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Overcoming Copyright Barriers to Public Participation in the Environmental Decision-Making Process in Trinidad and Tobago

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Abstract

This essay analyzes the issue of copyright laws being used to stifle public involvement in the environmental decision-making process in Trinidad and Tobago. It provides a comprehensive discussion of the problem of the Environmental Management Authority (EMA), which is the regulatory body in Trinidad and Tobago (TT), attempting to treat an Environmental Impact Assessment (EIA) as copyrighted. The essay tracks the challenges faces by Fishermen and Friends of the Sea (FFOS), a local NGO, in its efforts to promote environmentalism. This led to a legal challenge by FFOS on the issue, which is examined in this essay.
The essay delves into the fundamental principles of public participation/consultation as articulated by Parliament, the EM Act, the National Environment Policy, and related case law. It highlights the critical relationship between access to information and public participation/consultation. Moreover, the essay provides an in-depth analysis of the relationship between an EIA generated in accordance with the EM Act and the Copyright Act. The essay argues for the importance of preserving the right to information as the foundation of public participation in the environmental decision-making process.

The Problem

Governments make decisions every day that impact communities. In an environmental context, decision-makers are responsible for rendering discussion to environmental legislation have an inherent responsibility to consider the public interest. According to Bran (1996), it is on this foundation that the uprising of the call for greater public participation/consultation occurred. Public participation/consultation is a process by which interested and affected individuals, organizations, and government entities are consulted and included in the decision-making process. For effective participation, the minimum requirements include:
1. Providing education on the environment and factors that may impact it
2. Providing access to information, including awareness that information exists and is available
3. Providing a voice in decision-making process

4. Ensuring transparency in the decision-making process by formally considering public input and explain how it affected the decisions
5.Conducting post-project analysis and monitoring, and providing access to relevant information
6.Establishing enforcement structures
7.Providing recourse to independent tribunals for redress (Popovic, 1993).

The system of planning approval with the requirement to assess the environmental impacts of a proposed activity has been scrutinized by the Courts of most countries that have introduced an Environmental Impact Assessment (EIA) process. Almost all EIA systems make provision for some public involvement. This term includes public consultation (or dialogue) and public participation, which is a more interactive and intensive process of stakeholder engagement. At a minimum, public involvement must provide an opportunity for those directly affected by a proposal to express their views regarding it and its environmental and social impacts.

The problem, in this case, arises from the attempt of the Environmental Management Authority (EMA), the regulatory body in Trinidad and Tobago (TT), established pursuant to the Environmental Management Act ("EM Act"), to treat an EIA as copyrighted. The practical effect is that only ten percent of the EIA can be copied. Even more so, any attempt to send multiple people to copy individually ten percent (10%) would also arguably put the party responsible for the multiple acts of photocopying in breach of the Copyright Act (Copyright Act 2001). The practical consequence of the attempt by the EMA to assert that EIAs are copyrighted is the impact on the public procuring the necessary expertise to conduct technical reviews of what are essentially highly complex technical documents.

Effective public interest environmental litigation often hinges substantially on the ability of civil society to present its legal position from a sound scientific and technical standpoint. TT is a relatively small country with just more than one million people. Scientific and technical professionals are not in abundance, and those present are very often engaged in earning their livelihood from work within the corporate sector. Therefore, attracting technical and scientific assistance to support public interest environmental litigation is difficult. The struggle to provide technical and scientific support for public interest environmental litigation has involved few local scientists. It has meant that for effective public participation, attempts must be made to obtain scientific and technical assistance from external sources. In the case of Trinidad and Tobago Civil Rights Association v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago, Staff Scientist Mark Chernaik of Environmental Law Alliance Worldwide (ELAW) submitted a written expert affidavit on behalf of the claimants in that matter. ELAW also assisted in the case of Fishermen and Friends of the Sea v Environmental Management Authority, Ministry of Works and Transport (First Interested Party), and KALL Company Limited (Second Interested Party), where the preparatory work for the filing of a judicial review claim for the grant of a Certificate of Environmental Clearance (CEC) by the EMA for the construction of a highway in close proximity to the Aripo Savannas, a designated

sensitive area with designated sensitive species, required technical expertise which Dr. Heidi Weiskel of ELAW provided.

Even the EMA acknowledges the technical challenges in assessing an EIA by its conduct. In the case of People United Respecting the Environment and Rights Action Group v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago (2007), the EMA recruited Jacques Whitford Limited, a Canadian environmental firm, on its behalf, to conduct a review of the EIA submitted by the applicant, Alutrint. The situation with seeking external experts to allow for genuine public participation/consultation is worsened having regard to the provisions of the Environmental Management Act (EM Act 2000). The EIA hast to be submitted for written public comment which covered by the EM Act 2000, stating,

> "Section 35(5) Any application which requires the preparation of an environmental impact assessment shall be submitted for public comment in accordance with section 28 before any Certificate is issued by the Authority" (p. 30).

While thirty days are the minimum requirement for the public comment period, the practice of the EMA, regardless of the complexity of EIAs, is to stay close to the minimum period. This issue was unsuccessfully raised in People United Respecting the Environment and Rights Action Group v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago (2007) Justice Dean-Armourer as she then was, acknowledged the statutory basis of the conduct of the EMA and stating:

> "65. No ground of illegality could be established because public comment periods were within the minimum time stipulated by s. 28(3) of the EM Act, while accepting that the issues canvassed by the proposed project were both deep and numerous, the time allotted in this case cannot be regarded as unreasonable, having regard to the timetable set by the Rule. The Authority finds itself in this unenviable predicament of having to balance environmental with economic considerations, or more specifically having to balance the need of the public for thorough consultation with the developer's need to press on with the project. In my view, the EMA cannot be faulted for complying with the statutory timetable" (p. 185).

It must be emphasized that at least in the case of People United Respecting the Environment and Rights Action Group v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago (2007) the public was not constrained by any copyright issues and had full access to the EIA at the earliest possible time. If the EMA is permitted to introduce a copyright stipulation, it would have the effect of destroying public participation as the likelihood of even copying ten percent (10%) repeatedly and getting the material to external or internal technical experts to review and submitting within the required period, would become practically impossible, and destroy the very notion of public participation/consultation.

The Challenge

In TT NGOs play different roles in developing a culture of environmentalism. By far, Fishermen and Friends of the Sea (FFOS) is the NGO with the longest history of judicial activism on behalf of the environment. Legal proceedings pursued by FFOS dominate the judicial landscape of environmental law. This is in addition to its strong public awareness and advocacy program on environmental causes. This group was formed in 1996 out of an interest in fishing and, at that time, was known as the North Coast Fishermen. The group functioned as an unincorporated body from 1996 until 2000. The group was formed as a community-based initiative based on the United Nations model of focal point leader networks from its inception.

