s 111 and s 112 of the *Environmental Planning and Assessment Act* with respect to logging operations authorised by the minister's determination.

The *Timber Industry (Interim Protection) Act* came into force on 12 March 1992.

Section 120 of the *National Parks and Wildlife Act 1974(NSW)* provides the authority for the issue of a general licence to take or kill or obtain any protected fauna.

Section 99(1) of the *National Parks and Wildlife Act* makes it an offence for a person to take or kill any endangered fauna, but pursuant to s 99(2), a person shall not be convicted of an offence if he proves the act constituting the offence was done under and in accordance with or by virtue of the authority conferred by a s 120 licence.

A general licence may be issued by the Director-General, a person or officer of the Service authorised by the Director-General or any person holding an office, position or rank prescribed.

The following definitions in the *National Parks and Wildlife Act* are important:

> "Endangered fauna" means protected fauna of a species named in Sch 12 as threatened, as vulnerable and rare, or as a marine mammal. `take', in relation to any fauna, includes, hunt, shoot, poison, net, snare, spear, pursue, capture, disturb, lure or injure, and without limiting the foregoing also includes significant modification of the habitat of the fauna which is likely to adversely affect its essential behavioral patters."

Amendments made to the *National Parks and Wildlife Act* by the *Endangered Fauna (Interim Protection) Act 1991* (NSW) on 17 December 1991 inserted ss 92A to 92E.

Section 92A requires the Director-General to appoint a Scientific Committee charged with the task, where appropriate, to place the species of mammals, birds, reptiles and amphibians known or expected to be present in New South Wales into Pt 1 (Threatened), Pt 2 (vulnerable and rare) or Pt 3 (Marine Mammals) in Schedule 12.

Subsections (5) and (6) of s 92A specify the matters to which the committee is to have regard in deciding whether to place a species of fauna in Pt 1 (Threatened) or Pt 2 (Vulnerable and Rare) in Schedule 12.Section 92B provides that a general licence to take or kill endangered fauna must not be issued except by the Director-General.

In addition to the application fee, an application for such a licence must be accompanied by a fauna impact statement prepared in accordance with s 92D

Under s 92D a fauna impact statement must:

"(a) be in writing; and

(b) be signed by the person who prepared it; and

(c) include, to the fullest extent reasonably practicable, the following:

(i) a full description of the fauna to be affected by the actions and the habitat used by the fauna;

(ii) an assessment of the regional and statewide distribution of the species and the habitat to be affected by the actions and any environmental pressures on them;

(iii) a description of the actions and how they will modify the environment and affect the essential behavioural patterns of the fauna in the short and long term where long term encompasses the time required to regenerate essential habitat components;

(iv) details of the measures to be taken to ameliorate the impacts;

(v) details of the qualifications and experience in biological science and fauna management of the person preparing the statement and of any other person who has conducted research or investigations relied upon."

The person preparing a fauna impact statement must, in accordance with s 92D(2), consult with the Director-General and must, in preparing the statement, have regard to any requirements notified to him or her by the Director-General in respect of the form and content of the statement.

Section 92B(5) requires the Director-General to exhibit the application and invite submissions.

In considering an application made under s 92B, the Director-General must, pursuant to s 92B(6), take into account the following:

"(a) any fauna impact statement or environmental impact statement;

(b) any submissions received within the period specified under subsection (5);

(c) the factors specified in section 92A(5) and (6); and

(d) Any reasons provided pursuant to section 92A(3)(d)."

The Director-General may require any further information concerning the proposed action and the environment to be affected from the applicant or from any public authority.

The factors specified in s 92A(5) and (6) are as follows:

"(5)... (a) whether the population of a species has been reduced to a critical level;

(b) whether habitat of a species has been drastically reduced or modified;

(c) whether a species may be in danger of extinction;

(d) whether a species may now be considered extinct but has been seen in the wild in the last 50 years;

(e) any other matter with the Committee considers relevant.

(6).. (a) whether the population of a species is decreasing because of over-exploitation, extensive destruction of habitat or other environmental disturbance;

(b) whether the population of a species has been seriously depleted and its ultimate security has not yet been assured;

(c) whether the population of a species is still abundant but is under threat from severe adverse factors throughout its range;

(d) whether a species has a small population contained in restricted areas or habitats or thinly scattered over a more extensive area;

(e) any other matter which the committee considers relevant."

Section 92A(d) requires that the Scientific Committee provide reasons for its decision in relation to the revision of Schedule 12 and any recommendation to add species to or omit species from Schedule 12.

An applicant for a licence to which s 92B(5), if dissatisfied with the Director-General's decision under s 92B, may appeal to this Court pursuant to s 92C.

The applicant in these proceedings made a submission pursuant to s 93B(5) and has appealed against the decision of the Director-General.

The objects of the *Endangered Fauna (Interim Protection)Act* are set out in s 2. The objects relevant to these proceedings are:

"(b) to divide species of fauna into endangered, protected and unprotected species;

(c) to ensure endangered species of fauna are only harmed with the informed consent of the Director of National Parks and Wildlife;

(d) to set criteria and performance standards for the giving or withholding of that consent and to guarantee fairness of treatment by providing an appeal on the merits to the Land and Environment Court."

THE PROPOSAL

The activities proposed by the Forestry Commission in the Wingham Management Area are the harvesting of 10,750 hectares of old growth forest, the thinning of re-growth forests covering 14,650 hectares and the harvesting of about 13,400 hectares of re-cut forest which was previously logged prior to 1977. Harvesting in these areas between 1991 and 2025 is expected to yield significant quantities of hardwood quota saw logs, small saw logs, veneer logs, poles and miscellaneous products such as pulp wood, salvage saw logs, sleepers and fencing material. Existing roads and tracks over 596 kilometres will be maintained and approximately 135 kilometres of new roads will be constructed over the next 20 years.

The Wingham Management Area covers an area of 195,000 hectares including 58,253 hectares of state forests, 6,000 hectares of Crown timberlands with most the balance being private property. Ten thousand six hundred and seventy-seven hectares of rain forest will be excluded from general purpose logging.

The Forestry Commission proposes to establish a system of conservation reserves encompassing a minimum of five per cent of the area of each of the twenty-two productive forest types. The conservation reserves will incorporate 7,814 hectares of old growth hardwood forests in an undisturbed condition and will cover 13.3 per cent of the total State forest area.

Noting that a natural hardwood forest consists of a mosaic of areas at various stages of a dynamic ecosystem that passes through a cycle of germination, growth, maturity, over maturity and decline, the Environmental impact statement concludes that the proposed harvesting operations will convert the 10,750 hectares of old growth into re-growth forest over a period of twenty-seven years and that the forest resource retained in the harvested areas will include:

"- substantially undisturbed areas of existing forest along drainage lines which will function as filter strips and protection for riparian habitats

- Over—mature trees with hollows to function as habitat trees or seed trees

- semi-mature trees that have the potential to grow into large quota sawlogs or to develop into future fauna habitat trees dependent on future management decision

- non-commercial tress that are also non habitat tress."

In his determination under the *Timber Industry (Interim Protection) Act*, the Minister has prescribed that those areas identified in the Conservation Strategy in the environmental impact statement shall not be logged or have roads constructed on them. A further thirteen compartments are not to be constructed in them until further assessment of conservation values, including old growth values of all Crown-timberlands and some forested public land has been completed.

A wildlife corridor connecting a major conservation reserve and the existing Weelah Nature Reserve to the central ridge system is to be established at a central location within the Wingham Management Area.

The wildlife corridor connecting a major conservation reserve and the existing Weelah Nature Reserve to the central ridge system is to be established at a central location within the Wingham Management Area.

The Minister's determination also requires that in dry hardwood forest, an average of four habitat trees per hectare shall be retained and in moist and New England hardwood forest, an average of six habitat trees per hectare shall be retained. It also requires that clusters of vegetation around the habitat trees shall be retained and that sufficient recruitment trees shall be retained in order to sustain the prescribed density of habitat trees in perpetuity.

The Minister's determination provides that habitat trees shall be identified by a person suitably trained in the recognition of trees having habitat values appropriate to that area. In calculating the average number of habitat or habitat recruitment trees retained per hectare, all land in conservation reserves or the subject of the moratorium shall not be included.

In addition, where there is evidence of Yellow-belied Gliders, individual feed trees shall be retained together with an average of up to ten trees of feed trees species and an average of five mature bark shedding trees per hectare.

The Minister requires pre-logging inspections to be undertaken in old growth forests for the purpose of identifying habitat trees of significance to the species listed in Schedule 12 and for refugia to be retained where habitat areas of significance are identified.

Special prescriptions for the Hastings River Mouse, cave roosting bats and koalas are applied by the minister in old growth forests, re-growth forests and re-cut forests.

The environmental impact statement provides details of fauna monitoring and research to be carried out in Wingham Management Area State Forests as follows:

"- additional surveys for monitoring purposes to clarify the distribution and habitat usage of the Tiger Quoll, Long-nosed Potoroo and Squirrel Glider

- further survey for the Hastings River Mouse

- monitoring bat populations in the abandoned gold mines in the Cells River area by carrying out annual or biennial surveys

- cooperation with other research organisations or individuals to take advantage of the relatively high numbers of Parma Wallaby found in the Wingham Management Area State Forests to study their habitat utilisation."

In addition to those listed in the environmental impact statement, the following species were highlighted for further monitoring in the fauna impact statement:

- Brush-tailed Phascogale

- Yellow-bellied Glider- Koala

- Glossy Black Cockatoo

- Sooty Owls.

The fauna impact statement also recommended monitoring of bats generally.

The Minister's determination requires the Forestry Commission to carry out all fauna monitoring programmes proposed in the environmental impact statement and the fauna impact statement.

In addition to the retention of discrete conservation reserves, the specific wildlife corridor and habitat trees, the conservation strategy described in the environmental impact statement also allows for the retention of a variety of habitats by virtue of physical constraints on logging, such as steep sided hills, streams, cliffs, moderate slopes and flat areas and the exclusion of rainforest and filter strips to undisturbed areas within logged compartments. It is proposed that the discrete conservation reserves be linked by modified habitats and unmodified habitats incorporating rainforest strips and regrowth forest and that harvesting of adjoining areas will be delayed when practicable in order to assist fauna conservation and minimise the impact on water catchment values.

The report by the Director of Planning critisised the conservation reserve system proposed in the environmental impact statement for not targeting areas where endangered fauna were recorded in the fauna survey and for failing to take into account the variability within a forest type.

However, although the Director considered that the energy and resource requirements of ground dwelling marsupials had not been accounted for, she concluded that the proposed habitat prescriptions and conservation strategy are able to maintain viable populations of hardwood forest dependent fauna and that the areas reserved are suitable representative fauna habitat.

She also noted that rainforest is not suitable habitat for use by hardwood forest specialist fauna and that consequently the reliance on retained rainforest for use as fauna corridors is unlikely to achieve the goals that the Forestry Commission intends such corridors to achieve.

She recommended that, as the ability of habitat prescriptions to maintain viable fauna populations has not been demonstrated, it would not be prudent to approve the entire proposal without such information.

She considered that the areas of high quality faunal habitat (particularly for fauna listed on Schedule 12) should be identified and excluded from logging until such time as regional assessment of conservation value has been undertaken.

These concerns by the Director appear to be reflected in the condition of the Minister's determination directing the exclusion of twenty-four compartments from logging or road construction until further assessment of conservation values and additional regional studies of

other forested public lands are completed.

The environmental impact statement and fauna impact statement were exhibited contemporaneously for the purposes of the Minister's determination pursuant to the *Timber Industry (Interim Protection) Act* and the decision by the Director-General.

The determination made by the Minister was made after examining and considering the environmental impact statement, which incorporated the fauna impact statement, representations made, submissions by the Forestry Commission and the two reports of the Director of Planning, and after consulting and considering the matters raised by the Minister responsible for the Forestry Commission.

Although the application to the Minister was for a twenty-six year period, he determined, after consideration of the reports and submissions, to approve only a ten year period.

Rather than targeting endangered fauna habitat requirements as the applicant contends, the conservation strategy adopted by the Forestry Commission and approved by the Minister involves logging based upon the provision of conservation reserves which achieve a broad habitat protection for endangered fauna under the following conditions:

(a) logging and roading operations are excluded from conservation areas;

(b) twenty-three additional compartments are reserved from logging until there has been further assessment;

(c) pre-logging inspections in old growth forests to identify habitat trees of significance;

(d) the provision of a wildlife corridor;

(e) the preservation of habitat trees beyond that proposed in the environmental impact statement;

(f) the retention of clusters of vegetation containing understorey layers and ground logs around the habitat trees;

(g) special provisions in regard to the Yellow-bellied Glider, Hastings River Mouse, cave roosting bats and koalas;

(h) the retention of recruitment habitat trees in order to sustain the retained density of habitat trees in perpetuity;(i) specific limitations are placed on logging or road construction within or adjacent to rainforest;

(j) refugia to be retained where pre-logging inspections identify habitat areas of significance to Schedule 12 species;

(k) fauna monitoring programmes are required;

(l) post-logging inspections shall be carried out to monitor the implementation of the prescriptions, procedures and conditions imposed;

(m) the results of the monitoring programmes shall be the subject of a report every three years;

It is the proposal which has been approved by the determination of the Minister which is the subject of the application for a licence pursuant to s 120 for the *National Parks and Wildlife Act.*

When the Director-General made his decision on 15 February 1994, he had the benefit of the determination by the Minister and the decision report by the Threatened Species Unit of the Service.

THE LICENCE APPLICATION AND BACKGROUND HISTORY

By letter dated 13 May 1992 the Director-General of the Service, in response to a letter dated 15 April 1992 from the Forestry Commission notified requirements in respect of the form and content of a proposed fauna impact statement in accordance with s 92D(3) of *the National Parks and Wildlife Act*. The letter noted twenty-one individual requirements in addition to the basic requirement set out in s 92D(1).

A fauna impact statement dated 24 June 1992 was prepared for the Forestry Commission by Dr Denny, the Principal of Mount King Ecological Surveys. Although the fauna impact statement used information gathered for the purposes of the environmental impact statement, it was completed before the environmental impact statement was published so that it could be incorporated in the environmental impact statement as Appendix A.

A series of fauna surveys were undertaken by the Forestry Commission for the purpose of the environmental impact statement. Fauna survey reports in respect of bats, reptiles and amphibians were published in January 1992. Further fauna survey reports in respect of mammals and birds were published in March 1992.

In addition to the information generated by the environmental impact statement surveys, the fauna survey reports also contain the results of other surveys and observations. The fauna impact statement contains

additional information on individual endangered species including distribution, population status, habitat requirements and other characteristics.

The environmental impact statement incorporating the fauna impact statement was completed by the end of August 1992 and was exhibited from 7 September 1992 to 26 October 1992.The Forestry Commission lodged an application for a general licence for the Wingham Management Area with the Director-General on 5 September 1992.

A report prepared in accordance with s 9 of the *Timber Industry (Interim Protection) Act* was signed by the Director of Planning on 28 January 1993. The Director of Planning prepared a further report dated 16 March 1993 following her consideration of the matter that the Minister for Conservation and Land Management (CALM) requested that the Minister for Planning take into account.

On 18 March 1993 the Minister for Planning determined, under s 9(1) of the *Timber Industry (Interim Protection) Act*, to grant approval to the Forestry Commission to continue the logging operations outlined in the Wingham Management Area environmental impact statement.

The Director-General of the Service published a report detailing the decision-making process for the Wingham Management Area licence application on 15 February 1994 and pursuant to which the application was granted.

Nine conditions were placed on the proposed licence. Notice of the issue of the licence was published in the Government Gazette.

The applicant, as a person who had made a submission pursuant to s 92B(5) of *the National Parks and Wildlife Act*, commenced these proceedings by way of an appeal pursuant to s 92C on 14 March 1994.

In his Decision Report, the Director-General stated that the Service is satisfied that the fauna impact statement substantially complied with the issued requirements of the Director-General.

CONSIDERATION OF THE LICENCE APPLICATION

The report prepared by the Director-General presented a summary of the information contained in the fauna impact statement and examined the manner in which the fauna impact statement addressed the relevant statutory requirements in s 92D of the *National Parks and Wildlife Act* including the requirements notified by the Director-General.

The report also identified and summarised the main fauna-related issues raised by the public submissions in response to the exhibition of the fauna impact statement. It also considered the determination made by the Minister and its relevance to the licensing process.

The fauna impact statement listed twenty-four species of endangered fauna. By the time the Director-General considered the application, two species of fauna considered in the fauna impact statement were no longer on Schedule 12 whereas a further four species known or likely to occur in the Wingham Management Area, not listed on Schedule 12 at the time of preparation of the fauna impact statement, had subsequently been included. A further seven species not detected in the fauna impact statement fauna surveys had since been detected in the 1992/1993 North East Forests Biodiversity Surveys.

The thirty-three species considered by the Director-General in his report were ultimately the subject of the licence issued on 15 February 1994. All of these species were classified as vulnerable and rare species except one, namely the Hastings River Mouse, which has been classified as threatened.

Each species was considered in the report by reference to the Scientific Committee's reasons for the listing of the species.

The Director-General determined that none of the identified endangered fauna issues are such as to warrant refusal of the licence application. The report asserted that the specific examination of the likely effects of the proposed operation for each species has demonstrated that adequate amelioration of the likely effects from logging can be provided for each species. Notwithstanding, it concluded that there are a number of fauna issues which require further examination and where further amelioration can be provided through appropriate licence conditions. These included:

(a) Length of approval to be granted

Noting that the Minister had reduced the period of twenty-six years proposed by the Forestry Commission to ten years to permit periodic monitoring of the effectiveness of proposed ameliorative measures, the Director-General determined that any approval for a licence should be limited to the same period given in the Minister's determination, that is until 18 March 2003.

(b) Species of fauna to be included in the licence

Noting that the environmental impact statement/fauna impact statement fauna surveyed did not detect a number of species which have since been recorded in more recent surveys and that knowledge of which species are known or likely to occur in the Wingham Management Area will

continue to changer over time, the report concluded that provisions should be made in the licence for its conditions to be varied to include new species and additional conditions placed on the licence for appropriate ameliorative measures.

(c) Old growth forests

Noting that neither the environmental impact statement nor the fauna impact statement considered the implication of the proposal to log 96 per cent of the un-logged hardwood on gentle slopes, the report recognised the considerable importance of old growth forest for endangered fauna. Following receipt of the licence application, the Service further assessed the Wingham Management Area old growth forest compartments on the basis of:

- known records of endangered fauna;
- the known importance of the forest type for endangered fauna;
- overall site quality;
- slope and forest height, as indicators of site quality;
- their area and distance from other old growth forest (more isolated areas being more important;
- the degree of disturbance, especially from past logging, road construction and other uses; and,
- the relative extent and degree of disturbance for that forest type within the Wingham Management area.

This assessment allowed the Service to develop a list of old growth forest compartments said to be ranked in order of their estimated endangered fauna habitat value. Taking a so-called precautionary approach which allows continuation of resource supply whereby old growth forest compartments are ranked in terms of their likely endangered fauna habitat value, the report adopted a harvesting strategy in which compartments considered to be of lesser endangered fauna habitat value are harvested before those of higher value.

(d) Species-specific amelioration

Although the Minister's determination recognised the limitations of the general ameliorative measures proposed in the fauna impact statement by providing a series of specific ameliorative measures for increased habitat tree retention and four identified species, the report considered that further ameliorative measures could be usefully applied for a further ten particular species.

(e) Monitoring and research

A lack of details of the future monitoring and research programmes for the Wingham Management Area induced the conclusion that further assessment of the effectiveness of the proposed ameliorative measures is clearly required although the report concludes this would be more appropriately undertaken as part of longer term research and monitoring programmes. In this respect, the report concluded that further consultation between the Service, the Forestry Commission and other agencies and fauna experts is warranted so that future priorities for monitoring and research can be determined.

The above matters referred to in the report by the Director-General were reflected in his published reasons for granting the licence to take or kill endangered fauna within the Wingham Management Area and the licence conditions.

At face value, the regimes established, respectively by the Minister and the Director-General, reflect a responsible and balanced approach to protect endangered fauna having regard t the need to maintain ecologically sustainable development to provide adequate supplies of timber for the community. The applicant challenges this proposition.

SOME PROCEDURAL ISSUES

At the commencement of the hearing Mr. McClellan QC appeared for the Minister for Planning seeking to deal with issues arising in regard to the validity of the decision by the Minister under the *Timber Industry (Interim Protection) Act*. The Minister was formally joined as a party.

Mr. McClellan pointed out that issues raised in these proceedings regarding the validity of the environmental impact statement and the fauna impact statement amounted to a challenge to the Minister's decision. The applicant thereupon amended the statement of issues to delete any formal challenge to the validity of the environmental impact statement and to confine the issue in regard to the fauna impact statement to its lack of factual and scientific adequacy. Mr. McClellan was excused from further attendance after the issues had been confined to the satisfaction of the Minister. The Court was informed that a representative of the Minister was present throughout the hearing.

On the fourth day of the hearing, the applicant announced that he would no longer be represented by a solicitor and counsel and thereafter Ms Russell appeared as his agent. Without reflecting on the forensic skills of Ms Russell, who carried out the task with impressive proficiency;, the hearing became protracted as a consequence of lengthy cross-examination and examination in chief, some of which, under other circumstances, could have

been avoided. It is appropriate to observe in this context that it is not necessary for a party in class 1 or class 2 proceedings, where the rules of evidence do not apply, to challenge every detail of the material presented by an opponent's witness particularly where that witness is an expert and the issues and arguments have been clearly identified and established in written material already presented to the Court. That is not to say that some propositions should not be challenged and discussed in either oral examination or cross-examination in order for the court to be satisfied that it properly understands the propositions that are being put.

On final submissions, notwithstanding the amendment to the statement of issues, Ms Russell addressed the legal adequacy of the fauna impact statement and submitted that it failed to comply with statutory requirements. Mr. Hale objected that the substance of this submission by Ms. Russell would be treated as going only to the factual and scientific adequacy of the information in the fauna impact statement unless an application was made to the contrary. No such application was made.

When Mr Hale completed his submissions on behalf of the first respondent, Ms. Russell made application to re-open the applicant's case to deal with the basis for the Director-General's decision. The applicant was in response to a submission made by Mr Hale that the process undertaken by the Director-General in determining the licence application was sustainable as being based on adequate information and that it took into account the required relevant factors. Ms Russell submitted that there had not been an opportunity to scrutinise the process undertaken by the Director-General and accordingly the applicant had been denied natural justice. The application was opposed by the respondents. David John Papps, the present Deputy Director (Policy and Wildlife) of the Services, the member of Service's executive directly responsible for the administration of the *Endangered Fauna (Interim Protection) Act 1991* and, in that capacity, for the Service's assessment of the Forestry Commission's environmental impact statement and fauna impact statement for the Wingham Management Area gave evidence in the first respondent's case in chief and was recalled by the applicant in reply. On both occasions he was subjected to examination in chief and cross-examination. The application was rejected.

Alternatively, Ms Russell submitted that the Director-General's decision should be given no weight. It is not a question of weight that should be given to the actual decision decision itself where an appeal such as this is by way of re-hearing. Rather it is a question of weight to be given to the material upon which the decision appealed from was based, together with any other material before the Court. Whether or not the decision of the Director-General was properly and soundly based can be judged ultimately from the outcome of these proceedings by the determination of the Court.

During the course of the hearing evidence from several witnesses and the tender of a number of reports, scientific material, and other literature was rejected. The Court rejected much of that material on the basis of its relevance. Other expert material was rejected because the party seeking to rely on it, generally the applicant, failed to appraise the other parties of the nature of the evidence even by the production of an outline or proof of the evidence. The Rules and Practice Directions of the Court are designed to allow all parties a proper opportunity to prepare their case and to facilitate the efficient conduct of the business of the Court. Where the established procedures are not followed or witnesses are called only at a time which is principally to meet the convenience of the witness, the opportunity to present evidence will be strictly limited, to the most exceptional circumstances.

The hearing extended over eighteen days including two days for a useful and instructive inspection of the Wingham Management Area and submissions over several days. Thousands of pages of written exhibits have been admitted into evidence. The Court has before it a massive body of material which must be considered before the appeal is determined. Accordingly, the Court has the benefit, or dare I say burden, of a far greater amount of material than was available to the Service and the Minister of Planning. It also has the benefit of further comment and opinion from representatives of the Forestry Commission and the Service in respect of that further material. Unless the contrary is indicated, the whole of that evidence has been taken into account in making the determination.

THE MAIN ISSUES

The respondents described the discretion of the Director-General to exercise the discretion whether or not to grant a licence, either conditionally or unconditionally, as a wide one generally unconfined except as to the level of information to be taken into account. Even after the decision is made to grant a licence, the situation remains dynamic. The Director-General has the power to amend the licence to meet changing conditions or the emergence of further faunal information regarding endangered species. They advocate an approach based on practicality in circumstances where the decision whether or not to carry out logging has already been taken by the Minister for Planning.

The respondents also contend that it is not reasonably practicable to establish the actual presence of most endangered fauna and, therefore, the task should be to concentrate on habitat and the key environments for

known endangered fauna or those species suspected or expected to be present in the Wingham Management Area.

On the other hand, the applicant points to the lack of scientific certainty in regard to seventeen of the thirty-three species covered by the proposed licence. His case was largely directed to the adequacy of the fauna impact statement and the level of information obtained in surveys undertaken for the purpose of the environmental impact statement.

The respondents claim that any shortcomings in the fauna impact statement are at the very margin of relevance because the Court can have regard to the whole body of evidence now before it.

The applicant argued that appropriate ameliorative measures and conservation strategy cannot be determined until the alleged anomalies and deficiencies in the fauna surveys and fauna impact statement have been rectified. Applying the statement of the precautionary principle, the applicant says the lack of full scientific certainty should not be used as a reason for postponing measures to minimise impact.

All parties relied on extensive written and oral expert evidence.

It will be instructive to refer to some of the detail of the evidence in order to appreciate the true issues between the applicant and the respondents.

Conditions of licence proposed by the Director-General seek to establish a protocol for ranking of blocks to be logged in order of lower endangered fauna habitat value. Under the Director-General's conditions, no forestry operation shall be carried out in any block until an inspection has been carried out to identify potential or known endangered fauna habitats, and trees to be retained or areas to be preserved are marked and incorporated into any harvesting plan.

On the other hand the applicant proposes that a scientific committee should be established with the responsibility to identify allold growth forests of lowest conservational value sufficient to supply quota saw logs for the period of the licence. The applicant calls for a moratorium upon forestry operations in all remaining identified old growth forests until further assessment. In addition surveys for endangered fauna conducted over three days in appropriate seasons should be undertaken by appointees of the scientific committee prior to roading or logging. The scientific committee would also be charged with responsibility for the design of a conservation reserve strategy, undertaking population viability analysis and the design and implementation of monitoring of all conditions of the licence. The establishment of the scientific committee is adjudged by the respondents to usurp the role of the Service.

The applicant seeks stricter prescription for the selection of suitable habitat and habitat recruitment trees. The most significant disagreement in regard to habitat trees involves the proposal by the applicant that a habitat tree working group be established to identify retention requirements. In the meantime, the applicant seeks the retention of ten habitat trees per hectare in moist forest and six per hectare in dry forests. The proposal by the applicant appears to take no account of, or give no credence to, the Minister's condition requiring expert identification of habitat trees.

There is a conflict between the parties regarding the criteria for determining the extent of habitat retention for the Yellow-bellied Glider. The applicant demands surveys to identify the animal, whereas the Minister and the Director-General concentrate on establishing a core feeding area where there is evidence of presence.

Again in the case of the koala, the applicant seeks to specify the method for pre-logging surveys whereas the Minister and the Director-General are content to provide for a response to evidence of regular koala activity. The applicant proposes a stricter regime than either the Minister or the Director-General for retaining koala food trees.

For the purpose of the licence, the Director-General included the Rufous Bettong, Long-nosed Potoroo, Red-legged Pademelon, Parma Wallaby and the Tiger Quoll as Critical Weight Range species. Critical Weight Range species are those small to medium-sized mammal species in the weight range from 200 to 5,000 grams threatened by feral carnivores. Again the applicant seeks to specify detection techniques. The Minister made no reference to Critical Weight Range species in his determination. The Director-General proposed that no post harvest or hazard reduction burning shall be undertaken, grazing shall be excluded and no poison baits laid in the areas identified as potential habitat. In addition, the applicant seeks to exclude roading and logging from within 50 metres of rainforest and grassed areas where there is a rainforest understorey in areas of likely habitat of the Parma Wallaby, Long-nosed Potoroo and Red-legged Pademelon. The approach by the respective parties to the Brush-tailed Phascogale is similarly distinct.

The Minister has directed, notwithstanding the species has not been detected in Wingham Management Area and the fauna impact statement stated there appeared to be no impact from logging, that the preferred habitat of the Hastings River Mouse should be protected from tree felling. The Service considers that further knowledge of this species is required before assumptions about impact of logging can be made. The Director-General imposed

a condition that the Forestry Commission notify the Service on becoming aware of a confirmed record of the species and thereafter to comply with any reasonable directions made by the Director-General. The applicant seeks to require a minimum effort of 1,000 trap nights in each area of likely habitat and exclusion of forestry operations within 800 metres of known capture sites.

The Director-General and the applicant agree on an appropriate description of the habitat for the Rufous Scrub-bird and appropriate detection methods. The Director-General advocates that a 300 metre radius centred on confirmed habitat should be established, whereas the applicant seeks to exclude logging from the whole compartment and adjacent compartments until a systematic survey is completed and a Rufous Scrub-bird Conservation Plan is prepared and approved.

The applicant proposes that the Director-General establish, at the cost of the Forestry Commission an Owl Recovery Team to identify the conservation requirements for endangered owls whereas the Director-General is content to concentrate on protecting known nest and roost sites. The applicant also recommends the employment by the Forestry Commission of an owl expert to identify core habitats.

The Director-General is content to require all practicable attempts to minimise disturbance to the species of principal feed trees for the Glossy Black Cockatoo but the applicant again requires pre-logging surveys in the breeding season to identify nest sites.

The argument in regard to the endangered frogs also centres around the extent of survey required. The Director-General provides no species-specific prescriptions for endangered frogs except the Sphagnum Frog.

The Director-General adopted the Service recommendation that no measure specific to the Squirrel Glider was required apart from the general ameliorative measures as the Minister's determination provided further protection of habitat for this species by retention of hollow-bearing den trees in harvesting areas. The applicant suggests pre-logging surveys and retention of family group preferred habitat.

The Director-General considered that the general measures will provide broad protection for the Olive Whistler and the Wompoo Fruit Dove. Whereas the applicant is pushing for a specific 50 metre buffer around all rainforest and within 200 metres of any localities of the Olive Whistler.

There are no species-specific prescriptions for endangered bat species in the conditions imposed by the Director-General. The Minister made provision only in respect of cave roosting bats and additional habitat tree retention for tree roosting and breeding species. The applicant's witnesses were critical of this lack of recognition and have urged the Court to provide for pre-logging and roading surveys using prescribed techniques for detection for and following detection, the reservation of foraging habitat refugia. The applicant is also seeking the establishment of a Bat Research and Monitoring Team to devise species-targeted surveys and conservation plans.

In regard to the Yellow-bellied Glider, the koala and the Squirrel Glider, the applicant seeks to restrain logging until viable populations have been encompassed into the reserve system and research has ascertained the level of tolerable disturbance to habitat.

It must be recognised that the Director-General also provided that ameliorative prescriptions for endangered fauna shall continue to be developed through consultation having regard to the conditions of the Minister's determination and the fauna prescriptions contained in the licence. The need to consult specialists and for continuing monitoring is also spelt out in the conditions imposed by the Director-General. He also called for submission of details for the qualifications and experience of people selected by the Forestry Commission in response to the Minister's conditions which require the appointment of persons suitably trained to carry out specific tasks.

The applicant submits that community involvement in the ongoing process of evaluation, prescription and monitoring should be maintained by prohibiting any amendment to the licence conditions until:

"(a) all groups and individuals who have made submissions to the fauna impact statement have been provided with a document which sets out the amendment and justifications for it;

(b) 30 days have elapsed from the date of notification in (a) above; and

(c) The Director-General has considered all submissions received."

The respondents see this provision as a fetter on the exercise of the Director-General's discretion. As a matter of practicality, they say the capacity of the Director-General to respond to critical situations would be unduly constrained.

ADEQUACY OF THE FAUNA IMPACT STATEMENT

The fauna impact statement is one only of a number of tools to be used in determining whether or not a general

licence to take or kill endangered fauna should be issued by the Director-General. The applicant has approached this issue as if the fauna impact statement and the specific survey and other information upon which it was based is the only information upon which the Director-General and thus the court, can rely in the determination of an application for a general licence to take or kill endangered fauna. The applicant's approach takes no account of the ongoing opportunities for inspection, survey and assessment which can lead to responsive changes to the conditions of any licence issued.

Section 92D of the *National Parks and Wildlife Act* requires that the fauna impact statement include the designated descriptions, assessments and details, to the fullest extent reasonably practicable. The approach by the applicant has been in effect to widen this requirement to all things that are physically possible.

It was necessary for the author of the fauna impact statement to have regard to the practicabilities in terms of time and cost in proportion to the risk of failing to identify, and assess the impact upon, fauna in the short and long term.

Dr. Denny relied upon the results of surveys undertaken on behalf of the Forestry Commission within Mount Royal, Glen Innes and Wingham forest management areas.

Dr. Allan York is a wildlife ecologist with the Forestry Ecocology Section Wood Technology and Forest Research Division of the Forestry Commission. He developed the methodology to be used and procured survey guidelines for the environmental impact statement and fauna impact statement.

There were three basic strategies employed during the surveys. First a broad area assessment (general survey) which aimed to identify general trends of species distributions and locate areas which required "specialised survey". Secondly, site specific survey (plot-based survey) was utilised to obtain quantitative data on the richness and relative abundance of species within areas differing with respect to broad forest types, management history and altitude. Thirdly, "specialised survey" techniques were used in habitats recognised as potentially important to certain faunal groups particularly species considered to be highly conservation significant or "of special concern".

No mammal species listed as "threatened" in Schedule 12 of *the National Parks and Wildlife Act* were recorded during the survey and none were expected to occur within the Wingham Management Area. However five species listed as "vulnerable and rare" were recorded during the survey (Tiger Quoll, Koala, Parma Wallaby, Yellow-bellied Glider, Long-nosed Potoroo). A further four species were thought to occur in the Wingham Management Area, namely the Squirrel Glider, Hastings River Mouse, Red-legged Pademelon and the Brush-tailed Phascogale. The author did not expect that any of these animals will be seriously affected by future management operations but identified the need for ongoing survey/monitoring.

Dr. York was responsible for the fauna survey undertaken on behalf of the Forestry Commission to cover all mammal groups in the Wingham Management Area, excluding bats. A general list of mammalian fauna known from the Wingham Management Area and surrounding region was compiled through literature review, opportunistic sightings, road survey and predator scat analysis. The survey report by Dr York concludes:

> "An important issue here is the overall conservation status of the Wingham Management Area and its relationship to reserves in the region. While the diversity of the State forest areas is high, all species recorded here are known from Werrikimbe National Park to the north-west, and most in the other smaller reserves nearby. Given the `peninsular' nature of the management areas, it is not functioning as a corridor between large forested areas, but more as a buffer between Werrikimbe and the developed land to the south. The complex interspersion of rainforest patches with moist and dry forest types provides refuge environments for fauna during wildfire and extended drought periods. Wingham Management Area makes an important contribution to regional fauna conservation in the long-term because of its high habitat diversity, and will continue to do so through active management of the forest environments."

Gregory Richards is a bat biologist in the Division of Wildlife and Ecology of the CSIRO in Canberra and he is the author of the bat fauna survey of the Wingham Management Area. Mist-netting, harp trapping, and an electronic detection were employed in the survey. Field work resulted in an overall survey effort of 122 net nights, 104 trap nights and sixty detection sessions (forty-five hours of recording). A total number of sixty-one forest sites were surveyed. A total of nineteen species were recorded during the survey. Past surveys revealed fifteen species in the region, compared with the nineteen established by this survey. No threatened species within Pt 1, Schedule 12 of *the National Parks and Wildlife Act* was noted in the survey but three species in the list of Pat 2 (vulnerable and rare) were detected with the following comment:

> "*Minioptents australis* and *M schreibersii*: Both species are present in the Wingham Management Area. The recommendation to exclude human interference from the Cells River gold mine will assist in maintaining number of these species. *M schreibersii* is very common in the tropics.
>
> *Myotis adversus*: This species is present in the

> Wingham Management Area, and recommendations for preservation of habitat have been made above.
>
> *Scoteanax meppellii*: A reasonably common species of coastal New South Wales; its listing in this part of Schedule 12 is doubtful. Found at three sites in the Wingham Management Area (one un-logged, two logged)."

A total of twenty-four species of amphibians and fifty-one species of reptiles had been recorded previously within the general area and eleven and twenty-nine species respectively were located during the survey. Three species of reptile included in Schedule 12 (endangered species list) of the *National Parks and Wildlife Act* at the time of the survey were found in the survey. In addition, two frogs listed on Schedule 12A (protected amphibians) were recorded. The revised (interim) Schedule 12 was not available at the time of preparation of the report.

It was noted that there is a paucity of information in the literature concerning the effects of logging and associated fire management on reptiles and amphibians.

The fauna impact statement is predicated on the considerable difficulty in obtaining knowledge of whether forestry operations will significantly affect the population status of a particular species and providing definitive conclusions from the results of surveys. The information in the environmental impact statement was available. A number of matters that Dr Denny was required to take into account pursuant to s 92D of the *National Parks and Wildlife Act* or the requirements of the Director-General were not reiterated where they had been covered in sections of the environmental impact statement.

Each known or expected endangered species in the Wingham Management Area is dealt with individually in a series of profiles.

Dr Des Nicholls, a reader in statistics and Dean of the Faculty of Economics and Commerce at the Australian National University, criticised the fauna impact statement for its failure to take account of other variables beside broad forest type, altitude and management history and the limited period of the surveys. He was not available for cross-examination.

Dr. Hugh Phillip Possingham, an expert in the field of applied mathematics, told the Court that the only way to determine the response of rare and threatened fauna to forest activity was to carry out a population viability analysis which requires a detailed knowledge of the life history and habitat requirements of the species with a computer model which simulates population dynamics to assess the likelihood of extinction within a specified time frame. He had not visited the Wingham Management Area.

In the opinion of Dr Tony Wallace Norton, A Research Fellow in Ecology and Biological Sciences at the Australian National University, a much more carefully designed and comprehensive biological survey is required for the area, giving emphasis to the remaining areas of old growth forests and their constituent biota. In his opinion, the fauna impact statement is seriously flawed particularly because of the reliance on the limited extent of sampling over time and various forest ecosystems. He expressed no confidence that the areas proposed to be set aside for conservation purposes are either appropriate, adequate, sufficient, adequately connected or adequately buffered against disturbance.

Dr. Michael Mahoney, a lecturer in the Department of Biology at the University of Newcastle, who has had a continuing scientific interest in frogs over the past twenty years, told the Court of his belief that the measures to ameliorate impacts are based on many assumptions which are unsubstantiated. He expressed a number of other concerns including the absence of firm proposals for research and monitoring. This concern and belief was based upon the material in the fauna survey and the fauna impact statement without taking account of further information before the Minister and the Director-General and this Court. He recommended that some effort should be made to at least identify the habitat preferences of the endangered frogs followed by mapping of such habitats and an assessment of the availability and condition of these sites prior to continued logging. He was critical of the lack of protection to the headwaters of many streams and the proposed width of filter strips and buffer sizes.

Steve Phillips, as manager of the Environment Division of the Australian Koala Foundation, criticised the absence of criteria to ascertain the use of the Wingham Management Area by Koalas and techniques used for management of the population. To do this, in his opinion, it is necessary to determine exactly what constitutes critical habitat for the species at both the local and regional management level together with the knowledge of the size of the population being affected by the logging activity.

Harry Brian Hines, who holds a degree of Bachelor of Natural Resources from the University of New England and is currently a consultant to the Service, gave evidence for the applicant to the effect that the descriptions and assessments of the impacts of forestry operations in the Wingham Management Area are so affected by fundamental statistical flaws that the material dealing with fauna is unscientific and misleading. Recognizing the concept of reserving areas from harvesting, he stipulated that the occurrence of population and density of species must first be known. He described the detailed techniques required for various species. He conducted a demonstration for the Court in the forest at night in respect of some of these techniques, including call back

and spotlighting. He explained that his object would be to determine the presence of the species and then follow that up by determination of the important areas.

Although the general purpose of the evidence from each of the above witnesses, called in support of the applicant's case, was to show the extent of further survey and assessment required, it also helps to identify the level of inquiry and research that the applicant contends is to the fullest extent reasonably practicable within the meaning of s 92D.

Dr Lionel Wayne Braithwaite is a principal research scientist with CSIRO Division of Wildlife and Ecology in Canberra. Although, he agreed, it is scientifically possible to include a whole range of variables in a fauna impact statement, it is nevertheless logistically impossible to take all variables into account. Although the studies undertaken for the fauna impact statement included only a limited number of variables, they were appropriate to locate the species at that time. Dr. Braithwaite pointed out that development since then means that more should be done.

Dr Harold Edwin Parnaby is currently a consultant honorary research associate at the Australian Museum. In his opinion, the fauna impact statement bat survey report and other material available to the Service do not provide an adequate basis to enable an informed and unbiased assessment either of potential impact of the proposed operations on endangered bat species, the adequacy of the conservation reserve system or the adequacy of proposed ameliorative measures. He also attacked the lack of detailed information, methodology and experimental design of the bat species to utilise regrowth forest. At this point Dr Parnaby says that the information necessary for formulation of quantitative ameliorative measures does not exist. The stringent criteria set down by Dr Parnaby only seeks to emphasise the extent to which the applicant's witnesses failed to appreciate what "to the fullest extent reasonably practicable" means in s 92D(1)(c).

Notwithstanding that there are admitted inaccuracies and misleading statements in respect of some of the detail in the fauna impact statement, based upon the information available at the time of its preparation, it does assist the reader to appreciate what species are known or likely to exist within the Wingham Management Area. It enables the reader to understand the likely habitat requirements of those species and to be informed about the potential impact from forestry operations.

Apart from the measures to ameliorate the impacts of forestry activities, the Australian Museum review of the fauna impact statement concluded that it generally satisfies the requirements of the Director-General of the Service and the *National Parks and Wildlife Act*. In its formal response to the fauna impact statement the Australian Museum stated that the fauna impact statement can be considered to have satisfied the legal requirements in the sense that it has considered the factors specified in s 4A of the *Environmental Planning and Assessment Act*, satisfied the requirements of s 92D of the *National Parks and Wildlife Act*, and generally provided the information requested by the Director-General of the Service. The Service reached a similar conclusion even though it was critical of some factual matters and conclusions reached.

After taking account of the whole of the evidence in relation to the adequacy of the fauna impact statement and the information contained therein, I am satisfied that the fauna impact statement does include to the fullest extent reasonably practicable, the information required by s 92B(1)(c) and s 92D(2).

Bearing in mind that the fauna impact statement is only one of the tools to be used by the Director-General for the purpose of determining whether a licence should be granted, and further having regard to the disproportion between the cost, time and trouble involved in carrying out a full scientific survey to the satisfaction of the applicant and the risk associated with the issue of a licence conditioned to deal with any current lack of knowledge, the fauna impact statement is a document which materially assists achievement of the object of the Act to ensure endangered species of fauna are only harmed with the informed consent of the Director-General.

Recognizing, as Stein J did in L*eatch v National Parks and Wildlife Service and Shoalhaven City Council* (1993) 91 LGERA 270 at 279, that information will continue to evolve over time, the fauna impact statement provides a proper basis for further inquiry and assessment. There is no reason why the information in the fauna impact statement should not be supplemented by further information required as a condition of the licence. The extent of further information about an additional eleven species available to the Director-General by the date of this decision demonstrates how this can occur.

Finally, the applicant relies on the amendment made to the *Environmental Planning and Assessment Act* by the *timber Industry (Interim Protection) Act* omitting the words "protected fauna" wherever occurring and by inserting instead the words "endangered fauna". The *Timber Industry (Interim Protection) Act* requires the Forestry Commission to obtain an environmental impact statement. A fauna impact statement is required only in the circumstances referred to in s 77(3)(d1) of the *Environmental Planning and Assessment Act.*

Although the requirement for a fauna impact statement under s 92B of the *National Parks and Wildlife Act* relates only to a general licence to take or kill endangered fauna,

s 92D(c)(i) requires that the fauna impact statement must include a full description of "the fauna to be affected". By limiting its address to endangered fauna, the applicant says the fauna impact statement is fatally flawed.

In considering whether a fauna impact statement complies with the provisions of s 92D, it is important to consider the purpose for which the fauna impact statement has been prepared. The underlying reason is to enable the Director-General to take the information into account in determining whether a general licence to take or kill "endangered" fauna should be issued. The object of inserting ss 92A to 92B in the *National Parks and Wildlife Act* by the *Endangered Fauna (Interim Protection) Act* 1991 is apparent from the stated object of the latter, namely, to ensure endangered species of fauna are only harmed with the informed consent of the Director-General of the Service.

The legislation also relaxed the prohibition upon harming protected fauna where consents and approvals have been issued under the *Environmental Planning and Assessment Act* by inserting s 4A and s 77(3)(d1). The subsequent amendment made to the *Environmental Planning and Assessment Act* by the *Timber Industry (Interim Protection) Act* confirms the intent to require a fauna impact statement where there is likely to be significant effect on endangered fauna.

Section 92D(1)(c) must therefore be read in context as requiring the fauna impact statement to deal with the fauna the subject of an application under s 92B.

The environmental impact statement is not a superficial, subjective or non-informative document and is comprehensive in its treatment of the subject matter so far as the information available to the author extended at the time of preparation. It is certainly not a perfect document and does not cover every conceivable topic or explore every possible avenue. However it does alert the Director-General, as the decision-maker, and members of the public, such as the applicant, to the inherent problems of the proposal. To that end, the applicant, a host of others who have responded and both the Minister for Planning and the Director-General have had a long, hard, close look at the proposal and its potential for impact. In accordance with the authorities summarised conveniently by the Chief Judge in *Schaffer Corporation Ltd v Hawkesbury City Council (1992)* 77 LGRA 21 at 31 and mentioned without dissent by Stein J in Leatch (at 280) the fauna impact statement was adequate to fulfil its purpose.

PRECAUTIONARY PRINCIPAL

In *Leatch* (at 281-283), Stein J discussed the precautionary principle nothing that, while there is no express provision requiring consideration of it, the adoption of a cautious approach in protection of endangered fauna is clearly consistent with the subject matter, scope and purpose of the *National Parks and Wildlife Act.*

The applicant goes beyond the approach endorsed by Stein J and contends that the precautionary principle ought to be applied and should be taken into account by the Court in considering the merits of this appeal.

In addition to the international environmental agreements, the 1992 Intergovernmental Agreement on the Environment and the *Protection of the Environment Administration Act 1991* (NSW) referred to by Stein J (at 281), the applicant also referred to the National Forest Policy Statement signed by the Prime Minister, the Premiers of all States except Tasmania and the Chief Ministers of the Territories in 1992. The statement explains the strategy to lay the foundation for ecologically sustainable management of Australia's forests. Reference is made to the precautionary principle and the state governments, in keeping with it, will undertake continuing research and long-term monitoring so that adverse impacts that may arise can be detected and redressed through revised codes of practice and management plans.

The only legislation drawn to my attention is the *Protection of the Environment Administration Act 1991.* It sets out as one of the objects of the Environmental Protection Authority, to protect, restore and enhance the quality of the environment in New South Wales having regard to the need to maintain ecologically sustainable development. The Act states that ecologically sustainable development can be achieved through the implementation of four stated principles and programs including the precautionary principle. It does not apply here.

The 1992 Intergovernmental Agreement on the Environment and the National forest Policy Statement are not legislation and accordingly are no more than an understanding between representatives of the Commonwealth, States and Territories. They are series of policies and objects with broad, general agreement on national strategy. They create no binding obligations upon the Director-General or this Court. They are heavily constrained to accommodate differing regional requirements and budgetary priorities.

If I understand the applicant's position correctly, it is that this Court is obliged, as a matter of law, to take into account Australia's international obligations in determining the application. No binding imperative upon the Director-General to do so has been drawn to my attention.

Furthermore, the statement of the precautionary principle,

while it may be framed appropriately for the purpose of a political aspiration, its implementation as a legal standard could have the potential to create interminable forensic argument. Taken literally in practice it might prove to be unworkable. Even the applicant concedes that scientific certainty is essentially impossible. It is only 500 years ago that most scientists were convinced the world was flat. The controversy in this matter further demonstrates that all is not yet settled. What the applicant asks is that decision making is based on conclusions that can be validly drawn from the levels of scientific information available. The question is what that level should be in the context of an application of a s 92B licence.

As Stein J noted, the 1992 Intergovernmental Agreement provides (at 3.5.1) in the application of the precautionary principle, public and private decisions should be guided by:

"(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and

(ii) as assessment of the risk-weighted consequences of various options."

That is a practical approach which this Court finds axiomatic, in dealing with environmental assessment.

The evidence in this case provides the opportunity for the Court to make an informed decision. The environmental impact statement and the fauna impact statement and the subsequent reports have provided a basis for evaluation of the potential for damage to endangered species. The Court also has the benefit of further expert evidence to enable it to weigh the consequences of various options.

In addition to the experts already referred to, Dr Harry Recher, Associate Professor, Department of Ecosystem Management at the University of New England, counselled for caution until the final impact of current logging acceptable to rely on existing research results complimented to some extent by targeted survey work for forest planning purposes.

Mr Papps said population viability analysis is a useful aid for conservation decisions as a computer based tool but it cannot replace the decision-making process in the design of a conservation reserve strategy as the conditions proposed by the applicant suggest.

Mr. Mackowski is a wildlife ecologist employed by the Forestry Commission. He is critical of the conditions for licence proposed by the applicant in that they purport to set up the scientific committee as a regulatory body, with no accountability, and substitute a regime of surveys and moratoria on logging which takes the forest management decisions outside the control of the relevant statutory authorities, namely the Service, the Forestry Commission and the Minister for Planning.

The conservation reserve strategy proposed by the applicant will, in Mr Mackowski's opinion, have the effect of wholly negating the conclusions and the determination of the Minister for Planning. He contends that the applicant is seeking to preserve every individual rather than to manage populations through periods of habitat change by retaining refuge areas, critical habitat components and spatial and temporal variations. In his opinion the applicant's conditions are too concentrated on small areas and "family"populations rather than considering the survival of the species in a regional and wider context.

I have given careful consideration to the whole of the evidence presented by the applicant and the responses thereto.

It is acceptable to allow logging to take place pursuant to a s 92B licence subject to conditions which take account of the need for ongoing survey research and assessment which enables the Director-General to be kept up to date so that the conditions of the licence can be varied or the licence revoked according to the evolving circumstances.

As Dr Braithwaite pointed out, it is not reasonably practicable to rely on sightings to establish the presence of most endangered fauna and the strategy should concentrate on habitat and the key environments of critical significance to fauna.

THE CONDITIONS

The Forestry Commission claims it has obtained approval from the Minister for logging based upon the provision of conservation reserves which achieve a broad habitat protection for endangered fauna based on broad forest types.

The Director-General reviewed that decision and identified an hierarchy of compartments containing the most significant habitat. The hierarchy was not an issue but the effectiveness of the reserve system was disputed by the applicant.

Instead the applicant seeks to re-open the Minister's determination by creating a joint scientific committee to carry out rapid interim assessment and population viability analysis. I accept the evidence from Dr Recher and others that rapid assessment will serve no useful purpose. Further, although population viability analysis may be regarded by some as a useful computer based tool, that opinion is not reflected by its widespread use

to date. It may be appropriate to carry out Population Viability Analysis in respect of particular species. That can be determined by the Director-General as required. She has sufficient resources and expertise available to her to assist with such decisions. The functions of the Director-General as an independent umpire appointed by the *Endangered Fauna (Interim Protection) Act* should not defer to such a committee.

No credible argument has been raised to substantiate limiting the duration of the licence to eighteen months. It is logical and consistent for the term to be sychronised with the determination of the Minister as the approvals will work in tandem. Even so, the Director-General has wide powers under s 133 and s 134 of the *National Parks and Wildlife Act.*

There is no need for there to be any special provision regarding inconsistency between the conditions of the licence and the Minister's determination even if, as a matter of law, which I doubt, the procedures and conditions of the licence can prevail. The logging operations are required to be in accordance with both approvals according to the relevant legislation.

The applicant, in his draft conditions, seeks to impose a strict regime for pre-logging surveys for endangered fauna. The conditions attached to the issued licence require inspections to be carried out to identify potential or known endangered fauna habitats. The inspections proposed by the Director-General recognise that further information obtained on habitat and impacts of logging and roading will be utilised to amend and update the conditions of licence. It is reasonable to expect that, following inspection, carried out jointly by representatives of the Forestry Commission and Service, that the Director-General will respond in an appropriate and responsible way. It is also reasonable to expect that the Director-General may, in exercise of her discretion, requisition the surveys the applicant specifies. That will depend on circumstances as they evolve. The applicant's arguments in this respect do not take sufficient account of the dynamics of the situation and the unfettered power and discretion left with the Director-General as the statutory umpire. The Director-General has the capacity, the power and a duty to act promptly and effectively. This is recognised by the *Endangered Fauna (Interim Protection)Act* stated object to give the Director-General and the Minister an emergency power to stop work where protected fauna is at risk (s2(b)). The Courts expects and relies upon the Director-General to fulfil her duties in accordance with the statutory framework.

In regard to specification for retention of habitat trees, the applicant again seeks to create a separate group of experts to identify retention requirements.

Mr Mackowski explained that a widely representative group had recently been established for the same purpose and the proposal by the applicant would duplicate the work of this group at a local level.

The Director-General maintains the rate of retention specified by the Minister and incorporates a general description of the evaluation process. According to the district forest at Taree, between twelve and twenty-three trees per hectare are being retained in practice. The prescription for retention of habitat trees must be considered in the overall context of the conservation strategy taking account of the areas reserved from logging. Dr Recher recognised that logging in accordance with the Minister's conditions would mean that there would be a greater number of trees retained than the base number specified, and that he would not be surprised if that was as high as twenty trees per hectare. However, he went on to say that the number of trees itself is relevantly meaningless without reference to the quality of what is retained. His concern was to prevent logging of old growth forest pending further assessment. The number of habitat trees retained will do nothing to resolve this dilemma.

However, the hierarchy for logging of compartments established by the licence will give the opportunity for proper reflection and further assessment. I do not propose to increase the specification for retention of habitat trees requested by the applicant.

I agree with the applicant that habitat and recruitment trees should be permanently marked and maintained.

The effect of the prescription proposed by the applicant in regard to the Yellow-bellied Glider and the koala will be to render logging untenable having regard to the broad distribution of the species. The Director-General targets feed trees where the species has been detected as an interim prescription. It is reasonable to expect that any final prescription will follow from the results of pre-logging inspection and monitoring. Again the ultimate solution will remain in the hands of the Director-General and it is appropriate, as I have already said, for this to be the case.

Conditions proposed by the applicant in respect of the Critical Weight Range species are not appropriate, in the absence of pre-logging and roading surveys contemplated by the applicant and which I have already rejected as a condition of the licence. However, once again there is no reason why the Director-General should not implement constraints in terms of the proposed conditions when habitat for these species is identified. The Director-General should not be phased by the complaint from the Forestry Commission that a proposal for a buffer zone or protection strip is unjustified.

The same conclusion is appropriate in regard to logging

bans and survey for carnivorous marsupials, the Squirrel Glider, the Glossy Black Cockatoo, the Hastings River Mouse and the Rufous Scrub bird.

A ban on poisoned baits should extend to the Brush-tailed Phascogale in addition to the Tiger Quoll.

The Forestry Commission has already initiated the establishment of an owl recovery team, the work of which would be duplicated by the proposal from the applicant. The Director-General will be cognisant of any findings by this team and has the capacity to implement its recommendations through the licence procedures.

The Forestry Commission accepts pre-logging and roading surveys should be conducted in respect of the Sphagnum Frog. The licence conditions already incorporate a requirement for the establishment of filter strips along drainage lines. Protection of catchments should extend to areas above where the Green-thighed Tree Frog and Great-barred River Frog are located.

Given that there will be no logging of rainforests and that the Olive Whistler and Wompoo Fruit Dove only use wet sclerophyll forest adjacent to rainforest for foraging, a further fixed 50 metre buffer appears to be unnecessary.

The Director-General's conditions include specific reference to the continuing development and implementation of fauna conditions, fauna prescriptions and monitoring programmes after consultation.

The suggestion by the applicant that all groups and individuals who made submissions in response to the exhibition of the fauna impact statement be consulted before any conditions of licence are amended is totally impractical as a felter on the capacity of the Director-General to respond diligently and expeditiously to any change in circumstance or new information.

The applicant seeks to prohibit grazing throughout the Wingham Management Area and restrict post-harvest or hazard reduction burning in known or likely habitat for a Critical Weight Range species. Dr Recher's major problem with the conditions drafted by the Director-General is that they do not really address post-logging management. Post-logging burns, hazard reduction burning, post-logging grazing (cattle, bees) have great effect on the biota of the original forest. In his opinion, those species most affected are those that require substantial area of old growth. These organisms, he says, are greatly affected by the proliferation of edge species as well as changes in forest structure, species composition and fire regimes.

The fauna impact statement states there are seventeen mammal species known from the Wingham Management Area that can be disadvantaged by burns, whereas seven can be advantaged. The results of surveys of the bat fauna and the herpatofauna in the Wingham Management Area do not provide a clear picture of the effects of fire on these two groups. Concern is expressed about the impacts of grazing and burning upon small native fauna including the Hastings River Mouse. The fauna impact statement contemplates that it may be necessary to restrict further stock grazing in the future.The question of grazing and fire control has not been fully or adequately resolved to the extent necessary to enable the Court to make a final determination in either respect. Accordingly, I propose to take a conditions approach and incorporate conditions relating to grazing and fire hazard appreciating that the Director-General can amend the licence if required after the matter has been further investigated.

DETERMINATION

Accordingly, pursuant to s 92c of the *National Parks and Wildlife Act* and s 39 of the *Land and Environment Court Act 1979* (NSW), I determine that a licence, subject to the conditions attached, shall be issued in accordance with the provisions of s 120 of the *National Parks and Wildlife Act* to take or kill the endangered fauna listed in the conditions.

The conditions are generally in accordance with those attached to the licence issued by the Director-General with amendments to take account of the changes suggested by the applicant and adopted in my reasons.

As I have already indicated, and it will be spelt out, the specific fauna prescriptions in the conditions are to apply pending the development of ameliorative prescriptions after further surveys and investigation and an agreed ongoing consultative procedure between the Forestry Commission and the Service. The report by the Director-General expressly contemplates that this will be done and the Court expects and relies upon responsible action by the Director-General in this respect.

The exhibits may be returned.

I grant leave for any party to file minutes of formal orders, to be settled, if required.

MATTER NO 10151 OF 1994 JERRY NICHOLLS v DIRECTOR NATIONAL PARKS AND WILDLIFE SERVICE AND FORESTRY COMMISSION OF NEW SOUTH WALES AND MINISTER FOR PLANNING ATTACHMENT TO JUDGEMENT

GENERAL LICENCE CONDITIONS

1. **Duration of licence**

This licence will expire on 18 March 2003 or on such other date as the licensee may be notified by the Director-General.

2. **Operations to be in accordance with licence**

Forestry operations shall not be carried out other than in accordance with the conditions of this licence or as those conditions may be varied by the Director-General from time to time, and with the endangered fauna-related conditions set by the Minister for Planning in Schedule 1 of the determination, as may be amended by the Minister from time to time.

3. **Delegation of functions**

The Director-General and the Managing Director may from time to time delegate in writing their respective functions contained in this licence as appropriate to officers of their respective agencies.

4. **Endangered fauna licence**

The species of fauna to which this licence applies are:

Part 1 - Threatened	
Mammals	
Hastings River mouse	*Pseudonys oralis*
Part 2 - Vulnerable and rare	
Mammals	
Tiger Quoll	*Dasyurus maculatus*
Brush-tailed Phascogale	*Phascogale tapoatafa*
Parma Wallaby	*Macropus parma*
Rufous Beltong	*Aepyprymnus nifescens*
Red-legged Pademelon	*Thylogate stigmatica*
Long-nosed ptoroo	*Potorous tridactylus*
Yellow-bellied Glider	*Petaurus austratis*
Squirrel Glider	*Petamus norfolcensis*
Koala	*Phascolasctos cinereus*
Yellow-bellied Sheathtail Bat	*Saccolaimus flaviventris*
Eastern Little Mastif Bat	*Mornopterus norfolkensis*
Goldgen-tipped bat	*Kerivoula puapuensis*
Large-footed Mouse-eared Bat	*Myotis adversus*
Greater Long-eared Bat	*Nyclophilus timoriensis*
Little Bent-wing Bat	*Miniopterus aystralis*
Common Bent-Wing Bat	*Miniopterus schreibersii*
Great Pipistrelle	*Falsistrellus lasmaniensis*
Greater Broad-nosed Bat	*Scotemax nsepellii*
Large Pied Bat	*Chatinoiobus dweyeri*
BirdsGlossy Black Cockatoo	*Calyptorhynchus lathami*
Sooty Owl	*Tyto Tengbricara*
Masked Owl	*Tyto novachollandiae*
Powerful Owl	*Ninax strenua*
Rufous Scrub-bird	*Atrichomis nifescens*
Olive Whistler	*Pachycephala olivacea*
Wompoo Fruit Dove	*Ptilinopus magnificus*
AmphibiansGreen-thighed Tree Frog	*Litoria brevipalmata*
New England Tree Frog	*Itoria subglandulosa*
Sphagnum Frog	*Philoria sphagnicolus*
Giant Barred Frog	*Mixophyes iteratus*
Southern Barred Frog	*Mixophyes batbis*
ReptilesStephen's Banded Snake	*Hoplocephatus stephensii*

5. **Reporting of endangered fauna**

5.1 Unless otherwise specified in this licence, the Forestry Commission shall notify the Service in writing of any new confirmed records of endangered fauna detected within the Wingham Management Area by the Forestry Commission officers or contractors or which are reported to the Forestry Commission, within seven days, or where the record is for a species of endangered fauna which is not a species mentioned in condition 4 above, as soon as practicable after the initial detection of that species.

5.2 Where a confirmed record is for a species of endangered fauna which is not a species mentioned in condition 4 above, the Forestry Commission shall, with respect to that species, comply with any direction made by the Director-General or his delegate in relation to that species.

6. **Old growth forest inspections and surveys**

6.1 This condition applies to the following blocks and compartments with the management area:

Block	**Compartments**
1	209
2	55
3	245
4	248
5	266, 267
6	282, 283
7	144, 145, 146
8	260, 258
9	285
10	287
11	275, 269, 268
12	227, 225
13	289, 290
14	216
15	63
16	235
17	278, 279
18	229
19	186, 226
20	38
21	207, 208, 204
22	40, 41
23	307, 305
24	151, 149

25	264, 265
26	250
27	254, 251, 252
28	236
29	243, 239
30	176
31	303, 306
32	174
Block	**Compartments**
33	75
34	213, 121
35	242
36	223, 228
37	241
38	286
39	244
40	233, 232
41	240
42	231, 230

6.2 Compartments are listed in 6.1 above in blocks which are comprised of one or more compartments. The ordering of blocks is predominantly arranged to place those of highest endangered fauna habitat value towards the end of the list, although operational requirements of the Forestry Commission and issues of Aboriginal and European heritage have also been taken into account in order of listing.

6.3 The order of working for the management area shall generally be arranged so that blocks of lower endangered fauna habitat value have forestry operations carried out in them before blocks of higher endangered fauna habitat value, commencing with block 1 and ending with block 42 as listed in 6.1 above. This order of working can only be amended by joint agreement of the Director-General and the Managing Director and only where the Commission can demonstrate that operational requirements render such an amendment to be necessary for maintaining timber supplies within the management area.

6.4 For all the compartments listed in this condition, a compartment shall not have forestry operations carried out in it until:

(a) an inspection has been carried out in that compartment to identify potential or known endangered fauna habitats. Inspections will be carried out either as an independent inspection by a person approved by both the Director-General and the Managing Director or as a joint inspection by a person nominated by the Director-General and a person nominated by the Managing Director.

Persons performing inspections must be suitably qualified and experienced in the identification of the habitats of endangered fauna known or likely to occur in the management area. In the case of joint inspections, the Service may elect whether or not to participate in an inspection. The Forestry Commission will notify the Service at least ten working days in advance of its intention to undertake a pre-logging inspection;

(b) the Forestry Commission has appropriately marked trees or areas in that compartment for restrictions on the forestry operations to be carried out as specified by the person or persons in (a) above and as may be required by any other relevant restrictions specified in other conditions of this licence; and

(c) the Forestry Commission has incorporated into any Harvesting Plan prepared for that compartment the restrictions referred to in (b) above and the Forestry Commission ensures that such restrictions are complied with by persons carrying out forestry operations in that compartment.

6.5 The Forestry Commission shall, as a component of the further assessment of concentration values required in cl 6 of the determination, undertake further fauna surveys of old growth forest within the management areas using methods and relevant experts approved by the Director-General. These surveys will specifically target those species of endangered fauna for which old growth forest constitutes optimum habitat.

7. **Fauna Prescription**

7.1 Until further prescriptions are developed in accordance with condition 8 below, the following interim prescriptions shall apply to all forestry operations in the management area.

7.2 Habitat Trees

A. Habitat trees will be live, hollow-bearing trees of the largest size class which are likely to have the greatest longevity. Habitat trees will be well spaced consistent with the size of canopy gaps required for adequate regeneration and growth for the species of these forest types. Stags shall not be counted as habitat trees.

B All practical precautions shall be taken to avoid tree heads landing adjacent to identified habitat trees. In gapping operations tree heads shall be moved to the centre of gaps prior to burning. Wherever possible, disturbance to understorey vegetation and logs shall be minimised when moving tree heads. In forests with a xeromorphic understorey, tree heads will be removed from within approximately a 5 metre radius of identified habitat trees. In forests with mesic understorey, heads of trees within a radius of 10 metres of identified habitat trees are not to be burnt, or alternatively, if a ground burn can be sustained in these forest types, trees heads will be removed from within approximately a five metre radius

of identified habitat trees.

C Retained recruitment habitat trees should be selected where possible so as to sustain the floristic diversity of existing retained habitat trees in perpetuity. Recruitment habitat trees shall be selected to provide a representative sample of all age classes present.

D All habitat trees and recruitment habitat trees shall be permanently marked. E. Monitoring of the effectiveness of habitat and recruitment tree retention shall be carried out.

7.3 *Yellow-bellied Glider*

A. When implementing cl 9 of the determination, an inspection shall be undertaken in the vicinity of the Yellow-bellied Glider record or where there is evidence of Yellow-bellied Gliders to determine the feed tree with the most active V-notch markings or other incisions made in the bark by Yellow-bellied Gliders. The tree with the most recent V-notch markings or other incisions shall be the centre tree of an area with a 100 metre radius, that area constituting a core feeding area for the glider.

B When calculating the number of trees per hectare to be retained pursuant to cl 9 of the determination, a minimum of thirty trees of the feed tree species and fifteen bark-shedding trees of the largest size class present shall be retained with the 100 metre radius area referred to in A above. (The bark-shedding tree species include Flooded Gum and the Blue, Grey, Red and White Gum groups.)

C Where the density of feed trees species does not permit the number of trees specified in B above to be retained, all esisting trees of the appropriate species shall be retained. If there is more than one marked V-notched or otherwise incised tree within the 100 metre radius the additional V-notched or incised trees may be counted as feed trees to be retained.

7.4 Koala

A If a past record of a koala is accurately known or if evidence or regular koala activity is detected prior to or during forestry operations, operations will be excluded from within 100 metres of the location of the record or the location of the evidence of activity until the assessment in part B below has been undertaken.

B. The extent of habitat use and preferred food trees within the 100 metre radius area referred to in A above shall be assessed using a method approved by the Director-General. Paragraph C,D or E below will then apply, as appropriate to the outcome of that assessment.

C If no further evidence of regular koala activity is found, forestry operations may resume but a minimum of 5 koala food trees must be retained within the 100 metre radius area referred to in A above. If a koala was recorded in a preferred food tree, that tree must be included among the retained trees.

D. If regular koala activity is detected but less than 20 per cent of trees examined have koala faecal pellets underneath and no further koalas are observed, limited forestry operations may resume under the following conditions:

(i) trees with evidence of regular koala activity shall be retained;

(ii) a minimum of fifteen koala food trees per hectare shall be retained within a 100 metre radius area referred to in A above;

(iii) if the density of koala food trees per hectare does not permit the above specified number of trees to be retained, all existing koala food trees shall be retained.

E. If regular koala activity is detected and more than one koala is observed or more than 20 per cent of trees examined have koala faecal pellets underneath, forestry operation, including post-harvest and hazard reduction burning, shall be excluded from the 100 metre radius area referred to in A above and the Director-General notified.

For the purposes of A and E above, koala food trees shall be leafy, with broad crowns and represent the range of sizes greater than 40 centimetres dbh present and be selected with preference to Tallowwood *Eucalyptus microcorys*, Small-fruited Grey Gum *E. propinqua*, Grey Gum *E punctata*, Forest Red Gum *E tereticomis*, and Sydney Blue Gum *E saligna*. If these species are not present in adequate numbers, food trees should be selected from the following species: Blackbull *E pilularis*, Flooded Gum *E grandis* and Red Mahogany *E resinifera*. Koala food trees retained pursuant to this condition may be counted as habitat trees or habitat recruitment trees for the purposes of other conditions.

For the purposes of A and E above, regular koala activity is indicated by the presence of koala faecal pellets beneath trees or by characteristic claw scratch marks on the trunks of trees.

7.5 *Critical Weight Range species - Tiger Quoll, Rufous Bettong, Long-nosed Potoroo, Red-legged Podemelon and Parma Wallaby*

Critical Weight Range species are those small to medium-sized mammal species in the weight range from 200 to 5,000 grams and which are threatened by predation or

competition from feral carnivores. For the purposes of this licence, these species include Tiger Quoll, Rufous Bettong, Long-nosed Potoroo, Red-legged Pademelon and Parma Wallaby.

In areas identified in the inspections referred to in condition 6.4 above as being potential habitat for a Critical Weight Range species, no post-harvest or hazard reduction burning shall be undertaken, and grazing shall be excluded from these areas as soon as practicable.

A. No poisoned baits for feral animal control purposes shall be laid in compartments where Tiger Quoll or Brushtailed Phascogale are known or likely to occur or in contiguous compartments.

Hastings River Mouse

The Forestry Commission shall immediately notify the Service on becoming aware of a confirmed record of Hastings River Mouse within the State forests in the management area. The Forestry Commission shall comply with any reasonable direction made by the Director-General in relation to that species. Pending any such direction, no forestry operations shall be conducted within an 800 metre radius of known capture sites. Grazing shall be excluded from these areas as soon as practicable.

Rufous Scrub-bird

Critical Rufous Scrub-bird habitat is considered to occur in those areas which have a minimum area of 1 hectare and which are rainforest or wet sclerophyll forest generally above 600 metres ASL and which have extremely dense cover 2 to 50 centimetres above ground, moderate cover 50 to 100 centimetres above ground, a moist microclimate at ground level and abundant leaf litter. The inspections pursuant to condition 6.4 above shall, when occurring in the habitats above, include identification of locations of potential Rufous Scrub-bird habitat.

Forestry operations shall be excluded from identified potential habitat until surveys (including playing of taped Rufous Scrub-bird calls and listening for callback) have been undertaken in spring or early summer to confirm the presence or absence of Rufous Scrub-birds.

There shall be an exclusion zone of 300 metres radius centred on any confirmed Rufous Scrub-bird habitat within which forestry operations shall not be carried out.

7.8 Sooty Owl and Powerful Owl

All forestry operations shall be excluded from a zone of 100 metres radius centred on known nest and roost sites of Sooty or Powerful Owls.

In sub-catchments where records of Sooty or Powerful Owls are known, 100 metre wide riparian reserves shall be established along all second and third order streams. Filter strips shall be extended along first order streams to reserve moist gully vegetation types as far as these types extend upslope.

No tree shall be felled within or, as far as is practicable, into these reserves or filter strips.

(The order of streams is that shown on the relevant topographic map for the management area as published by the Central Mapping Authority at the scale of 1:25,000).

*7.9 Glossy Black Cockatoo*All practicable attempts shall be made to minimise disturbance to seeding forest oaks greater than ten years of age throughout areas subject to forestry operations.

7.10 Sphagnum Frog

Sphagnum Frog habitat is found in wet sclesophyll forest and rainforest where the substrata is characterised by permanent soakages or seepages.

Filter strips shall be established on all drainage lines within catchments under 100 hectares where Sphagnum Frogs are known to occur. Where Sphagnum Frogs are known to occur away from streams, filter strips shall be expanded to incorporate the locations of those records. These filters strips shall also be extended to include any potential Sphagnum Frog habitat located in areas adjacent to known locations. Where soakages or seepages within such potential Sphagnum Frog habitat located away from filter strips, a 20 metre buffer shall be established around them from which forestry operations shall be excluded. Log dumps shall not be located within 100 metres of any buffers or filter strips established pursuant to this prescription.

Where known records of Sphagnum Frog occur grazing shall be excluded from these areas as soon as is practicable.

(Drainage lines shall be those shown on the relevant topographic map for the management area as published by the Central Mapping Authority at scale of 1:25,000).

7.11 Green-thighed Tree Frog, Giant Barred Frog and Southern Barred Frog

Forestry operations in all catchments above where the Green-thighed Tree Frog or Great-barred River Frogs are located shall only proceed in accordance with prescriptions issued by the Director-General subsequent to being informed of their locations.

7.12 Bats

Where known nest or roost sites of endangered bat species are detected foraging habitat shall be reserved. Such refugia should be a minimum of 250 metres wide, and encompass a transect from gully to ridge top inclusive. Areas selected for reserves will be undisturbed and of high site quality wherever possible. Such areas could comprise refugia set aside for other endangered fauna. Logging, roading and burning will not be permitted in such reserves. The minimum length of such reserves shall be 350 metres.

8. **Fauna prescriptions and monitoring programs**

8.1 Having regard to appropriate fauna conditions of the determination and the fauna prescriptions in condition 7 above, the ameliorative prescriptions for endangered fauna species sensitive to forestry operations shall continue to be developed following further survey and investigation and an agreed ongoing consultative procedure to be adopted jointly by the managing director and the Director-General. Where necessary, specialists approved by the Director-General shall be consulted in the development of these prescriptions.

8.2 Having regard to appropriate monitoring programme conditions of the determination, the structure and design of programmes to monitor the effectiveness of the prescriptions mentioned in 8.1 above shall be developed using the same consultative procedure as described in 8.1 above. Where necessary, specialists approved by the Director-General shall be consulted in the development of these programmes.

8.3 The prescriptions and monitoring programs developed in 8.1 and 8.2 above, once developed and jointly approved by the Director-General and the managing director, shall be implemented by the Forestry Commission throughout the Management Area.

9. Qualifications of persons

Details of the qualifications and experience of people selected by the Forestry commission under conditions 9(c), 10, 12(b)(iii), and 12(c)(ii) of Schedule 1 of the determination will be provided to the Director-General prior to their commencement of the nominated work.

10. Grazing

No further grazing permits shall be issued and no existing permits shall be renewed by the Forestry Commission for grazing in the management area.

11. Exclusion zones

Where an exclusion zone is identified it shall be clearly delineated in the field by tree marking as for filter strips, recorded on harvesting plans and preferred management priority maps, identified to contractors in the field, and no trees shall be felled into such zones.

DEFINITIONS

The following definitions are used in this licence:

Forestry Commission:	Means the Forestry Commission of New South Wales.
Director-General:	Means the Director-General of National Parks and Wildlife
Determination:	Means the approval of the Wingham Management Area granted by the Minister for Planning on 18 March 1993 under s 9(1) of *the Timber Industry (Interim Protection) Act 1992*
Environmental Impact Statement:	Means the environmental impact statement for the Wingham Management Area dated August 1992 prepared by Truyard Pty Ltd.
Endangered Fauna:	Means the fauna species listed on Schedule 12 of *the National Parks and Wildlife Act 1974*, as may be amended from time to time.
Fauna Impact Statement:	Means the fauna impact statement dated 24 June 1992 for the Wingham Management Area prepared by Dr Martin Denny of Mount King Ecological Surveys.
forestry operations:	Includes logging, road construction, prescribed burning, feral animal control and weed control operations.
Managing Director:	Means the managing director of State Forests of New South Wales.
Service	Means the National Parks and Wildlife Service of New South Wales.
State Forests of New South Wales:	Is the registered business name of the Forestry Commission.

