

**LAUNCH OF *ENSURING ENVIRONMENTAL ACCESS RIGHTS IN
THE CARIBBEAN: ANALYSIS OF SELECTED CASE-LAW***

Justice Winston Anderson, JCCJ

April 27, 2018

St Lucia

The CCJ Academy for Law is pleased to have partnered with the Economic Commission for Latin America and the Caribbean (ECLAC) in producing the book we launch this afternoon, *Ensuring Environmental Access Rights in the Caribbean: Analysis of Selected Cases-Law*.

The Academy, which is the educational arm of the Caribbean Court of Justice, has the overriding objective of contributing to the development of high standards of excellence in the administration of justice. And a key strategy is the promotion of research and publication into “new and ground-breaking areas of the law with a view to fashioning an appropriate Caribbean response.”¹

We consider that the research into and the publication of materials on environmental access rights fall neatly into this strategy. The book conveys the seriousness with which Caribbean jurisprudence views rights of access by the public to environmental information, participation in environmental decision-making, and access to judicial tribunals to resolve environmental disputes.

The Caribbean should feel a sense of ownership of the process of encouraging these access rights; after all, it was this region which adopted the Port of Spain Accord on

¹ Articles of Incorporation.

the Management and Conservation of the Caribbean Environment, in April 1989, some three years before the global community adopted Principle 10 in the Rio Declaration. The Accord identified 14 priority areas for action including the promotion of public education and awareness, and the collection and dissemination of environmental information. The Accord, together with the Port of Spain Consensus of 1991, the Barbados Programme of Action for Sustainable Development of Small Island States (SIDS) of 1992, the CARICOM Charter of Civil Society of 1997, the Revised Treaty of Chaguaramas of 2001, and the St. George's Declaration of Sustainability Principles, revised in 2006) lay a strong foundation for respect for environmental access rights. In the words of the St. George's Declaration:

“All stakeholders must also have access to clear and timely information on environmental matters and the opportunity to participate in and receive reports back on all decisions regarding development plans and actions that affect their use of and access to natural resources and their benefits, both now and in the future.”

Caribbean policy-makers have accepted a wide range of environmental agreements such as the Convention on Biological Diversity and the Climate Change Convention which require the promotion of public education and awareness.² Our Parliaments have generated a large body of constitutional amendments, legislation, and institutional arrangements, touching upon many aspects of environmental access rights. Worthy of special mention is the Freedom of Information Act which grants the right to individuals to obtain access to official documents held by public

² In the case of the Climate Change Convention parties are required (Article 6) to promote and facilitate public access to information and public participation in addressing climate change and its effects. Several others relevant conventions are mentioned in the book.

authorities; the Caribbean nation of Belize being the first in Latin America and the Caribbean to adopt such legislation in 1994.

Caribbean courts have been increasingly called upon to clarify and enforce these environmental rights and in the process these courts have generated an impressive body of cases and it is this case-law which is the focus of the book being launched today. The book reviews and analyses the approach taken by Caribbean courts in over 30 cases to issues of access to environmental information, to public participation and to justice. I will now highlight a few key areas and findings that are discussed in the book.

ENVIRONMENTAL INFORMATION

In relation to the right to environmental information the book reports on the approach taken by the courts to such issues such as: 1) What constitutes environmental information? 2) Has the disclosure of environmental information been sufficient and timely? 3) What are the kinds of information which are exempt from the right of access by the public? These issues are confronted with incisiveness and evenhandedness by Caribbean judiciary over the few decades.

PUBLIC PARTICIPATION

Disputes over public participation has sparked most environmental litigation and much of the jurisprudence has developed in judicial review proceedings. Caribbean courts have considered the right of public participation in environmental activities and projects (e.g., EIAs, drafting of development plans) to be a key component of proper environmental governance. In one case, *Talisman (Trinidad) Petroleum Limited v Environmental Management Authority*,³ the court stated that the advantages of public

³ Decision of Environmental Commission, No. EA3 (2002) (Trinidad & Tobago).

participation included: (i) improving the understanding of the issues among all parties (ii) finding common grounds and determining whether agreement can be reached on some issues and (iii) highlighting tradeoffs that must be addressed in reaching decision. The process is not a mere formality but rather allows the public to have a reasonable and sufficient opportunity to review, consult and comment on specific decision-making.

Consultation with the public does not require disclosure of every submission made to the agency or all the advice received; nor does it mean acceptance of every view offered by the public. But it does mean that representations, questions and suggestions of the public must be considered. As the courts have said, proper consultation entails letting “those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response”⁴.

ACCESS TO JUSTICE

The right of access to justice is the backbone of all access rights in that it provides the redress mechanism for these rights. There has been significant development in the jurisprudence in this regard. In the early litigation, Caribbean judges interpreted the right of individuals and groups to bring environmental challenges in a narrow way, holding that only individuals with a direct property interest could sue. However, recent cases have moved away from this restrictive approach⁵ and now concerned citizens, associations and non-governmental organizations promoting environmental protection have been granted the right to initiate lawsuits on environmental issues because their interest was relevant and sufficient.

⁴ Ibid.

Statutory developments have bolstered this change in judicial attitude. Legislation on judicial review increasingly allow individuals to bring proceedings in the public interest. In case of the Environmental Management Act of Trinidad and Tobago, any private person may bring a civil action against any other person for violation of an environmental requirement. The only requirement that must be met is that person wishing to initiate litigation is for that person to have a general interest in the environment or a specific concern with respect to the claimed violation.

Caribbean courts are also sensitive to the fact that the issue of costs and affordability to bring about claims can constitute a significant barrier to access environmental justice. The costs of challenging a decision involves expenditure on legal and technical services. This problem has been addressed through mechanisms for legal aid⁶ and technical assistance, the admission of unrepresented litigants in bodies such as the Environmental Commission of Trinidad and Tobago, and the judicial trend not to award costs against a litigant who brings a bona fide environmental complaint.

CONCLUSION

The 31 cases researched and faithfully reproduced and analyzed in this book provide a transparent analysis into the judicial attitude towards environmental rights. We think the book shows that Caribbean judges have been interpreted the Constitution, legislation and the common law in ways that advance environmental access rights. The book celebrates the strides the Caribbean has made in implementing the

⁵ See Anderson, Winston (2003), *Principles of Caribbean Environmental Law*, pages 118-124.

environmental rights enshrined in Principle 10. And we are convinced that a reading of the text will demonstrate that these strides are entirely consistent with broad Caribbean participation in the regional Agreement on Environmental Access Rights, adopted in Costa Rica last month, and which will open for signature in New York on 27 September this year.

Again, the CCJ Academy is very pleased to have collaborated in the research and preparation of this publication. We wish to express especial gratitude to the President of the CCJ, the Right Honourable Sir Dennis Byron, who was very supportive of the process. We would also like to make special mention is Ms Alicia Carter, judicial research assistant, who was instrumental in locating especially recent Caribbean cases, and Mr David Barrio of ECLAC who was and remains the most hardworking member of the editorial team.

Distinguished ladies and gentlemen, the Academy commends this book to you and to all those who will read it as a worthy contribution to Caribbean legal literature and as providing support for Caribbean countries as they consider formalizing their support for the Regional Agreement on Access Rights, 2018.

Thank you very much.

⁶ For example, there are Legal Aid Acts in Jamaica and in Saint Lucia.