The facts gave rise to the judicial challenge by FFOS are best stated in the judgement resulting from the filing of an interpretation summons as seen in the matter of the Environmental Management Act Chapter 35:05 In the matter of the Copyright Act Chapter 82:80 Between Environmental Management Authority v Fishermen and Friends of the Sea Limited (2020), Rampersad J states:

> "1. This interpretation claim arises from the decision, reasons, and policy of the Environmental Management Authority ('EMA') not to allow any person(s) to obtain a complete copy of an Environmental Impact Assessment ('EIA'), whether in hard copy or digitally. Further, restrictions were placed so that any copying permitted was limited to 10% percent of the EIA, on the basis that the EIAs are subject to third-party copyright in Trinidad and Tobago arises from the decision, reasons, and policy of the EMA not to allow any person(s) to obtain a complete copy of an EIA, whether in hard copy or digitally. Further, restrictions were placed so that any copying permitted was limited to 10% percent of the EIA, on the basis that the EIAs are subject to third-party copyright in Trinidad and Tobago"(p.3).

General Principles of Public Participation/Consultation

The Role of Parliament

Reference to parliamentary proceedings can be of assistance in the interpretation of legislation but the parliamentary statement relied on must be clear and unequivocal. Once the statements are clear and made by a minister or other promoter of the bill, they qualify as an external aid. In such a case, therefore, the statements are a factor the Court could consider in construing legislation that was ambiguous, obscure, or productive of absurdity. This is particularly the case where the matter involves the use of an Interpretation Summons as seen in the Matter of the Legal Profession Act Chap 90:03 and In the Matter of the Interpretation of sections 9 and 27 of the Legal Profession Act Chap 90:03 and In the Matter of the construction of section 26 of the Legal Profession Act Chap 90:03 between Law Association of Trinidad and Tobago v The Attorney General of Trinidad and Tobago and Michelle Mayers and Nadine Nabbie (2012). Therefore, the Court is entitled to look at the words of the promoters of the EM Act to determine the intent and import of public participation/consultation. From the

Hansard in Parliament: February 03, 1995, Environmental Management Bill, Hansard Record, Senator Dr. Lenny Saith (Minister of Planning and Development) states:

> "The Government also took into consideration the need for the involvement of the private sector, labour, the scientific community, environmental NGOs, government agencies and the 'general public in a participatory co-management approach to the environment, for after all, the environment is everyone's business" (p. 898).

It is also of significance that the legislation provides that the Authority "shall facilitate co-operation among persons and manage the environment in a manner which fosters participation and promotes consensus, including the encouragement and use of appropriate means to avoid or expeditiously resolve disputes through mechanisms for alternative dispute resolution. This reflects our conviction that the Authority must not be unduly confrontational or anti-development and that it should seek to engender co-operation, promote awareness and encourage voluntary compliance as key strategies in the pursuit of national environmental management objectives. (pp. 899-900)

The Honourable Colm Imbert, states:

> "For the first time in any bill that has ever been passed in this Parliament, public participation is enshrined" (p. 942).

Keith Sobion (Attorney General) Senate Hansard, January 24, 1995, states:

> "This Bill has attempted to deal with public consultations on a number of matters; and I think that approach is one which suggests that there is not going to be a whimsical exercise of any of the powers contained herein" (p. 1246).

It is quite apparent that Parliament intended to enact a law that enshrined public participation/consultation, recognizing that the environment is everyone's business. The promoters of the EM Act made it quite clear that the EMA was required to pursue a participatory co-management approach to the environment.

The EM Act

The actual words of the legislation must be carefully examined to determine the meaning of the legislation. The very foundation of the EM Act is based on the principle of public participation/consultation. A perusal of the EM Act reveals the intent of Parliament to ensure that the EM Act promotes, at its very core, the notion of public participation/consultation in the environmental decision-making process. According to the EM Act (2000) Preamble:

> "And whereas, in furtherance of its commitment, the Government is undertaking the establishment and operation of an Environmental Management Authority to coordinate, facilitate and oversee the execution of the national environmental strategy and programmes, to promote public awareness of environmental concerns, establish an effective regulatory regime which will protect, enhance and conserve the environment" (pp. 8 -9).

According to the EM Act (2000) Section 4:

> The objects of this Act are to:
>
> "(c) ensure the establishment of an integrated environmental management system in which the Authority, in consultation with other persons, determines

priorities and facilitates coordination among governmental entities to effectively harmonise activities designed to protect, enhance and conserve the environment" (pp. 12-13).

According to the EM Act (2000) Section 16:

Functions and Powers of the Authority

"(2) In performing its functions, the Authority shall facilitate co-operation among persons and manage the environment in a manner which fosters participation and promotes consensus" (p. 18).

Therefore, it follows that the EM Act provides a statutory basis for public participation/consultation, and any interpretation of the law that limits its ability to foster public participation/consultation, such as restricting access to an EIA, is illegal and/or contrary to the spirit and intent of the EM Act.

National Environmental Policy 2018

An important aspect of the statutory regime for public participation/consultation in the decision-making process is the National Environmental Policy (NEP) which enshrines participation/consultation as part of the environmental management system. The NEP is a critical component of the environmental legal regime of TT. Notwithstanding the rapid preparation of a wide range of environmental impacting national policies, the main policy for protecting the environment remains the NEP. The EMA is required by Section 16 (1) (a) of the EM Act "to (a) make recommendations for a National Environmental Policy". The exact procedure for establishing the NEP by the EMA is laid out in Section 18 of the EM Act (2000):

"(1) In furtherance of section 16(1)(a), the Board shall prepare and submit to the Minister, not later than two years after the commencement of this Act or such other time as the Minister may direct by Order, recommendation for a comprehensive National Environmental Policy (hereinafter called "the Policy") in accordance with the objects of this Act including (c) a programme for promoting the Policy and seeking an effective commitment from all groups and citizens in the society to achieve the stated objectives in the Policy" (pp.19-21).

What is unique about the NEP is that it has the force of law and must be adhered to by all governmental entities, including the EMA. According to Section 31 of the EM Act (2000):

"The Authority and all other governmental entities shall conduct their operations and programmes in accordance with the National Environmental Policy established under section 18" (p. 28).

The statutory character of the NEP was clearly stated in Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment (2016), Lord Carnwath, in upholding the polluter pays principle as enshrined in the NEP, stated: "In Trinidad and Tobago an attempt has been made to tackle such questions more methodically through the statutory National Environmental Policy ("the NEP") as applied to charges for licenses, and, in the context of water pollution, through the Water Pollution Management Programme ("the WPMP").