Appeal dismissed

Solicitors for the applicant: Berveling & Co.

Solicitors for the first respondent (Director-General of National Parks and Wildlife): National Parks and Wildlife Service.

Solicitors for the second respondent (Forestry Commission of New South Wales): Forestry Commission of New South Wales.

Solicitor for the third respondent (Minister for Planning): C C Hanson.

TFMN

[LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES]

LEATCH

v.

NATIONAL PARKS AND WILDLIFE SERVICE AND SHOALHAVEN CITY COUNCIL

Stein J

1-5, 23 November 1993

Fauna Protection - Licence to take or kill endangered fauna - Road construction - Objector appeal against grant of licence - Fauna impact statement - Adequacy - Factors to be taken into account - Benefits of development to be balanced against likely loss of endangered species - National Parks and Wildlife Act 1974 (NSW), ss 5, 92, 92A-92D, 99, 120.

Section 92 of the *National Parks and Wildlife Act* 1974 (NSW) makes the Director-General of the National Parks and Wildlife Service the authority for the protection and care of fauna. Under s 92A a scientific committee was appointed to review and continue to review Schedule 12 of the Act which provides a list of endangered fauna. Subsections (5) and (6) specify matters which the committee must have regard to in deciding to place species of fauna on the schedule as "threatened" (Pt 1) or "vulnerable and rare" (Pt 2). Section 92B provides that only the Director-General may issue licences to take or kill endangered fauna. In considering a licence application the Director-General must take into account the fauna impact statement, any submissions received, the factors listed in s 92A(5) and (6) and any reasons given by the scientific committee under s 92A(3)(d). The Director-General may require further information and may grant the application unconditionally or subject to conditions or may refuse it. Section 92C provides a right of appeal to the Land and Environment Court by an applicant for a licence to which s 92A applies or by any person who made a submission under subs (5) thereof. Section 92D sets out the requirements for a fauna impact statement. Section 99 provides substantial penalties for taking or killing endangered fauna without authority of a licence. Section 120 enables licences to be issued to take or kill any protected fauna in the course of carrying out specified development or activities.

On 25 February 1993, Shoalhaven City Council applied to the Director-General of the National Parks and Wildlife Service for a licence to take or kill endangered fauna. The need for the licence arose from the granting of development consent by the Council to itself for the construction of a link road through North Nowra to the Princes Highway, including a bridge over Bomaderry Creek. The licence application was supported by a fauna impact statement pursuant to s 92A of the *National Parks and Wildlife Act.* The Director-General granted the licence subject to conditions and an objector who had made a submission appealed, submitting that the fauna impact statement was invalid or legally inadequate as failing to comply with s 92D of the Act. In particular, it was submitted that there had been a failure to include "to the fullest extent reasonably practicable" a description of the fauna affected by the actions and the habitat of the fauna.

Held: (1) The same tests of adequacy in relation to environmental impact statements under the *Environmental Planning and Assessment Act* 1979 (NSW) should apply to fauna impact statements under the *National Parks and Wildlife Act*

Schaffer Corporation Ltd v Hawkesbury City Council (1992) referred to.

(2) Like an environmental impact statement a fauna impact statement is not the decision but rather a tool to be used in the decision making and may be supplemented by further information.

(3) In the circumstances of the present matter the omission to advertise certain further information which had been provided to supplement the fauna impact statement did not cause the fauna impact statement to be legally inadequate, or otherwise fatally flaw the decision making process.

(4) In the present matter the fauna impact statement included a reasonably thorough discussion of the significant issues and likely faunal consequences and was not legally inadequate.

(5) The "precautionary principle", under which, if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental damage, is not an extraneous consideration for the purposes of Pt 7 (Fauna) of the *National Parks and Wildlife Act* 1974.

(6) A licence to take or kill endangered fauna should not in most circumstances be "general" in its coverage of endangered species but should specify the species which it permits to be taken.

(7) The period of a licence to take or kill endangered fauna should be confined, so far as reasonable, because of possible changes in the physical environment and state of scientific knowledge.

(8) In the present matter the purely economic analysis of the respective alternative road routes had resulted in a failure to include natural values in the evaluating balance.

(9) Upon examination of all of the evidence the Court could not be satisfied that a licence under s 120 of the *National Parks and Wildlife Act* 1974 to take or kill endangered fauna should be granted to the Council in the present matter.

APPEAL

This was an objector appeal under s 92c of the *National Parks and Wildlife Act* 1974 against the granting of a licence under s 120 of that Act to take or kill endangered fauna. The facts are set out in the judgment.

I J Dodd (solicitor), for the applicant.

B J Preston, for the respondent.

J J Webster, for the second respondent (the Council)

Judgment reserved

23 November 1993

STEIN J.

INTRODUCTION

Shoalhaven City Council (the Council) applied to the Director-General of the National Parks and Wildlife Service for a licence to take or kill endangered fauna. The Director-General granted a general licence subject to conditions. Any person who made a submission pursuant to s 92B(5) of the *National Parks and Wildlife Act* 1974 (NSW) as amended (the Act) may appeal to the Court if dissatisfied with the decision. Ms May Leatch objected by filing the subject Class 1 application in court on 23 July 1993.

The need for a licence arises from the granting of development consent by the Council to its own proposal to construct a link road through North Nowra to the Princes Highway. The proposed road includes a 60 metre bridge over Bomaderry Creek. In support of its application for a licence the Council submitted a fauna impact statement to the National Parks and Wildlife Service pursuant to s 92B(2) of the Act. The fauna impact statement was advertised in February 1993 and a number of submissions, including one from the applicant, were received by the National Parks and Wildlife Service. After consideration of the licence application the National Parks and Wildlife Service sought further information from the Council. A supplementary submission was provided by the Council on 19 May and on 24 June 1993 the Director-General formally notified the Council that a general licence under s 120 of the Act had been granted for a period of ten years subject to a number of ameliorative conditions. Notice of the issue of the licence was published in the Government Gazette of 2 July 1993.

THE LEGISLATIVE FRAMEWORK

The *National Parks and Wildlife Act* was extensively amended in terms of its fauna protection provisions by the enactment of the *Endangered Fauna (Interim Protection) Act* 1991 (NSW): The amending legislation was in part a response to the decision of the Court in *Corkill v Forestry Commission (NSW)* (1991) 73 LGRA 126, affirmed in the Court of Appeal in *Forestry Commission (NSW) v Corkill* (1991) 73 LGRA 247.

It may be useful to attempt a brief summary of the relevant provisions of the Act. Section 92 makes the Director-General the authority "for the protection and care of fauna". A scientific committee was appointed pursuant to s 92A to review and continue to review Schedule 12 of the Act, which provides a list of endangered fauna. Section 92A(5) and s 92A(6) respectively specify matters which the committee must have regard to in deciding to place species of fauna on the schedule as threatened (pt 1) or vulnerable and rare (Pt 2). Only the Director-General may issue a licence to take or kill endangered fauna (s 92B). Section 5 of the Act defines "take" as follows:

> "'take', in relation to any fauna, includes hunt, shoot, poison, net, snare, spear, pursue, capture, disturb, lure or injure, and without limiting the foregoing also includes significant modification of the habitat of the fauna which is likely to adversely affect its essential behavioural patterns;"

It may be seen that the definition includes habitat modification discussed in *Corkill*.

In considering a licence application the Director-General must, pursuant to s 92B(6), take into account the fauna impact statement, any submissions received, the factors listed in s 92A(5) and s 92A(6) and any reasons given by the scientific committee under s 92A(3)(d). Subsection (6) allows the Director-General to require "further information concerning the proposed action and the environment to be affected from the applicant ...". The Director-General may grant the application unconditionally or subject to conditions or refuse the application (s 92B(8)). Section 92D sets out the requirements of a fauna impact statement. Subsection (1) provides:

(b) be signed by the person who prepared it; and

(c) include, to the fullest extent reasonably practicable, the following:

(i)a full description of the fauna to be affected by the actions and the habitat used by the fauna;

(ii) an assessment of the regional and statewide distribution of the species and the habitat to be affected by the actions and any environmental pressures on them;

(iii) a description of the actions and how they will modify the environment and affect the essential behavioural patterns of the fauna in the short and long term where long term encompasses the time required to regenerate essential habitat components;

(iv) details of the measures to be taken to ameliorate the impacts;

(v) details of the qualifications and experience in biological science and fauna management of the person preparing the statement and of any other person who has conducted research or investigations relied upon."

Substantial penalties are provided by s 99 of the Act for taking or killing endangered fauna - imprisonment and/ or a fine. It is a defence if the act was done under or in accordance with a general licence issued under s 120. The latter section permits licences to be issued to take or kill any protected fauna in the course of carrying out specified development or activities. A general licence may, but need not, specify the species of fauna which may be taken or killed under its authority.

On any appeal under s 92C the Court must take into account the factors set out in s 92B(6) viz, the fauna impact statement, submissions received by the Director-General, the factors set out in s 92A(5) and s 92A(6) (which include "any other matter which the Committee considers relevant"), any reasons of the committee provided under s 92A(3)(d) and any further information provided under s 92B(6). Section 92C(2) makes it clear that s 92B(6) does not limit s 39 of the *Land and Environment Court Act* 1979 (NSW). Relevantly this section provides:

"(2) In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.

(3) An appeal in respect of such a decision shall be by way of rehearing, and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be given on the appeal;

(4) In making its decision in respect of an appeal, the Court shall have regard to this or any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest.

(5) The decision of the Court upon an appeal shall, for the purposes of this or any other Act or instrument, be deemed, where appropriate [to be that of the Director-General?]

Pursuant to s 17(ea) of the *Land and Environment Court Act* appeals under s 92C of the Act are assigned to class 1 of the jurisdiction of the Court.

Besides what might be broadly described as the "merit" issues arising on the appeal, the applicant seeks to argue that the fauna impact statement does not comply with the Act, specifically with the requirements of s 92D(1)(c) and s 92D(2). I will return to this issue later in my reasons.

BACKGROUND

For some years the Council have perceived the need for a new road link across Bomaderry Creek between the expanding residential areas of North Nowra and the Princes Highway. It is said that congestion at the intersection of Illaroo Road and the Princes Highway, just north of the bridge over the Shoalhaven River, is becoming chronic and the intersection approaching finite capacity. A new link will relieve this situation and defer highway upgrading for around five years. I accept Council's position that a new road link is justified. Various options were discussed in a Council Situation Paper issued in December 1990.

Following this paper, in or around August 1991, Council made a development application to itself, as consent authority, to permit the construction of an east/west road and bridge over the Bomaderry creek linking North Nowra to the Princes Highway. The route of the link was from the intersection of Pitt Street and Illaroo Road (in the west) to Nerang Road (to the east) and joining the Princes Highway approximately 2 kilometres north of the Shoalhaven River. The bridge crossing of the creek would be located in the vicinity of an existing weir and water pipeline, and the road would approximately follow an electricity transmission line easement. The application was accompanied by a review of environmental factors in two volumes prepared for the Council by consultants, Mitchell McCotter & Associates.

The review of environmental factors discussed four potential alternative routes concluding that the preferred route had clear overall benefits as it provided a necessary level of traffic service, a positive benefit to cost ratio and "acceptable environmental impacts". The document made an assessment of the alternatives on economic, environmental and social or community factors and ranked each option from A to D. For the purposes of this case it is probably sufficient to concentrate on Council's preferred alignment and the northern alternative following West Cambewarra Road from its intersection with Illaroo Road to the Princes Highway (or Moss Vale Road). The review of environmental factors estimated the cost of this route at $1.1 million and the preferred alternative at $1.8 million. The cost/ benefit analysis, however, was found to be positive for the preferred route and slightly negative for the northern alternate route. The lengths of each road varied, the proposed route being 1.9 kilometres and the northern alternative 1.6 kilometres.

Flora and fauna impact was assessed at a most favourable A rating for the West Cambewarra Road link compared to a B for flora and C for fauna for the proposed road. Among the various community factors assessed was "traffic flows". In this regard the preferred route was assessed as A and the northern alternative route graded as C. The preferred route was said to provide significant benefits in terms of vehicle travel time and cost savings. The northern option was seen as non cost effective because traffic would still be attracted to the Illaroo Road route to Nowra township.

The review of environmental factors described a number of diverse vegetation communities in the area, particularly towards the Bomaderry Creek gorge. A number of rare plant species were identified. For example, the Eucalyptus Iangleyi occurring immediately to the north of the creek at the picnic area; Dampeira rodwayana, a small shrub occurring in the Scribbly Gum woodland and Zierla bacuerlenii (Rutaceae) a rare and endangered plant occurring only in bushland around the Bomaderry Creek. As Dr. Kevin Mills says this means that it is found nowhere else in the world. Already it has been noted that many Zierla plants in the area of the proposed road have been vandalised and destroyed. Some Zierla bacuerlenii are growing a small distance to the north of the proposed road and are proposed to be fenced off. The Australian Heritage Commission has placed a nearby area of the Bomaderry Creek on the Register of the National Estate because of the occurrence of Zierla. In addition, the plant is listed as an endangered species under Schedule 1 of the *Endangered Species Protection Act* 1992 (Cth).

The comment might be made that it is somewhat strange that under State law rare and endangered plants are not accorded similar protection to rare and endangered fauna, especially since flora is important for biological diversity and advances in medical science sometimes involve the application of rare plants.

The review of environmental factors found that diverse fauna communities were expected to be present in the gorge area. Fauna were briefly surveyed. A number of species listed in schedule 12 of the Act were known, or likely, to occur in the study area. However, the review of environmental factors (at 4.12) stated that the impact of the road on fauna "is likely to be negligible". To protect the ecological values of the area the report proposed a number of mitigation measures. An ecological assessment of Dr. Kevin Mills was appended to the review of environmental factors. It examined the vegetation communities, the presence of threatened plant species and fauna of conservation importance. His assessment stated that "the Bomaderry Creek gorge is probably one of the most valuable areas of fauna habitat within the Noowra town limits" (at 13). The report also noted that the Yellow-bellied Glider could be present in the area. In assessing the options, the document concluded that the northern alternative avoided the creek gorge, the dissection of the Bomaderry Creek bushland and also damage to rare plant species. By contrast, the Council's preferred route had potential impacts on rare plants and on the recreational values of the gorge (at 11).

In June 1992 the Council asked the Director-General for a specification for a fauna impact statement and this was provided on 14 July 1992. The three page document required, inter alia, "a full fauna survey" along the proposed route and all feasible alternatives. It mentioned the targeting of endangered species known or likely to occur in the area including the Yellow-bellied Glider, Diamond Python and the Tiger Quoll.

It appears that in October 1992 the Council resolved to approve the development application "subject to the imposition of appropriate conditions of consent, provided recommendations of a fauna impact statement were satisfactory". By letter dated 3 February 1993, Council

applied to the National Parks and Wildlife Service for a licence under s 120 of the Act to take or kill endangered fauna, enclosing copies of a fauna impact statement prepared in October 1992 by its consultants Mitchell McCotter & Associates. On 25 February 1993, Council resolved to grant conditional development consent to its road proposal. Condition 2 thereof provides:

> "This consent is conditional upon the obtaining of a Licence pursuant to s 120 of the *National Parks and Wildlife Act* [as amended by the Endangered Fauna (Interim Protection) Act the New South Wales National Parks and Wildlife Service prior to any works commencing."

The fauna impact statement and licence application were advertised by the National Parks and Wildlife Service and a number of public submissions were received,including one from the present appellant. The fauna impact statement concluded that the site was the habitat of endangered species. However, as it was isolated from other areas of suitable habitat, the long term viability of the species was questionable. Impacts on endangered fauna were not considered sufficient to prevent the construction of the proposed road. Mitigation measures were recommended.

The public submissions drew attention to a number of matters including the rare plant species. The Shoalhaven branch of the Australian Conservation Foundation was critical of the fauna impact statement and drew attention to the likely occurrence of the giant Burrowing Frog which had been added to Schedule 12 by the scientific committee in December 1992, after the fauna impact statement was prepared. The Total Environmental Centre, in a detailed submission, was also critical of aspects of the fauna impact statement and drew attention to the precautionary principle.

The fauna impact statement was assessed by the National Parks and Wildlife Service's Natural Resources Co-ordinator (Southern Region), Ms Liz Dovey. She noted that the Diamond Python, referred to in the specification, had been removed from Schedule 12 in December 1992 but the Giant 10 Burrowing Frog had been added and would need to be assessed. The officer critically examined the fauna impact statement and found it deficient in a number of aspects. As a result the National Parks and Wildlife Service requested further information from the Council (5 May 1993). In response a further report of Mitchell McCotter was provided to the National Parks and Wildlife Service by the Council.

The report referred to the Giant Burrowing Frog but stated that since the gorge area had been substantially degraded it was "not considered prime habitat for the species". The document continued: "... it is considered therefore that the proposed road will not impact upon this species." The further information did not note that Council's consultants, Dr. York and Mr. Daly, had heard the call of the Giant Burrowing Frog in May 1992 when spotlighting for gliders. Although not expressly required, no mention was made of the occurrence in the fauna impact statement. The position where the frog was heard was north of the proposed road alignment (to the west of the gorge) and on the edge of the Grey Gum woodland adjacent to a dry scrub community dominated by White Kunzea Ambigua and Tea-tree. The report concluded that on balance the proposed road best met environmental and economic objectives. The integrity of the gorge could be protected by a range of ameliorative measures, including an extensive buffer conservation zone.

The further information provided was not advertised, although news of it appears to have leaked and further public submissions were received by the National Parks and Wildlife Service. Ms Dovey again assessed the material, concluding much of it to be inadequate. However, the Director determined to grant a general licence subject to conditions.

While the process of the Court on appeal is by way of re-hearing it is useful to examine the decision-making process of the National Parks and Wildlife Service. The decision-making documents (exhibit A, documents 37 and 38) considered that direct impacts of the development would likely result in the killing or injuring of fauna. Indirect impacts of the development included habitat fragmentation and disturbance to individual animals from noise and light. Document 37 contains the following conclusions:

> "Overall, it is considered that the additional information provided by Shoalhaven City Council, when combined with the information in the fauna impact statement, is adequate to permit a decision to be made on this licence application. Based on this information, it is considered that the taking or killing of endangered fauna is likely to occur if the road proposal proceeds. This is especially the case in relation to populations of Yellow-bellied Glider and Tiger Quoll, even though precise estimates cannot be given as to current population distribution and abundances.
>
> It is also considered that the definite need for the road has been demonstrated by Shoalhaven City Council and it is noted that development approval under the *Environmental Planning and Assessment Act* 1979 has been granted for the construction of the road.
>
> It is also considered that there is uncertainty as to the long-term viability of the local endangered fauna populations which are likely to be affected by this road. Long-term development plans for the locality indicate increasing pressures on existing populations which may become locally extinct irrespective of whether or not the road is constructed. This is especially the case in relation to populations of Yellow-bellied Glider and Tiger Quoll.

> Generally, the ameliorative prescriptions proposed by Council as described in the fauna impact statement and Council's additional information provide an adequate amelioration of any adverse effects which the road may have on endangered fauna."

THE HEARING

The Director-General, represented by Mr. Preston, tendered the whole of the relevant National Parks and Wildlife Service documentation including the review of environmental factors, the fauna impact statement, the public submissions and further information provided by the Council. No oral evidence was called. The applicant, Mrs. Leatch, represented by Mr. Dodd, tendered reports of Mr. Terence Barratt, an environmental scientist with the Water Board and ex-National Parks and Wildlife Service officer (and a member of the Shoalhaven branch of Australian Conservation Foundation); Mr. Garry Webb, an expert on the giant Burrowing Frog and Dr. Roger Coles, an expert on bats. The Council, represented by Mr. Webster, tendered reports form two of its officers, Messrs Murray and Aber; Dr. Kevin Mills, ecological and environmental consultant; Mitchell McCotter, planning and environmental consultants; Dr. Alan York, a wildlife ecologist with State Forests and Mr. Robert Nairn, a transport planner and economist.

The parties also tendered a number of plans, photographs, background reports and documentation. It may be reasonable to summarise the thrust of the evidence as principally concerning the impact of the road proposal on the Yellow-bellied Gliders living in the vicinity and their habitat and the likely impact of the road on the Giant Burrowing frog. Besides these species it may be concluded that the evidence does not establish that any other species of endangered fauna is likely to be taken or killed in the course of carrying out the development. No licence is therefore required for those animals. The applicant placed emphasis on the perceived lack of exploration of the alternative northern route via West Cambewarra Road as a factor to balance against the application for a licence to take or kill endangered fauna.

THE VALIDITY OF THE FAUNA IMPACT STATEMENT

The applicant submits that the fauna impact statement is invalid or legally inadequate as failing to comply with s 92D(1)(c) of the Act. In particular, it is submitted that there was a failure to include "to the fullest extent reasonably practicable" a description of the fauna affected by the actions and the habitat of the fauna (s 92D(1)(c)(i)). Particular reference is made to the non-inclusion of the Giant Burrowing Frog. Should the fauna impact statement be found to be legally inadequate, the applicant submits that there is no jurisdiction in the Court to embark on the appeal.

Both the Director-General and the Council submit that the fauna impact statement can be amplified by further information sought and provided under s 92B(6) of the Act. They also submit that the standard required for a fauna impact statement is not intended to be as rigorous as that required for an environmental impact statement under the *Environmental Planning and Assessment Act* 1979 (NSW).

I am unable to discern any ambiguity in the ordinary meaning of the statutory provisions. Accordingly the extrinsic materials relied on and contained in the explanatory note and Second reading Speech are of no assistance. Even if taken into account they don't take the issue of construction any further. I fail to perceive why any different or lesser standard should be applied to a fauna impact statement as opposed to an environmental impact statement. While the scope and purpose of the two Acts (the *National Parks and Wildlife Act and Environmental Planning and Assessment Act*) is different, the purpose of both statements is similar - to assist the decision-maker in its task and to inform the public and enable its participation. A fauna impact statement is a narrower document than an environmental impact statement, confining itself to impacts on endangered fauna. This is made plain by s 92D(4) which provides that if an environmental impact statement, prepared under Pt 4 or Pt 5 of the *Environmental Planning and Assessment Act*, addresses the matters set forth in s 92D(1), no separate fauna impact statement is required.

In my opinion the same tests of adequacy developed in relation to environmental impact statements should apply to fauna impact statements. Nothing in the subject matter, scope and purpose of the *National Parks and Wildlife Act*, particularly the amendments inserted by the *Endangered Fauna (Interim Protection) Act*, lead to a contrary conclusion. Indeed, the reverse is the case. This means that the tests laid down in the authorities, in particular *Prineas v Forestry Commission of New South Wales* (1983) 49 LGRA 402, are relevant.

Mr. Preston (supported by Mr. Webster) submits that the fauna impact statement, together with the supplementary information, is adequate in law to comply with the requirements of the Act and satisfy the twin goals of the exercise. Assuming a deficiency in the fauna impact statement, Mr. Preston says that it would be ridiculous if this could not be overcome by the provision of additional information referred to in the closing words of s 92B(6). While acknowledging that the additional information was not advertised he notes that there is no statutory requirement to advertise such material.

The issue of the jurisdiction of the Court in a class 1 appeal to consider the validity of an environmental impact

statement was exhaustively examined by the Chief Judge of the Court, Pearlman J in *Schaffer Corporation Ltd v Hawkesbury City Council* (1992) 77 LGRA 21 at 28.30. The decision of the Court of Appeal did not affect her Honour's judgment on the issue. I agree with Pearlman J's analysis of the legal situation and her conclusion:

> "But what is in issue in this case is not a question of relief for breach, but a question of whether or not, exercising the functions of a consent authority, the Court would grant consent to the development application. In pursuing that issue, one of the questions for determination is whether or not there is a valid environmental impact statement on which a grant of consent by the Court is (sic) so exercising its functions can be founded."

Mr. Dodd submits that the additional information cannot be relied on to bolster the environmental impact statement. He says that the ability of the Director-General to seek the further information assumes an adequate fauna impact statement. The provision (in a 92B(6) is merely an enabling one to allow the Director to seek additional information which may not necessarily be included in a fauna impact statement but which would assist him in making a decision on the application.

I reject the submission. The provision allowing the Director-General to seek further information from an applicant is clearly designed to assist the decision-maker and supplement the fauna impact statement in any area specified by the Director in his request. Like an environmental impact statement, a fauna impact statement is not the decision, rather it is a tool to aid the decision-maker in his/her task. The Schedule of endangered species is not static; see s 92A(3) and s 94. Indeed, changes to the listed endangered fauna may be illustrated by this case. When the fauna impact statement was compiled and submitted, the Diamond Python was listed and thus was included in the statement. The Giant Burrowing Frog, however, was not listed and not discussed in the statement. In December 1992, after the fauna impact statement was completed, but before the further information was requested by the Director-General, the Diamond Python was removed from the list and the Giant Burrowing Frog added. The additional information forwarded by the Council sought to describe and assess that creature.

In a dynamic situation, such as this, it cannot realistically be suggested that when a new species is added to the list, a new fauna impact statement is required. Such a requirement would make a nonsense of the system, render it almost unworkable, overly expensive and subject to unreasonable delays. In my opinion a fauna impact statement can be supplemented by further information required by the Director-General and that information can be taken into account by the Court in assessing the question of the legal adequacy of the process. One aspect, however, is of concern. The failure to advertise the further information may have deprived members of the public of the opportunity to participate. Although not required by the legislation, it would have been preferable for the National Parks and Wildlife Service to have re-advertised especially since a new species was included - the Giant Burrowing Frog. But it is clear that most, if not all, objectors who made written submissions were aware that information had been provided by the Council to the National Parks and Wildlife Service, although not its full content. Further comprehensive public submissions were made to the National Parks and Wildlife Service. This is not a class 4 judicial review proceeding under the *Environmental Planning and Assessment Act* where the discretion inherent in s 124 is applicable, nor is it a proceeding brought under s 176A of the *National Parks and Wildlife Act* alleging a breach of the Act. In my opinion the omission to advertise the further information does not cause the fauna impact statement to be legally inadequate or otherwise fatally flaw the decision-making process.

Mr. Dodd further submits that the fauna impact statement is inadequate in failing to address sufficient species and in sufficient detail. He maintains that the fauna surveys were inadequate and there has been a failure to provide a full description of the affected fauna and their habitat. Moreover, he contends that there is an inadequate description of the actions involved in the proposal. He draws attention to the fauna impact statement not including the development consent conditions, taking account of their import and including an examination of the proposed Illaroo Road deviation. In my opinion the criticisms catalogued by Mr. Dood are insufficient to lead the Court to conclude that the fauna impact statement is legally inadequate. It may not be perfect, but it does not need to be. The fauna impact statement includes a reasonably thorough discussion of the significant issues and likely faunal consequences. It appears to me that the fauna impact statement, read with the further information, satisfies the tests: collected in *Schaffer Corporation v Hawkesbury City Council Ltd* (at 30-32). In my opinion the fauna impact statement is legally adequate and not in breach of s 92D(1) or s 92D(2) of the Act. Accordingly, the Court may proceed to the merit review of the application.

THE MERITS

Since as far as I am aware, this is the first appeal under s 92C of the *National Parks and Wildlife Act*, it may be useful to examine the Court's role in such proceedings. In determining an appeal s 92C(2) directs the Court to s 92B(6). It is mandatory for the Court to take these matters into account. They comprise:

- The fauna impact statement.

- Any public submissions received by the National Parks and Wildlife Service.

- The factors set out in s 92A(5) and s 92A(6). These differ between threatened and vulnerable and rare species but in both cases include (e) "any other matter which the Committee [I interpolate the Director-General under s 92B(6) and the Court under s 92C(2)] considers relevant".

- Any reasons of the scientific committee under s 92A(3)(d).

- Any further information provided under s 92B(6).

In addition, s 92C(2) makes it clear that the factors set forth in s 92B(6) do not limit s 39 of the *Land and Environment Court Act.* As quoted earlier s 39(2) states that in addition to any other functions and discretions that the Court has, it shall have all the functions and discretions of the person whose decision is the subject of the appeal, in this case the Director-General of the National Parks and Wildlife Service. Subsection (3) requires an appeal to be by way of re-hearing and fresh evidence, in addition to or in substitution for the evidence given on the making of the decision, may be given. Of importance to this application is subs (4). It provides that in making its decision on appeal the Court shall have regard to the *Land and Environment Court Act* and any other relevant Act or instrument, "the circumstances of the case and the public interest".

As previously mentioned, at least two submissions raised the question of the application of the "precautionary principle". The question arises whether, if the principle is relevant, it may be raised in the appeal. Mr. Dood asks that it be taken into account, particularly in relation to the Giant Burrowing Frog. On behalf of the Director-General, Mr. Preston submits that the principle could be applicable. For example, he says that the Court would not issue a licence to take or kill a particular endangered species if it was uncertain where that species would be present or there was scientific uncertainty as to the effect of the development on the species.

While there has been express references to what is called the "precautionary principle" since the 1970's, international endorsement has occurred only in recent years. Indeed, the principle has been referred to in almost every recent international environmental agreement, including the 1992 Rio Declaration on Environment and Development [Principle 15], the 1992 UN Framework Convention on Climate Change [art 3(3)], the June 1990 London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer [preamble, par 6] and the 1992 Convention on Biological Diversity. This latter convention, which Australia has ratified, is of relevance to the present case. It formulates the precautionary principle in the following terms:

> "... where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise such a threat."

Within Australia the Commonwealth has enacted the *Endangered Species Protection Act* 1992 which makes provision under s 175 to give effect to international agreements specified in Schedule 4 of the Act. At this point in time, Schedule 4 does not include the 1992 Convention on Biological Diversity. However, the precautionary principle has been incorporated in the Commonwealth strategies on Endangered Species and Biological Diversity and, more generally, in the 1992 Intergovernmental Agreement on the Environment, as well as state legislation such as the *Protection of the Environment Administration Act* 1991 (NSW). In this statute the statement of the principle has taken the following form:

> "... if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation" (s 6(2)(a)).

The 1992 Intergovernmental Agreement on Environment has also utilised this formulation, but expanded it by adding:

"In the application of the precautionary principle public and private decisions should be guided by:

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and

(ii) an assessment of the risk weighed consequences of various options."

On behalf of the Director-General, Mr. Preston made submissions on the incorporation of international law into domestic law. It seems to me unnecessary to enter into this debate. In my opinion the precautionary principle is a statement of commonsense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision-makers should be cautious.

I have earlier referred to the factors the Court must take into account on an appeal under s 92C of the Act. These include the submissions made (s 92B)(6)(b)), some of which argued that the precautionary principle was

appropriate to the case; any other matter which the Court considers *relevant* (s 92A(6)(e)) and the circumstances of the case and the public interest (s 39(4) of the *Land and Environment Court Act*). The issue then is whether it is relevant to have regard to the precautionary principle or what I refer to as consideration of whether a cautious approach should be adopted in the face of scientific uncertainty and the potential for serious or irreversible harm to the environment.

To test the relevance of these considerations, or the precautionary principle, to the endangered fauna provisions of the *National Parks and Wildlife Act*, one needs to examine the subject matter, scope and purpose of the enactment. A consideration will be irrelevant if one is bound by the enactment to ignore it. However, where a matter is not expressly referred to, consideration of it may be relevant if an examination of the subject matter, scope and purpose shows it not to be an extraneous matter: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

Under Pt 7 of the Act, the Director-General is appointed the authority for "the protection and care of fauna" (s 92). The remainder of Pt 7 establishes a regime requiring consideration and identification of endangered fauna (threatened or vulnerable and rare) (s 92A), licensing where endangered fauna may be taken or killed and the creation of offences involving stringent penalties (including imprisonment) for the taking or killing of protected and endangered fauna in contravention of the Act (as 98, 99, 103). It is clear that the purpose of these provisions is the protection and care of endangered fauna. To this end the scientific committee (in placing fauna on the endangered list), the Director-General (in determination of a licence) and the Court (on appeal) are to have regard, inter alia, to the population, distribution, habitat destruction and ultimate security of a species; see s 92A(5) and s (2A(6). Similar data or details are to be assessed under the fauna impact statement: see in particular s 92D(c)(ii) and s 92D(c)(iii).

When Pt 7 of the Act is examined it is readily apparent that the precautionary principle, or what I have stated this may entail, cannot be said to be an extraneous matter. While there is no express provision requiring consideration of the "precautionary principle", consideration of the state of knowledge or uncertainty regarding a species, the potential for serious or irreversible harm to an endangered fauna and the adoption of a cautious approach in protection of endangered fauna is clearly consistent with the subject matter, scope and purpose of the Act.

Upon an examination of the available material relevant to the Giant Burrowing Frog (Heleioporus australiacus) and the knowledge of the frog in this particular habitat, one is driven to the conclusion that there is a dearth of knowledge. We know with reasonable certainty that the call of a male frog was heard by Dr. York and Mr. Daly in 1992. We know that it is likely that there is a population of the frogs in the area. Webb, an expert on the frog, says that the amphibian is known to move great distances from breeding areas when foraging for food at night. While its prime habitat appears to be a gorge or creek environment, the Giant Burrowing Frog may forage wider afield into drier areas. It is not surprising therefore that its call was heard in an area some distance from the gorge. Dr. York's statement that the degradation of the gorge habitat leads to the conclusion that it is not prime habitat for the species is open to question and is not self-evident to me. Dr. York does, however, make the point in his report (exhibit M1) that the nature and extent of the population of the Giant Burrowing Frog in the study area are unknown. Notwithstanding, he says that it is possible to make a reasonable assessment of the possible impacts of the road because of the known habitat requirements. Dr. York sees a very small loss of foraging habitat and no loss or interference with access to food or breeding patterns.

Garry Webb disagrees with a number of conclusions of Dr. York. He accepts that the species is notoriously difficult to find but is critical of the limited reptile and amphibian survey, which is certainly inadequate to determine the regional significance of its presence at Bomaderry Creek. Since it is listed as a rare and vulnerable species, Mr. Webb says that its conservation should be given a high priority. I accept his opinion. The frog is known in only a small number of locations in the Shoalhaven region. Apart from the present case, only two sightings have been made - at Jervis Bay and 15 kilometres south-east of Bowral in 1963. Its distribution is obviously patchy and its recent listing by the scientific committee understandable.

In the opinion of Mr. Webb the road would present an insurmountable barrier to the dispersion of frogs at favourable times and divide suitable habitat into small isolates. He doubts the relevance of any of the proposed mitigating factors to frogs and knows of no study which supports the efficacy of underpasses for frogs. (In this regard Mr. Webster handed up a beautifully presented booklet entitled *Amphibienschutz* from Baden-Wurttemberg. Its photographs include frogs and highway underpasses. Unfortunately the text is in German, and notwithstanding my ancestry, I am unable to comprehend its import.)

Mr. Webb also opines other potential impacts on the Giant Burrowing Frog. However, he concludes his report by emphasising the inadequacy of the date to quantify the extent and size of the population in the area "nor to assess the potential impact of the proposed road". In his view there has been an inadequate survey, an inadequate assessment of potential habitat and an inadequate

assessment of the impact of the development on the survival of the population of the giant Burrowing Frog. Again, I accept and prefer his opinion.

Given that the Giant Burrowing Frog has only recently been added to the schedule of endangered species by the scientific committee as vulnerable and rare, and noting the factors set forth in s 92A(6) to guide the committee's deliberations, caution should be the keystone to the Court's approach. Application of the precautionary principle appears to me to be most apt in a situation of a scarcity of scientific knowledge of species population, habitat and impacts. Indeed, one permissible approach is to conclude that the state of knowledge is such that one should not grant a licence to "take or kill" the species until much more is known. It should be kept steadily in mind that the definition of "take" in s 5 of the Act includes disturb, injure and a significant modification of habitat which is likely to adversely affect the essential behavioural patterns of a species. In this situation I am left in doubt as to the population, habitat and behavioural patterns of the Giant Burrowing Frog and am unable to conclude with any degree of certainty that a licence to "take or kill" the species should be granted. Accordingly, the licence under s 120, in so far as it seeks a permit to take or kill the Giant Burrowing Frog in the course of carrying out the development, is refused.

The other principal species involved in the licence application is the Yellow-bellied Glider (Petaurus australis). There is no doubt about its presence, although the Council's consultants believe that only two small groups inhabit the area. While the gliders are expected to use all the eucalypti species present, the woodland, are another food resource. Mitchell McCotter accept that the road may be a barrier to movement of gliders attempting to utilise food resources. A proposal for the erection of gliding poles to help facilitate movement of the gliders has been made. This is accepted to be a somewhat novel ameliorative strategy which is yet to be the subject of any published research. The efficacy of such a measure is therefore unknown.

The Yellow-bellied Glider has been listed as a fauna of special concern since the *National Parks and Wildlife Act* was passed in 1974. In 1991 it was placed on Pt 2 of Schedule 12 as vulnerable and rare. This status was confirmed by the scientific committee in 1992. There is little doubt that the Grey Gum forested areas of the gorge are likely to represent core areas of favoured habitat for the gliders. It is also likely that the population of Yellow-bellied Gliders has been isolated in the study area and cut off from other populations of the species for some years. On the one hand the road will likely split and accordingly further reduce their habitat. On the other hand the Council's case suggests that their long-term survival is threatened in any event by increasing residential development and the possibility of the construction of the Nowra by-pass in fifteen to twenty years time. These prognostications are difficult for the Court to place great store in because they seem to be assuming that the endangered fauna may die out anyway at some future point in time, so why worry about conserving them now.

In the final addresses made to the Court all parties - the applicant, the Director and the Council - appeared to accept that the Yellow-bellied Glider was likely to be adversely affected by the proposed road, that is, within the definition of "take" in s 5. This is no doubt why the Council applied for and the Director granted a licence under s 120 of the Act to take or kill the species. I agree that the evidence leads to the inevitable conclusion that the construction of the road and its development is likely to involve the taking or killing of the Yellow-bellied Glider.

The question for the Court is therefore, should the licence be granted, and if so upon what conditions? In this regard I would suggest that a licence should not in most circumstances be "general" in its coverage of endangered species but should specify the species which it permits to be taken. I think this view is shared by the National Parks and Wildlife Service, according to the submission of Mr. Preston. It makes good sense not to grant a licence in relation to all endangered fauna when some species may be later located which were not the subject of a fauna impact statement or added to the schedule by the scientific committee at a date after the issue of a general licence. Further, I note that the licence in question was issued for a period of ten years. The development consent in this case does not lapse if it is physically commenced within five years of its grant. Accordingly, a period of five years or thereabouts would probably be an appropriate period for a licence. The length of a licence should be confined, so far as reasonable, because of possible changes in the physical environment and state of scientific knowledge.

The decision-making process involved in the issue of a licence under s 120 obviously involves a balancing of considerations. This appears to be accepted by all parties and was applied by the National Parks and Wildlife Service in its assessment of the application. Such a balancing of considerations is also part of the Council's case. Can the benefits of the proposed road be balanced against the likely loss of endangered species? The Council says that it can, pointing to the need for the link road because of the growth of North Nowra, the advantages to the public as well as economic arguments. Not surprisingly the applicant takes a different view of the balance. The Director-General, although having determined to grant a licence, remains neutral, drawing attention to his role in the protection and care of fauna.

As I have already stated, I am satisfied that there is a need for a link road between North Nowra and the Princes

Highway to reduce the pressure on the Illaroo Road/ Highway intersection. I accept Mr. Webster's point that the public interest includes having the new link as well as the preservation of endangered fauna. Having concluded that the proposal is likely to take or kill endangered fauna, the Court needs to weigh all competing factors in order to determine whether a licence should be granted or refused. In this case one of the critical factors to be balanced is the alternatives, especially where one may involve environmental harm but not another. It is in this is area where, to my thinking, the Council's case is deficient.

It seems apparent from the evidence that the northern route via West Cambewarra Road is shorter and cheaper than the preferred route. This was confirmed by the cross-examination of Mr. Nairn. This alternative is unarguably better for the environment, for endangered fauna, rare plants and the recreational values of the Bomaderry Creek gorge. This is because the northern route is situated on the extremity of the area. But, in traditional cost/benefit terms, utilised by the Council, the option is said not to be economically feasible. I have a certain difficulty in accepting this proposition at face value. Quite apart form the narrow purely economic balancing, what appears to be involved in the reasoning is a conclusion that predictable human behaviour will lead to not enough people in North Nowra using the northern route. It is claimed that they will prefer to remain on Illaroo Road which is shorter in distance, notwithstanding that they may experience delays at the intersection with the highway.

It should not necessarily be assumed that the travel time will be more for users of the northern route. Indeed, for the expanding residential areas to the north-west the route would be more convenient. Mr. Nairn is concerned that residents in the Pitt Street precinct and beyond will not be prepared to travel north-east (away form Nowra) before turning south and will therefore prefer to stay on Illaroo Road. One may ask whether people are so committed to the motor vehicle that they are not prepared to spend what might be an extra minute or two (at the most) to preserve an area of natural values and fauna habitat, a resource used by the very same community? A public education campaign by the Council (and the National Parks and Wildlife Service) with appropriate signage, could well help explain a new link route to the north-east in preference to one traversing the Bomaderry Creek gorge.

With respect to the northern route two comments are worth making on Mr. Nairn's reports. First, he states that environmental factors were not included in the cost/ benefit analysis. In this circumstance, the value to the Court of his cost/benefit analysis is limited. Mr. Nairn says that the inclusion of environmental values is not required by the State Treasury and not usual in Australia. I find the latter comment hard to accept. There are a number of environmental economic models which factor environmental values into cost/benefit analysis. Surely an approach which attempts to integrate economic and environmental factors is preferable. In my opinion the purely economic analysis of the respective alternatives neglected to include natural values the balance. As a result the northern route via West Cambewarra Road was screened out too early in the process to be properly considered as a real alternative to the preferred route.

This is made more apparent from Mr. Nairn's evidence in reply, which includes the option of a Pitt Street extension north-east through Crown land to connect with West Cambewarra Road. This proposed extension of Pitt Street is unlikely to pass through any environmentally sensitive land and is well clear of the Bomaderry gorge. If constructed, it will take people from the Pitt Street precinct and beyond well onto the northern option for the link road and, for large numbers of residents, would provide a real alternative to Illaroo Road. It seems to me that insufficient attention has been given to the northern route, especially coupled with the Pitt Street extension canvassed by Mr. Nairn in his report in reply (exhibit K2 - figure 4 alternative 1)). The route also needs to be considered in the context of the proposed sports complex in West Cambewarra Road near the intersection with Illaroo Road. In addition, the northern option leaves the Bomaderry Creek gorge area intact rather than split into segments.

CONCLUSION

It is the context of a thorough examination of alternatives, especially ones which have minimal environmental impact, that one must balance the issue of a licence to take or kill endangered fauna. The need for a link road is accepted but I question, when all pertinent factors are weighed in the balance, whether the need is for this particular road. The issue of the best route, taking account of all relevant circumstances, including environmental factors, needs to be carefully assessed. It appears to me that alternatives need to be further explored. I am not satisfied that a licence to take or kill the Yellow-bellied Glider, or any of the other species discussed in the fauna impact statement, is justified. The applicant for such a licence needs to satisfy the Court, on the civil standard on the balance of probabilities, that it is appropriate in all the relevant circumstances to grant the licence. I am not convinced of the strength and validity of the economic arguments presented to the Court by the Council, nor do I take such a predictable view of human behaviour as Mr. Nairn.

Following an examination of the evidence, I am not satisfied that a licence under s 120 of the *National Parks and Wildlife Act* to take or kill endangered fauna should

be granted to the Council. However, it should be emphasised that refusal of this licence application should not necessarily be assumed to be an end of the proposal. Further information on endangered fauna and advances in scientific knowledge may mean that a licence could be granted in the future. Also, changes in the proposal and ameliorative measures may lead to a different assessment. This case has been determined, as it must, on the evidence produced to the Court at the hearing and the Court cannot speculate as to the future.

Accordingly, the appeal is upheld and the licence refused. The exhibits may be returned. Costs are reserved.

Appeal allowed and

licence refused

Solicitors for the applicant: *Bartier Perry & Purcell.*

Solicitors for the respondent: *J A Gibbins* (National Parks and Wildlife Service).

Solicitors for the second respondent (the Council): *Morton & Harris* (Nowra).

TFMN

SECTION 6

Polluter-Pays Principle/ Liability for Environmental Damage

NATAL FRESH PRODUCE GROWERS' ASSOCIATION AND OTHERS

v.

AGROSERVE (PTY), LTD AND OTHERS

NATAL PROVINCIAL DIVISION

Howard J.P.

1989 December 13 1990 January 19

Negligence — Liability for — Wrongful conduct — Exception to particulars of claim as lacking averments to sustain action for interdict on basis of Lex Aquilia — Failure to allege facts from which inference or conclusion to be drawn that defendant's activities in manufacturing and distributing hormonal herbicides wrongful — Manufacture and distribution throughout South Africa of hormonal herbicides registered for sale in terms of Fertilisers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 for use as agricultural remedies prima facie lawful activities — Not rendered unlawful by use to detriment of some by third parties for whose conduct manufacturers and distributors not responsible — Manufacture and distribution of herbicides not amounting to procuring, instigating or encouraging such use so as to make manufacturers legally responsible for products' users' actions — Manufacture and distribution constituting *causa sine qua non* of such use but not sufficient to saddle manufacturers with legal responsibility — Failure to allege facts to support extension of concept of wrongfulness to cover novel situation — Grossly unreasonable to brand manufacturer's actions unlawful in absence of allegations giving rise to policy considerations militating in favour of such extension.

Practice — Pleadings — Exception — Rule that Court obliged to take pleadings as they stood for purpose of deciding exception — Operation of rule limited to allegations of fact and cannot be extended to inferences and conclusions not warranted by allegations of fact — Principle also not obliging Court to stultify itself by accepting facts which are manifestly false and so divorced form reality that they could not possibly be proved.

Practice — Parties —*Locus standi* — Growers' association — Objects of promoting and protecting interests of growers of all kinds of fresh produce — No direct and substantial interest in action to interdict manufacture and distribution of hormonal herbicides — No legal interest prejudicially affected by judgment — Damage to fresh produce of some members not hindering association in objects — At best indirect interest not sufficient to confer *locus standi* to join proceedings.

In an action base don the *Lex Aquilia*, a plaintiff must allege and prove facts to show that the defendant's conduct is wrongful. To determine whether it is wrongful the conduct is measured against a criterion of reasonableness representing the legal convictions of the community. The decision as to whether the conduct is wrongful involves policy considerations and entails evaluating and balancing the conflicting interests involved with due regard to the social consequences of categorising conduct as wrongful. In line with the Court's conservative approach to the extension of the act*io legis Aquilia*, it will be extended only if positive policy considerations favouring such extension are shown to exist.

Defendants, in an action for an interdict restraining certain of their conduct, excepted to plaintiffs' particulars of claim. They alleged that plaintiffs had failed to allege sufficient facts to justify the conclusion that defendant's conduct was wrongful. *Ex facie* the particulars of claim, the defendants did no more than manufacture and distribute hormonal herbicides duly registered for sale in terms of the Fertilisers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947, activities which were *prima facie* lawful. Defendants alleged that such activities were not rendered unlawful by the fact that the herbicides were used to the detriment of some by third parties for whose conduct the defendants were not legally responsible. To hold otherwise, they alleged, would involve an extension of the concept of wrongfulness in Aquilian liability to a new situation, an extension not warranted by the general criterion of reasonableness and inimical to public policy amounting to an unjustified interference with defendant's freedom of trade. Plaintiffs pointed to the particulars of claim which contained allegations of fact to the effect that (a) any use of hormonal herbicides anywhere in South Africa resulted in damage to fresh produce in the Tala Valley, (b) such damage could not be prevented except by eliminating the use of

herbicides throughout South Africa, (c) the use of herbicides was caused, accommodated and encouraged by their manufacture and distribution, and (d) therefore the damage was caused by the manufacture and distribution of such herbicides. They contended further that such particulars set out a cause of action established by authority and involving no extension of the Aquilian action. Plaintiffs also contended that for the purpose of deciding the exception the Court was obliged to take the pleadings as they stood, assuming the truth of the allegations contained therein.

Held, that the principle that a Court was obliged to take the pleadings as they stood for the purpose of determining whether an exception to them should be upheld, was limited in operation to allegations of fact and could not be extended to inferences and conclusions not warranted by the allegations of fact.

Held, further, that such principle did not oblige a Court to stultify itself by accepting facts which were manifestly false and so divorced from reality that they could not possibly be proved and the Court could not accept as fact the allegation that any use of herbicides anywhere in South Africa resulted in damage to fresh produce growing in the Tala Valley.

Held, further, that the allegation that the use of hormonal herbicides was caused, accommodated and encouraged by their manufacture and distribution was not an allegation of fact but an inference or conclusion not entirely warranted by the facts.

Held, further, that there was no allegation that the defendants used, procured or instigated the use of herbicides by others and, while the manufacture and distribution of the products undoubtedly facilitated their use, that did not amount to procuring, instigating or encouraging such use so as to make defendants legally responsible for the actions of the products' users.

Held, further, that the only connection between the activities of defendants and the damage-producing use of the herbicides by others was that the manufacture and distribution facilitated such use so that it could be regarded as a *causa sine qua non* of the use, but that in itself was not sufficient to saddle the manufacturers with legal responsibility for the conduct of the users nor was it sufficient to place plaintiffs' cause of action in the established or traditional category of damage to property which was limited to damage to property caused by the defendant himself or by his agent or employee or some other person for whose actions he was legally responsible.

Held, further, with regard to the argument that if the use of the herbicides anywhere in South Africa inevitably resulted in damage then it followed that the manufacture and distribution of such herbicides facilitating such use caused the damage, that, the logic of such reasoning aside, the argument had to be rejected because it was based on the false premise that the facts alleged, namely any use of the herbicides anywhere in South Africa resulted in damage to the fresh produce in the Tala Valley, could be proved.

Held, furthermore, bearing in mind that the scope of the Aquilian action would not be extended to new situations unless there were positive policy considerations favouring such an extension, that the onus was on the plaintiffs to make such allegations regarding such policy considerations and they had vouchsafed no particulars of the extent of the use of the herbicides or the effect such an interdict as was sought would have on users of herbicides, the agricultural sector and the economy as a whole.

Held, accordingly, that it would be grossly unreasonable to brand the defendants' activities as wrongful merely because such herbicides had been used to the detriment of growers of fresh produce in the Tala Valley by one or more unidentifiable persons over whom the defendants had no control and for whose conduct they were not legally responsible.

Held, therefore, that the plaintiffs' allegations of fact contained in their particulars of claim did not give rise to policy considerations favouring the extension of the concept of wrongfulness in Aquilian liability to cover defendants' conduct and the exception had to be upheld.

Held, further, with regard to the argument that first plaintiff lacked *locus standi* to sue for the relief claimed, that the legitimate interest alleged by plaintiff which it claimed it was entitled to protect, namely promoting and protecting the interests of growers of all kinds of produce, did not amount to a direct and substantial interest in the subject-matter of the action which could be prejudicially affected by the judgment.

Held, further, in this regard, that it had not been alleged that the wrongdoing of the defendants was directed towards the Tala Valley growers because of their membership of the first plaintiff nor that first plaintiff conducted, organised or directed farming operations on behalf of its members.

Held, further, that damage to the fresh produce of some of its members could not hinder the first plaintiff in carrying out its objects of promoting and protecting the interests of growers so that at best it had an indirect interest in the proceedings, but this did not confer *locus standi* to join the action.

Exception to particulars of claim in an action for an interdict. The nature of the pleadings appears from the reasons for judgment.

C.E. Puckrin SC (with him D.N. Beasley and P.Q.R. Boberg) for the excipients.

D.J. Shaw QC (with him P.J. Olsen) for the respondents.

Cur adv vult.

Postea (January 19).

Howard JP: The first, second, third, eighth, ninth, eleventh, thirteenth, fifteenth and seventeenth defendants (the excepting defendants) except to the plaintiffs' particulars of claim as lacking averments which are necessary to sustain an action. The exception is based on several grounds only two of which I find it necessary to consider.

The Plaintiffs have instituted action for an order interdicting each defendant except the eighteenth from 'manufacturing and or distributing within the Republic of South Africa' products which are collectively referred to as 'hormonal herbicides'. The eighteenth defendant is the Registrar of Fertilisers, Farm Feeds, Agricultural Remedies and Stock Remedies duly designated by the Minister of Agriculture in terms of s 2 of the Fertilisers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947. He is cited by reason of his potential interest arising form his duty to register agricultural remedies (including herbicides) under the Act. The particulars of claim contain the following allegations:

1. The first plaintiff is the Natal Fresh Produce Growers' Association, a duly constituted association of persons not for gain which:

(a) has as one of its objects the promotion and protection of the interests of growers of all kinds of fresh produce;

(b) has as its members growers of fresh produce who farm within the province of Natal, including the second and third plaintiffs.

2. The second and third plaintiffs are farmers who grow fresh produce in an area within and adjoining the place generally known as the Tala Valley, Natal.

3. Either alone or in combination with other substances, the chemical compounds known as 2, 4-D, dicamba, MCPA, MCPB, picloram and triclopyr are the active ingredients of hormonal herbicides, which

(a) are registered by the eighteenth defendant for sale within the Republic of South Africa under certain product names;

(b) are used within the Republic of South Africa as agricultural remedies for the control of weeds, and in similar applications;

(c) have the property of being toxic to broad leafed plants.

4. Each of the excepting defendants is the holder of a certificate of registration (or a certificate of renewal of registration) in respect of one or more hormonal herbicides registered for sale in terms of Act 36 of 1947.

5. Each of the excepting defendants manufactures and or distributes registered hormonal herbicides for use within the Republic of South Africa.

6. Hormonal herbicides used within the Republic of South Africa are transported through the medium of water and air and are thus deposited on fresh produce growing within the province of Natal, and especially within the Tala Valley area.

7. The deposit of hormonal herbicides upon fresh produce within the province of Natal, and especially the Tala Valley, has damaged and will continue to damage plants grown and owned by members of the first plaintiff, and in particular by the second and third plaintiffs.

8. The said damage flows as a result of the distribution and consequent use of hormonal herbicides within the Republic of South Africa.

9. The use of hormonal herbicides within the Republic of South Africa is caused, accommodated and encouraged by the manufacture and distribution of hormonal herbicides for use within the Republic of South Africa.

10. The said damage cannot be prevented except by the elimination of the use of hormonal herbicides within the Republic of South Africa.

11. The matters set forth in 6, 7 and 8 above have at all material times been well known to the defendants.

12. The defendants have further at all material times known, or ought reasonably to have known, of the risk of damage to farmers such as members of the first plaintiff, including the second and third plaintiffs.

13. In the premises, the use, and the manufacture and distribution of hormonal herbicides for use within the Republic of South Africa is wrongful.

14. In the premises, each defendant save the eighteenth defendant has wrongfully caused, and continues to wrongfully cause, damage to fresh produce grown and owned by members of the first plaintiff, and especially by the second and third plaintiffs, and is liable to be interdicted against its wrongful activity.

It is common cause that the plaintiffs' claim to an interdict is based on the delict, specifically on the *actio legis*

Aquiliae as it has been extended and applied in our law, and that to succeed in their claim the plaintiffs must allege and prove facts to show that the conduct of the defendants which they seek to interdict is wrongful. To decide whether conduct is wrongful in the delictual sense the Court applies the general criterion of reasonableness (algemene redelikheidsmaatstaf) which is determined according to the legal convictions of the community. The decision involves policy considerations, and the Court has to evaluate and balance the conflicting interests of all concerned parties, with due regard *inter alia* to the social consequences of recognising or denying the existence of liability in a given case: see *Minister van Polisie v Ewels 1975* (3) SA 590(A) at 596f-597f; *Administrateur, Natal v Trust Bank van Afrika Bpk 1979* (3) SA 824 (A) at 832-4; *Marais v Richard en'n Ander 1981* (1) SA 1157 (A) at 1168C-E; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982* (4) SA 371 (D) at 380A-E, 384C-E; *Lilklicrap, Wassenar and Partners v Pilkington Brothers* (SA) (Pty) Ltd 1985 (1) SA 475 (A) at 498C-499A, 503F-H. As stated by Grosskopf AJA in the last-mentioned case (at 500D, 503I-504A, 504G our law adopts a conservative approach to the extension of liability under the *actio legis Aquiliae* to circumstances not covered by existing authority; it will not extend the scope of the action to such new situations "unless there are positive policy considerations which favour such an extension".

Counsel for the excepting defendants submit that the plaintiffs have failed to allege sufficient facts to justify the conclusion that their conduct is wrongful in the delictual sense. They point out that ex *facie* the particulars of claim the defendants do no more than manufacture and distribute hormonal herbicides which are duly registered for sale in terms of Act 36 of 1947 an used as agricultural remedies for the control of weeds and in similar applications. These activities are *prima facie* lawful and the manufactured products are capable of perfectly lawful use. They submit that the lawful manufacture and distribution of these products is not rendered wrongful by the fact that they are used to the detriment of the second and third plaintiffs by third parties for whose conduct the defendants are not legally responsible. To hold otherwise would involve an extension of the concept of wrongfulness in Aquilian liability to a new situation, an extension which is not warranted by the general criterion of reasonableness, and which would be inimical to public policy as amounting to an unjustified interference with the defendants' freedom of trade and the right of legitimate users of the products to protect their crops.

Counsel for the plaintiffs, Mr. Shaw, contends that the particulars of claim set out a cause of action which is established by authority and involves no extension of the scope of the Aquilian action; (a) the plaintiffs have a *prima facie* right not to be injured in their property; (b) their property has been damaged; and (c) the acts of the defendants have caused such damage. He refers to paras 27-31 of the particulars of claim (reproduced as paras 6-10 above) and says that they contain allegations of fact to the effect that: (a) any use of hormonal herbicides in South Africa results in damage to fresh produce grown in the Tala Valley, particularly that grown by the second and third plaintiffs; (b) such damage cannot be prevented except by eliminating the use of hormonal herbicides thorughout South Africa; and (d) the damage is therefore caused by the manufacture and distribution of hormonal herbicides and cannot be prevented without putting a stop to such manufacture and distribution.

Mr. Shaw relies on the principle that in these proceedings the Court must take the pleading excepted to as it stands, assuming the truth of the allegations it contains. He submits that even though some of the allegations may appear to be far-fetched there may well be evidence available to prove them, and that the question of causations is a factual issue which cannot be decided without evidence. The principle referred to is limited in its operation to allegations of fact. It does not extend to inferences and conclusions not warranted by allegations of fact. And I do not think that it obliges the Court to stultify itself by accepting allegations of 'fact' which are manifestly false, allegations which are so divorced from reality that they cannot possibly be proved.

I do not accept as a fact that any use of hormonal herbicides anywhere in South Africa results in damage to fresh produce growing in the Tala Valley. Granted that hormonal herbicides sprayed on crops can be transported through the medium of water and air, I cannot accept that any that are applied by watering can to crops or domestic lawns in the Cape Peninsula or the far Northern Transvaal, for example, can possibly be deposited on fresh produce growing in the Tala Valley,or anywhere in Natal for that matter. Miracles of that order do not happen. I am not concerned to determine what use or misuse of hormonal herbicides on farms bordering on the Tala Valley or further afield may feasibly result in damage to fresh produce growing in that area. All that I do say, without fear of contradiction by any truthful evidence that can possibly be adduced, is that the allegation in paras 27 and 31 of the particulars of claim (to the effect that any use of hormonal herbicides anywhere in South Africa results in damage to fresh produce growing in the Tala Valley) is based on fantasy rather than fact.

In my judgment the allegation in para 30 of the particulars of claim (para 9 above) that the use of hormonal herbicides is 'caused, accommodated and encouraged' by their manufacture and distribution is not an allegation of fact but an inference or conclusion which is not entirely warranted by the facts. The factual allegations are that the defendants manufacture and distribute hormonal herbicides for use within the Republic of South

Africa. It is not alleged that they use hormonal herbicides or procure or instigate the use of hormonal herbicides by others. It is not even alleged that they deal directly with the suers of their products. There is presumably a vast network of merchants and other middlemen who sell and supply the products to consumers. By manufacturing and distributing their products the defendants undoubtedly facilitate or accommodate the use of hormonal herbicides by others but that does not amount to procuring, instigating or encouraging such use so as to make them legally responsible for the actions of the users, on the basis that *qui facit per alium facit per se. (Cf Belegging en Exploitatioemaatschappij Lavender BV v Witten Industrial Diamonds Ltd [1979]* Fleet Street Rep 59 (CA) at 60, 65.) Nor do the alleged facts warrant the conclusion that the manufacture and distribution of hormonal herbicides causes the use of such herbicides by others, in the sense that the manufacturers are legally responsible for such use. On the facts pleaded the only connection between the activities of the defendants and the damage-producing use of hormonal herbicides by others is that the manufacture and distribution of the hormonal herbicides facilitates such use. It may be that the use cannot take place without the manufacture and distribution, so that the manufacture and distribution can be regarded as a *causa sine qua non* of the use, but that is not sufficient to saddle the manufacturers with legal responsibility for the conduct of the users. Nor does it suffice to place the plaintiffs' cause of action in the established or traditional category of damage to property referred to in *Cape Town Municipality v Paine* 1923 AD 207 at 216-17 and *Lillicrap, Wassenaar and Partners v. Pilkington Brothers (SA) (Pty) Ltd (supra at 497B-C).* That category is limited to damage to property caused by the defendant himself or by an agent, employee or other person for whose actions he is legally responsible.

Mr. Shaw contends that on the facts alleged in the particulars of claim the manufacture and distribution of hormonal herbicides is not only a *causa sine qua non* of damage but the *causa causans.* He refers in this connection to the allegations in paras 27 and 31 that the damage is caused by any use of hormonal herbicides anywhere in South Africa, and he argues that if that is proved the manufacture and distribution of the hormonal herbicides cannot but be the *causa causans* of the damage. If I understand it correctly the reasoning is that, if the mere use of hormonal herbicides anywhere in South Africa inevitably results in the alleged damage, it follows that, by manufacturing and distributing and thereby facilitating the use of hormonal herbicides in South Africa, the defendants themselves cause the damage. I am not sure that I follow the logic, but that does not matter. Whether logically sound or not the argument must be rejected because it is based on the false premise that the 'facts' alleged in paras 27 and 31 can be proved.

I agree with counsel for the excepting defendants that on the allegations of fact properly so called it is only the use of hormonal herbicides which results in damage to fresh produce growing in the Tala Valley, and that their clients do no more than facilitate such use by manufacturing and distributing hormonal herbicides. That being so, the plaintiffs' action for an interdict to prohibit the defendants from manufacturing and distributing their products does not arise from acts by the defendants which are *prima facie* clearly wrongful. It is not sanctioned by any authority to which I have been referred, and it clearly involves an extension of the concept of wrongfulness in Aquilian liability to a novel situation. And that gives rise to the question whether the plaintiffs have alleged sufficient facts to justify the legal conclusion that the conduct of the defendants is wrongful in the delictual sense, bearing in mind that the scope of the Aquilian action may not be extended to new situations unless there are positive policy considerations which favour the extension. That it is incumbent upon the plaintiffs to allege such facts is clear, I think, from the following passage in the judgment of Grosskopf AJA in Li*llicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd (supra at 4961-497B):*

The fundamental question for decision is accordingly whether the respondent has alleged sufficient facts to constitute a cause of action for damages in delict. In the present case we are concerned with a delictual claim for pecuniary loss, and, as mentioned above, it is common cause that the claim was founded on the principles of the extended Aquilian action. It is trite law that, to succeed in such a claim, a plaintiff must allege and prove that the defendant has been guilty of conduct which is both wrongful and culpable; and which caused patrimonial damage to the plaintiff (see e.g. *Van de Walt (op cit para 2 at 2)).* What has been placed in issue by the appellant is whether, on the facts pleaded, the appellant's conduct was wrongful for purposes of delictual liability, and whether the damages alleged to have been suffered, are recoverable in a delictual action.

That case came before the Court on exception, and the exception was allowed on appeal mainly on the ground that the plaintiff's allegations (of fact) did not disclose that the defendant's conduct was wrongful for the purposes of Aquilian liability. It follows that if the plaintiffs in this case have failed to allege sufficient facts to warrant the conclusion of wrongfulness the exception must be allowed.

In *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd (supra)* Booysen J adopted a different approach in deciding an exception that the plaintiff's allegations did not disclose that the defendant's conduct was wrongful in the delictual sense. His approach appears from the following passages in the reported judgment (at 379F-H);

'This being the exception stage the excipient has to satisfy the Court that the particulars of claim as amplified do not contain sufficient averments to sustain the action. If there were no averment of an essential element of the wrong complained of then the question would be whether it is a reasonable inference from the facts alleged that the element is alleged. In this case though, because of the construction which I place upon the averment of negligence, my view is that unlawfulness has been alleged, i.e. that it has by implication been alleged that defendant breached a legal duty owed by it to the plaintiff. Defendant has therefore to satisfy me that the other allegations are of such a nature that the only reasonable inference is that defendant's acts or omissions were lawful.

And at 384H-385A:

'As is apparent from what I have said it is obviously of great importance to know all the relevant circumstances when deciding whether the conduct complained of was unlawful. Because of this a defendant in a case in which pure economic loss is claimed who wishes to except to particulars of claim in which unlawful conduct on his part has either expressly or by implication been alleged should, in his request for particulars, ask plaintiff to state all the circumstances which the plaintiff avers gave rise to a legal duty to take care. It seems to me that in such circumstances it is not sufficient merely to request particulars of certain circumstances which have been alleged and then complain that those circumstances are not sufficient to justify the allegation of unlawfulness. If this is done the excipient runs the risk that the Court might have to find that the general allegation of unlawfulness carries the day.'

The reasoning in these passages has been criticised by Prof Boberg in *The Law of Delict* at 145, and in my respectful opinion the criticism is well founded. Wrongfulness, unlike the other requirements of Aquilian liability, is not a factual issue but a conclusion of law for the Court to draw from the facts. (See *Mabaso v Felix* 191 (3) SA 865 (A) at 875.) An averment that the defendant's conduct is wrongful, whether express or implied, cannot affect the incidence of the burden of proof or add anything to the facts alleged in support of that conclusion. In the light of the *Lillicrap* decision *supra* it is for the plaintiff to allege sufficient facts to justify the conclusion of wrongfulness, failing which his particulars of claim are open to exception as lacking averments necessary to sustain the action. It is inconsistent with that approach, and in my respectful opinion clearly wrong, to require the defendant to attempt to complete the plaintiff's cause of action by way of further particulars before excepting on the ground that it lacks necessary averments. As already indicated, a 'general allegation of unlawfulness', being a conclusion of law, can never carry the day if the plaintiff has failed to furnish particulars of facts and circumstances sufficient to justify the conclusion.

The plaintiffs allege that hormonal herbicides are used in South Africa as agricultural remedies for the control of weeds and in similar applications, but they vouchsafe no particulars of the extent of such use or the effect which the interdict would have on the users, the agricultural industry or the economy. For all we know hormonal herbicides may be used beneficially by countless thousands of persons throughout the country; they may be necessary for the protection of various crops and their prescription might cripple important sectors of the agricultural industry and seriously damage the national economy. It is not alleged that the use of hormonal herbicides cause such widespread damage that fresh produce can no longer be successfully grown in South Africa. On the contrary, the particulars of claim create the impression that all hormonal herbicides used in South Africa home in on the Tala Valley, leaving the rest of the country unscathed.

Why then should the manufacture and distribution of hormonal herbicides for use in South Africa be banned merely because they are used to the detriment of growers of fresh produce in the Tala Valley, by one or more unidentified persons over whom the manufacturers have no control and for whose conduct they are not legally responsible? I consider that on the facts pleaded it would be grossly unreasonable to brand the defendants' activities as wrongful, notwithstanding their alleged knowledge of the damage being caused to fresh produce growing in the Tala Valley. The allegations of fact certainly do not give rise to policy considerations which favour extending the concept of wrongfulness in Aquilian liability to cover the conduct of the defendants.

In my judgement the exception to the particulars of claim of the first plaintiff also succeeds on the further ground that it does not have *locus standi* to sue for the relief claimed. Mr. Shaw submits that although the first plaintiff has not alleged and cannot allege that it has suffered or will suffer any damage as a result of the conduct of the defendants, it has a 'legitimate' interest which it is entitled to protect by joining as a plaintiff in this action. That interest is alleged in para 25 of the particulars of claim (para 1 above) to be 'the promotion and protection of the interests of growers of all kinds of fresh produce'. It is further alleged that members of the first plaintiff who are growers of fresh produce in the Tala Valley are suffering damage as a result of the defendants' alleged wrongdoing. The growers' interests are being damaged and that, says Mr. Shaw gives the first plaintiff *locus standi* to protect their interests by way of interdict proceedings.

A 'legitimate' interest does not entitle the first plaintiff to sue unless it amounts to a direct and substantial interest, a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment. (See *United Watch & Diamond Co (Pty) Ltd and Others*

v Disa Hotels Ltd and Another 1972 (4) SA 409 (C) at 415; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (T) at 804A-E; *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) and Another v Muslim Judicial Council (Cape) and Others* 1983 (4) SA 855 (C) at 863H-864F.) It is not alleged that the wrongdoing of the defendants is directed towards the Tala Valley growers because of their membership of the first plaintiff. Nor is it alleged that the first plaintiff conducts, organises or directs farming operations in the Tala Valley or elsewhere on behalf of its members or otherwise. Its position is therefore quite different to that of the first applicant in *Transvaal Canoe Union and Another v Butgereit* 1986 (4) SA 207 (T). In that case the Canoe Union was held to have *locus standi* to sue for an interdict to restrain the respondent from interfering with the rights of its members to canoe on the Crocodile River, on the basis that it had an interest of its own to protect, in that its functions included organising, controlling and administering canoeing on the stretch of river in question. In this case the fact that the fresh produce of some of its members is damaged cannot hinder the first plaintiff in carrying out its object of promoting and protecting the interests of growers. At best it has an indirect interest which does not give it *locus standi* to join in this action.

In the result the exception is allowed with costs, including the costs of two counsel where applicable. The particulars of claim are set aside and second and third plaintiffs are granted leave to deliver amended particulars of claim within 20 Court days.

Excipient' (Defendants') Attorneys: *D M Kisch Inc*, Johannesburg; *Loots Steenkamp*, Pietermaritzburg. Respondents' (Plaintiffs') Attorneys; *Brokensha, Meyer & Partners*, Pietermaritzburg.

SUPREME COURT CASES

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FORTNIGHTLY REPORTING JUDGEMENTS,

REPORTABLE AND NON-REPORTABLE,

OF THE SUPREME COURT OF INDIA

(1996) 3 SUPREME COURT CASES 212

(BEFORE B.P. JEEVAN REDDY AND B.N. BIRPAL, JJ)

INDIAN COUNCIL FOR ENVIRO-LEGAL ACTION AND OTHERS — PETITIONERS;

v.

UNION OF INDIA AND OTHERS — RESPONDENTS.

Writ Petitions (C) No.967 of 1989 with Nos. 94 of 1990, 824 of 1993 and 76 of 1994[1], decided on February 13, 1996

A. Constitution of India - Arts. 32, 21, 48-A and 51-A(g) - PIL - Petition alleging environmental pollution caused by private industrial units - Maintainability - Writ petition filed by an environmentalist organization, not for issuance of writ, order or direction against such units but against Union of India, State Government and State Pollution Board concerned to compel them to perform their statutory duties on ground that their failure to carry on such duties violated rights guaranteed under Art.21 of the residents of the affected area - Held, maintainable - Court can, after ascertaining that the alleged industrial units were responsible for causing ecological fragility in the area, direct the authorities concerned to perform their statutory duties - Environment (Protection) Act, 1986, Ss.3, 4, 5 - Water Prevention and Control of Pollution) Act, 1974, Ss. 24(1), 25(1) (as amended by Act 53 of 1988), 33, 33-A (as introduced by Act 53 of 1988) - Air (Prevention and Control of Pollution) Act, 1974, Ss.24(1), 25(1) (as amended by Act 53 of 1988), 33, 33-A (as introduced by Act 53 of 1988) - Air (Prevention and Control of Pollution) Act, 1981 - Hazardous Wastes (Management and Handling) Rules, 1989.

B. Constitution of India - Arts. 32, 21, 48-A, 51-A(g) - Environmental pollution - Compensation - Imposition of cost of remedial measures - Principles of Strict

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[1] Under Article 32 of the Constitution of India

Liability and Polluter Pays - Applicability - Hazardous and inherently dangerous activity carried on by industrial units - Principle laid down by Supreme Court in Oleum Gas Leak case regarding strict and absolute liability of such units to compensate to persons adversely affected thereby, held, not obiter but binding - Rule in *Rylands v. Fletcher*, which is subject to exceptions of 'foreseeability' and 'non-natural user', not suitable for Indian conditions and hence not applicable - Discharge of highly toxic effluents viz. waste water and sludge, both iron-based and gypsum-based, from respondents' chemical factories manufacturing 'H' Acid, poisoning earth, underground water, wells, agriculture and other vegetation and rendering the village, where the factories located, ecologically fragile - Respondents operating contrary to law without obtaining clearances from authorities concerned and also disobeying orders of authorities as well as of Supreme Court - Respondents alone found to be responsible for such extensive damages - Held on facts, principles of Strict Liability and Polluter Pays applicable - Power of Central Government to direct such industries to defray costs for undertaking remedial measures implicit under Ss. 3 and 4 of Environment (Protection) Act - Determination of the amount required for carrying out the remedial measures, recovery/realization thereof and undertaking such measures are functions of Central Government - Court can therefore issue appropriate directions to the Central Government to invoke and exercise the powers under Ss. 3 and 4 of the said Act - Environment (Protection) Act, 1986, Ss. 3 to 5 - Water (Prevention and Control of Pollution) Act, 1974, Ss. 24(I), 25(I) (as amended by Act 53 of 1988), 33, 33-A (as introduced by Act 53 of 1988) - Air (Prevention and Control of Pollution) Act, 1981 - Hazardous Wastes (Management and Handling) Rules, 1989 - Tort.

C. Constitution of India - Art. 32 - PIL - Reports submitted by experts pursuant to court's orders - Absence of opportunity to respondents to cross-examine the experts - Plea regarding raised at very late stage, unacceptable.

The units/factories of Respondents 4 to 8, located in an industrial complex in village Bichhri in Udaipur (Rajasthan), were all chemical industries and were controlled by the same group of individuals. Respondent 4 started producing in 1987 certain chemicals like Oleum (concentrated form of sulfuric acid) and Single Super Phosphate. Respondent 5 (Silver Chemicals) and Respondent 8 (Jyoti Chemicals) commenced production of 'H' acid. Respondents 6 and 7 were producing fertilizers and a few other products. The respondents had not obtained the requisite clearances/consents/ licences; nor did they install any equipment for treatment of highly toxic effluents discharged by them. 'H' acid was meant for export exclusively. Its manufacture gives rise to enormous quantities of highly toxic effluents - in particular, iron-based and gypsum-based sludge - which if not properly treated, pose grave threat to Mother Earth. It poisons the earth, the water and everything that comes in contact with it. The chemicals produced by Respondents 5 and 8 gave birth to about 2400-2500 MT of highly toxic sludge (iron-based sludge and gypsum-based sludge) besides other pollutants. Since the toxic untreated waste waters were allowed to flow out freely and because the untreated toxic sludge was thrown in the open in and around the complex, the toxic substances percolated deep into the bowels of the earth polluting the aquifers and the subterranean supply of water. The water in the wells and the streams turned dark and dirty rendering it unfit for human consumption, unfit for cattle to drink and for irrigating the land. The soil became polluted rendering it unfit for cultivation, the mainstay of the villagers. It spread diseases, death and disaster in the village and the surrounding areas. The villagers then rose in virtual revolt leading to the imposition of Section 144 CrPC by the District Magistrate in the area. It was averred by the respondents that both the units, Silver Chemicals and Jyoti Chemicals had stopped manufacturing 'H' acid since January 1989 were closed. Yet the consequences of their action remained - the sludge, the long-lasting damage to earth, to underground water, to human beings, to cattle and the village economy. An environmentalist organization filed the present writ petition before the Supreme Court by way of social action litigation, complaining precisely of the above situation and requesting for appropriate remedial action. Pursuant to notice issued by the Supreme Court, the Government of India, Government of Rajasthan, Rajasthan Pollution Control Board (RPCB) and Respondents 4 to 8 filed counter-affidavits. The Court by its order dated 11-12-1989 requested the National Environmental Engineering Research Institute (NEERI) to study the situation in and around Bichhri village and submit their report "as to the choice and scale of the available remedial alternatives". From the affidavits of the parties, various orders of the Court, technical reports and other data, it was found that out of 2440 tonnes of sludge, about 720 tonnes had been stored in the pits provided by the respondents. The remaining sludge was still there either within the area of the complex of the respondents or outside their complex. With a view to conceal it from the eyes of the inspection teams and other authorities, the respondents dispersed it all over the area and covered it with earth. In some places, the sludge was lying in mounds. The units continued to function even after and in spite of the closure orders of the RPCB. They never did carry out the orders of the Supreme Court fully (e.g., entombing the sludge), nor did they fulfil the undertaking given by them to the court (in the matter of removal of sludge and de-watering of the wells). In spite of repeated reports of officials and expert bodies, they persisted in their illegal course of action in a brazen manner exhibiting their contempt for law, for the lawful authorities and the courts. Allowing the writ petition with costs.

Held:

The contention that the respondents being private corporate bodies and not 'State' within the meaning of Article 12, a writ petition under Article 32 would not lie against them, cannot be accepted. If the Supreme Court finds that the Government/authorities concerned have not taken the action required of them by law and that their inaction is jeopardizing the right to life of the citizens of this country or of any section thereof, it is the duty of the Supreme Court to intervene. It is found that the respondents are flouting the provisions of law and the directions and orders issued by the lawful authorities, the Court can certainly make appropriate directions to ensure compliance with law and lawful directions made thereunder. This is a social action litigation on behalf of the villagers whose right to life, is invaded and seriously infringed by the respondents as is established by the various reports of the experts called for, and filed before, the Court. If an industry is established without obtaining the requisite permission and clearances and if the industry is continued to be run in blatant disregard of law to the detriment of life and liberty of the citizens living in the vicinity, the Supreme Court has power to intervene and protect the fundamental right to life and liberty of the citizens of this country.

(Para 54)

The contention of respondents that the reports submitted by various expert bodies could not be relied upon by the Court in absence of opportunity to cross-examine the experts cannot be accepted. These reports were called by the Court and several orders passed on the basis of those reports. It was never suggested on behalf of offending industrial units (Respondents 4 to 8) that unless they are permitted to cross-examine the experts or the persons who made those reports, their reports cannot be acted upon. This objection, urged at this late stage of proceedings - after a lapse of several years - is wholly unacceptable. The persons who made the said reports are all experts in their field and under no obligation either to the State Pollution Control Board or for that matter to any other person or industry. It is in view of their independence and competence that their reports were relied upon and made the basis of passing orders by the Supreme Court from time to time. (Para 54)

Relying on the reports submitted by the National Environmental Engineering Research Institute by the Central team (experts from the Ministry of Environment and Forests, Government of India) and the Rajasthan PCB, it must be held that the respondents alone were responsible for all the damage to the soil, to the underground water and to the village in general.(Paras 54 and 57).

[See also 'Conclusions' at para 69].

The question is whether and to what extent can the respondents be made responsible for defraying the cost of remedial measures in these proceedings under Article 32. (Para. 54 and 57).

Any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country. According to the rule laid down by the Constitution Bench of the Supreme Court in Oleum Gas Leak case, once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on. In the words of the Constitution Bench, such an activity "... can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not". The Constitution Bench has also assigned the reason for stating the law in the said terms. It is that the enterprise (carrying on the hazardous or inherently dangerous activity) alone has the resource to discover and guard against hazards or dangers - and not the person affected and the practical difficulty (on the part of the affected person) in establishing the absence of reasonable care or that the damage to him was foreseeable by the enterprise. The Bench also observed that such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher*. The twin tests laid down in *Rylands v. Fletcher* - apart from the proof of damage to the plaintiff by the act/negligence of the defendants - which must be satisfied to attract its rule are 'foreseeability' and 'non-natural' user of the land. The observation of Ranganath Misra, C.J. in his concurring opinion in Union Carbide Corpn. case that the view declared in Oleum was only obiter cannot be accepted. It does not appear to be unnecessary for the purposes of that case. Thus the law stated by the Supreme Court in Oleum Gas Leak case is by far the more appropriate one - apart from the fact that it is binding. (Paras 65, 58 and 62).

M.C. Mehta v. Union of India, (1987) J SCC 395: 1987 SCC (L&S) 37, affirmed *Rylands* v. Fletcher, (1868) LR 3 HL 330: (186-73) All ER Rep. 1, disapproved Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584, paras 14 and 15, overruled on this aspect

Cambridge Water Co. Ltd. v. Eastern Counties Leather, plc, (1994) 2 WLR 53: (1994) 1

All ER 53; Burnie Port Authority v. General Jones Pty Ltd., (1994) 68 Aus I.J. 331, considered.

Pravinbhai Jashbhai Patel v. State of Gujarat, (1995) 2 GLR 1210: (1995) 2 GLH 352, referred to

Ballard v. Tomlinson, (1885) 29 Ch D 115: (1881-5) All ER Rep 688, cited

The question of liability of the respondents to defray the costs of remedial measures can also be looked into from another angle, which has now come to be accepted universally as a sound principle, viz., the "Polluter Pays" principle. According to this principle, the responsibility for repairing the damage is that of the offending industry. (Para 67)

Carolyn Shelbourn: "Historic Pollution - Does the Polluter Pay"? - Journal of Planning and Environmental Law, Aug. 1974 issue), approved.

Read with the wide definition of 'environment' in Section 2(a), Sections 3 and 5 clothe the Central Government with all such powers as are "necessary or expedient for the purpose of protecting and improving the quality of the environment". The Central Government is empowered to take all measures and issue all such directions as are called for the above purpose. Levy of costs required for carrying out remedial measures is implicit in Sections 3 and 4. (Para 60)

In the present case, the said powers will include giving directions for the removal of sludge, for undertaking remedial measures and also the power to impose the cost of remedial measures on the offending industry and utilize the amount so recovered for carrying out remedial measures. The Supreme Court can certainly give directions to the Central Government or its delegate to take all such measures, if in a given case the Court finds that such directions are warranted. Therefore, appropriate directions can be given by the Court to the Central Government to invoke and exercise those powers with such modulations as are called for in the facts and circumstances of this case. (Paras 60 and 66)

Indian Council for Enviro-Legal Action v. Union of India, (1995) 3 SCC 77: (1995) 5 Scale 578, relied on

Further, in this case, there is a clear violation of law and disobedience to the orders of the Supreme Court apart from the orders of the lawful authorities. In this respect it is distinct from Oleum Gas Leak case. The Supreme Court has to ensure the observance of law and of its orders as a part of enforcement of fundamental rights. That power cannot be disputed. If so, the Court is competent to make orders necessary for a full and effective implementation of its orders - and that includes the imposition and recovery of cost of all measures including remedial measures. (Para 60)

However, in all the circumstances, it is appropriate that the task of determining the amount required for carrying out the remedial measures, its recovery/realization and the task of undertaking the remedial measures is placed upon the Central Government in the light of the provisions of the Environment (Protection) Act, 1986. It is, of course, open to the Central Government to take the help and assistance of State Government, the Rajasthan Pollution Control Board or such other agency or authority, as they think fit. It is but appropriate that an estimate of the cost of remedial measures be made now with notice to the respondents, which amount should be paid to Central Government and/or recovered from them by the Central Government. Other directions are also called for in the light of the facts and circumstances mentioned above. (Paras 67 and 68)

[See 'Directions' in para 70]

Suggested Case Finder Search Text:

(1)

Environment or ecology or pollution or (hazardous near substance*

Search again:

Compensation or costs or directions

Rylands or "strict liability" not criminal

D. Constitution of India - Arts. 32 and 21, 48-A & 51-A(g) - PIL - Environmental pollution - Central Government directed to consider and examine the advisability of treating chemical industries as a category apart for scrutinising their establishments and functioning more rigorously and allowing these industries to be established in arid area (most of them being water-intensive industries); establishment of environment courts; strengthening the environment protection machinery both at the Centre and the States and providing them more teeth; personal accountability of the industrial units directed to be considered and examined by Central Government - Environment (Protection)

Act, 1986, Ss.3 to 5.

[Paras 70(4), (6) and (7)]

E. Constitution of India - Art. 32 - PIL - Costs - Actions of voluntary bodies in furtherance of public interest deserve encouragement - Hence while allowing the public interest writ petition respondents directed to pay Rs.50,000 by way of costs to the petitioner - Supreme Court Rules, 1966, Or. 41. (Para 71)

R-M/15795/C

Advocates who appeared in this case:

Altaf Ahmed, Additional Solicitor General, Harish N. Salve, K.N. Bhat and P.P. Malhotra, Senior Advocates (M.C. Mehta, Ms. Seema Midha, K.R.R. Pillai, P.R. Seetharaman, R.P. Wadhwani, K.S. Rohtagi, M.K. Aggarwal, Ms. Aparna Rohtagi, Mukul Mudgal, Aruneshwar Gupta, S.B. Wad, Surya Kant, Ms. Sushma Suri and Wasim A. Qadri, Advocates, with them) for the appearing parties.

Chronological list of cases cited

1. (1995) 3 SCC 77: (1995) 5 Scale 578, Indian Council for Enviro-Legal Action v. Union of India 43.60

2. (1995) 2 GLR 1210: (1995) s GLH 352, Pravinbhai Jashbhai Patel v. State of Gujara t 4.46

3. (1994) 2 WLR 53: (1994) 1 All ER 53, Cambridge Water Co. Ltd. v. Eastern Counties Leather, plc 63

4. (1994) 68 Aus LJ 331, Burnie Port Authority v. General Jones Pty Ltd. 64

5. (1991) 4 SCC 584, Union Carbide Corpn. v. Union of India 46, 59

6. 1987) SCC 395: 1987 SCC (L&S) 37, M.C. Mehta v. Union of India38, 43, 46, 58, 59, 60, 61, 65, 66, 69

7. (1885) 29 Ch D 115: (1881-5) All ER Rep 688, Ballard v. Tomlinson 63

8. *(1868) LR 3 HL 330: (1861-73) All ER Rep 1, Rylands v. Fletcher 58, 59, 61, 63, 64*

THE JUDGEMENT OF THE COURT WAS DELIVERED BY B.P. JEEVAN REDDY, J.-

Writ Petition (C) No.967 of 1989

1. This writ petition filed by an environmentalist organization brings to light the woes of people living in the vicinity of chemical industrial plants in India. It highlights the disregard, nay, contempt for law and lawful authorities on the part of some among the emerging breed of entrepreneurs, taking advantage, as they do, of the country's need for industrialization and export earnings. Pursuit of profit has absolutely drained them of any feeling for fellow human beings - for that matter, for anything else. And the law seems to have been helpless. Systemic defects? It is such instances which have led many people in this country to believe that disregard of law pays and that the consequences of such disregard will never be visited upon them - particularly, if they are men with means. Strong words indeed - but nothing less would reflect the deep sense of hurt, the hearing of this case has instilled in us. The facts of the case will bear out these opening remarks.

2. Bichhri is a small village in Udaipur District of Rajasthan. To its north is a major industrial establishment, Hindustan Zinc Limited, a public sector concern. That did not affect Bichhri. Its woes began somewhere in 1987 when the fourth respondent herein, Hindustan Agro Chemicals Limited started producing certain chemicals like Oleum (said to be the concentrated form of sulfuric acid) and Single Super Phosphate. The real calamity occurred when a sister concern, Silver Chemicals (Respondent 5), commenced production of 'H' acid in a plant located within the same complex. 'H' acid was meant for export exclusively. Its manufacture gives rise to enormous quantities of highly toxic effluents - in particular, iron-based and gypsum-based sludge - which if not properly treated, pose grave threat to Mother Earth. It poisons the earth, the water and everything that comes in contact with it. Jyoti Chemicals (Respondent 8) is another unit established to produce 'H' acid, besides some other chemicals. Respondents 6 and 7 were established to produce fertilizers and a few other products.

3. All the units/factories of Respondents 4 and 8 are situated in the same complex and are controlled by the same group of individuals. All the units are what may be called "chemical industries". The complex is located within the limits of Bichhri village.

4. Because of the pernicious wastes emerging from the production of 'H' acid, its manufacture is stated to have been banned in the western countries. But the need of 'H' acid continues in the West. That need is catered to by the industries like the Silver Chemicals and Jyoti Chemicals in this part of the world. (A few other units producing 'H' acid have been established in Gujarat, as would be evident from the decision of the Gujarat High Court in Pravinbhai Jashbhai Patel v. State of Gujarat[2], a decision rendered by one of us, B.N. Kirpal, J, as the Chief Justice of that Court.) Silver Chemicals is stated to have produced 375 MT of 'H' acid. The quantity of 'H' acid produced by Jyoti Chemicals is not known. It says that it produced only 20 MT, as trial production, and no more. Whatever quantity these two units may have produced, it has given birth to about 2400-2500 MT of highly toxic sludge (iron-based sludge and

[2] (1995) 2 GLR 1210: (1995) 2 GLH 352

gypsum-based sludge) besides other pollutants. Since the toxic untreated waste waters were allowed to flow out freely and because the untreated toxic sludge was thrown in the open in and around the complex, the toxic substances have percolated deep into the bowels of the earth polluting the aquifers and the subterranean supply of water. The water in the wells and the streams has turned dark and dirty rendering it unfit for human consumption. It has become unfit for cattle to drink and for irrigating the land. The soil has become polluted rendering it unfit for cultivation, the mainstay of the villagers. The resulting misery to the villagers needs no emphasis. It spread disease, death and disaster in the village and the surrounding areas. This sudden degradation of earth and water had an echo in Parliament too. An Honourable Minister said, action was being taken, but nothing meaningful was done on the spot. The villagers then rose in virtual revolt leading to the imposition of Section 144 CrPC by the District Magistrate in the area and the closure of Silver Chemicals in January 1989. It is averred by the respondents that both the units, Silver Chemicals and Jyoti Chemicals have stopped manufacturing 'H' acid since January 1989 and are closed. We may assume it to be so. Yet the consequences of their action remain - the sludge, the long-lasting damage to earth, to underground water, to human beings, to cattle and the village economy. It is with these consequences that we are to contend with in this writ petition.

5. The present social action litigation was initiated in August 1989 complaining precisely of the above situation and requesting for appropriate remedial action. To the writ petition, the petitioner enclosed a number of photographs illustrating the enormous damage done to water, cattle, plants and to the area in general. A good amount of technical data and other material was also produced supporting the averments in the writ petition.

Counter-affidavits of the Respondents

6. On notice being given, counter-affidavits have been filed by the Government of India, Government of Rajasthan, Rajasthan Pollution Control Board (RPCB) and Respondents 4 to 8. Since the earliest counter-affidavit in point of time is that of RPCB, we shall refer to it in the first instance. It was filed on 26-10-1989. The following are the averments:

(a) Re Hindustan Agro Chemicals Limited (R-4). The unit obtained "No Objection Certificate" from the PCB for manufacturing sulfuric acid and alumina sulphate. The Board granted clearance subject to certain conditions. Later "No Objection Certificate" was granted under the Water (Prevention and Control of Pollution) Act, 1974 (Water Act) and Air (Prevention and Control of Pollution) Act, 1981 (Air Act), again subject to certain conditions. However, this unit changed its product without clearance from the Board. Instead of sulfuric acid, it started manufacturing Oleum and Single SuperPhosphate (SSP). Accordingly, consent was refused to the unit on 16-2-1987. Directions were also issued to close down the unit.

(b) Re Silver Chemicals (R-5): This unit was promoted by the fourth respondent without obtaining "No Objection Certificate" from the Board for the manufacture of 'H' acid. The waste water generated from the manufacture of 'H' acid is highly acidic and contains very high concentration of dissolved solids along with several dangerous pollutants. This unit was commissioned in February 1988 without obtaining the prior consent of the Board and accordingly, notice of closure was served on 30—4-1988. On 12-5-1988, the unit applied for consent under Water and Air Acts which was refused. The Government was requested to issue directions for cutting off the electricity and water to this unit but no action was taken by the Government. The unit was found closed on the date of inspection, viz., 2-10-1989.

(c) Re Rajasthan Multi Fertilizers (R-6): This unit was installed without obtaining prior "No Objection Certificate" from the Board and without even applying for consent under Water and Air Acts. Notice was served on this unit on 20-2-1989. In reply whereto, the Board was informed that the unit was closed since last three years and that electricity has also been cut off since 12-2-1988.

(d) Re Phosphates India (R-7): This unit was also established without obtaining prior "No Objection Certificate" from the Board nor did it apply for consent under the Water and Air Acts. When notice dated 20-2-1989 was served upon this unit, the Management replied that this unit was closed for a long time.

(e) Re Jyoti Chemicals (R-8): This unit applied for "No Objection Certificate" for producing ferric alum. "No Objection Certificate" was issued imposing various conditions on 8-4-1988. The "No Objection Certificate" was withdrawn on 30-5-1988 on account of non-compliance with its conditions. The consent applied for under Water and Air Acts by this unit was also refused. Subsequently, on 9-2-1989, the unit applied for fresh consent for manufacturing 'H' acid. The consent was refused on 30-5-1989. The Board has been keeping an eye upon this unit to ensure that it does not start the manufacture of 'H' acid. On 2-10-1989, when the unit was inspected, it was found closed.

7. The Board submitted further (in its counter-affidavit) that the sludge lying in the open in the premises of Respondents 4 to 8 ought to be disposed of in accordance with the provisions contained int he Hazardous Wastes (Management and Handling) Rules, 1989 framed under Environment (Protection) Act, 1986. According to the Board, the responsibility for creating the said hazardous situation was squarely that of Respondents 4 to 8. The Board enclosed several documents to its counter in support of the averments contained therein.

8. The Government of Rajasthan filed its counter-affidavit on 20-1-1990. It made a curious statement in para 3 to the following effect:

> "(T)hat the State Government is now aware of the pollution of underground water being caused by liquid effluents from the firms arrayed as Respondents 4 to 8 in the writ petition. Therefore, the State Government has initiated action through the Pollution Control Board to check further spread of pollution."

The State Government stated that the water in certain wells in Bichhri village and some other surrounding villages has become unfit for drinking by human beings and cattle, though in some other wells, the water remains unaffected.9. The Ministry of Environment and Forests, Government of India filed its counter on 8-2-1990. In their counter, the Government of India stated that Silver Chemicals was merely granted a Letter of Intent but it never applied for conversion of the Letter of Intent into industrial licence. Commencing production before obtaining industrial licence is an offence under Industries (Development and Regulation) Act, 1951. So far as Jyoti Chemicals is concerned, it is stated that it has not approached the Government at any time even for a Letter of Intent. The Government of India stated that in June 1989, a study of the situation in Bichhri village and some other surrounding villages was conducted by the Centre for Science and Environment. A copy of their report is enclosed to the counter. The report states the consequences emanating from the production of 'H' acid and the manner in which the resulting wastes were dealt with by Respondents 4 to 8 thus:

> "The effluents are very difficult to treat as many of the pollutants present are refractory in nature. Setting up such highly polluting industry in a critical groundwater area was essentially ill-conceived. The effluents seriously polluted the nearby drain and overflowed into Udaisagar main canal, severely corroding its cement-concrete lined bed and banks. The polluted waters also seriously degraded some agricultural land and damaged standing crops. On being ordered to contain the effluents, the industry installed an unlined holding pond within its premises and resorted to spraying the effluent on the nearby hill slope. This only resulted in extensive seepage and percolation of the effluents into groundwater and their spread down the aquifer. Currently about 60 wells appear to have been significantly polluted but every week a few new wells, down the aquifer start showing signs of pollution. This has created serious problems for water supply for domestic purposes, cattle-watering, crop irrigation and other beneficial uses, and it has also caused human illness and even death, degradation of land and damage to fruit,, trees and other vegetation. There are serious apprehensions that the pollution and its harmful effects will spread further after the onset of the monsoon as the water percolating from the higher parts of the basin moves down carrying the pollutants lying on the slopes - in the holding pond and those already underground."

10. Each of the Respondents 4 to 8 filed separate counter-affidavits. All the affidavits filed on behalf of these respondents are sworn to by Lt. Gen. M.L. Yadava, who described himself as the President of each of these units. In the counter-affidavit filed on behalf of the fourth respondent, it is stated that it is in no way responsible for the situation complained of. It is engaged in the manufacture of sulfuric acid and had commenced its operations on 6-1-1987. It has been granted "No Objection Certificates" from time to time. The consent obtained from RPCB is valid up to 15-8-1988. Application for extension of consent has already been filed. This counter-affidavit was filed on 18-1-1990.

11. In the counter-affidavit filed on behalf of the fifth respondent (Silver Chemicals), it is stated that the manufacture of 'H' acid which was commenced in February 1988 has been completely stopped after January 1989. The respondent is fully conscious of the needs to conserve and protect environment and is prepared fully to cooperate in that behalf. It is ready to comply with any stipulations or directions that may be made for the purpose. It, however, submitted that the real culprit is Hindustan Zinc Limited. The Archaeological Department of the Government of Rajasthan had issued environmental clearance for its unit (rather surprising statement). "No Objection Certificates" had also been issued by the Executive Engineer (Irrigation), Udaipur Division and the Wild Life Warden. So far as the requirement of 'consent' under Water and Air Acts is concerned, it merely stated that it had applied for it. Its closure in January 1989 was on account of promulgation of an order under Section 144 CrPC by the District Magistrate in view of widespread agitation by the villagers against its functioning.

12. In the counter-affidavit filed on behalf of the sixth respondent (Rajasthan Multi Fertilizers), it is stated that it commenced production on 14-3-1982 and closed down in December 1985. Electrical connection to it was disconnected on 13-2-1988. It was submitted that since it is a small-scale industry, no consent was asked for from anyone. It denied that it was causing any pollution, either ground, air or water.

13. In the counter-affidavit filed on behalf of the seventh respondent (Phosphates India), it is stated that this unit

commenced production on 15-5-1988 but was closed on and with effect from 1-9-1988 for want of support from the Central Government in the form of subsidies. It submitted that it has merged with the fourth respondent in 1987-88.

14. In the counter-affidavit filed on behalf of the eighth respondent (Jyoti Chemicals), it is stated that it has no electrical connection, that it had commenced production in April 1987 and closed down completely in January 1989. It is stated that the unit produced 'H' acid to an extent of 20 MT as a trial measure for one month with the permission of the Industries Department. It is no longer manufacturing 'H' acid and, therefore, is not responsible for causing any pollution. It is further submitted that it is a small-scale industry and was registered with the District Industry Centre, Udaipur for the manufacture of ferric alum and 'H' acid. It began its operation simultaneously with the fifth respondents, Silver Chemicals, and several of the clearances are common to both, as both of them are located together. The trial production of 'H' acid, it is stated, took place in January 1987.

15. Hindustan Zinc Limited was impleaded as the ninth respondent at the instance of Respondents 4 to 8. It has filed a counter-affidavit denying that it is responsible in any manner for causing any pollution in Bichhri village or the surrounding areas. According to it, its plants are situated downstream, towards north of Bichhri village. We do not think it necessary to refer to this affidavit in any detain inasmuch as we are not concerned, in this writ petition, with the pollution, if any, caused by the ninth respondent in other villages but only with the pollution caused by Respondents 4 to 8 in Bichhri or surrounding villages.

Orders passed and steps taken during the period 1989-1992

16. The first considered order made, after hearing the parties, by this Court is of 11-12-1989. Under this order, the court requested the National Environmental Engineering Research Institute (NEERI) to study the situation in and around Bichhri village and submit their report "as to the choice and scale of the available remedial alternatives". NEERI was requested to suggest both short-term and long-term measures required to combat the hazard already caused. Directions were also made for supply of drinking water to affected villages by the State of Rajasthan. The RPCB was directed to make available to the court the Report it had prepared concerning the situation in Bichhri village.

17. On the next date of hearing, i.e. 5-3-1990, the court took note of the statements made on behalf of Respondents 4 to 8 that they have completely stopped the manufacture of 'H' acid in their plants and that they did not propose to resume its manufacture. The court also took note of the petitioner's statement that though the manufacture of 'H' acid may have been stopped, a large quantity of highly dangerous effluent waste/sludge has accumulated in the area and that unless properly treated, stored and removed, it constitutes a serious danger to the environment. Directions were given to the RPCB to arrange for its transportation, treatment and safe storage according to the technically accepted procedures for disposal of chemical wastes of that kind. All reasonable expenses for the said operation were to be borne by Respondents 4 to 8 (hereinafter referred to in this judgement as the 'respondents'). So far as the polluted water in the well was concerned, the court noted the offer made by the learned counsel for the respondents that they will themselves undertake the de-watering of the wells. The RPCB was directed to inspect and indicate the number and location of the wells to be de-watered.

18. The matter was next taken up on 4-4-1990. It was brought to the notice of the court that no meaningful steps were taken for removing the sludge as directed by this Court in its order dated 5-3-1990. Since the monsoon was about to set in, which would have further damaged the earth and water in the area, the court directed the respondents to immediately remove the sludge from the open spaces where it was lying and store it in safe places to avoid the risk of seepage of toxic substances into the soil during the rainy season. The respondents were directed to complete the task within five weeks therefrom.

19. It is not really necessary to refer to the contents of the various orders passed in 1990 and 1991, i.e., subsequent to the order dated 4-4-1990 for the present purposes. Suffice it to say that the respondents did not comply with the direction to store the sludge in safe places. The de-watering of wells did not prove possible. There was good amount of bickering between the respondents on one side and the RPCB and the Ministry of Environment and Forests on the other. They blamed each other for lack of progress in the matter of removal of sludge. Meanwhile, years rolled by and the hazard continued to rise. NEERI submitted an interim report. (We are, however, not referring to the contents of this interim report inasmuch as we would be referring to the contents of the final report presently after referring to a few more relevant orders of this Court.)

20. On 17-2-1992, this Court passed a fairly elaborate order observing that respondents 5 to 8 are responsible for discharging the hazardous industrial wastes; that the manufacture of 'H' acid has given rise to huge quantities of iron sludge and gypsum sludge - approximately 2268 MT of gypsum-based sludge and about 189 MT of iron-based sludge: that while the respondents blamed Respondent 9 as the main culprit, Respondent 9 denied any responsibility therefor. The immediate concern, said

the Court, was the appropriate remedial action. The report of the RPCB presented a disturbing picture. It stated that the respondents have deliberately spread the hazardous material/sludge all over the place which has only heightened the problem of its removal and that they have failed to carry out the order of this Court dated 4-4-1990. Accordingly, the court directed the Ministry of Environment and Forests, Government of India to depute its experts immediately to inspect the area to ascertain the existence and extent of gypsum-based and iron-based sludge, to suggest the handling and disposal procedures and to prescribe a package for its transportation and safe storage. The cost of such storage and transportation was to be recovered from the respondents.

21. Pursuant to the above order, a team of experts visited the area and submitted a report along with an affidavit dated 30-3-1992. The report presented a highly disturbing picture. It stated that the sludge was found inside a shed and also at four places outside the shed but within the premises of the complex belonging to the respondents. It stated further that sludge has been mixed with soil and at many places it is covered with earth. A good amount of sludge was said to be lying exposed to sun and rain. The report stated:

> "Above all, the extent of pollution in groundwater seems to be very great and the entire aquifer may be affected due to the pollution caused by the industry. The organic content of the sludge needs to be analyzed to assess the percolation property of the contents from the sludge. It is also possible that the iron content in the sludge may be very high which may cause the reddish colouration. As the mother liquor produced during the process (with pH-I) was highly acidic in nature and was indiscriminately discharged on land by the unit, it is possible that this might have eroded soil and caused the extensive damage. It is also possible that the organic contents of the mother liquor would have gone into soil with water together with the reddish colour."

The report also suggested the mode of disposal of sludge and measures for reconditioning the soil.

22. In view of the above report, the court made an order on 6-4-1992 for entombing the sludge under the supervision of the officers of the Ministry of Environment and Forests, Government of India. Regarding revamping of the soil, the court observed that for this purpose, it might become necessary to stop or suspend the operation of all the units of the respondent but that, the court said, requires to be examined further.

23. The work of entombment of sludge again faced several difficulties. While the respondents blamed the government officers for the delay, the government officials blamed the said respondents of non-cooperation. Several orders were passed by this Court in that behalf and ultimately, the work commenced.

Orders passed in 1993, filing of Writ Petition (C) No. 76 of 1994 by Respondent 4 and the orders passed therein

24. With a view to find out the connection between the wastes and sludge resulting from the production of 'H' acid and the pollution in the underground water, the court directed on 20-8-1993, that samples should be taken of the entombed sludge and also of the water from the affected wells and sent for analysis. Environment experts of the Ministry of Environment and Forests were asked to find out whether the pollution in the well water was on account of the said sludge or not. Accordingly, analysis was conducted and the experts submitted the Report on 1-11-1993. Under the heading 'Conclusion', the report stated:

> 5.0 Conclusion
>
> 5.1 On the basis of the observations and analysis results, it is concluded beyond doubt that the sludge inside the entombed pit is the contaminated one as evident from the number of parameters analyzed.
>
> 5.2 The groundwater is also contaminated due to discharge of H-acid plant effluent as well as H-acid sludge/contaminated soil leachates as shown in the photographs and also supported by the results. The analysis results revealed good correlation between the colour of well water and H-acid content in it. The analysis results show high degree of impurities in sludge/soil and also in well water which is a clear indication of contamination of soil and groundwater due to disposal of H-acid waste."

The report which is based upon their inspection of the area in September 1993 revealed many other alarming features. It represents a commentary on the attitude and actions of the respondents. In para 2, under the heading "Site Observations and Collection of Sludge/Contaminated Soil Samples", the following facts are stated:

> "2.1 The Central team, during inspection of the premises of M/s HACL, observed that H-acid sludge (iron/gypsum) and contaminated soil are still lying at different places, as shown in Fig.1, within the industrial premises (Photograph 1) which are the leftovers. The area, where the solar evaporation pond was existing with H-acid sludge dumped here and there, was observed to have been levelled with borrowed soil (Photograph 2). It was difficult to ascertain whether the sludge had been removed before filling. However, there are visual evidences of contaminated soil in the area.
>
> 2.2 As reported by the Rajasthan Pollution Control Board (RPCB) representatives, about 720 tonnes out of the total contaminated soil and sludge scraped from the sludge dump sites is disposed of in six lined entombed pits covered by lime/flyash mix, brick soiling and concrete (Photographs 3 and 4). The remain-

> ing scraped sludge and contaminated soil was lying near the entombed pits for want of additional disposal facility. However, during the visit, the left over sludge and contaminated soil could not be traced at site. Inspection of the surrounding area revealed that a huge heap of foreign soil of 5 metre height (Photograph 5) covering a large area, as also indicated in Fig. 1, was raised on the sloppy ground at the foothill within the industry premises. The storm water run-off pathway over the area showed indication of H-acid sludge leachates coming out of the heap. Soil in the area was sampled for analysis.
>
> 2.3 M/s HACL has a number of other industrial units which are operating within the same premises without valid consents from the Rajasthan Pollution Control Board (RPCB). These plants are sulfuric acid (H_2SO_4), fertilizer (SSP) and vegetable oil extraction. The effluent of these units are not properly treated and the untreated effluent particularly from the acid plant is passing through the sludge dump area playing havoc (Photograph 7). The final effluent was collected at the outlet of the factory premises during operation of these units, at the time of groundwater monitoring in September 1993, by the RPCB. Its quality was observed to be highly acidic (pH: 1.08, Conductivity: 37,100 mg/1, SO_4:21,000 mg/1, Fe: 392 mg/1, COD: 167 mg/1) which was also revealed in the earlier visits of the Central teams. However, these units were not in operation during the present visit."

Under para 4.2.1, the report stated inter alia:

> "The sludge samples from the surroundings of the (presently non-existent) solar evaporation and the contaminated soil due to seepage from the newly raised dump site also exhibited very high values of the above-mentioned parameters. This revealed that the contaminated soil is buried under the new dump found by the team."

25. So much for the waste disposal by the respondents and their continuing good conduct! To the same effect is the report of the RPCB which is dated 30-10-1993.

26. In view of the aforesaid reports, all of which unanimously point out the consequences of the 'H' acid production, the manner in which the highly corrosive waste water (mother liquor) and the sludge resulting from the production of 'H' acid was disposed of and the continuing discharge of highly toxic effluents by the remaining units even in the year 1993, the authorities (RPCB) passed orders closing down, in exercise of their powers under Section 33-A of the Water Act, the operation of the Sulfuric Acid Plant and the solvent extraction plant including oil refinery of the fourth respondent with immediate effect. Orders were also passed directing disconnection of electricity supply to the said plants. The fourth respondent filed Writ Petition (C) No. 76 of 1994 in this Court, under Article 32 of the Constitution, questioning the said orders in January 1994. The main grievance in this writ petition was that without even waiting for the petitioner's (Hindustan Agro Chemicals Limited) reply to the show-cause notices, orders of closure and disconnection of electricity supply were passed and that this was done by the RPCB with a mala fide intent to cause loss to the industry. It was also submitted that sudden closure of its plants is likely to result in disaster and, may be, an explosion and that this consideration was not taken into account while ordering the closure. In its Order dated 7-3-1994, this Court found some justification in the contention of the industry that the various counter-affidavits filed by the RPCB are self-contradictory. The Board was directed to adopt a constructive attitude in the matter. By another order dated 18-3-1994, the RPCB was directed to examine the issue of grant of permission to restart the industry or to permit any interim arrangement in that behalf. On 8-4-1994, a 'consent' order was passed whereunder the industry was directed to deposit a sum or Rupees sixty thousand with RPCB before 11-4-1994 and the RPCB was directed to carry on the construction work of storage tank for storing and retaining ten days' effluents from the Sulfuric Acid Plant. The construction of temporary tank was supposed to be an interim measure pending the construction of an ESP on permanent basis. The order dated 28-4-1994 noted the report of the RPCB stating that the construction of temporary tank was completed on 26-4-1994 under its supervision. The industry was directed to comply with such other requirements as may be pointed out by RPCB for prevention and control of pollution and undertake any work required in that behalf forthwith. Thereafter, the matter went into a slumber until 13-10-1995.

NEERI Report

27. At this juncture, it would be appropriate to refer to the report submitted by NEERI on the subject of "Restoration of Environmental Quality of the affected area surrounding Village Bichhri due to paste Waste Disposal Activities". This report was submitted in April 1994 and it states that it is based upon the study conducted by it during the period November 1992 to February 1994. Having regard to its technical competence and reputation as an expert body on the subject, we may be permitted to refer to its report at some length.

28. At p.7, the report mentions the industrial wastes emerging from the manufacture of 'H' acid. It reads:

> "Solid wastes generated from H-acid manufacturing process are:
>
> Gypsum sludge produced during the neutralization of acidic solution with lime after nitration stage (around 6 tonnes/tonne of 11-acid manufactured).
>
> Iron sludge produced during the reduction stage (around 0.5 tonnes/tonne of H-acid manufactured).

> Gypsum sludge contains mostly calcium sulphate along with sodium salts and organics. Iron sludge constitutes untreated iron powder, besides ferric salts and organics.

It is estimated that, for each tonne of H-acid manufactured, about 20m^3 of highly corrosive waste water was generated as mother liquor, besides the generation of around 2.0 m^3 of wash water. The mother liquor is characterized by low pH (around 2.0) and high concentration of total dissolved solids (80-280 g/L). High COD of the waste water (90 g/L) could be attributed to organics formed during various stages of manufacture. These include naphthalene trisulphonic acid, nitro naphthalene sulfonic acid, Koch acid and H-acid, besides several other intermediates."

29. At pp.8 and 9, the report describes the manner in which the sludge and other industrial wastes were disposed of by the respondents. It states *inter alia:*

> "The total quantities of waste water and that of sludge generated were around 8250 m^3 and 2440 tonnes respectively for a production of 375 tonnes by M/s Silver Chemicals Ltd. and M/s Jyoti Chemicals Ltd...
>
> Majority of sludge brought back from disposal sites located outside the plant was transferred inside a covered shed.
>
> The sludge lying in the plant premises was entombed in the underground pit by RPCB as per the directions of the Honourable Supreme Court. It may be mentioned that only 720 MT of sludge out of the estimated quantity of 2440 MT could be entombed as the capacity of the underground tanks provided by the industry for the purpose was only to that extent.
>
> Remaining sludge and sludge-mixed soil were, however, present in the plant premises as these could not be transferred into underground tanks. It has also been observed that only sludge above the soil was removed from the six sites and transferred to the plant site. Sub-surface soil of these sites appears to have been contaminated as the soil has reddish colour akin to that of the sludge.

A fertilizer plant (single superphosphate), a sulfuric acid plant and an oil extraction and oil refining plant were in operation in the same premises where H-acid was earlier manufactured. The acidic waste water (around pH 1.0) presently generated from these units was flowing over the abandoned dump site. This leaches the sludge-mixed soil from the abandoned dump site and the contaminated water flows by gravity towards east and finds its way into a nullah flowing through the compound and conveys the contaminated water to an irrigation canal which originates from Udaisagar Lake (Pat 1.4)."

(emphasis added)

30. At p.10, the report mentions the six dump sites outside the 'H' acid plant premises where the sludge was lying in the open. At pp.26 and 27, the report states on the basis of VES investigations that while certain wells were found contaminated, others were not. At p.96, the report states thus:

Damage to Crops and Trees

The field surveys in contaminated fields in Zones I and II showed that no crops were coming in the fields particularly in low-lying areas. On some elevated areas, crops like jowar, maize were growing; however the growth and yield were very poor.

Further it was also observed that even trees like eucalyptus planted in contaminated fields show leaf burning and stunted growth. Many old trees which were badly affected due to contamination are still growing under stress conditions as a result of soil contamination.

The top soils at the old dump sites outside the plant premises are still contaminated and require de-contamination before the land is used for other purposes.

It was observed that even after the operation of hauling the sludge back to the industry premises, some sludge-mixed soil was still lying in the premises of a primary school (Table 1.1), which needs de-contamination."

31. In Chapter 6, the report mentions the remedial measures. Para 6.1 titled INTRODUCTION, states:

> "As could be seen from the data reported in Chapters 4 and 5, the groundwater and soils within 2 kms from the plant have been contaminated. After critically scrutinising the data, it was concluded that there is an urgent need to work out a de-contamination strategy for the affected area. This strategy includes the de-contamination of the soil, contaminated groundwater and abandoned dump sites. This chapter details the remedial measures that can be considered for implementation to restore the environmental quality of the affected area."

32. The chapter then sets out the various remedial measures, including land treatment, soil washing, revegetation, control over the flow of the contaminated water to adjoining lands through canals, leaching of soluble salts, design of farm to development of agro-forestry and/or forestry plantation with salt tolerant crops/ plants and groundwater de-contamination. *Inter alia,* the report states:

> "The entire contaminated area comprising of 350 ha of contaminated land and six abandoned dump sites outside the industrial premises has been found to be ecologically fragile due to reckless past disposal activities practiced by M/s Silver Chemicals Ltd. and M/s Jyoti Chemicals Ltd. Accordingly, it is suggested

that the whole of the contaminated area to be developed as a green belt at the expense of M/s Hindustan Agrochemicals Ltd. during the monsoon of 1994."

33. Under para 6.3.2, the report suggests "De-contamination Alternatives for Groundwater" including bioremediation, degradation of H-acid by Azotobacter Vinelandit, isolation of bacterial population from H-acid contaminated soil and several other methods.

34. Under para 6.4.2, the report mentions the several de-contamination alternatives including containment of contaminated soil, surface control, groundwater control, leachate collection and treatment, gas migration control and direct waste treatment.

35. At pp. 157 and 158, the report mentions the continuing discharge of effluents in an illegal and dangerous manner. It reports:

> "It was also observed by NEERI's team during the current study that the industry has not provided adequate effluent treatment facilities and the waste waters (pH<1.5) from the existing plants (sulfuric acid, fertilizer, and oil extraction) are being discharged, without treatment, on land within the plant premises. This indiscriminate and wilful disposal activity is further aggravating the contamination problem in the area. Acidic effluent leaches the pollutants from the dumped sludge and the contaminated soil and facilitates their penetration through the ground and thereby increasing the concentration of sulphates and dissolved solids in groundwater. What is most serious is the fact that the industry produced chlorosulponic acid for a few months during late 1992 which is a hazardous and toxic substance as per MEF Notification titled 'Manufacture, Storage and Import of Hazardous Chemical Rules, 1989' and even floated public shares for the manufacture of this obnoxious chemical. The production was however ceased due to the intervention of the Rajasthan Pollution Control Board in December 1992 as the industry was operating without obtaining site clearance. No Objection Certificate (NOC)/Consent from the concerned appropriate regularity (regulatory?) authorities and without providing for any pollution-control measures. It is, therefore, essential for M/s Hindustan Agrochemicals Ltd. to comply with these requirements for carrying out the present industrial activities. The abatement of further contamination warrants the closure of all industrial operations till an appropriate effluent treatment plant is installed, and certified by RPCB for its functionality in keeping with the provisions of Water Act."

The report adds:

> "The Industry management in the past (during 1988-89) has shown scant respect for Pollution Control and Environment Protection Acts. Not only this, the management continues industrial activity producing obnoxious waste waters and dumping the same without any treatment, contaminating land and groundwater without any concern for ecology and public health. It is necessary that the provisions of relevant legislations are imposed on the industry to avoid environmental damage and harm to public welfare." (emphasis added)

36. We do not think that the above report requires any emphasis at our hands. It speaks for itself - and it speaks volumes of the "high regard" the respondents have for law!

37. From p. 179 onwards, the report refers to the damage to the crops and the land and to the psychological and mental torture inflicted upon the villagers by the respondents and suggests that the principle of "Polluter Pays" should be applied in this case inasmuch as "the incident involved deliberate release of untreated acidic process waste water and negligent handling of waste sludge knowing fully well the implication of such acts". The report suggests that compensation should be paid under two heads, viz., (a) for the losses due to damage and (b) towards the cost of restoration of environmental quality. It then works out the total cost of restoration of environmental quality at Rs.3738.5 lakhs - i.e. Rs.37.385 crores.

38. Para 7.4 states the conclusions flowing from the material in Chapter 6 thus:

> "The cost of damage to be disbursed to the affected villagers is estimated at Rs.342.8 lakhs and remediation of impacted well waters and soil at Rs3738.5 lakhs. This cost needs to be borne by the management of the industry in keeping with the Polluter Pays principle and the doctrine of Strict/Absolute liability, as applied to Shri Ram Food and Fertilizers Industry in the case of Oleum leak[3] in 1985."

Report of RPCB submitted in January 1996 during the final hearing of these matters

39. When all these matters were posted before the court on 13-10-1995, we realized that the matter requires to be heard on a priority basis. Having regard to the voluminous data gathered by this Court and the several orders passed from time to time, the matter was listed for regular hearing. We heard all the parties at length on 10th, 11th, 16th and 17th January, 1996. We have been taken through the voluminous record. Submissions have also been made on the questions of law arising herein.

40. At the end of the first day of regular hearing, we made an order calling upon the RPCB to send a team of high officials to the spot and report to us the latest position of the following aspects:

[3] M.C. Mehta v. Union of India (1987) 1 SCC 395: 1987 SCC (L&S)37

(i) Whether the factories of Silver Chemicals, Rajasthan Multi Fertilizers and Jyoti Chemicals are still working and whether the machinery installed in the said plant is still existing? (This information was required to check the statement of the respondents that the said units are lying closed since last several years.)

(ii) To report whether the factory or factories of Respondent 4, Hindustan Agrochemicals Limited, are working and if they are working, what are the products being manufactured by them? The Board was also directed to report whether the seventh respondent, Phosphate India, which was said to have merged with the fourth respondent, is having a separate factory and if so, what is being produced therein?

(iii) The approximate quantity of sludge - whether "iron sludge" or "gypsum sludge" - lying in the area. The report was to indicate what quantity was entombed pursuant to the orders of this Court and whether any sludge was lying in the area or in the premises of the respondents' complex, its approximate quantity and the time, effort and cost required to remove the same.

(iv) The Board was also to take samples of the water in wells and tanks in the area and have them analyzed and tell us whether it is fit for drinking by cattle and/or fit for irrigation purposes.

41. Accordingly, the RPCB officials visited the site and have filed a report dated 16-1-1996 along with an affidavit. The report discloses the following facts:

(1) The two units, Silver Chemicals and Jyoti Chemicals, do not exist now. There is no machinery. A godown and a Ferric Alum Plant have been constructed at the site of the said plant. The Ferric Alum Plant was not in operation at the time of inspection though plant and machinery for manufacturing it was found installed therein. Certain old stock of Ferric Alum was also found lying within the plant premises.

(2) Hindustan Agrochemicals Limited (R-4) has seven industrial plants, viz., Rajasthan Multi Fertilizers [manufacturing Granulated Single Super Phosphate (GSSP), a Sulfuric Acid Plant, a Chlorosulphonic Acid Plant, Edible Oil Solvent Extraction Plant, Edible Oil Refinery and a Ferric Alum Plant (known as M/s Jyoti Chemicals), all of which are located within the same premises. All these seven plants were found not operating on the date of inspection by the RPCB officials though in many cases the machinery and other equipment was in place.

So far as the sludge still remaining in the area is concerned, the report stated:

"3. Village Bichhri and other adjoining areas were visited by the undersigned officials to know whether gypsum and iron sludge is still lying in the aforesaid area. In area adjoining the irrigation canal, sludge mixed with soil were found on an area of about 3000 sq.ft. The area was covered with foreign soil. Sample of the sludge-mixed soil was collected for the perusal of the Honourable Court. Entire premises of M/s Hindustan Agrochemicals Ltd. was also inspected and sludge mixed with soil was observed in a large area. It was further observed that fresh solid in the varying depth has been spread over in most of the area. In view of the fact that sludge was mixed with the soil and difficult to separate out of the soil it is very difficult to estimate the exact quantity of the sludge required to be removed. Samples of sludge mixed with soil were collected from different parts of this area after serving due notices under Environment Protection Act, 1986."

So far as the water in the wells was concerned, the report mentioned that they took samples from the wells from Bichhri and other surrounding villages, i.e., from thirty-two different locations and that water in sixteen locations was found to "contain colour of varying intensities ranging from very dark brown to light pink which apparently shows that these wells/handpumps are still polluted".

42. Shri K.N. Bhat, learned counsel for the respondents, however, submitted that the RPCB officials have throughout been hostile to the respondents and that, therefore, the reports submitted by them should not be acted upon. He also submitted that respondents have had no opportunity to file objections to the said report or to produce material to contradict the statements made therein. While taking note of these submissions, we may, however, refer to the letter dated 13-1-1996 written by the fourth respondent to the RPCB. In this letter, the particulars of the stocks remaining in cash of its seven plants are mentioned along with the date of the last production in each of those plants. The last dates of production are the following: Sulfuric Acid Plant - 10-11-1995, SSP Plant (Phosphate India) - 11-11-1995, GSSP Plant (Rajasthan Multi Fertilizers) - 7-7-1995, Solvent Extraction Plant and Refinery - 2-12-1993, Jyoti Chemicals - October 1990 and Chlorosulphonic Acid Plant - 29-9-1995. It is worthy of note that these dates are totally at variance with the dates of closure mentioned in the counter-affidavits filed by these units in 1990-91.

Contentions of the parties

43. Shri M.C. Mehta,, learned counsel appearing for the petitioner, brought to our notice the several reports, orders and other material on record. He submitted that the

abundant material on record clearly establishes the culpability of the respondents for the devastation in Village Bichhri and surrounding areas and their responsibility and obligation to properly store the remaining sludge, stop discharge of all untreated effluents by taking necessary measures and defray the total cost required for remedial measures as suggested by NEERI (Rupees forty crores and odd). Learned counsel suggested that in view of the saga of repeated and continuous violation of law and lawful orders on the part of the respondents, they must be closed forthwith. So far as the legal propositions are concerned, the learned counsel relied strongly upon the Constitution Bench decision in M.C. Mehta v. Union of India (Oleum Gas Leak case) as well as the recent order of this Court in Indian Council for Enviro-Legal Action v. Union of India[4]. Learned counsel also invited our attention to quite a few foreign decisions and text books on the subject of environment. Shri Altaf Ahmad, the learned Additional Solicitor General appearing for the Union of India, also stressed the need for urgent appropriate directions to mitigate and remedy the situation on the spot in the light of the expert reports including the one made by the Central team of experts.

44. The learned counsel for the State of Rajasthan, Shri Aruneshwar Gupta, expressed the readiness of the State Government to carry out and enforce such orders as this Court may think fit and proper in the circumstances.

45. Shri K.B. Rohatgi, learned counsel for the RPCB, invited our attention to the various orders passed, action taken, case instituted and reports submitted by the Board in this matter. He submitted that until recently the Board had no power to close down any industry for violation of environmental laws and that after conferment of such power, they did pass orders of closure. He denied the allegations of mala fides or hostile intent on the part of the Board towards the respondents. Learned counsel lamented that despite its best 'efforts. the Board has not yet been successful in eradicating the pollution in the area and hence asked for stringent orders for remedying the appalling conditions in the village due to the acts of the respondents.

46. Shri K.N. Bhat, learned counsel for the respondents, made the following submissions:

(1) The respondents are private corporate bodies. They are not 'State' within the meaning of Article 12 of the Constitution. A writ petition under Article 32 of the Constitution, therefore, does not lie against them.

(2) The RPCB has been adopting a hostile attitude towards these respondents from the very beginning. The reports submitted by it or obtained by it are, therefore, suspect. The respondents had no opportunity to test the veracity of the said reports. If the matter had been fought out in a properly constituted suit, the respondents would have had an opportunity to cross-examine the experts to establish that their reports are defective and cannot be relied upon.

(3) Long before the respondents came into existence, Hindustan Zinc Limited was already in existence close to Bichhri village and has been discharging toxic untreated effluents in an unregulated manner. This had affected the water in the wells, streams and aquifers. This is borne out by the several reports made long prior to 1987. Blaming the respondents for the said pollution is incorrect as a fact and unjustified.

(4) The respondents have been cooperating with this Court in all matters and carrying out its directions faithfully. The report of the RPCB dated 13-11-1992 shows that the work of entombment of the sludge was almost over. The report states that the entire sludge would be stored in the prescribed manner within the next two days. In view of this report, the subsequent report of the Central team, RPCB and NEERI cannot be accepted or relied upon. There are about 70 industries in India manufacturing 'H' acid. Only the units of the respondents have been picked upon by the Central and State authorities while taking no action against the other units. Even in the matter of disposal of sludge, the directions given for its disposal in the case of other units are not as stringent as have been prescribed in the case of respondents. The decision of the Gujarat High Court in Pravinbhai Jashbhai Patel shows that the method of disposal prescribed there is different and less elaborate than the one prescribed in this case.

(5) The reports submitted by the various so-called expert committees that sludge is still lying around within and outside the respondents' complex and/or that the toxic wastes from the Sulfuric Acid Plant are flowing through and leaching the sludge and creating a highly dangerous situation is untrue and incorrect. The RPCB itself had constructed a temporary ESP for the Sulfuric Acid Plant pursuant to the orders of this Court made in Writ Petition (C) No.76 of 1994. Subsequently, a permanent ESP has also been constructed. There is no question of untreated toxic discharges from this plant leaching with sludge. There is no sludge and there is no toxic discharge from the Sulfuric Acid Plant.

(6) The case put forward by the RPCB that the respondents' units do not have the requisite permits/ consents required by the Water Act, Air Act and the Environment (Protection) Act is again unsustainable in law and incorrect as a fact. The respondents' units were established before the amendment of Section 25 of the

[4] (1995) 3 SCC 77: (1995) 5 Scale 578

Water Act and, therefore, did not require any prior consent for their establishment.

(7) The proper solution to the present problem lies in ordering a comprehensive judicial enquiry by a sitting Judge of the High Court to find out the causes of pollution in this village and also to recommend remedial measures and to estimate the loss suffered by the public as well as by the respondents. While the respondents are prepared to bear the cost of repairing the damage, if any, caused by them, the RPCB and other authorities should be made to compensate for the huge loses suffered by the respondents on account of their illegal and obstructionist policy adopted towards them.

(8) The decision in *Oleum Gas Leak* case has been explained in the opinion of Ranganath Misra, C.J., in the decision in Union Carbide Corpn. v. Union of India[5]. The law laid down in *Oleum Gas Leak* case is at variance with the established legal position in other Commonwealth countries.

47. Shri Bhat suggested that in the larger interests of environment, industry and public, this Court may direct the Government of India to constitute, by proper legislation, environment courts all over the country - which courts alone should be empowered to deal with such cases, to give appropriate directions including orders of closure of industries wherever necessary, to make necessary technical and scientific investigations, to suggest remedial measures and to oversee their implementation. Proceedings by way of a writ in this Court under Article 32 or in the High Court under Article 226, the learned counsel submitted, are not appropriate to deal with such matters, involve as they do several disputed questions of fact and technical issues.

48. Before we proceed to deal with the submissions of the learned counsel, it would be appropriate to notice the relevant provisions of law.

Relevant statutory provisions

49. Article 48-A is one of the Directive Principles of State Policy. It says that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. Article 51-A sets out the fundamental duties of the citizens. One of them is "(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;"

50. The problem of increasing pollution of rivers and streams in the country - says the Statement of Objects and Reasons appended to the Bill which became the Water (Prevention and Control Pollution) Act, 1974 - attracted the attention of the State legislatures and Parliament. The realized the urgency of ensuring that domestic and industrial effluents are not allowed to be discharged into water courses without adequate treatment and that pollution of rivers and streams was causing damage to the country's economy. A committee was set up in 1962 to draw a draft enactment for prevention of water pollution. The issue was also considered by the Central Council of Local Self-Government in September 1963. The Council suggested the desirability of having a single enactment for the purpose. A Draft Bill was prepared and sent to various States. Several expert committees also made their recommendations meanwhile. Since an enactment on the subject was relatable to Entry 17 read with Entry 6 of List II in the Seventh Schedule to the Constitution - and, therefore, within the exclusive domain of the States - the State Legislatures of Gujarat, Kerala, Haryana and Mysore passed resolutions as contemplated by Article 252 of the Constitution enabling Parliament to make a law on the subject. On that basis, Parliament enacted the Water (Prevention and Control Pollution) Act, 1974. (The State of Rajasthan too passed the requisite resolution.)

Section 24(1) of the Water Act provides that:

"24. (1) Subject to the provisions of this section, —

(a) no person shall knowingly cause or permit any poisonous, noxious or polluting matter determined in accordance with such standards as may be laid down by the State Board to enter (whether directly or indirectly) into any stream or well ...."

Section 25(1), before it was amended by Act 53 of 1988, provided that:

"25.(1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board, bring into use any new or altered outlet for the discharge of sewage or trade effluent into a stream or well or begin to make any new discharge of sewage or trade effluent into a stream or well."

As amended by Act 53 of 1988, Section 25 now reads:

"25. (1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board, -

(a) establish or take any steps to establish any industry, operation or process, or any treatment and disposal system or an extension or addition thereto, which is

[5] (1991) 4 SCC 584

likely to discharge sewage or trade effluent into a stream or well or sewer or on land (such discharge being hereafter in this section referred to as 'discharge of sewage'); or

(b) bring into use any new or altered outlets for the discharge of sewage; or

(c) begin to make any new discharge of sewage ..."

(It is stated that the Rajasthan Assembly passed resolution under Article 252 of the Constitution adopting the said Amendment Act vide Gazette Notification dated 9-5-1990.) Section 33 empowers the Pollution Control Board to apply to the court, not inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class, to restrain any person causing pollution if the said pollution is likely to prejudicially affect water in a stream or a well. Section 33-A, which has been introduced by Amendment Act 53 of 1988, empowers the Board to order the closure of any industry and to stop the electricity, water and any other service to such industry if it finds such a direction necessary for effective implementation of the provisions of the Act. Prior to the said Amendment Act, the Pollution Control Board had no such power and the course open to it was to make a recommendation to the Government to pass appropriate orders including closure.

51. The Air (Prevention and Control of Pollution) Act, 1981 contains similar provisions.

52. In the year 1986, Parliament enacted a comprehensive legislation, Environment (Protection) Act. The Act defines **'environment'** to include "water, air and land and the interrelationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property". The preamble to the Act recites that the said Act was made pursuant to the decisions taken at the United Nations Conference on Human Environment held at Stockholm in June 1972 in which India also participated. Section 3 empowers the Central Government "to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution". Sub-section (2) elucidates the several powers inhering in the Central Government in the matter of protection and promotion of environment. Section 5 empowers the Central Government to issue appropriate directions to any person, officer or authority to further the objects of the enactment. Section 6 confers rule-making power upon the Central Government in respect of matters referred to in Section 3. Section 7 says that "no person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutant in excess of such standards as may be prescribed".

53. The Central Government has made the Hazardous Wastes (Management and Handling) Rules, 1989 in exercise of the power conferred upon it by Section 6 of the Environment (Protection) Act prescribing the manner in which the hazardous wastes shall be collected, treated, stored and disposed of.

Consideration of the submissions

54. Taking up the objections urged by Shri Bhat first, we find it difficult to agree with them. This writ petition is not really for issuance of appropriate writ, order or directions against the respondents but is directed against the Union of India, Government of Rajasthan and RPCB to compel them to perform their statutory duties enjoined by the Acts aforementioned on the ground that their failure to carry out their statutory duties is seriously undermining the right to life (of the residents of Bichhri and the affected area) guaranteed by Article 21 of the Constitution. If this Court finds that the said authorities have not taken the action required of them by law and that their inaction is jeopardizing the right to life of the citizens of this country or of any section thereof, it is the duty of this Court to intervene. If it is found that the respondents are flouting the provisions of law and the directions and orders issued by the lawful authorities, this Court can certainly make appropriate directions to ensure compliance with law and lawful directions made thereunder. This is a social action litigation on behalf of the villagers of Bichhri whose right to life, as elucidated by this Court in several decisions, is invaded and seriously infringed by the respondents as is established by the various reports of the experts called for, and filed before, this Court. If an industry is established without obtaining the requisite permission and clearances and if the industry is continued to be run in blatant disregard of law to the detriment of life and liberty of the citizens living in the vicinity, can it be suggested with any modicum of reasonableness that this Court has no power to intervene and protect the fundamental right to life and liberty of the citizens of this country. The answer, in our opinion, is self-evident. We are also not convinced of the plea of Shri Bhat that RPCB has been adopting a hostile attitude towards his clients throughout and, therefore, its contentions or the reports prepared by its officers should not be relied upon. If the respondents establish and operate their plants contrary to law, flouting all safety norms provided by law, the RPCB was viybd to act. On that account, it cannot be said to be acting out of animus or adopting a hostile attitude. Repeated and persistent violations call for repeated orders. That is no proof of hostility. Moreover, the reports of RPCB officials are fully corroborated and affirmed by the reports of the Central team of experts and of NEERI. We are also not prepared to agree with Shri Bhat that since the report of NEERI was prepared at the instance of RPCB, it is suspect. This criticism is not only unfair but is also

uncharitable to the officials of NEERI who have no reason to be inimical to the respondents. If, however, the actions of the respondents invite the concern of the experts and if they depict the correct situation in their reports, they cannot be accused of any bias. Indeed, it is this Court that asked NEERI to suggest remedial measures and it is in compliance with those orders that NEERI submitted its interim report and also the final report. Similarly, the objection of Shri Bhat that the reports submitted by the NEERI, by the Central team (experts from the Ministry of Environment and Forests, Government of India) and RPCB cannot be acted upon is equally unacceptable. These reports were called by this Court and several orders passed on the basis of those reports. It was never suggested on behalf of Respondents 4 to 8 that unless they are permitted to cross-examine the experts or the persons who made those reports, their reports cannot be acted upon. This objection, urged at this late stage of proceedings - after a lapse of several years - is wholly unacceptable. The persons who made the said reports are all experts in their field and under no obligation either to the RPCB or for that matter to any other person or industry. It is in view of their independence and competence that their reports were relied upon and made the basis of passing orders by this Court from time to time.

55. Now coming to the question of alleged pollution by Hindustan Zinc Limited (R-9), it may be that Respondent 9 is also responsible for discharging untreated effluents at one or the other point of time but that is not the issue we are concerned with in these writ petitions. These writ petitions are confined to the pollution caused in Bichhri village on account of the activities of the respondent. No report among the several reports placed before us in these proceedings says that Hindustan Zinc Limited is responsible for the pollution at Bichhri village. Shri Bhat brought to our notice certain reports stating that the discharges from Hindustan Zinc Limited were causing pollution in certain villages but they are all downstream, i.e., to the north of Bichhri village and we are not concerned with the pollution in those villages in these proceedings. The bringing in of Hindustan Zinc Limited in these proceedings is, therefore, not relevant. If necessary, the pollution, if any, caused by Hindustan Zinc Limited can be the subject-matter of a separate proceeding.

56. We may now deal with the contentions of Shri Bhat based upon the affidavit of RPCB dated 13-11-1992 which has been repeatedly and strongly relied upon by the learned counsel in support of his submission that the entire sludge has been properly stored by or at the expense of his clients. It is on the basis of this affidavit that Shri Bhat says that the subsequent reports submitted showing the existence of sludge within and outside their complex should not be accepted or acted upon. Let us turn to the affidavit of RPCB dated 13-11-1992 and see how far does it support Shri Bhat's contention. It is in para 2(b) that the sentence, strongly relied upon by Shri Bhat occurs, viz., "remaining work is likely to be completed by 15-11-1992". For proper appreciation of the purport of the said sentence, it would be appropriate to read the entire para 2(b), which is to the following effect:

> "(b) that all the six tanks have been entombed with brick toppings. Roofing is complete on all tanks which have also been provided with proper outlets for the exit of gases which may form as a result of possible chemical reactions in the sludge mass. The tanks have also been provided with reinforced concrete to prevent drooping of the roof. Remaining work is likely to be completed by 15-11-1992."

We find it difficult to read the said sentence as referring to the storage of the remaining about 1700 MT of sludge. When the storage of 720 MT itself took up all the six tanks provided by the respondent, where was the remaining 1700 tonnes stored? Except relying upon the said sentence repeatedly, Shri Bhat has not been able to tell us where this 1700 MT has been stored, whether in tanks and if so, who constructed the tanks and when and how were they covered and sealed. He is also not able to tell us on what dates the remaining sludge was stored. It is evident that the aforesaid sentence occurring in clause 2(b) refers to the proper sealing and completion of the said tanks wherein 720 MT of sludge was stored. If, in fact, the said 1700 MT has also been entombed, it was not difficult for the respondents to give the particulars of the said storage. We are, therefore, unable to agree with Shri Bhat that the subsequent reports which repeatedly and uniformly speak of the presence of sludge within and outside the complex of the respondents should not be accepted. It may be recalled that the report of the team of Central experts was submitted on 1-11-1993 based upon the inspection made by them in September/ October 1993. To the same effect is the affidavit of RPCB dated 30-10-1993 and the further affidavit dated 1-12-1993. These reports together with the report of NEERI clearly establish that huge quantities of sludge were still lying around either in the form of mounds or placed in depressions, or spread over the contiguous areas and covered with local soil to conceal its existence. It is worth reiterating that the said sludge is only part of the pernicious discharges emanating from the manufacture of 'H' acid. The other part, which is unfortunately not visible now (except in its deleterious effects upon the soil and underground water) is the "mother liquor" produced in enormous quantities which has either flowed out or percolated into the soil.

57. So far as the responsibility of the respondents for causing the pollution in the wells, soil and the aquifers is concerned, it is clearly established by the analysis report referred to in the report of the Central experts' team dated 1-11-1993 (p.1026 of Vol.II). Indeed, number

of orders passed by this Court, referred to hereinbefore, are premised upon the finding that the respondents are responsible for the said pollution. It is only because of the said reason that they were asked to defray the cost of removal and storage of sludge. It is precisely for this reason that, at one stage, the respondents had also undertaken the de-watering of polluted wells, Disclaiming the responsibility for the pollution in and around Bichhri village, at this stage of proceedings, is clearly an afterthought. We accordingly hold and affirm that the respondents alone are responsible for all the damage to the soil, to the underground water and to Village Bichhri in general, damage which is eloquently portrayed in the several reports of the experts mentioned hereinabove. NEERI has worked out the cost for repairing the damage at more than Rupees forty crores. Now, the question is whether and to what extent can the respondents be made responsible for defraying the cost of remedial measures in these proceedings under Article 32. Before we advert to this question, it may perhaps be appropriate to clarify that so far as removal of remaining sludge and/or the stoppage of discharge of further toxic wastes are concerned, it is the absolute responsibility of the respondents to store the sludge in a proper manner (in the same manner in which 720 MT of sludge has already been stored) and to stop the discharge of any other or further toxic wastes from its plants including Sulfuric Acid Plant and to ensure that the wastes discharged do not flow into or through the sludge. Now, turning to the question of liability, it would be appropriate to refer to a few decisions on the subject.

58. In *Oleum Gas Leak case*, a Constitution Bench discussed this question at length and held thus: (SCC pp.420-21. paras 31-32)

> "We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which t is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise must be held strictly liable for causing such harm as a part of the social cost of carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not ... We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher*[6].

We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be collerated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise."

59. Shri Bhat, however, points out that in the said decision, the question whether the industry concerned therein was a 'State' within the meaning of Article 12 and, therefore, subject to the discipline of Part III of the Constitution including Article 21 was left open and that no compensation as such was awarded by this Court to the affected persons. He relies upon the observations in the concurring opinion of Ranganath Misra, C.J., in *Union Carbide Corpn.* The learned Chief Justice referred in the first instance, to the propositions enunciated in Oleum Gas Leak case and then made the following observations in paras 14 and 15: (SCC pp.607-08)

> "14. In M.C. Mehta case, no compensation was awarded as this Court could not reach the conclusion that Shriram (the delinquent company) came within the meaning of 'State' in Article 12 so as to be liable to the discipline of Article 21 and to be subjected to a proceeding under Article 32 of the Constitution. Thus what was said was essentially obiter.

[6] (1868) LR 3 HL 330: (1861-73) All ER Rep 1

> 15. The extracted part of the observations from M.C. Mehta case perhaps is a good guideline for working out compensation in the cases to which the ratio is intended to apply. The statement of the law ex facie makes a departure from the accepted legal position in *Rylands v. Fletcher*[7]. We have not been shown any binding precedent from the American Supreme Court where the ratio of M.C. Mehta decision has in terms been applied. In fact Bhagwati, C.J. clearly indicates in the judgement that his view is a departure from the law applicable to western countries."

60. The majority judgement delivered by M.N. Venkatachaliah, J. (on behalf of himself and two other learned Judges) has not expressed any opinion on this issue. We on our part find it difficult to say, with great respect to the learned Chief Justice, that the law declared in *Oleum Gas Leak case* is obiter. It does not appear to be unnecessary for the purposes of that case. Having declared the law, the Constitution Bench directed the parties and other organizations to institute actions on the basis of the law so declared.[8] Be that as it may, we are of the considered opinion that even if it is assumed (for the sake of argument) that this Court cannot award damages against the respondents in these proceedings that does not mean that the Court cannot direct the Central Government to determine and recover the cost of remedial measures from the respondents. Section 3 of the Environment (Protection) Act, 1986 expressly empowers the Central Government (or its delegate, as the case may be) to *"take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of environment ..."*. Section 5 clothes the Central Government (or its delegate) with the power to issue directions for achieving the objects of the Act. Read with the wide definition of 'environment' in section 2(a), Sections 3 and 5 clothe the Central Government with all such powers as are "necessary or expedient for the purpose of protecting and improving the quality of the environment". The Central Government is empowered to take all measures and issue all such directions as are called for the above purpose. In the present case, the said powers will include giving directions for the removal of sludge, for undertaking remedial measures and also the power to impose the cost of remedial measures on the offending industry and utilize the amount so recovered for carrying out remedial measures. This Court can certainly give directions to the Central Government/its delegate to take all such measures, if in a given case this Court finds that such directions are warranted. We find that similar directions have been made in a recent decision of this Court in Indian Council for Enviro-Legal Action. That was also a writ petition filed under Article 32 of the Constitution. Following is the direction:

> "It appears that the Pollution Control Board had identified as many as 22 industries responsible for the pollution caused by discharge of their effluents into Nakkavagu. They were responsible to compensate to farmers. It was the duty of the State Government to ensure that this amount was recovered from the industries and paid to the farmers."

It is, therefore, idle to contend that this Court cannot make appropriate directions for the purpose of ensuring remedial action. It is more a matter of form.

61. Shri K.N. Bhat submitted that the rule of absolute liability is not accepted in England or other Commonwealth countries and that the rule evolved by the House of Lords in *Rylands v. Fletcher* is the correct rule to be applied in such matters. Firstly, in view of the binding decision of this Court in *Oleum Gas Leak* case, this contention is untenable, for the said decision expressly refers to the rule in *Rylands* but refuses to apply it saying that it is not suited to the conditions in India. Even so, for the sake of completeness, we may discuss the rule in *Rylands* and indicate why that rule is inappropriate and unacceptable in this country. The rule was first stated by Blackburn, J. (Court of Exchequer Chamber) in the following words: (All ER p.7)

> "We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps, that the escape was the consequence of vis

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[7] (1868) KR 3 HL 330: (1861 - 73) All ER Rep 1

[8] A distinction between the Oleum Gas Leak case and the present case may be noticed. That was not a case where the industry was established or was being operated contrary to Law as in the present case. That was also not a case where the orders of lawful authorities and courts were violated with impunity as in this case. In this case, there is a clear violation of Law and disobedience to the orders of this Court apart from the orders of the lawful authorities. The facts stated above and findings recorded by us hereinafter bear it out. This Court has to ensure the observance of law and of its orders as a part of enforcement of fundamental rights. That power cannot be disputed. If so, a question may arise why is this Court not competent to make orders necessary for a full and effective implementation of its orders - and that includes the imposition and recovery of cost of all measures including remedial measures. Above all, the Central Government has the power under the provisions of Sections 3 and 5 of the Environment (Protection) Act, 1986 to levy and recover the cost of remedial measures - as we shall presently point out. If the Central Government omits to do that duty, this Court can certainly issue appropriate situation, to award damages against private parties as part of relief granted against public authorities. This is a question upon which we do not wish to express any opinion in the absence of a full debate at the Bar.

> major, or the act of God; ... and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property."

62. The House of Lords, however, added a rider to the above statement, viz., that the user by the defendant should be a "non-natural" user to attract the rule. In other words, if the user by the defendant is a natural user of the land, he would not be liable for damages. Thus, the twin tests - apart from the proof of damage to the plaintiff by the act/negligence of the defendants - which must be satisfied to attract this rule are 'foreseeability' and 'non-natural' user of the land.

63. The rule in *Rylands* has been approved by the House of Lords in the recent decision in Cambridge Water Co. Ltd. v. Eastern Counties Leather, plc[9]. The plaintiff, Cambridge Water Company, was a statutory corporation engaged in providing public water supply within a certain area including the city of Cambridge. It was lifting water from a bore well situated at some distance from Sawstyn. The defendant-Company Eastern Leather, was having a tannery in Sawstyn. Tanning necessarily involves degreasing of pelts. For that purpose, the defendant was using an organo chlorine called PCE. PCE was stored in a tank in the premises of the defendant. The plaintiff's case was that on account of the PCE percolating into the ground, the water in its well became contaminated and unfit for human consumption and that on that account it was obliged to find an alternative source at a substantial cost. It sued the defendant for the resulting damages. The plaintiff based his claim on three alternative grounds, viz., negligence, nuisance and the rule in Rylands. The trial Judge (High Court) dismissed the action in negligence and nuisance holding that the defendant could not have reasonably foreseen that such damage could occur to the plaintiff. So far as the rule in *Rylands* was concerned, the trial Judge held that the user by the defendant was not a non-natural user and hence, it was not liable for damages. On appeal, the Court of Appeal declined to decide the matter on the basis of the rule in *Rylands.* It relied strongly upon the ratio in Ballard v. Tomlinson[10] holding that no person having a right to use a common source is entitled to contaminate that source so as to prevent his neighbour from having a full value of his right of appropriation. The Court of Appeal also opined that the defendant's use of the land was not a natural use. On appeal by the defendant, the House of Lords allowed the appeal holding that foreseeability of the harm of the relevant type by the defendant was a pre-requisite to the right to recover damages both under the heads of nuisance and also under the rule in *Rylands* and since that was not established by the plaintiff, it has to fail. The House of Lords, no doubt, held that the defendant's use of the land was a non-natural use but dismissed the suit as stated above, on the ground that the plaintiff has failed to establish that pollution of their water supply by the solvent used by the defendant in hispremises was in the circumstances of the case foreseeable by the defendant.

64. The Australian High Court has, however, expressed its disinclination to treat the rule in *Rylands* as an independent head for claiming damages or as a rule rooted in the law governing the law of nuisance in Burnie Port Authority v. General Jones Pty Ltd.[11] The respondent, General Jones Limited, had stored frozen vegetables in three cold storage rooms in the building owned by the appellant, Bernie Port Authority (Authority). The remaining building remained under the occupation of the Authority. The Authority wanted to extend the building. The extension work was partly done by the Authority itself and partly by an independent contractor (Wildridge and Sinclair Pty. Ltd). For doing its work, the contractor used a certain insulating material called EPS, there was a fire which *inter alia* damaged the rooms in which General Jones had stored its vegetables. On an action by General Jones, the Australian High Court held by a majority that the rule in *Rylands* having attracted many difficulties, uncertainties, qualifications and exceptions, should not be seen, for the purposes of Australian Common Law, as absorbed by the principles of ordinary negligence. The Court held further that under the rules governing negligence, if a person in control of a premises, introduces a dangerous substance to carry on a dangerous activity, or allows another to do one f those things, owes a duty of reasonable care to ———————————— injury or damage to the person or property of another. In a case where a person or the property of that other is lawfully in a place outside the premises, the duty of care varies in degree according to the magnitude of the risk involved and extends to ensuring that such care is taken. Applying the said principle, the court held that the authority allowed the independent contractor to introduce or retain a dangerous substance or to engage in a dangerous activity in its premises which substance and activity caused a fire that destroyed the goods of General Jones. The evidence, the court held, established that the independent contractor's work was a dangerous activity in that it involved real and foreseeable risk of a serious conflagration unless special precautions were taken. In

[9] (1994) 2 WLR 53: (1994) AILER 53

[10] (1885) 29 Ch D 115: (1881-5) All ER Rep 688

[11] (1994) 68 Aus LJ 331

the circumstances, it was held that the authority owed a non-delegable duty of care to General Jones to ensure that its contractor took reasonable steps to prevent the occurrence of a fire and the breach of that duty attracted liability pursuant to the ordinary principles of negligence for the damage sustained by the respondent.

65. On a consideration of the two lines of thought (one adopted by the English courts and the other by the Australian High Court), we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country. We are convinced that the law stated by this Court in *Oleum Gas Leak case* is by far the more appropriate one — apart from the fact that it is binding upon us. (We have disagreed with the view that the law stated in the said decision is obiter.) According to this rule, once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on. In the words of the Constitution Bench, such an activity: (SCC p.421, para 31)

> "... can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not".

The Constitution Bench has also assigned the reason for stating the law in the said terms. It is that the enterprise (carrying on the hazardous or inherently dangerous activity) alone has the resource to discover and guard against hazards or dangers - and not the person affected and the practical difficulty (on the part of the affected person) in establishing the absence of reasonable care or that the damage to him was foreseeable by the enterprise.

66. Once the law in *Oleum Gas Leak case* is held to be the law applicable, it follows, in the light of our findings recorded hereinbefore, that Respondents 4 to 8 are absolutely liable to compensate for the harm caused underground water and hence, they are bound to take all necessary measures to remove the sludge and other pollutants lying in the affected area (by affected area, we mean the area of about 350 ha indicated in the sketch at p. 178 if NEERI report) and also to defray the cost of the remedial measures required to restore the soil and the underground water sources. Sections 3 and 4 of Environment (Protection) Act confers upon the Central Government the power to give directions of the above nature and to the above effect. Levy of costs required for carrying out remedial measures is implicit in Sections 3 and 4 which are couched in very wide and expansive language. Appropriate directions can be given by this Court to the Central Government to invoke and exercise those powers with such modulations as are called for in the facts and circumstances of this case.