The NEP has been revised from its first manifestation in 1998, but it has retained its commitment to the principle of public participation/consultation, as seen in the NEP (2018). According to Section 1.05 and 2.20:

> "1.05 Public participation is critical to sustainable development and is a prerequisite for responsive, transparent and accountable governmental entities and civil society organisations. It is also acknowledged that meaningful public participation can only be attained where there are transparent public processes, and access to appropriate, timely and comprehensible information concerning the environment held by public authorities. Such information must be made widely available without imposing undue financial burdens on the applicant and with adequate protection of privacy and business confidentiality. Consequently, all governmental entities of Trinidad and Tobago shall, in accordance with Principle 10 of the Rio Declaration, facilitate and encourage public awareness and participation in environmental and developmental matters by making information widely available, and ensuring effective access to judicial and administrative proceedings, including redress and remedy" (p. 7).
>
> 2.20 Communication, Education and Public Participation the GoRTT recognizes that empowering individuals to undertake environmentally responsible behaviour also requires systemic reinforcement of pro-environmental behaviours and knowledge. This entails continuous environmental education and public participation in environmental decision-making. It is the Government's policy that all environmental education in Trinidad and Tobago is in keeping with the goals, objectives and characteristics contained in the Belgrade Charter (1975), the Tbilisi Declaration (1977) and Chapter 36 or Agenda 21 (1992). To this end, and in keeping with SDG 4, the GoRTT will: a) Continue to introduce environmental education from pre-school school age to adulthood, for both formal and informal sectors, with the goal of providing knowledge of both local and global environmental issues as well as the skills required to enable effective public participation, decision-making and action; b) Further the integration of sustainable development concepts and the principles of this NEP into all education programmes and curricula; c) Mobilize resources and encourage partnerships among national, regional and international entities towards building public awareness and behavioural change; d) Coordinate environmental education and awareness programmes initiated by the public, private and non-governmental sectors at the national level; e) Empower public agencies to undertake environmental communication, awareness and education programmes based on local environmental issues in a manner appropriate for target community; f) Support the development and promotion of mechanisms that provide viable solutions to environmental problems in communities; g) Ensure that mechanisms established for meaningful participation in decision-making regarding environmental and/or development issues are appropriately promoted, and made available to the public; and h) Ensure that all efforts at education, awareness-building and meaningful participation in decision-making regarding environmental and/or development issues encourage and facilitate the inclusion of marginalized groups such as indigenous peoples, the rural poor, children, youth, women, sick, disabled and elderly" (p. 39).

It must be noted that the NEP requires meaningful public participation/consultation, which mandates access to appropriate, timely, and comprehensible information concerning the environment held by public authorities. Such information must be made widely available without imposing undue financial burdens on the applicant and with adequate protection of privacy and business confidentiality. Of course, as will be seen later, applicants submitting EIAs are given legislative protection for their confidential trade or business information.

Case Law

The role of public participation/consultation in legal environmental management has been emphatically endorsed in Caribbean jurisprudence for almost two decades. Starting with the Judicial Committee of the Privy Council in the matter of Fishermen and Friends of the Sea v. Environmental Management Authority and BP Trinidad and Tobago LLC (Interested Party) (2005). The Court made clear that the very democracy of our countries may be compromised when public participation/consultation is undermined. According to Lord Walker:

> "This case is an appeal at the Privy Council for refusal for leave for judicial review of a decision to grant an approval for the BP Bombax and Kapok projects to run a 36" cross country pipeline without being subjected to the EMA's CEC Rules. 28. In their Lordships' view there is only one significant criticism to be made of the judge's careful and thorough judgment. In the penultimate paragraph of his judgment (set out in paragraph 26 above) the judge emphasized that the Authority had taken an informed decision, but the judge paid insufficient attention to the need for public consultation and involvement in the decision-making process (his reference to "consultation by technocrats" does not seem to refer to public consultation). Public consultation and involvement in decisions on environmental issues are matters of high importance in a democracy" (para. 28).

In 2006, the High Court of Jamaica delivered the first major environmental victory for public interest activists in the matter of the Natural Resources Conservation Authority Act v. Northern Jamaica Conservation Association and Jamaica Environment Trust (2005), according to the now Chief Justice Sykes:

> "38. It is now safe to say that consultation of citizens by public bodies and authorities is now a well-established feature of modern governance" (pp. 18-19).

It was the turn of the Supreme Court of Trinidad and Tobago in 2007 to pronounce on the inviolability of public participation/consultation in People United Respecting the Environment (PURE) and Rights Action Group (RAG) v Environmental Management Authority and ALUTRINT Ltd. (2007), Dean-Armourer J, added her endorsement to the view that public participation/was part of an inclusive democratic procedure:

> "51. This Court is, however, not only to be guided but is indeed bound by the pronouncement of their Lordships in FFOS v EMA (P.C). Pace Learned Senior Mrs. Peake, the words of Lord Walker in FFOS v EMA (P.C.), have had the effect of importing the Berkley Principle directly into our local jurisprudence. Notwithstanding the differences in the respective Legislative regimes, following

> FFOS v EMA (P.C.), this Court is bound to regard an inclusive democratic procedure, conferring on the public an opportunity to express its opinion on environmental issues as a "directly enforceable right" (p. 182).

Recently the Supreme Court of Belize took the opportunity to review the importance of public participation/consultation in the environmental decision-making process in the matter of Belize Tourism Industry Association v. National Environmental Appraisal Committee, Department of Environment and Belize Island Holdings Limited (2014), according to Justice Abel:

> "99. The case of Talisman (Trinidad) Petroleum Limited v Environmental Management Authority where it itemized some of the advantages of public participation, is particularly insightful in relation to this matter, where it makes the following comments: - i. it improves the understanding of issues among all parties; ii. finds common ground and determines whether agreement can be reached on some issues; and iii. highlights trade-offs that must be addressed in reaching decisions.
>
> 100. Likewise the UK decision of R v North and East Devon Health Authority, Ex Parte Coughlan provides some useful remarks in relation to consultation where it is observed that to be proper: "…consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give consideration and an intelligent response; adequate time must be given for this purpose.
>
> 101. The Jamaican case of Northern Jamaica Conservation Association & Ors v The Natural Resources Conservation Authority and the National Environment and Planning Agency also provides useful guidance. Here the Court dealt with a situation where two addenda and a marine ecology report were not included in the EIA when the public meeting was held. Sykes J found that 'consultation process was flawed because an important part of the EIA was not placed in the public domain30' The Court explained at para. 49 that: - "It does not follow … that flaws in the consultation process will necessarily mean that the decision should be quashed. It depends on the seriousness of the flaw and the impact that it had or might have had on the consultation process. Consultation is the means by which the decision- maker receives concerns, fears and anxieties from the people who might or will be affected by his decision. These concerns should be considered conscientiously when making his decision … the Court's will examine what took place and make a judgment on whether the flaws were serious enough to deprive the consultation process of efficacy" (pp. 19-20).