67. The question of liability of the respondents to defray the costs of remedial measures can also be looked into from another angle, which has now come to be accepted universally as a sound principle, viz., the "Polluter Pays" principle.[12]

"The Polluter Pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution. Under the principles it is not the role of Government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer. The 'Polluter Pays' principle was promoted by the Organization for Economic Cooperation and Development (OECD) during the 1970s when there was great public interest in environmental issues. During this time there were demands on Government and other institutions to introduce policies and mechanisms for the protection of the environment and the public from the threats posed by pollution in a modern industrialized society. Since then there has been considerable discussion of the nature of the Polluter Pays principle, but the precise scope of the principle and its implications for those involved in past, or potentially polluting activities have a never been satisfactorily agreed.

Despite the difficulties inherent in defining the principle, the European Community accepted it as a fundamental part of its strategy on environmental matters, and it has been one of the underlying principles of the four Community Action Programmes on the Environment. The current Fourth Action Programme [(1987) OJC 328/ 1] makes it clear that 'the cost of preventing and eliminating nuisances must in principle be borne by the polluter', and the Polluter Pays principle has now been incorporated into the European Community Treaty as part of the new articles on the environment which were introduced by the Single European Act of 1986. Article 130-R(2) of the Treaty states that environmental considerations are to play a part in all the policies of the community, and that action is to be based on the three principles: the need for preventive action: the need for environmental damage to be rectified at source; and the polluter should pay."

[12] (Historic Pollution - Does the Polluter Pay? by Carolyn Shelbourn ... Journal of Planning and Environmental Law. Aug. 1974 issue.)

Thus, according to this principle, the responsibility for repairing the damage is that of the offending industry. Section 3 and 5 empower the Central Government to give directions and take measures for giving effect to this principle. In all the circumstances of the case, we think it appropriate that the task of determining the amount required for carrying out the remedial measures, its recovery/realization and the task of undertaking the remedial measures is placed upon the Central Government in the light of the provisions of the Environment (Protection) Act, 1986. It is, of course, open to the Central Government to take the help and assistance of State Government, RPCB or such other agency or authority; as they think fit.

68. The next question is what is the amount required for carrying out the necessary remedial measures to repair the damage and to restore the water and soil to the condition it was in before the respondents commenced their operations. The report of NEERI has worked out the cost at more than Rupees forty crores. The estimate of cost of remedial measures is, however, not a technical matter within the expertise of NEERI officials. Moreover, the estimate was made in the year 1994. Two years have passed by since then. Situation, if at all, must have deteriorated further on account of the presence of - and dispersal of the sludge - in and around the complex of the respondents by them. They have been discharging other toxic effluents from their other plants, as reported by NEERI and the Central team. It is but appropriate that an estimate of the cost of remedial measures be made now with notice to the respondents, which amount should be paid to Central Government and/or recovered from them by the Central Government. Other directions are also called for in the light of the facts and circumstances mentioned above.

Conclusions

69. From the affidavits of the parties, orders of this Court, technical reports and other data, referred to above (even keeping aside the latest report of the RPCB), the following facts emerge:

(i) Silver Chemicals (R-5) and Jyoti Chemicals (R-8) had manufactured about 375 MT of 'H' acid during the years 1988-89. This had given rise to about 82.50 m^3 of waste water and 2440 tonnes of sludge (both iron-based and gypsum-based). The waste water had partly percolated into the earth in and around Bichhri and part of it had flowed out. Out of 2440 tonnes of sludge, about 720 tonnes has been stored in the pits provided by the respondents. The remaining sludge is still there either within the area of the complex of the respondents or outside their complex. With a view to conceal it from the eyes of the inspection teams and other authorities, the respondents have dispersed it all over the area and covered it with earth. In some places, the sludge is lying in mounds. The story of entombing the entire quantity of sludge is untrue.

The units manufacturing 'H' acid - indeed most of the units of the respondents - had started functioning, i.e. started manufacturing various chemicals without obtaining requisite clearances/consents/licences. They did not instal any equipment for treatment of highly toxic effluents discharged by them. They continued to function even after and inspite of the closure orders of the RPCB. They never did carry out the orders of this Court fully, (e.g. entombing the sludge) nor did they fulfil the undertaking given by them to the court (in the matter of removal of sludge and de-watering of the wells). In spite of repeated reports of officials and expert bodies, they persisted in their illegal course of action, in a brazen manner, which exhibits their contempt for law, for the lawful authorities and the courts.

(ii) That even after the closure of 'H' acid plant, the fourth respondent had not taken adequate measures for treating the highly toxic waste water and other waste emanating from the Sulfuric Acid Plant. The untreated highly toxic waste water was found - by NEERI as well as the Central team - flowing through the dumps of iron/gypsum sludge creating a highly potent mix. The letter of the fourth respondent dated 13-1-1996, shows that the Sulfuric Acid Plant was working till 10-11-1995. An assertion is made before us that permanent ESP has also been constructed for the Sulfuric Acid Plant in addition to the temporary tank which was constructed under the orders of this Court. We express no opinion on this assertion, which even if true, is valid only for the period subsequent to April 1994.

(iii) The damage caused by the untreated highly toxic wastes, resulting from the production of 'H' acid - and the continued discharge of highly toxic effluent from the Sulfuric Acid Plant, flowing through the sludge (H-acid waste - is indescribable. It has inflicted untold misery upon the villagers and long lasting damage to the soil, to the underground water and to the environment of that area in general. The report of NEERI contains a sketch, at p.178, showing the area that has been adversely affected by the production of 'H' acid by the respondents. The area has been divided into three zones on the basis of the extent of contamination. A total area of 350 ha has become seriously contaminated. The water in the wells in that area is not fit for consumption either by human being or cattle. It has seriously affected the productivity of the land. According to NEERI report, Rupees forty crores is required for repairing the damage caused to men, land, water and the flora.

(iv) This court has repeatedly found and has recorded in its orders that it is the respondents who have caused the said damage. The analysts reports obtained pursuant to the directions of the court clearly establish that the pollution of the wells is on account of the wastes discharged by Respondents 4 to 8, i.e., production of 'H' acid. The report of the environment experts dated 1-11-1993 has already been referred to hereinbefore. Indeed, several orders of this Court referred to supra are also based upon the said finding.

(v) Sections 3 and 5 of the Environment (Protection) Act, 1986, apart from other provisions of Water and Air Acts, empower the Government to make all such directions and take all such measures as are necessary or expedient for protecting and promoting the 'environment', which expression has been defined in very wide and expansive terms in Section 2(a) of the Environment (Protection) Act. This power includes the power to prohibit an activity, close an industry, director and/or carry out remedial measures, and wherever necessary impose the cost of remedial measures upon the offending industry. The principle "Polluter Pays" has gained almost universal recognition, apart from the fact that it is stated in absolute terms in *Oleum Gas Leak case*. The law declared in the said decision is the law governing this case.

Directions

70. Accordingly, the following directions are made:

1. The Central Government shall determine the amount required for carrying out the remedial measures including the removal of sludge lying in and around the complex of Respondents 4 to 8, in the area affected in Village Bichhri and other adjacent villages, on account of the production of 'H' and the discharges from the Sulfuric Acid Plant of Respondents 4 to 8. Chapters VI and VII in NEERI report (submitted in 1994) shall be deemed to be the show-cause notice issued by the Central Government proposing the determination of the said amount. Within six weeks from this day, Respondents 4 to 8 shall submit their explanation, along with such material as they think appropriate in support of their case, to the Secretary, Ministry of Environment and Forests, Government of India, (MEF). The Secretary shall thereupon determine the amount in consultation with the experts of his Ministry within six weeks of the submission of the explanation by the said respondents. The orders passed by the Secretary, (MEF) shall be communicated to Respondents 4 to 8 - and all concerned - and shall also be placed before this Court. Subject to the orders, if any, passed by this Court, the said amount shall represent the amount which Respondents 4 to 8 are liable to pay to improve and restore the environment in the area. For the purpose of these proceedings, the Secretary, (MEF) and Respondents 4 to 8 shall proceed on the assumption that the affected area is 350 ha, as indicated in the sketch at p.178 of NEERI report. In case of failure of the said respondents to pay the said amount the same shall be recovered by the Central Government in accordance with law. The factories, plant, machinery and all other immovable assets of Respondents 4 to 8 are attached herewith. The amount so determined and recovered shall be utilized by the MEF for carrying out all necessary remedial measures to restore the soil, water sources and the environment in general of the affected area to its former state.

2. On account of their continuous, persistent and insolent violations of law, their attempts to conceal the sludge, their discharge of toxic effluents from the Sulfuric Acid Plant which was allowed to flow through the sludge, and their non-implementation of the orders of this Court - all of which are fully borne out by the Expert Committee's reports and the findings recorded hereinabove - Respondents 4 to 8 have earned the dubious distinction of being characterized as "rogue industries". They have inflicted untold misery upon the poor, unsuspecting villagers, de-spoiling their land, their water sources and their entire environment - all in pursuance of their private profit. They have forfeited all claims for any consideration by this Court. Accordingly, we herewith order the closure of all the plants and factories of Respondents 4 to 8 located in Bichhri village. The RPCB is directed to sell all the factories/units/plants of the said respondents forthwith. So far as the Sulfuric Acid Plant is concerned, it will be closed at the end of one week from today, within which period Respondent 4 shall wind down its operations so as to avoid risk of any untoward consequences, as asserted by respondent 4 in Writ Petition (C) No.76 of 1994. It is the responsibility of Respondent 4 to take necessary steps in this behalf. The RPCB shall seal this unit too at the end of one week from today. The reopening of these plants shall depend upon their compliance with the directions made and obtaining of all requisite permissions and consents from the relevant authorities. Respondents 4 to 8 can apply for directions in this behalf after such compliance.

3. So far as the claim for damages for the loss suffered by the villagers in the affected area is concerned, it is open to them or any organization on their behalf to institute suits in the appropriate civil court. If they file the suit or suits in *forma pauperis*, the State of Rajasthan shall not oppose their applications for leave to sue in *forma pauperis.*

4. The Central Government shall consider whether it would not be appropriate, in the light of the experience gained, that chemical industries are treated as a category apart. Since the chemical industries are the main culprits

in the matter of polluting the environment, there is every need for scrutinising their establishment and functioning more rigorously. No distinction should be made in this behalf as between a large-scale industry and a small-scale industry or for that matter between a large-scale industry and a medium-scale industry. All chemical industries, whether big or small, should be allowed to be established only after taking into consideration all the environmental aspects and their functioning should be monitored closely to ensure that they do not pollute the environment around them. It appears that most of these industries are water-intensive industries. If so, the advisability of allowing the establishment of these industries in arid areas may also require examination. Even the existing chemical industries may be subjected to such a study and if it is found on such scrutiny that it is necessary to take any steps in the interests of environment, appropriate directions in that behalf may be issued under Sections 3 and 5 of the Environment Act. The Central Government shall ensure that the directions given by it are implemented forthwith.

5. The Central Government and the RPCB shall file quarterly reports before this Court with respect to the progress in the implementation of Directions 1 to 4 aforesaid.

6. The suggestion for establishment of environment courts is a commendable one. The experience shows that the prosecutions launched in ordinary criminal courts under the provisions of the Water Act, Air Act and Environment Act never reach their conclusion either because of the workload in those courts or because there is no proper appreciation of the significance of the environment matters on the part of those in charge of conducting of those cases. Moreover, any orders passed by the authorities under Water and Air Acts and the Environment Act are immediately questioned by the industries in courts. Those proceedings take years and years to reach conclusion. Very often, interim orders are granted meanwhile which effectively disable the authorities from ensuring the implementation of their orders. All this points to the need for creating environment courts which alone should be empowered to deal with all matters, civil and criminal, relating to environment. These courts should be manned by legally trained persons/judicial officers and should be allowed to adopt summary procedures. This issue, no doubt, requires to be studied and examined in depth from all angles before taking any action.

7. The Central Government may also consider the advisability of strengthening the environment protection machinery both at the Centre and the States and provide them more teeth. The heads of several units and agencies should be made personally accountable for any lapses and/or negligence on the part of their units and agencies. The idea of an environmental audit by specialist bodies created on a permanent basis with power to inspect, check and take necessary action not only against erring industries but also against erring officers may be considered. The idea of an environmental audit conducted periodically and certified annually, by specialists in the field, duly recognized, can also be considered. The ultimate idea is to integrate and balance the concern for environment with the need for industrialization and technological progress.

71. Respondents 4 to 8 shall pay a sum of Rupees fifty thousand by way of costs to the petitioner which had to fight this litigation over a period of over six years with its own means. Voluntary bodies, like the petitioner, deserve encouragement wherever their actions are found to be in furtherance of public interest. The said sum shall be deposited in this Court within two weeks from today. It shall be paid over to the petitioner.

72. Writ Petition (C) No.967 of 1989 is allowed with the above directions with costs as specified hereinabove.

Writ Petition (C) No.76 of 1994

73. In view of the decision in Writ Petition (C) No.967 of 1989, the writ petition is dismissed.

74. No costs.

Writ Petition (C) No.94 of 1990

75. In view of the decision in Writ Petition (C) No.967 of 1989, no separate orders are necessary in this petition. The writ petition is accordingly dismissed.

76. No costs.

Writ Petition (C) No.824 of 1993

77. In view of the decision in Writ Petition (C) No.967 of 1989, no separate orders are necessary in this petition. The writ petition is accordingly dismissed.

78. No costs.

Section 7

Riparian Right to Water

AIR 1988 SUPREME COURT 1115

E.S. VENKATARAMIAH AND K.N. SINGH. J.J.

Writ Petn. No. 3727 of 1985.D/- 12-1-1988

M.C. MEHTA — PETITIONER

v.

UNION OF INDIA AND OTHERS — RESPONDENTS

(A) Constitution of India, Arts. 32, 226 - Public interest litigation - Pollution of river Ganga - Public nuisance - Writ petition by person who is not a riparian owner but is interested in protecting lives of people using water of river Ganga - Maintainable as public interest litigation. (Civil P.C. (1908), O. 39 R. 1)

In common law the Municipal Corporation can be restrained by an injunction in an action brought by a riparian owner who has suffered on account of the pollution of the water in a river caused by the Corporation by discharging into the river insufficiently treated sewage from discharging such sewage into the river. 1953 Chancery 149, Rel. on.

In the instant case, the petitioner had filed writ petition for prevention of nuisance caused by the pollution of the river Ganga. No doubt, the petitioner is not a riparian owner. He is a person interested in protecting the lives of the people who make use of the water flowing in the river Ganga and his right to maintain the petition cannot be disputed. The nuisance caused by the pollution of the river Ganga is a public nuisance, which is widespread in range and indiscriminate in its effect and it would not be reasonable to expect any particular person to take proceedings to stop it as distinct from the community at large. The petition was therefore, entertained as a Public Interest Litigation. The petitioner was entitled to move the Supreme Court in order to enforce the statutory provisions which impose duties on the municipal authorities and the Boards constituted under the Water Act.

It was observed that although Parliament and the State Legislature have enacted many laws imposing duties on the Central and State Boards and the Municipalities for prevention and control of pollution of water, may of those provisions have just remained on paper without any adequate action being taken pursuant thereto. On account of failure of authorities to obey the statutory duties for several years the water in the river Ganga at Kanpur has become so much polluted that it can no longer be used by the people either for drinking or for bathing. The Nagar Mahapalika of Kanpur has to bear the major responsibility for the pollution of the river near Kanpur city.

(Paras 13, 16)

(B) Constitution of India, Arts. 32, 226 - Pollution of river Ganga at Kanpur - Prevention and control of - Certain directions issued by Supreme Court - (Pollution of water - Prevention and control of) - U.P. Nagar Mahapalika Adhiniyam (1959), Ss. 114, 251, 396, 405 and 407) - (U.P. Municipalities Act (11 of 1916), Ss. 245, 275) -(Water (Prevention and Control of Pollution) Act (6 of 1974), Ss. 2(g), 2(k), 19) - Environment (Protection) Act (29 of 1986), S.7).

In order to control and prevent the pollution of water in the river Ganga at Kanpur the Supreme Court issued certain directions for compliance by the Kanpur Municipal Corporation and concerned authorities.

1. It is seen that Kanpur Mpl. Corporation is taking certain steps but not with sufficient speed. It is noticed that the Mpl. Corporation has not submitted its proposals for sewage treatment works to the State board constituted under the Water Act. The Mpl Corporation should submit its proposals to the State Board within six months from 12-1-1988.

2. Appropriate steps be taken to prevent pollution of water on account of waste accumulated at the dairies.

3. Should take immediate steps to increase the size of the sewers in labour colonies so that the sewage may be carried smoothly through the sewerage system. Wherever sewerage line is not yet constructed steps should be taken

to lay it.

4. Immediate action should also be taken by the Kanpur Nagar Mahapalika to construct sufficient number of public latrines and urinals for free use of the poor people in order to prevent defecation by them on open land.

5. Since the problem of pollution of the water in the river Ganga has become very acute the High Courts should not ordinarily grant orders of stay of criminal proceedings in cases under S.482, Cr. P.C., and even if such an order of stay is made in any extraordinary case the High Courts should dispose of the case within a short period, say about two months, from the date of the institution of such case.

6. Steps shall be taken by the Kanpur Nagar Mahapalika and the Police authorities to ensure that dead bodies or half burnt bodies are not thrown into the river Ganga.

7. Licences should not be issued to establish new industries unless adequate provision has been made for the treatment of trade effluents flowing out of the factories. Immediate action should be taken against the existing industries if they are found responsible for pollution of water.

8. Central Government should direct all educational institutions to include the subject of national environment in text-books.

9. To make people aware of the importance of cleanliness and hazards of pollution, "Keep city/village clean" weeks should be observed.

10. The directions given to the Kanpur Mpl. Corporation applies mutatis mutandis to other Mpl. Corporations and Municipalities.

(Paras 17 to 26)

(C) Criminal P.C. (2 of 1974), S. 482 - Prosecution of Industries for pollution of river Ganga - Stay by High Courts - Should not ordinarily be granted - If granted, matter should be disposed of within short period, say about 2 months

(Para 21)

Cases Referred: Chronological Paras

AIR 1988 SC 1037: (1987) SCC 463 1, 4 (1953) Ch. 149: (1953) 2 WLR 58: (1953) 1 All ER 179 (Rel on). Pride of Derby and Derbyshire Angling Association v. British Celanese Ltd.

Mr. B. Datta, Addl. Solicitor General; Mr. R.K. Jain; Mr. Vinod Bobde; Mr. R.N. Trivedi; Mr. K. N. Bhat; Mr. Tapash Ray and Mr. B.R.L. Ayenger Sr. Advocates, Mr. R.P. Sing; Mr. R.P. Kapur; Mr. Ravinder Narain; Mr. S. Sukumaran; Mr. C. B. Singh; Mr. S.K. Dhingra; Mr. P.K. Jain; Mr. D.N. Goburdhan; Mr. Arvind Kumar; Ms. Laxmi Arvind; Mr, Vineet Kumar; Mr. Deepak K. Thakur; Mr. T.V.S.N. Chari; Mr. Vrinda Grover; Mr. Badri Nath; Mr. Rakesh Khanna; Mr. R.P. Sing; Mr. Mukul Mudgal; Mr. A.K. Ghose; Mr. M.M. Gangedeb; Mr. Probir Mitra; Mr. Sushil Kumar Jain; Mr. Suryakant; Mr. Pappy T. Mathews; Mrs. Mamta Kachhawaha; Mrs. Shobha Dikship; Mr. G.S. Misra; Mr. S.R. Srivastava; Mr. Parijat Sinha; Mr. R. Mohan; Ms. Bina Gupta; Mr. Ranjit Kumar; Mr. Krishna Kumar; Mr. R.C. Verma; Mr. Arun Minosha; Mr. Shri Narain; Mr. E.C. Agarwala; Mr. S.R. Setia; Mr. H.K. Puri; Mr. T.S. Rana; Mr. Pramod Swarup; Mr. Ashok Grover; Mr. S. Markandeya; Mr. Swarup; Ms. Lalita Kohli; Mr. K.C. Dua; Mr. Rajbirbal; Mr. R.A. Gupta and Ms. A. Subhashini, Advocates with them for Respondents.

1. VENKATARAMIAH, J.: -By our judgement dated September 22, 1987 in M.C. Mehta v. Union of India, (1987) 4 SCC 463: (AIR 1988 SC 1037) we issued certain directions with regard to the industries in which the business of tanning was being carried on at Jajmau near Kanpur on the banks of the river Ganga. On that occasion we directed that the case in respect of the municipal bodies and the industries which were responsible for the pollution of the water in the river Ganga would be taken up for consideration on the next date of hearing. Accordingly, we took up for consideration first the case against the municipal bodies. Since it was found that Kanpur was one of the biggest cities on the banks of the river Ganga, we took up for consideration the case in respect of the Kanpur Nagar Mahapalika.

2. The Kanpur Nagar Mahapalika is established under the provisions of the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959 (hereinafter referred to as 'the Adhiniyam'). Sub-section (3) of section 1 of the Adhiniyam, which is to be found in its 1st Chapter, provides that the 1st Chapter of the Adhiniyam shall come into operation at once and the remaining provisions in relation to a city shall come into operation from such date as the State Government may by notification in the official Gazette appoint in that behalf and different dates may be appointed for different provisions. In exercise of the powers conferred by the said sub-section and in continuation of a notification dated September 18, 1959 bringing into operation sections 579 and 580 of the Adhiniyam, the Government of Uttar Pradesh was pleased to issue a notification dated January 18, 1960 appointing the 1st day of February, 1960 as the date on which the remaining provisions of the Adhiniyam and the three Schedules, appended thereto, would come into operation in relation to the cities of Kanpur, Allahabad, Varanasi, Agra and Lucknow, as constituted under section 3 of the Adhiniyam. The duties of the Mahapalika and

Mahapalika authorities are set out in Chapter V of the Adhiniyam; Clauses (iii), (vii) and (viii) of section 114 of the Adhiniyam, which incorporates the obligatory duties of the Mahapalika, read as follows:

"114, Obligatory duties of the Mahapalika - It shall be incumbent on the Mahapalika to make reasonable and adequate provision, by any means or measures which it is lawfully competent to it to use or to take, for each of the following matters, namely' -

.....

(iii) the collection and removal of sewage, offensive matter and rubbish and treatment and disposal thereof including establishing and maintaining farm or factory;

.....

(vii) the management and maintenance of all Mahapalika Waterworks and the construction or acquisition of new works necessary for a sufficient supply of water for public and private purposes,

(viii) guarding from pollution water used for human consumption and preventing polluted water from being so used;

.....

3. Sections 251, 388, 396, 397, 398, 405 and 407 of the Adhiniyam read as follows:

"251. Provision of means for disposal of sewage - The Mukhya Nagar Adhikari may, for the purpose of receiving, treating, storing, disinfecting, distributing or otherwise disposing of sewage, construct any work within or without the City or purchase or take on lease any land, building, engine, material or apparatus either within or without the City or enter into any arrangement with any person for any period not exceeding twenty years for the removal or disposal of sewage within or without the City.

.....

388. Provision may be made by Mukhya Nagar Adhikari for collection, etc., or excrementitious and polluted matter - (1) The Mukhya Nagar Adhikari may give public notice of his intention to provide, in such portion of the City as he may specify, for the collection, removal and disposal by Mahapalika agency, of all excrementitious and polluted matter from privies, urinals, and cess-pools, and thereupon it shall be the duty of the Mukhya Nagar Adhikari to take measures for the daily collection, removal and disposal of such matter from all premises situated in such portion of the City.

(2) In any such portion as is mentioned in sub-section (1) and in any premises, wherever situated, in which there is a water-closet or privy connected with a Mahapalika drain, it shall not be lawful, except with the written permission of the Mukhya Nagar Adhikari, for any person who is not employed by or on behalf of the Mukhya Nagar Adhikari to discharge any of the duties of scavengers.

.....

396. Removal of carcasses of dead animals - (1) It shall be the duty of the Mukhya Nagar Adhikari to provide for the removal of the carcasses of all animals dying within the City.

(2) The occupier of any premises in or upon which any animal shall die or in or upon which the carcass of any animal shall be found, and the person having the charge of any animal which dies in the street or in any open place, shall, within three hours after the death of such animal or, if the death occurs at night within three hours after sunrise, report the death of such animal at the nearest office of the Mahapalika health department.

(3) For every carcass removed by Mahapalika agency, whether from any private premises or from public street or place, a fee for the removal of such amount as shall be fixed by the Mukhya Nagar Adhikari shall be paid by the owner of the animal, or, if the owner is not known, by the occupier of the premises in or upon which, or by the person in whose charge, the said animal died.

397. Prohibition of cultivation, use of manure or irrigation injurious to health - if the Director of Medical and Health Services or the Civil Surgeon or the Nagar Swasthya Adhikari certifies that the cultivation of any description of crops or the use of any kind of manure or the irrigation of land in any specified manner -

(a) in a place within the limits of a City is injurious or facilitates practices which are injurious to the health of persons dwelling in the neighbourhood, or

(b) in a place within or beyond the limits of a City is likely to contaminate the water-supply of such City or otherwise render it unfit for drinking purposes,

the Mukhya Nagar Adhikari may by public notice prohibit the cultivation of such crop, the use of such manure or the use of the method of irrigation so reported to be injurious, or impose such conditions with respect thereto as may prevent the injury or contamination:

Provided that when, on any land in respect of which such notice is issued, the act prohibited has been practiced in the ordinary course of husbandry for the five successive years next preceding the date of prohibition, compensation shall be paid from the Mahapalika Fund to all persons interested therein for damage caused to

them by such prohibition.

398. Power to require owners to clear away noxious vegetation - The Mukhya Nagar Adhikari may, by notice, require the owner or occupier of any land to clear away and remove any vegetation or undergrowth which may be injurious to health or offensive to the neighbourhood.

.....

405. Power to require removal of nuisance arising from tanks, etc. - The Mukhya Nagar Adhikari may by notice require the owner or occupier of any land or building to cleanse, repair, cover, fill up or drain off a private well, tank, reservoir, pool, depression or excavation therein which may appear to the Mukhya Nagar Adhikari to be injurious to health or offensive to the neighbourhood:

Provided that the owner or occupier may require the Mukhya Nagar Adhikari to acquire at the expense of the Mahapalika or otherwise provide, any land or rights in land necessary for the purpose of effecting drainage ordered under this section.

407. Any place may at any time be inspected for purpose of preventing spread of dangerous disease - The Mukhya Nagar Adhikari may at any time, by day or by night, without notice or after giving such notice of his intention as shall in the circumstances, appear to him to be reasonable, inspect any place in which any dangerous disease is reported or suspected to exist, and take such measures as he shall think fit to prevent the spread of the said disease beyond such place."

4. The above provisions deal with the specific duties of the Nagar Mahapalika or the Mukhya Nagar Adhikari appointed under the river Ganga with regard to the disposal of sewage and protection of the environment in or around the City to which the river Ganga applies. There are as most similar provisions in sections 7, 189, 191 and other provisions of the Uttar Pradesh Municipalities Act, 1916 which applies to the smaller municipal bodies. The Uttar Pradesh Water Supply and Sewerage Act, 1975 imposes statutory duties on the authorities mentioned therein regarding the provision of water supply to the cities and towns and construction of sewerage systems in them. The perusal of these provisions in the laws governing the local bodies shows that the Nagar Mahapalikas and the Municipal Boards are primarily responsible for the maintenance of cleanliness in the areas under their jurisdiction and the protection of their environment. We have in the judgement delivered by us on September 22, 1987 (reported in AIR 1988 SC 1037), briefly referred to the Water (Prevention and Control of Pollution) Act, 1974 (Act No. 6 of 1974) (hereinafter referred to as 'the Water Act') in which provisions have been made for the establishment of the Boards for the prevention and control of water pollution for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith. In the Water Act the expressions 'pollution', 'sewage effluent', 'stream, and 'trade effluent' are defined as follows:

"2. Definitions - In this Act, unless the context otherwise requires-

.....

(e) 'Pollution' means such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of any other liquid, gaseous or solid substance into water (whether directly or indirectly as may or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plants or of aquatic organisms;

.....

(g) 'sewage effluent' means effluent from any sewerage system or sewage disposal works and includes sullage from open drains;

(gg) 'sewer' means any conduit pipe or channel open or closed, carrying sewage or trade effluent;

.....

(j) 'stream' includes-

(i) river;

(ii) water course (whether flowing or for the time being dry;

(iii) inland water (whether natural or artificial);

(iv) sub-terranean waters;

(v) sea or tidal waters to such extent or, as the case may be, to such point as the State may, by notification in the Official Gazette, specify in this behalf;

(k) 'trade effluent' includes any liquid, gaseous or solid substance which is discharged from any premises used for carrying on any trade or industry, other than domestic sewage."

5. Sections 3 and 4 of the Water Act provide for the constitution of the Central Board and State Boards respectively. A State Board has been constituted under section 4 of the Water Act in the State of Uttar Pradesh.

Section 16 of the Water Act sets out the functions of the Central Board and section 17 of the Water Act lays down the functions of the State Board. The functions of the Central Board are primarily advisory and supervisory in character. The Central Board is also required to advise the Central Government on any matter concerning the prevention and control of water pollution and to co-ordinate the activities of the State Boards. The Central Board is also required to provide technical assistance any guidance to the State Boards, carry out and sponsor investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution. The functions of the State Board are more comprehensive. In addition to advising the State Government on any matter concerning the prevention, control or abatement of water pollution, the State Board is required among other things (i) to plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells in the State and to secure the execution thereof (ii) to collect and disseminate information relating to water pollution and the prevention, control or abatement thereof; (iii) to encourage, conduct and participate in investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution; (iv) to inspect sewage or trade effluents, works and plants for the treatment of sewage and trade effluents; (v) to review plans, specifications or other data relating to plants set up for the treatment of water, works for the purification thereof and the system for the disposal of sewage or trade effluents or in connection with the grant of any consent as required by the Water Act; (vi) to evolve economical and reliable methods of treatment of sewage and trade effluents, having regard to the peculiar conditions of soils, climate and water resources of different regions and more especially the prevailing flow characteristics of water in streams and wells which render it impossible to attain even the minimum degree of dilution, and (vii) to lay down standards of treatment of sewage and trade effluents to be discharged into any particular stream taking into account the minimum fair weather dilution available in that stream and the tolerance limits of pollution permissible in the water of the stream, after the discharge of such effluents. The State Board has been given certain executive powers to implement the provisions of the Water Act. Sections 20, 21 and 23 of the Water Act confer power on the State Board to obtain information necessary for the implementation of the provisions of the Water Act, to take samples of effluents and to analyse them and to follow the procedure prescribed in connection therewith and the power of entry and inspection for the purpose of enforcing the provisions of the Water Act. Section 24 of the Water Act prohibits the use of stream or well for disposal of polluting matters etc. contrary to the provisions incorporated in that section. Section 32 of the Water Act confers the power on the State Board to take a certain emergency measures in case of pollution of stream or well. Where it is apprehended by a Board that the water in any stream or well is likely to be polluted by reason of the disposal of any matter therein or of any likely disposal of any matter therein, or otherwise, the Board may under section 33 of the Water Act make an application to a court not inferior to that of a Resident Magistrate or a Magistrate of the first class, for restraining the person who is likely to cause such pollution from so causing.

The Environment (Protection) Act, 1986, which has also been referred to in our earlier judgement, also contains certain provisions relating to the control, prevention and abatement of pollution of water and one significant provision in that Act is what is contained in section 17 thereof, which provides that where an offence under that Act is committed by any Department of Government, the Head of that Department shall be deemed to be guilty of the offence and is liable to be punished.

7. It is unfortunate that although Parliament and the State Legislature have enacted the aforesaid laws imposing duties on the Central and State Boards and the municipalities for prevention and control of pollution of water, many of those provisions have just remained on paper without any adequate action being taken pursuant thereto. After the above petition was filed and notice was filed and notice was sent to the Uttar Pradesh State Board constituted under the Water Act, an affidavit has been filed before this Court by Dr. G.N. Misra, Scientific Officer of the U.P. Pollution Control Board setting out the information which the Board was able to collect regarding the measures taken by the several local bodies and also by the U.P. Pollution Control Board in order to prevent the pollution of the water flowing in the river Ganga. A copy of the report relating to the inspection made at Kanpur on 23-11-87/24-11-87 by Shri Tanzar
1988 S.C./17 VI G-11 Ullah Khan, Assistant Environmental Engineer and Shri A.K. Tiwari, Junior Engineer enclosed to the counter affidavit as Exhibit K-5 reads thus:

The inspection made on 23.11.87/24.11.87 along with Sri A.K. Tiwari, Junior Engineer. Following are the facts observed at the time of inspection.

1. Kanpur town is situated on the southern bank of river Ganges.

2. The present population of the town is approximately 20 lacs.

3. The city is covered with piped water supply.

4. The city has developed between river Ganges on the north side and river Pandu on the south side G.T. Road divides the city into two halves.

In the north side most of the area is covered by sewerage

system and the sullage/sewage is discharged without treatment into river Ganges through 17 nalas including sewerage by-pass channel at Jajmau.

In the south side there is no sewerage system and the sewage/sullage are discharged without treatment into river Pandu through 5 nalas. River Pandu joins river Ganges near Fatehpur (Sketch enclosed.)

5. The Kanpur Nagar Mahapalika has not yet submitted any proposal of sewage treatment works to the Board.

6. Mr. Ikramur Rahman, A.E. Nagar Mahapalika told the Kanpur town is covered under Ganga Action Plan and following are the proposals-

(A) U.P. Jal Nigam.

(1) Re-modelling of sewage pumping station at Jajmau and improvement to sewage farm.

(2) Nala Tapping.

(3) Sewage Treatment Plant.

(B) Kanpur Jal Sansthan

(1) Cleaning of Trunk and main sewers.

(C) Integrated Environmental and sanitary Engineer project is being executed under the Dutch Assistance in Jajmau area.

1. Crash Programme (is to remove deficiencies in the existing sanitary facilities)

2. Laying of Industrial sewer.

3. U.A.S.B. Sewage Treatment Plant.

sd/- sd/-

(A.K. TIWARI) (TANZAR ULLA KHAN)

J.E. ASSTT. ENVIRONMENTAL ENGINEER"

8. Appendix A/1 to 'An Action Plan for Prevention of Pollution of the Ganga gives the following particulars relating to the quantity of sewerage generated in the City of Kanpur which is discharged into the river Ganga and other relevant matters:

9. It is thus seen that 274.50 million litres a day of sewage water is being discharged into the river Ganga from the city of Kanpur, which is the highest in the State of Uttar Pradesh and next only to the city of Calcutta which discharges 580.17 million litres a day of sewage water into the river Ganga. Para 4 of the affidavit filed by Shri Jai Shanker Tewari, Executive Engineer of Kanpur Nagar Mahapalika reads thus:

"4. That the pollution in river Ganga from Kanpur is occurring because of following reasons:

(i) About 16 nalas collecting sullage water, sewage, textile waste, power plant waste and tannery effluents used to be discharged without any treatment into the river. However some Nalas have been trapped now.

(ii) The dairies located in the city have a cattle population of about 80,000. The dung, fodder waste and other refuse from this cattle population is quantitatively more than the sullage from the city of human population of over 20 lakhs. All this finds its way into the sewerage system and the nalas in the rainy season. It has also totally choked many branches of sewers and trunk sewers resulting in the overflow of the system.

(iii) The night soil is collected from the unsewered areas of the city and thrown into the nalas.

(vi) There are more than 80 tanneries in Jajmau whose effluent used to be directly discharged into the river.

(v) The total water supply in Kanpur is about 55 million gallons per day. After use major part of it goes down the Jajmau sewage pumping station and a part of it is being supplied to sewage farms after diluting it with raw Ganges water and the remaining part is discharged into the river.

(vi) Dhobi Ghats

(vii) Defecation by economically weaker sections."

10. The affidavit further states that the U.P. Jal Nigam, the U.P. Water Pollution Control board, the National Environmental Engineering Research Institute, the Kanpur Nagar Mahapalika, the Kanpur Development Authority and the Kanpur Jal Sansthan have started taking action to minimise the pollution of the river Ganga. It is also stated therein that the financial assistance is being provided by the Central Ganga Authority through Ganga Project Directorate. State Government, the World Bank, the Dutch Government etc. for implementing the said measures. The said affidavit gives information about the several works undertaken at Kanpur for minimising the pollution of the river Ganga. It also states that Rs. 493.63 lacs had been spent on those works between the years 1985 and 1987 and that the total allocation of funds by the Central Ganga Authority for Kanpur is Rs. 3694.94 lacs and that up to the end of the current financial year it

is proposed to spend Rs. 785.58 lacs (1985 to 1987-88) towards various schemes to be completed under Ganga Action Plan.

KANPUR

Population in 1981	Estimated water supply in 1981
Estimated sewage generated	Treatment
(70% of the water supply to the city)	
16.39 lacs	392.14 million litres a day
274.50 million litres a day	Nil

The affidavit points out that in Kanpur City sewer cleaning has never been done systematically and in a planned way except that some sewers were cleaned by the U.P. Jal Nigam around 1970. The main reasons for mal-functioning and choking of the city sewerage, according to the affidavit, are (i) throwing or discharging of solids, clothes, plastics, metals etc. into the sewerage system; (ii) throwing of cow dung from dairies which are located in every part of the city which consists of about 80,000 cattle; (iii) laying of under-sized sewers specially in labour colonies; (iv) throwing of solid wastes and malba from construction of buildings into sewers through manholes; (v) non-availability of mechanical equipment for sewer cleaning works; and (vi) shortage of funds for proper maintenance. It is asserted that the discharge of untreated effluents into the river Ganga will be stopped up to 80% by March, 1988.

11. Shri M.C. Mehta, the petitioner herein, drew out attention to the Progress of the Ganga Action Plan (July, 1986 -January, 1987) prepared by the Industrial Toxicology Research Centre, Council of Scientific & Industrial Research. At page 20 of the said report the details of the analysis of the Ganga water samples collected during August, 1986 to January, 1987 from Uttar Pradesh region are furnished. That report shows that the pollution of the water in the river Ganga is of the highest degree at Kanpur. The Ganga water samples taken at Kanpur shows that the water in the river Ganga at Kanpur consisted of 29.200 units (mg/ml) of iron in the month of August, 1986 when the ISI limit for river water is 0.3 and 0.900 (mg/ml) of manganese whereas the WHO limit of manganese for drinking water is 0.05. The Progress Report for the period February, 1987 - June, 1987 of Microlevel Intensive Monitoring of Ganga under Ganga Action Plan describes the samples of the water taken from the river Ganga at Kanpur thus:-

"B.O.D. (Bio Oxygen Demand) values are found to be higher than prescribed values of I.S.I. C.O.D. (Chemical Oxygen Demand) values are also found to be higher. These values clearly indicate that river water is not fit for drinking, fishing and bathing purposes.

Table II further shows that Total Coliform and Fecal Coliform bacteria are always found very high. This is due to disposal or large quantity of untreated municipal waste into river Ganga. These high values of bacteria indicate that water is not fit for drinking, bathing and fishing purpose.

To improve quality of water in Ganga, all nallahs should be trapped immediately and raw water should be treated conventionally at water works and disinfected by chlorination."

(underlining by us)

12. In the concluding part of the said Progress Report it is stated thus:

"The Ganga is grossly polluted at Kanpur. All hullahs are discharging the polluted waste water into river Ganga. But Jajmau by-pass channel, Sismau, Muir Mill, Golf Club and Gupta Ghat nullahs are discharging huge quantities of polluted waste water. To improve the water quality of Ganga all major nullahs should be diverted and treated. Combined treatment should be provided for Jamau tanneries. Effluent treatment plants should be installed by all major polluting industries."

13. It is needless to say that in the tropical developing countries a large amount of misery, sickness and death due to infectious diseases arises out of water supplies. In Lall's Commentaries on Water and Air Pollution Laws (2nd Edition) at pages 331 and 333 is observed thus:

"In the tropics, we cannot safely take such a limited view. Such water-borne diseases as malaria, schistosomiasis, guinea worm and yellow fever are either terrible scourges of, or threats to, many tropical populations. The hazards from bad water are thus much greater. Poverty is much more serious for many tropical areas; in the rural areas - where most people live - and around the edges of the cities, which are the fastest-growing communities, most people cannot afford a conventionally good water supply at present, and the choice in the short run may be between doing nothing and providing somewhat improved supply. If an ideal water system is not possible, there are options as to what needs should be met by the partial improvements. To make the right decisions we need again the broad picture of water-related diseases. So, because of these two tropical characteristics - warmth and poverty - a wider view than in temperate lands is necessary. (P.311)

.....

Water-borne diseases - The classical water-borne diseases are due to highly infective organisms where only rather

few are needed to infect someone, relative to the levels of pollution that readily occur. The two chief ones have a high mortality if untreated and are diseases which a community is very anxious to escape: typhoid and cholera. Both are relatively fragile organisms whose sole reservoir is man.

These two diseases occur most dramatically as the 'common source out-break' where a community water supply gets contaminated by faeces from a person suffering from, or carrying, one of the infections. Many people drink the water and a number of these fall ill from the infection at about the same time.

Typhoid is the most cosmopolitan of the classical water-borne infections. In man it produces a severe high fever with generated systemic, more than intestinal, symptoms. The bacteria are ingested and very few are sufficient to infect. The typhoid patient is usually too ill to go out polluting the water and is not infective prior to falling sick. However, a small proportion of those who recover clinically continue to pass typhoid bacteria for months or years; these carriers are the source of water-borne infections. Gallstones predispose to the carrier state as the bacteria persist in the inflamed gall bladder. In the tropics, lesions of Schistosoma haematobium in the bladder also act as nide of infection, producing urinary typhoid carriers, whilst rectal schistosomiasis combined with typhoid leads to persistent severe fever lasting many months. Typhoid bacteria survive well in water but do not multiply there.

Cholera is in some ways similar to typhoid, but its causative bacteria are more fragile and the clinical course is extremely dramatic. In classical cholera the onset of diarrhoea is sudden and its volume immense so that the untreated victim has a high probability of dying from dehydration within 24 hours or little more.

Several other infections are water borne but are less important than typhoid and cholera. Leptospirosis, due to a spirochaete, has its reservoir in wild rodents which pollute the water. Leptospires can penetrate the skin as well as being ingested. They produce jaundice and fever, called 'well's disease. Which is severe but not common."

14. The amount of suffering which the members of the public are likely to undergo by using highly polluted water can be easily gathered from the above extract.

15. In the book entitled 'Water Pollution and Disposal of Waste Water on Land' (1983) by U.N. Mahida, I.S.E. (Retd) the problem of water pollution, the benefits of control of pollution and urgency of the problem have been dealt with. At pages 1, 2, 4 and 5 of the said book it is observed thus:

"As long as the human population was small and communities were scattered over large areas of land, the disposal of human wastes created no problems. People could defecate in areas surrounding villages and other habitations and leave it to nature to dispose of the waste by assimilation in the surrounding land and air. But as communities became more concentrated and villages and towns grew, such a mode of disposal by natural agencies came to be replaced by organised disposal, though again through the agency of natural land and soil columns. The collection of human excreta and its disposal in earthen trenches was resorted to by many towns and adopted the basket privy system.

The introduction of a system of water-borne sewage created new problems in the disposal of human wastes, as now along with the earlier problem of getting rid of solid wastes' i.e., human excreta, the problem of the disposal of the water employed for the removal of human wastes had also to be faced. This was the origin of the problem of sewage disposal. At first, the natural instinct was to channelize the sewage - the soiled water - to natural streams and rivers. For a time this mode of disposal was even considered quite efficacious. Such methods did not create difficulties as sewage discharges were small as compared to the stream flow. But with the increased discharge of progressively large quantities of sewage, polluted streams became a serious menace to public health.

NATURE OF THE PROBLEM

The introduction of modern water carriage systems transferred the sewage disposal from the streets and the surroundings of townships to neighbouring streams and rivers. This was the beginning of the problem of water pollution. It is ironic that man, from the earliest times, has tended to dispose of his wastes in the very streams and rivers from which most of his drinking water is drawn. Until quite recently this was not much of a problem, but with rapid urbanisation and industrialisation, the problem of the pollution of natural waters is reaching alarming proportions.

The most disturbing feature of this mode of disposal is that those who cause water pollution are seldom the people who suffer from it. Cities and industries discharge their untreated or only partially treated sewage and industrial waste waters into neighbouring streams and thereby remove waste matter from their own neighbourhood. But in doing so, they create intense pollution in streams and rivers and expose the downstream riparian population to dangerously unhygienic conditions. In addition to the withdrawal of water for downstream towns and cities, in many developing countries, numerous villages and riparian agricultural population generally rely on streams and rivers for drinking water for themselves and their cattle, for cooking, bathing, washing and numerous other uses.

It is thus riparian population that specially needs protection from the growing menace of water.

.....

BENEFITS OF CONTROL

The benefits which result from the prevention of water pollution include a general improvement in the standard of health of the population, the possibility of restoring stream waters to their original beneficial state and rendering them fit as sources of water supply, and the maintenance of clean and healthy surroundings which would then offer attractive recreational facilities. Such measures would also restore fish and other aquatic life.

A part from its menace to health, polluted water considerably reduces the water resources of a nation. Since the total amount of a country's utilisable water remains essentially the same and the demand for water is always increasing, schemes for the prevention of water pollution should, wherever possible, make the best use of treated waste waters either in industry of agriculture. Very often such processes may also result in other benefits in addition to mere reuse. The application of effluents on agricultural land supplies not only much needed water to growing crops but also manurial ingredients during the treatment of industrial waste waters often yields by products which may to some extent offset the cost of treatment.

If appropriate financial credits could be calculated in respect of these and other incidental benefits, it would be apparent that measures for the prevention of pollution are not unduly costly and are within the reach of all nations, advanced or developing. It is fortunate that people are becoming more receptive to the idea of sharing the financial burden for lessening pollution. It is now recognised in most countries that it is the responsibility of industries to treat their trade wastes in such a way that they do not deteriorate the quality of the receiving waters, which otherwise would make the utilisation of such polluted waters very difficult or costly for downstream settlers.

URGENCY OF THE PROBLEM

The crucial question is not whether developing countries can afford such measures for the control of water pollution but it is whether they can afford to neglect them. The importance of the latter is emphasised by the fact that in the absence of adequate measures for the prevention or control of water pollution, a nation would eventually be confronted with far more onerous burdens to secure wholesome and adequate supplies of water for different purposes. If developing countries embark on suitable pollution prevention policies during the initial stages of their industrialisation, they can avoid the costly mistakes committed in the past by many developed countries. It is, however, unfortunate that the importance of controlling pollution is generally not realised until considerable damage has already been done.

16. In common law the Municipal Corporation can be restrained by an injunction in an action brought by a riparian owner who has suffered on account of the pollution of the water in a river caused by the Corporation by discharging into the river insufficiently treated sewage from discharging such sewage into the river. In Pride of Derby and Derbyshire Angling Association v. British Celanese Ltd., 1953) Ch 149, the second defendant, the Derby Corporation admitted that it had polluted the plaintiff's fishery in the River Derwent by discharging into it insufficiently treated sewage, but claimed that by the Derby Corporation Act, 1901 it was under a duty to provide sewerage system, and that the system which had accordingly been provided had become inadequate solely from the increase in the population of Derby. The Court of Appeal held that it was not inevitable that the work constructed under the Act of 1901 should cause a nuisance, and that in any case the Act on its true construction did not authorise the commission of a nuisance. The petitioner in the case before us is no doubt not a riparian owner. He is a person interested in protecting the lives of the people who make use of the water flowing in the river Ganga and his right to maintain the petition cannot be disputed. The nuisance caused by the pollution of the river Ganga is a public nuisance which is wide spread in range and indiscriminate in its effect and it would not be reasonable to expect any particular person to take proceedings to stop it as distinct from the community at large. The petition has been entertained as a Public Interest Litigation. On the facts and in the circumstances of the case we are of the view that the petitioner is entitled to move this Court in order to enforce the statutory provisions which impose duties on the municipal authorities and the Boards constituted under the Water Act. We have already set out the relevant provisions of the statute which impose those duties on the authorities concerned. On account of their failure to obey the statutory duties for several years the water in the river Ganga at Kanpur has become so much polluted that it can no longer be used by the people either for drinking or for bathing. The Nagar Mahapalika of Kanpur has to bear the major responsibility for the pollution of the river near Kanpur City.

17. It is no doubt true that the construction of certain works has been undertaken under the Ganga Action Plan at Kanpur in order to improve the sewerage system and to prevent pollution of the water in the river Ganga. But as we see from the affidavit filed on behalf of the authorities concerned in this case the works are going on at a snail's pace. We find from the affidavits filed on behalf of the Kanpur Nagar Mahapalika that certain target dates have been fixed for the completion of the works

already undertaken. We expect the authorities concerned to complete those works within the target dates mentioned in the counter-affidavit and not to delay the completion of the works beyond those dates. It is, however, noticed that the Kanpur Nagar Mahapalika has not yet submitted its proposals for sewage treatment works to the State Board constituted under the Water Act. The Kanpur Nagar Mahapalika should submit its proposals to the State Board within six months from today.

18. It is seen that there is a large number of dairies in Kanpur in which there are about 80,000 cattle. The Kanpur Nagar Mahapalika should take action under the provisions of the Adhiniyam of the relevant bye-laws made thereunder to prevent the pollution of the water in the river Ganga on account of the waste accumulated at the dairies. The Kanpur Nagar Mahapalika may either direct the dairies to be shifted to a place outside the city so that the waste accumulated at the dairies does not ultimately reach the river Ganga or in the alternative it may arrange for the removal of such waste by employing motor vehicles to transport such waste from the existing dairies in which event the owners of the dairies cannot claim any compensation. The Kanpur Nagar Mahapalika should immediately take action to prevent the collection of manure at private manure pits inside the city.

19. The Kanpur Nagar Mahapalika should take immediate steps to increase the size of the sewers in the labour colonies so that the sewage may be carried smoothly through the sewerage system. Wherever sewerage line is not yet constructed steps should be taken to lay it.

20. Immediate action should also be taken by the Kanpur Nagar Mahapalika to construct sufficient number of public latrines and urinals for the use of the poor people in order to prevent defecation by them on open land. The proposal to levy any charge for making use of such latrines and urinals shall be dropped as that would be a reason for the poor people not using the public latrines and urinals. The cost of maintenance of cleanliness of those latrines and urinals has to be borne by the Kanpur Nagar Mahapalika.

21. It is submitted before us that whenever the Board constituted under the Water Act initiates any proceedings to prosecute industrialists or other persons who pollute the water in the river Ganga, the persons accused of the offenses immediately institute petitions under section 482 of the Code of Criminal Procedure, 1973 in the High Court and obtain stay orders thus frustrating the attempt of the Board to enforce the provisions of the Water Act. They have not placed before us the facts of any particular case. We are, however, of the view that since the problem of pollution of the water in the river Ganga has become very acute the High Courts should not ordinarily grant orders of stay of criminal proceedings in such cases and even if such an order of stay is made in any extraordinary case the High Courts should dispose of the case within a short period, say about two months, from the date of the institution of such case. We request the High Courts to take up for hearing all the cases where such orders have been issued under sections 482 of the Code of Criminal Procedure, 1973 staying prosecutions under the Water Act within two months. The counsel for the Board constituted under the Water Act shall furnish a list of such cases to the Registrar of the concerned High Court for appropriate action being taken thereon.

22. One other aspect to which our attention has been drawn is the practice of throwing corpses and semi-burnt corpses into the river Ganga. This practice should be immediately brought to an end. The cooperation of the people and police should be sought in enforcing this restriction. Steps shall be taken by the Kanpur Nagar Mahapalika and the Police authorities to ensure that dead bodies or half burnt bodies are not thrown into the river Ganga.

23. Whenever applications for licences to establish new industries are made in future, such applications shall be refused unless adequate provision has been made for the treatment of trade effluents flowing out of the factories. Immediate action should be taken against the existing industries if they are found responsible for pollution of water.

24. Having regard to the grave consequences of the pollution of water and air and the need for protecting and improving the natural environment which is considered to be one of the fundamental duties under the Constitution [vide Clause (g) of Article 51A of the Constitution] we are of the view that it is the duty of the Central Government to direct all the educational institutions throughout India to teach at least for one hour in a week lessons relating to the protection and the improvement of the natural environment including forests, lakes, rivers and wild life in the first ten classes. The Central Government shall get text books written for the said purpose and distribute them to the educational institutions free of cost. Children should be taught about the need for maintaining cleanliness commencing with the cleanliness of the house both inside and outside, and of the streets in which they live. Clean surroundings lead to healthy body and healthy mind. Training of teachers who teach this subject by the introduction of short term courses for such training shall also be considered. This should be done throughout India.

25. In order to rouse amongst the people the consciousness of cleanliness of environment the Government of India and the Governments of the States and of the Union Territories may consider the desirability of organising "keep the city clean week" (Nagar Nirmalikarana Saptaha), "keep the town clean" week

(Pura Nirmalikarana Saptaha) and "Keep the village clean" week (Grama Nirmalikarana Saptaha) in every city, town and village throughout India at least once a year. During that week the entire city, town or village should be kept as far as possible clean, tidy and free from pollution of land, water and air. The organisation of the week should be entrusted to the Nagar Mahapalkikas, Municipal corporations, Town Municipalities, Village Panchayats or such other local authorities having jurisdiction over the area in question. If the authorities decide to organise such a week it may not be celebrated in the same week throughout India but may be staggered depending upon the convenience of the particular city, town or village. During that week all the citizens including the members of the executive, members of Parliament and the State Legislatures, members of the judiciary may be requested to cooperate with the local authorities and to take part in the celebrations by rendering free personal service. This would surely create a national awareness of the problems faced by the people by the appalling all round deterioration of the environment which we are witnessing today. We request the Ministry of Environment of the Government of India to give a serious consideration to the above suggestion.

26. What we have stated above applies *mutatis mutandis* to all other Mahapalikas and Municipalities which have jurisdiction over the areas through which the river Ganga flows. Copies of this judgement shall be sent to all such Nagar Mahapalikas and Municipalities. The case against the Nagar Mahaplikas and the Nagar Municipalities in the State of Uttar Pradesh shall stand adjourned by six months. Within that time all the Nagar Mahapalikas and Municipalities in the State of Uttar Pradesh through whose areas the river Ganga flows shall file affidavits in this Court explaining the various steps they have taken for the prevention of pollution of the water in the river Ganga in the light of the above judgement. The case as against the several industries in the State of Uttar Pradesh which are located on the banks of the river Ganga will be taken up for hearing on the 9th of February, 1988.

Order accordingly

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 706 OF 1997

NAIROBI GOLF HOTELS (KENYA) LTD — PLAINTIFF

v.

PELICAN ENGINEERING AND CONSTRUCTION CO. LTD. — DEFENDANT

RULING

This is a preliminary objection raised against the plaintiff's application for an order of injunction dated 24.3.97.

Plaintiff filed a suit on 24.3.97 against the defendant claiming damages and a permanent injunction to restrain the defendant from constructing a dam on or across Gatharaini River and from trespassing on the plaintiff's land. On the same day, plaintiff filed an application for interlocutory injunction to restrain the defendant from constructing a dam on Gatharaini River and from diverting the River water and from trespassing on the plaintiffs land.

On the same day, an exparte interlocutory injunction as prayed was granted by Khamoni J. That exparte injunction is still in existence.

When the application came for hearing inter parties, Mr. Owino for the defendant raised a preliminary objection to the application.

The basis of the plaintiffs suit and the interlocutory injunction is in summary that:

(a) Plaintiff owns land reference No.14883 on which it has erected a prestigious and unique five star resort hotel/club, conference facilities and an 18 hole golf club of international repute known as "Windsor Golf and Country Club" unparalleled elsewhere in Kenya.

(b) With a view to conserving nature, plaintiff has natured, maintained and preserved indigenous trees on the golf course.

(c) The boundary of the land is the centre line of Gatharaini River which flows naturally from west to east and that with the permission, inter alia, of Water Apportionment Board, it has erected a dam (Windsor Dam) from which it derives water for the maintenance of the golf course, the trees and grass on the premises.

(d) Further plaintiff is a riparian owner with natural rights "Exjure naturae" to the use of the water from the River.

(e) Defendant is the owner of land reference number 15153 curved from Kiambu Forest Reserve which land does not border the Gatharaini River and is separated from the River by a portion of the forest.

(f) From February 1997, defendant contrary to the Water Act, erected a concrete reinforced wall across the river up stream, erected a temporary water reservoir pending construction of a dam, installing a water pump and diverting large quantities of water from the river via the reservoir to its land for irrigated floricultural and horticultural farming and water storage reservoirs thereby extinguishing the natural flow down stream of Gatharaini River.

(h) Defendants actions are crippling the plaintiffs user of the Windsor dam and water rights causing the grass on the Golf course and vegetation to wither.

Those are of course allegations as the application and the suit has not been heard.

Mr. Mike Maina the managing director of the defendant has sworn a replying affidavit. The defendant has also filed a defence. The defence is a mere denial of all the allegations in the plaint except that defendant admits that it is the owner of the land referred to by the plaintiff. All what Mr. Mike Maina states in the replying affidavit is that defendant has leased the land to Valentine Growers and therefore defendant is wrongly sued. The other thing Mr. Mike Maina states is that plaintiff has come to court with unclean hands as it has unlawfully and without permission blocked the flow of waters of the river thereby out obstructing and diverting the waters of the river to

waste.

Defendant has raised four preliminary objections to the application namely

(i) As by section 3 of the Water Act, water is vested in the Government, plaintiff has no locus standi to bring the suit.

(ii) That it is the Water appointment Board which determines the utilisation of Water and therefore plaintiff should have lodged a complaint with the Water Appointment Board.

(iii) That plaintiff can only come to court for Judicial Review after all the administrative machinery under the Water Act are exhausted.

(iv) That as the defendant has leased the land to Valentine Growers - a firm, plaintiff can only sue Valentine Growers and not the defendant.

Mr. Muturi Kigano for the plaintiff has replied to the preliminary objection. He contends inter alia, that High Court has Original unlimited jurisdiction, that plaintiff has permission from Water Appointment Board; defendant has not deponed that it has permission from Water Appointment Board; that defendant has not traversed the various breaches complained of; that the lease was hurriedly registered on 3.4.97 and in any case the lease is invalid in law; that the same Mike Maina M.D of defendant is the representative of Valentine Growers; that riparian rights lie against the offending land owner and riparian owner can obtain an injunction to restrain the diversion even without proof of damages.

Dealing with the first, second and third objections together, it is true that every body of water in Kenya is vested in the Government but that is as section 3 of the Water Act provides subject to any rights of user to any person granted under the Act or recognised as being vested in any other person. As Mr. Kigano states, the Government is a trustee for the general public. As the Government is the people, the body of water logically belongs to the people but the Government has to preserve it, control it and apportion it for the general good of the people. It is aptly said that Water is life and no doubt that water is very valuable Natural resource. The Government controls the use of water by requiring that permits be obtained for some extra ordinary use of water. Such cases where permits are required are one specified in section 35 of the Water Act and include cases of use of water for irrigation. But by S. 38 of the Act, a permit is not required for the abstraction or use of water from any body of water for domestic purposes by any persons having lawful access to the water and if such abstraction is made without employment of works. This natural right to use water for domestic purposes is subject to section 50 and 74 of the Act. By section 50 of the Act a person cannot construct a well within 100 yards of anybody of surface water or construct a well within half a mile of another well. By section 74 of the Act, the Government can declare any areas a conservation area and refuse the extraction of water. A riparian owner is a person who owns land on a bank of a river, or along a river or bordering a river or contiguous to a river. Under the common law and as permitted by section 38 of the Water Act, he has a right to take a reasonable amount account of water from a natural river as it flows past his land for ordinary purposes such as domestic use which includes such things as watering his animals, his garden. He can even construct a dam so long as it is not within 100 yards of surface water - It may be that the wider right or riparian owner under common law are limited by the water Act but it is clear that a riparian owner has the natural right to use the water adjacent to his land for normal use.

For cases where a permit is required, it is an offence to use the water without a permit (section 36 of the Act). For the use of water where a permit is required it is the intended user who is required to apply to the Water Appointment Board for a permit and anybody objecting to the issuing of a licence is required to file an objection. I can find no provision in the Water Act which gives any member of public a right to complain to either the Water Apportionment Board or to Water Resources Authority for use of water by anybody in the absence of an application for a permit. The objection that plaintiff should have exhausted the machinery prescribed in the Water Act would have been valid if the defendant had said that it applied for a permit from the water Apportionment Board and that plaintiff failed to file an objection or appeal. As the pleadings and affidavits stand, the defendant has not said that it has applied for a permit and that such a permit was duly granted.

If it is true, as plaintiff pleads,that the defendant has not obtained a permit and if it is true that it has committed the acts complained of, then it would have committed an offence under S. 36(2) of the Water Act. If such is the case, then the Minister or Water Resources Authority or the Water Apportionment Board has power to prosecute the defendant or take any civil proceedings against the defendant (Section 181). But as section 180(2) of the Act provides, the payment of any such penalty does not affect the right of any other person to bring any action or take any proceedings against the defendant for alleged illegal construction of the dam and alleged diversion of water. Plaintiff is such a person and comes to court against the defendants for the alleged illegal works and also as a riparian owner. He has a right of action under S.180 (2) of the Act. Further, plaintiff by virtue of being a riparian owner who alleges that defendant is not a riparian owner can apply for injunction under the common law to restrain the non-riparian for extra ordinary use of water

for irrigation purposes. Halisburys Laws of England vol. 24 page 574 para 1028. As for the objection that the suit and application cannot be maintained against the defendant as defendant has leased the land to Valentine Growers, I note that the defendant has been granted a 99 year lease from April, 1991. If the lease to Valentine Growers is valid, (I am not going to decide on its validity) it is for 10 years from 1.11.96 after which it will revert to the defendant for use for over 80 years. One of the acts complained of by the plaintiff is trespass to his land. The works complained of by plaintiff are of permanent nature. It is my view that if the defendant has by the lease authorised Valentine Growers to utilise the land in the manner complained of by the plaintiff and if the utilisation of the land in that manner is going to cause permanent damage to the plaintiffs investment, the plaintiff has a cause of action against the head lessee now without waiting for the estate to fall in possession of the defendant in future.

In any case, it is not clear as to who is dealing with the defendants land as Mr. Mike Maina is involved both in the defendant and in Valentine Growers and seems to wear two hats. If Valentine Grower feel that they have an interest to protect it as a firm, it has a right to apply to be joined as a defendant to protect those interests.

For those reasons the preliminary objection has no merit and is over ruled with costs to the plaintiff. I order that the application do proceed to hearing on merits.

E. M. Githinji
Judge
8.5.97

Mr. Owino present

Mr. Kigano present

Mr. Owino: We wish to appeal against the Ruling because you seem to have decided the issue of facts. There is a pending application for injunction. We need your directions. We can exhaust the application for the injunction and hear it next week after which I can go on appeal.

E. M. Githinji
Judge

Mr. Kigano: I agree with that cause - to deal with application for injunction and if it is against them, then proceed to appeal on the whole matter.

E. M. Githinji
Judge

Mr. Kigano: I apply for leave to join Mike Maina as a party under order 1 rule 10 CP Rules...

Mr. Owino: We will be objecting to that.

E. M. Githinji
Judge

Order: The intended application to join Mike Mwangi as a party to be made by a formal application.

E. M. Githinji
Judge

Mr. Owino: The pending application for injunction can be fixed for hearing on 9.6.97 together with the intended application to join Mike Maina.

Mr. Kigano: It is alright. Extend interim orders.

Order: By consent hearing of the application for injunction on 9.6.97 at 11 a.m. Interim orders extended to 9.6.97. Ruling to be typed.

E. M. Githinji
Judge

Summaries of Decisions

SUMMARIES OF JUDICIAL DECISIONS

FOLLOWING ARE SUMMARIES OF JURISPRUDENCE CASES RELATED TO THE DIVERSE RANGE OF SUBJECT AREAS TACKLED BY NATIONAL JURISDICTIONS IN FRANCE

CASE No.1

[Association pour la défense de la population concernée par la création de la zone de Naujac, La Primaube, Luc]

TRIBUNAL ADMINISTRATIF de Toulouse, 24 Janvier 1980

MM. Dechaux, rapp.; Salvadori, c.du g.; Rouquet, av.

Topic: Environmental Impact assessment

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Key features: - Environmental Impact assessment - Establishment of a Z.A.C. with an industrial accent. - Declaration of public interest. - Application of article 2 of the Law of 10th July 1976. - Contents of the public inquiry file. - Contents of the Impact study. - Insufficiency. - Nullification of Order for failure to comply with formal EIA requirements-.

Facts: A request of the "Association de Défense de la population concernée par la création de la zone de Naujac, La Primaube, Luc", was presented by its Chairman, in which he sought to obtain nullification, for abuse of power, of the Order by the 'Préfet' of the Aveyron dated 20th September 1978 which declared as being of public interest the proposal by the authorities of the Grand Rodez district area, to create a [Z.A.C.] (planning component zone) with industrial activities, in the "Naujac à La Primaube commune de Luc", and authorising the district authorities to acquire either through mutual consent or through expropriation, the buildings aimed at the realisation of the project.

In this Decision the Administrative Tribunal of Toulouse considered the Code of providing for the "expropriation pour cause d'utilité publique"; the Law No. 76-629 of 10th July 1976 relative to the protection of nature; the Decree No. 88-1141 of 12th October 1977 providing for the implementation of article 2 of the aforementioned Law; the Code of Administrative Tribunals; and the Decree of 11 January 1965 as amended;

As a rule provided at article R. 11-3 of the Code providing for the expropriation for public interest it is a duty for the authority that expropriates to avail to the district officer [préfet], a file for the purpose of public inquiry, comprising the following:

a) Concerning the realisation of public works or developments:

1. An explanatory note;

2. The map of the area;

3. A general outline of the envisaged development;

4. The main features of the most important works envisaged;

5. A summary assessment of expenses;

6. An EIA as described at article 2 of the Decree No. 77.1141 of 12 October 1977, when such works are not expressly exempted from that requirement... ";

By virtue of article 2 of the aforesaid Decree: "The contents of EIA study shall be in relation with the importance of the development works envisaged and with their anticipated effects on the environment".

Such an EIA should, necessarily present:

1. An analysis of the initial state of the site and its environment, which shall deal particularly with the natural riches and the natural agricultural landscapes... affected by the developments or the works;

2. An analysis of the effects on the environment and, particularly, on the sites and landscapes, fauna and flora... and, otherwise, on the comfort of the neighbourhood (noise, vibrations, odours...) or on the hygiene and public sanitation;

3. The reasons why, namely from the point of view of environmental preoccupations, the project has been selected among others;

4. The measures envisaged by the proponent to suppress, reduce and whenever possible, to compensate the adverse consequences of the project on the environment, as well as the estimates of the corresponding costs..."

The Tribunal considered that it was not contested that the undertaking of the project designated as "projet de création d'une zone d'aménagement concerté à usage dominant d'activités industrielles de Naujac à La Primaube, commune de Luc", which was subjected to joint public consultations (or inquiries) prior to the declaration of public interest, as prescribed by the order

of the district commissioner [préfet] dated 30 march 1978, was not exempted from the EIA procedure.

The Tribunal further considered that, from the documents found in the file, the EIA prescribed by article R. 11-1-6 of the Code of Expropriation, and which was part of the file presented during the joint public inquiry undertaken prior to the decision to declare that the project was of public interest, was not a special document, but rather just a simple elaboration inserted in the "explanatory note" under the title of - "Etude d'impact"[Impact study];

According to the Tribunal's findings the said document had two parts respectively entitled

"1) Insertion dans l'environnement (super structure)", and

"2) Dispositions techniques des ouvrages principaux",

The information contained in the latter actually encompassed "the main characteristics of the major works" as provided by article R. 11-3-4 of the Code of Expropriation. So, the same document contained both [under the title "notice explicative"] the"explicative note" required under the provisions of article R. 11-3-1-1, the "impact study" as also required under article R.11.3.1.6, and the main characteristics of the works *as required under article R. 11-3-1-4;

As such, the impact study was just a patchwork of information presented on 8 paragraphs of 42 lines in total;

Furthermore, the elements of information contained in the "étude d'impact"(impact study) did not encompass either indications sufficiently precise and concrete on the initial state of the site and its environment, or a true analysis of the effects of the creation of the Z.A.C. on the environment, or the reasons why the proposed project was adopted from the point of view of the environment, and the measures envisaged for "suppressing, reducing and compensating" the adverse consequences of the project on the environment,

The alleged study only mentioned the refusal to issue an authorisation under the legislation on classified installations, which are subjected to administrative authorisations.

Considering that a number of such installations subjected to the regime of declaration are polluting installations, and that the legislation on soil and construction as well as the one on urban planning and nature protection were to be taken into account, the Tribunal found that the information provided under the denomination of "Etude d'impact" and inserted in the explicative note did not comply with the requirements that derive from the combined prescriptions of article 2 of the Law No. 76-629 of 10 July 1976 relative to the protection of nature and article 2 of the Decree providing for its implementation. Further, the file, which was subjected to the public inquiry, was insufficiently and irregularly composed.

As a formal and substantial shortcoming, the challenged order was issued further to a shortcoming in procedure and therefore revealed an abuse of power.

The tribunal held,

That the order of the "préfet" dated 20 September 1978 declaring the 'projet de création par le district du Grand Rodez de la Zone d'aménagement concerté à usage dominant d'activités industrielles de Naujac à La Prumaube as being of public interest is nullified.

CASE No.2:

TRIBUNAL ADMINISTRATIF de Toulouse, 22 May 1980

MM. Louis Sidney, rapp.; Salvadori, c.du g.

Topic: Environmental Impact Assessment

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In this case, the local authorities of the Launaget town were seeking the nullification of an Order by the Commissioner of the Haute Garonne dated 20th November 1978, which was authorising the MWP company belonging to Mr. Perret to establish itself and operate as a metallic waste recovery workshop.

The establishment was classified as being part of the First class of polluting installations as provided in the Legal Nomenclature of the French Law of 29 July 1976 and subjected to the authorization procedure.

Article 3 of the French Decree providing for the implementation of the above-mentioned Law provides for the requirements regarding the contents of EIA studies.

The Tribunal was of the opinion that the documentation required in the process of issuance of the authorization did neither contain sufficient, concrete and precise indications relating to the initial state of the site and its environment, nor an analysis of the effects of the workshop on the environment, or the reasons why the project was adopted from the point of view of environment protection. That the documentation also did not consider that the project site was located in the vicinities of an agricultural land and upon a groundwater layer etc. And that for these reasons the Order of the Prefet authorising the Mr Perret to run a metallic wastes recovery Workshop was declared as nullified.

CASE No.3:

CONSEIL D'ETAT, 18 June 1980

Mlle Laroque, rapp.; M. Franc, c.du g.

Topic: Environmental Impact Assessment

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In this case, the "Comité Departemental de Protection de la Nature en Saone et Loire" [District Committee for the Protection of nature in Saone and Loire] was seeking the nullification by the Conseil d'Etat, of an Order issued by the Counsellor of the Administrative Tribunal of Dijon, which dismissed the claim of that Committee, seeking to urgently take note of the absence of EIA in the documentation relating to the public consultation which was to be held concerning the landscape development project in the Town of Brangy-sur-Saone.

As regards the procedural aspects the Conseil d'Etat based its argumentation on Article R.102 of the Code of Administrative Tribunals which stipulates that in case of urgency, the President of the Tribunal or the Magistrate in charge, can upon a single request, order the necessary measures without impeding the course of the Action or any administrative decision.

Concerning the substantial aspect of the case; that is, the need to examine the contents of the documentation on EIA presented for the Landscape development Project in the town of Brangy-sur-Saone, the Conseil d'Etat considered that the request of the Comite Departemental de Protection de la nature should be dismissed before its jurisdiction because there was an error of Procedure as the legality of the documents were not appreciated by the right lower jurisdiction.

CASE No.4:

COURT D'APPEL DE LYON, 22 JUNE 1983, CRAVERO

MM. Roman pres., Becquet, rapp. Langlade, subst. Gen.; M. Caron [Barreau de Paris], M Moulard [barreau de St.Etienne], av.

Topic: Water PollutionTopic: Water Pollution

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In this case, the facts are as follows:

During an authorised technical operation consisting of the emptying (by EDF- Electricite de France) of a compensating dam located at Sail-sous-Couzan, in the French region of the Loire, the waters of the river Le Lignon happened to be polluted by the mud that derived from the waters from the dam. It was noticed that the interference involved depletion of the oxygen tenure of the river waters, which provoked the destruction of fish resources on a distance of about one-mile.

It was established that Mr. Cravero, an engineer of the EDF Company was held responsible for the incident.

The Societé des Sciences Naturelles Loire-Forez, (a scientific research society), the Club des pêcheurs sportifs Forez-velay (an association of Fishermen) and the Federation Française des Societés de Protection de la nature (An NGO for nature protection brought claims before the Court, based on article 40 of the Law of 10 July 1976 on the Protection of Nature and on Articles 1382 and 1383 of the Civil Code that deal with civil liability. The claimants particularly insisted on the importance and the magnitude of the pollution caused and they were claiming financial compensation for the damages amounting up to 100.000 francs. They also invoked Article 434-1 of the Rural Code which stipulates that whoever dumps directly or indirectly any substance whose action or reaction in water destroys fish or causes a nuisance as to its nutrition, reproduction or nutritional value shall be liable of a criminal offence. This provision applies to all the waters of lakes, rivers, canals and any other watercourses.

The Court considered that the Dam should be considered as a watercourse since it has a link with the river Lignon, and that the wastes that polluted the river were part of the debris brought to the lake by the river itself and that the pollution was to be considered as a natural process. The requests of the three claimants were simply dismissed.

CASE No.5:

TRIBUNAL ADMINISTRATIF DE POITIERS, 25 Octobre 1985

Association Ecole 79

MM. Courtin rapp. De Sevin c. Du g.

Topic: Nature Protection

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This case involves a claim by Association Ecole 79 requesting the Tribunal to nullify an Order issued by the Prefet and Commissioner of the Deux-Sevres district which provides for the protection of the biotope of the Cebron dam water. The Order prohibited access to the water in any manner, so preventing the Association Ecole 79 to practice leisure activities in the dam. The Tribunal considered that the Commissioner did not abuse power

and that the legality of his order was not questionable. It based its decision on the law of 10 July 1976 that gives large powers to the administrative authorities for the purpose of nature protection. The claim of the Association was dismissed before the Tribunal.

CASE No. 6:

TRIBUNAL ADMINISTRATIF RENNES, 7 Novembre 1985

Commissaire de la République des Côtes-du-Nord (Reg. No. 85-224)

MM. Latrille, rapp., Lotoux, c.du g.

Topic: Marine Pollution

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Key features: - Dumping of oil at Port. - Offence. - Law of 5th July 1983. Incompetence of the Administrative judge.

A written notification was registered by the tribunal on 19 October 1984, from the Provincial commissioner of the Côtes-du-Nord Province (Department); relating to an offence reported on 8 Mai 1984 against M. Pascal Mauffret, a French national living in Kourou (French Guyana) for having dumped diesel oil from his ship (the "Bran-Ruz"), at the port of lézardrieux on 8 May 1984.

The Tribunal considered that following the dumping of diesel oil, on 8 may 1984, in the Port of Lézardrieux, by the "Bran-Ruz" ship, the charge for the offence was notified against the owner, M. Pascal Mauffret; and that it was the mandate of the tribunal to seek whether the provisions of article L.322-1 of the Code of Maritime Ports and article 2 of the decree No. 80-567 of 18 July 1980 relating to the applicable sanctions in the field of police-related offences were infringed, since these provisions prohibit the dumping of soil or wastes in sea water at the ports and their vicinities.

Furthermore, the tribunal considered that so long as it is the dumping of hydrocarbons in the sea by a ship, even though it is within the limits of the port, which falls under the London International Convention of 2 November 1973 relative to the Prevention of Pollution by Ships, the French Law No. 83-583 of 5 July 1983 that sanctions pollution of the sea by hydrocarbons, and, particularly, its article 14, constitutes an obstacle to the administrative jurisdiction's ability to condemn the author of the act to pay a fine on account of the same facts, and that it was incompetent to undertake the trial.

As far as the sentence is concerned, the request by the provincial Commissioner of the department of the Côtes-du-Nord, which aimed at condemning M. Pascal Mauffret to pay a fine, was rejected as being brought to the incompetent jurisdiction to know about it.

CASE No.7

TRIBUNAL ADMINISTRATIF DE LIMOGES, 15 Janvier 1986

Association contre la pollution de la haute vallée de la Gartempe
c/o Ministre de l'environnement
(Req. Nos. 83-420 et 83-421)
MM. Foucher, rapp, Moreau, c. du g., Grimaud, av.