It is abundantly clear that the courts of the Caribbean have placed public participation/consultation at the forefront of the legal, environmental regime for the management of the environment.

Access to Information and Public Consultation/Participation

Access to information is a fundamental component of public participation/consultation. The NEP 2018 clearly explains the critical relationship between access to information and public participation/consultation. According to Section 1.05:

> "Public participation is critical to sustainable development and is a prerequisite for responsive, transparent and accountable governmental entities and civil society organisations. It is also acknowledged that meaningful public participation can only be attained where there are… access to appropriate, timely and comprehensible information concerning the environment held by public authorities. Such information must be made widely available without imposing undue financial burdens on the applicant and with adequate protection of privacy and business confidentiality. Consequently, all governmental entities of Trinidad and Tobago shall… facilitate and encourage public awareness and participation in environmental and developmental matters by making information widely available" (p. 7).

It follows, therefore, that any actions of the EMA to copyright an EIA and not to allow any person(s) to obtain a complete copy of an EIA), whether in hard copy or digitally. Further, restrictions that limit copying to 10% percent of the EIA, on the basis that the EIAs are subject to third-party copyright, would have the consequence of negating public participation/consultation on the EIA.

Public Participation and the CEC Process

It is necessary to see how the environmental legal regime has emerged concerning public participation in the central area of regulatory concern, namely the regulation of new and significantly modified activities through the CEC process.
The application for a Certificate of Environmental Clearance (CEC) allows the EMA to control the environmental impacts associated with new developments or significant modification of existing developments. CECs are intended to ensure that there are limited or no environmental consequences of developmental activities occurring in the post-EM Act era.

Implementing the CEC process starts with engaging in a new or significantly modified construction, process, works or other activity with respect to an activity identified in the CEC (Designated Activities) Order L.N. No. 103 of 2001. According to Section 35 of the EM Act (2000):

> "(1) For the purpose of determining the environmental impact which might arise out of any new or significantly modified construction, process, works or other activity, the Minister may by Order subject to negative resolution of Parliament designate a list of activities requiring a certificate of environmental clearance (hereinafter called "Certificate").
> (2) No person shall proceed with any activity which the Minister has designated as requiring a Certificate unless such person applies for and receives a Certificate from the Authority.

(3) An application under this section shall be made in accordance with the prescribed manner" (p. 30).

The CEC (Designated Activities) Order identified forty-four activities requiring a CEC. Once a person believes that a CEC is needed, such a person is required to apply for a CEC pursuant to Rule 3 of the Certificate of Environmental Clearance Rules (CEC Rules) L.N. No. 104 of 2001, and the Certificate of Environmental Clearance (Fees and Charges) Regulations, L.N. No. 91 of 2001. Upon receipt of the application, the EMA has four options.

CEC Not Required

According to Rule 4(1) (a) of the CEC Rules (2001), the EMA can notify an applicant that a CEC is not required under the EM Act, which consequently means that the applicant can proceed with the activity subject to the requirements of other relevant legislation.

Further Information Required to Process CEC Application

The EMA may inform an applicant for a CEC that it requires further information to process an application for a CEC pursuant to Rule 4(1) (b) of the CEC Rules (2001). This, however, has to be construed together with Rule 4(1) (a) of the CEC Rules (2001) that the application lacks sufficient information to determine whether or not a CEC is required. At this point, there is no requirement for public participation/consultation.

Application Does Not Require an EIA

The applicant, after submitting the information required under Rule 4(1) (a) and (b) of the CEC Rules (2001), may be informed by the EMA in accordance with Rule 4(1) (c) of the CEC Rules that the application requires a CEC but not an EIA. This determination is critical as the statutory right to public participation/consultation only arises when an EIA is required.

The position of statutory public participation/consultation as exclusively part of the EIA process is underscored by several decisions of the Courts on public participation/consultation in the non-EIA required approval process for a CEC. In one instance, the High Court took the view that when an EIA is not required as part of the CEC approval process, there is no statutory requirement for public participation. Still, the Court noted favorably public participation/consultations done voluntarily by an applicant. In Bhadase Sooknanan and Fishermen and Friends of the Sea v Environmental Management Authority and the Ministry of Energy (2014)**,** Kangaloo J:

> "56. The requirement of public consultation in Trinidad and Tobago is borne out in section 35(5) of the EMA Act. This is only activated and enforced when the EMA has commissioned the preparation of an EIA in relation to the application before it.
>
> 57. The Respondent is of the view that there was no express duty on the part of the EMA to consult when considering whether an EIA is required but rather, it is only when an EIA is required that such a duty arises. The case of R (on the

application of Hillingdon London Borough Council) v Lord Chancellor (2008) EWHC 2683 suggests that the Respondent had no legal obligation to consult with the Applicants.

58. In response to this the Applicants, relying on the case of Ulric ‘Buggy’ Haynes Coaching School v The Minister of Planning and Sustainable Development CV2013-05227, submit that the Court is not prevented from imposing such a duty of consultation on a decision maker. Further, the Applicants have lamented throughout their evidence and submissions about the lack of "meaningful" consultation with "meaningful" effect on the part of the EMA. The question that this Court is therefore obliged to pose is - what is meaningful, in whose eyes and to whose standards?

59. The Applicants on the one hand contend that the EMA ought itself to have conducted consultation but then on the other hand submit that the EMA ought to have insisted that rather Petrotrin engage in "meaningful" consultation with those persons potentially affected by the activities of Petrotrin.

60.The evidence of the Respondent clearly demonstrates that Petrotrin had three consultation meetings in July 2013 with the fishing community. On a reading of the Atlantic LNG case per Stollmeyer J. this court is satisfied that any such consultation would have been adequately carried either by Petrotrin or by the EMA in more serious cases, where an EIA was required. In that case Stollmeyer J. said: “EMA had a broad discretion in determining whether and when to hold public hearings. There is no express provision requiring follow-up public hearings before granting the CEC. That is left up to its discretion …”

61. Stollmeyer J. goes on: “… section 28 attempts to remedy this by allowing affected communities more meaningful participation in decisions that affect them. It also provides communities with valuable information about the potential health and environmental effects of the project. It affords persons who may be affected the opportunity to voice their concerns … and correspondingly places EMA under a duty to consider what they say. These persons are given a fair hearing.”

62. In the Atlantic LNG case Stollmeyer J found that the consultation process had been accomplished in three stages by virtue of three meetings and so concluded that there was consultation, going further to say that the EMA had not exercised its discretion unreasonably.

63. This court is satisfied that meetings held by Petrotrin with the fishing community demonstrated sufficient consultation in all the circumstances of this case, particularly in light of this Court’s finding that such consultation was not mandated by the legislation, no EIA having been required by the EMA.

64. Even in the absence of the requirement for an EIA, this court finds that, as per Berkeley v Sec of State for the Environment [2001] 2 AC 603, the Applicants were given "an opportunity to express [their] opinion on the environmental issues" by virtue of the three (3) consultative sessions held by Petrotrin.

65. As per Stollmeyer J in the Atlantic LNG case,

“It is sufficient if those affected, or likely to be affected, are put into a position that allows their views and opinions to be heard, to be ventilated fully, and that those views and opinions be considered properly in the decision-making process. There is no requirement for ongoing public debate.”

66. This Court agrees with the submission of the Respondent that consultations cannot go on forever. There must be an end at some point. Therefore, the Court finds that those affected persons were indeed given an opportunity to have their concerns addressed and as such there was consultation although not mandated by legislation in this instance" (pp. 16-18).

The High Court has also taken the view that the issue of public consultations outside of the EIA process is largely irrelevant as it is not statutorily required. In the matter of Irwin Hercules Samuel Mapp, Kenneth Murray (On Their Own Behalf and as Members of the Charlotteville Beachfront Movement) v Tobago House of Assembly (2013), Rajkumar J stated:

"73. It is therefore not necessary to consider or even comment upon whether there was adequate consultation or whether such consultation as there was is reviewable by a court on the evidence presented by the applicants, save that in the event that the EMA were to require an EIA in respect of any other activity related to the project, (a matter entirely within its sole discretion), the issue of the adequacy and content of consultation may assume relevance" (p. 21).

Therefore, the only occasion that the public can participate/consult in the CEC process is when an EIA is required. This makes it critical, therefore, that the public has full, practical, meaningful, proper, and unhindered access to an EIA. Failure to provide such access will undermine the only statutory mechanism available for public participation/consultation in the CEC process.

EIA Required to Process CEC Application

Rule 4(1)(d) of the CEC Rules provides that the applicant may be required to conduct an EIA in compliance with the Terms of Reference (TOR) as a condition to the determination of an application for a CEC by the EMA. Rule 4(1) of the CEC Rules (2001) states:

"(1)(d) The Authority shall, within 10 working days after receipt of an application under rules 3(1) or 3(3) issue to the applicant a notice acknowledging receipt of the application and it shall –(d) notify the applicant that an EIA is required in compliance with a TOR" (pp. 359 – 360).

This is a critical component of the environmental approval process, and the emerging legal concerns center around public participation/consultation and the EIA to facilitate the issuing of a CEC by the EMA in accordance with existing legal principles used in judicial review to assess the decisions of a governmental entity. According to Section 35 of the Environmental Management Act (2000):

"(4) The Authority in considering the application may ask for further information including, if required, an environmental impact assessment, in accordance with the procedure prescribed.

(5) Any application which requires the preparation of an environmental impact assessment shall be submitted for public comment in accordance with section 28 before any Certificate is issued by the Authority" (p. 30).

The Relationship between the EIA and Public Consultation

In the United States Supreme Court, Justice Stevens's judgment of the Court recognized the importance of public involvement in the EIA process. Justice Stevens in Robertson v. Methow Valley Citizens Council (1989) highlighted the significance of public participation/ consultation in the EIA process.

> "7. The statutory requirement that an agency contemplating a major action prepare an environmental impact statement… ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. It also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision…. Publication of an EIS, both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency "has indeed considered environmental concerns in its decision-making process," Baltimore Gas & Electric Co., supra, at 97, and, perhaps more significantly, provides a springboard for public comment" (p. 490 US 350).

In Australia, it was stated by SA Forgie in The Environment Centre NT Inc. v. Department of the Environment, Sport and Territories (1995):

> "114. There can be little doubt that the public does have a real and legitimate interest in the environmental consequences of proposed projects. Furthermore, there can be little doubt that it has an interest in the proper assessment of those consequences and, if the project proceeds, the management of those consequences. It follows that the public has an interest in having relevant information to assess these matters."

The Environmental Commission of TT has succinctly explained the interlocking relationship between an EIA and the public participation/consultation process. The Talisman (Trinidad) Petroleum Ltd v. Environmental Management Authority (2002), Hosein J states:

> "Quite apart from the Rules, there is in conformity with the need for participation under Section 16(2) of the Act, the provision relating to Public comment and the procedure thereunder, (See Section 28 of the Act). The general advantages of public participation are, inter alia, that it: - 1. improves the understanding of issues among all parties; 2. finds common ground and determines whether agreement can be reached on some of the issues; 3. highlights tradeoffs that must be addressed in reaching decisions; and 4. improves the general understanding of the problems associated with a project, as well as the overall decision-making process. (See Columbia Journal of Transnational Law Vol. 33, 1995 No. 2 at page 344 by Dr. William A. Tilleman) ……. And among the justifications for allowing public participation into EIA's at page 345 the Author states: - "1. Environmental assessments are intended to generate higher quality information about potential environmental impacts. In other words, it is a process designed to assist the proponent and the regulators with decisions regarding approvals. Public input therefore enhances a policy of consultation, one designed to improve the quality of development decisions. The public has access to

decision-makers to advise them of concerns, issues and values." I think it is right that I should indicate a few of the relevant aspects of the principles of natural justice, which are applicable in this matter" (pp.19-20).

Public Hearing

Perhaps the main and most significant pillar of the public participation process is the discretion vested in the EMA to hold a public hearing where there is sufficient public interest. According to Section 28(3) of the EM Act (2000):

> "3. The Authority shall receive written comments for not less than thirty days from the date of notice in the Gazette and, if the Authority determines there is sufficient public interest, it may hold a public hearing for discussing the proposed action and receiving verbal comments" (p. 27).

The EMA has made sparing use of this power, and it is undoubtedly the exception for a public hearing to be held rather than the norm. The failure to hold a public hearing constituted one of the grounds for judicial review in Fishermen and Friends of the Sea v The Environmental Management Authority and Atlantic LNG Company of Trinidad and Tobago (Interested Party) (2003), where Justice Stollmeyer agreed with the views of the EMA and noted:

> "The EMA has a broad discretion in determining whether and when to hold public hearings. There is no express provision requiring follow-up public hearings before granting the CEC. That is left up to its discretion, and will depend on the circumstances of the case and the severity of the concerns… The rules of natural justice do not necessarily require that there be a formal, oral, hearing in public. It is sufficient if those affected, or likely to be affected, are put into a position that allows their views and opinions to be heard, to be ventilated fully, and that those views and opinions be considered properly in the decision-making process. There is no requirement for ongoing public debate" (p. 2).