Topic: Classified installations

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In this case there was a request dated 25 June 1984 aiming at the nullification of an order issued by the Commissioner of the Department of Creuse which authorized the syndicate of Interregional Waste Treatment (SITOM) in the region of Guéret to establish itself and exploit an Urban Waste Landfill in the town of Saint-leger-Guéretois. In fact there were two claims which were joined into one as the Tribunal considered it to be.

The claims were based on the fact that the authorization needed the opinion of various services involved in waste management issues, and also on the fact that there was an error in the determination of the size of the land allocated for the landfill, and also on the fact that the legislation on forestry was not taken into account as well as the one on water management and classified establishments. The Tribunal considered that the absence of dates on the various notices issued for justifying the authorization was not a sufficient reason. On the second reason that is the error on the size of land it considered that the material error noticed in the documentation had already been corrected and therefore the order was valid. On the issue of compliance with the forest legislation it considered that the claimants did not have knowledge of new provisions embodied in the forest code and that such a claim was to be rejected. As regards water legislation, it considered that the proposed landfill site was not included in an area covered by the provisions of the health code of April 1979 which regulates the protection of perimeters in which the classified establishment cannot be set. As regards the legislation on classified establishments, which takes into account the aspect of risks and pollution of water bodies the Tribunal considered that though the landfill could present serious dangers for the interests mentioned at Article 1 of the Law of 19 July 1976, the proposed project suggested specific protective and monitoring measures which could ensure the protection of the Gartempe river. Therefore the claims were rejected.

CASE No.8

COUNSEL D'ETAT, 17 Janvier 1986
Société Tioxide c/ Association de défense des marins-pêcheurs de Grand-Fort-Philippe (Req. no. 05-863)

Mlle Langlade, rapp., M. Stirn, c. du g., S.C.P. Peignot, Garreau, av. de la société
Tioxide.

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This case involves claims from an Association of Fishermen seeking redress regarding the activities of Société Tioxide which releases industrial effluents in the sea water. They based their claims on the provisions of the law of 19 December 1917 relating to the classified establishments and also on the order of the Minister of Industry dated 6 June 1953 relating to the release of waste water by such establishments and also the law of 16 December 1964 relating to water pollution control and other texts such as the Code of Administrative Tribunals etc. A lower Tribunal had cancelled the authorization issued by the Commissioner of the Pas-de-Calais to the factory relative to the release of effluents in the water. The first judges considered that in the circumstances of the case an inaccurate application of the provisions of the Minister's instruction occurred because a derogation to the prescriptions did not justify the difficulties related to the process. Their value was simply indicative in order for the Commissioner to prepare the orders in compliance with the law of 19 December 1917. It also considered that there was an inaccurate appreciation of the fact because the toxicity of the effluents released by the factory did not require their neutralization or any prior treatment before their release. The Counseil d'Etat therefore nullified the authorization.

CASE No.9

TOPIC: Impact Assessment

CONSEIL D'ETAT, 7 mars 1986: Ministre de l'Industrie c. Cogema et Flepna

(Req. No. 49-644) [1]

MM. Guillaume, rapp., Jeanneney, c. du g., S.C.p. Labbé-Delaporte, av.

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This case involves a plaint in the name of the state presented by the Minister for Industry and Scientific Research aiming at the nullification of the judgement of the Administrative Tribunal of Limoges which:

1 - annuls the decision by the Engineer of the service of Industry and Mines of the region of Auvergne Limousin that approves the opening of a quarry for the exploitation of uranium in Saint-Sormin-Leulac (Haute-Vienne) by the Cogema Company.

2 - dismisses the claim presented to the Administrative Tribunal of Limoges by the Federation Limousine pour l'étude et la protection de la nature (FLEPNA).

In this case the Conseil d'état considered the following legislation:

The Mining Code,

The Code of Administrative Tribunals, and particularly the decree of 12 October 1977 on EIA which provides that the contents of the Impact Assessment Study should be in relation with the importance of the proposed development as regards its effects on the environment. EIA should contain an analysis of the site and its environments, an analysis of its effects on the environment and the reasons why from the point of view of environmental protection such a project has been adopted etc. The Counseil d'état further considered that through the examination of the documentation before it, the impact assessment presented by the Cogema Company was only a summary of nuisances that would be created such as noise and the traffic without quantification and therefore the Minister had no basis for his request of nullification.

The claim was dismissed.

CASE No.10

COUNSEL D'ETAT, 11 Avril 1986 Ministre de l'Environnement c/ Société des

Produits Chimiques Ugine-Kuhlman (Req. no. 62-234)

MM. Guillaume, rapp., Dandelot, c. du g., S.C.P. Piwnica-Molinié av.

Topic: - Toxic Waste

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In this case the claimant the Minister for Environment sought the nullification of a judgement dated 12 July 1984 by the Administrative Tribunal of Strasbourg which annulled the request by Société des Produits Chimiques Ugine-Kuhlman to be exempted from the procedure of providing an inventory of its chemical wastes deriving from the exploitation of its factory based at huningue and to ensure the monitoring of hydrological resources.

The Counsel d'état considered the provisions of the law of 19 July 1976 which stipulates that all workshops, factories, quarries etc. being exploited by private or public persons and which present dangers or inconvenience to the environment, health and security or sanitation should take measures to comply with the conditions needed for the protection of such interests. It also considered that the risks of nuisance presented by the lindane contained in the wastes which were released by the factory at Huningue (haut-Rhin) before its closure in 1974 should be regarded as directly related to the activity of the company. Therefore it decided that the judgement of the Tribunal of Strasbourg was null.

CASE No.11

[CONSEIL D'ÉTAT, Section 18 Avril 1986] : Société "Les mines de potasse d'Alsace" c/province de la Hollande Septentrionale et autres.

Present: MM.Jhery, rapp., Dandelot, Attorney., S.C.P. Labbé, Delaporte et S.C.P. Nicolay, adv.

Topic: Transboundary pollution of water

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Key features:

- Salt effluent releases in the River Rhine by the "Mines Domaniales de Potasse d'Alsace".

- Right of public persons from foreign countries and moral persons of the same kind to take civil action in order to seek redress. B Cause of action or Interest to sue.

- License to pollute water. - Decree of 23 February 1973. Licenses issued for an unlimited duration. - Renewals. - Applicable legal regime. - Extension of license.

- Provisional and interim measures not to be subjected to prior inquiry.

- Lawfulness of pollution licenses. - Substantive conditions. - The taking into account of transboundary effects. - Obligation imposed neither by international law, nor by national law.

- *Procedural Rules applicable to the effluent licenses issued for the "classified installations". Co-ordination of procedures. Article 12 of the decree of 23 February 1973.*

The request of the "Société des Mines de Potasse d'Alsace (M.P.D.A.)" aimed at instructing the "Conseil d'Etat" to:

1 - Nullify the decision dated 27th July 1983 by the Administrative Tribunal of Strasbourg, upon the request of: - the province of the Southern Netherlands, - the City of Amsterdam (Netherlands), - the Wateringue de Delfand (Netherlands), - the Wateringue de Rijnland (Netherlands), - the Association of Water services (Netherlands), - the Stichting Reinwater Foundation (Netherlands) and

- the Society for Water transportation Rhinkennerland (Netherlands), which nullified:

- On the one hand, three Orders Nos 65-118, 65-119 et 6455-450 of the Local Government of the Haut-Rhin dated 22 December 1980 which extends to 31 December 1981 the duration of validity of the previous three Orders which authorise the "Société des Mines de Potasse d'Alsace (M.P.D.A.)" to utilize its facilities for releasing effluents in the Rhine River and in the great canal of the Alsace, on the territory of the district town of Fessenheim, in order to ensure the evacuation of various liquid wastes deriving from their industrial installations;

- On the other hand, an Order No.65-823 of 18 March 1981 through which the "Préfet" of the Haut-Rhin authorized the "Société des Mines de Potasse d'Alsace (M.P.D.A.)" to maintain and utilise the pollution control facilities for polluting the great canal of the Alsace for the evacuation of various liquid wastes deriving from their industrial installations;

2-. to reject the claims presented by the local authorities and the organs mentioned above before the Administrative Tribunal of Strasbourg;

The Conseil d'Etat considered the following Laws:

- Constitution of France of 4 October 1958

- Law of 16 December 1964,

- Decree of 23 February 1973,

- Order of 20 November 1979;

- Law of 19 July 1976;

- Decree of 7 May 1980;

- Decree of 1st August 1905;

- Treaty of 25 March 1957;

- Code of Administrative Tribunals;

- Ordinance of 31 July 1945 and

- Decree of 30 September 1953;

- Law of 30 December 1977;

The Conseil d'Etat decided as follows:

Concerning the receivability of the requests presented by the Province de la Hollande Septentrionale [Southern Netherlands] and others before the administrative tribunal of Strasbourg;

The Conseil d'Etat considered that the *province de la Hollande septentrionale*, as well as the City Council of Amsterdam and the specialized bodies of the Netherlands, which were the claimants before the *Tribunal administratif de Strasbourg*, had all interest to exploit the Rhine waters and they also justified an interest which allowed them to act before the tribunal by bringing the case regarding the issuance of the three orders dated 22 December 1980 and Order of 18 March 1981 by the préfet of the Haut-Rhin relative to the effluents release in the Rhine river by the Société des Mines de Potasse d'Alsace;

It further considered that the Société des Mines de Potasse d'Alsace was not right to argue that the requests presented in the lower jurisdictions which were not late at all, were irreceivable;

Concerning the three Orders of 22 December 1980; the conseil d'Etat considered that, when it is requested to renew a pollution license that concerns the pollution of underground water or artificial waters, or even sea waters within the territorial limits of the country, the administrative authority can, as an interim measure, maintain the situation as it is, which derives from the previous authorization, by extending the latter through a decision taken before its expiration, in order to take into account the general interest drawn from the serious economic consequences that ensue from the closure of the operating installation. This is so in order to allow the authority to process the new request for a license as provided in the decree of 23 February 1973 and the Decree of 1er August 1905. The Conseil d'Etat also considered that the "Préfet" of the "Hollande Septentrionale [Southern Netherlands] Haut-Rhin, from whom the "Société des Mines de Potasse d'Alsace " requested the renewal in July 1980, of its pollution licenses regarding its effluents in the Alsace Great Canal, which licenses were expiring on 31 December 1980, did not take a decision on the request for renewal as such, (which he settled later on, precisely on 3rd March 1981); but he only took an exclusively provisional and interim measure which was not to be subjected to *a public inquiry* as prescribed by Article 9 of the decree of 23 February 1973.

It further considered, first of all, that no provision either in the French legislation or in international law was constituting an impediment to the principle of issuance of authorizations to release effluents, (at the date during which the Orders of 22 December 1980 were issued), nor consequently, to the faculty for the administration to adopt an interim and provisional measure as analyzed in this case;

Secondly, it also considered that because of the character and the purpose of the measure, all the arguments drawn from the fact of ignorance of the rules of procedure and the substantive conditions regulating the issuance of authorizations for effluents dumping are without effect. That it is so, also for the alleged violation of the provisions of the decrees of 1er August 1905, 23 February 1973 and 7 May 1980, as well as for the international obligations that may result from:

- The Convention of Lucerne of 18 May 1889,

- The Exchange of letters between France and The Netherlands of 3 December 1976 or;

- The Directives of the Council of the European Communities dated 16 June 1975, 18 July 1978 and 15 July 1980;

Thirdly, the Conseil d'Etat further considered that in light of all these considerations, the "Préfet" who should have only assessed the seriousness of the respective consequences of an extension of authorization, (that is limited in time), concerning the dumping, did not commit a manifest error of appreciation, with regard to the conciliation of all the general interests he was supposed to take into account. The Conseil d'Etat also considered that article 12, (title III) of the Decree of 23rd February 1973 involved co-ordination measures concerning the classified establishments, which are related to the procedures respectively applicable in compliance with article 9 of that decree and the regulation on the Classified installations.

It then ruled that the "Société des Mines de Potasse d'Alsace" had no basis to complain that, through the judicial decision, the Administrative Tribunal of Strasbourg nullified the Order of the [Prefet] Commissioner of the Hollande Septentrionale Haut-Rhin dated 22 December 1980. It also ruled that article 3 of the decision by the Administrative Tribunal of Strasbourg dated 27 July 1983 was nullified as it annulled the orders of the Commissioner of the Haut-Rhin of 22 December 1980.

CASE No.12

COUR DE CASSATION (Ch. crim.), 23 mai 1986
Société des Sciences naturelles Loire-Forez et autres

Topic: Water Pollution. - Appeal to the Decision: COUR D'APPEL DE LYON, 22 JUNE 1983, CRAVERO

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This decision of the "Cour de cassation" confirmed the Order of the COURT D'APPEL DE LYON of 22 JUNE 1983, (CRAVERO) regarding which the three claimants alleged that they still believed article 434-1 of the Rural Code and other texts evoked were violated and that the jurisdiction of the COURT D'APPEL DE LYON of 22 June 1983, took a decision which lacked a legal basis.

The Cour de Cassation appreciated the decision in light of the facts and the reasoning of the lower Court and considered the appeal claims were to be dismissed.

CASE No.13

TRIBUNAL ADMINISTRATIF DE BORDEAUX: 2 Octobre 1986

SEPANSO c/Ministère de l'Environnement et du Cadre de vie

Topic: Classified Establishments - Controlled Landfill - Cause for Action

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Key Features: *Sanitary Landfill - Legality or validity of administrative authorization, pollution risks for groundwater not taken into account - Illegality of Order by the Commissioner - Indemnity - Ecological damage compensation - Reimbursement of litigation fees.*

In this case, the two claims from the "Association pour la Protection de l'Environnement" (SEPANSO) that aimed at requesting the Tribunal to settle the issues of *locus standi*, (and whereby the Tribunal admitted the right of the association to stand before it) as well as that of the procedural shortcomings by the Ministry of Environment regarding the renewal of licenses for the exploitation of the "Brede" sanitary landfill, were joined into one and settled positively.

However, the Tribunal considered that the claims of the SEPANSO for indemnification were to be dismissed because of the fact that the SEPANSO did not suffer any direct material prejudices or harm which could justify the basis for such claims for indemnities.

CASE No. 14

TRIBUNAL ADMINISTRATIF DE POITIERS, 26 Novembre 1986: Association des Deux-Sèvres d'Etude et d'Action pour la Sauvegarde de la Nature et de l'Environnement (A.S.N.A.T.E.)

Topic: Order Protection of Biodiversity and biotopes

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Key issues: *Legality and validity of the local authority's Order to create a protected area. Substantial procedural shortcomings.*

This Case involves a request by the Association des Deux-Sèvres d'Etude et d'Action pour la Sauvegarde de la Nature et de l'Environnement (A.S.N.A.T.E.) seeking that the Tribunal decides on the withholding, postponing or nullification of an Order issued by the Commisioner of the region of the "Deux-Sevres", relating to the protection of the Water biotope situated on the territories of the Districts of Gourgé, Lageon, Louin and Saint-Loup-Lamairé.

Although the Order issued by the Prefet served a noble cause and purpose, the Tribunal considered that by virtue of the existing provisions laid down in the Decree of 25 November 1977, the measures for the conservation of the biotopes and the prevention of species extinction included the enactment by the Prefet, of Orders, only after obtaining the opinion of the "Commission Departementale des Sites" of the region's Agricultural Chamber through consultation.

The Tribunal further noted that the consultation of the Agricultural Chamber ("Commission Departementale des Sites") as required by law before the enactment of the Order was not hampered by exceptional circumstances and therefore the attitude of the Prefet constituted a procedural shortcoming which should be sanctioned by the nullification of the Order.

CASE No.15

CONSEIL D'ÉTAT, 16 janvier 1987
Commune de Gif-sur-Yvette
(Req. No. 55-711)

Mme Lenoir, rapp., M. Stirn, c. du g., M^e^ Odent, av.

Topic: Environmemental Impact AssessmentTopic: Environmemental Impact Assessment

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Key features:

Scope of application of EIA procedure. - Financial Cost of EIA. - General Programme for EIA. B Notion of EIA. - Programme for urban development. B Operations in Urban sanitation. - Distinct Operations. - Cost less than the legally established threshold of 6 millions Francs. - No necessity to undertake an impact assessment.

On the basis of a plaint and a supplementary "mémoire" presented on behalf of the "Commune de Gif-Sur-Yvette", claiming that the "Conseil d'Etat" should:

1-. Cancel the decision of 21 July 1983 by the Administrative Tribunal of Versailles which nullified and rejected the claim by Mrs. Huet, Mrs Joly and Mrs Héloir, regarding the Order of 25 April 1980 which was enacted by the "Préfet" of the Essonne region, declaring the acquisition of a certain piece of land as being of public interest, as the Order aimed at enlarging the Amodru street, which is located at the city centre of the Gif-Sur-Yvette town;

2-. Reject the conclusions of the request of Mrs Huet, Mrs Joly and Mrs Héloir before the Administrative Tribunal of Versailles aiming at the nullification of that Order;

The Conseil d'Etat held that under the terms of the second part of article 2 of the Law of 10 July 1976 relative to the Protection of Nature which stipulates that:

"The studies undertaken prior to the implementation of developments or constructions which, on the basis of their importance, their size or magnitude or their impact on the natural environment, can actually damage the latter, should contain an Impact Assessment study which could help assess the consequences"; and the first paragraph of Article 3-B of the Decree of 12 October 1977, enacted for the application of the above mentioned article 2 of the Law of 10 July 1976, which exempts from the Impact Assessment procedure "all the developments, buildings and works whose total cost is less than six millions francs. ..";

The procedure of public interest and the one relative to the authorisations provided in the Forest Code are two separate and distinct administrative procedures.

CASE No.16

CONSEIL D'ÉTAT, 20 Février 1987, M. Chevalerias (Req. No. 70-051)

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In this Case the plaintiff Mr. Jean Chevalerias, sought that the Conseil d'Etat:

- Annuls the judgement of the Administrative Tribunal of Clermont Ferrand, which dismissed his claim aiming at the nullification of an Order issued by the Commissioner of the Puy-de-Dome, whose effect was the closure of his metal depot.

- Annuls the Order itself for alleged abuse of power by the Commissioner Prefet.

However, before the case was brought to court, Mr Chevalerias had already been given a two-year deadline by the administrative authorities after which he should have closed his depot. The deadline was even postponed to twice, but he never complied with the injunctions of the Commissioner.

The Conseil d'Etat considered that by virtue of Article 24 of the Law of 19 July 1976 relating to the classified establishments, when an installation is already existing and being exploited without the required authorizations, "the commissioner may request the owner to correct the situation by submitting an appropriate request for authorization. If such a request is dismissed, the commissioner can, as may be necessary, order the closure or the destruction of the said installation...."

Furthermore, it considered that the decision of the commissioner was definitive, and Mr. Chevalerias' claims that he had certain rights that he had acquired from the fact that the situation has been there for long, could not be received.

The Conseil d'Etat held that since Mr Chevalerias'operation of his installation has always been a source of nuisance and that he was materially and economically unable to correct the situation, that establishment needed to be closed in any way and that his claim was rightly dismissed by the lower tribunal.

CASE No.17

TRIBUNAL CORRECTIONNEL MENDE, 12 Août 1987

Topic: Water pollution - Civil liability for environment damage

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In this case the claimants were: the Federation of Fisheries of the Haute-Loire, Federation for Fisheries and Fish husbandry of the Lozère and the "Association nationale agréée de protection des salmonidés, (T.O.S),

The defendant was Mr. Andre Sabadel.

On the 16 July 1987, after the public hearings, the Tribunal declared the following:

André Sabadel is being prosecuted for the following facts:

"Having thrown, released or left in the waters of river Ance, directly or indirectly, any substances the action of reactions of which have destroyed fish, or caused a nuisance to its nutrition, to its reproduction or to its value as food; facts provided and regulated by articles 407 et 409 of the Rural Code";

These facts were reported respectively on 24 April, 28 May, 18 September and 19 November 1986, 11 February, 7 March and 21 March 1987

On the facts reported on 14 March 1986:

Mr. André Sabadel admitted the facts, but argued that the causes of pollution were simply accidental. Indeed it was made known that further to the breaking of a device controlling a container of 3,000 litres of chlorine acid, this chemical was leaking to the point of totally destroying fish in the Ance du Sud River, on a distance of 10 km;

André Sabadel argued that the elements that constitute the offence were not materially gathered in the framework of this case, and that no fish actually were dying, no damage to flora was noticed; and furthermore apart from the facts reported on 21 March 1987, the sampling undertaken by the Administration in charge of Water (Water Authority) were not made available to the public; therefore a doubt still subsisted on the origin of the pollution and that the only scientific analysis made available revealed only insignificant quantities of nitric acid, etc.;

However, the tribunal was informed that the file contained evidence of a chronic release in the river, of polluting effluents (i.e. milk-serum) from the milk-processing plant that belonged to M. Sabadel and which was detrimental to the water flora;

A continuous release of such effluents would indeed trigger lack of oxygen and consequently result in the asphyxia of fauna and destruction of flora;

The tribunal decided, on the basis of the French Law on the Regulation of Pollution that taking into account the seriousness of the facts before the tribunal, Mr. André Sabadel should be declared guilty of an offence for wilfully causing water pollution;

As a sanction, the Tribunal condemned him to pay a fine of 8 000 FF and be jailed for one-month. The imprisonment sanction was to be carried out under the terms and conditions contained in articles 734 and 735 of the Code of Penal procedure. The tribunal ordered that its decision (excerpts only) be published in the local newspaper entitled *Journal La Lozère Nouvelle*, at the expense of M. André Sabadel, not exceeding two thousand French Francs.

M. André Sabadel was ordered to invest monies for setting up (or putting in place) an effluent-treatment device, in close collaboration with the Agency in charge of water management of the Loire-Bretagne river basin, within a one-year period starting from the date during which the Tribunal's decision was published. Failure to do this, Mr. André Sabadel should be paying two hundred a fifty French Francs per delayed day of due payment.

All the claimants (that's to say: the Federation of Fisheries of the Haute-Loire, Federation for Fisheries and Fish husbandry of the Lozère and the "Association nationale agréée de protection des salmonidés, (T.O.S), were declared to have the right to locus standi;

M.André Sabadel was ordered to pay the following to the respective claimants:

i. 86 712,94 FF to the Federation of Fisheries of the Haute-Loire as an indemnity for compensation of the damage, and 1 000 FF in compliance with article 475-1 of the Code of Penal procedure;

ii. 17 707,18 FF to the Federation for Fisheries and Fish husbandry of the Lozère for compensation of the damage, and 1 000 FF in compliance with article 475-1 of the Code of Penal procedure;

iii. 2.000 FF to the Association Nationale agréée de protection des salmonidés, (T.O.S)", for the overall causes of their complaint.

Kahn Freund, levy and Rudden in *A source book on French Law (1979) pp. 116-165.*

In French judgements, individual precedents are not quoted, as they would have been in the British system for example.

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SUMMARY OF THE CASE FROM CANADA

FOLLOWING IS THE SUMMARY OF THE JURISPRUDENCE CASE FROM CANADA

Friends of the Oldman River v. Canada (1992)

The respondent, Society, an Alberta environmental group, brought applications for *certiorari* and *mandamus* in the Federal Court seeking to compel the federal departments of Transport and Fisheries and Oceans to conduct an environmental assessment, pursuant to the federal *Environmental Assessment and Review Process Guidelines Order*, in respect of a dam constructed on the Oldman River by the province of Alberta - a project which affects several federal interests, in particular navigable waters, fisheries, Indians, and Indian lands. Alberta had conducted studies over the years which took into account public views, including the views of Indian Bands, and environmental groups, and in September 1987, had obtained from the Minister of Transport an approval for the work under s. 5 of the *Navigable Waters Protection Act.* This section provides that no work is to be built in navigable waters, without the prior approval of the Minister. In assessing Alberta's application, the Minister considered only the project's effect on navigation and no assessment under the *Guideline Orders* was made.

The procedural history shows that the court held that:

1) the Society had standing to bring the suit;

2) the Minister of Transport was not bound to apply the *Guidelines Order* in assessing the application under the *Navigable Waters Protection Act* because the Act does not set out requirements for environmental review but instead confines the Minister to consider only factors affecting marine navigation, similarly he held that the Minister of Fisheries and Oceans was not bound to apply the *Guidelines Order* in assessing the application because his department had not undertaken the project.

3) in deciding the applicability of **Canadian Wildlife Federation v. Canada** to the facts of this case, the trial court distinguished the case on two grounds - first, that case involved authorization under the *International River Improvements Act,* which required prior approval from the Minister of the Environment, as opposed to the instant case where approval may be granted under the *Navigable Waters Protection Act* after the project is commenced and second, the Rafferty-Alameda project involved the Minister of the Environment whose statutory duties under the *Department of the Environment Act* included consideration of the environment; and

4) in deciding whether or not to grant the remedies, the trial court held against the Society because of the delay and unnecessary duplication that would result.

The Society launched an appeal to the Federal Courts of Appeal which found that the Oldman River Dam may have an environmental effect on three areas of federal responsibility mainly fisheries, Indians and Indian lands, the court held that:

1) the dam project fell within the ambit of the *Guidelines Order* and that the Department of Transport was an "initiating department" and therefore compelled to apply it;

2) that since the Minister of Fisheries and Oceans was aware of a "proposal" as defined in the *Guidelines Order,* he is subject to the Order,

3) as to the unnecessary duplication that could result from granting relief, the Court found that the provincial environmental review was deficient in two respects when contrasted with the environmental impact assessment required by the *Guidelines order*. First, the provincial legislation did not place the same emphasis on public participation in the process as the *Guidelines Order*. Secondly, there was nothing in the provincial legislation requiring the same degree of independence of the review panel.

As a result, the appeal was allowed, the approval was quashed and the Ministers of Transport and Fisheries and Oceans were ordered to comply with the *Guidelines Order.*

As a result, the case is now on appeal from the Federal Court of Appeal.

The Issues raised in this case are:

1) Statutory validity of the *Guidelines Order*. The following questions were posed:

a. Is the *Guidelines Order* authorized by s. 6 of the *Department of Environment Act?*

b. Is the *Guidelines Order* inconsistent with the *Navigable Waters Protection Act* and the *Fisheries Act ?*

2) Obligation of the Ministers to comply with the *Guidelines Order*

a. Does s. 4(1) of the *Department of the Environment Act* preclude the application of the *Guidelines Order* to the Ministers?

b. Does the *Guidelines Order* apply to projects other than new federal projects?

c. Are the Ministers "initiating departments"?

d. Is the *Navigable Waters Protection Act* binding on the Crown in right of Alberta?

3) The Constitution Question

a. Is the *Guidelines Order* so broad as to offence ss. 92 and 92A of the *Constitution Act, 1867* and therefore constitutionally inapplicable to the Oldman River Dam owned by Alberta?

It was Held that the appeal should be dismissed, with the exception that there should be no order in the nature of *mandamus* directing the Minister of Fisheries and Oceans to comply with the *Guidelines Order.*

Reasoning

As regards the Statutory validity of the *Guidelines Order*

The *Guidelines Order* was validly enacted pursuant to s. 6 of the *Federal Department of the Environment Act* and is mandatory in nature. It requires all federal departments and agencies that have a decision-making authority for any proposal which may have an environmental effect on an area of federal responsibility to initially screen such proposal to determine whether it may give rise to any potentially adverse environmental effects (including socio-economic effects).

The *Guidelines Order* is consistent with the *Navigable Waters Protection Act.* There is nothing in the *Act* which precludes the Minster of Transport from taking into consideration any matters other than marine navigation in exercising his approval under s. 5. The Minister's duty under the *Order* is supplemental to his responsibility under the *Act,* and he cannot resort to an excessively narrow interpretation of his existing statutory powers to avoid compliance with the *Order.* There is also no conflict between the requirement for an initial assessment as "as early in the planning process as possible and before irrevocable decisions are taken in s. 3 of the *Guidelines Order*, and the remedial power under s. 6(4) of the *Act* to grant approval after the commencement of construction. That power is an exception to the general rule in s. 5 of the Act requiring approval prior to construction, and in exercising his discretion to grant approval after commencement, the Minister is not precluded from applying the *Order*.

As regards the Applicability of the *Guidelines Order*

The scope of the *Order* is not restricted to "new federal projects, programs, and activities"; the *Order* is not engaged in every time a project may have an environmental effect on an area of federal jurisdiction. There must first be a "proposal" which requires an "initiative, undertaking or activity for which the Government of Canada has a decision-making responsibility." The proper construction to be placed on the term "responsibility" is that the federal government, having entered the field in a subject matter assigned to it under s. 91 of the *Constitution Act, 1867,* must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity.

Once such a duty exists, it is a matter of identifying the "initiating department" assigned responsibility for its performance, for it then becomes the "decision-making authority" for the proposal and thus responsible for initiating the process under the *Order.*

The Oldman River Dam project falls within the ambit of the *Guidelines Order* and for which the Minister of Transport alone is the initiating department. *The navigable Waters Protection Act*, s. 5 places an affirmative regulatory duty on the Minister of Transport to approve any work that substantially interferes with the navigation may be places in, upon, over, or under, through or across any navigable water.

The Court held, however, that the *Guidelines Order* does not apply to the Minister of Fisheries and Oceans, however, because there is no equivalent regulatory scheme under the *Fisheries Act* which is applicable to this project. The discretionary power to request or not to request information to assist a Minister in the exercise of a legislative function does not constitute a "decision making responsibility" within the meaning of the Order. The Minister of Fisheries and Oceans under s. 37 of the *Fisheries Act* has only been given a limited ad hoc legislative power which does not constitute an affirmative regulatory duty.

The scope of assessment under the *Guidelines Order* is not confined to the particular head of power under which the Government of Canada has a decision making responsibility within the meaning of the term "proposal". Under the *Order,* the initiating department which has been given authority to embark on an assessment must consider the environmental effect on all areas of federal jurisdiction. So the Minister of Transport has to consider the environmental impact of the dam on all areas of federal jurisdiction and not just navigation.

3) Constitutional Validity of the *Guidelines Order*

Provincial vs. Federal Authority

Local projects will generally fall within provincial responsibility, but federal participation will be required if, as in this case, the project impinges on an area of federal jurisdiction. The *Order* does not attempt to regulate the environmental effects of matters within the control of the province but merely makes environmental impact as-

sessment an essential component of federal decision making. In essence, the *Order* has two fundamental aspects. First, there is the substance of the *Order* dealing with the environmental impact assessment to facilitate decision making under the federal head of power through which a proposal is regulated. This aspect of the *Order* can be sustained on the basis that it is legislation in relation to the relevant subject matters enumerated in s.91 of the *Constitution Act, 1867*. The second aspect of the *Order* is its procedural or organizational element that coordinates the process of assessment, which can in any given case touch upon several areas of federal responsibility, under the auspices of a designated decision maker (the "initiating" department). The *Guidelines Order* cannot be used as a device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power.

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Section 8

French Cases

CASES FROM FRANCE

POLLUTION DE LA MER

Convention de Bruxelles du Septembre 1968. Compétence judiciaire. Compétence territoriale. Faute délictuelle . Réparation du domage. Tribunal du lieu de dommage.

COUR DE CASSATION (civ.2) 3 Avril 1978 (1) . Société Montedison contre Préfet du département de la Haute Corse et autres.

MM.Bel,pres; Granjou, rapp.; Clerget, av. gén.; Labbé et Ryziger, av.

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LA COUR,

.....Sur le deuxième moyen, pris en ses deux branches:

Attendu que l'arrêt, statuant sur contredit, a déclaré le tribunal de Grande Instance de Bastia compétant, en application de l'article 5-3e de la Convention de Bruxelles du 27 Septembre 1968 pour connaitre, comme juridiction du lieu ou le fait dommageable s'est produit, de l'action engagée par la Prud'homie des pêcheurs de Bastia contre la societé Montedison en réparation du préjudice causé à ses membres par les déversements en mer de déchets industriels, les départements de la Corse du Sud et de la Haute Corse étant intervenus au cours de l'instance;

Mais attendu que, par un motif adopté du jugement, l'arrêt constate que des conséquences dommageables des déversements se sont manifestés dans les eaux territoriales de la circonscription du Tribunal de Bastia; que l'arrêt enonce que les actions en responsabilité postulaient que les dommages auraient été ressentis dans cette circonscription, qu'en l'état de ces constatations et énonciations, d'ou il résulte que l'allégation des dommages apparaissait comme sérieuse, la Cour d'appel, qui s'est bornée, sans se contredire, à statuer sur la compétence territoriale, a légalement justifié sa décision de ce chef.

Que le moyen n'est pas fondé;

PAR CES MOTIFS :

REJETTE LE POURVOI formé contre l'arrêt rendu le 28 Février 1977 par la Cour d'appel de Bastia .

Etude d'impact, Création d'une Z.A.C. à dominante industrielle. Déclaration d'utilié publique. Application de l'article 2 de la loi du 10 juillet 1976. Composition du dossier d'enquête. Contenu de l'étude. Insuffisance. Annulation pour vice de former

TRIBUNAL ADMINISTRATIF de Toulouse, 24 janvier 1980
Association pour la défense de la population Concernée par la création de la zone de Naujac, La Primaube, Luc

MM. Dechaux, rapp.; Salvadori, d.du g.; Rouquet, av.

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Requête de l'«Association de Défense de la population concernée par la création de la zone de Naujac, La Primaube, Luc», représentée par son président et tendant à l'annulation, pour excès de pouvoir de l'arrêté du préfet de l'Aveyron en date du 20 septembre 1978 déclarant d'utilité publique le projet de création par le district du grand Rodez de la Z.A.C. à usage dominant d'activités industrielles de Naujac à La Primaube' commune de Luc et autorisant le district à acquérir soit à l'amiable, soit par voie d'expropriation les immeubles destinés à l réalisation de cette opération;

Vu le Code de l'expropriation pour cause d'utilité publique; Vu la loi 76-629 du 10 juillet 1976 relatives à la protection de la nature; Vu le décret 88-1141 du 12 octobre 1977 pris pour l'application de l'article 2 de ladite loi; Vu le Code des Tribunaux administratifs; Vu le décret du 11 janvier 1965 modifié;

Sur les conclusions à fin d'annulation, sans qu'il soit besoin de statuer sur les autres moyens de la requête:

Considérant qu'aux termes de l'article R. 11-3 du Code de l'expropriation «l'expropriant adresse au préfet pour être soumis à l'enquête un dossier qui comprend obligatoirement:

a) Lorsque la déclaration d'utilité publique est demandée en vue de la réalisation des travaux ou d'ouvrages:

1. une notice explicative;

2. le plan de situation;

3. le plan général des travaux;

4. les caractéristiques principales des ouvrages les plus importants;

5. l'appréciation sommaire des dépenses;

6. l'étude d'impact définie à l'article 2 du décret 77.1141 du 12 octobre 1977, lorsque les ouvrages ou travaux n'en sont pas dispensés... »;

Considérant qu'en vertu de l'article 2 dudit décret: «Le contenu de l'étude d'impact doit être en relation avec l'importance des travaux et aménagements projetés et avec leurs incidences prévisibles sur l'environnement.

L'étude d'impact présente nécessairement:

1. une analyse de l'état initial du site et de son environnement portant notamment sur les richesses naturelles et les espaces naturels agricoles... affectés par les aménagements ou ouvrages;

2. une analyse des effets sur l'environnement et, en particulier, sur les sites et paysages, la faune et la flore... et, le cas échéant, sur la commodité du voisinage (bruit, vibrations, odeurs...) ou sur l'hygiène et la salubrité publique;

3. les raisons pour lesquelles, notamment du point de vue des préoccupations d'environnement, parmi les partis envisagés, le projet présenté a été retenu;

4. les mesures envisagées par le maître de l'ouvrage ou le pétitionnaire pour supprimer, réduire et, si possible, compenser les conséquences commageables du projet sur l'environnement, ainsi que l'estimation des dépenses correspondantes...»

Considérant d'une part qu'il n'est pas contesté par l'administration que l'opération dénommée «projet de création d'une zone d'aménagement concerté à usage dominant d'activitées industrielles de Naujac à La Primaube, commune de Luc», faisant l'objet des enquêtes conjointes préalables à la déclaration d'utilité publique et parcellaire prescrites par l'arrêté préfectoral du 30 mars 1978, n'était pas dispensée de l'étude d'impact;

Considérant en second lieu qu'il résulte des pièces du dossier que l'étude d'impact prescrite par l'article R. 11-1-6 du Code de l'expropiration, et insérée dans le dossier présenté lors de l'enquête publique conjointe préalable à la déclaration d'utilité publique et à la déclaration de cessibilité, ne faisait pas l'objet d'un document spécial, mais d'un simple développement inséré dans la «notice explicative» sous le sous-titre dénommé «Il - Etude d'impact»; que si cette «étude» était divisée en deux parties appelées «1) Insertion dans l'environnement (super structure)», et »2) Dispositions techniques des ouvrages principaux», les informations contenues sous ce dernier vocable contenaient en réalité «les caractéristiques principales des ouvrages les plus importants» prévues par l'article R. 11-3-4« du Code de l'expropriation; qu'ainsi le même document comportait à la fois sous la dénomination «notice explicative» 1) la «notice explicative» exigée par l'article R. 11-3-1-1«, 2) l'«étude d'impact» exigée par l'article R.11.3.1.6«, et 3) les caractéristiques principales des ouvrages «exigées par l'article R. 11-3-1-4»; qu'ainsi, l'étude d'impact se réduisait aux informations présentées sur 8 paragraphes de 42 lignes au total;

Considérant en trosième lieu que les éléments d'information contenus dans cette «étude d'impact» ne comportaient ni des indications suffisamment précises et concrètes sur l'état initial du site et son environnement, ni une véritable analyse des effets de la création de la Z.A.C. sur l'environnement, ni les raisons pour lesquelles le projet présenté a été retenu du point de vue de l'environnement, les mesures envisagées pour «supprimer, réduire et compenser» les conséquences commageables du projet sur l'environnement, dès lors que cette prétendue étude se bornait à faire état d'un refus d'autorisation des installations classées soumises à autorisation - alors que nombre d'installations soumises à déclaration sont poluantes, - et à renvoyer à des prescriptions ultérieures, à définir, - notamment par voie d'un règlement de la Z.A.C. - les mesures à prendre en matière de coefficient des sols et d'emprise au sol des bâtiments, mesures relavant d'ailleurs davantage de la législation de l'urbbanisme que de celles de la protection de la nature;

Considérant qu'il résulte de tout ce qui précède que les informations fournies sous la dénomination «Etude d'impact» insérées dans la notince explicative ne répondaient pas aux exigences découlant des prescriptions combinées de l'article 2 de la loi 76-629 du 10 juillet 1976 relatives à la protection de la nature et de l'article 2 du décret pris pour son application;

que, par suite, le dossier soumis à enquête publique était insuffisant et irrégulièrement composé, qu'en raison de ce vice de forme substaniel, l'arrêté attaqué est entervenu à la suite d'une procédure irrégulière et se trouve entaché d'excès de pouvoir;

Sur les conclusions à fin de sursis à exécution:

Considérant qu'il résulte de ce qui précède spécialement de l'annulation de l'arrêté attaqué que les conclusions tendant au sursis à exécution dudit arrêté sont devenues sans objet;

Par ces motifs,

DECIDE:

Article 1er: .....

Article 2: L'arrêté préfectoral en date du 20 septembre 1978 déclarant d'utilité publique le projet de création par le district du Grand Rodez de la Zone d'aménagement concerté à usage dominant d'activités industrielles de Naujac à La Prumaube est annulé.

Article 3: Il n'y a lieu de stature sur les conclusions tendant au sursis à exécution de cet arrêté.

Etude d'impact. Installation classée. Contenu. Insuffisance au regard de la loi du 10 juillet 1976 et du décret du 12 octobbre 1977. Annulation de l'arrêté d'autorisation.

TRIBUNAL ADMINISTRATIF DE TOULOUSE, 22 mai 1980
Commune de Launaguet

MM. Louis Sidney, rapp.; Salvadori, c. du g.

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Vu la requête présentée par la commune de Launaguet (Haure-Garonne) tendant à ce qu'il plaise au Tribunal d'annuler, pour excès de pouvoir, l'arrêté en date du 20 novembre 1978 par lequel le Préfet de la Haute-Garonne a autorisé M.W.P. à exploiter un atelier de récupération de métaux;

Considérant que les conclusions de la commune de Launaguet tendent à obtenir l'annulation de l'arrêté en date du 20 novembre 1978 par lequel le Préfet de la Haute-Garonne a autorisé l'installation de l'établissement de récupération de métaux de M. Perret sis impasse Pivoulet sur le territoire de ladite commune, l'établissement en cause relevant de la 1ere classe des installlations soumises à autorisation par la loi du 29 juillet 1976 susvisée;

Considérant qu'aux termes de l'article 3 du décret n° 77-1133 en date du 21 septembre 1977 pris pour l'application de la loi du 19 juillet 1976 relative aux installations classées pour la protection de l'environnement: 4° «l'étude d'impact prévue à l'article 2 de la loi du 10 juillet 1976 indiquera les éléments propres à caractériser la situation existante au regard des intérêts visés à l'article 1er de la loi du 19 juillet 1976 et fera ressortir les effets prévisibles de l'installation sur son environnement, au regard des intérêts;

L'étude détaillera en outre l'origine, la nature et limportance des inconvénients susceptibles de résulter de l'exploitation de l'installation considérée. A cette fin, elle indiquera notamment en tant que de besoin, le niveau acoustique des appareils qui seront employés, le mode et les conditions d'approvisionnement en eau et d'utilisation de l'eau, les dispositions prévues pour la protection des eaux souterraines, l'épuration et l'évacuation des eaux résiduaires et des émanations gazeuses, l'élimination des déchets et résidus de l'exploitation, les conditions d'apport à l'installation des matières destinées à y être traitées et de transport des produits fabriqués.

Les mesures envisagées par le demandeur pour supprimer, limiter ou compenser les inconvénients de l'installation feront l'objet de descriptifs précisant les dispositions d'aménagement et d'exploitation prévues, leurs caractéristiques détaillées ainsi que les performances attendues.

5° Une étude exposant les dangers que peut présenter l'installation en cas d'accident et justifiant les mesures propres à en réduire la probabilité et les effets, déterminées sous la responsabilité du demandeur. Cette étude précisera notamment, compte tenu des moyens de secours publics portés à sa connaissance, la consistance et l'organisation des moyens de secours privés dont le demandeur dispose ou dont il s'est assuré le concours en vue de combattre les effets d'un éventuel sinistre;«qu'aux termes de l'article 2 du décret n° 77-1141 en date du 12 octobre 1977: «Article 2. - Le contenu de l'étude d'impact doit être en relation avec l'importance des travaux et aménagements projetés et avec leurs incidences prévisibles sur l'environnement. L'étude d'impact présente successivement:

1° Une analyse de l'état initial du site et de son environnement, portant notamment sur les richesses naturelles et les espaces naturels agricoles, forestiers, maritimes ou de loisirs, affectés par les aménagements ou ouvrages;

2° Une analyse des effets sur l'environnement, et en particulier sur les sites et les paysages, la faune et la flore, les milieux naturels et les équilibres biologiques et, le cas échéant, sur la commodité du voisinage (bruits, vibrations, odeurs, émissions lumineuses), ou sur l'hygiène et la salubrité publique;

3° Les raisons pour lesquelles, notamment du point de vue des préoccupations d'environnement, parmi les partis envisagés, le projet présenté a été retenu;

4° Les mesures envisagées par le maître de l'ouvrage ou le pétitionnaire pour supprimer, réduire et, si possible, compenser les conséquences dommageables du projet sur l'environnement, ainsi que l'estimation des dépenses correspondantes.»

Considérant qu'il résulte de l'instruction que l'étude d'impact jointe au dossier d'autorisation de l'installation litigieuse ne comporte pas des indications suffisament précises et concrètes sur l'état initial du site et son environnement; qu'elle ne fournit pas une véritable analyse des effets de la création de l'atelier de récupération et de traitement des métaux sur l'environnement, ni les raisons pour lesquelles le projet d'installation présenté a été retenu du point de vue de l'environnement; qu'ainsi les lacunes de ce document touchent entre autres à la nature même des cultures pratiquées au voisinage dans une zone à vocation première essentiellement agricole, à la prévention des nuisances et en particulier en ce qui concerne les effets des activités de traitement des métaux sur la nappe phréatique, à la sélection des techniques

spécifiques à la marche de l'atelier et enfin au choix proprement dit du site de son implantation; que dès lors les insuffisances constatées et l'imprécision des indications fournies font qu'un tel document ne répond pas dans son contenu aux exigence découlant des prescriptions édictées par l'article 2 de la loi n° 76-629 du 10 juillet 1976 relative à la protection de la nature ainsi que par l'article 2 du décret du 12 octobre 1977 pris pour son application; qu'en raison même de ce vice de forme substantiel l'arrêté attaqué du Préfet de la Haute-Garonne est intervenu à la suite d'une procédure irrégulière; qu'il se trouve entâché d'excès de pouvoir et ne peut pour ce motif qu'être annulé;

Par ces motifs,

DECIDE:

Article 1: L'arrêté susvisé en date du 20 novembre 1979 du Préfet de la Haute-Garonne autorisant M. William Perret à installer un chantier de récupération de métaux et un dépôt de véhicules hors d'usage, à Launaguet est annulé.

Etude d'impact. Sursis automatique. Procédure d'urgence. Référé irrecevable.

CONSEIL D'ETAT, 18 juin 1980

(Req. n° 17 605) Comité départemental de protection de la nature en Saône-et-Loire

Mlle Laroque, rapp.; M. Franc, c. du g.

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Requête du Comité départemental de protection de la nature en Saône-et-Loire tendant à ce que le Conseil d'Etat:

1° annule la décision du 11 avril 1979 par laquelle le Conseiller délégué par le Président du Tribunal Administratif de Dijon a rejeté sa demande tendant à ce que soit constatée d'urgence l'absence d'étude d'impact dans le dossier d'enquête du projet de remembrement concernant la commune de Brangny-sur-Saône

2° ordonne ce constat d'urgence;

Vu la loi du 10 Juillet 1976.

Considérant qu'aux termes de l'article R.102 du Code des Tribunaux Administratifs «Dans tous les cas d'urgence, le Président du Tribunal Administratif ou le magistrat qu'il délègue peut, sur simple requête qui sera recevable même en l'absence d'une décision administrative préalable, ordonner toutes mesures utiles sans faire préjudice au principal et sans faire obstacle à l'exécution d'aucune décision administrative»;

Considérant que le Comité Départemental de Protection de la nature en Saône-et-Loire a demandé au Président du Tribunal Administratif de Dijon, par voie de référé, qu'il soit procédé à l'examen du document figurant comme étude d'impact au dossier soumis à l'enquête publique sur le projet de remembrement de la commune de Bragny-sur-Saône et qu'il soit constaté que ledit document, eu égard à ses insuffisances et à ses lacunes, ne présentait pas le caractère d'une étude d'impact telle qu'elle est définie à l'article 2 de la Loi du 10 Juillet 1976 et à l'article 2 du Décret du 12 Octobre 1977; qu'il n'appartenait pas au juge des référés de se livrer à l'appréciation que comportait la mesure demandée, laquelle relevait du seul juge de la légalité et faisait ainsi préjudice au principal; que, dès lors, l'association requérante, qui, au surplus et en tout état de cause, ne pouvait, faute d'avoir saisi le Tribunal administratif de demandes à fin d'annulation et de

sursis à exécution d'une décision administrative, se prévaloir des dispositions de l'article 2 dernier alinéa de la loi du 10 Juillet 1976, n'est pas fondée à se plaindre que par l'ordonnance attaquée le conseiller de Tribunal Administratif délégué par le Président du Tribunal Administratif de Dijon a rejeté sa demande;

DECIDE:

Article 1er: La requête du Comité Départemental de Protection de la Nature en Saône-et-Loire est rejetée.

Vidange de barrage. Déversement de boues mêlées de débris végétaux. Destruction de poissons. Code rural. Article 434-1 (407 nouveau). Infraction constituée (non) - Relaxe

COUR D'APPEL DE LYON, 22 juin 1983, Cravero

MM. Roman prés., Becquet, rapp., Langlade, subst.gén.; Me. Carron [Barreau de Paris], Moulard [Barreau de St-Etienne], av.

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Attendu qu'il n'est pas contesté que le 7 septembre 1981 à Sail-sous-Couzan (Loire), au cours d'une opération de vidange du barrage compensateur de la Beaume exploité par Electricité de France, nécessitée par des travaux d'entretien et régulièrement autorisée par l'administration, les eaux de la rivière Le Lignon en aval du barrage ont été polluées par des boues provenant de

la retenue, qui ont diminé la teneur en oxygène de l'eau de telle sorte que le poisson a été détruit sur environ un kilomètre et demi;

Attendu que Cravero et son employeur civilement responsable sollicitent sa relaxe, par divers moyens de fait et de droit et notamment en soutenant qu'il n'a commis aucune faute; qu'ils invoquent subsidiairement une situation de force majeure ou un état de contrainte qui exonérerait le prévenu de toute responsabilité pénale; qu'ils demandent à titre encore plus subsidiaire que, si une condamnation est prononcée, elle soit réduite à une amende symbolique; qu'ils soulèvent l'irrecevabilité des constitutions de partie civile, les associations présentes aux débats ne justifiant selon eux d'aucun préjudice direct causé par l'infraction poursuivie, et la poursuite n'étant pas exercée en vertu des articles 3 à 7 ou 18 de la Loi du 10 juillet 1976 sur la protection de la nature;

Attendu que la société des sciences naturelles Loire-Forez, le club des pêcheurs sportifs Forez-Velay et la Fédération française des sociétés de protection de la nature, invoquant l'article 40 de la loi du 10 juillet 1976 précitée et les articles 1382 et 1383 du Code civil, et insistant sur l'importance des dommages écologiques causés selon eux par le fait poursuivi, conncluent à la confirmation du jugement déféré en ce qui concerne la responsabilité du prévenu et de son employeur civilement responsable et demandent;

- les deux premiers, conjointement, la somme de 100 000 F à titre de dommages-intérêts, l'insertion d'un extrait de la décision de condamnation dans quatre journaux à titre de supplément de dommages-intérêts et les sommes de 5 000 F pour leur intervention en première instance et de 3 000 F pour leur intervention en appel au titre de l'article 475-1 du Code de procédure pénale;

- la dernière, la confirmation des dommages-intérêts fixés par les premiers juges outre 2 000 F pour son intervention en première instance et 1 500 F pour son intervention en appel au titre de l'article 475-1 susvisé;

Attendu que la poursuite est exercée en vertu de l'article 434-1 alinéa premier du Code Rural, inséré dans ce code par l'ordonnance n° 59-25 du 3 Janvier 1959, qui incrimine quiconque aura jeté, déversé ou laissé écouler dans les cours d'eau, directement ou indirectement, des substances quelconques, dont l'action ou les réactions ont détruit le poissons ou nui à sa nutrition, à sa reproduction ou à sa valeur alimentaire;

Attendu que le titre II du livre III du Code Rural, relatif à la pêche fluviale auquel appartient l'article 434-1, s'applique aux eaux libres, lacs canaux, ruisseaux ou cours d'eau quelconques (art. 401), par opposition aux étangs ou enclos n'ayant aucune communication avec les eaux libres; qu'aucune disposition de ce titre, ni du titre II du livre premier relatif aux cours d'eaux non domaniaux, ni de la loi du 16 octobre 1919 relative à l'utilisation de l'énergie hydraulique n'exclut des cours d'eaux soumis à l'application du Code Rural les retenues aménagées artificiellement en vue de la production d'énergie électrique ou dans tout autre but; que les dispositions de l'article 428 dudit Code relatives à l'établissement d'échelles destinées à assurer la libre circulation du poisson dans les fleuves, rivières, canaux et cours d'eau équipés de barrages consacrent l'appartenance des retenues des barrages à la catégorie des cours d'eau;

Attendu qu'en l'espèce, la retenue du barrage de la Beaume fait partie d'un cours d'eau puisqu'elle communique au moins avec le cours supérieur du Lignon qui l'alimente;

Attendu que les boues mêlées de débris végétaux, dont le déversement en aval, au cours des opérations de vidange, a détruit le poisson, ont été apportées dans cette retenue par la rivière elle-même;

Attendu qu'un tel déversement de produits naturels se trouvant déjà dans le cours d'eau au moment de l'intervention du prévenu n'entre pas dans les prévisions de l'article 434-1 du Code Rural; que par conséquent Cravero doit être relaxé;

Attendu que cette décision de relaxe entraîne de plein droit la mise hors de cause d'Electricité de France et le rejet des demandes des parties civiles, sans qu'il soit utile d'examiner la recevabilité de leur intervention;

PAR CES MOTIFS:

La Cour, statuant publiquement, contradictoirement, en matière correctionnelle, après en avoir délibéré conformément à la loi:

- Renvoie Cravero Jean-Marie des fins de la poursuite;

- Met hors de cause Electicité de France;

- Déboute de leurs demandes la Société de Sciences naturelles Loire-Forez, le Club des pêcheurs sportifs Forez-Velay et la Fédération française des sociétés de protection de la nature; les condamne aux frais de leur intervention.

PROTECTION DE LA NATURE

Arrêté de protection de biotope. Plan d'eau. Pratique de la planche à voile. Interdiction justifiée, assurant la protection des reptiles, amphibiens et oiseaux. Légalité (1er espèce).

TRIBUNAL ADMINISTRATIF DE POITIERS, 25 Octobre 1985
Association «Ecole 79»

MM. Courtin, rapp., de Sevin, c. du g.

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Vu la requête présentée par l'Association «Ecole 79» et tendant à ce que le tribunal annule l'arrêté du préfet, commissaire de la République des Deux-Sèvres, portant protection du biotope constitué par la retenue d'eau du Cébron et de ses rives;

Sans qu'il soit besoin de statuer sur la recevabilité de la requête:

Considérant qu'aux termes de l'article 4 du décret n° 77-1295 en date du 25 Novembre 1977 pris pour l'application des articles 3 et 4 la loi n° 76-629 du 10 Juillet 1976 relative à la protection de la nature et concernant la protection de la flore et de la faune sauvages du patrimoine naturel français: «Afin de prévenir la disparition d'espèces figurant sur la liste prévue à l'article 4 de la loi du 10 Juillet 1976, le préfet peut fixer, par arrêté, les mesures tendant à favoriser, sur tout ou partie du territoire d'un département, à l'exclusion du domaine public maritime où les mesures relèvent du ministre chargé des Pêches maritimes, la conservation des biotopes tels que mares, marécages, marais, haies, bosquets, landes, dunes, pelouses ou toutes autres formations naturelles, peu exploitées par l'homme, dans la mesure où ces biotopes ou formations sont nécessaires à l'alimentation, à la reproduction, au repos ou à la survie des espèces... Le préfet peut interdire, dans les mêmes conditions, les actions pouvant porter atteinte d'une manière indistincte à l'équilibre biologique des milieux et notamment l'écobuage, le brûlage des chaumes, le brûlage ou le broyage des végétaux sur pied, la destruction des talus et des haies, l'épandage de produits antiparasitaires»;

Considérant que le préfet, commissaire de la République du département des Deux-Sèvres, a interdit, dans son arrêté portant protection d'un biotope constitué par l'emprise de la retenue d'eau du Cébron et de ses rives, «d'accéder à l'eau par quelque moyen que ce soit» et «d'accéder, entre l'eau et la clôture de ceinture», sauf exceptions limitativement énumérées, faisant ainsi obstacle à ce que puisse être pratiquée la planche à voile sur ladite retenue d'eau; que le préfet, commissaire de la République, était fondé à prononcer, ainsi qu'il l'a fait une telle interdiction qui constitue la mesure appropriée pour assurer la protection des reptiles, amphibiens et oiseaux désignés à l'article 2 de l'arrêté dont il s'agit; que l'atteinte ainsi portée à l'exercice des libertés individuelles doit être considérée comme une restriction justifiée et non entachée d'illégalité; qu'il résulte de ce qui précède que la requête de l'Association «Ecole 79» ne peut qu'être rejetée;

DECIDE:

Article premier. - Le requête susvisée de l'Association «Ecole 79» est rejetée.

Art. 2. - Notification du présent jugement sera faite, dans les conditions prévues par l'article R. 177 du Code des Tribunaux Administratifs, au président de l'Association «Ecole 79», au ministre de l'Environnement.

POLLUTION DE LA MER

Rejet d'hydrocarbures dans un port. Contravention de grande voirie ou loi du 5 juillet 1983. Incompétence du juge administratif.

TRIBUNAL ADMINISTRATIF RENNES, 7 novembre 1985

Commissaire de la République des Côtes-du-Nord (Reg. n° 85-224)

MM. Latrille, rapp., Lotoux, c.du g.

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Vu, enregistré le 19 octobre 1984, le déféré par le préfet, commissaire de la République du département des Côtes-du-Nord, du procès-verbal de contravention de grande voirie dressé le 8 Mai 1984 à l'encontre de M. Pascal Mauffret, demeurant au port de Kourou (Guyanne) 97310, pour avoir, le 8 mai 1984, déversé de son navire, le «Bran-Ruz», du gas-oil dans le port de lézardrieux;

Considérant qu'à la suite du déversement de gas-oil, le 8 mai 1984, dans le port de Lézardrieux, par le navire «Bran-Ruz», procès-verbal de contravention de grande voirie a été dressé à l'encontre de son propriétaire, M. Pascal Mauffret; que, par déféré en date du 19 Octobre 1984, le préfet, commissaire de la République du département des Côtes-du-Nord se borne à demander la condamnation du contrevenant à une amende et au remboursement des frais avancés par l'administration pour la remise en état du port;

Considérant qu'il appartient au juge de la contravention de grande voirie de rechercher, même d'office, comme

en l'espèce, si les faits constatés dans le procès-verbal produit à la procédure constituent une infraction aux dispositions relatives à la conservation ou à l'exploitation des ports;

Considérant qu'il résulte des dispositions combinées à l'article L.322-1 du Code des Ports Maritimes et de l'article 2 du décret n° 80-567 du 18 Juillet 1980 relatives aux peines applicables en matière de contravention de police qu'il est défendu, sous peine d'une amende de 150 à 300 F, de jeter des terres ou immondices dans les eaux des ports et leurs dépendances, mais que ces prescriptions, qui relèvent du juge de la contravention de grande voirie, ne sont pas applicables à l'espèce;

Considérant, en effet, que dès lors qu'il s'agit du rejet à la mer d'hydrocarbures, même à l'intérieur d'un port, par un navire relevant de la Convention internationale de Londres du 2 novembre 1973 relative à la prévention de la pollution par les navires, la loi n° 83-583 du 5 juillet 1983 réprimant les pollutions de la mer par les hydrocarbures, et, en particulier, son article 14, fait obstacle à ce que la juridiction administrative prononce en raison du même fait une condamnation à une amende pour contravention de grande voirie; que, par suite, il y a lieu de rejeter, comme portées devant une juridiction incompétente pour en connaître, les conclusions du préfet, commissaire de la République du département des Côtes-du-Nord portant sur l'amende à infliger à M. Mauffret;

Considérant, par ailleurs, que si la juridiction administrative reste compétente selon la procédure de contravention de grande voirie, en vertu de l'article 14 de la loi du 5 juillet 1983 pour les dommages causés au domaine public maritime, en revanche l'administration ne saurait, comme en l'espèce, se borner à demander le remboursement des frais de remise en état sans produire d'état justificatif desdits frais; qu'ainsi, ses conclusions en ce sens doivent être rejetées;

DÉCIDE:

Article premier. - La demande du préfet, commissaire de la République du département des Côtes-du-Nord, tendant à la condamnation de M. Pascal Mauffret à une amende est rejetée comme portée devant une juridiction incompétente pour en connaître.

Art. 2. - Le surplus des conclusions du préfet est rejeté.

INSTALLATIONS CLASSÉES

Décharge d'ordures ménagères. Procédure d'autorisation, erreurs matérielles n'entraît pas d'illégalité: violation de circulaires (non). Pouvoirs du juge de modifier l'arrêté d'autorisation (oui).

TRIBUNAL ADMINISTRATIF DE LIMOGES, 15 Janvier 1986

Association contre la pollution de la haute vallée de la Gartempe c/ Ministre de l'environnement (Req. n°s 83-420 et 83-421)

MM. Foucher, rapp, Moreau, c. du g., Grimaud, av.

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Vue, enregistrée le 25 Juin 1984, la requête tendant à l'annulation de l'arrêté en date du 26 avril 1984, par lequel le préfet, commissaire de la République du département de la Creuse, a autorisé le Syndicat Intercommunal de Traitement des Ordures Ménagères (SITOM) de la région de Guéret à établir et exploiter sur le territoire de la commune de Saint-Léger-Le-Guérétois une décharge contrôlée d'ordures ménagères;

Sur la jonction:

Considérant que les requêtes n° 83-420 et n°83-421 émanent des mêmes requérants, présentent à juger des questions semblables et ont fait l'objet d'une instruction commune; qu'il y a lieu de les joindre pour qu'elles fassent l'objet d'un seul jugement;

Sur la requête n° 83-420 à fin d'annulation:

Considérant que les requérants demandent l'annulation de l'arrêté en date du 26 Avril 1984 par lequel le préfet, Commissaire de la République du département de la Creuse, a autorisé le Syndicat Intercommunal de Traitement des Ordures Ménagères de la région de Guéret à établir et exploiter sur le territoire de la commune de Saint-Léger-Le-Guérétois, au lieu dit «Puy-Aufin», une décharge contrôlée d'ordures ménagères, constituant une installation classée pour la protection de l'environnement, repérée sous le n° 322 B. 2 de la nomenclature;

Sur le moyen tiré de l'absence d'indication, dans les visas, de la date des avis émis par les différents services intéressés:

Considérant que si l'arrêté litigieux se borne à viser les avis des différents services consultés selon la procédure réglementaire lors de l'instruction, sans indiquer la date à laquelle ces avis ont été émis, cette absence d'indication de date n'est pas de nature à entraîner la caducité desdits avis, ni à entâcher d'illégalité l'arrêté attaqué; par suite, ce moyen doit être rejeté;

Sur le moyen tiré de l'erreur de superficie des terrains affectés à l'emprise de la décharge:

Considérant que si l'arrêté attaqué en date du 26 avril

1984 autorisait l'emprise de la décharge sur les parcelles numérotées au cadastre de la commune de Saint-Léger-Le-Guérétois, section B 3 n°s 650 á 668 et section C 1 n° 218, alors que le projet et toute la procédure d'instruction ne portaient que sur les parcelles cadastrées section B 3 n°s 650 à 657 et n° 668 section C 1 n° 218, il résulte de l'instruction que ledit arrêté comportait une erreur matérielle dans sa rédaction et que, par un arrêté rectificatif du 17 Mai 1984, l'emprise de la décharge autorisée a été limitée aux seules parcelles de terrains prévues au projet; que, dès lors, les requérants ne peuvent se prévaloir de l'erreur matérielle ainsi rectifiée, pour soutenir que l'arrêté litigieux est entâché d'illégalité;

Sur le moyen tiré de la violation de la Circulaire du 13 Juin 1969 relative à la protection des massifs forestiers et celle du 9 Mars 1973 relative aux décharges contrôlées de résidus urbains:

Considérant, en premier lieu, que la Circulaire du 13 Juin 1969 était relative à l'application de l'article 178 du Code Forestier dans sa rédaction ancienne; que les dispositions de cet article ne sont plus aujourd'hui en vigueur et ont été modifiées par les dispositions de l'article L. 322-2 du Code Forestier dans sa rédaction nouvelle; que, dès lors, les requérants ne peuvent se prévaloir utilement de la Circulaire susvisée;

Considérant, en second lieu, que même en admettant que la Circulaire du 9 Mars 1973 ait pu valablement édicter des prescriptions relatives à l'implantation des décharges contrôlées de résidus urbains et dont les requérants peuvent se prévaloir, il n'est pas établi que, ne s'agissant pas en l'espèce de massifs forestiers particulièrement exposés au risque d'incendie, une distance minimum de 20 m n'ait pas été respectée; qu'ainsi, le moyen tiré de la violation de ladite circulaire ne peut être que rejeté;

Sur le moyen tiré de la violation des arrêtés préfectoraux relatifs à divers captages d'eaux et de sources:

Considérant que si les arrêtés préfectoraux en date du 15 Juin 1969, du 25 Février 1975 et du Avril 1979 ont pu, conformément aux dispositions de l'article L.20 du Code de la Santé Publique, déterminer autour des points de captage d'eaux qu'ils autorisaient, des périmètres de protection à l'intérieur desquels sont interdites ou réglementées toutes implantations d'établissements classés comme insalubres, il ressort des pièces du dossier que la décharge contestée n'est implantée à l'intérieur d'aucun des périmètres de protection déterminés par les arrêtés susvisés; que, dès lors, le moyen tiré d'une violation de ces arrêtés est inopérant;

Sur le moyen tiré d'une violation des règles relatives aux établissements classés particulièrement dangereux et du risque de pollution des eaux de la Gartempe:

Considérant que, selon les dispositions de l'article 3 de la Loi du 19 Juillet 1976: «sont soumises à autorisation préfectorale les installations qui présentent de graves dangers ou inconvénients pour les intérêts visés à l'article premier - c'est-à-dire pour la commodité du voisinage, pour la santé, la sécurité, la salubrité publique, la protection de la nature et de l'environnement -, l'autorisation ne peut être accordée que si ces dangers ou inconvénients peuvent être prévenus par des mesures que spécifie l'arrêté préfectoral»; qu'en l'espèce, l'arrêté d'autorisation du 26 Avril 1984, d'une part, a prévu des mesures spécifiques de protection et de surveillance des eaux souterraines ausi bien que des eaux de ruissellement, d'autre part, a prescrit des aménagements particuliers de l'ensemble de la décharge elle-même et du lit du ru de Puy-Aufin qui la traverse afin qu'aucun déversement de ladite décharge ne puisse être à l'origine d'une pollution des eaux; qu'il n'est pas établi qu'en édictant ces prescriptions dont l'insuffisance n'est pas démontrée, l'autorité compétente ait commis une erreur manifeste d'appréciation; que, dès lors, les requérants ne sont pas fondés, par les moyens qu'ils invoquent, à conclure à l'annulation de l'arrêté litigieux; qu'il leur appartiendra éventuellement, s'ils s'y croient fondés, de mettre en oeuvre les procédures prévues en cas de manquement à ces prescriptions;

Considérant cependant que le Tribunal est, en la matière, investi du pouvoir de modifier la décision administrative, s'il constate que soit par son objet, soit par ses conditions, elle ne permet pas d'assurer suffisamment la protection des intérêts fondamentaux définis par l'article premier de la loi du 19 Juillet 1976; qu'en l'espèce, il apparaît, ainsi que le reconnaît le Ministre de l'Environnement, que certains aménagements doivent être apportés à l'autorisation préfectorale afin d'assurer une protection accrue des eaux et de prévoir une meilleure réglementation du trafic des véhicules lourds de collecte des ordures ménagères; qu'ainsi, dans le but notamment d'éviter tout phénomène d'affouillement des digues formant les aires de dépôt, par les eaux du ru de Puy-Aufin en période de crues, il convient de modifier le troisième alinéa de l'article 10-2 de l'arrêté d'autorisation selon les dispositions ci-dessous définies au dispositif du présent jugement et que, d'autre part, dans le but de préserver la tranquillité qui caractérise les zones traversées dans la commune de Saint-Léger-Le-Guérétois, par les véhicules de collecte des ordures ménagères, il convient aussi d'ajouter à l'article 10-1 de l'arrêté susvisé les dispositions ci-dessous définies au dispositif du présent jugement;

Sur la requête n° 83-421 à fin de sursis à exécution:

Considérant qu'à la suite de la décision relative à la requête à fin d'annulation, la requête à fin de sursis à exécution de l'arrêté attaqué est devenue sans objet; que, dès lors, il n'y a pas lieu d'y statuer;

PAR CES MOTIFS, DÉDIDE:

Article premier. - Il n'y a pas lieu de statuer sur la requête n° 83-421 à fin de sursis à exécution.

Art. 2. - L'alinéa 3 de l'article 10-2 «Aménagements particuliers» de l'arrêté préfectoral du 26 Avril 1984 est ainsi modifié: «Les casiers seront confectionnés par creusement de la partie amont et élévation de digues étanches sur leurs quatre côtés. Ces digues seront ancrées à 0,80 m à 1m de profondeur. Elles seront constituées avec des matériaux exempts de matières putrescibles et élevées par couches successives de 0,30 m d'épaisseur dûment compactées. Ces digues auront une base de 13 m, une pente de talus de 1, 3/1 et une hauteur de 5,5 m notamment côtés aval et en bordure du ruisseau. Les talus bordant le ruisseau seront protégés par un enrochement serré et jointé au béton de façon à éviter tout affouillement des talus par les eaux. Cet enrochement sera constitué sur les talus perpendiculaires au ruisseau, côté amont sur 10 m de part et d'autre du ruisseau».

Art.3 - Il est ajouté à l'article 10-1 de l'Arrêté préfectoral du 26 Avril 1984 l'alinéa suivant: «Les horaires et la répartition du trafic des véhicules de collecte des ordures ménagères seront aménagés sur les zones traverées de la commune de Saint-Léger-Le-Guérétois, en accord avec le maire de ladite commune, de manière à regrouper les passages dans la journée et éviter tout passage aux heures d'entrée et de sortie des écoles».

Art. 4. - Le surplus des conclusions de la requête n° 83-420 à fin d'annulation est rejeté.

Rejet d'effluents industriels. Installtion classée, arrêté d'extention Instruction du 6 juin 1983. Erreur de droit.

CONSEIL D'ÉTAT, 17 janvier 1986

Société Tioxide c/ Association de défense des marins-pêcheurs de Grand-Fort-Philippe
(Req. n° 05-863)

Mlle Langlade, rapp., M. Stirn, c. du g., S.C.P. Peignot, Garreau, av. de la société Tioxide.

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Vu la requête sommaire et le mémoire complémentaire enregistrés les 20 Janvier 1977 et 2 mars 1977 au Secrétariat du Contentieux du Conseil d'Etat, présentés pour la Société Tioxide, dont le siège est 1, rue des Garennes, à Calais (Pas-de-Calais), agissant poursuites et diligences de son Président-Directeur Général en exercice, domicilié audit siège, et tendant à ce que le Conseil d'Etat:

1° Annule les articles 3 et 5 du jugement en date du 9 décembre 1976 par lequel le tribunal administratif de Lille a annulé les dispositions de l'article 2 et du paragraphe 3 de l'article 3 de l'arrêté du 26 avril 1971 du préfet du Pas-de-Calais autorisant l'extension de l'usine Tioxide et modifiant, par les dispositions des articles susmentionnés, les conditions de rejet dans la mer des eaux résiduaires;

Vu la loi du 19 Décembre 1917 relative aux établissements classés comme dangereux, incommodes et insalubres;

Vu le décret n° 64-803 du 1er avril 1964;

Vu l'instruction du Ministre du Commerce et de l'Industrie en date du 6 juin 1953 relative au rejet des eaux résiduaires des établissements classés;

Vu la loi du 16 Décembre 1964 relative au régime et à la répartition des eaux et à la lutte contre leur pollution;

Vu le décret n° 73-218 du 23 Février 1973 et les arrêtés interministériels du 13 Mai 1975;

Vu le Code des Tribunaux Administratifs;

Vu l'ordonnance du 31 Juillet 1945 et le décret du 30 Septembre 1953;

Vu la loi du 30 Décembre 1977;

Considérant que la requête de la société Tioxide est dirigée contre le jugement en date du 9 Décembre 1976 du Tribunal Administratif de Lille en tant qu'il a annulé les dispositions de l'article 2 et du paragraphe 3 de l'article 3 de l'arrêté du préfet du Pas-de-Calais en date du 26 Avril 1971 autorisant l'extention de l'usine Tioxide, relatives aux modalités de rejet des effluents produits par le fonctionnement de cette usine, et en tant qu'il a condamné la société requérante aux dépens;

Considérant que, pour annuler des dispositions ci-dessus analysées, les premiers juges se sont fondés sur le motif que le préfet a fait, dans les circonstances de l'affaire, une inexacte application des dispositions du Chapitre II de la deuxième partie de l'instruction du Ministre du Commerce, en date du 6 Juin 1953, en accordant à la société Tioxide une dérogation aux prescriptions de cette instruction relative à la neutralisation et au traitement des effluents rejetés directement dans le milieu naturel, alors que l'application de ces prescriptions ne se heurtait pas aux difficultés ou impossibilités auxquelles l'instruction subordonne l'octroi d'une dérogation;

Considérant que, comme le souligne cette instruction, les prescriptions qu'elle édicte en ce qui concerne la protection du milieu naturel contre les rejets d'effluents

industriels n'ont qu'une valeur indicative pour la préparation des arrêtés qu'il appartient au préfet de prendre en application de la loi du 19 Décembre 1917; que le tribunal ne pouvait, sans commettre d'erreur de droit, se fonder sur la méconnaissance de ces prescriptions pour annuler les dispositions de l'arrêté préfectoral du 26 Avril 1971 relatives aux rejets en mer;

Considérant qu'il appartient au Conseil d'Etat, saisi de l'ensemble du litige par l'effet dévolutif de l'appel d'examiner les autres moyens soulevés par l'Association de défense des marins-pêcheurs de Grand-Fort-Philippe devant le Tribunal Administratif de Lille à l'appui de ses conclusions contre les dispositions sus-analysées de l'arrêté préfectoral du 26 avril 1971;

Considérant qu'il ne résulte pas de l'instruction que le préfet du Pas-de-Calais a fait une inexacte appréciation des faits de l'espèce et notamment de la toxicité des effluents rejetés par l'usine Tioxide, d'une part, en n'exigeant pas de neutralisation, ni de traitement préalables au rejet de ces effluents, d'autre part, au cas où le pH des eaux résiduaires ne serait pas compris entre 5,5 et 8,5 ou entre 5,5 et 9,5 si la neutralisation est faite à l'aide de chaux, en ne prescrivant pas la mise en oeuvre dans un délai maximum d'un an, de mesures scientifiques et technologiques propres à ramener le pH à l'intérieur des limites fixées;

Considérant qu'il résulte de tout ce qui précède que la demande de l'Association de Défense des Marins-pêcheurs de Grand-Fort-Philippe doit être rejetée;

Considérant que le jugement attaqué a été rendu avant l'entrée en vigueur de la loi du 30 Décembre 1977; qu'il y a lieu, dans les circonstances de l'affaire, de mettre à la charge de l'Association de Défense des Marins-pêcheurs de Grand-Fort-Philippe les sommes qui ont pu être versées à titre de dépens de première instance;

DÉCIDE:

Article premier. - Les articles 3 et 5 du jugement du tribunal administratif de Lille en date du 9 Décembre 1976 sont annulés.

Art. 2. - Les conclusions de la demande de l'Association de Défense des Marins-pêcheurs de Grand-Fort-Philippe devant le tribunal administratif de Lille, tendant à l'annulation des dispositions de l'article 2 et de l'article 3-3° de l'arrêté du préfet du Pas-de-Calais en date du 26 Avril 1981 et relatives aux rejets d'effluents liquides que la société Tioxide est autorisée à effectuer en mer sont rejetées.

Art. 3. - Les sommes qui ont pu être versées à titre de dépens de première instance sont mises à la charge de l'Association de Défense des Marins-pêcheurs de Grand-Fort-Philippe.

ÉTUDES D'IMPACT

Mise en exploitation d'une mine d'uranium. Examen sommaire des nuisances créées. Pas d'analyse précise ni quantifiée du niveau de radioactivité ni des conséquences sur les éequilibres biologiques. Pas d'exposé des mesures de contrôle de la radioactivité. Insuffisances ayant un caractère substantiel.

CONSEIL D'ÉTAT, 7 mars 1986

Ministre de l'Industrie c/ Cogema et Flepna (Req. n° 49-644) [1]

MMM. Guillaume, rapp., Jeanneney, c. du g., S.C.p. Labbé-Delaporte, av.

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Recours présenté au nom de l'Etat par le ministre de l'Industrie et de la Recherche et tendant à ce que le Conseil d'Etat:

1° Annule le jugement du 1er février 1983 par lequel le Tribunal Administratif de Limoges a annulé la décision implicite de l'ingénieur du service de l'industrie et des mines d'Auvergne Limousin approuvant l'ouverture des travaux d'exploitation de la mine d'uranium de Saint-Sornin-Leulac (Haute-Vienne) par la Cogema;

2° Rejette la demande présentée par la Fédération limousine pour l'étude et la protection de la nature (FLEPNA) au tribunal administratif de Limoges;

Vu le Code minier;

Vu le décret n° 72-645 du 4 juillet 1972;

Vu le décret n° 77-1141 du 12 octobre 1977;

Vu le Code des tribunaux administratifs;

Vu l'ordonnance du 31 juillet 1945 et le décret du 30 septembre 1953;

Vu la loi du 30 décembre 1977;

Considérant qu'aux termes de l'article 2 du décret du 12 octobre 1977, «le contenu de l'étude d'impact doit être en relation avec l'importance des travaux et aménagements projetés et avec leurs incidences

prévisibles sur l'environnement. L'étude d'impact présente successivement: 1° Une analyse de l'état initial du site et de son environnement... 2° Une analyse des effets sur l'environnement... 3° Les raisons pour lesquelles, notamment du point de vue des préoccupations d'environnement, parmi les partis envisagés, le projet présenté a été retenu; 4° Les mesures envisagées par le maître de l'ouvrage ou le pétitionnaire pour supprimer, réduire et, si possible, compenser les conséquences dommageables du projet sur l'environnement...»;

Considérant qu'il résulte des pièces du dossier que l'étude d'impact présentée le 5 janvier 1979 par la Cogema à l'appui de la déclaration d'ouverture des travaux de la mine d'uranium de Saint-Sornin-Leulac (Haute-Vienne) se limite, en ce qui concerne les effets du projet sur l'environnement, à un examen sommaire des nuisances créées, sans analyse précise et quantifiée de l'accroissement du bruit, du trafic de poids lourds et du niveau de radioactivité, ni des conséquences de ce phénomène sur les équilibres biologiques ainsi que sur la santé et la salubrité publiques; que les mesures de contrôle et de prévention du risque lié à la radioactivité ne font l'objet d'aucun exposé détaillé; que, compte tenu de l'importance des travaux projetés et de leurs incidences particulières sur l'environnement, ces insuffisances revêtent un caractère substantiel; que, dès lors, l'étude d'impact ne peut être considérée comme satisfaisant aux conditions posées par les dispositions réglementaires précitées; que, par suite, le ministre du Redéploiement industriel n'est pas fondé à soutenir que c'est à tort que, par le jugement at taqué, le tribunal administratif de Limoges a annulé la décision implicite de l'ingénieur en chef des mines d'Auvergne Limousin autorisant l'ouverture des travaux de la mine de Saint-Sornin-Leulac;

DÉCIDE:

Article premier. - Le recours du ministre du Redéploiement industriel et du Commerce extérieur est rejeté.

DÉCHETS TOXIQUES

Pouvoirs du préfet d'imposer des prescriptions supplémentaires à un établissement industriel ayant cessé son exploitation. Résidus de lindane demeurés sur le site. Risque de nuisance pour les eaux souterraines. Etablissement soumis à autorisation par la loi du 19 décembre 1917. Régime applicable. Loi du 19 juillet 1976. Déchets se rattachant directement à l'activité de la société de produits chimiques. Obligations de l'ancien exploitant. Arrêté préfectoral pouvant valablement prescrire des travaux de surveillance hydrogéologiques et l'étude des dépôts.

CONSEIL D'ÉTAT, 11 Avril 1986

Ministre de l'Environnement
c/ Société des Produits Chimiques Ugine-Kuhlman
(Req. n° 62-234

MM. Guillaume, rapp., Dandelot, c. du g., S.C.P. Piwnica-Molinié av.

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Vu le recours sommaire, enregistré au Secrétariat du Contentieux du Conseil d'Etat le 3 septembre 1984, et le mémoire complémentaire, enregistré le 19 Décembre 1984, présentés au nom de l'Etat par le Ministre de l'Environnement et tendant à ce que le Conseil d'Etat:

1° Annule le jugement du 12 Juillet 1984 par lequel le Tribunal Administratif de Strasbourg a annulé à la demande de la Société de produits chimiques Ugine-Kuhlman, l'arrêté du préfet, Commissaire de la République du Haut-Rhin, en date du 17 novembre 1982, imposant à cette société de fournir un inventaire des dépôts de résidus du lindane se rattachant à l'exploitation de l'usine de Huningue et d'exécuter des travaux de surveillance hydrogéologiques;

2° Rejette la demande présentée par la Société des produits chimiques Ugine-Kuhlman devant le tribunal administratif de Strasbourg;

Considérant qu'aux termes de l'article premier de la Loi du 19 Juillet 1976, «sont soumis aux dispositions de la présente loi les usines, ateliers, dépôts, chantiers, carrières et d'une manière générale les installations exploitées ou détenues par tout personne physique ou morale, publique ou privée, qui peuvent présenter des dangers ou des inconvénients soit pour la commodité du voisinage, soit pour la santé, la sécurité, la salubrité publique...»; et qu'aux termes de l'article 6 de ladite loi: «les conditions d'installation et d'exploitation jugées indispensables pour la Protection des intérêts mentionnés à l'article premier de la présente loi, les moyens d'analyse et de mesure et les moyens d'intervention en cas de sinistre sont fixés par l'arrêté d'autorisation et, éventuellement, par des arrêtés complémentaires pris postérieurement á cette autorisation»;

Considérant, d'une part, que les risques de nuisance que présentaient le dépôt de résidus de lindane constitué sur le site de l'usine de Huningue (Haut-Rhin) par la Société des produits chimiques Ugine-Kuhlman avant la fermeture et la vente de cet établissement en 1974 et les dépôts réalisés par les établissements Genet dans le département du Haut-Rhin en exécution du contrat d'évacuation des déchets de lindane passé avec ladite société, doivent être regardés, dans les circonstances de

l'affaire, comme se rattachant directement à l'activité de la Société des produits chimiques Ugine-Kuhlman, qui était soumise à autorisation sous le régime de la loi du 19 juillet 1976; que les dispositions du contrat passé entre la société et les établissements Genet sont inopposables à l'administration; que la société ne peut davantage invoquer la vente des terrains où se situait son usine pour s'exonérer des obligations au titre de la législation sur les installations classées, dès lors que l'acquéreur ne s'est pas substitué à elle en qualité d'exploitant;

Considérant, d'autre part, que l'arrêté attaqué prescrivant à la Société des Produits Chimiques Ugine-Kuhlman divers travaux de surveillance hydrogéologique ainsi qu'une étude des dépôts en cause, est intervenu sur le fondement de la Loi du 19 Juillet 1976 régissant la police des installations classées et non de la loi du 15 Juillet 1975 relative à l'élimination des déchets; qu'ainsi, le moyen tiré de ce que l'administration aurait fait une application rétroactivement illégale de cette dernière loi n'est pas de toute façon fondé;

Considérant, enfin, que compte tenu des nuisances causées par les dépôts aux eaux souterraines, le préfet du Haut-Rhin était fondé à mettre en demeure la société de prendre les mesures que prescrit son arrêté;

Considérant qu'il résulte de ce qui précède que c'est à tort que, par le jugement attaqué, le tribunal administratif de Strasbourg, faisant droit à la demande de la Société des produits chimiques Ugine-Kuhlman, a annulé l'arrêté du préfet, Commissaire de la République du Haut-Rhin, du 17 Novembre 1982;

DÉCIDE:

Article premier. - Le jugement du tribunal administratif de Strasbourg du 12 Juillet 1984 est annulé.

Art. 2. - La demande présentée par la Société des produits chimiques Ugune-Kuhlman devant le tribunal administratif de Strasbourg est rejetée.

POLLUTION TRANSFRONTIERE - POLLUTION DES EAUX

Rejets salins dans le Rhin des mines domaniales de potasse d'Alsace.

Recevabilité des recours de collectivités publiques et des personnes morales étrangères. Intérêt à agir.

Autorisation de rejet dans les eaux. Décret du 23 février 1973. Autorisation délivrée pour une durée limitée. Renouvellement. Régime juridique applicable. Prorogation. Mesure provisoire et conservatoire non soumise à enquête préalable.

Légalité des autorisations de rejet. Conditions de fond. Prise en compte des effets à l'étranger. Obligation imposée ni par le droit international ni par le droit interne.

Règles de procédure applicables aux autorisations de rejet des installations classées. Coordination des procédures. Article 12 du décret du 23 février 1973. Méconnaissance.

CONSEIL D'ÉTAT, Section 18 Avril 1986

Société "Les mines de potasse d'Alsace"c/province de la Hollande Septentrionale et autres

MM.Jhery, rapp., Dandelot, c. du g., S.C.P. Labbé, Delaporte et S.C.P. Nicolay, av.

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Requête de la société «Les mines domaniales de potasse d'Alsace» tendant à ce que le Conseil d'Etat:

1° Annule le jugement du 27 Juillet 1983 par lequel le tribunal administratif de Strasbourg, à la demande de la province de la Hollande Septentrionale, de la ville d'Amsterdam (Pays-Bas), du Wateringue de Delfand (Pays-Bas), du Wateringue de Rijnland (Pays-Bas), de l'Association de services des eaux (Pays-Bas), de la Fondation Stichting Reinwater (Pays-Bas) et de la Société de transports de l'eau Rhinkennerland (Pays-Bas), a annulé:

- D'une part, trois arrêtés n°s 65-118, 65-119 et 6455-450 du préfet du Haut-Rhin du 22 Décembre 1980 prorogeant jusqu'au 31 Décembre 1981 la durée de validité de trois arrêtés préfectoraux antérieurs autorisant la société des Mines de Potasse d'Alsace (M.P.D.A.) à utiliser les ouvrages de rejet dans le Rhin et le grand canal d'Alsace, sur le territoire de la commune de Fessenheim, pour l'évacuation de divers résidus liquides provenant de leurs installations industrielles;

- D'autre part, un arrêté n° 65-823 du 18 Mars 1981 par lequel le préfet du Haut-Rhin a autorisé la Société des mines de potasse d'Alsace à maintenir et utiliser les ouvrages de rejet sur le grand canal d'Alsace pour l'évacuation de divers résidus liquides provenant de ses installations industrielles;

2° Rejette les demandes présentées par les collectivités et organismes mentionnés ci-dessus devant le tribunal administratif de Strasbourg;

Vu la Constituttion du 4 Octobre 1958

Vu la loi du 16 Décembre 1964, le décret du 23 Février 1973, l'arrêté du 20 novembre 1979;

Vu la loi du 19 Juillet 1976;

Vu le décret du 7 Mai 1980;

Vu le décret du 1er Août 1905;

Vu le traité du 25 Mars 1957;

Vu le Code des tribunaux administratifs;

Vu l'ordonnance du 31 Juillet 1945 et le décret du 30 Septembre 1953;

Vu la loi du 30 Décembre 1977;

En ce qui concerne les conclusions à fin de non-lieu du Ministre de l'Environnement:

Considérant que la circonstance que le préfet du Haut-Rhin a pris, le 5 Septembre 1985, un nouvel arrêté qui aurait le même objet que les arrêtés annulés par le jugement attaqué, ne rend pas sans objet la requête de la Société des Mines de Potasse d'Alsace dirigée contre ce jugement; qu'ainsi, les conclusions à fin de non-lieu, présentées par le Ministre de l'Environnement dans son mémoire en date du 7 Novembre 1985, ne peuvent être accueillies;

En ce qui concerne la recevabilité des demandes présentées par la province de la Hollande septentionale et autres devant le tribunal administratif de Strasbourg:

Considérant que la province de la Hollande septentrionale, la ville d'Amsterdam et les organismes spécialisés Néerlandais, demandeurs devant le tribunal administratif de Strasbourg, exploitent les eaux du Rhin et justifiaient d'un intérêt leur donnant qualité pour déférer à ce tribunal trois arrêtés en date du 22 Décembre 1980 et un arrêté en date du 18 Mars 1981 du préfet du Haut-Rhin relatifs aux déversements effectués dans le Rhin par la Société des Mines de Potasse d'Alsace; que, par suite, cette société n'est pas fondée à soutenir que les demandes de première instance qui, en outre n'étaient pas tardives, étaient irrecevables;

En ce qui concerne les trois arrêtés du 22 Décembre 1980:

Considérant que, saisie d'une demande de renouvellement d'une autorisation de rejet d'effluents dans les eaux superficielles ou souterraines ou dans les eaux de la mer dans les limites territoriales, l'autorité administrative, dans le cas où les procédures d'instruction de la demande ne pourraient être menées à bien avant l'expiration de l'autorisation en cours, peut, pour le motif d'intérêt général tiré des graves conséquences d'ordre économique ou social qui résulteraient d'une interruption dans le fonctionnement d'installations en service, maintenir, à titre conservatoire, la situation découlant de l'autorisation en vigueur en prorogeant celle-ci, par une décision prise avant son terme, pendant le temps nécessaire pour achever l'instruction de la demande; qu'une telle décision, qui n'a pas pour objet de statuer sur la demande et qui ne préjuge en rien le sort qui sera réservé à celle-ci, ne présente le caractère ni d'une modification de l'autorisation en vigueur, ni d'une nouvelle autorisation, et n'est par suite, pas soumise aux procédures d'instruction des décisions d'autorisation fixées par les dispositions combinées du décret du 23 Février 1973 et du décret du 1er Août 1905;

Considérant que le Préfet du Haut-Rhin, de qui la Société des Mines de Potasse d'Alsace avait sollicité en Juillet 1980 le renouvellement d'autorisations de rejet d'effluents dans le grand canal d'Alsace qui venaient à expiration le 31 Décembre 1980, par une demande dont l'instruction ne pouvait être achevée à cette date, n'a pas, en prorogeant pour un an au plus les autorisations en cours, par trois arrêtés du 22 Décembre 1980, pris de décision sur la demande de renouvellement dont il demeurait saisi, et sur laquelle il a d'ailleurs statué le 3 Mars 1981, mais a adopté une mesure exclusivement provisoire et conservatoire qui n'avait pas à être soumise à l'enquête préalable prescrite par l'article 9 du décret du 23 Février 1973; que par suite, c'est à tort que, par le jugement attaqué, le tribunal administratif de Strasbourg s'est fondé sur la méconnaissance de cette disposition réglementaire pour annuler ces trois arrêtés;

Considérant qu'il appartient au Conseil d'Etat, saisi de l'ensemble du litige par l'effet dévolutif de l'appel, d'examiner les autres moyens invoqués devant le tribunal administratif par les demandeurs de première instance;

Considérant, en premier lieu, qu'aucune disposition du droit interne ni aucune stipulation du droit international ne faisait obstacle, à la date à laquelle sont intervenus les arrêtés du 22 Décembre 1980, au principe de la délivrance d'autorisations de rejets d'effluents, ni, par voie de conséquence, à la faculté pour l'administration d'adopter la mesure conservatoire et provisoire ci-dessus analysée;

Considérant, en second lieu, qu'en raison du caractère et de l'objet de ladite mesure, tous les moyens tirés de la méconnaissance tant des règles de procédure que des conditions de fond régissant la délivrance des autoristions de rejet sont inopérants; qu'il en est ainsi, notamment, de la prétendue violation, d'une part, des dispositions des décrets du 1er Août 1905, du 23 Février 1973 et du 7

Mai 1980, d'autre part, et en tout état de cause, des engagements internationaux qui résulteraient de la Convention de Lucerne du 18 Mai 1889, de l'échange de lettres franco-néerlandais du 3 Décembre 1976 ou des directives du Conseil des Communautés Européennes en date des 16 Juin 1975, 18 Juillet 1978 et 15 Juillet 1980;

Considérant, en troisième lieu, qu'il résulte de ce qui précède que le préfet devait se borner, pour prendre les trois arrêtés attaqués, à apprécier la gravité des conséquences respectives d'une interruption des activités de la Société des Mines de Potasse d'Alsace et d'une prorogation, limitée dans le temps, des rejets tels qu'ils résultaient des autorisations en vigueur; qu'il ne ressort pas des pièces du dossier qu'il ait commis, dans la conciliation de tous les intérêts généraux dont il avait à tenir compte, une erreur manifeste d'appréciation;

Considérant que, dans ces conditions, la Société des mines de potasse d'Alsace est fondée à soutenir que c'est à tort que, par le jugement attaqué, le tribunal administratif de Strasbourg a annulé les trois arrêtés du préfet du Hollande Septrionale Haut-Rhin en date du 22 Décembre 1980;

En ce qui concerne l'arrêté du 18 Mars 1981

Considérant que l'article 12 du titre III du Décret précité du 23 Février 1973 comporte, en ce qui concerne les établissements classés, des mesures de coordination entre les procédures respectivement applicables au titre de l'article 9 de ce décret et de la réglementation sur les installations classées pour la protection de l'environnement;

Considérant que le respect de ces dispositions s'impose à la fois aux demandes de première autorisation et aux modifications, lesquelles, en vertu du titre IV du Décret du 23 Février 1973, interviennent «dans les formes établies au titre III relatif aux premières autorisations»; que, par suite, et sans qu'il soit besoin de se prononcer sur le point de savoir si l'Arrêté du 18 Mars 1981 doit, en l'espèce, être regardé comme une modification de l'autorisation antérieure ou une première autorisation, cet arrêté devait être pris conformément aux règles fixées par l'article 12 du Décret du 23 Février 1973, qui lui étaient applicables; qu'il est constant que ces dispositions n'ont pas été respectées, alors qu'il résulte des pièces du dossier que les effluents qui ont fait l'objet de la pétition et de l'autorisation de rejet dans le Rhin sont constitués par des rejets provenant d'installations de la Société des Mines de Potasse d'Alsace relevant de la législation sur les installations classées, ainsi, d'ailleurs, que le reconnaît, dans son mémoire en date du 7 Novembre 1985, le Ministre de l'Environnement, après avoir consulté sur ce point le Conseil Supérieur des Installations Classées; que, par suite, l'Arrêté du 18 Mars 1981 a été pris selon une procédure irrégulière;

Considérant qu'il résulte de ce qui précède que la Société des Mines de Potasse d'Alsace n'est pas fondée à se plaindre de ce que, par le jugement attaqué, le tribunal administratif de Strasbourg a annulé l'arrêté du 18 mars 1981;

DECIDE:

Article premier. - L'article 3 du jugement du tribunal administratif de Strasbourg en date du 27 Juillet 1983 est annulé en tant qu'il annule les arrêtés du Préfet du Haut-Rhin du 22 Décembre 1980.

Article 2. - La demande de la province de la Hollande Septentrionale et autres présentée devant le tribunal administratif de Strasbourg et dirigée contre les arrêtés du préfet du Haut-Rhin du 22 Décembre 1980 et le surplus des conslusions de la requête de la Société des Mines de Potasse d'Alsace sont rejetés.

COUR DE CASSATION (Ch. crim.), 23 mai 1986

Société des Sciences naturelles Loire-Forez et autres

MM. Angevin, prés., Suquet, rapp., Méfort, av. gén.; M° Gauzes, Cautard, av.

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Sur le moyen unique de cassation commun aux trois demandeurs au pourvoi, et pris de la violation de l'article 434-1 du Code Rural, de l'article 593 du Code de Procédure Pénale, violation de la loi, manque de base légale; « en ce que l'arrêt attaqué a relaxé M. Cravero des fins de la poursuite, et, en conséquence mis E.D.F. hors de cause; aux motifs que la poursuite est exercée en vertu de l'article 434-1, alinéa premier du Code Rural, inséré dans ce Code par l'Ordonnance n° 59-25 du 3 janvier 1959, qui incrimine quiconque aura jeté, déversé ou laissé écouler dans les cours d'eau, directement ou indirectement, des substances quelconques, dont l'action ou les réactions ont détruit le poisson ou nui à sa nutrition, à sa reproduction ou à sa valeur alimentaire; qu'en l'espèce, la retenue du barrage de la Beaume fait partie d'un cours d'eau puisqu'elle communique au moins avec le cours supérieur du Lignon, qui l'alimente; que les boues mêlées de débris végétaux, dont le versement en aval, au cours des opérations de vidange, a détruit le poisson, ont été apportées dans cette retenue par la rivière elle-même; qu'un tel déversement de produits naturels se trouvant déjà dans le cours d'eau au moment de l'intervention du prévenu n'entre pas dans les prévisions de l'article 434-1 du Code rural; alors que l'article 434-1 du Code rural prévoit et réprime le fait de laisser écouler dans les cours d'eau directement ou indirectement des

substances quelconques dont l'action ou les réactions ont détruit le poisson ou nui à sa nutrition, à sa reproduction; qu'il ressort des énonciations de l'arrêt que le 7 septembre 1981 l'opération de vidange dont était responsable le prévenu a eu pour effet de laisser écouler dans le cours d'eau « Lignon » en aval du barrage, des boues qui jusqu'alors étaient retenues par ledit barrage; que cet écoulement a eu pour effet de détruire une grande quantité de poissons; qu'en statuant comme elle l'a fait, la Cour n' a pas tiré les conséquences juridiques de ses propres constatations qui caractérisaient l'infraction prévue et réprimée par l'article 434-1 du Code Rural »;

Attendu qu'il résulte de l'arrêt attaqué *(Lyon, 4° Ch., 22 juin 1983)* qu'au cours d'une opération de vidange d'un barrage exploité par l'Electricité de France (E.D.F.), des parois boueuses qui formaient le lit de la rivière se sont effondrées en provoquant un rejet important d'eau chargée de boue et qu'il en est résulté une baisse du taux d'oxygène dans l'eau et la destruction de poissons;

Attendu que pour relaxer Cravero, ingénieur de l'E.D.F., prévenu du délit de pollution de cours d'eau, la cour d'appel énonce que les boues ont été apportées dans la retenue du barrage par la rivière elle-même et « qu'un tel déversement de produits naturels se trouvant déjà dans le cours d'eau au moment de l'intervention du prévenu n'entre pas dans les prévisions de l'article 434-1 du Code Rural »;

Attendu qu'en l'état de ces constatations de fait souverainement appréciées desquelles il résulte que ne sont pas réunis les éléments constitutifs du délit de pollution prévu par l'ancient article 434-1 du Code Rural auquel a été substitué l'article 407 dudit Code, la cour d'appel a donné une base légale à sa décision; d'où il suit que le moyen doit être rejeté;

Et attendu que l'arrêt est régulier en la forme;

REJETTE LES POURVOIS

ASSOCIATIONS - INSTALLATION CLASSÉE

Décharge d'ordures ménagères. Autorisation temporaire. Installation appelée à fonctionner pour une durée supérieure à un an. Légalité (non).

Insallation autorisée malgré les risques grafes de pollutions de la nappe phréatique. Illégalité de l'arrête préfectoral.

Recourse en indemnisation. Dispense d'advocat (non). Dommage écologique. Réparation (non). Remboursement des frais d'instance de l'association (non).

TRIBUNAL ADMINISTRATIF DE BORDEAUX
2 octobre 1986
SEPANSO c/Ministère de l'Environnement et du Cadre de vie

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Considérant que les reqêtes n° 1638/85et n° 117/85 de la SEPANSO présentent à juger des questions semblables; qu'il y a lieu de les joindre pour y être statué par une seule décision;

Sur la requête n° 1173/85

En ce qui concerne la recevabilité:

Considérant que le SEPANSO, Association pour la protection de la nature a intérêt à agir; qu'il ne résulte pas des pièces du dossier que son président n'avait pas qualité pour ester en justice.

En ce qui concerne l'intervention de l'Association Aquitaine-Alternatives:

Considérant que l'Association « Aquitaine-Alternatives» a intérêt à l'annulation des décisions attaquées, qu'ainsi son intervention est recevable.

En ce qui concerne les conclusions à fin d'annulation des arrêtés du 10 juillet 1984 et du 10 janvier 1985:

Considérant qu'aux termes de l'article 23 du décret du 21 Septembre 1977: « Dans le cas où l'installation n'est appelée à fonctionner que pendant une durée de moins d'un an dans des délais incomptatibles avec le déroulement de la procédure normale d'instruction, le préfet peut accorder, à la demande de l'exploitant... une autorisation pour une durée de six mois renouvelable une fois, sans enquête publique...»; que ces dispositions ne permettent pas à l'autorité administrative d'autoriser l'exploitation d'une installation qui est appelée à fonctionner sur une durée supérieure à un an, et pour laquelle une procédure d'instruction de la demande est en cours;

Considérant que si l'administration soutient que ces arrêtés renouvelant pour une période de six mois l'autorisation d'exploiter la décharge, sont intervenus sur le fondement de l'article 24 de la loi du 19 Juillet 1976, cette disposition prévoit seulement la mise en demeure par le préfet d'avoir à régulariser la situation; qu'il n'est pas contesté que le site d'implantation ne convenait pas à une décharge d'ordures ménagères; que dès lors le Commissaire de la République ne pouvait autoriser l'exploitation de ladite décharge; qu'il a lieu par suite d'annuler les arrêtés du 10 Juillet 1984 et du 10 Janvier 1985 du Commissaire de la République du Département de la Gironde.

En ce qui concerne les conclusions à fin d'annulation de l'arrêté du 3 Juillet 1985:

Considérant qu'aux termes de l'article premier de la loi du 19 Juillet 1976: «Sont soumis aux dispositions de la présente loi les usines, ateliers, dépôts... qui peuvent présenter des dangers ou des inconvénients soit pour la commodité du voisinage, soit pour la santé, la sécurité, la salubrité, soit pour la protection de la nature et de l'environnement»; qu'aux termes de l'article 3 du même texte: «L'autorisation ne peut être accordée que si ces dangers ou inconvénients peuvent être prévenus par des mesures que spécifie l'arrêté préfectoral»;

Considérant qu'il résulte de l'instruction que la décharge d'ordures ménagères de la Brède présente de graves risques de pollution chimique de la nappe phréatique; que dès lors, le commissaire de la République du département de la Gironde ne pouvait légalement par l'arrêté attaqué autoriser l'exploitation de la décharge de la Brède; que dès lors ledit arrêté doit être annulé.

En ce qui concerne les conclusions tendant à la fermeture de la décharge publique de la Brède:

Considérant que le tribunal ne peut en tout état de cause ordonner la fermeture de l'établissement litigieux, laquelle ne peut être prononcée que par le Commissaire de la République.

Sur la requête n° 1638/85

En ce qui concerne l'intervention de l'Association « Aquitaine-Alternatives»:

Considérant qu'aux termes de l'article R-78 du Code des Tribunaux Administratifs: « Les recours et les mémoires doivent être présentés et signés par un avocat au Conseil d'Etat et à la Cour de Cassation, soit par un avocat inscrit au barreau, soit par un avoué en exercice dans le ressort du Tribunal Administratif intéressé»;

Considérant que l'intervention de l'Association «Aquitaine-Alternatives» est présentée au soutien de conclusions tendant à la condamnation de l'Etat à verser à la SEPANSO une indemnité de 70 000 F; qu'un tel litige n'est pas au nombre de ceux qui sont dispensés du ministère d'avocat par l'article R. 79 du même code; que dès lors l'intervention de l'Association «Aquitaine-Alternatives» ne saurait être admise.

En ce qui concerne la demande d'indemnité:

Considérant en premier lieu que la SEPANSO ne justifie pas d'un préjudice matériel et n'invoque par ailleurs qu'un «dommage écologique» qui n'est pas susceptible d'ouvrir droit à indemnité à son profit;

Considérant en second lieu que la SEPANSO demande le remboursement des frais qu'elle a été amenée à engager à l'occasion des différentes instances; que s'agissant d'instances devant la juridiction administrative cette demande ne saurait être accueillie;

Considérant qu'il résulte de ce qui précède que la SEPANSO n'est pas fondée à demander une indemnité;

DÉCIDE:

Article premier. - L'intervention de l'Association «Aquitaine Alternatives» est admise en ce qui concerne la requête n° 1173/85.

Art. 2. - Les arrêtés du 10 Juillet 1984, 10 Janvier 1985 et 3 Juillet 1985 du Commissaire de la République du département de la Gironde sont annulés; le surplus des conclusions de la requête n°1173/85 est rejeté.

Art. 3. - L'intervention de l'Association «Aquitaine-Alternatives» n'est pas admise en ce qui concerne la requête n° 1638/85

Art. 4 - La requête n° 1638/85 est rejetée.

Arrêté de protection de biotope. Création. Consultation de la chambre départementale d'agriculture. Absence. Vice de forme substantiel. Annulation (2e espèce).

TRIBUNAL ADMINISTRATIF DE POITIERS, 26 Novembre 1986

Association des Deux-Sèvres d'Etude et d'Action pour la Sauvegarde de la Nature et de l'Environnement (A.S.N.A.T.E.)

MM. Bourderioux, rapp., de Sevin, c. du g., Me Roche, av.

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1° Vu, enregistrée le 25 Juin 1986, la requête présentée pour l'A. S. N. A. T. E. tendant à annulation de l'arrêté en date du 25 Avril 1986 du préfet, commissaire de la République des Deux-Sèvres, portant protection d'un biotope sur le territoire des communes de Gourgé, Lageon, Louin et Saint-Loup-Lamairé, constitué par l'emprise de la retenue d'eau du Cébron et de ses rives; et la requête présentée pour l'A.S.N.A.T.E. et tendant à ce que le tribunal ordonne qu'il soit sursis à l'exécution de la décision visée ci-dessus;

Sans qu'il soit besoin d'examiner les autres moyens de la requête:

Considérant qu'en vertu des dispositions du premier alinéa de l'article 4 du décret n° 77-1295 du 25 Novembre 1977, les mesures de conservation de biotopes destinées à prévenir la disparition de certaines espèces animales peuvent donner lieu à des arrêtés préfectoraux; qu'aux termes des dispositions du deuxième alinéa dudit article 4: «Les arrêtés préfectoraux mentionnés à l'alinéa précédent sont pris après avis de la commission départementale des sites siégeant en formation de protection de la nature ainsi que de la chambre départementale d'agriculture»;

Considérant qu'en l'espèce il est constant que l'arrêté préfectoral, en date du 25 avril 1986, portant protection d'un biotope constitué par l'emprise de la retenue d'eau du Cébron et de ses rives n'a pas été précédé de la consultation de la chambre départementale d'agriculture; que cette irrégularité constitue un vice de forme substantiel de nature à entacher d'illégalité l'arrêté attaqué;

Considérant que l'administration n'établit pas l'existence de circonstances exceptionnelles ayant pour effet de la dispenser d'accomplir la consultation susmentionnée;

Considérant qu'il résulte de ce qui précède que l'association reqérante est fondée à soutenir que l'arrêté attaqué est entaché d'illégalité;

Sur la requête n° 738-86/CG:

Considérant que le présent jugement rend sans objet les conclusions aux fins qu'il soit sursis à l'exécution de la décision attaquée; qu'il n'y a, dès lors, pas lieu d'y statuer;

DÉCIDE:

Article premier. - L'intervention de la Fédération Française des sociétés de Protection de la nature est admise.

Article 2. - L'arrêté en date du 25 avril 1986 du commissaire de la République du département des Deux-Sèvres est annulé.

Article 3. - Il n'y a lieu de statuer sur la requête n° 738-86/CG.

ÉTUDE D'IMPACT

Champ d'application, Coût financier. Programme général. Notion. Programme de rénovation urbain. Opérations de voirie. Opérations distinctes. Coût inférieur au seuil de 6 millions. Nécessité d'une étude d'impact préalable à la D.U.P. Non.

CONSEIL D'ÉTAT, 16 janvier 1987

Commune de Gif-sur Yvette
(Req. n° 55-711)

Mme Lenoir, rapp., M. Stirn, c. du g., M^e^ Odent, av.

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Vu la requête sommaire et le mémoire complémentaire présentés pour la commune de Gif-Sur-Yvette, tendant à ce que le Conseil d'Etat:

1° Annule le jugement du 21 Juillet 1983 du Tribunal Administratif de Versailles en tant qu'il a annulé, à la demande de Mmes Huet, Joly et Héloir, l'arrêté du 25 Avril 1980 du préfet de l'Essonne portant déclaration d'utilité publique de l'acquisition d'une parcelle destinée au dédoublement de la rue Amodru, située au centre de la commune;

2° Rejette les conclusions de la demande de Mmes Huet, Joly et Héloir devant le Tribunal Administratif de Versailles tendant à l'annulation de cet arrêté;

Considérant qu'aux termes du deuxième alinéa de l'article 2 de la Loi du 10 Juillet 1976 relative à la protection de la nature: «Les études préalables à la réalisation d'aménagements ou d'ouvrages qui, par l'importance de leurs dimensions ou leurs incidences sur le milieu naturel, peuvent porter atteinte à ce dernier doivent comporter une étude d'impact permettant d'en apprécier les conséquences»; que le premier alinéa de l'article 3-B du Décret du 12 Octobre 1977, pris pour l'application de l'article 2 précité de la Loi du 10 Juillet 1976, dispense de la procédure de l'étude d'impact «tous aménagements, ouvrages et travaux dont le coût total est inférieur à six millions de francs. En cas de réalisation fractionnée, le montant à retenir est celui du programme général»;

Considérant que l'ensemble des opérations de voirie et d'urbanisme destinées à assurer la rénovation du centre urbain de Gif-sur-Yvette et faisant l'objet du contrat régional passé entre cette commune et le Conseil Régional de l'Ile-de-France, dont le coût global s'élève à 18 149 886 F, se compose d'une série d'opérations indépendantes les unes des autres et dont chacune a sa finalité propre et ne peut être regardée comme un seul programme d'aménagements, d'ouvrages et de travaux au sens des dispositions précitées du décret du 12 Octobre 1977; qu'il suit de là que, pour l'application de ces dispositions, il convient de prendre en compte non le montant cumulé des opérations inscrites au programme, mais le coût de chacune de celles qui forment un ensemble distinct d'aménagement et de travaux; qu'il ressort des pièces du dossier que l'ensemble des opérations que forment le doublement de la rue Amodru, l'aménagement de la rue existante et celui de ses abords, constitue un

programme d'opérations distinct d'autres opérations prévues au plan général de rénovation du centre de la ville, telles que la construction d'une salle de réunion, d'un marché public et de parcs de stationnement pour les véhicules, dont la réalisation n'est pas rendue nécessaire par l'aménagement de la rue Amodru; que le coût total de l'aménagement, de cette rue et de ces abords, pour l'exécution duquel a été pris l'arrêté préfectoral déclarant l'utilité publique de ces travaux, est évalué à 3 300 000 F; que cette opération n'est donc pas soumise à la procédure d'étude d'impact; que c'est dès lors à tort que le Tribunal Administratif de Versailles s'est fondé sur la méconnaissance des dispositions de l'article 2 de la loi du 10 Juillet 1976 pour annuler l'arrêté attaqué;

Considérant toutefois qu'il appartient au Conseil d'Etat, saisi de l'ensemble du litige par l'effet dévolutif de l'appel, d'examiner les autres moyens soulevés par Mmes Huet, Joly et Héloir devant le tribunal administratif de Versailles;

Considérant, en premier lieu, que la procédure de déclaration d'utilité publique et celle relative aux autorisations de défrichement prévue au Code forestier sont deux procédures administratives distinctes et indépendantes; que par suite, la légalité d'une déclaration d'utilité publique n'est pas subordonnée à l'intervention préalable d'une autorisation de déboiser;

Considérant, en second lieu, que si une opération ne peut légalement être déclarée d'utilité publique que si les atteintes à la propriété privée, le coût financier et éventuellement, les inconvénients d'ordre social ou l'atteinte à d'autres intérêts publics qu'elle comporte ne sont pas excessifs eu égard à l'intérêt qu'elle présente, il ressort des pièces du dossier que l'opération sur laquelle a porté la déclaration d'utilité publique attaquée ne compromet pas la sécurité des riverains et que les nuissances qu'elle entraîne pour ceux-ci ne sont pas excessives eu égard à l'intérêt de cette opération destinéee à améliorer la circulation urbaine;

Considérant qu'il résulte de tout ce qui précède que, sans qu'il soit besoin d'examiner la recevabilité de la demande de Mmes Huet, Joly et Héloir devant le tribunal administratif, la commune de Gif-sur-Yvette est fondée à soutenir que c'est à tort que le tribunal administratif a annulé l'arrêté du préfet de l'Essonne du 25 Avril 1980;

DÉCIDE:

Article premier. - L'article 2 du jugement du Tribunal Administratif de Versailles en date du 21 Juillet 1983 est annulé.

Art. 2. - Les conclusions de la demande présentées par Mmes Huet, Joly et Héloir devant le Tribunal Administratif de Versailles, tendant à l'annulation de l'arrêté du préfet de l'Essonne du 25 Avril 1980, sont rejetées.

Art. 3. - La présente décision sera notifiée à la Commune de Gif-sur-Yvette, à Mmes Huet, Joly et Héloir et au Ministre de l'Intérieur.

INSTALLATIONS CLASSÉES

Dépôt de ferraille. Exploitation sans autorisation. Rejet de la demande de régularisation et mise en demeure de cesser l'activité. Décision devenue définitive. Refus du préfet de revenir sur sa décision. Droits acquis de l'exploitant. Moyen inopérant. Nuisances rendant toujours la fermeture nécessaire. Légalité du refus.

CONSEIL D'ÉTAT, 20 février 1987

M. Chevalerias (Req. n° 70-051)

MM. Arnoult, rapp., Guillaume, c.du g., M^e^ Goutet, av.

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Vu la requête le 1er Juillet 1985 au Secrétariat du Contentieux du Conseil d'Etat, présentée pour M. Jean chevalerias, et tendant à ce que le Conseil d'Etat:

1° Annule jugement du 28 Mars 1985 par lequel le Tribunal Administratif de Clermont-Ferrand a rejeté sa demande dirigée contre la décision du 28 Mars 1984 par laquelle le préfet, Commissaire de la République du Puy-de-Dôme, a refusé de revenir sur la décision de fermeture du dépôt de ferraille exploité pour M. Chevalerias, et qui a fait l'objet des arrêtés préfectoraux des 3 Juillet et 6 Août 1979 donnant à l'intéressé jusqu'au 1er Octobre 1979 pour cesser son activité;

2° Annule pour excès de pouvoir cette décision;

Considérant que, par un arrêté en date du 7 Décembre 1976, le préfet commissaire de la République du Puy-de-Dôme, a refusé à M. Chevalerias l'autorisation qu'il sollicitait, à titre de régularisation, d'exploiter une installation de récupération de matériaux au lieu dit «Le Chambon», dans la commune de Thiers, et lui a accordé un délai de deux ans pour cesser son activité; que ce délai été prorogé jusqu'au 1er octobre 1979 par deux arrêtés les 3 Juillet et 6 Août 1979; que, par la décision attaquée, le préfet a refusé de revenir sur la décision ordonnant à M. Chevalerias de cesser con activité;

Considérant qu'aux termes de l'article 24 de la Loi n° 76-663 du 19 Juillet 1976 «Lorsqu'une installation classée est exploitée sans avoir fait l'objet de... l'autorisation requise par la présente loi, le préfet met

l'exploitation en demeure de régulariser sa situation... en déposant… une demande d'autorisation. Si sa demande d'autorisation est rejetée, le préfet peut, en cas de nécessité, ordonner la fermeture ou la suppression de l'installation...» ;

Considérant, d'une part, que l'arrêté préfectoral susanalysé du 7 Décembre 1976 étant devenu définitif, le moyen de M. Chevalerias , tiré de ce qu'ayant des droits acquis à exploiter son installation sans autorisation, le préfet du Puy-de-Dôme aurait dû revenir sur la décision de cessation d'activité prise à son encontre ne saurait, en tout état de cause, être accueilli;

Considérant, d'autre part, qu'il résulte de l'instruction que l'installation de M. Chevalerias entraîne des nuisances qui rendent toujours nécessaire sa fermeture; que, dès lors, les circonstances alléguées par le requérant, tirées de l'impossibilité matérielle dans laquelle il se trouve d'effectuer son déménagement et des incidences économiques et sociales que celui-ci entraînerait étant inopérantes, M. Chevalerias n'est pas fondé à soutenir que c'est à tort que, par le jugement attaqué, le Tribunal Administratif de Clermont-Ferrand a rejeté sa demande;

DÉCIDE:

Article premier. - La requête de M. Chevalerias est rejetée.

Article 2. - La présente décision sera notifiée à M. Chevalerias et au Ministre Délégué auprès du Ministre de l'Equipement, du Logement, de l'Aménagement du Territoire et des Transports, chargé de l'Environnement.

POLLUTION DES EAUX

Rejet accidentel. Acide chlorydrique. - Destruction totale de la faune piscicole. - Déversement chronique de lacto-sérum. - Dégradation de la flore et de la faune. - Infractions constituées à l'article 407 nouveau du Code rural.

Sanctions. Article 409 du Code pénal. Amendes. Emprisonnement avec sursis. Peines complémentaires. Obligation de traiter les eaux usées. Astreinte. Article 463 du Code rural.

Parties civiles. Recevabilité. Préjudice. Evaluation.

TRIBUNAL CORRECTIONNEL MENDE,
12 Août 1987

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En ce jour 16 Juillet 1987, l'audience étant toujours publique, le Tribunal, vidant son délibéré, a statué en ces termes:

André Sabadel fait l'objet des procédures suivantes:

N°s 1756, 1757, 1758, 3395, 3343-86 du Parquet comme prévenu d'avoir, à Chambon-le-Château (48), les 14 Mars, 24 Avril, 28 mai, 18 Septembre et 19 Novembre 1986, jeté, déversé ou laissé écouler dans les eaux de la rivière Ance, directement ou indirectement, des substances quelconques dont l'action ou les réactions ont détruit le poisson ou nui à sa nutrition, à sa reproduction ou à sa valeur alimentaire; fait prévu et réprimé par les articles 407 et 409 du Code rural;

N° 677-87 du Parquet comme prévenu d'avoir à Chambon-le-Château, le 11 Février 1987, jeté, déversé ou laissé écouler dans les eaux de la rivière Ance, directement ou indirectement, des substances quelconques dont l'action ou les réactions ont détruit le poisson ou nui à sa nutrition, à sa reproduction ou à sa valeur alimentaire; fait prévu et réprimé par les articles 407 et 409 du Code rural;

N° 676, 819-87 du Parquet comme prévenu d'avoir à Chambon-le-Château, le Château (48), les 7 et 21 Mars 1987, jeté, déversé ou laissé écouler dans les eaux de la rivière Ance, directement ou indirectement, des substances quelconques dont l'action ou les réactions ont détruit le poisson ou nui à sa nutrition, à sa reproduction ou à sa valeur alimentaire; fait prévu et réprimé par les articles 407 et 409 du Code rural;

Il y a lieu d'ordonner la jonction des trois procédures et de statuer par un seul et même jugement;

Sur les faits constatés le 14 Mars 1986

André Sabadel reconnaît les faits qui lui sont reprochés et soutient que les causes de la pollution sont purement accidentelles. Il est établi qu'à la suite d'une rupture de vanne d'une cuve, 3.000 litres d'acide chlorhydrique on été évacués, provoquant une destruction totale de la faune piscicole dans l'Ance du Sud, sur une distance de 10 km;

Sur les faits constatés les 24 Avril, 28 mai, 18 Septembre et 19 Novembre 1986, 11 Février, 7 Mars et 21 Mars 1987:

André Sabadel soutient que les éléments de l'infraction ne sont pas réunis, aucune mortalité de poisson, aucune atteinte à la flore n'ayant été constatée; de plus, sauf en ce qui concerne les faits du 21 Mars 1987, les résultats des prélèvements effectués par l'administration n'ont pas été communiqués, si bien qu'un doute subsiste sur l'origine des pollutions et la seule analyse communiquée fait apparaître des quantités infimes d'azote nitrique, d'azote nitreux et d'azote total;

Les procès-verbaux versés au dossier font ressortir un

rejet chronique de lacto-sérum à la rivière par la laiterie Sabadel. Or, le lacto-sérum est une substance toxique qui nuit à la flore aquatique;

Un déversement continuel ou important provoque en effet une carence en oxygène et par conséquent asphyxie la faune et la flore;

La dégradation de la flore ou de la faune aquatique consommant le délit de pollution, André Sabadel doit être déclaré coupable de l'ensemble des faits qui lui sont reprochés;

Sur la sanction:

Compte tenu de la gravité des faits, il convient de condamner André Sabadel à 8 000 F d'amende et un mois d'emprisonnement avec sursis, un extrait du jugement devant être inséré aux frais du condamné dans le journal «La lozère nouvelle»;

En outre, en application de l'article 409 du Code rural, André Sabadel devra mettre en oeuvre les investissements permettant un traitement des eaux usées de la laiterie, dans un délai de un an, les travaux devant être effectués en relation avec l'agence du bassin Loire-Bretagne.

Sur les constitutions de parties civiles:

Se constituent parties civiles:

- La Fédération de pêche de la Haute-Loire qui demande les sommes de: 86 712,94F en réparation de son préjudice, 25 000 F à titre de dommages-intérêts, lesdites sommes avec intérêts de droit, 6 000 F sur la base de l'article 475- 1 du Code de Procédure Pénale;

- La Fédération départementale des Associations de pêche et de pisciculture de la Lozère qui sollicite les sommes de: 17 707,18 F avec intérêts au taux légal et 4 000 F sur la base de l'article 475-1 du Code de Procédure Pénale;

- L'Association nationale agréée de protection des salmonidés, dite T.O.S, qui demande les sommes de 5 000 F pour le préjudice matériel et 3 000 F pour le préjudice moral;

Les constitutions de partie civile sont recevables;

Au vu du rapport de Christian Romieux, garde-chef commissionné de l'administration, il convient d'allouer à:

1. La Fédération de Pêche de Haute-Loire: les sommes de 86 712,94 F en réparation du préjudice subi et 1 000 F sur la base de l'article 475-1 du Code de procédure pénale;

2. La Fédération de Pêche de la Lozère, les sommes de 17 707,18F en réparation du dommage subi et 1 000 F en application de l'article 475-1 du Code de procédure pénale;

3. T.O.S., toutes causes de préjudices confondues, la somme de 2 000 F;

PAR CES MOTIFS:

Le Tribunal, statuant publiquement, contradictoirement et en premier ressort, après en avoir délibéré conformément à la loi:

Ordonne la jonction des procédures 1756, 1757, 1758, 3395, 3543-86, 677-87, 676, 819-87 du Parquet;

Déclare André Sabadel coupable du délit de pollution;

En répression, le condamne à la peine de huit mille francs d'amende (8 000 F) et un mois d'emprisonnement;

Dit toutefois qu'il sera sursis à l'exécution de la peine d'emprisonnement dans les conditions des articles 734 et 735 du Code de procédure pénale;

Ordonne la publication, par extrait, du présent jugement aux frais d'André Sabadel sans que ceux-ci ne dépassent la somme de deux mille francs, dans le journal «La Lozère nouvelle»;

Condamne André Sabadel à mettre en place un dispositif de traitement des rejets, en relation avec l'agence du bassin Loire-Bretagne, dans un délai de un an à compter du présent jugement et, passé ce délai, sous astreinte de deux cent cinquante francs par jour de retard;

Reçoit les constitutions de parties civiles de la Fédération de pêche de la Haute-Loire, de la Fédération de pêche et de pisciculture de la Lozère et de l'Association nationale agréée de protection des salmonidés, dite T.O.S.;

Condamne André Sabadel à payer:

- A la Fédération de pêche de Haute-Loire la somme de quatre-vingt -six mille sept cent douze francs et quatre-vingt-quatorze centimes (86 712,94 f) en réparation du dommage subi et mille francs (1 000 F) sur la base de l'article 475-1 du Code de procédure pénale;

- A la Fédération de pêche et de pisciculture de la Lozère, la somme de dix-sept mille sept cent sept francs et dix-huit centimes (17 707,18 F) en réparation du dommage subi et mille francs (1 000

F) en application de l'article 475-1 du Code de procédure pénale;

- A T.O.S., la somme de deux mille francs (2 000 F), toutes causes de préjudices confondues.

CONSEIL D'ETAT. SECTION DU CONTENTIEUX. 5ÈME ET 3ÈME SOUS-SECTIONS. MINISTERE DE L'INDUSTRIE, DES POSTES ET TELECOMMUNICATIONS ET DU TOURISME c/L'Etat 30 juin 1989 N 89.883.

Cette décision sera publiée au Recueil LEBON

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Sur le rapport de la 5ème sous-section

Vu le recours et le mémoire complémentaire du MINISTRE DE L'INDUSTRIE, DES P ET T ET DU TOURISME enregistrés les 28 juillet 1987 et 29 Septembre 1987 au Contentieux du Conseil d'Etat, et tendant à ce que le Conseil d'Etat:

1) annule le judgement du 11 juin 1987, par lequel le tribunal administratif de Strasbourg a d'une part, annulé les arretés du 21 février 1986 relatifs aux autorisations de rejets radio-actifs gazeux et liquides par le centre de production nucléaire et, de Cattenom en tant qu'ils concernent les tranches 3 et 4 de la Centrale nucléaire et d'autre part, sursis à statuer sur le surplus des conclusions des demandes qui lui étaient présentées jusqu'à ce que la cour de justice des communautés européennes se soit prononcée sur la question de savoir si l'article 37 du traité du 25 mars 1957 instituant la communauté européenne de l'énergie atomique exige que la commission des communautés européennes soit saisie avant que les rejets d'effluents radio-actifs par les centres de production nucléaire soient autorisés par les autorités compétentes des Etats membres, lorsqu'une procédure d'autorisation préalable est instituée, ou avant qu'ils soient effectués par les centres de production nucléaire et a renvoyé à la cour de justice des communautés européennes la question relative à l'interprétation de ces dispositions,

2) rejette les demandes présentées devant le tribunal administratif de Strasbourg,

Vu la loi du 2 Août 1961 relative à la lutte contre les pollutions atmosphériques et les odeurs, et portant modification de la loi du 19 Décembre 1917, et notamment son article 8;

Vu le décret No.63-228 du 11 Décembre 1963 relatif aux installations nucléaires;

Vu le décret No.77-945 du 6 Novembre 1974 relatif au rejet d'effluents provenant des installations nucléaires de base et des installations nucléaires implantées sur le même site;

Vu le décret No.74 1181 du 31 Décembre 1974 relatif aux rejets d'effluents radioactifs liquides provenant d'installations nucléaires;

Vu le décret du 11 Octobre 1978 déclarant d'utilité publique les travaux de construction de la centrale nucléaire de Cattenom et de ses installations annexes;

Vu les décrets du 24 Juin 1982 et du 29 Février 1984 autorisant la création par Electricité de France de tranches de la centrale nucléaire de Cattenom;

Vu les arrêtés du 21 Octobre 1988 retirant l'autorisation de rejet d'effluents radioactifs liquides et gazeux par le centre de production nucléaire de Cattenom (Tranches 1 et 2);

Vu le décret No. 88-907 du 2 Septembre 1988;

Vu le Code des tribunaux administratifs et des cours administratives d'appel;

Vu le l'ordonnance No. 45-1708 du 31 Juillet 1945, le décret No. 53-934 du 30 Septembre 1953 et et la loi No. 87-1127 du 31 Décembre 1987 ;

Vu le décret No. 88-907 du 2 Septembre 1988 portant diverses mesures relatives à la procédure administrative contentieuse, et notamment sont article 1er ;

Sur les conclusions tendant à l'annulation de l'article 3 du jugement attaqué,

Considérant que le MINISTRE DE L'INDUSTRIE DES P ET T ET DU TOURISME s'est désisté de ses conclusions dirigées contre l'article 3 du jugement par lequel le tribunal administratif de Strasbourg a sursis à statuer sur la demande tendant à l'annulation des arrêtés interministériels du 21 Février 1986 autorisant le rejet d'effluents radioactifs gazeux et liquide par la centrale nucléaire de Cattenom en tant que ces arrêtés concernent les tranches 1 et 2 de cette centrale jusqu'à ce que la cour de justice des communautés européennes se soit prononcée sur l'interprétation de l'article 37 du traité du 25 Mars 1957 instituant la communauté européenne de l'énergie atomique ; que ce désistement est pur et simple ; que rien ne s'oppose à ce qu'il soit donné acte ;

Sur les conclusions dirigées contre l'article 2 du jugement attaqué par lequel le tribunal administratif de Strasbourg a annulé les arrêtés du 21 Février 1986 en tant qu'ils concernent les tranches 3 et 4 de la centrale nucléaire de Cattenom ;

Considérant que les décrets autorisant la création de tranches d'une centrale nucléaire n'ont pas le caractère d'un acte réglementaire dont l'illégalité pourrait être invoquée, par voie d'exception, après l'expiration des délais de recours contentieux à l'appui d'un recours dirigé contre des actes relatifs au fonctionnement de cette centrale ;

Considérant que les décrets du 24 Juin 1982 et du 29 Février 1984 autorisant la création, par Electricité de France de tranches de la centrale nucléaire de Cattenom,

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Section 9

Friends of the Old Man River

FRIENDS OF THE OLDMAN RIVER v. CANADA

SA MAJESTÉ LA REINE DU CHEF DE L'ALBERTA, REPRÉSENTÉE PAR LE MINISTRE DE TRAVAUX PUBLICS, DES APPROVISIONNEMENTS ET DES SERVICES
APPELANTE

ET;

LE MINISTRE DES TRANSPORTS ET LE MINISTRE DES PÊCHES ET DES OCÉANS
APPELANTS

C.

FRIENDS OF THE OLDMAN RIVER SOCIETY *INTIMÉE*

ET

LE PROCUREUR GÉNÉRAL DU QUÉBEC, LE PROCUREUR GÉNÉRAL DU NOUVEAU-BRUNSWICK, LE PROCUREUR GÉNÉRAL DE LA COLOMBIE-BRITANNIQUE, LE PROCUREUR GÉNÉRAL DE LA SASKATCHEWAN, LE PROCUREUR GÉNÉRAL DE TERRE-NEUVE, LE MINISTRE DE LA JUSTICE DES TERRITOIRES DU NORD-OUEST, LA FRATERNITÉ DES INDIECES DU CANADA/ L'ASSEMBLÉE DES PREMIÈRES NATIONS, LA NATION DÉNÉE ET L'ASSOCIATION DES MÉTIS DES TERRITOIRES DU NORD-OUEST, LE CONSEIL NATIONAL DES AUTOCHTONES DU CANADA (ALBERTA), LE SIERRA LEGAL DEFENCE FUND, L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT, LE SIERRA CLUB OF WESTERN CANADA, SURVIE CULTURELLE (CANADA), LES AMIS DE LA TERRE ET L'ALBERTA WILDERNESS ASSOCIATION *INTERVENANTS*

RÊPERTORIÊ: FRIENDS OF THE OLDMAN RIVER SOCIETY c. CANADA (MINISTRE DES TRANSPORTS)

No du greffe: 21890.

1991: 19, 20 février; 1992: 23 janvier.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson et Lacobocci.

EN APPEL DE LA COUR D'APPEL FEDERALE

Droit constitutional - Répartition des pouvoirs législatifs - Environnement - Êvaluation environnementale - Les lignes directrices fédérales en matière d'environnement sont-elles intra vires du Parlement? - Loi constitutionnelle de 1867, art. 91, 92 - Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement, DORS/84-467.

Droit de l'environnement - Évaluation environnementale - validité législative du décret fédéral sur les lignes directrices en matière d'environnement - Le décret sur les lignes directrices est-il autorisé par l'art. 6 de la Loi sur le ministère de l'Environnement - Le décret sur les lignes directrices est-il incompatible avec la Loi sur la protection des eaux navigables? - Loi sur le ministère de l'Environnement, L.R.C. (1985), ch. E-10, art. 6 . - Loi sur la protection des eaux navigables, L.R.C. (1985), ch. N.22, art. 5, 6 - Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière

d'environnement, DORS/84-467.

Droit de l'environnement - Évaluation environnementale - Applicabilité du décret fédéral sur les lignes directrices en matière d'environnement - Construction d'un barrage par l'Alberta sur la rivière Oldman - Barrage touchant des domaines de compétence fédérale comme les eaux navigables et les pêches - Le décret sur les lignes directrices s'applique-t-il seulement aux nouveaux projets fédéraux - Le ministre de Transports et le ministre des Pêches et des Océans sont-ils tenus de se conformer au décret sur les lignes directrices? - Loi sur le ministère de l'Environnement, L.R.C. (1985), ch. E-10, art. 4(1)a), 5a)(ii), 6 - Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement, DORS/84-467, art. 2 «proposition», «ministère responsable», 6 - Loi sur la protection des eaux navigables, L.R.C. (1985), ch. N-22, art. 5 - Loi sur les pêches, L.R.C. (1985), ch. F-14, art. 35, 37.

Couronne - Immunité - Provinces - La Couronne du chef de la province est-elle liée par les dispositions de la Loi sur la protection des eaux navigables, L.R.C. (1985), ch. N-22? - Loi d'interprétation, L.R.C. (1985), ch. 1-21 art. 17.

Droit administratif - Contrôle judiciaire - Redressements - Pouvoir discrétionnaire - Construction d'un barrage par l'Alberta sur la rivière Oldman - Barrage touchant des domaines de compétence fédérale comme les eaux navigables et les pêches - Groupe environnemental, par demande de bref de certiorari et de bref de mandamus à la Cour fédérale, cherche à forcer le ministre des Transports et le ministre des Pêches et des Océans à se conformer ou décret fédéral sur les lignes directrices en matière d'environnement - Demandes rejetées en raison du retard déraisonnable et de la futilité de la procédure - La Cour d'appel a-t-elle commis une erreur en modifiant la décision du juge des requêtes, prise dans l'exercice de son pouvoir discrétionnaire, de ne pas accorder la réparation demandée?

L'intimée, la Friends of the Oldman River Society (la"Société"), un groupe environnemental de l'Alberta, par demande de bref de *certiorari* et de bref de *mandamus* présentée à la Cour fédérale, cherche à forcer deux ministère fédéraux, le ministère des Transports et le ministère des Pêches et des Océans, à procéder à une évaluation environnementale conformément au *Décret fédéral sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement*, relativement à un barrage construit sur la rivière Oldman par la province d'Alberta - un projet qui touche plusieurs sphères de compétence fédérale, notamment les eaux navigables, le pêcheries, les Indiens et les terres indiennes. Le Décret sur les lignes directrices a été pris en vertu de l'art. 6 de la *Loi sur le ministère de l'Environnment* et exige de tous les ministères et organismes fédéraux qui exercent un pouvoir de décision à l'égard d'une proposition (c'est-à-dire une entreprise ou activité) susceptible d'entrainer des répercussions environnementales sur une question de compétence fédérale, qu'ils procèdent à un examen initial de cette proposition afin de déterminer si elle peut éventuellemnt comporter des effets défavorables sur l'environnement. La province a elle-même procédé au cours des années à d'importantes études environnementales qui ont donné lieu à des consultations publiques, notamment auprès des bandes indiennes et des groupes environnementaux, et, en septembre 1987, avait obtenu du ministre des Transports une approbation de l'ouvrage en vertu de l'art. 5 de la *Loi sur la protection des eaux navigables*. Cette disposition prévoit qu'il est interdit de construire un ouvrage dans les eaux navigables à moins qu'il n'ait préalablement été approuvé par le ministre. Dans l'évaluation de la demande de l'Alberta, le ministre n'a examiné que l'incidence du projet sur la navigation et aucune évaluation n'a été faite en vertu du Décret sur les lignes directrices. Les tentatives de l'intimée devant les tribunaux de l'Alberta pour faire arrêter le projet ont échoué et les ministres fédéraux de l'Environnement et des Pêches et des Océans ont refusé d'assujettir le projet à l'évaluation en vertu du Décret sur les lignes directrices. Le contrat de construction du barrage a été octroyé en 1988 et les travaux étaient achevés à 40 pour 100 lorsque la présente action a été intentée devant la Cour fédérale en avril 1989. La Section de première instance a rejeté les demandes. La Cour d'appel a infirmé le jugement, annulé l'approbation accordée en vertu de l'art. 5 de la *Loi sur la protection des eaux navigables* et ordonné aux ministres des Transports et des Pêches et des Océans de se conformer au Décret sur les lignes directrices. Le présent pourvoir soulève la validité constitutionnelle et législative du Décret sur les lignes directrices et porte sur la nature et l'applicabilité de celui-ci. Il soulève aussi la question de savoir si le juge des requêtes a bien exercé son pouvoir discrétionnaire dans sa décision de ne pas accorder le redressement demandé en raison du retard déraisonnable et de la futilité de la procédure.

Arrêt (le juge Stevenson est dissident): Le pourvoi est rejeté, sauf qu'il ne sera pas délivré de bref de la nature d'un *mandamus* ordonnant au ministre des Pêches et des Océans de se conformer au Décret sur les lignes directrices.

La validité législative du Décret sur les lignes directrices

Le Décret sur les lignes directices a été validement adopté conformément à l'art. 6 de la *Loi sur le ministère de l'Environnement* et il est de nature impérative. Lorsqu'on examine l'art. 6 dans son ensemble, plutôt que seulement le terme «directives» en vase clos, on se

rend compte que le législateur fédéral a opté pour l'adoption d'un mécanisme de réglementation auquel on est soumis «légalement» et dont on peut obtenir l'exécution par bref de prérogative. Les «directives» ne sont pas simplement autorisées par une loi, mais elles doivent être officiellement adoptées par «arrêtés», sur approbation du gouverneur en conseil. Ce processus contraste vivement avec le processus habituel d'établissement de directives de politique interne ministérielle destinées à exercer un contrôle sur les fonctionnaires relevant de l'autorité du ministre.

Le Décret sur les lignes directrices, qui exige du décideur qu'il tienne compte de facteurs socio-économiques dans l'évaluation des répercussions environnementales, ne va pas au-dela de ce qui est autorisé par la *Loi sur le ministère de l'Environnement.* Le concept de la «qualité de l'environnement» prévu à l'art. 6 de la Loi ne se limite pas à l'environnement biophysique seulement. L'environnement est un sujet diffus et, sous réserve des impératifs constitutionnels, les conséquences éventuelles d'un changement environnemental sur le gagne-pain, la santé et les autres préoccupations sociales d'une collectivité font partie intégrante de la prise de décisions concernant des questions ayant une incidence sur la qualité de l'environnement.

Le Décret sur les lignes directrices est compatible avec la *Loi sur la protection des eaux navigables.* La Loi n'a pas pour effet d'empêcher explicitement ou implicitement le ministre des Transports de tenir compte de facteurs autres que ceux touchant la navigation dans l'exercice de son pouvoir d'approbation en vertu de l'art. 5 de la Loi. La fonction confiée au ministre en vertu du Décret vient s'ajouter à la responsabilité qu'il a en vertu de la *Loi sur la protection des eaux navigables*, et il ne peut invoquer une interprétation trop étroite des pouvoirs qui lui sont conférés par des lois pour éviter de se conformer au Décret. Il n'existe pas non plus de conflit entre, d'une part, le fait d'exiger, à l'art. 3 du Décret sur la lignes directrices, qu'un examen soit effectué "le plus tôt possible au cours de l'étape de planification et avant de prendre des décisions irrévocables" et, d'autre part, le pouvoir de redressement, prévu au par. 6(4) de la Loi, permettant au ministre d'accorder une approbation après le début des travaux. Ce pouvoir constitue une exception à la règle générale énoncée à l'art. 5 de la Loi selon laquelle il faut obtenir une approbation avant le début de la construction et, dans l'exercice de son pouvoir discrétionnaire d'accorder une approbation après le début des travaux, rien n'empêche le ministre d'appliquer le Décret.

L'applicabilité du Décret sur les lignes directrices

L'application du Décret sur les lignes directrices n'est pas restreinte aux «nouveaux projets, programmes et activités fédéraux»; le Décret ne reçoit pas application chaque fois qu'un projet peut comporter des répercussions environnementales sur un domaine de compétence fédérale. Il doit toutefois s'agir tout d'abord d'une «proposition» qui vise une «entreprise ou activité à l'égard de laquelle le gouvernement du Canada participe à la prise de décisions». L'interprétation qu'il faut donner à l'expression «participe à la prise de décisions» est que le gouvernement fédéral, se trouvant dans un domaine relevant de sa compétence en vertu de l'art. 91 de la *Loi constitutionnelle de 1867*, doit avoir une obligation positive de réglementation en vertu d'une loi fédérale relativement à l'entreprise ou à l'activité proposée. L'expression «participe à la prise de décisions» dans la définition du terme «proposition» signifie une obligation légale et ne devrait pas être interprétée comme ayant trait à des questions relevant généralement de la compétence fédérale. Si cette obligation existe, il s'agit alors de déterminer qui est le «ministère responsable» en la matière, puisque c'est ce ministère qui exerce le "pouvoir de décision" à l'égard de la proposition et qui doit donc entamer le processus d'évaluation visé par le Décret sur les lignes directrices.

Le projet de barrage sur la rivière Oldman est visé par le Décret sur les lignes directrices. Il peut être qualifié de proposition dont le ministre des Transports seul est le «ministère responsable» en vertu de l'art. 2 du Décret. *La Loi sur la protection des eaux navigables*, notamment son art. 5, impose une obligation positive de réglementation au ministre des Transports. Cette loi a mis en place un mécanisme de réglementation qui prévoit qu'il est nécessaire d'obtenir l'approbation du ministre avant qu'un ouvrage qui gêne sérieusement la navigation puisse être placé dans des eaux navigables ou sur, sous, au-dessus ou à travers de telles eaux.

Cependant, le Décret sur les lignes directrices ne s'applique pas au ministre des Pêches et des Océans, puisque la *Loi sur les pêches* ne renferme pas de disposition de réglementation équivalente qui serait applicable au projet. Le fait que le ministre possède le pouvoir discrétionnaire de demander des renseignements visant à l'aider dans l'exercice d'une fonction législative ne signifie pas qu'il «participe à la prise de décisions» au sens du Décret. Le ministre des Pêches et des Océans a, en vertu de l'art. 37 de *Loi sur les pêches*, un pouvoir législatif spécial limité qui ne constitue pas une obligation positive de réglementation.

L'étendue de l'évaluation en vertu de Décret sur les lignes directrices n'est pas limitée au domaine particulier de compétence à l'égard duquel le gouvernement du Canada participe à la prise de décisions au sens du terme «proposition». En vertu du Décret, le ministère responsable qui a reçu le pouvoir de procéder à l'évaluation doit tenir compte des répercussions environnementales dans tous les domaines de compétence

fédérale. Le ministre des Transports, à titre de décideur en vertu de la *Loi sur la protection des eaux navigables*, doit examiner les incidences environnementales du barrage sur les domaines de compétence fédérale, comme les eaux navigables, les pêcheries, des Indiens et les terres indiennes.

L'immunité de la Couronne

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci: la Couronne du chef de l'Alberta est par déduction nécessaire liée par la *Loi sur la protection des eaux navigables*. Le droit de propriété que la province peut détenir sur la lit de la rivière Oldman est assujetti au droit public de navigation, sur lequel le Parlement exerce une compétence législative exclusive. L'Alberta doit obtenir l'autorisation législative du Parlement pour contruire un ouvrage qui entraverait sérieusement la navigation dans la rivière Oldman; la *Loi sur la protection des eaux navigables* est le mécanisme qu'elle doit utiliser à cette fin. La Couronne du chef de l'Alberta est liée par la Loi, car il s'agit là du seul moyen pratique d'obtenir l'approbation requise. Par aileurs, si la province n'était pas liée par la Loi, celle-ci serait privée de toute efficacité. Les provinces font partie des organismes susceptibles de participer à des projets qui peuvent obstruer la navigation. Si la Couronne du chef d'une province était habilitée à saper l'intégrité des réseaux essentiels de navigation dans les eaux canadiennes, l'objet de la *Loi sur la protection des eaux navigables* serait, en fait, annihilé.

Le juge Stevenson (dissident): La province d'Alberta n'est pas liée par la *Loi sur la protection des eaux navigables*. Nul texte législatif ne lie la Couronne, sauf dans la mesure qui y est mentionée ou prévue. En l'espèce, la Loi ne renferme pas de termes qui «lient expressément» la Couronne et il n'existe pas d'intention claire de la lier qui «ressort du texte même de la loi». En outre, le fait que la Couronne ne soit pas liée ne priverait pas la Loi de toute efficacité ni ne donnerait lieu à une absurdité. Il existe de nombreux organismes non gouvernementaux dont les activités sont régies par la Loi et l'objet de la Loi n'est donc pas annihilé. Si la Couronne porte atteinte à un droit public de navigation, il est possible de la pousuivre en justice. Il n'y a pas d'avantage important lié à l'approbation en vertu de la Loi. Il peut toujours y avoir ouverture à responsabilité civile.

La validité constitutionnelle du Décret sur les lignes directrices

L'«environnement» n'est pas un domaine distinct de compétence législative en vertu de la *Loi constitutionnelle de 1867*. Dans son sens générique, il englobe l'environnement physique, économique et social touchant plusieurs domaines de compétence attribués aux deux paliers de gouvernement. Bien que les deux paliers puissent oeuvrer dans le domaine de l'environnement, l'exercice d'une compétence législative, dans la mesure où elle se rapporte à l'environnement, doit se rattacher au domaine de compétence approprié. Les projets de nature locale relèvent généralement de la compétence provinciale, mais ils peuvent exiger la participation du fédéral dans le cas où ils empiètent sur un domaine de compétence fédérale comme en l'espèce.

Le Décret sur les lignes directrices est *intra vires* du Parlement. Il ne tente pas de réglementer les répercussions environnementales de matières qui relèvent de la compétence de la province, mais fait simplement de l'évaluation des incidences environnementales un élément essentiel de la prise de décisions fédérales. De par son caractère véritable, le Décret n'est rien de plus qu'un instrument qui régit la façon dont les institutions fédérales doivent gérer leurs diverses fonctions. Essentiellement, le Décret comporte deux aspects fondamentaux. Il y a tout d'abord l'aspect de fond qui porte sur l'évaluation des incidences environnementales, dont l'objet est de faciliter la prise de décisions dans le domaine de compétence fédérale qui régit une proposition. Cet aspect du Décret peut être maintenu au motif qu'il s'agit d'un texte législatif se rapportant aux matières pertinentes énumérées à l'art. 91 de la *Loi constitutionnelle de 1867*. Le deuxième aspect est l'élément procedural ou organisationnel coordonnant le processus d'évaluation, qui peut dans un cas donné toucher plusieurs domaines de compétence fédérale, relevant d'un décideur désigné (le «ministère responsable»). Cette facette vise à réglementer la façon dont les institutions et organismes du gouvernement du Canada exercent leurs fonctions et responsabilités administratives. Cela est indiscutablement *intra vires* du Parlement. Cet aspect peut être considéré comme un pouvoir accessoire de la compétence législative en cause, ou de toute façon, être justifié en vertu du pouvoir résiduel prévu à l'art. 91.

Le Décret sur les lignes directrices ne peut être utilisé comme moyen déguisé d'envahir des champs de compétence provinciale qui ne se rapportent pas aux domaines de compétence fédérale concernés. Le «ministère responsable» n'a que le mandat d'examiner les questions se rapportant directement aux domaines de compétence fédérale concernés. Toute ingérence dans la sphère de compétence provinciale est simplement accessoire au caractère véritable du texte législatif.

Le pouvoir discrétionnaire

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci: La Cour d'appel fédérale n'a pas commis d'erreur, en

modifiant la décision du juge des requêtes, prise dans l'exercice de son pouvoir discrétionnaire, de ne pas accorder la réparation sollicitée en raison du retard déraisonnable et de la futilité de la procédure. L'intimée s'est efforcée d'une façon soutenue de contester, dans la cadre des poursuites judiciaires devant les tribunaux de l'Alberta et dans les lettres envoyées aux ministères fédéraux, d'une part, la légalité des mesures prises par l'Alberta relativement à la construction du barrage, et d'autre part, l'acquiescement des ministres appelants; il n'existe pas de preuve que l'Alberta a subi un préjudice quelconque en raison d'un retard à intenter la présente action. Malgré les contestations judiciaires en cours, la contruction du barrage s'est poursuivie. La province n'était pas disposée à consentir à une évaluation des incidences environnementales en vertu du Décret avant l'épuisement de tous les recours légaux. Le juge des requêtes n'a pas suffisamment accordé d'importance à ces considérations, ne laissant à la Cour d'appel d'autre choix que d'intervenir. Le motif de la futilité de la procédure ne pouvait justifier un refus dans les circonstances. Ou ne devrait refuser la délivrance d'un bref de prérogative pour ce motif que dans les rares cas où sa délivrance serait vraiment inefficace. En l'espèce, il n'est pas évident que l'application du Décret, même à cette étape tardive, n'aura pas un certain effet sur les mesures susceptibles d'être prises pour atténuer toute incidence environnementale néfaste que pourrait avoir le barrage sur un domaine de compétence fédérale.

Le juge Stevenson (dissident): La Cour d'appel fédérale a commis une erreur en modifiant la décision du juge des requêtes, prise dans l'exercice de son pouvoir discrétionnaire, de ne pas accorder une réparation par voie de bref de prérogative. La cour a clairement commis une erreur en rejetant sa conclusion relativement à la question du retard. La common law a toujours exigé du requérant qu'il agisse avec diligence lorsqu'il sollicite un bref de prérogative. Compte tenu de l'envergure du projet et des intérêts en jeu, il n' était pas raisonnable que la Société intimée attende 14 mois avant de contester l'approbation du ministre des Transports. Il est impossible de conclure que l'Alberta n'a pas subi un préjudice en raison du retard. Le juge des requêtes n'avait pas à tenir compte des procédures judiciaires que l'intimée et d'autres parties avaient entamées devant les tribunaux de l'Alberta. Ces procédures constituaient des recours distincts et différents du redressement sollicité en l'espèce et n'étaient pas pertinentes quant aux questions en litige. La présente action porte sur la constitutionnalité et l'applicabilité du Décret sur les lignes directrices. Il soulève des questions nouvelles et différentes. Pour déterminer s'il devait exercer son pouvoir discrétionnaire contre l'intimée, le juge des requêtes devait examiner seulement les facteurs qui, selon lui, se rattachaient directement à la demande dont il était saisi. On n'est pas justifié de modifier la décision qu'il a prise dans l'exercice de son pouvoir discrétionnaire, sauf si l'on peut affirmer avec certitude qu'il a eu tort de procéder ainsi. L'on n'a pas répondu au critère en l'espèce.

Les dépens

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et lacobucci: Il s'agit d'un cas où il est approprié d'accorder les dépens comme entre procureur et client à la Société intimée, compte tenu de la situation de cette dernière et du fait que les ministères fédéraux ont été joints comme appelants même s'ils n'avaient pas auparavant présenté une demande d'autorisation de pourvoi à notre Cour.

Le juge Stevenson (dissident): Les appelants ne devraient pas être contraints de payer les dépens comme entre procureur et client. Il n'y a pas de raison de déroger à notre règle générale que la partie qui a gain de cause a droit aux dépens sur la base des frais entre parties. Les groupes d'intérêt public doivent être disposés à se plier aux mêmes principes que les autres plaideurs et accepter une certaine responsabilité quant aux dépens.