If an EIA is copyrighted, there will be little public interest for the EMA to determine whether a public hearing is required. Public interest must flow from the written comments, and in the absence of such public interest, there can be no public hearing. Therefore, neutering the written public comment period by asserting copyright privileges to EIAs would render the public hearing component of public participation/consultation nugatory.

EIA and The Copyright Act

The core question in this submission is the relationship between an EIA generated pursuant to the EM Act and the Copyright Act. The position of the EMA is that an EIA is considered as "works" and, therefore, a copyrighted document subject to the requirements of the Copyright Act. According to Section 5 of the Copyright Act (1997):

> "Section 5. (1) Copyright is a property right which subsists in literary and artistic works that are original intellectual creations in the literary and artistic domain,

including in particular— (a) books, pamphlets, essays, computer programs and other writings" (p. 12).

Adopting this position frustrates the ability of the public to participate effectively in the public participation/consultation process. If the EMA was permitted to introduce a copyright stipulation, it would have the effect of destroying public participation/consultation as the likelihood of even copying ten (10%) percent repeatedly and getting to external or internal technical experts to review and submit within the statutorily required period, would become practically impossible.

Conflicting Enactments and the Doctrine of Implied Repeal

As seen by the EM Act, the NEP, and the Parliamentary debate, the underlying principle of the legal regime for environmental management is that of public participation/consultation. It is clearly the legislative policy embodied in the legal regime. The EM Act is about making available information to the public to help inform them of what is taking place and allow them to influence the ultimate decision, subject to certain exceptions. On the contrary, the objective of the Copyright Act is to prevent the dissemination of information to the public subject to certain exceptions.

It is important to note that the public participation/consultation regime envisaged by the EM Act protects information from the public domain that may undermine the commercial interests of an applicant for a CEC. According to Rule 8(3) of the CEC Rules (2001):

"8. (3) The Authority shall omit from the Register any information which the applicant claims under rule 3(7) should be treated as a 'trade secret or confidential business information' where— (a) the Authority does not contest the claim; or (b) the Authority rejects the claim, but the claim is upheld on appeal pursuant to rule 4(2)" (p. 362).

The fact that Parliament considered protecting trade secrets or confidential business information clearly illustrates that the fundamental intent of the Copyright Act was addressed. It follows, therefore, that if there is a conflict between the EM Act and the duty to provide information and the Copyright Act and the duty to protect information, the fact that the EM Act was passed in 2000 and the Copyright Act in 1997, should be resolved in favor of the later statute under the doctrine of implied repeal. This is more so the case where there is nothing expressly stated in the Copyright Act to render an EIA copyrighted. In Thoburn v. Sunderland City Council Laws LJ (2002):

"37. The rule is that if Parliament has enacted successive statutes which on the true construction of each of them make irreducibly inconsistent provisions, the earlier statute is impliedly repealed by the latter. The importance of the rule is, from the traditional view, that if it were otherwise the earlier Parliament might bind the later, and this would be repugnant to the principle of Parliamentary sovereignty" (p. 20).

63. Ordinary statutes may be impliedly repealed. Constitutional statutes may not" (p. 33).

Therefore, the provisions of the Copyright Act, insofar as there is an attempt to apply it to the EM Act and effectively limit the public participation/consultation process are impliedly repealed.

Private Right Versus Public Right

In any statutory interpretation, it is important to consider the purpose/philosophy of legislation. As per Lawrence-Beswick J in Gerville Williams v. The Attorney-General (2014):

> "294. As is well known, the first rule of statutory interpretation is to give the words that fall for interpretation their natural and ordinary meaning. If supporting authority be needed for this rule, then that support might be found in the case of Attorney-General v Mutual Tontine Westminster Chambers Association (1876) 1 Ex D 469 at pages 475 – 476. In that case, Sir George Jessel M.R., in construing the meaning of the word "house" in the legislation that fell for consideration before the English Court of Appeal, made the following remarks: …before considering the statute, it may be as well to say a word or two upon what I think are the established rules of construction, which, whether forgotten or not, are often disregarded in argument, and I am afraid sometimes even in judgments. Those rules, I take it, are these: In construing legal instruments, whether Acts of Parliament or not, it is the duty of the Court to give to every term used its ordinary and legal meaning, unless there is something either in the nature of the subject-matter or in the context which compels the Court to come to a different conclusion. It may also become necessary, later in this judgment, to have recourse to two other principles of statutory interpretation: One is the purposive approach, described by the learned author, Elmer Driedger, in The Construction of Statutes (2nd edition, 1983), at page 87 thus: The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [295] To the same effect in respect of the purposive approach is the case of Pepper v Hart [1993] AC 593, in which Lord Griffiths, at page 617, described the essence of the rule as one which: - ... seeks to give effect to the true purpose of legislation and [the courts] are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. [296] Not dissimilar from the purposive approach is the mischief rule, which is thought to have had its origins in Heydon's Case (1584) 76 ER 637. In that case the court stated that in approaching the interpretation of a statute, the court ought to consider and discern four matters: - (i) what was the common law (or previous law) before the statute in question was enacted; (ii) what was the mischief and defect for which the previous dispensation did not provide; (iii) what was the remedy that Parliament had appointed to cure the "disease"; (iv) what is the true reason for the remedy. It is the office of all judges, the judgment continued, to interpret statutes so as to suppress the mischief and advance the remedy, adding force and life to the cure and remedy according to the intention of Parliament, for the public good. Some say, however, that this approach or rule should only be applied where a statute has been enacted to cure a defect in the

> common law (and not in previous legislation); and, for this reason, the purposive approach is often preferred" (p. 103).

The conjoined effect of the NEP and the EM Act is to promote a policy endorsed by Parliament that the public participates/consults meaningfully in the environmental management process. This is the purpose of the legislation. It is necessary, therefore, to understand the philosophical basis of copyright. There are generally two philosophical approaches to copyright. According to Canellopoulou-Bottis (2018), civil law jurisdictions adhere to the deontological basis of the assertion of copyright which seeks to endorse copyright as a matter of rights or duty. Intellectual property protection is asserted because it is morally correct to do so.

The approach in common law jurisdictions such as Trinidad and Tobago is based on Utilitarianism. According to Chun Lam (2015):

> "IP laws in the UK complement the utilitarian assumption that, as self-interested individuals, incentives to innovate and create must be offered to inventors and creators if they are to produce intellectual creations, thus IPRs and their assurance of remunerative security are born. The perpetual, inalienable and spiritual nature of natural rights was regarded as "nonsense on stilts" by Bentham, the founding father of Utilitarianism. It therefore comes as no surprise that IPRs under a utilitarian justification are not concerned with personal or moral explanations for their existence; it is merely incidental that the objective utility of granting an individual IPR is the best way to provide the "greatest happiness for the greatest number", that being the most efficient way of promoting the innovative and creative progress of society as whole" (pp.1-2).

An interpretation of the Copyright Act to protect an EIA is contrary to the common law justification of intellectual property right protection, that is, Utilitarianism. There is no argument that it promotes the greatest happiness for the greatest number of members of society. Rather the assertion of copyright over an EIA will limit the benefit that might accrue to the greatest number of persons in favour of one, the applicant who procured its preparation. Further, there is absolutely nothing in an EIA that can even remotely be considered akin to being an incentive to innovate and create, which needs protection. It is simply to satisfy the EMA and the public that the environmental consequences of a proposed development have been considered and mitigation measures proposed to alleviate such environmental consequences where they exist. Moreover, the EM Act protects the economic interests of an applicant by providing a mechanism to exclude trade secrets and confidential business information from the public domain. This is consistent with the utilitarian approach of the Copyright Act. Indeed, even when the Copyright Act (1997) speaks of moral rights in a deontological manner, as in Section 19(1), it does so in clear distinction with copyright:

> "19 (1) Subject to the provisions of subsections (2) to (5), copyright and moral rights of the author shall be protected during the life of the author and for fifty years after his death" (p. 19).

Further, the assertion of copyright over an EIA is solely on a deontological basis, on the simple moral right 'that I created it and therefore, it is mine'. This philosophy belongs to

the civil law tradition and cannot be said to be part of the common law, which applies to TT.

The Exception by Virtue of Being in the National Register

The interpretation of the Copyright Act is fundamental to the defense of the EMA. The argument is that an EIA is covered by Section 5(10) of the Copyright Act and is akin to a "book". However, even if an EIA is copyrighted, arguably, it falls within the exception of copyrighted material contained. According to Section 7 of the Copyright Act (1997):

> "Section 7(1) Notwithstanding the provisions of sections 5 and 6, but subject to subsection (2), no protection shall extend under this Act to— (a) any idea, procedure, system, method of operation, concept, principle, discovery or mere data, even if expressed, described, explained, illustrated or embodied in a work; (b) any official text of a legislative, administrative or legal nature, as well as any official translation thereof; or (c) political speeches and speeches" (p. 13).

Section 7(1)(b) of the Copyright Act speaks of any official text of an administrative nature not being copyrighted. It is, therefore, important to analyze the status of an EIA. According to essay 35(2) of the EM Act (2000):

> "35. (2) No person shall proceed with any activity which the Minister has designated as requiring a Certificate unless such person 'applies for' and receives a Certificate from the Authority. (3) An application made under this section shall be made in accordance with the manner prescribed. (4) The Authority in considering the 'application may ask for further information' including, if required, 'an environmental impact assessment', in accordance with the procedure prescribed. (5) Any application which requires the preparation of an environment impact assessment shall be submitted for 'public comment' in accordance with section 28 before any Certificate is issued by the Authority" (p. 30).

An EIA is part of the official administrative process for the grant of a CEC. As seen in Section 35(4) of the EM Act, it is part of the application being merely the requirement of further information. The statutory evidence that an EIA is part of the official administrative process can be found in its inclusion in the National Register of Certificates of Environmental Clearance. Rule 8(1) of the CEC Rules (2001, 362) states "The Authority shall establish a National Register of Certificates of Environmental Clearance." According to Rule 2 of the CEC Rules (2001,362) "application" means an application for a Certificate made under section 35(2) of the Act." The EIA forms part of the National Register of Certificates of Environmental Clearance by virtue of Rule 8(2) of the CEC Rules (2001):

> **"(**2) Subject to subrule (3), the Authority shall enter in the Register the details and status of every— (a) application, including the information supplied under rule 3(5)" (p. 362).

The question that arises is whether the fact that an EIA is part of the application process but not specifically included in the definition under Rule 8(2)(a) of the CEC Rules means that it is excluded. Rule 8(2)(a) of the CEC Rules (2001, 362) expressly states,

“including the information supplied under rule 3(5);”. The information under Rule 3(5) of the CEC Rules (2001) does not include the EIA. The question is whether the information created pursuant to an application that finds its way to the National Register of Certificates of Environmental Clearance excludes the EIA. In Garner (1999) “the meaning of including “the Participle including typically indicates a partial list”. The use of the word “including” is not meant to be exhaustive. In Directv Inc. v. Crespin, United States Court of Appeals Tenth Circuit (2007), as per Justice Briscoe:

> “Crespin has cited no legal authority for his contention that the statute applies only to wholesale or retail distributors of satellite cable programming, and the plain language of the statute points to a contrary conclusion. For Crespin to be correct, the phrase “includes” in § 605(d)(6) must mean “be limited to.” Yet “include” is defined as “to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate.” Webster’s Third New Int’l Dictionary, 1143 (1993). The Supreme Court has noted that the term “including” “is not one of all-embracing definitions but connotes simply an illustrative application of the general principle.” Fed. Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 100 (1941) (citations omitted). Nothing in § 605(d)(6) indicates that Congress intended to depart from the normal use of “include” as introducing an illustrative – and non-exclusive – list of entities entitled to sue” (p. 8).

There is nothing in the statutory scheme of the Copyright Act to suggest that Parliament intended to depart from the regular use of the word “include” as introducing an illustrative and non-exclusive list of documents forming part of an application.
The position of the United States Court is like established law in Canada on the meaning of the word ‘include”. In Wagenstein v. Graham (1954), per Justice O’Halloran:

> “I said "partly defined" because of the word "includes." The latter word in contrast to "means" is inserted in an interpretation section to permit enlargement of the meaning of terms occurring in the body of the statute. It signifies that which is "included" is in addition to something else that is not specifically stated to be so included and may not need to be so "included" (p.394).

An EIA forms part of the application, which has to be included in the National Register of Certificates of Environmental Clearance. The National Register of the Certificates of Environmental Clearance is available to the public without limitation, save and except payment of a prescribed fee. There is no limitation of what can be copied or made available except information that may constitute a trade secret or confidential business information as approved by the EMA on request from an applicant. Rule 9 (1) of the CEC Rules (2001):

> “The Register shall be open to examination by members of the public at such places and during such times as the Authority may notify from time to time in the Gazette and in one or more daily news essays of general circulation. (2) An extract from the Register shall be supplied at the request of any person on payment of the prescribed fee” (p. 362).