JURISPRUDENCE

Citée por le juge La Forest

Arrêts mentionnés: *Fédération canadienne de la faune Inc. c. Canada (Ministre de l'Environnement),* (1989) 3 C.F. 309, (1re inst.), conf. (1989), 99 N.R. 72; *Alberta Government Telephones c. Canada (Conseil de la radiodiffusion et des telécommunications canadiennes)* (1989) 2 R.C.S. 225; *Renvoi relatif la Loi anti-inflation,* (1976) 2 R.C.S. 373; *Martineau c. Comité de discipline des détenus de l'Institution de Matsqui*, [1978] 1 R.C.S. 118; *Maple Lodge Farms Ltd. c. Gouvernement du Canada,* (1982) 2 R.C.S. 2; R. c. *Crown Zellerbach Canada Ltd.* (1988) 1 R.C.S. 401; *Belanger c. The King* (1916), 54 R.C.S. 265; *R. & W. Paul, Ltd. c. Wheat Commission,* (1937) A.C. 139, *Re Gray* (1918), 57 R.C.S. 150; *Daniels c. White,* (1968) R.C.S. 517; *Smith c. The Queen,* (1960) 3. C.F. 410; *Province of Bombay c. Municipal Corporation of Bombay,* (1947) A.C. 58; *Sparling c. Québec (Caisse de dépôt et placement du Québec),* (1988) 2 R.C.S. 1015; *R. c. Eldorado Nucléaire Ltée*, (1983) 2 R.C.S. 551; *Sa Majesté du chef de la province de l'Alberta c. Commission canadienne des transports,* (1978) 1 R.C.S. 61; *R. c Quellette,* (1980) 1 R.C.S. 568; *In Re Provincial Fisheries* (1896), 26 R.C.S. 444; *Flewelling c Johnston* (1921), 59 D.L.R. 419; *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839; *Attorney-General c. Johnson* (1819), 2 Wils. Ch. 87. 37 E.R. 240; *Wood c. Esson* (1884), 9 R.C.S. 239; *Reference re Waters and Water-Powers*, (1929) R.C.S. 200; *The Queen c. Fisher* (1891), 2 Ex. C.R. 365; *Queddy River Driving Boom Co. c. Davidson* (1883), 10 R.C.S. 222; *Whishreed*

c. Walley, (1990) e R.C.S. 1273; *Fowler c. La Reine*, (1960) 2 R.C.S. 213; *Northwest Falling Contractors Ltd. c. La Reine* (1990) 2 R.C.S. 292; *Murphyores Incorporated Pty. Ltd. c. Commonwealth of Australia* (1976), 136 C.L.R. 1; *Devine c. Québec (Procureur général*), (1988) 2 R.C.S. 790; *Jones c. Procureur général du Nouveau-Brunswick*, (1975) 2 R.C.S. 182; *Knox Contracting Ltd c. Canada*, [1990] 2 R.C.S. 338; *Campagnie des chemins de fer nationaux du Canada c. Courtois*, (1988) 1 R.C.S. 868; *Polylok Corp. c. Montreal Fast Print* (1975) Ltd, (1984) 1 C.F. 713; *Charles Osenton & Co. c. Johnston* (1942) A.C. 130; *Harelkin c. Université de Regina*, (1979) 2 R.C.S. 561; *Friends of the Oldman River Society c. Alberta (Minister of the Environment)* (1987), 85 A.R. 321; *Friends of Oldman River Society c. Alberta (Minister of the Environment)* (1968), 89 A.R. 339; *Friends of the Old Man River Society c. Energy Resources Conservation Board (Also.)* (1988), 89 A.R. 280; *Champion c. City of Vancouver*, (1918) 1 W.W.R. 216; *Isherwood c. Ontario and Minesota Power Co.* (1911), 18 O.W.R. 459.

Citée par le juge Stevenson (dissident)

Alberta Government Telephones c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes), (1989) 2 R.C.S. 225; *Province of Bombay c. Municipal Corporation of Bombay*, (1947) A.C. 58; *Champion c. City of Vancouver*, (1918) 1 W.W.R. 216; *Harelkin c. Université de Regina*, (1979) 2 R.C.S. 561; *Polylok Corp. c. Montreal Fast Print* (1975) Ltd., (1984) 1 C.F. 713; P.P.G. *Industries Canada Ltd c. Procureur général du Canada*, (1976) 2 R.C.S. 739; *Syndicat des employés du commerce de Rivière-du-Loup (section Èmilio Boucher, C.S.N.) c. Turcotte*, (1984)) C.A. 316.

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Acte concernant certaines constructions dans et sur les eaux navigables, S.C. 1886, ch. 35, art. 1, 7.

Acte concernant certaines constructions dans et sur les eaux navigables, Sl.R.C. 2886, ch. 92.

Acte concernant la protection des eaux navigables, S.C. 1886, ch. 36.

Acte concernant la protection des eaux navigables, S.R.C. 1886, ch. 91.

Acte concernant les bômes et outres ouvrages établis en eaux navigables soit sous l'autorité d'actes provincioux soit-autrement, S.C. 1883, ch. 43, art. 1.

Acte concernant les ponts établis en vertu d'actes provinciaux sur des eaux navigables, S.C. 1882, ch. 37.

Acte pour pourvoir à enlèment d'obstructions provenant de naufrages et autres causes semblables dans les rivières navigables du Canada, et pour d'autres objets relatifs aux naufrages, S.C. 1874, ch. 29.

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Loi sur les chemins de fer, L.R.C. (1985), ch. R-3.

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POURVOI contre un arrêt de la Cour d'appel fédérale, (1990) 2 C.F. 18, 68 D.L.R. (4th) 375, (1991) 1 W.W.R. 352, 108 N.R. 241, 76 alta. L.R. (2d) 289, 5 C.E.L.R. (N.S.) 1, qui a infirmé un jugement de la Section de première instance, (1990) 1 C.F. 248 (1990) 2 W.W.R. 150, 30 F.T.R. 108, 70 Alta. L.R. (2d) 289, 4 C.E.L.R. (N.S.) 137. Pourvoi rejeté, sauf qu'il ne sera pas délivré de bref de la nature d'un *mandamus* ordonnant au ministre des Pêches et des Océans de se conformer aux lignes directrices fédérales en matière d'environnement. Le juge Stevenson est dissident.

D.R. Thomas, c.r. T.W. Wakeling et G.D. Chipeur, pour l'appelante Sa Majesté la Reine du chef de l'Alberta.

E.R. Sojonky, c.r., B.J. Saunders et J. de Pencier, pour les appelants le ministre des Transports et le ministre des Pêches et des Océans.

B.A. Crane, c.r. pour l'intimée.

J.K. Samson et. A. Gingras, pour l'intervenant le procureur général du Québec.

P.H. Banchet, pour l'intervenant le procureur général du Nouveau-Brunswick.*G.E. Hannon*, pour l'intervenant le procureur général du Manitoba.

G.H. Copley, pour l'intervenant le procureur général de la Colombie-Britannique.

R.G. Richards, pour l'intervenant le procureur général de la Saskatchewan.

B.G. Welsch, pour l'intervenant le procureur général de Terre-Neuve.

R.A. Kasting et J. Donihee, pour l'intervenant le ministre de la Justice des Territoires du Nord-Quest.

P.W. Hutchins, D.J. Soroka et F.S. Gertler, pour l'intervenante la Fraternité des Indiens du Canada/ l'Assemblée des premières Nations.

J.J. Gill, pour les intervenants la Nation dénée et l'Association des Métis des Territoires du Nord-Ouest, et le Conseil national des autochtones du Canada (Alberta).

G.J. McDade et J.B. Hanebury, pour les intervenants le Sierra Legal Defence Fund, l'Association canadienne du droit de l'environnement, le Sierra Club of Western Canada, Survie culturelle (Canada), et les Amis de la Terre.

M.W. Mason, pour l'intervenante l'Alberta Wilderness Association.

Version française du jugement du juge en chef Lamer et des juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci rendu par

LE JUGE LA FOREST - La protection de l'environnement est devenue l'un des principaux défis de notre époque. Pour y faire face, les gouvernements et

les organismes internationaux ont participé à la création d'un éventail important de régimes législatifs et de structures administratives. Au Canada, les gouvernements fédéral et provinciaux ont mis sur pied des ministères de l'environnement, qui existent maintenant depuis environ 20 ans. Cependant, on s'est récemment rendu compte qu'un ministère de l'environnement est entouré d'un grand nombre d'autres ministères dont les politiques entrent en conflit avec ses objectifs. En conséquence, le gouvernement fédéral a pris des mesures pour confier au ministère de l'Environnement un rôle central et élargir le rôle d'autres ministères et organismes gouvernementaux pour s'assurer qu'ils tiennent compte des préoccupations touchant l'environnement dans la prise de décisions susceptibles d'entraîner des incidences environnementales.

À cette fin, en vertu de l'art. 6 de la *Loi sur le ministère de l'Environnement*, L.R.C. (1985), ch. E-10, le ministre peut par arrêté, au titre de celles de ses fonctions qui portent sur la qualité de l'environnement et avec l'approbation du gouverneur en conseil, établir des directives à l'usage des ministèrers et des organismes fédéraux dont ceux de réglementation dans l'exercice de leurs pouvoirs et fonctions. Conformément à cette disposition, le Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement («*Décret sur les lignes directrices*») a été pris et approuvé en juin 1984, DORS/84-467. Dans l'ensemble, ces lignes directrices exigent de tous les ministères et organismes fédéraux qui exercent un pouvoir de décision à l'égard d'une proposition, c'est-à-dire une entreprise ou activité susceptible d'entraîner des répercussions environnementales sur une question de compétence fédérale, qu'ils procèdent à un examen initial de cette proposition afin de déterminer si elle peut éventuellement comporter des effets néfastes sur l'environnement. Advenant le cas où une proposition risque d'avoir un effet néfaste important sur l'environnement, on prévoit la tenue d'un examen public effectué par une commission d'évaluation environnementale dont les membres doivent faire preuve d'objectivité, être à l'abri de l'ingérence politique et posséder des connaissances et une expérience particulières se rapportant aux effets de la proposition sur les plans technique environnemental et social.

Le présent pourvoi soulève la validité constitutionnelle et législative du *Décret sur les lignes directrices* et porte sur la nature et l'applicabilité de celui-ci. Ces questions s'inscrivent dans un contexte où l'intimée, la Friends of the Oldman River Society (la «socités», un groupe environnement de l'Alberta, par demande de bref de certiorari et de bref de *mandamus*, cherche à forcer deux minstères fédéraux, le ministère des Transports et le ministère des Pêches et des Océans, à procéder une évaluation environnementale publique conformément au *Décret sur les lignes directrices* relative à un barrage construit sur la rivière Oldman par le gouvernement de l'Alberta. Ce dernier a lui-même procédé à d'importantes études environnementales qui ont donné lieu à des consultations publiques. Toutefois, puisque le projet touche des eaux navigables, des pêcheries, des Indiens et des terres indiennes, il comporte des question de compétence fédérale. Plus particulièrement. Société soutient que le ministre des Transports doit approuver le projet en vertu de la *Loi sur la protection des eaux navigables*, L.R.C. (1985), ch. N-22 et que, ce faisant, il doit prévoir la tenue d'un évaluation publique du project conformément au *Décret sur les lignes directrices.* Elle soutient également que le ministre des Pêches et des Océans, une obligation similaire dans l'exécution de ses fonctions en vertu de la *Loi sur les pêches*, L.R.C. (1985), ch. F-14.

Le présent pourvoi soulève aussi la question de savoir si le juge des requêtes a bien exercé son pouvoir discrétionnaire dans sa décision concernant la délivrance d'un bref de *certiorari* ou de *mandamus*. En conséquence, les faits pertinents doivent être présentés en détail.

Les faits

L'historique du projet débute en mai 1958 au moment où le gouvernement de l'Alberta a demandé à l'Administration du rétablissement agricole des Prairies («ARAP») du ministère fédéral de l'Agriculture d'évaluer la possibilité de la construction d'un réservoir pour le stockage de l'eau de la rivière Oldman à un endroit appelé Livingston Gap. En décembre 1966, l'ARAP a déposé son rapport et proposé la réalisation d'une étude plus poussée relativement à un autre emplacement le long de la rivière Oldman, en l'occurrence Three Rivers. Entre 1966 et 1974, une étude fédérale-provinciale sur l'approvisionnement en eau a été réalisée. Après quoi, en juillet 1974, le ministère de l'Environnement de l'Alberta a entrepris des études visant à examiner les besoins en eau et à déterminer quels emplacements sur la rivière Oldman et ses affluents seraient susceptibles de servir au stockage de l'eau. Ces études devaient se dérouler en deux étapes.

La première consistait en une évaluation initiale des emplacements dans le bassin de la rivière Oldman aux fins du stockage de l'eau et a été réalisée par un comité consultatif technique composé de représentants de plusieurs organismes et ministères du gouvernement provincial, notamment Environnement, Culture et Multiculturalisme, l'Energy Resources Conservation Board, la division du poisson et de la faune de l'Agriculture, ainsi que de représentants des districts municipaux et de l'industrie. Le comité a déposé son rapport le 14 juillet 1976; et, par la suite, une série de consultations publiques s'est tenue auprès des autorités

locales et d'autres groupes et particuliers. On a procédé à l'évaluation des réponses reçues et déterminé les questions qui en découlaient en vue de les examiner au cours de la seconde étape.

La seconde étape a commencé le 4 février 1977 au moment de l'annonce par le ministre de l'Environnement de la mise sur pied du «Oldman River Study Management Committee» (le comité de gestion de l'étude sur la rivière Oldman), qui était formé de six représentants du public et de trois représentants du gouvernement provincial. Ce comité devait examiner les questions soulevées par le public au cours de la première étape et présenter des recommandations sur la gestion globale des eaux du bassin de la rivière, devant notamment tenir compte des préoccupations des résidents de la région. Cette étape devait être plus approfondie que la première et comporter notamment l'étude de questions touchant l'ensemble du bassin de la rivière, savoir la salinisation, la sédimentation, les loisirs, l'habitat du poisson et d'autres questions environnementales. On a encouragé le public à participer, une série de rencontres et d'ateliers publics ont eu lieu et divers groupes d'intérêts dont les bandes indiennes et les groupes environnementaux, ont présenté des observations orales et écrites. Le comité de gestion a soumis son rapport final en 1978.

La même année, un groupe a été constitué au sein de l'Environment Council of Alberta (le «conseil»); on lui a ordonné de tenir des audiences publiques sur la gestion des ressources en eau dans le bassin de la rivière Oldman. Plusieurs audiences publiques ont de nouveau eu lieu dans tout le Sud de l'Alberta et le conseil a reçu de nombreux exposés représentant les vues d'un large échantillon de la population albertaine, notamment le milieu des affaires, le secteur agricole, les gouvernements locaux et les bandes indiennes. Le conseil a soumis son rapport au ministre de l'Environnement en Août 1979 et a recommandé un nouvel emplacement, à Brocket, situé sur la réserve indienne de Peigan, dans l'hypothèse où un barrage serait nécessaire.

Le gouvernement provincial a ensuite examiné ce rapport et celui de 1978 et a annoncé le 29 août 1980 qu'il devait décider de construire un barrage sur la rivière Oldman. Il a précisé que l'emplacement de Three Rivers était l'emplacement privilégié, mais qu'il reportait sa décision définitive quant à ce choix jusqu'à ce que la bande indienne de Peigan ait pu présenter une proposition concernant la construction du barrage à Brocket. En novembre 1983, la bande de Peigan a présenté sa position au ministre de l'Environnement et précisé l'indemnisation qu'elle prévoyait dans l'hypothèse où le barrage serait construit à Brocket.

Le 8 Août 1984, le Premier Ministre de l'Alberta a annoncé que le gouvernement avait décidé de construire le barrage à l'emplacement de Three Rivers. Toutefois, avant cette annonce, le projet de construction du barrage avait été examiné par le Comité régional de sélection et de coordination (?CRSC), un comité du ministère fédéral de l'Environnement. Le CRSC devait s'assurer que les projets susceptibles d'entraîner une incidence sur les domaines de compétence fédérale soient soumis à une évaluation environnementale, et il a suivi l'évolution du projet de construction du barrage jusqu'à ce qu'il soit décidé qu'il ne serait pas construit sur les terres indiennes.

Après l'annonce de la construction du barrage à Three Rivers, l'Alberta a entrepris la conception du barrage et l'élaboration d'un plan d'atténuation ou d'exploitation des incidences environnementales qui a donné lieu à d'autres études environnementales et à la tenue de rencontres publiques. Le ministère provincial de l'Environnement a alors ouvert un bureau d'information sur le projet, situé à proximité de Three Rivers, afin de répondre aux demandes de renseignements du public. Le district municipal de Pincher Creek a ensuite constitué plusieurs sous-comités afin de faire connaître au ministères albertain de l'Environnemnt les préoccupations d'intérêt local concernant notamment l'utilisation des terres, le poisson et la faune, les loisirs et l'agriculture. En outre, le ministre provincial de l'Environnement a demandé la constitution d'un comité consultatif local chargé de le conseiller sur des questions touchant le réaménagement des routes, les préoccupations dans le domaine de la pêche et de la faune et les possibilités offertes en matière de loisirs. Après avoir recueilli des renseignements au cours de rencontres publiques, le comité a soumis au ministre son rapport accompagné de recommandations au sujet des pêches, de la faune, des ressources historiques, de l'agriculture, des loisirs et du transport.

En 1987, le CRSC fédéral a de nouveau participé au projet, à la demande du ministère des Affaires indiennes et du Nord canadien, afin d'en examiner l'incidence sur les intérêts fédéraux, notamment sur la réserve indienne de Peigan située a environ 12 kilomètres en aval de l'emplacement du barrage. L'Alberta avait déjà octroyé à la bande indienne de Peigan des fonds pour qu'elle effectue une étude indépendante de l'incidence du projet sur la réserve et ses habitants. La bande de Peigan a soumis son rapport au ministre provincial de l'Environnement en février 1987. Il portait notamment sur l'irrigation, les questions des eaux de surface et des eaux souterraines, la sécurité du barrage, l'évaluation des pêches et l'incidence du projet sur les plans spirituel et culturel. Le rapport préparé sur l'ordre du CRSC en juillet 1987 concluait que les effets du projet sur la réserve seraient favorables ou atténuables, mais faisait ressortir le possibilité de répercussions environnementale négatives sur la réserve, soit un accroissement de tourbillons de poussière, une augmentation du niveau de mercure dans le poisson et l'extinction des forêts de peupliers dans le périmètre d'inondation.

J'arrive maintenant à une étape d'importance primordiale. Le 10 mars 1986, le ministère du l'Environnement de l'Alberta a demandé au ministre fédéral des Transports d'approuver l'ouvrage en vertu de l'art. 5 de la *Loi sur la protection de eaux navigables.* Cette disposition prévoit qu'il est interdit de construire un ouvrage dans les eaux navigables à moins qu'il n'ait préalablement été approuvé par le ministre. Dans l'évaluation de la demande, le ministre a examiné l'incidence du projet sur la navigation et l'a approuvé, le 18 septembre 1987, sous réserve de certaines conditions relatives à la navigation. Je tiens toutefois à indiquer qu'il n'a pas assujetti la demande à une évaluation en vertu du *Décret sur les lignes directrices*. Comme nous le verrons, plusieurs de principales questions soulevées dans le présent pourvoi découlent de la question de savoir s'il aurait dû le faire.

Ce n'est qu'ensuite que la Société intimée commence à jouer un rôle. En effet, l'intimée a été constituée en Société le 8 september 1987 pour s'opposer au projet et a été informée que le ministre des Transports avait approuvé le projet le 16 février 1988. Toutefois, certains particuliers, qui sont ensuite devenus membres de la Société lors de sa constitution, s'étaient efforcés d'empêcher l'évolution du projet. À l'été 1987, le Southern Alberta Environmental Group avait écrit au ministre des Pêches et des Océans pour lui demander de procéder une évaluation initiale en vertu du *Décret sur les lignes directrices.* Cette demande fut refusée au motif que les problèmes possibles avaient été pris en charge et en raison de l'existence des [TRADUCTION] «arrangements administratifs qui régissent depuis longtemps la gestion des pêches en Alberta». Ce refus, à l'instar des mesures susmentionnées prises par le ministre des Transports, joue un rôle important dans l'argumentation juridique qui a suivi. Dans une lettre du 3 Décembre 1987, la Société intimée a demandé au ministre de l'Environnement d'assujettir le projet à l'évaluation en vertu du *Décret sur les lignes directrices*, cette fois principalement au motif que le projet de barrage relevait fondamentalement de la compétence provinciale et qu'Environnement Canada était convaincu que le plan d'atténuation proposé par l'Alberta devait pallier tout effet néfaste sur les ressources halieutiques. Le 22 Février 1988, la Société a de nouveau tenté d'inciter le ministre de l'Environnement à invoquer l'application du *Décret sur les lignes directrices*, mais a de nouveau essuyé un refus en Juin 1988 pour le même motif de compétence.

La Société a également tenté à l'échelon provincial de faire arrêter le projet. Le 26 Octobre 1987, elle a présenté une demande auprès de la Cour du Banc de la Reine de l'Alberta sollicitant l'annulation d'un permis provisoire délivré en vertu de la *Water Resources Act*, R.S.A. 1980, ch. W-5. Ce permis a été annulé le 8 Décembre 1987 et un second permis provisoire délivré le 5 Février 1988; la Société a de nouveau demandé à la Cour du Banc de la Reine d'annuler ce permis. Toutefois, cette demande a été rejetée le 21 Avril 1988. La Société a également demandé à l'Alberta Energy Resources Conservation Board de tenir une audience publique en vertu de *l'Hydro and Electric Energy Act*, R.S.A. 1980, ch. H-13, mais cette demande a été refusée. La Cour d'appel de l'Alberta a confirmé cette décision. En août 1988, la vice-présidente de la Société a déposé une plainte devant un juge de paix, alléguant qu'il y avait eu contravention à la *Loi sur les pêches* du fédéral; toutefois, le procureur général de l'Alberta a ordonné un arrêt des procédures.

Le contrat de construction du barrage a été octroyé en Février 1988 et, le 31 Mars 1989, les travaux étaient achevés à 40 pour 100. La présente action a été intentée le 21 avril 1989 devant la Section de première instance de la Cour fédérale, (1990) 1 C.F. 248. Dans cette action, la Société sollicitait une ordonnance cassant par voie de *certiorari* l'approbation donnée par le ministre des Transports ainsi qu'un bref de la nature d'un *mandamus* ordonnant au ministre des Transports et au ministre des Pêches et des Océans de se conformer au *Décret sur les lignes directrices.* Le juge en chef adjoint Jérome a rejeté la demande, mais la Société a eu gain de cause devant la Cour d'appel fédérale, (1990) 2 C.F. 18. Notre Cour a accordé l'autorisation de pourvoi le 13 septembre 1990, (1990) 2 R.C.S. x.

Les dispositions législatives

Avant de poursuivre, il est utile de présenter les principales parties des textes législatifs pertinents.

La *Loi sur le ministère de l'Environnement:*

4.(1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés:

a) à la conservation et l'amélioration de la qualité de l'environnement naturel, notamment celle de l'eau, de l'air et du sol;

5. Dans le cadre des pouvoirs et fonctions que lui confère l'article 4, le ministre:

a) lance, recommande ou entreprend à son initiative et coordonne à l'échelle fédérale des programmes visant à:

(i) favoriser la fixation ou l'adoption d'objectifs ou de normes relatifs à la qualité de l'environnement ou à la lutte contre la pollution.

(ii) faire en sorte que les nouveaux projets, programmes et activités fédéraux soient, dès les premières étapes de planification, évalués en fonction de leurs risques pour la qualité de l'environnement naturel, et que

ceux d'entre eux dont on aura estimé qu'ils présentent probablement des risques graves fassent l'objet d'un réexamen dont les résultats devront être pris en considération.

(iii) fournir, dans l'intérêt public, de l'information sur l'environnement à la population;

b) favorise et encourage des comportements tendant à protéger et améliorer la qualité de l'environnement, et coopère avec les gouvernements provinciaux ou leurs organismes, ou avec tous autres organismes, groupes ou particuliers, à des programmes dont les objets sont analogues;

c) conseille les chefs des divers ministères ou organismes fédéraux en matière de conservation et d'amélioration de la qualité de l'environnement naturel.

6. Au titre de celles de ses fonctions qui portent sur la qualité de l'environnement, le ministre peut par arrêté, avec l'approbation du gouverneur en conseil, établir des directives à l'usage des ministères et organismes fédéraux et, s'il y a lieu, à celui des sociétés d'Etat énumérées à l'annexe III de la *Loi sur la gestion des finances publiques* et des organismes de réglementation dans l'exercice de leurs pouvoirs et fonctions.

Conformément à l'art. 6, le ministre a par arrêté, avec l'approbation du gouverneur en conseil, établi le *Décret sur les lignes directrices*, dont les dispositions pertinentes sont:

2. Les définitions qui suivent s'appliquent aux présentes lignes directrices.

.....

«ministère responsable» Ministère qui, au nom du gouvernement du Canada, exerce le pouvoir de décision à l'égard d'une proposition.

.....

«promoteur» L'organisme ou le ministère responsable qui se propose de réaliser une proposition.

«proposition» S'entend en outre de toute entreprise ou activité à l'égard de laquelle le gouvernement du Canada participe à la prise de décisions.

3. Le processus est une méthode d'auto-évaluation selon laquelle le ministère responsable examine, le plus tôt possible au cours de l'étape de planification et avant de prendre des décisions irrévocables, les répercussions environnementales de toutes les propositions à l'égard desquelles il exerce le pouvoir de décision.

6. Les présentes lignes directrices s'appliquent aux propositions

a) devant être réalisées directement par un ministère responsable;

b) pouvant avoir des répercussions environnementales sur une question de compétence fédérale;

c) pour lesquelles le gouvenement du Canada s'engage financièrement; ou

d) devant être réalisées sur des terres administrées par le gouvernement du Canada, y compris la haute mer.

On doit aussi mentionner l'art. 5 de la *Loi sur la protection des eaux navigables:*

5. (1) Il est interdit de construire ou de placer un ouvrage dans des eaux navigables ou sur, sous, au dessus ou à travers de telles eaux à moins que:

a) préalablement au début des travaux, l'ouvrage, ainsi que son emplacement et ses plans, n'aient été approuvés par le ministre selon les modalités qu'il juge à propos;

b) la construction de l'ouvrage ne soit commencée dans les six mois et terminée dans les trois ans qui suivent l'approbation visée à l'alinéa a) ou dans le délai supplémentaire que peut fixer le ministre;

c) le construction, l'emplacement ou l'entretien de l'ouvrage ne soit conforme aux plans, aux règlements et aux modalités que renferme l'approbation visée à l'alinéa a).

L'HISTORIQUE JUDICIAIRE

La Section de première instance

Le juge en chef adjoint Jérome a présenté les quatre questions principales de la façon suivante: (1) la requérante a-t-elle qualité pour présenter la demande en l'espèce? (2) les ministres fédéraux nommés sont-ils tenus d'invoquer le *Décret sur les lignes directrices?* (3) la décision *Fédération canadienne de la faune Inc. c. Canada (Ministre de l'Environnement), (1989)* 3 C.F. 309 (1e inst.), confirmée par (1989), 99 N.R. 72 (C.A.F.), s'applique-t-elle aux faits de la présente espèce? (4) la cour devait-elle exercer son pouvoir discrétionnaire d'accorder les redressements demandés? En ce qui concerne la première question, il a simplement tenu pour acquis, sans en décider, que la Société avait la qualité voulue pour présenter la demande.

En ce qui concerne le *Décret sur les lignes directrices*, le juge en chef adjoint Jérome a tout d'abord statué que

le ministre des Transports n'était pas tenu de l'appliquer dans l'évaluation de la demande présentée en vertu de la *Loi sur la protection des eaux navigables* et, en fait, il a conclu que, s'il avait invoqué le *Décret sur les lignes directrices*, le ministre aurait excédé les limites de sa compétence. Le raisonnement était que la Loi n'établit pas d'obligation de tenir un examen des incidences environnementales, mais limite plutôt le ministre à prendre en considération seulement les facteurs touchant la navigation. Par ailleurs, le ministre des Pêches et des Océans n'avait pas compétence pour appliquer le *Décret sur les lignes directrices* parce que son ministère n'avait pas entrepris de projet. Par contre, dans l'hypothèse où le *Décret sur les lignes directrices* pouvait être étendu aux projets lancés par les provinces, il ne se serait appliqué que dans les cas où un ministère fédéral aurait reçu une «proposition» exigeant son approbation. Comme la Loi sur les pêches ne prévoit pas de procédure d'approbation qui serait applicable à un permis ou à une licence, le *Décret sur les lignes directrices* ne s'applique pas. En outre, les facteurs environnementaux ne sont soulevés ni dans la Loi sur les pêches ni dans la Loi sur le ministère des Pêches et des Océans, L.R.C. (1985), ch. F-15.

Le juge en chef adjoint Jérome examine ensuite l'arrêt *Fédération canadienne de la faune.* Dans cette affaire, que j'analyserai plus à fond plus loin, la Cour d'appel fédérale a statué que le ministre de l'Environnement devait approuver le projet en question, le barrage Rafferty-Alameda, avant sa mise en oeuvre. Le juge en chef adjoint Jérome estime que cette affaire se distingue de celle de l'espèce pour deux raisons. Premièrement, il était question d'une autorisation requise aux temes de la *Loi sur les ouvrages destinés à l'amélioration des cours d'eau internationaux*. L.R.C. (1985), ch. 1-20, nécessitant l'approbation préalable du ministre de l'Environnement; en l'espèce, l'approbation en vertu de la *Loi sur la protection des eaux navigables* peut être accordée une fois la réalisation du projet entamée. Deuxièmement, le project de construction du barrage de Rafferty-Alameda faisait intervenir le ministre de l'Environnement à qui la *Loi sur le ministère de l'Environnement* imposait l'obligation de se prononcer sur des facteurs environnementaux.

Enfin, en ce qui concerne le caractère discrétionnaire du redressement recherché, le juge en chef adjoint Jérome n'a pas fait droit à la demande de la Société en raison du retard et du chevauchement inutile qui s'ensuivraient. Entre l'approbation accordée le 18 septembre 1987 et le début de la présente action le 21 avril 1989, il précise qu'aucune mesure n'a été prise pour faire annuler cette approbation et forcer l'application du *Décret sur les lignes directrices.* À la date où la présente action a été intentée, le projet était déjà complété à environ 40 pour 100. Par ailleurs, la province d'Alberta avait déjà procédé à un examen exhaustif des incidences environnementales du projet qui «a permis le recensement complet des questions pouvant faire l'objet de préoccupations sociales environnementales, en sorte de donner à tous les citoyens, y compris les membres de l'organisation requérante, l'entière possibilité d'exprimer leur opinion et de se mobiliser en vue de contester le projet» (pp. 273 et 274). Cela étant, l'application du *Décret sur les lignes directrices* serait inutilement répétitive. Il a donc rejeté la demande.

La Société a alors interjeté appel auprès de la Cour d'appel fédérale.

La Cour d'appel

Le juge Stone, s'exprimant au nom de la cour, a tout d'abord fait remarquer que la construction du barrage sur la rivière Oldman peut avoir des répercussions environnementales sur au moins trois domaines de compétence fédérale, soit les pêcheries, les Indiens et les terres indiennes. Il n'est pas d'accord avec la proposition selon laquelle le ministre des Transports pouvait seulement prendre en considération les facteurs touchant la navigation. Il a conclu que le projet de barrage était visé par le *Décret sur les lignes directrices* et que le ministère des Transports était le «ministère responsables» aux fins de l'application de ce décret, ce qui en déclenchait l'application. Le juge Stone s'appuie ensuite sur l'arrêt *Fédération canadienne de la faune* pour déclarer que le *Décret sur les lignes directrices* est une règle d'application générale et qu'il impose au ministre une fonction qui «s'ajoute» à l'exercice des autres pouvoirs qui lui sont conférés par des lois. Il n'existe pas de conflit entre, d'une part, le fait d'exiger dans le *Décret sur les lignes directrices* qu'un examen soit effectué «le plus tôt possible au cours de l'étape de planification et avant de prendre des décisions irrévocables» et, d'autre part, le pouvoir de redressement permettant au ministre d'accorder une approbation après le début des travaux, en vertu de l'art. 6 de la *Loi sur la protection des eaux navigables.* Selon le juge Stone, ce pouvoir constitue une exception à la règle générale énoncée à l'art. 5 de la Loi selon laquelle il faut obtenir une approbation avant le début de la construction et, dans l'exercice de son pourvoir discrétionnaire, rien n'empêche le ministre d'appliquer le *Décret sur les lignes directrices*.

Le juge Stone examine ensuite la question de savoir si le ministre des Pêches et des Océans était tenu d'appliquer le *Décret sur les lignes directrices.* Il tente tout d'abord de déterminer si le ministre était saisi d'une «proposition» au sens de la Loi de façon à déclencher l'application du *Décret sur les lignes directrices*. Il arrive à une conclusion affirmative. Selon le juge Stone, le terme «proposition» est un terme défini dont la portée est beaucoup plus large que sa portée courante. En particulier il n'est pas limité à quelque chose de la nature

d'une demande. Une demande n'est qu'un moyen, parmi d'autres, d'attirer l'attention du ministre sur l'existence d'une «entreprise ou activité». Un ministre peut aussi être mis au courant par une démarche d'un particulier sollicitant des mesures spécifiques aux termes d'une loi, comme en l'espèce, et, puisque le ministre était au courant d'un projet dans un domaine de compétence fédérale, il existait une «proposition» au sens du *Décret sur les lignes directrices.* Par ailleurs, la décision du ministre de ne pas intervenir faisait de lui celui qui «exerce le pouvoir de décision», déclenchant ainsi ses obligations en vertu du *Décret sur les lignes directrices.*

Le juge Stone examine ensuite la question du pouvoir discrétionnaire et analyse les principes pertinents applicables à une cour d'appel quant à la modification d'une décision rendue par un juge de première instance dans l'exercise d'un pouvoir discrétionnaire. Bref, une cour d'appel ne serait pas justifiée de modifier en appel la décision, sauf si le juge de première instance a agi sur le fondement d'un principe erroné ou d'une appréciation fautive des faits ou si l'ordonnance prononcée n'est pas juste et raisonnable. Entre parenthèses, et dans la note en bas de page, le juge Stone se dit d'avis que la décision de refuser la délivrance du bref de prérogative parce que les procédures auraient été intentées trop tard n'est pas «bien fondée dans son principe», parce que les faits expliquent le retard, particulièrement que l'intimée n'a eu connaissance de la décision du ministre des Transports d'accorder l'approbation que deux mois avant le début des procédures. Par ailleurs, l'intimée avait tenté de contester le permis provincial délivré et ce n'est qu'à la veille du commencement des procédures que la Section de première instance de la Cour fédérale a décidé, dans l'affaire *Fédération Canadienne de la faune*, que le ministre de l'Environnement était lié par le *Décret sur les lignes directrices.*

En ce qui concerne la répétition inutile à laquelle pourrait donner lieu l'octroi de la réparation demandée, le juge Stone a statué que le processus provincial d'examen en matière d'environnement échoue sous deux aspects lorsqu'on le compare au processus d'évaluation des incidences environnementales prévu dans le *Décret sur les lignes directrices.* Premièrement, les textes législatifs provinciaux n'accordent pas la même importance à la participation du public au processus que le *Décret sur les lignes directrics.* Deuxièmement, rien dans les textes législatifs provinciaux n'exige le même degré d'indépendance que celui qui est exigé de la commission d'examen.

La dernière question analysée par le juge Stone et qui est aussi soulevée dans le présent pourvoi est celle de savoir si la *Loi sur la protection des eaux navigables* lie la Couronne du chef de l'Alberta. En se fondant sur la décision rendue par notre Cour dans *Alberta Government Telephones c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes),* (1989) 2 R.C.S. 225, le juge Stone a statué que la Loi, tout particulièrement l'art. 4 examiné dans son contexte, permet de constater une intention de lier la Couronne. Par ailleurs, la Loi serait privée de toute efficacité si ses dispositions ne liaient pas la Couronne, puisqu'il est notoire qu'un grand nombre d'ouvrages obstruant des eaux navigables sont construits sous l'égide des gouvernements.

En conséquence, l'appel a été accueilli, l'approbation a été annulée et le ministre des Transports et celui des Pêches et des Océans ont été enjoints de se conformer au *Décret sur les lignes directrices.*

Le pourvoi devant notre Cour

Comme je l'ai déjà mentionné, une autorisation de pourvoi a été demandée à notre Cour, qui l'a accordée, et le Juge en chef a formulé la question constitutionnelle suivante le 29 octobre 1990:

Le Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement, DORS/84-467, est-il général au point de cotnrevenir aux art. 92 et 92A de la *Loi constitutionnelle de 1867* et d'être, par conséquent, constitutionnellement inapplicable au barrage de la rivière Oldman appartenant à l'appelante Sa Majesté la Reine du chef de l'Alberta?

Des interventions ont ensuite été déposées par les procureurs généraux du Québec, du Nouveau-Brunswick, du Manitoba, de la Colombie-Britanique, de la Saskatchewan et de Terre-Neuve, le ministre de la Justice des Territoires du Nord-Ouest et un certain nombre de groupes environnementaux, notamment le Sierra Legal Defence Fund, l'Association canadienne du droit de l'environnement, le Sierra Club of Western Canada, Survie culturelle (Canada), les Amis de la Terre et l'Alberta Wilderness Association, ainsi que par plusieurs organisations indiennes, notamment la Fraternité des Indiens du Canada et l'Assemblée des premières nations, la Nation dénée et l'Association des Métis des Territoires du Nord-Ouest ainsi que le Conseil national des autochtones du Canada (Alberta).

Les questions en litige

Les parties ont présenté de diverses façons dans leur mémoire les nombreuses questions soulevées dans le présent pourvoi, mais je préfère les analyser dans l'ordre suivant:

1. La validité législative du *Décret sur les lignes directrices*

a. Le *Décret sur les lignes directrices* est-il autorisé par l'art. 6 de la *Loi sur le ministère de l'Environnement*?

b. Le *Décret sur les lignes directrices* est-il incompatible avec la *Loi sur la protection des eaux navigables* et la *Loi sur les pêches?*

2. L'obligation des ministres de se conformer au *Décret sur les lignes directrices*

a. Le paragraphe 4(1) de la *Loi sur le ministère de l'Environnement* écarte-t-il l'application aux ministres du *Décret sur les lignes directrices?*

b. *Le Décret sur les lignes directrices* s'applique-t-il aux-projets autres que les nouveaux projets fédéraux?

c. Les ministres sont-ils des "ministères responsables"

d. La *Loi sur la protection des eaux navigables* lie-t-elle la Couronne du chef de l'Alberta?

3. La question constitutionnelle

Le *Décret sur les lignes directrices* est-il général au point de contrevenir aux art. 92 et 92A de la *Loi constitutionnelle de 1867*, et d'être, par conséquent, constitutionnellement inapplicable au barrage de la rivière Oldman appartenant à l'Alberta?

4. Le pouvoir discrétionnaire

La Cour d'appel fédérale a-t-elle commis une erreur en modifiant la décision de refuser d'accorder les réparations demandées, prise par le juge en chef adjoint Jérome dans l'exercice de son pouvoir discrétionnaire?

La validité législative du Décret sur les lignes directrices

Le Décret sur les lignes directrices est-il autorisé par l'art. 6 de la *Loi sur le ministère de l'Environnement*?

L'appelante l'Alberta soutient que le *Décret sur les lignes directrices* est *ultra vires* parce qu'il n'est pas compris dans les pouvoirs prévus dans le texte habilitant, soit l'art. 6 de la *Loi sur le ministère de l'Environnement.* Par souci de commodité, je reproduis la disposition en question:

6. Au titre de celles de ses fonctions qui portent sur la qualité de l'environnement, le ministre peut par arrêté, avec l'approbation du gouveneur en conseil, établir des directrives à l'usage des ministères et organismes fédéraux et, s'il y a lieu, à celui des sociétés d'Etat énumérées à l'annexe III de la *Loi sur la gestion des finances publiques* et des organismes de réglementation dans l'exercice de leurs pouvoirs et fonctions.

Le principal motif invoqué à l'appui de la prétention que le *Décret sur les lignes directrices* n'est pas valide est que l'emploi du terme «directrives» à l'art. 6 ne permet pas l'adoption de textes réglementaires impératifs, mais envisage seulement l'établissement de directives purement administratives qui ne visent pas à lier juridiquement ceux à qui elles s'adressent. Il n'y a pas de doute que le pouvoir d'adopter des textes réglementaires doit être prévu dans la loi habilitante et c'est celle-ci que l'on doit examiner pour déterminer si la Loi peut appuyer l'adoption d'un texte réglementaire impératif, dont la violation peut entraîner une demande de bref de prérogative.

Cette question a été analysée dans l'arrêt *Fédération canadienne de la faune*, précité. Dans cette affaire, la requérante contestait la délivrance d'un permis par le ministre de l'Environnement en vertu de la Loi sur les ouvrages destinés à l'amélioration des cours d'eau internationaux et sollicitait une ordonnance de la nature d'un *certiorari* annulant le permis, et un *mandumus* enjoignant au ministre de l'Environnement de se conformer au *Décret sur les lignes directrices.* Le juge Cullen de la Section de première instance a statué que le *Décret sur les lignes directrices* est un texte ou un règlement au sens du par. 2(1) de la *Loi d'interprétation*, L.R.C. (1985) ch. 1-21:2. (1) Les définitions qui suivent s'appliquent à la présente loi.

«réglement» Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris:

a) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;

b) soit par le gouverneur en conseil ou sous son autorité.

«texte»Tout ou partie d'une loi ou d'un règlement.

Le juge Cullen conclut à la p. 322:

Par conséquent, le Décret n'est pas un simple énoncé de politique ou de programme; il est susceptible de créer des droits qu'on peut faire respecter par voie de *mandamus* (voir *Young c. Ministre de l'emploi et de l'immigration* (1987), 8 F.T.R. 218 (C.F. 1e inst.), à la p. 221).

En Cour d'appel, le juge Hugessen s'est fondé sur les versions française et anglaise de l'art. 6 de la *Loi sur le ministère de l'Environnement* pour statuer que cette loi pouvait appuyer l'existence d'un pouvoir d'adopter un texte réglementaire impératif. «Le mot «directives» en lui-même, a-t-il précisé, est neutre à cet égard». Quant à la question de savoir si les Lignes directrices avaient été rédigées de façon à les rendre impératives, il écrit aux pp. 73 et 74:

En dernier lieu, rien dans le textes des Directives elles-mêmes n'indique qu'elles ne sont pas impératives; au contraire, l'emploi répété du verbe «shall» [....] dans la version anglaise des Directives, et particulierement aux articles 6, 13 et 20, montre l'intention évidente que les Directives aient force obligatoire pour tous ceux qu'elles visent, y compris le ministre de l'Environnemment lui-même. Je suis d'acord avec lui sur ces deux points. La première question dépend de l'intention du législateur. Les lignes directrices, établies en vertu de la Loi que notre Cour a analysée dans le *Renvoi relatif à la Loi anti-inflation,* (1976) 2 R.C.S. 373, par exemple, étaient clairement impératives. Je suis convaincu que l'art. 6 de la Loi permet l'adoption de lignes directrices impératives et que les Lignes directrices sont formulées de façon à les rendre impératives.

En l'espèce, rien n'indique que le *Décret sur les lignes directrices* ne constitue qu'une autre forme de directive administrative qui ne peut établir de droits exécutoires, comme dans l'arrêt *Martineau c. Comité de discipline des détenus de l'Institution de Matsqui*, (1978) 1 R.C.S. 118. Dans cette affaire, la question était de savoir si l'on était «légalement» soumis, au sens de l'art. 28 de la *Loi sur la Cour fédérale*, S.C. 1970-71-72, ch. 1, à une directive concernant les mesures disciplinaires prises contre les détenus, adoptée en vertu du par.

29(3) de la *Loi sur les pénitenciers*, S.R.C. 1970, ch. P-6, de façon que la Cour fédérale avait compétence pour examiner une décision disciplinaire prononcée par le Comité. Notre Cour à la majorité a statué que la décision du comité ne se trouvait pas, au sens de l'art. 28, «légalement» soumise au processus prescrit par la directive. Le juge Pigeon indique à la p. 129:

Il est significatif qu'il n'est prévu aucune sanction pour elles et, bien qu'elles soient autorisées par la Loi, elles sont nettement de nature administrative et non législative. Ce n'est pas en qualité de législateur que le commissaire est habilité à établir des directives, mais en qualité d'aministrateur. Je suis convaincu qu'il aurait l'autorité d'établir ces directives même en l'absence d'une disposition législative expresse. [Je souligne.]

Il y a peu de doute qu'un ministre possède habituellement un pouvoir implicite d'établir des directives visant l'application d'une loi dont il est responsable; voir, par exemple, l'arrêt *Maple Lodge Farms Ltd. c. Gouvernement du Canada,* (1982) 2 R.C.S. 2. Il est également évident que la violation de ces directives ne donnerait lieu qu'à une sanction administrative et non judiciaire puisque celles-ci n'ont pas force de loi.

Cependant, en l'espèce, il s'agit d'une directive qui n'est simplement autorisée par une loi, mais qui doit être officiellement adoptée par «arrêté» et promulguée en vertu de l'art. 6 de la *Loi sur le ministère de l'Environnement*, sur approbation du gouverneur en conseil. Ce processus contraste vivement avec le processus habituel d'établissement de directives de politique interne ministérielle destinées à exercer un contrôle sur les fonctionnaires relevant de l'autorité du ministre. À mon avis, il s'agit là d'une distinction essentielle. Voici comment R. Dussault et L. Borgeat décrivent l'effet de cette distinction dans *Traité de droit administratif* (2e éd. 1984), t. I, à la p. 429:

Lorsqu'un gouvernement juge nécessaire de régir une situation par des normes de comportement, il peut faire adopter une loi ou édicter lui-même un règlement, ou bien procéder administrativement par voie de directives. Dans le premier cas, il doit s'astreindre aux formalités de l'adoption des lois et des règlements; par contre, il sait que, une fois ces formalités respectées, les nouvelles normes entreront dans le cadre de la «légalité», et qu'en vertu de la *Rule of law* elles seront appliquées par les tribunaux. Dans le second cas, c'est-à-dire s'il choisit de procéder par directives, que celles-ci soient ou non autorisées législativement, il opte plutôt pour la voie moins formalisée de l'autorité hiérarchique, dont les tribunaux n'ont pas à assurer le respect. Attribuer à des directives l'effet de règlements, c'est aller au-delà de l'intention du législateur. Celui-ci ne parlant pas pour ne rien dire, il faut respecter sa volonté implicite de laisser une situation hors du cadre strict de la «légalité».

On ne doit pas examiner le terme «directives» en vase clos; il faut interpréter l'art. 6 dans son ensemble. On se rend alors compte que le législateur fédéral a opté pour l'adoption d'un mécanisme de réglementation auquel on est soumis «légalement» et dont on peut obtenir l'exécution par bref de prérogative.

L'Alberta prétend également que le *Décret sur les lignes directrices* est *ultra vires* au motif que l'étendue du sujet traité dans la législation déléguée va bien au-delà de ce qui est autorisée par la *Loi sur le ministère de l'Environnement*. Plus particulièrement, l'Alberta soutient que le pouvoir du ministre de prendre des directives au titre de celles de ses fonctions qui portent sur la «qualité de l'environnement» ne comprend pas l'établissement d'un processus d'évaluation des incidences environnementales, comme celui que prévoit le *Décret sur les lignes directrices*, dans l'exécution duquel le décideur doit tenir compte de facteurs socio-économiques. On fait valoir plutôt que la Loi permet seulement l'adoption de textes réglementaires qui visent strictement les questions portant sur la qualité de l'environnement, prise dans un sens physique.

Je ne puis accepter que le concept de la qualité de l'environnement se limite à l'environnement biophysique seulement; une telle interprétation est indûment étroite et contraire à l'idée généralement acceptée que l'«environnement» est un sujet diffus; voir l'arrêt R. c.

Crown Zellerbach Canada Ltd. (1988) 1 R.C.S. 401. Ce point a été énoncé par le Conseil canadien des ministres des Ressources et de l'Environnement, à la suite du «Rapport Brundtland» de la Commission mondiale sur l'environnement et le développement, dans le *Rapport du Groupe de Travail national sur l'environnement et l'économie*, 24 septembre 1987, à la p. 2:

Nos recommandations reflètent des principes que nous partageons avec la Commission mondiale sur l'environnement et le développement. Nous croyons notamment que la planification environnementale et la planification économique ne peuvent pas se faire dans des milieux séparés. La croissance économique à long terme dépend de l'environnement. Elle affecte aussi l'environnement de bien des façons. Pour assurer un développement économique durable et compatible avec l'environnement, nous avons besoin de la technologie et de la richesse produites par une croissance économique soutenue. La planification et la gestion de l'économie et de l'environnement doivent donc être intégrées.

Certes, les conséquences éventuelles d'un changement environmental sur le gagne-pain, la santé et les autres préoccupations sociales d'une collectivité font partie intégrante de la prise de décisions concernant des questions ayant une incidence sur la qualité de l'environnement, sous réserve, bien entendu, des impératifs constitutionnels, question que j'examinerai plus loin.

Je conclus en conséquence que le Décret sur les lignes directrices a été validement adopté conformément à la *Loi sur le ministère de l'Environnement* et qu'il est de nature impérative.

L'incompatibilité avec la *Loi sur la protection des eaux navigables et la Loi sur les pêches*

Les appelants, l'Alberta et les ministres fédéraux, prétendent que le *Décret sur les lignes directices* est incompatible avec les exigences de la *Loi sur la protection des eaux navigables* pour ce qui est de l'obtention d'une approbation en vertu de l'art. 5 de cette loi et que celle-ci doit avoir préséance sur le Décret. Plus particulièrement, ils disent que le ministre des Transports ne peut, en vertu de la Loi, tenir compte que des facteurs touchant la navigation et que le *Décret sur les lignes directrices* est également incompatible avec la *Loi sur les pêches;* toutefois, pour les motifs exprimés plus loin, j'estime inutile d'analyser cette question.

On ne met pas en doute les principes fondamentaux du droit. Il ne peut y avoir incompatibilité entre le texte réglementarie et la loi en vertu duquel il est adoptée (*Belanger c. The King* (1916), 54 R.C.S. 265), pas plus qu'il ne peut y en avoir avec les autres lois fédérales (*R. & W. paul, Ltd. c. Wheat Commission*, (1937) A.C. 139 (H.L.)). sauf si la loi l'autorise (*Re Gray* (1918), 57 R.C.S. 150). Normalement, la loi fédérale doit l'emporter sur le texte réglementaire incompatible. Toutefois, en matière d'interprétation, un tribunal préférera, dans la mesure du possible, une interprétation qui permet de concilier les deux textes. Dans ce contexte, l'«incompatibilité» renvoie à une situation où le texte législatif et le texte réglementaire ne peuvent être conciliés; voir l'arrêt *Daniels c. White*, (1968) R.C.S. 517. Dans cette affaire, la règle a été énoncée à l'égard de deux lois incompatibles dont l'une était réputée abroger l'autre en raison de l'incompatibilité. Toutefois, la justification fondamentale est la même que dans le cas où le texte réglementaire serait incompatible avec une autre loi fédérale - il existe une présomption que le législateur n'a pas eu l'intention d'adopter des textes contradictoires ou d'habiliter quiconque à le faire. Il existe également une ressemblance doctrinale avec le principe de la prépondérance dans les affaires de partage constitutionnel des compétences dans lesquelles l'incompatibilité a aussi été définie dans le sens de contradiction - c'est-à-dire lorsque le fait de [TRADUCTION] «se conformer à une loi signifie que l'on enfreint l'autre»; voir l'arrêt *Smith c. The Queen* (1960) R.C.S. 776, à la p. 800.

L'incompatibilité invoquée est que la *Loi sur la protection des eaux navigables* empêche implicitement le ministre des Transports de tenir compte de facteurs autres que ceux touchant la navigation dans l'exercice de son pouvoir d'approbation en vertu de l'art. 5 de la Loi, alors que le *Décret sur les lignes directrices* exige tout au moins l'établissement d'une évaluation initiale des incidences environnementales. Les ministres appelants reconnaissent qu'il n'existe pas d'interdiction explicite de tenir compte des facteurs environnementaux, mais prétendent que l'objet et l'esprit de la Loi limitent le ministre des Transports à l'examen des effets possibles d'un ouvrage sur la navigation seulement. Si les appelants ont raison, il me semble que le ministre approuverait très peu d'ouvrages parce que plusieurs des «ouvrages» visés par l'art. 5 ne favorisent pas la navigation en tant que telle, mais la gênent plutôt, ou y font obstacle, en raison même de leur nature, par exemple, les ponts, les estacades, les barrages et autres choses du même genre. Si l'importance de l'incidence sur la navigation constituait le seul critère, il est difficile d'envisager l'approbation d'un barrage du même type que celui en l'espèce. Il est donc évident que le ministre doit tenir compte de plusieurs éléments dans toute analyse coûts-avantages visant à déterminer s'il est justifié dans les circonstances de gêner d'une façon importante la navigation.

Il se peut que le ministre des Transports dans l'exercise de ses fonctions en vertu de l'art. 5 ait toujours tenu compte de l'incidence environnementale d'un ouvrage, tout au moins en ce qui concerne d'autres domaines de

compétence fédérale, comme les Indiens ou les terres indiennes. Bien que cela puisse être le cas, le Décret sur les lignes directrices exige officiellement qu'il le fasse et, je ne vois rien là d'incompatible avec les fonctions que lui attribue l'art. 5. Comme le juge Stone de la Cour d'appel l'a indiqué, le Décret a créé une fonction qui "s'ajoute» à tout autre pouvoir qui lui est conféré par des lois et qui n'entre pas en conflit avec ce pouvoir. À mon avis, la fonction confiée au ministre en vertu du *Décret sur les lignes directrices* vient en fait s'ajouter à la responabilité qu'il a en vertu de la *Loi sur la protection des eaux navigables* et il ne peut invoquer une interprétation trop étroite des pouvoirs qui lui sont conférés par des lois pour éviter de se conformer au *Décret sur les lignes directrices.*

L'article 8 du *Décret sur les lignes directrices* reconnaît déjà que l'évaluation des incidences environnementales ne recevra pas application s'il est incompatible avec les dispositions d'autres textes législatifs.

8. Lorsqu'une commission ou un organisme fédéral ou un organisme de réglementation exerce un pouvoir de réglementation à l'égard d'une proposition, les présentes lignes directrices ne s'appliquent à la commission ou à l'organisme que si aucun obstacle juridique ne l'empêche ou s'il n'en découle pas de chevauchement des responsabilités.

Une interprétation libérale de l'application du *Décret sur les lignes directrices* est compatible avec les objectifs mentionnés à la fois dans le Décret et dans la loi en vertu de laquelle il a été adopté - faire de l'évaluation des incidences environnementales un élément essentiel de la prise de décisions fédérales. Une analyse similaire a été adoptée aux Etats-Unis relativement à la *National Environnemental Policy Act.* Comme l'affirme le juge Pratt dans l'arrêt *Environmental Defense Fund, Inc. c. Mathews,* 410 F. Supp. 336 (D.D.C. 1976), à la p. 337:

[TRADUCTION] La *National Environmental Policy Act* ne l'emporte pas sur les autres fonctions conférées par des lois mais, dans la mesure où cette loi est conciliable avec ces fonctions, elle vient les compléter. On ne peut éviter de se conformer pleinement aux exigences de cette loi, sauf si la conformité entrerait directement en conflit avec d'autres fonctions existantes conférées par des lois.

Toute autre interprétation ne tiendrait pas compte, à mon avis, du régime législatif de protection de l'environnement envisagé par le législateur lorsqu'il a adopté la *Loi sur le ministère de l'Environnement,* et, plus particulièrement, l'art. 6.

Je ne crois pas non plus que l'art. 3 du *Décret sur les lignes directrices*, qui exige que l'évaluation soit réalisée «le plus tôt possible au cours de l'étape de planification et avant de prendre des décisions irrévocables», soit d'une façon quelconque incompatible avec l'art. 6 de *Loi sur la protection des eaux navigables.* L'article 6 vise principalement à habiliter le ministre qui constate qu'un ouvrage a été construit sans qu'aient été repectées les exigences de l'art. 5 à prendre des mesures pour le faire détruire ou toute autre mesure de redressement nécessaire; toutefois, les appelants ont attiré notre attention sur le par. 6(4) qui habilite le ministre à approuver un ouvrage qui a déjà été construit. Sur ce point, je suis entièrement d'accord avec le juge Stone de la Cour d'appel, qui mentionne à la p. 41:

À mon avis, les dispositions de l'article 6 de Loi concernent les pouvoirs de redressement que détient le ministre lorsqu'il détermine les mesures qu'il pourrait prendre advenant un défaut d'obtenir une approbation conformément à l'article 5 avant le début de la construction. Le pouvoir prévu au paragraphe (4) de l'article 6 constitue une exception à la règle générale; il est entièrement discrétionnaire et se trouve clairement subordonné à l'exigence fondamentale de l'alinéa 5(1)(a) selon laquelle une approbation doit être obtenue avant le début de la construction. Je suis également incapable de trouver dans le Décret sur les lignes directrices une disposition qui empêcherait le ministre de se conformer à ses prescriptions dans toute la mesure du possible lorsqu'il exerce son pouvoir discrétionnaire sous le régime du paragraphe 6(4) de la *Loi sur la protection des eaux navigables.* Cela étant, je ne puis conclure à aucune incompatibilité et à aucun conflit entre ces deux textes de la législation fédérale.

Il me paraît donc évident non seulement que le *Décret sur les lignes directrices* s'inscrit dans le cadre des pouvoirs conférés par la *Loi sur le ministère de l'Environnement,* mais qu'il est entièrement compatible avec la *Loi sur la protection des eaux navigables.* Il faut donc se demander si le Décret s'applique en l'espèce.

L'obligation des ministres de se conformer au Décret sur les lignes directrices.

Le paragraphe 4(1) de la Loi sur le ministère de l'Environnement

Voici le texte de l'al. 4(1)a) de la *Loi sur le ministère de l'Environnement.*

4. (1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés:

a) à la conservation et l'amélioration de la qualité de l'environnement naturel, notamment celle de l'eau, de l'air et du sol;

L'Alberta prétend qu'en restreignant la compétence du

ministre de l'Environnement aux «domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux» (je souligne), l'art. 4 rend le *Décret sur les lignes directrices* inopérant en l'espèce. Parce que la *Loi sur les pêches* réglemente la gestion des ressources halieutiques du Canada, on soutient que la compétence du ministre de l'Environnement a été écartée à l'égard de toutes les questions concernant l'habitat du poisson. Cet augument peut être tranché rapidement. Il est fondé sur une interprétation tout à fait erronée des «domaines» visés par les divers textes législatifs. Le *Décret sur les lignes directrices* établit une méthode d'évaluation des incidences environnementales à l'intention de tous les ministères fédéraux dans l'exercice de leurs pouvoirs et dans l'exécution de leurs obligations et fonctions, alors que la *Loi sur les pêches* traite de la question de fond de la protection du poisson et de son habitat. Il existe certes un lien entre les deux, mais la différence essentielle est que l'une porte fondamentalement sur la procédure, alors que l'autre porte sur le fond. L'analyse proposée par les appelants rendrait pratiquement vide de sens le pouvoir conféré par l'art. 6 de la *Loi sur le ministère de l'Environnement.*

Les nouveaux projets fédéraux

L'Alberta s'attaque ensuite à la prétendue application du *Décret sur les lignes directrices* à des propositions autres que les «nouveaux projets, programmes et activités fédéraux» visés au sous-al.5*a*(ii) de la *Loi sur le ministère de l'Environnement:*

5. Dans le cadre des pouvoirs et fonctions que lui confère l'article 4, le ministre:

a) lance, recommande ou entreprend à son initiative et coordonne à l'échelle fédérale des programmes visant à:

....

(ii) faire en sorte que les nouveaux projets, programmes et activités fédéraux soient, dès les premières étapes de planification, évalués en fonction de leurs risques pour la qualité de l'environnement naturel, et que ceux d'entre eux dont on aura estimé qu'ils présentent probablement des risques graves fassent l'objet d'un réexamen dont les résultats devront être pris en considération...[Je souligne.]

On soutient que le libellé de ce sous-alinéa permet d'établir que le législateur avait l'intention de restreindre l'application du *Décret sur les lignes directrices* aux nouveaux projets fédéraux et que celui-ci ne saurait en conséquence s'appliquer à un projet parrainé par une province. À mon avis, l'Alberta cherche encore ici à interpréter d'une façon trop étroite l'étendue des fonctions du ministre de l'Environnement en vertu de l'art. 6 de la Loi. Le *Décret sur les lignes directrices* a été adopté en vertu de l'art. 6 et non de l'art. 5 et les pouvoirs et fonctions du ministre qui y sont mentionnés visent à englober des domaines qu'on trouve à l'art. 4 ainsi qu'à l'art. 5, y compris: «la conservation et l'amélioration de la qualité de la environnement» (al. 4(1)a)). L'article 6 n'est donc pas limité aux nouveaux projets, programmes et activités. L'article 5 ne fait que décrire les fonctions minimales du ministre en vertu de l'art. 4, lequel est beaucoup plus vaste. C'est là que l'on trouve la véritable gamme des fonctions du ministre en matière de qualité de l'environnement relativement à laquelle des directives peuvent être établies.

Les ministères responsables

Au coeur des moyens invoqués par les ministres appelants est la question de savoir si le *Décret sur les lignes directrices,* de par son libellé, est applicable au projet de construction d'un barrage sur la rivière Oldman. L'Alberta n'a pas soulevé cette question et les ministres reconnaissent que le ministère des Transports est un ministère «responsable« mais ils soutiennent que le *Décret sur les lignes directrices* est incompatible avec la *Loi sur la protection des eaux navigables* et ne peut recevoir application. J'ai conclu que les deux textes sont compatibles pour les motifs déjà énoncés; il n'existe donc plus de controverse entre les parties quant à savoir si le ministre des Transports est régi par les dispositions du *Décret sur les lignes directrices.* En ce qui concerne le ministre des Pêches et des Océans, on soutient qu'il n'est pas tenu d'invoquer l'application du *Décret sur les lignes directrices* en l'espèce parce qu'il n'exerce pas un «pouvoir de décision» conformément aux dispositions pertinentes de la *Loi sur les pêches.* Puisque la question de l'application du *Décret sur les lignes directrices* a donné lieu à un profond désaccord devant les tribunaux d'instance inférieure, j'estime nécessaire d'analyser tout d'abord de le *Décret sur les lignes directrices* pour interpréter les dispositions qui en déterminent l'application.

À mon avis, le point de départ est l'art. 6 du *Décret sur les lignes directrices* qui énonce son principe d'application. Il vaut la peine de le reproduire de nouveau:

6. Les présentes lignes directrices s'appliquent aux propositions

a) devant être réalisées directement par un ministère responsable;

b) pouvant avoir des répercussions environnementales sur une question de compétence fédérale;

c) pour lesquelles le gouvernement du Canada

s'engage financièrement; ou

d) devant être réalisées sur des terres administrées par le gouvernement du Canada, y compris la haute mer. [Je souligne.]

On ne peut sérieusement mettre en doute que le projet de barrage sur la rivière Oldman peut avoir des répercussions environnementales sur une question de compétence fédérale, notamment les domaines visés par l'art. 91 de la *Loi constituionnelle de 1867* déjà mentionnés, soit la navigation, les Indiens, les terres réservées aux Indiens et les pêcheries de l'intérieur. En conséquence, le *Décret sur les lignes directrices* s'applique si le projet en l'espèce constitue une «proposition» au sens de l'art. 2:

2. Les définitions qui suivent s'appliquent aux présentes lignes directrices.

«proposition» S'entend en outre de toute entreprise ou activité à l'égard de laquelle le gouvernement du Canada participe à la prise de décisions. [Je souligne.]

Si une telle proposition existe, les art. 3 et 10 du *Décret sur les lignes directrices* confient l'application de la méthode d'évaluation au "ministère responsables», qui doit s'assurer d'une part, d'examiner à fond les répercussions environnementales de toute proposition dont il est saisi et d'autre part, de soumettre cette proposition à une évaluation initiale afin de déteminer la nature des effets néfastes qu'elle peut avoir sur l'environnement. L'article 2 définit aussi l'entité désignée comme «ministère responsable»:

2. Les définitions qui suivent s'appliquent aux présentes lignes directrices.

.....

«ministère responsable» Ministère qui, au nom du gouvernement du Canada, exerce le pouvoir de décision à l'égard d'une proposition. [Je souligne.]

On soutient que, dans la version anglaise, l'emploi de l'article défini «the» dans la définition de «initiating department», par opposition à l'emploi de l'article indéfini «a» dans la définition du terme «proposal», peut indiquer une intention de limiter l'application du *Décret sur les lignes directrices* aux projets sur lesquels le gouvernment fédéral exerce le principal ou le seul pouvoir de décision; voir, par exemple, C.J. Gillespie, «Enforceable Rights from Administrative Guidelines?» (1989-1990), 3. C.J.A.L.P. 204. Je ne suis pas d'accord avec cette interprétation. À mon avis, la seule conséquence qu'entraîne le fait de passer de l'emploi de l'article indéfini dans la définition du terme «proposal» à celui de l'article défini dans la définition de «initiating department» est de désigner de façon précise, une fois établi que le gouvernement fédéral participe à la prise de décisions, l'autorité, particulière au sein du gouvernement du Canada qui sera responsable de la mise en oeuvre du *Décret sur les lignes directrices.*

Dans l'arrêt *Angus c. Canada (1990)* 3 C.F. 410 (C.A.), le juge Décary a adopté une analyse similaire relativement à l'interprétation du *Décret sur les lignes directrices*, mais dans un contexte différent. Dans cette affaire, la question en litige était de savoir si le *Décret sur les lignes directrices* s'appliquait à un décret pris par le gouverneur en conseil en vertu de l'art. 64 de la *Loi de 1987 sur les transports nationaux,* L.R.C. (1985), ch. 28 (3e suppl.), qui ordonnait à VIA Rail d'éliminer ou de réduire certains services voyageurs. Bien que cette affaire ait porté sur la question précise de savoir si le gouverneur en conseil était tenu de se conformer au *Décret sur les lignes directrices*, ce qui n'est pas soulevé en l'espèce, et que le juge Décary ait été dissident sur ce point, l'analyse globale qu'il fait, à la p. 434, de l'application du *Décret sur les lignes directrices* est utile:

Le juge de première instance et les intimés ont mis l'accent sur les mots «ministère responsable» qui ont trait à l'administration des Lignes directrices. Je mettrais plutôt l'accent sur les mots «proposition» et «gouvernement du Canada» qui ont trait au «champ d'application» des Lignes directrices. Rien n'exige dans la définition du mot «proposition» que celle-ci soit faite par un ministère responsable, au sens des Lignes directrices. L'intention du rédacteur semble être que les Lignes directrices doivent s'appliquer chaque fois qu'une activité peut avoir des répercussions environnementales sur une question de compétence fédérale et quel que soit le preneur de décision au nom du gouvernment, qu'il s'agisse d'un ministère, d'un ministre ou du gouverneur en conseil, et cela devient alors une question purement pratique, lorsque le preneur de décision ultime n'est pas un ministère, de déterminer quel ministère ou ministre est le preneur de décision originel ou celui qui va effectivement mettre la décision à exécution, car il se trouve toujours un ministère ou un ministre qui est présent «à l'étape de planification» et «avant» que ne soient prises «des décisions irrévocables» ou qui voit à la «réalisation directe» de la proposition.

Puisque cette question n'est pas soulevée, je ne vois pas l'intérêt de faire des observations sur l'application au gouverneur en conseil du *Décret sur les lignes directrices*; toutefois, le passage précité permet de bien saisir l'essence de son application.

Je ne veux pas dire pour autant que le *Décret sur les lignes directrices* reçoit application chaque fois qu'un projet peut comporter des répercussions environnementales sur un domaine de compétence fédérale. Il doit tout d'abord s'agir d'une «proposition»

qui vise une «entreprise ou activité à l'égard de laquelle le gouvernement du Canada participe à la prise de décision». (Je souligne.) À mon avis, l'interprétation qu'il faut donner à l'expression «participe à la prise de décisions» est que le gouvernement fédérale, se trouvant dans un domaine relevant de sa compétence en vertu de l'art. 91 de la *Loi constitutionnelle de 1867*, doit avoir une obligation positive de réglementation en vertu d'une loi fédérale relativement à l'entreprise ou à l'activité proposée. On n'a pas pu vouloir que le *Décret sur les lignes directrices* soit invoqué chaque fois qu'il existe certaines possibilités de répercussions environnementales sur un domaine de compétence fédérale. En conséquence, l'expression «participe à la prise de décisions» dans la définition du terme «proposition» ne devrait pas être interprétée comme ayant trait à des questions relevant généralement de la compétence fédérale. Cette expression signifie plutôt une obligation légale. Si cette obligation existe, il s'agit alors de déterminer qui est le «ministère qui exerce le pouvoir de décision à l'égard de la proposition et qui doit donc entamer le processus d'évaluation visé par le *Décret sur les lignes directrices.*

La nécessité d'une obligation positive de réglementation pour que le gouvernement du Canada «participe à la prise décisions» ressort d'autres dispositions« du *Décret sur les lignes directrices*, qui laissent entendre que le ministère responsable doit détenir un certain pouvoir de réglementation sur le projet. Par exemple, l'art. 12 dispose que:

12. Le ministère responsable examine ou évalue chaque proposition à l'égard de laquelle il exerce le pouvoir de décision, afin de déterminer:

f) si les effets néfastes que la proposition peut avoir sur l'environnement sont inacceptables, auquel cas la proposition est soit annulée, soit modifiée et soumise à un nouvel examen ou évaluation initiale.

L'article 14:

14. Le ministère responsable voit à la mise en application de mesures d'atténuation et d'indemnisation, s'il est d'avis que celles-ci peuvent empêcher que les effets néfastes d'une proposition sur l'environnement prennent de l'ampleur.

Ces dispositions amplifient le pouvoir de réglementation que doit avoir le gouvernement du Canada en vertu d'une loi fédérale avant de pouvoir participer à la prise de décisions.

si on applique cette interprétation à l'espèce, on se rendra compte que le projet de barrage sur la rivière Oldman peut être qualifié de proposition dont le ministre des Transports seul est le ministère responsable. À mon avis, la *Loi sur la protection des eaux navigables* impose une obligation positive de réglementation au ministre des Transports. Cette loi a mis en place un mécanisme de réglementation qui prévoit qu'il est nécessaire d'obtenir l'approbation du ministre avant qu'un ouvrage qui gêne sérieusement la navigation puisse être placé dans des eaux navigables ou sur, sous, au-dessus ou à travers de telles eaux. L'article 5 accorde au ministre le pouvoir de fixer les modalités qu'il juge à propos lorsqu'il approuve un ouvrage; si le propriétaire ne se conforme pas aux modalités, le ministre peut lui ordonner d'enlever l'ouvrage ou de le modifier. Pour ces motifs, je conclurais qu'il s'agit ici d'une «proposition» dont le ministre des Transports est un «ministère responsable».

La *Loi sur les pêches* ne renferme cependant pas de disposition de réglementation équivalente qui serait applicable au projet. L'article 35 interdit d'exploiter des ouvrages ou entreprises entraînant la détérioration, la destruction ou la perturbation de l'habitat du poisson, et l'art, 40 assortit cette interdiction d'une sanction pénale. En vertu du par. 37(1), le ministre des Pêches et des Océans peut demander des renseignements à quiconque exploite ou se propose d'exploiter des ouvrages ou entreprises de nature à entraîner la détérioration, la perturbation ou la destruction de l'habitat du poisson. Toutefois, cette demande n'a pas pour objet la mise en oeuvre d'une procédure de réglementation; elle aide simplement le ministre à exercer le pouvoir législatif spécial, qui lui a été délégué en vertu du par. 37(2), d'autoriser une exception à l'interdiction générale. En voici le libellé:

37.....

(2) Si, après examen des documents et des renseignements reçus et après avoir accordé aux personnes qui les lui ont fournis la possibilité de lui présenter leurs observations, il est d'avis qu'il y a infraction ou risque d'infraction au paragraphe 35(1) ou à l'article 36, le ministre ou son délégué peut par arrêté et sous réserve des réglements d'application de l'alinéa (3)b) ou, à défaut, avec l'approbation du gouverneur en conseil:

a) soit exiger que soient apportées les modifications et adjonctions aux ouvrages ou entreprises, ou aux documents s'y rapportant, qu'il estime nécessaires dans les circonstances;

b) soit restreindre l'exploitation de l'ouvrage ou de l'entreprise.

Il peut en outre, avec l'approbation du gouverneur en conseil dans tous les cas, ordonner la fermeture de l'ouvrage ou de l'entreprise pour la période qu'il juge nécessaire en l'occurrence. [Je souligne.]

À mon avis, le fait que le ministre possède le pouvoir discrétionnaire de demander des renseignements visant à l'aider dans l'exercice d'une fonction législative ne signifie pas qu'il participe à la prise de décisions au sens du *Décret sur les lignes directrices.* Alors que le ministre des Transports a une responsabilité en vertu de la *Loi sur la protection des eaux navigables* à titre d'autorité réglementante, le ministre des Pêches et des Océans a, en vertu de l'art. 37 de la *Loi sur les pêches,* un pouvoir législatif spécial limité qui ne constitue pas une obligation positive de réglementation. Pour ce motif, je ne crois pas que la demande de bref de *mandamus* visant à forcer le ministre à agir soit bien fondée.

L'immunité de la Couronne

Selon l'Alberta, même si on pouvait dire que le *Décret sur les lignes directrices* s'applique de lui-même au projet, la Couronne du chef de l'Alberta n'est pas liée par la *Loi sur la protection des eaux navigables.* Dès lors, la participation «à la prise de décisions», au sens du *Décret sur les lignes directrices*, par le gouvernement du Canada, ne saurait avoir une incidence sur la province. Les ministres appelants conviennent que la Loi ne lie pas la Couronne du chef d'une province, mais prétendent que l'Alberta a renoncé à cette immunité en présentant une demande d'approbation en vertu de la Loi.

Le point de départ de cet argument est l'art.17 de la *Loi d'interprétation* qui codifie la présomption que la Couronne n'est pas liée par une texte législatif.

17. Sauf indication contraire y figurant, nul texte ne lie Sa Majesté ni n'a d'effet sur ses droits et prérogatives.

Toutes les parties intéressées reconnaissent que la *Loi sur la protection des eaux navigables* ne prévoit pas expressément qu'elle lie la Couronne; il reste donc à déterminer si la Couronne est liée par déduction nécessaire.

Il est utile d'examiner tout d'abord la situation en common law. L'arrêt de principe en la matière est *Province of Bombay c. Municipal Corporation of Bombay, (1947)* A.C. 58, rendu par le Conseil privé. Dans cette affaire, il s'agissait de savoir si la province de Bombay était exemptée de l'application de la *City of Bombay Municipal Act,* 1888, laquelle conférait à la ville le pouvoir d'installer des conduites d'eau [TRADUCTION] «sur, à travers ou sous tout bien-fonds situé à l'intérieur des limites de la ville». La province était propriétaire d'un bien-fonds sous lequel on se proposait d'installer une conduite d'eau et elle s'opposait aux plans de la ville, sauf si celle-ci acceptait de se conformer à certaines conditions, jugées inacceptables par la ville. Même si le texte législatif ne renfermait pas de dispositions expresses liant la Couronne, la Haute Cour de Bombay a statué que la Couronne était liée par déduction nécessaire parce que la loi [TRADUCTION] «ne peut avoir une efficacité raisonnable si elle ne lie pas la Couronne».

Le Conseil privé a reconnu que la règle de l'immunité de la Couronne souffre au moins une exception, la déduction nécessaire. Lord du Parcq explique cette exception, à la p. 61:

[TRADUCTION] C'est-à-dire que, s'il ressort du texte même de la Loi que le législateur entendait lier la Couronne, le résultat est le même que si cette demière était expressément mentionnée. Il faut donc en déduire que la Couronne, en promulguant la loi, a accepté d'être liée par ses dispositions.

Leurs Seigneuries ont ensuite analysé l'argument, fondé sur une jurisprudence antérieure, qu'une loi adoptée pour le bien public doit recevoir une interprétation qui lie la Couronne parce que cette loi vise manifestement à garantir le bien-être public. Cette prétention a été rejetée pour le simple motif que toutes les lois sont présumées être adoptées pour le bien public. Toutefois, cela ne signifiait pas nécessairement que l'objet d'un texte législatif ne présente aucune pertinence (à la p. 63):

[TRADUCTION] Leurs Seigneuries préferent dire que l'objet apparent de la loi constitue un élément, et peut être un élément important, à examiner lorsque l'on prétend que l'intention était de lier la Couronne. Si l'on peut affirmer qu'au moment où la Loi a été adoptée et a reçu la sanction royale, il ressortait clairement de son texte qu'elle serait privée de toute efficacité si elle ne liait pas la Couronne, on peut déduire que la Couronne a accepté d'être liée.

Comme je l'ai mentionné dans l'arrêt *Sparling c. Québec (Caisse de dépôt et placement du Québec,* (1988) 2 R.C.S. 1015, à la p. 1022, certains doutes ont été exprimés dans l'arrêt *R. c. Eldorado Nucléaire Liée,* (1983) 2 R.C.S. 55), et dans l'arrêt *Sa Majesté du chef de la province de l'Alberta c. Commission canadienne des transports* (1978) 1 R.C.S. 61 (cf. *R. c. Ouellette,* (1980) 1 R.C.S. 568), quant à savoir si l'exception de la déduction nécessaire survivait à la révision de ce qui est maintenant l'art. 17 de la *Loi d'interprétation*, effectuée en 1967. On aurait également pu se demander si le critère de l'absence de toute efficacité de la loi énoncé dans l'arrêt Bombay était déterminant dans la décision que la Couronne était liée par déduction nécessaire. Le professeur Hogg dans son ouvrage initulé *Liability of the Crown* (2e éd. 1989) soutient que l'exception de la déduction nécessaire énoncée au début de l'arrêt Bombay renvoie à une analyse contextuelle de la loi au terme de laquelle on peut dégager une intention de lier la Couronne par déduction logique; il s'agit donc là d'une espèce différente de déduction nécessaire de celle qui existe lorsque l'objet de la loi serait privé de toute efficacité. Il affirme à la p. 210:

[TRADUCTION] Ce qui est envisagé dans ce passage est qu'une loi, en l'absence de termes qui lient expressément la Couronne, peut contenir des renvois à la Couronne ou à une activité gouvernementale, qui n'auraient aucun sens sauf si la Couronne était liée. Si ces indications dans le texte sont suffisamment claires, les tribunaux concluront que la présomption a été réfutée et que la Couronne est liée.