As part of the National Register of Certificates of Environmental Clearance, an EIA is an official text (being the application) of an administrative nature. Indeed, the EM Act refers

explicitly to an EIA as part of an administrative record. Section 28 (1) of the EM Act (2000) states:

> "28. (1) Where a provision of this Act specifically requires compliance with this section, the Authority shall— (a) publish a notice of the proposed action in the Gazette and at least one daily news essay of general circulation— (i) advising of the matter being submitted for public comment, including a general description of the matter under consideration; (ii) identifying the location or locations where the 'administrative record is being maintained'; (iii) stating the length of the public comment period; and (iv) advising where the comments are to be sent; (b) 'establish and maintain an administrative record' regarding the proposed action 'and make such administrative record available to the public at' one or more locations. (2) The administrative record required under subsection (1) shall include a written description of the proposed action, the major environmental issues involved in the matter under consideration, copies of documents or other supporting materials which the Authority believes would assist the public in developing a reasonable understanding of those issues, and a statement of the Authority's reasons for the proposed action" (p. 27).

Section 28(1)(b) of the EM Act squarely places an EIA as part of an official text of an administrative nature. This is buttressed by the position in Canada where the Canadian Environmental Assessment Act (1992) contains a similar system for creating a National Register and the availability of EIAs without restriction pursuant to any copyright claim. In one instance, an applicant, with the support of the regulatory authority, attempted to uphold such a claim. The attempt at copyrighting was vigorously opposed by the public interest applicant in like manner as in this matter, on the basis that such a step undermines the foundation of public participation. The Canadian swiftly rejected any attempt to claim that an EIA was copyrighted. In Sierra Club of Canada v. The Attorney General of Canada (2003), as per Blais J:

> "71. Furthermore, by unjustifiably declaring the EIS copyrighted and protected property, considering the supposed sensitive commercial nature of some of its parts, the Minister failed to meet his obligations.
>
> 72. Bounty Bay and 5M allege that the EIS is copyrighted and protected property due to the commercially sensitive nature of its Part 2. Such part relates to Bounty Bay's expertise of adequate aquaculture site selection.
>
> 73. Scott Dockendorff, owner of Bounty Bay, justified such allegation in his cross-examination. Since some aquaculture leases are poorly situated, the criteria used for a site selection, "... including exposure to wind, ice conditions, predators, growth periods, quality of product, [etc.]", is therefore sensitive. What was also sensitive, according to Mr. Dockendorff, is the fact that Bounty Bay came to the conclusion that St. Ann's Harbour was a good site for aquaculture. Because past competitors' attitude was to follow where they went, Bounty Bay was scared that there would be an abundance of aquaculture project applications relative to the St. Ann's site.
>
> 74. Further along in his cross-examination, Mr. Dockendorff elaborated his conclusion as to the commercially sensitive information proprietary to Bounty

> Bay and 5M. It related to the physical design of their aquaculture farms which, according to him, is unique in the industry.
> 75. Indeed, in a letter dated April 28, 2002 to Harold Frizzel and Donna Montgomery-Frizzel, Robert G. Thibault, on behalf of the Minister, responded to their concerns regarding the copyright issue. He wrote: ... Despite the copyright, however, the public was given approximately five weeks to review the document, and DFO received considerable comments on the EIS from various community members. Nevertheless, actions have been taken within DFO to ensure that the copyright issue does not occur in the future.
> [emphasis added]
> 76. Such comment is a clear admission that Bounty Bay and 5M should not have been permitted to declare the EIS copyrighted" (p. 18-19).

The Exception by Virtue being Gazzeted

Gazetting is the official publicizing of law or other material of a legal nature by the state in its government gazette. Gazetting is a process which grants final legal validity to statutory instruments. The ordinary meaning of statutory is limited to instruments of a legal nature with public implications. Statutes Act, Chap. 3:02, Section 12(1) (a) Every statutory instrument shall be published in the Gazette and shall come into operation on the date of such publication unless a later or, so far as the common law or any statute allows, an earlier date is prescribed in the instrument. As Garner (1999), highlighted the Gazette is an official news essay of the British government. It must be emphasized that gazetting is synonymous with legal matters. The notice to the public that an EIA is ready for public comment is an official notice of a legal nature. Section 28(1) of the EM Act mandatorily requires such notice to be gazetted. Section 28 (1) of the EM Act (2000) states:

> "Where a provision of this Act specifically requires compliance with this section, the Authority shall— (a) publish a notice of the proposed action in the 'Gazette' and at least one daily news essay of general circulation… (3) The Authority shall receive written comments for 'not less than thirty days from the date of notice in the Gazette" (p. 27).

The effect of the gazetting of the notice for public comment on an EIA as part of the administrative record is to clothe such notice and all accompanying documents, such as the EIA, with legal stature, rendering same akin to a statutory instrument as per Section 12(1) of the Statutes Act. Therefore, even if an EIA is considered copyrightable under Section 5(1) of the Copyright Act, it is an exempt document pursuant to Section 7(1)(b) of the Copyright Act being an official text of a legal nature.

Conclusion

Effective challenging of environmental regulatory decisions often hinges substantially on the ability of civil society to present its legal position within a sound scientific and technical standpoint. The introduction of a copyright stipulation would have the effect of destroying or frustrating public participation/consultation. Fortunately, the Court

acknowledged the injustice of such a copyright claim, particularly concerning the poor. It denied the EMA the ability to apply copyright laws to EIAs in the matter of the Environmental Management Act Chapter 35:05. In the matter of the Copyright Act Chapter 82:80 between Environmental Management Authority v Fishermen and Friends of the Sea Limited (2020), Rampersad J states:

> "129. Whether the decision, reasons and policy of the EMA not to allow persons to obtain or access complete copies of environmental impact assessments (whether in hard copy or digitally) and to restrict copying to no more than 10% is reasonable, rational and lawful? 129.1. No it is not.
> 130. Whether the EMA can claim third party copyright as justification for not providing whole copies of an environmental impact assessment in light of its role, functions and obligations pursuant to statute and official policy? 130.1. No it cannot.
> 131. Whether EMA's obligation to make information available to the public necessarily or automatically translates into a right by the public to copy documents. Is it lawful or reasonable to equate making information available for viewing with having a right to copy? 131.1. In the circumstances set out above in relation to poor persons without means or persons unable to travel back and forth due to disability, personal circumstances, that position is arguable as mentioned in relation to section 17. However, having regard to the finding in relation to Rule 9, the right to a copy is sanctioned.
> 132. Should being able to copy amount to, or be elevated to, the status of rights? 132.1. In the context of Rule 9, yes, subject to the limitations in the Act as to what may or may not form part of the Register under Rule 3 (7) and (8)" (pp. 44–45).

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