Toutefois, notre Cour a dissipé toute incertitude quant à la situation du droit dans l'arrêt récent *Alberta Government Telephones*, précité. Après une analyse de la jurisprudence, le juge en chef Dickson conclut à la p. 281]:

À mon avis, compte tenu des affairs *PWA* et *Eldorado*, la portée des termes «mentionnée ou prévue» doit s'interpréter indépendamment de la règle de *common law* supplantée. Toutefois, le réserves exprimées dans l'arrêt Bombay, précité, sont fondées sur de bons principes d'interprétation que le temps n'a pas complètement effacés. Il me semble que les termes «mentionnée ou prévue» contenus à l'art. 16 [maintenant l'art. 17 de la *Loi d'interprétation]* peuvent comprendre: (1) des termes qui lient expressément la Couronne («Sa Majesté est liée») ; (2) une intention claire de lier qui, selon les termes de l'arrêt Bombay, «ressort du texte même de la loi», en d'autres termes, une intention qui ressorte lorsque les dispositions sont interprétées dans le contexte d'autres dispositions, comme dans l'arrêt *Ouellette,* précité; et (3) une intention de lier lorsque l'objet de la loi serait «privé» [...] de toute efficacité» si l'Etat n'était pas lié ou, en d'autres termes, s'il donnait lieu à une absurdité (par opposition à un simple résultat non souhaité). Ces trois éléments devraient servir de guide lorsqu'une loi comporte clairement une intention de lier la Couronne.

À mon avis, ce passage fait clairement ressortir qu'une analyse du contexte d'une loi peut révéler une intention de lier la Couronne si cette conclusion s'impose immanquablement par déduction logique.

On ne doit cependant pas effectuer cette analyse dans l'abstrait. En conséquence, il ne faudrait pas interpréter le «contexte» pertinent de façon trop restreinte. Le contexte doit plutôt englober les circonstances qui ont donné lieu à l'adoption de la loi et la situation qu'elle voulait corriger. Ce point de vue est compatible avec le raisonnement énoncé dans l'arrêt *Bombay* comme l'indiquent les passages susmentionnés dans lesquels le critère de la déduction nécessaire est exprimé par rapport au moment de l'adoption de la loi. En fait, l'analyse adoptée par la Haute Cour de Bombay a été critiquée par le Conseil privé pour ce motif même, à la p. 62:

[TRADUCTION] Même si la Haute Cour a interprété correctement le principe, sa façon de l'appliquer permet de soulever l'objection qu'elle aurait dû tenir compte non pas des conditions qui ont existé pendant de nombreuses années après l'adoption de la Loi, mais de l'état de chose qui existait en 1888 ou que la législature aurait pu prévoir.

J'examinerai tout d'abord les circonstances qui existaient au moment de l'adoption de la loi, en tenant compte du fait que le sujet général de la loi porte sur la navigation.

Ce faisant, il est utile de passer en revue certains des principes fondamentaux du droit maritime dans ce domaine, notamment ceux qui se rapportent aux eaux navigables. Il importe de se rappeler que le droit de la navigation au Canada comporte deux dimensions fondamentales - l'ancien droit public de navigation de la *common law* et la compétence constitutionnelle sur la navigation - qui sont nécessairement interdépendantes en vertu du par. 91(10) de la *Loi constitutionnelle de 1867* qui confère au Parlement une compétence législative exclusive sur la navigation.

La *common law* d'Angleterre prévoit depuis longtemps que le public a un droit de navigation dans les eaux de marée; toutefois, bien que les eaux sans marée puissent être navigables, le public n'a pas le droit d'y naviguer, sous réserve de certaines exceptions qui ne sont pas pertinentes en l'espèce. Au Canada, la distinction entre les eaux de marée et les eaux sans marée a été abandonnée il y a longtemps, sauf dans les provinces de l'Atlantique où des considérations différentes pourraient bien s'appliquer; voir l'arrêt In *Re Provincial Fisheries* (1896), 26 R.C.S. 444; pour un sommaire des arrêts applicables, voir mon ouvrage intitulé *Water Law in Canada* (1973), aux pp. 178 à 180. La règle est plutôt la suivante: si les eaux sont navigables, que ce soient des eaux de marée ou sans marée, il existe un droit public de navigation. C'est le cas en Alberta où la Division d'appel de la Cour suprême, dans l'application de l'*Acte des territoires du Nord-Ouest*, S.R.C. 1886, ch. 50, a à bon droit statué dans l'arrêt *Flewelling c. Johnston* (1921), 59 D.L.R. 419, que la règle anglaise ne pouvait être appliquée à la province. Les parties ne contestent pas que la rivière Oldman est en fait navigable.

La nature du droit public de navigation a donné lieu à beaucoup de jurisprudence au cours des années, mais certains principes sont toujours valables. Premièrement, le droit de navigation n'est pas un droit de propriété, mais simplement un droit public de passage; voir l'arrêt *Orr Ewing c. Colquhoun* (1877), 2 App. Cas. 839 (H.L.), à la p. 846. Ce n'est pas un droit absolu, mais il doit être exercé d'une façon raisonnable de manière à ne pas empiéter sur les droits équivalents des autres. Il est tout particulièrement important en l'espèce de préciser que le droit de navigation l'emporte sur les droits du propriétaire du lit, même si le propriétaire est la Couronne. Par exemple, dans l'arrêt *Attorney-General c. Johnson* (1819), 2 Wils. Ch. 87, 37 E.R. 240, concernant l'action d'une partie civile visant à éliminer

une nuisance publique causant une obstruction dans la Tamise et sur une voie publique le long de la rive, le lord chancelier dit à la p. 246:

[TRADUCTION] J'estime qu'il n'est aucunement pertinent que le titre de propriété du sol entre la laisse des hautes eaux et celle des basses eaux appartienne à la Couronne ou à la ville de *Londres*, ou que la ville de *Londres* possède le droit d'administration, permettant ainsi de surveiller toute utilisation incorrecte du sol lorsque la Couronne en détient le titre, ou que lord *Grosvenor ou M. Johnson* possède un titre dérivé obtenu par concession de quiconque a le pouvoir de le faire [...] À mon avis, la Couronne n'a pas le droit de créer une nuisance lorsqu'elle utilise son droit de propriété du terrain situé entre la laisse des basses eaux et celle des hautes eaux ou de placer sur ce terrain quelque chose qui constituera une nuisance pour les sujets de la Couronne. Si la couronne ne possède pas ce droit, elle ne pouvait pas l'accorder à la ville de *Londres*, et la ville de *Londres* ne pouvait pas le transférer à qui que ce soit.

Notre Cour est arrivée à la même conclusion dans l'arrêt *Wood c. Esson (1884)*, 9 R.C.S. 239. Dans cette affaire, les demandeurs avaient allongé leur quai et entravaient ainsi l'accès au quai du défendeur. Celui-ci fit enlever la partie des travaux qui obstruait l'accès à son quai; les demandeurs ont ensuite intenté une poursuite pour violation de propriété au motif qu'ils jouissaient, en vertu d'une concession par la province de la Nouvelle-Ecosse, du titre de propriété du sol à l'endroit dans le port où le quai était construit. La Cour a statué que le défendeur avait le droit d'éliminer l'obstacle créé par l'obstruction à la navigation dans le port. Le juge Strong indique à la p. 243:

[TRADUCTION] Le titre de propriété du sol n'autorisait pas les demandeurs à allonger leur quai de façon à créer une nuisance publique qui, selon la preuve, constituait une obstruction à la navigation dans le port car la Couronne ne peut concéder le droit d'entraver ainsi les eaux navigables; seule une loi peut déterminer que quelque chose qui gêne la navigation n'est pas une nuisance. (Je souligne.)

Ce passage fait également ressortir un autre aspect de la suprématie du droit public de navigation: ce droit ne peut être modifié ou éteint que par une loi habilitante, et la concession d'un bien-fonds par la Couronne ne peut conférer le droit de gêner la navigation; voir aussi les arrêts *The Queen c. Fisher (1891)*, 2 Ex. C.R. 365; *In Re Provincial Fisheries*, à la p. 549, le juge Girouard; et *Reference re Waters and Water-Powers (1929)* R.C.S. 200

Par ailleurs, les provinces ne sont pas habilitées, sur le plan constitutionnel, à adopter une loi autorisant l'établissement d'un obstacle à la navigation puisque le par. 91(10) de la *Loi constitutionnelle de 1867* confère au Parlement une compétence législative exclusive sur la navigation. Notre Cour a clairement établi ce point dans l'arrêt *Queddy River Driving Boom Co. c. Davidson (1883)*, 10 R.C.S. 222. Dans cette affaire, le demandeur cherchait à obtenir une injonction visant à empêcher la société défenderesse de construire des jetées et des estacades dans la rivière Queddy au Nouveau-Brunswik. La défenderesse invoquait sa loi habilitante, adoptée par la législature provinciale, qui autorisait certaines entraves à la navigation. La seule question en litige devant la Cour était le pouvoir de la législature provinciale d'adopter la loi constitutive de la défenderesse. Le juge en chef Ritchie conclut, à la p. 232:

[TRADUCTION] .... la question juridique dans cettte affaire, savoir qui du Parlement du Dominion ou de l'Assemblée législative du Nouveau-Brunswick possède le pouvoir législatif d'autoriser l'obstruction, au moyen de jetées et d'estacades, d'une rivière à marée publique et navigable portant ainsi gravement atteinte au droit public de navigation dans ces eaux. Il n'est pas contesté en l'espèce que la loi gênait la navigation dans la rivière.

Je crois qu'il ne fait aucun doute que c'est le Parlement du Dominion qui a la compétence législative exclusive sur les eaux navigables, comme celles visées en l'espèce. Tout ce qui touche la navigation et les expéditions par eau semble avoir été soigneusement conféré au Parlement du Dominion par l'A.A.N.B.

Ces arrêts ont donné lieu à l'adoption de textes législatifs qui ont finalement abouti à la *Loi sur la protection des eaux navigables.* Il est pertinent ici de mentionner l'un des textes législatifs - *l'Acte concernant les bômes et autres ouvrages établis en eaux navigables soit sous l'autorité d'actes provinciaux soit autrement*, S.C. 1883, ch. 43 - qui a précédé la Loi codifiée qui devait régir tous les aspects de la protection des eaux navigables. L'article premier dispose que:

1. l'aucun bôme, barrage ou aboiteau ne sera établi

[*missing text from the original text*]...

nance des Territoires du Nord-Ouest ou du District de Kéwatin, ou autrement, de manière à gêner la navigation, à moins que l'emplacement n'en ait été approuvé, - et que l'ouvrage n'ait été construit et ne soit maintenu en état conformément à des plans qui auront été approuvés - par le Gouverneur général en conseil.

La Loi prévoyait aussi que les ouvrages existants qui gênaient la navigation, créant ainsi une nuisance publique, pouvaient être légalisés s'ils étaient approuvés par le gouverneur général en conseil.

Cette loi n'est qu'un des textes où le Parlement a exercé sa compétence pour empêcher la construction ou la

continuation d'obstacles à la navigation. Il avait déjà notamment légiféré à l'égard des ponts (*Acte concernant les ponts établis en vertu d'actes provinciaux sur des eaux navigables,* S.C. 1882, ch. 37), de l'enlèvement d'obstructions et d'épaves dans les rivières navigables (*Acte pour pourvoir à l'enlèvement d'obstructions provenant de naufrages et autres causes semblables dans les rivières navigables du Canada, et pour d'autres objets relatifs aux naufrages,* S.C. 1874, ch. 29) et des effluents des moulins à scie dans les eaux navigables (*Acte à l'effet de mieux protéger les cours d'eau et rivières navigables, S.C.* 1873, ch. 65).

La codification a commencé avec l'adoption d'un *Acte concernant certaines constructions dans et sur les eaux navigables,* S.C. 1886, ch. 35, ayant trait à la contruction de tout «ouvrage» dans les eaux navigables et de la loi d'accompagnement intitulée *Acte concernant la protection des eaux navigables,* S.C. 1886, ch. 36, portant sur les obstructions provenant de naufrages dans les eaux navigables. L'article premier de l'*Acte concernant certaines constructions dans et sur les eaux navigables* définissait succinctement le terme «ouvrages»:

1. Dans le présent acte, à moins que le contexte n'exige une interprétation différente, l'expression «ouvrage» signifie et comprend tout pont, estacade, barrage, aboiteau, quai, dock, jetée, pilier ou autre construction, et leurs approches ou avenues et autres travaux nécessaires ou s'y rattachant:

[*Missing text from the original text*]

Mon collègue le juge Stevenson a cependant fait mention de la déclaration du juge en chef Fitzpatric dans *Champion c. City of Vancouver,* (1918) 1 Wl.W.R. 216 (C.S.C.), selon laquelle la Loi ne faisait qu'¨accorder une permission et n'empêchait pas un tiers d'intenter une action pour atteinte au droit public de navigation malgré l'approbation de l'ouvrage par le Ministre. Toutefois, cette déclaration n'était qu'incidente. Il s'agissait de déterminer si la structure en cause portait atteinte au droit d'accès privé des demandeurs. Les deux autres juges de la majorité ont limité leurs remarques à cette question et les deux juges de la minorité n'ont pas, à plus forte raison, approuvé la déclaration. Pour ma part, je préfère l'opinion exprimée dans *Isherwood c. Ontario and Minnesota Power Co. (1911),* 18 O.W.R. 459 (C. div.), selon laquelle la Loi permet de porter atteinte au droit public de navigation mais non aux droits privés des particuliers. C'est la proposition pour laquelle l'arrêt *Champion* fait autorité.

Pour ces motifs, j'ai conclu que la Couronne du chef de l'Alberta est, par déduction nécessaire ou logique, liée par la *Loi sur la protection des eaux navigables.* Je suis également d'avis que, s'il n'en était pas ainsi, la Loi serait privée de toute efficacité. J'ai pris note des considérations soulevées par le juge Stone, savoir que les provinces font partie des organismes susceptibles de participer à des projets, par exemple, la construction de ponts, qui peuvent gêner la navigation, ce qui était le cas au Canada bien avant l'adoption de la Loi; toutefois, je m'intéresse également à des considérations encore plus fondamentales, savoir la nature de la navigation au Canada et la compétence législative du législateur fédéral sur ce domaine.

Certains cours d'eau navigables constituent une partie cruciale des réseaux de transport interprovincial, essentiels aux échanges internationaux et à l'activité commerciale au Canada. En ce qui concerne l'opinion contraire, il n'est pas très logique de prétendre qu'il serait possible d'atteindre en quoi que ce soit l'objectif du Parlement dans l'exercice de sa compétence sur l'administration des eaux navigables si la Couronne n'était pas liée par l'effet de la Loi. La réglementation des eaux navigables doit être analysée dans son ensemble et ce serait une situation absurde si la Couronne du chef d'une province pouvait impunément entraver la navigation à un endroit le long d'un cours d'eau navigable, alors que le Parlement travaille assidûment à en préserver la navigabilité à un autre.

La nécessité en pratique d'avoir un régime de réglementation uniforme pour les eaux navigables a déjà été reconnue par notre Cour dans l'arrêt *Whitbread c. Walley,* (1990) 3 R.C.S. 1273; le raisonnement présenté dans cet arrêt en faveur d'un régime de règles de droit maritime uniformes relevant de la compétence fédérale est également applicable en l'espèce. Aux pages 1294 et 1295, on dit:

Mise à part la jurisprudence, la nature même des activités relatives à la navigation et aux expéditions par eau, du moins telles qu'elles sont exercées ici, fait que des règles de droit maritime uniformes s'appliquant aux voies navigables intérieures sont nécessaires en pratique. La plupart des activités relatives à la navigation et aux expéditions par eau ayant lieu sur les voies navigables intérieures sont nécessaires en pratique. La plupart des actictivités relatives à la navigation et aux expéditions par eau ayant lieu sur les voies navigables intérieures du Canada sont étroitement liées avec celles qui sont exercées dans la sphère géographique traditionnelle du droit maritime. Cela est particulièrement évident lorsque l'on considère les Grands Lacs et la Voie maritime du Saint-Laurent, qui sont dans une très large mesure une extension, sinon le commencement, des voies de transport maritime grâce auxquelles le pays fait du commerce avec le monde. Mais cela est également manifeste lorsque l'on examine les nombreux fleuves, rivières et voies d'eau moins importants qui servent de port d'escale aux océaniques et de point de départ pour quelques-unes des plus importantes exportations du Canada. C'est à n'en pas douter l'une des considérations qui ont amené les

tribunaux de l'Amérique du Nord britannique à décider que le droit public de navigation, contrairement à ce que prétendaient les Anglais, s'étend à tous les fleuves et rivières navigables, peu importe qu'ils soient ou non à l'intérieur de l'aire de flux et de reflux; [...] Cela explique probablement aussi pourquoi les Pères de la Confédération ont estimé nécessaire d'attribuer le pouvoir général sur la navigation et les expéditions par eau au gouvernement central plutôt qu'à celui des provinces...

Si la Couronne du chef d'une province était habilitée à saper l'intégrité des réseaux essentiels de navigation dans les eaux canadiennes, à mon avis, l'objet de la *Loi sur la protection des eaux navigables* serait, en fait, annihilé. Vu ces conclusions, je n'ai pas à examiner la question de la renonciation soulevée par les ministres appelants.

La question constitutionnelle

La question constitutionnelle vise à savoir si le *Décret sur les lignes directrices* est général au point de contrevenir aux art. 92 et 92A de la *Loi constitutionnelle de 1867*. Toutefois, aucun moyen n'a été présenté relativement à l'art. 92A au motif apparent que le project de construction d'un barrage sur la rivière Oldman n'est pas, selon les appelants, visé par cette disposition. Quoi qu'il en soit, la question n'a pas d'importance. Le processus de révision judiciaire d'un texte législatif contesté parce qu'il serait *ultra vires* du parlement a récemment fait l'objet d'une analyse dans l'arrêt *Whitbread c. Walley*, précité, et je n'ai pas besoin de la reprendre ici, sauf pour dire que si l'on conclut que, de par son caractère véritable, le *Décret sur les lignes directrices* est un texte législatif lié à des matières relevant de la compétence exclusive du Parlement, la question est épuisée. Il serait alors indifférent qu'il touche également des matières liées à la propriété et aux droits civils (*Whitbread*, à la p. 1286). L'analyse consiste tout d'abord à déterminer si, de par son caractère véritable, le texte législatif est lié à une matière relevant d'un ou plusieurs domaines de compétence législative.

Bien que diverses expressions aient été utilisées pour décrire ce que l'on entend par le «caractère véritable» d'une disposition législative, j'ai exprimé dans l'arrêt *Whitbread c. Walley* une préférence pour la détermination de «la caractéristique principale ou la plus importante de la loi contestée». Il va sans dire que les parties ont fait valoir des aspects fort différents comme caractéristique la plus importante du *Décret sur les lignes directrices*. Pour l'Alberta, c'est la façon dont le Décret empiéterait sur les droits provinciaux; toutefois, elle n'a pas mentionné de matière spécifique autre que des renvois généraux à l'environnement. L'Alberta soutient, d'une part, que le Parlement n'a pas une compétence absolue sur l'environnement, s'agissant là d'une matière relevant de la compétence législative des deux paliers de gouvernement et, d'autre part, que le *Décret sur les lignes directrices* est exorbitant de la compétence du Parlement sur l'environnement. Les ministres appelants soutiennent que, de par son caractère véritable, le *Décret sur les lignes directrices* n'est qu'un moyen d'aider le gouvernement fédéral à prendre des décisions dans des domaines qui relèvent de la compétence du Parlement; l'intimée est en grande partie d'accord avec cette proposition.

L'essentiel de la thèse de l'Alberta est que le *Décret sur les lignes directrices* prétend conférer au gouvernement du Canada une compétence générale sur l'environnement d'une façon qui empiète sur la compétence législative exclusive de la province. L'Alberta soutient que le *Décret sur les lignes directrices* tente de réglementer les répercussions environnementales de matières qui relèvent en grande partie de la compétence de la province et qui, par conséquent, ne peuvent, en vertu de la Constitution, constituer une préoccupation du Parlement. Elle est d'avis tout particulièrement que le Parlement n'a pas de compétence à l'égard des répercussions environnementales d'ouvrages provinciaux comme le barrage sur la rivière Oldman.

Je suis d'accord que la *Loi constitutionnelle de 1867* n'a pas conféré le domaine de l'«environnement» comme tel aux provinces ou au Parlement. L'environnement, dans son sens générique, englobe l'environnement physique, économique et social touchant plusieurs domaines de compétence attribués aux deux paliers de gouvernement. Le professeur Gibson a succinctement résumé ce point il y a plusieurs années dans son article intitulé: «Constitutionnal Jurisdiction over Environmental Management in Canada» (1973), 23 U.T.I.J. 54 à la p. 85:

[TRADUCTION]... la «gestion de l'environnement» ne constitue pas dans la situation actuelle une unité constitutionnelle homogène. Elle touche plutôt différents domaines de responsabilité constitutionnelle, certains relevant du fédéral, d'autres des provinces. Il est par ailleurs fort évident que la «gestion de l'environnement» ne pourrait jamais être considérée comme une unité constitutionnelle relevant d'un seul palier de gouvernement à l'intérieur d'une constitution de type fédéral parce qu'aucun système à l'intérieur duquel un seul gouvernement serait aussi puissant ne serait fédéral.

J'ai déjà mentionné que l'environnement est un sujet diffus, reprenant ainsi ce que j'ai dit dans l'arrêt *R. c. Crown Zellerbach Canada Ltd.*, précité, que le contrôle de l'environnement, en tant que sujet, ne possède pas la particularité requise pour satisfaire au critère en vertu de la théorie de l'intérêt «national» formulée par le juge Beetz dans le *Renvoi relatif à la Loi anti-inflation*, précité. Bien que j'aie exprimé l'opinion minoritaire dans l'arrêt *Crown Zellerbach*, elle n'a pas été contestée sur ce point par les juges de la majorité. La majorité a simplement

décidé que la pollution des mers est une question d'intérêt national à cause de son caractère et de ses incidences surtout extra-provinciales et internationales, et parce que ses caractéristiques sont suffisamment distinctes pour en faire un sujet relevant du pouvoir résiduel du Parlement.

Il faut reconnaître que l'environnement n'est pas un domaine distinct de compétence législative en vertu de la *Loi constitutionnelle de 1867* et que c'est, au sens constitutionnel, une matière obscure qui ne peut être facilement classée dans le partage actuel des compétences, sans un grand chevauchement et une grande incertitude. On a élaboré diverses méthodes analytiques pour régler ce problème; toutefois, il n'en existe pas une seule qui conviendra dans tous le cas. Certains envisagent une analyse fonctionnelle en décrivant des préoccupations environnementales spécifiques et en attribuant ensuite la responsabilité en fonction des divers domaines de compétence; voir par exemple Gibson, *loc. cit.* D'autres abordent le problème du point de vue de l'étendue des pouvois fédéraux en distinguant ceux qui peuvent être considérés comme «conceptuels» ou «globaux» (par exemple, le droit criminel, la taxation, les échanges et le commerce, le pouvoir de dépenser et le pouvoir résiduel général) par opposition à ceux qui sont «fonctionnels» (la navigation et les pêcheries); voir P. Emond, «The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution» (1972), 10 *Osgood Hall L.J. 647,* et M.E. Hatherly, *Constitutional Jurisdiction in Relations to Environmental Law*, document d'étude rédigé dans le cadre du projet de la protection de la vie, Commission de réforme du droit du Canada (1984).

À mon avis, on peut plus facilement trouver la solution applicable à l'espèce en examinant tout d'abord l'énumération des pouvoirs dans la *Loi constitutionnelle de 1867* et en analysant comment ils peuvent être utilisés pour répondre aux problèmes environnementaux ou pour les éviter. On pourra alors se rendre compte que, dans l'exercice de leurs pouvoirs respectifs, les deux paliers de governement peuvent toucher l'environnement, tant par leur action que par leur inaction. Pour mieux comprendre, on doit examiner des pouvoirs spécifiques. Un exemple intéressant est la compétence législative exclusive du Parlement fédéral sur le transport ferroviaire interprovincial en vertu de l'al. 92(10)a) et du par. 91(29) de la *Loi constitutionnelle de 1867.* La réglementation du transport ferroviaire fédéral a été confiée à l'Office national des transports conformément à la *Loi de 1987 sur les transports nationaux;* le mandat de cet office est vaste, comme le résume la déclaration figurant à l'art. 3 qui prévoit notamment:

3.(1) Il est déclaré que, d'une part, la mise en place d'un réseau sûr, rentable et bien adapté de services de transport viables et efficaces, utilisant au mieux et aux moindrres frais globaux tous les modes de transport existants, est essentielle à la satisfaction des besoins des expéditeurs et des voyageurs en matière de transports comme à la prospérité et à la croissance économique du Canada et de ses régions, d'autre part, ces objectifs ont le plus de chances de se réaliser en situation de concurrence, dans et parmi les divers modes de transport entre tous les transporteurs, à condition que, compte dûment tenu de la politique nationale et du contexte juridique et consitutionnel:

d) les transports soient reconnus comme un facteur primordial du développement économique régional et que soit maintenu un équilibre entre les objectifs de rentabilité des liaisons de transport et ceux de développement économique régional en vue de la réalisation du potentiel économique de chaque région; .....

Cette déclaration nous éclaire sur l'étendue de la compétence législative du Parlement en matière de transport ferroviaire et sur la façon dont on lui impose de tenir compte des ramifications socio-économiques à la fois nationales et locales de ses décisions. Par ailleurs, on ne peut sérieusement mettre en doute que le Parlement puisse s'occuper de questions biophysiques environnementales ayant une incidence sur l'exploitation des chemins de fer dans la mesure où il le fait dans le cadre d'une loi sur les chemins de fer. Il pourrait notamment s'agir de questions touchant les normes d'émission ou les mesures de réduction du bruit.

Pour poursuivre avec le même exemple, on peut proposer l'emplacement et la construction d'une nouvelle voie ferrée, qui devraient être approuvés en vertu des dispositions pertinentes de la *Loi sur les chemins de fer*, L.R.C. (1985), ch. R-3. En effet, cette voie pourrait traverser des habitats fragiles du point de vue écologique comme des marécages et des forêts. En outre, le risque de déraillement peut présenter un grave danger pour la santé et la sécurité des collectivités avoisinantes dans le cas de transport de marchandises dangereuses. Par contre, cette voie peut entraîner d'importantes retombées économiques locales grace à la création d'emplois et à l'effet de multiplication qui s'ensuivra. L'autorité réglementante peut exiger que la voie soit construite à l'extérieur des districts résidentiels eu égard à la suppression du bruit et par souci de sécurité. À mon avis, on peut validement tenir compte de toutes ces considérations dans la décision finale d'accorder ou non l'approbation nécessaire. Prétendre le contraire nous conduirait à des résultats étonnants et il ne serait pas logique d'affirmer que la Constitution ne permet pas au Parlement de tenir compte des vastes répercussions environnementales, y compris des préoccupations socio-économiques, lorsqu'il légifère relativement à des décisions de cette nature.

Le même raisonnement peut être appliqué à plusieurs autres matières, y compris une de celles dont nous sommes saisis, savoir la navigation et les expéditions par eau. Certaines dispositions de la *Loi sur la proteciton des eaux navigables* visent directement les préoccupations environnementales biophysiques qui touchent la navigation. Les articles 21 et 22 disposent:

21. Il est interdit de jeter ou déposer, de faire jeter ou déposer ou de permettre ou tolérer que soient jetés ou déposés des sciures, rognures, dosses, écorces, ou des déchets semblables de quelque nature susceptibles de gêner la navigation dans des eaux dont une partie est navigable ou qui se déversent dans des eaux navigables.

22. Il est interdit de jeter ou déposer, de faire jeter ou déposer ou de permettre ou tolérer que soient jetés ou déposés de la pierre, du gravier, de la terre, des escarbilles, cendres ou autres matières ou déchets submersibles dans des eaux dont une partie est navigable ou qui se déversent dans des eaux navigables et où il n'y a pas continuellement au moins vingt brasses d'eau; le présent article n'a toutefois pas pour effet de permettre de jeter ou déposer une substance dans des eaux navigables là où une autre loi interdit de le faire.

Comme je l'ai mentionné, cette loi a une dimension environnementale de plus grande envergure, compte tenu du contexte de common law dans lequel elle a été adoptée. La common law interdit les obstacles qui portent atteinte au droit public suprême de navigation. Plusieurs des «ouvrages» mentionnés dans la Loi ne visent pas à améliorer la navigation. Les ponts ne favorisent pas la navigation ni d'ailleurs un grand nombre de barrages. Par conséquent, lorsqu'il s'agit de décider d'autoriser un ouvrage de cette nature, le ministre devrait presque certainement tenir compte des avantages et désavantages résultant de l'entrave à la navigation. Cela pourrait nécessiter un examen des préoccupations environnementales comme la destruction de la pêche; le *Décret sur les lignes directrices* ne vise donc qu'à étendre la portée de ses préoccupations.

On doit rappeler que l'exercice d'une compétence législative, dans la mesure où elle se rapporte à l'environnement, doit, comme toute autre préoccupation, se rattacher au domaine de compétence approprié; puisque la nature des divers domaines de compétence en vertu de la *Loi constitutionnelle de 1867* diffère, l'importance qui pourra être accordée aux préoccupations environnementales dans l'exercice d'une compétence donnée pourra varier d'un domaine à l'autre. Par exemple, le Parlement peut jouer, en matière d'environnement, dans l'exercice de sa compétence sur les pêcheries, un rôle quelque peu différent de celui qu'il a en vertu de sa compétence sur les chemins de fer ou la navigation puisque dans le premier cas il gère une ressource, alors que dans les deux autres, il gère des activités. Ces observations peuvent être illustrées par deux arrêts sur les pêches. Dans *Fowler c. La Reine (1980)* 2 R.C.S. 213, la Cour a statué que le par. 33(3) de la *Loi sur les pêches* excédait les pouvoirs du Parlement parce que l'interdiction générale de déposer «des déchets de bois, souches ou autres débris» dans une eau fréquentée par le poisson n'était pas suffisamment liée aux dommages, réels ou probables, que les pêches pourraient subir. Toutefois, dans l'arrêt *Northwest Falling Contractors Ltd. c. La Reine (1980)* 2 R.C.S. 292, la Cour a statué que le par. 33(2), qui interdit à qui que ce soit de déposer une substance nocive en quelque lieu dans des conditions où cette substance nocive pourrait pénétrer dans des eaux poissonneuses, était de la compétence du Parlement du Canada en vertu du par. 91(2).

Les provinces peuvent de la même façon oeuvrer dans le domaine de l'environnement dans l'exercice de leur compétence législative en vertu de l'art. 92. Par exemple, les lois ayant trait aux ouvrages et entreprises de nature locale tiendront souvent compte de préoccupations environnementales. Toutefois, dans la détermination de la compétence constitutionnelle de chacun des paliers de gouvernement sur un projet comme le barrage de la rivière Oldman, il n'est par particulièrement utile de qualifier cet ouvrage de [TRADUCTION] «projet provincial ou d'entreprise [TRADUCTION] «principalement assujettie à la réglementation provinciale» comme a tenté de le faire l'appelante l'Alberta. C'est présumer de la réponse et poser un principe erroné qui semble accepter l'existence d'une théorie générale de l'exclusivité des compétences visant à exempter les ouvrages ou entreprises de nature provinciale de l'application de lois fédérales par ailleurs valides. Comme le fait remarquer le juge en chef Dickson dans l'arrêt *Alberta Government Telephones*, précité, à la p. 275:

Il faut se rappeler que l'un des aspects de la théorie du caractère véritable est qu'une loi relative à un chef de compétence d'un palier de gouvernement peut validement toucher un chef de compétence de l'autre palier. Le fédéralisme canadien a évolué de façon à tolérer à plusieus égards le chevauchement des lois fédérales et provinciales et, à mon avis, une théorie de l'immunité constitutionnelle n'est ni souhaitable ni nécessaire à la réalisation d'objectifs provinciaux réguliers.

Il importe de déterminer quel palier de gouvernement peut légiférer. Un palier peut légiférer à l'égard des aspects provinciaux et l'autre, à l'égard des aspects fédéraux. Bien que les projets de nature locale relèvent généralement de la compétence provinciale, ils peuvent exiger la participation du fédéral dans le cas où le projet empiète sur un domaine de compétence fédérale comme en l'espèce.

Toutefois, le raisonnement de l'Alberta recèle un sophisme encore plus fondamental, qui touche la façon d'exercer les pouvoirs constitutionnels. Lorsqu'il légifère sur une matière, l'organe législatif doit s'en tenir à cette matière. L'objet pratique à la base de la loi et les répercussions dont l'organe doit tenir compte dans sa prise de décision sont une toute autre chose. En l'absence d'un objet déguisé ou d'un manque de bonne foi, ces considérations ne porteront pas atteinte à la nature fondamentale de la loi. On peut exiger qu'une voie ferrée soit construite à un endroit où la fumée ou le bruit ne constituera pas une nuisance pour la municipalité, mais il s'agit néanmoins d'un règlement sur les chemins de fer.

Un arrêt australien, *Murphyores Incorporated Pty Ltd. v. Commonwealth of Australia (1976),* 136 C.L.R. 1 (H.C.), illustre bien le point dans un contexte semblable à celui de l'espèce. Dans cette affaire, les demandeurs exploitaient une carrière qui servait à la production de concentrés de zircon et de rutile. L'exportation de ces substances était régie par le *Customs (Prohibited Exports) Regulations* (adopté en vertu de la compétence du Commonwealth (c'est-à-dire le pouvoir fédéral) en matière d'échanges et de commerce) et devait être approuvée par le ministre des mines et de l'énergie. Le litige a pris naissance dans le cadre d'une equête devant être réalisée en vertu de l'*Environment Protection (Impact of Proposals Act 1974-1975* (Cth) sur l'incidence environnementale de l'extraction minière à l'endroit où les demandeurs détenaient leurs baux miniers. Le ministre responsable informa alors les demandeurs qu'il devrait faire analyser le rapport d'enquête avant d'autoriser toute autre exportation de concentrés.

Les demandeurs prétendaient que le ministre pouvait seulement tenir compte des questions se rapportant à la [TRADUCTION] «politique relative aux échanges» adoptée en vertu de la compétence des pays du Commonwealth en matière d'échanges et de commerce, plutôt que des préoccupations environnementales se rattachant à l'exploitation minière antérieure, qui relevait principalement de la compétence de l'Etat. Cette prétention a été unanimement rejetée; le juge Stephen indique à la p. 12:

[TRADUCTION] La décision administrative d'assouplir ou non l'interdiction d'exporter des marchandises tiendra nécessairement compte des considérations qui intéressent l'administrateur, toutefois, quelle que soit la nature de ces considérations, la conséquence sera nécessairement exprimée en fonction des échanges et du commerce, soit l'approbation ou le rejet d'une demande visant à assouplir l'interdiction des exportations. Ce sera alors une décision prise dans le cadre d'un pouvoir constitutionnel. Les considérations à la base de la prise de décisions peuvent ne pas avoir trait aux questions d'échanges et de commerce, mais la décision ne sera pas inconstitutionnelle pour autant puisqu'elle porte directement sur le sujet de l'exportation et les considérations qui la sous-tendent ne portent pas atteinte au caractère que le sujet de compétence lui confère.

Je m'empresse d'ajouter que je ne veux pas établir de comparaison entre la compétence des pays du Commonwealth en matière d'échanges et de commerce prévue par la Constitution Australienne et celle que existe dans la Constitution Canadienne. Certes, il y a des différences importantes entre les deux documents, mais l'idée générale qui ressort de l'arrêt *Murphyores* est néanmoins valide en l'espèce. Cet arrêt souligne le risque de croire à tort que l'environnement est une question accessoire lorsqu'il s'agit de faire des choix législatifs ou de prendre des décisions administratives. De toute évidence, cela ne peut être le cas. Tout simplement, l'environnement comprend tout ce qui nous entoure et, comme tel, doit être à la base d'un grand nombre de décisions courantes.

L'évaluation des incidences environnementales est, sous sa forme la plus simple, un outil de planification que l'on considère généralement comme faisant partie intégrante d'un processus éclairé de prise de décisions. R. Cotton et D. P. Emond, dans un ouvrage intitulé «Environmental Impact Assessment», dans J. Swaigen, dir., *Environmental Rights in Canada (1981),* 245, à la p. 247, résument l'objet fondamental de cette évaluation:

[TRADUCTION] Les concepts fondamentaux à la base de l'évaluation environnementale peuvent être énoncés en termes simples: (1) déterminer et évaluer avant coup toutes les conséquences environnementales possibles d'une entreprise proposée; (2) permettre une prise de décisions qui à la fois garantira l'à-propos du processus et concilliera le plus possible les désirs d'aménagement du promoteur et la protection et la préservation de l'environnement.

En tant qu'outil de planification, le processus d'évaluation renferme un mécanisme de collecte de renseignements et de prise de décisions, qui fournit au décideur une base objective sur laquelle il pourra s'appuyer pour autoriser ou refuser un projet d'aménagement; voir M. I. Jeffery, *Environmental Approvals in Canada (1989),* à la p. 1.2, ch.1.4; D.P Emond,*Environmental Assessment Law in Canada (1978),* à la p.5. Bref, l'évaluation des incidences environnementales constitue simplement une description du processus de prise de décisions.

Le *Décret sur les lignes directrices* vient simplement s'ajouter aux questions dont les décideurs fédéraux doivent tenir compte. Si le ministre des Transports devait spécifiquement tenir compte des préoccupations en matière de pêche dans l'examen des demandes de construction d'ouvrages dans les eaux navigables,

pourrait-on soulever que cette attribution de compétence est *ultra vires?* Tout ce que cela signifierait est que le décideur doit aussi prendre en considération d'autres questions qui relèvent de la compétence fédérale. Je ne suis pas indifférent aux propos du substitut du procureur général de la Saskatchewan qui a cherché à qualifier le *Décret sur les lignes directrices* de cheval de Troie constitutionnel permettant au gouvernement fédéral, sous prétexte de l'existence de quelque champ restreint de compétence fédérale, de procéder à un examen approfondi de questions qui relèvent exclusivement de la compétence des provinces. Toutefois, suivant mon interprétation du *Décret sur les lignes directrices,* le «Ministère responsable» qui procède à l'évaluation initiale et, au besoin, la Commission d'évaluation environnementale n'ont que le mandat d'examiner les questions se rapportant directement aux domaines de compétence fédérale concernés. En conséquence, le ministère responsable ou la commission ne peuvent se servir du *Décret sur les lignes directrices* comme moyen déguisé d'envahir des champs de compétence provinciale qui ne se rapportent pas aux domaines de compétence fédérale concernés.

À cause de son caractère accessoire, l'évaluation des incidences environnementales doit «véritablement viser une institution ou une activité qui relève de la compétence législative [fédérale]»; voir l'arrêt *Devine c. Québec (Procureur général),* (1988) 2 R.C.S. 790, à la p. 808. Compte tenu de l'élément nécessaire de proximité qui doit exister entre le processus d'évaluation environnementale et le domaine de compétence fédérale concerné, ce texte législatif peut, à mon avis, s'appuyer sur le domaine particulier de comptétence fédérale invoqué dans chaque cas. Plus particulièrement, le *Décret sur les lignes directrices* exige un rapport étroit entre les répercussions sociales susceptibles d'être examinées et les répercussions environnementales en général. Aux termes de l'art. 4, les répercussions sociales examinées, au cours de l'étape initiale d'évaluation, doivent être «directement liées» aux effets possibles de la proposition sur l'environnement, à l'instar de l'art. 25 portant sur le mandat en vertu duquel une commission d'évaluation environnementale peut agir. Par ailleurs, dans le cas où le *Décret sur les lignes directrices* s'applique à une proposition parce qu'elle a des répercussions sur un domaine de compétence fédérale, par opposition aux trois autres cas d'application prévus à l'art. 6, les répercussions environnementales à examiner sont seulement celles qui peuvent avoir une incidence sur les domaines de compétence fédérale touchés.

Toutefois, je dois préciser que l'étendue de l'évaluation n'est pas limitée au domaine particulier de compétence à l'égard duquel le gouvernement du Canada participe à la prise de décisions au sens du terme «proposition». Cette participation, comme je l'ai déjà mentionné, est une condition nécessaire à l'application du processus; toutefois, lorsque le ministère responsable a reçu le pouvoir de procéder à l'évaluation, cet examen doit tenir compte des répercussions environnementales dans tous les domaines de compétence fédérale. Aucun obstacle constitutionnel n'empêche le Parlement d'adopter un texte législatif en vertu de plusieurs domaines de compétence en même temps; voir les arrêts *Jones c. Procureur général du Nouveau-Brunswick, (1975)* 2 R.C.S. 338, à la p. 350. Dans le cas du *Décret sur les lignes directrices,* le Parlement a conféré à une institution le «ministère responsable») la responsabilité, dans l'exercice de son pouvoir de décision, d'évaluer les répercussions environnementales sur tous les domaines de compétence fédérale susceptibles d'être touchés. En l'espèce, le ministre des Transports, à titre de décideur en vertu de la *Loi sur la protection des eaux navigables,* doit examiner les incidences environnementales du barrage sur les domaines de compétence fédérale, comme les eaux navigables, les pêcheries, les Indiens et les terres indiennes, pour ne nommer que ceux qui sont le plus pertinents dans les circonstances.

Essentiellement, le *Décret sur les lignes directrices* comporte deux aspects fondamentaux. Il y a tout d'abord l'aspect de fond qui porte sur l'évaluation des incidences environnementales, dont l'objet est de faciliter la prise de décisions dans le domaine de compétence fédérale qui régit une proposition. Comme je l'ai mentionné, cet aspect du *Décret sur les lignes directrices* peut être maintenu au motif qu'il s'agit d'un texte législatif se rapportant aux matières pertinentes énumérées à l'art. 91 de la *Loi constitutionnelle de 1867.* Le deuxième aspect est l'élément procédural ou organisationnel coordonnant le processus d'évaluation, qui peut dans un cas donné toucher plusieurs domaines de compétence fédérale, relevant d'un décideur désigné ou, pour employer le jargon du *Décret sur les lignes directrices,* le «ministère responsables». Cette facette vise à réglementer la façon dont les institutions et organismes du gouvernement du Canada exercent leurs fonctions et responsabilités administratives. Cela, à mon avis, est indiscutablement *intra vires* du Parlement. Cet aspect peut être considéré comme un pouvoir accessoire de la compétence législative en cause, ou de toute façon, être justifié en vertu du pouvoir résiduel prévu à l'art. 91.

Dans une situation connexe, la Cour a adopté une analyse similaire dans l'arrêt *Jones c. Procureur général du Nouveau-Brunswick,* précité. Dans cette affaire, la Cour devait trancher la question de la constitutionnalité, en fonction du partage des compétences, de certaines dispositions de la *Loi sur les langues officielles,* S.R.C. 1970, ch. O-2, de l'*Evidence Act* du Nouveau-Brunswick, R.S.N.B. 1952, ch. 74, et de la *Loi sur les langues officielles du Nouveau-Brunswick,* S.N.B. 1969, ch. 14. La loi fédérale faisait du français et de l'anglais les langues officielles du Canada; les dispositions attaquées reconnaissaient l'utilisation des deux langues officielles

devant les tribunaux fédéraux et dans les procédures criminelles. Le juge en chef Laskin affirme à la p. 189:

....je ne doute aucunement qu'il était loisible au Parlement du Canada d'édicter la *Loi sur les langues officielles* (restreinte qu'elle est à ce qui relève du Parlement et du gouvernement du Canada, et aux institutions de ces Parlement et gouvernement) à titre de loi «pour la paix, l'ordre et le bon gouvernement du Canada, relativement à [une matière] ne tombant pas dans les catégories de sujets ... exclusivement assignés aux législatures des provinces». Les termes en question sont extraits de l'alinéa liminaire de l'art. 91 de l'*Acte de l'Amérique du Nord britannique;* et, en me basant sur eux comme fondement constitutionnel de la *Loi sur les langues officielles,* je ne tiens compte que du caractère purement résiduaire du pouvoir législatif qu'ils confèrent. Point n'est besoin de citer de précédent à l'appui du pouvoir exclusif du Parlement du Canada de légiférer relativement au foncionnement et à l'administration des institutions et organismes du Parlement et du gouvernement du Canada. Ces institutions et organismes sont de toute évidence hors de la portée des provinces. [Je souligne.]

La Cour a également confirmé la loi fédérale en vertu de la compétence du Parlement en matière de droit criminel (par. 91(27)) et d'établissement de tribunaux fédéraux (art. 101). Le juge en chef Laskin indique aussi que rien dans la Constitution n'empêche le Parlement d'étendre le champ de l'emploi privilégié ou obligatoire du français et de l'anglais dans les institutions ou les activités qui relèvent du contrôle fédéral. Pour des motifs semblables, la loi provinciale prévoyant l'utilisation des deux langues officielles devant les tribunaux du Nouveau-Brunswick a été jugée valide en raison de la compétence des provinces en matière d'administration de la justice (par. 92(14)).

En fin de compte, je suis convaincu que, de par son caractère véritable, le *Décret sur les lignes directrices* n'est rien de plus qu'un instrument qui régit la façon dont les institutions fédérales doivent gérer leurs diverses fonctions. En conséquence, il n'est rien de plus qu'un ajout à l'exercice des compétences législatives fédérales concernées. Quoi qu'il en soit, ce texte peut être adopté en vertu du pouvoir purement résiduel à titre de loi «pour la paix, l'ordre et le bon gouvernement du Canada» en vertu de l'art. 91 de la *Loi constitutionnelle de 1867*. Toute ingérence dans la sphère de compétence provinciale est simplement accessoire au caractère véritable du texte législatif. On doit aussi rappeler, d'une part, que le processus d'évaluation est essentiellement un processus de collecte de renseignements destiné à faciliter la prise de décisions relevant du fédéral et, d'autre part, que les recommandations présentées à la fin de l'étape de collecte de renseignements ne lient pas le décideur. Ni le ministère responsable ni la commission ne peuvent assigner des témoins à comparaître, comme c'était le cas dans l'arrêt *Compagnie des Chemins de fer nationaux du Canada c. Courtois,. (1988)* 1 R.C.S. 868, dans lequel, la Cour a statué que certaines dispositions de la *Loi sur la santé et la sécurité du travail,* L.Q. 1979, ch. 63, qui permettaient notamment à la province d'enquêter sur les accidents et d'émettre des avis de correction, étaient inapplicables à une entreprise ferroviaire interprovinciale. Je tiens à préciser que l'Alberta a, à tort, accordé une trop grande importance à cet arrêt. Celui-ci se distingue de la présente affaire pour plusieurs motifs, le plus important étant que le texte législatif provincial attaqué dans cet arrêt était impératif à l'égard d'une entreprise fédérale et a été interprété par la Cour comme réglementant l'entreprise.

Pour ces motifs, je conclus que le *Décret sur les lignes directrices est intra vires* du Parlement et je répondrais par la négative à la question constitutionnelle.

Le pouvoir discrétionnaire

La dernière question de fond soulevée dans le présent pourvoi est de savoir si la Cour d'appel fédérale a commis une erreur en modifiant la décision du juge des requêtes, prise dans l'exercice de son pouvoir discrétionnaire, de ne pas accorder la réparation sollicitée, en l'occurrence un bref de la nature d'un *certiorari* et un bref de la nature d'un *mandamus*, en raison du retard déraisonnable et de la futilité de la procédure. Le juge Stone a statué que le juge des requêtes avait commis un type d'erreur justifiant la Cour d'appel de modifier l'exercice de son pouvoir discrétionnaire sur les deux motifs.

Les principes qui régissent l'examen en appel de l'exercice du pouvoir discrétionnaire d'un tribunal d'instance inférieure n'ont pas été examinés en profondeur, seule leur application aux faits de l'espèce l'a été. Le juge Stone a cité l'arrêt *Polylok Corp. c. Monstreal fast Print (1975) Ltd,* (1984) 1 C.F. 713 (C.A.), qui approuve l'énoncé suivant du vicomte Simon, lord Chancelier, dans *Charles Osenton & Co. c. Johnston, (1942)* A.C. 130, à la p. 138:

[TRADUCTION] La règle relative à l'annulation par une cour d'appel d'une ordonnance rendue par un juge d'une instance inférieure dans l'exercice de son pouvoir discrétionnaire est bien établie, et tous les problèmes qui se présentent résultent seulement de l'application de principes déterminés à un cas particulier. Le tribunal d'appel n'a pas la liberté de simplement substituer l'exercice de son propre pouvoir discrétionnaire à celui déjà exercé par le juge. En d'autres termes, les juridictions d'appel ne devraient pas annuler une ordonnance pour la simple raison qu'elles auraient exercé le pouvoir discrétionnairre original, s'il leur avait appartenu, d'une manière différente. Toutefois, si le tribunal d'appel conclut que le pouvoir discrétionnaire a été exercé de façon erronée, parce qu'on n'a pas accordé

suffisamment d'importance, ou qu'on en n'a pas accordé du tout, à des considérations pertinentes comme celles que l'appelante a fait valoir devant nous, il est alors possible de justifier l'annulation de l'ordonnance.

C'était essentiellement le critère adopté par notre Cour dans l'arrêt *Harelkin c. Université de Regina, (1979)* 2 R.C.S. 561, dans lequel, le juge Beetz affirme à la p. 588:

Deuxièmement, en refusant d'évaluer, malgré la difficulté, si le défaut de respecter la justice naturelle pouvait être corrigé en appel, le savant juge de première instance a refusé de tenir compte d'un élément prépondérant en l'espèce; de ce fait, il n'exerçait pas son pouvoir discrétionnaire pour des motifs pertinents et ne laissait à la Cour d'appel d'autre choix que d'intervenir. [Je souligne.)

Quelles sont alors les considérations pertinentes dont le juge des requêtes aurait dû tenir compte dans l'exercice de son pouvoir discrétionnaire? La question du retard est le premier motif invoqué par le juge des requêtes lorsqu'il a, dans l'exercice de son pouvoir discrétionnaire, refusé d'accorder le bref de prérogative. Il n'y a pas de doute qu'un retard déraisonnable peut empêcher un requérant d'obtenir un redressement assujetti à l'exercice d'un pouvoir discrétionnaire, notamment dans le cas où ce retard risquerait d'être préjudiciable à d'autres parties qui se seraient fiées, à leur détriment, à la décision contestée; la question du caractère déraisonnable dépendra des faits de chaque affaire; voir S. A. de Smith, *Judicial Review of Administrative Action* (4e éd. 1980), à la p. 423, et D.P. Jones et A.S. de Villars, *Principles of Administrative Law (1985)*, aux pp. 373 et 374. Le juge des requêtes a, d'une part, tenu compte du délai qui s'est écoulé entre l'approbation accordée par le ministre des Transports le 18 septembre 1987 et le dépôt de l'avis de requête dans la présente action le 21 avril 1989 et, d'autre part, du fait que le projet était déjà complété à environ 40 pour 100 à cette date. Toutefois, en toute déférence, il n'a pas tenu compte d'un grand nombre de mesures que la Société intimée a prises avant d'entamer la présente contestation, dont certaines ont été mentionnées par le juge Stone. Je tiens à faire remarquer que le juge Stone s'est trompé lorsqu'il a affirmé que les procédures avaient été intentées deux mois seulement après que la Société eut été mise au courant de la décision d'accorder l'approbation. Au cours du contre-interrogatoire relatif à son affidavit à l'appui de la demande, Mme Kostuch, vice-présidente, a reconnu que la Société avait été mise au courant de l'approbation le 16 février 1988, soit quelque 14 mois avant le début de la présente action.

Toutefois, la présente action n'est pas la seule engagée par la Société relativement à la construction du barrage. La Société a tout d'abord intenté une action en octobre 1987, sollicitant la délivrance d'un bref de *certiorari* assorti d'un bref de prohibition visant à annuler un permis provisoire délivré par le ministre de l'Environnement de l'Alberta conformément à la *Water Resources Act.* Le 8 décembre 1987, le juge en chef Moore de la Cour du Banc de la Reine a annulé tous les permis qui avaient été délivrés par le ministre parce que le ministère n'avait pas déposé les approbations nécessaires avec sa demande, qu'il n'avait pas soumis la question à l'examen de l'Energy Resources Conservation Board conformément à l'art. 17 de la Loi et que le délégué du ministre avait mal exercé son pouvoir discrétionnaire en renonçant aux exigences prévues dans la Loi relativement aux avis publics: *Friends of the Oldman River Society v. Alberta (Minsiter of the Environment (1987)* 85 A.R. 321. Un autre permis provisoire a été délivré le 5 février 1988; l'intimée a de nouveau présenté une demande d'annulation de ce permis, principalement au motif que l'on avait à tort renoncé aux avis publics. La demande a été rejetée par le juge Picard, qui a statué que les documents appropriés avaient été déposés en même temps que la demande de permis et que le délégué du ministre avait le pouvoir de renoncer à l'avis public: *Friends of Oldman River Society v. Alberta (Minister of the Environment) (1988)*, 89 A.R. 339 (B.R.).

Entretemps, la Société intimée avait demandé à l'Energy Resources Conservation Board de l'Alberta de tenir une audience publique aux fins de l'examen des aspects hydro-électriques du barrage conformément à l'*Hydro and Electric Energy Act*. Dans sa réponse du 18 décembre 1987, le Board a refusé d'acquiescer à la demande de la Société au motif que le barrage ne constituait pas un [TRADUCTION] «développement hydro-électrique' au sens de la Loi. Une demande d'autorisation d'appel a été présentée à la Cour d'appel de l'Alberta, qui a rejeté la demande, souscrivant à l'opinion du Board qu'il ne s'agissait pas d'un projet hydro-électrique, même s'il devait permettre l'installation future d'une centrale électrique: *Friends of the OldMan River Society v. Energy Resoruces Conservation Board (Alta.) (1988)*, 89 A.R. 280. Enfin, Mme Kostuch a déposé une dénonciation devant un juge de paix dans laquelle elle allègue qu'une infraction a été commise en contravention de l'art. 35 de la *Loi sur les pêches.* Après les assignations, le procureur général de l'Alberta est intervenu et a ordonné un arrêt des procédures le 19 août 1988. J'ai déjà examiné les lettres adressées au ministre fédéral de l'Environnement et au ministre des Pêches et des Océans en 1987 et 1988, dans lesquelles des membres de la Société ont cherché en vain à faire appliquer le *Décret sur les lignes directrices.*

À mon avis, cette chronologie indique que la Société s'est efforcée d'une façon soutenue et concetée de contester d'une part, la légalité des mesures prises par l'Alberta relativement à la construction du barrage et d'autre part, l'acquiescement des ministres appelants. Pendant tout ce temps, la construction du barrage s'est poursuivie, en

dépit des contestations judiciaires en cours; à la date de l'audience devant notre Cour, l'avocat de l'Alberta nous a informés que la construction du barrage était en grande partie achevée. Je ne crois pas qu'il existe une preuve que l'Alberta a subi un prédice quelconque en raison d'un retard à intenter la présente action; rien n'indique que la province était disposée à consentir à une évaluation des incidences environnementales en vertu du *Décret sur les lignes directrices* avant l'épuisement de tous les recours légaux, y compris le pourvoi devant notre Cour. Le juge des requêtes n'a pas suffisamment accordé d'importance à ces considérations ou les a ignorées. En conséquence, la Cour d'appel était justifiée de modifier l'exercice de son pouvoir discrétionnaire sur ce point.

L'autre motif du refus de délivrer un bref de prérogative se fondait sur la futilité de la procédure, savoir que l'évaluation des incidences environnementales en vertu du *Décret sur les lignes directrices* serait inutilement répétitive en raison des études réalisées dans le passé. À mon avis, ce motif ne pouvait justifier un refus dans les circonstances. La délivrance d'un bref de prérogative devrait être refusée pour motif de futilité seulement dans les rares cas où sa délivrance serait vraiment inefficace. par exemple, le cas où sa délivrance serait vraiment inefficace. Par exemple, le cas où l'ordonnance ne pourrait pas être exécutée, savoir une ordonnance de prohibition à l'encontre d'un tribunal s'il ne lui reste rien à faire qui puisse être interdit; voir de Smith, *op. cit.* aux pp. 427 et 428. Ce n'est pas du tout la même situation lorsque l'on ne peut déterminer à priori qu'une ordonnance de la nature d'un bref de prérogative n'aura aucune incidence sur le plan pratique. En l'espèce, mis à part ce que le juge Stone a déjà dit relativement aux différences du point de vue qualitatif entre l'évaluation prévue par le *Décret sur les lignes directrices* et les études antérieures, il n'est pas du tout évident que l'application du *Décret sur les lignes directrices*, même à cette étape tardive, n'aura pas un certain effet sur les mesures susceptibles d'être prises pour atténuer toute incidence environnementale néfaste que pourrait avoir le barrage sur un domaine de compétence fédérale. En conséquence, je conclus que la Cour d'appel n'a pas commis d'erreur en modifiant la décision du juge des requêtes de refuser, dans l'exercice de son pouvoir discrétionnaire, le redressement sollicité.

En ce qui concerne les dépens, à mon avis, il s'agit d'un cas où il est approprié d'accorder les dépens comme entre procureur et client à la Société intimée, compte tenu de la situation de cette dernière et du fait que les ministères fédéraux ont été joints comme appelants même s'ils n'avaient pas auparavant présenté une demande d'autorisation de pourvoi à notre Cour.

Dispositif

Pour ces motifs, je suis d'avis de rejeter le pourvoi, sauf qu'il ne sera pas délivré de bref de la nature d'un *mandamus* ordonnant au ministre des Pêches et des Océans de se conformer au *Décret sur les lignes directrices*, avec dépens comme entre procureur et client en faveur de l'intimée dans toutes les cours. Je suis d'avis de répondre par la négative à la question constitutionnelle.

Version française des motifs rendus par

LE JUGE STEVENSON (dissident) - J'ai eu l'avantage de lire les motifs de mon collègue le juge La Forest et, avec égards, je ne suis pas d'accord avec lui sur trois points. À mon avis:

1. La Couronne n'est pas liée par la *Loi sur la protection des eaux navigables*, L.R.C. (1985), ch. N-22 («L.P.E.N.»ê.

2. La Cour d'appel fédérale, (1990) 2 C.F. 18, a commis une erreur en modifiant la décision du juge des requêtes, prise dans l'exercice de son pouvoir discrétionnaire, de ne pas accorder le bref de prérogative.

3. Les appelants ne devraient pas être contraints de payer les dépens comme entre procureur et client.

Je suis d'accord avec son analyse des questions constitutionnelles et avec son interprétation des dispositions de mise en oeuvre du *Décret sur les lignes directrices visant le processus d'évaluation et d'examine en matière d'environnement*, DORS/84-467.

1. L'immunité de la Couronne

En l'espèce, la question est simple: la Couronne est-elle liée par la L.P.E.N.? Pour les fins de la présente analyse, je n'établis pas de distinction entre les Couronnes fédérale et provinciales. La Couronne est indivisible à cette fin: *Alberta Government Telephones c. Canada (Conseil de la radiodiffusion et des télécommunications Canadiennes, (1989)* 2 R.C.S. 225, aux pp. 272 et 273.

Conformément à la Loi *d'interprétation*, L.R.C. (1985), ch. I-21 (auparavant S.R.C. 1970, ch. I-23), nul texte législatif ne lie la Couronne, sauf dans la mesure qui y est mentionnée ou prévue. La portée de ces termes a été interprétée dans l'arrêt *Alberta Government Telephones*, à la p. 281:

Il me semble que les termes «mentionnée ou prévue» contenus à l'art. 16 (maintenant l'art. 17) peuvent comprendre: (1) des termes qui lient expressément la Couronne «Sa Majesté est liée»; (2) une intention claire de lier qui, selon les termes de l'arrêt *Bombay*, «ressort du texte même de la loi, en d'autres termes, une intention qui ressorte lorsque les dispositions sont interprétées dans le contexte d'autres dispositions, comme dans l'arrêt *Ouellette,* précité; et (3) une intention de lier lorsque

l'objet de la loi serait «privé[...] de toute efficacité» si l'Etat n'était pas lié ou, en d'autres termes, s'il donnait lieu à une absurdité par opposition à un simple résultat non souhaité). Ces trois éléments devraient servir de guide lorsqu'une loi comporte clairement une intention de lier la Couronne.

Toutes les parties sont d'avis que la L.P.E.N. ne renferme pas de termes qui «lient expressément» la Couronne. A mon avis, on ne peut soutenir qu'il existe une intention claire de lier la Couronne, qui «ressort du texte même de la loi». En prenant cette décision, on doit se limiter à ce que dit le texte législatif. Nous ne devons pas oublier que l'arrêt *Province of Bombay v. Municipal Corporation of Bombay, (1947)* A.C. 58 (C.P.), n'est plus applicable compte tenu des dispositions expresses de la Loi d'interprétation 24, sauf dans la mesure où il est adopté comme dans l'arrêt *Alberta Government Telephones*, qui, à mon avis, est l'arrêt de principe.

La Société intimée doit en conséquence démontrer que la L.P.E.N. serait privée de toute efficacité ou donnerait lieu à une absurdité si la Couronne n'était pas liée. Je dois garder à l'esprit l'arrêt *Bombay*, dans lequel le Conseil privé a dit que si l'intention du législateur est de lier la Couronne, [TRADUCTION] «rien de plus facile que de le dire en toutes lettres» (p. 63).

Si la Couronne n'est pas liée, cette situation donne-t-elle lieu à une absurdité? L'existence d'un vide ne suffit pas: Alberta Government Telephones, à la p. 283. La L.P.E.N. s'applique aux entreprises privées et municipales; réflexion faite, on se rend compte qu'il existe de nombreux organismes non gouvernementaux dont les activités sont régies par la L.P.E.N. L'objet de la L.P.E.N. n'est donc pas annihilé.

Par ailleurs, les tribunaux ne concluront pas à la mauvaise foi de la Couronne lorsqu'elle exerce des activités qui pourraient à d'autres égards être réglementées.

Si la Couronne porte atteinte aux droits publics de navigation, il est possible de la poursuivre en justice. Bref, on ne peut soutenir que la L.P.E.N. sera privée d'efficacité en raison des actes de l'Etat. La réglementation des activités non gouvernementales est vaste et on ne peut soutenir que l'objet de la L.P.E.N. est privé d'efficacité.

Il me faut mentionner brièvement l'argument que l'appelante l'Alberta, en invoquant l'application de la L.P.E.N., aurait accepté d'être assujettie à la réglementation en matière environnementale. Il n'y a pas d'avantage important lié à l'approbation en vertu de la L.P.E.N. Il peut y avoir ouverture à responsabilité civile. La L.P.E.N. ne confère pas expressément d'avantages. Par ailleurs, il n'est pas évident que l'approbation accordée en vertu de l'art. 5 de la L.P.E.N. écarterait la possibilité de responsabilité civile. Dans l'arrêt *Champion c. City of Vancouver*, (1918) 1 W.W.R. 216 (C.S.C.), le juge en chef Fitzpatrick de notre Cour a statué, aux pp. 218 et 219, que:

[TRADUCTION] Dans l'examen de l'interprétation à donner à cette loi [la L.P.E.N., S.R.C. 1906, ch. 115], on doit se rappeler que tout ouvrage construit dans les eaux navigables ne gêne pas nécessairement la navigation de façon à constituer une obstruction illégale. Cependant, dans l'affirmative, l'ouvrage pourrait être enlevé par l'autorité compétente. En conséquence, il est à l'avantage des personnes qui se proposent de construire des ouvrages, pour lesquels il n'existe pas de sanction, de pouvoir obtenir, préalablement au début des travaux, l'approbation du gouverneur en conseil en vertu de l'art. 7; cette disposition ne fait toutefois qu'accorder une permission et ne prévoit pas de conséquences une fois l'approbation obtenue; elle ne rendrait certainement pas légal un ouvrage qui serait illégal. Toute atteinte à un droit public de navigation est une nuisance à laquelle les tribunaux peuvent mettre fin, nonobstant l'approbation qu'aurait pu donner le gouverneur en conseil en vertu de l'art. 7. (Je souligne.)

2. Les pouvoir discrétionnaire

Les redressements sollicités par la Société intimée sont discrétionnaires: *Harelkin c. Université de Regina (1979)* 2 R.C.S. 561, à la p. 574: «On ne peut contester le principe que le *certiorari* et le *mandamus* sont par nature des recours discrétionnaires», et D.P. Jones et A.S. de Villars, Principles of Administrative Law (1985)24, aux pp. 372 et 373.

Une cour d'appel est justifiée d'intervenir seulement lorsque le tribunal d'instance inférieure a «commis une erreur de principe» ou «n'a pas accordé d'importance (ou qu'il n'a pas accordé suffisamment d'importance) aux considérations dont il aurait dû tenir compte.»: *Polylok Corp. c. Montreal Fast Print (1975) Ltd, (1984)* 1 C.F. 713 (C.A., aux pp. 724 et 725.

La Cour d'appel fédérale a clairement commis une erreur en rejetant la conclution du juge des requêtes relativement à la question du retard, conclusion dont elle «doute» qu'elle soit bien fondée dans son principe. La Cour d'appel affirme que la Société intimée n'a eu connaissance de la décision d'accorder l'approbation en vertu de la L.P.E.N. qu'environ deux mois avant que les procédures ne soient entamées. En fait, l'intimée avait été mise au courant de l'approbation quelque 14 mois auparavant et les principaux promoteurs de la Société le savaient même avant.

La *Common law* a toujours exigé du requérant qu'il agisse avec diligence lorsqu'il sollicite des recours extraordinaires;

En raison de leur caractère discrétionnaire, les recours en révision judiciaire, extraordinaires ou ordinaires, doivent être exercés avec diligence. Comme le rappelait dans un langage imagé le juge Donaldson, de la Cour d'appel de l'Angleterre, dans *R. v. Aston University Senate (1969)* 2 Q.B. 538, à la p. 555): [TRADUCTION] 174 Les réparations par voie de brefs de prérogative sont de nature exceptionnelle et ils ne devraient pas être mis à la disposition de ceux que tardent à exercer leurs droits»

(R. Dussault et L. Borgeat, *Traité de droit adminsitratif (2e éd. 1989)*, t. III, à la p. 660).

Le juge en chef Laskin de notre Cour a reconnu cette obligation dans l'arrêt P.P.G. *Industries Canada Ltd. c. Procureur* général du Canada, (1976) 2 R.C.S. 739, aux pp. 749 et 750:

À mon avis, les requêtes en annulation déposées par le procureur général sont sujettes au pouvoir discrétionnaire des tribunaux tout autant que le sont sans conteste ses requêtes pour l'obtention d'un bref de prohibition ou ses demandes de jugement déclaratoire. La présente cause est éminemment propice à l'exercice du pouvoir discrétionnaire qui permet de refuser le redressement demandé par le procureur général. Au premier rang des facteurs qui m'inclinent en ce sens il y a le retard inexpliqué de deux ans qui a précédé la contestation de la décision du Tribunal antidumping. [Je souligne.)

L'importance d'agir avec diligence dans les demandes de bref de prérogative a également été reconnue dans la plupart des textes législatifs qui régissent maintenant la révision judiciaire. Par exemple, la *Loi sur la procédure de révision judiciaire* de l'Ontario, L.R.O. 1990, ch. J.1, permet à un tribunal de proroger le délai fixé pour présenter une requête en révision judiciaire, mais seulement s'il est convaincu qu'il existe à première vue un motif pour accorder le redressement et qu'aucune personne touchée par la prorogation ne subira de préjudice grave (art. 5). En vertu de la *Judicial Review Procedure Act* de la Colombie-Britannique, R.S.B.C. 1979, ch. 209, une demande de révision judiciaire peut être prescrite par l'écoulement du temps dans le cas où un tribunal estime que le retard causerait un préjudice important (art. 11). Le paragraphe 28(2) de la *Loi sur la Cour fédérale,* L.R.C. (1985), ch. F-7, dispose que toute demande de révision judiciaire devant la Cour d'appel fédérale doit être présentée dans les dix jours qui suivent la première communication de la décision ou de l'ordonnance attaquée. Ce délai ne peut être prorogé qu'avec l'autorisation de la cour. En Alberta, le par. 753.11(1) des *Alberta Rules of Court* (Alta. Reg. 390/68) dispose que si le redressement sollicité est l'annulation d'une décision ou d'un acte, la demande de révision judiciaire doit être déposée et signifiée dans les six mois qui suivent la décision ou l'acte en question. Enfin, l'art. 835.1 du *Code de procédure civile* du Québec, L.R.Q., ch. C-25, qui s'applique à tous les recours extraordinaires, dispose que la requête doit être signifiée «dans un délai raisonnable». La Cour d'appel du Québec a statué dans l'arrêt *Syndicat des employés du commerce de Rivière-du-Loup (section Emilio Boucher, C.S.N.) c. Turcotte, (1984)* C.A. 316, à la p. 318: «Cet article (835.1) n'a fait que codifier la règle de la *common law* que ce recours doit être exercé dans un délai raisonnable.»

Au moment où le présent recours a été exercé, le barrage était complété à 40 pour 100. Un bon montant de deniers publics avait déjà été dépensé. Il est établi que les membres de la Société intimée étaient au courant de l'approbation accordée sous le régime de la L.P.E.N. avant le mois de février 1988. Même s'ils ne l'étaient pas, la Société intimée aurait pu intenter son action au début de 1988. À cette époque, les travaux importants de construction n'avaient pas encore commencé. Si la société intimée avait alors intenté ses poursuites au lieu de le faire en avril 1989, l'appelante l'Alberta aurait été en bien meilleure position pour évaluer objectivement tout risque juridique lié à la poursuite des travaux. Face à l'éventuelle invalidité de l'approbation du fédéral, elle aurait bien pu décider alors de ne pas investir les deniers publics comme elle l'a fait.

Après avoir consacré de nombreuses années à une planification intense, tenu d'innombrables audiences publiques, réalisé un grand nombre d'études et de rapports en matière d'environnement et établi divers conseils et comités chargés de l'examen des propositions présentées, l'appelante l'Alberta s'est lancée dans une entreprise d'envergure pour répondre aux besoins de ses électeurs. Elle l'a fait aux frais du public, mais après avoir été avisée par le gouvernement fédéral qu'elle pouvait légitimement le faire. Le barrage de la rivière Oldman nécessite certes une administration globale. Sa construction comporte également un nombre important de contrats avec des tiers. Compte tenu de l'envergure du projet et des intérêts en jeu, il n'était pas raisonnable que la Société intimée attende 14 mois avant de contester la décision du ministre des Transports. Dans le présent contexte, la Société intimée devait absolument respecter l'obligation de diligence de la common law.

Si la Société intimée avait agi d'une façon plus diligente, l'appelante l'Alberta aurait pu évaluer sa position sans tenir compte de l'engagement économique et administratif qui était mis en oeuvre au moment où les présentes procédures ont été intentées. Il est impossible de conclure que l'appelante l'Alberta n'a pas subi de préjudice en raison du retard. Par ailleurs, le juge des requêtes a évalué le préjudice et a statué que rien ne justifiait d'attendre pour entamer la présente contestation que le barrage soit complété pour près de 40 pour 100.

On exige que les auteurs d'une demande de bref de

prérogative agissent avec diligence pour permettre aux intimés de donner suite au pouvoir qui leur est conféré. Le requérant ne peut justifier son retard en soutenant que l'intimé a fait ce qu'il avait légalement le droit de faire. Ce point de vue favoriserait les retards et induirait en erreur les personnes qui ont l'intention de présenter une demande de bref de prérogative.

Mon collègue le juge La Forest accorderait également une certaine importance au fait que l'appelante l'Alberta était au courant de l'opposition de la société intimée et des autres parties en raison des autres contestations infructueuses intentées par celles-ci. À mon avis, ces contestations ne sont aucunement pertinentes en l'espèce. Elles étaient toutes mal fondées et l'appelante l'Alberta n'avait pas à s'attendre que ces poursuites connexes et incidentes laissaient présager une contestation fondamentale du permis initial. Le fait que des détracteurs manifestent du mécontentement au sujet d'un train en marche ne nous met pas en garde contre la possibilité qu'ils en contestent l'autorisation de mise en route. À mon avis, le juge des requêtes n'avait pas à tenir compte de ces activités. Aucune des activités de la Société ou de ses membres n'empêchait la Société intimée d'entamer la présente contestation.

Les activités mentionnées par mon collègue étaient qualitativement différentes de celles visées par la présente action et n'ont aucune pertinence en l'espèce. Les demandes de bref de *certiorari* présentées par la Société intimée en octobre 1987 et au début de 1988 visaient des permis provisoires délivrés par le ministre de l'Environnement de l'Alberta, sous le régime de la *Water Resources Act*, R.S.A. 1980, ch. W-5, de cette province. La demande auprès de l'Energy Resources Conservation Board de l'Alberta portait sur les aspects hydroélectriques du barrage. La dénonciation faite sous serment devant un juge de paix mentionnait une infraction de la *Loi sur les pêches*, L.R.C. (1985), ch. F-14.

Le présent pourvoi porte sur la constitutionnalité et l'applicabilité du *Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement.* Il soulève des questions nouvelles et différentes. Les efforts déployés auparavant par la Société intimée n'étaient pas des préliminaires nécessaires; il s'agissait là de recours distincts et différents du redressement sollicité en l'espèce. À mon avis, pour déterminer s'il devait exercer son pouvoir discrétionnaire contre la Société intimée, le juge en chef adjoint Jérome devait examiner seulement les facteurs qui, selon lui, se rattachaient directement à la demande dont il était saisi. Il était clairement le mieux placé pour évaluer la pertinence de ce que les parties lui ont présenté. On n'est justifié d'intervenir à l'égard de l'exercice de son pouvoir discrétionnaire, que si l'on peut affirmer avec certitude qu'il a eu tort de procéder ainsi. Pour les motifs qui précèdent, je suis d'avis de conclure que l'on n'a pas satisfait à ce critère en l'espèce.

3. Les dépens

À mon avis, il n'est pas justifié d'adjuger les dépens comme entre procureur et client en faveur de la Société intimée. En règle générale devant notre Cour, la partie qui a gain de cause a droit aux dépens sur la base des frais entre parties. C'est la règle que les tribunaux d'instance inférieure ont appliquée. Mon collègue propose une adjudication des dépens comme entre procureur et client dans toutes les cours. Rien n'indique que les tribunaux d'instance inférieure ont commis une erreur et je ne vois pas pourquoi il faudrait déroger à notre règle générale. Les groupes d'intérêt public doivent être disposés à se plier aux mêmes principes que les autres plaideurs. Si l'on établissait des règles spéciales pour ces groupes, on mettrait en danger l'application d'un important principe: ceux qui intentent des poursuites doivent être disposés à accepter une certaine responsabilité quant aux dépens. En l'espèce, je ne vois rien qui justifie d'imposer aux contribuables qu'ils assument les dépens comme entre procureur et client pour le compte de cette partie.

4. Conclusion

Je suis d'avis d'accueillir le pourvoi avec dépens.

Pourvoi rejeté, sauf qu'il ne sera pas délivré de bref de la nature d'un mandamus ordonnant au ministre de Pêches et des Océans de se conformer aux lignes directrices fédérales en matière d'environnement. Le juge STEVENSON est dissident.

Procureurs de l'appelante Sa Majesté la Reine du chef de l'Alberta: Milner & Steer, Edmonton.

Procureur des appelants le ministre des Transports et le ministre des Pêches et des Océans: John C. Tait, Ottawa.

Procureurs de l'intimée: Gowling, Strathy & Henderson, Ottawa.

Procureurs de l'intervenant le procureur général du Québec: Jean-K. Samson, Alain Gingras et Denis Lemieux, Ste-Foy.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick: Le procureur général du Nouveau-Brunswick, Fredericton.

Procureur de l'intervenant le procureur général du Manitoba: Le procureur général du Manitoba, Winnipeg.