

**Remarks Delivered by Dr. Winston Anderson, General Counsel to the
Caribbean Community Secretariat,
At The Environmental Commission's National Launch of its
Informational Material**

**23 FEBRUARY 2005
CROWN PLAZA
TRINIDAD AND TOBAGO**

Greetings

Good morning.

Please permit me to say how delighted and excited I am to be here in Trinidad and Tobago at this National Launch of Informational Material by the Environmental Commission. The Secretary-General of the Community, HE Edwin Carrington, a son of the soil, has asked that I convey his personal regards to you, Mr. President, and also his best wishes to the organizers and participants for a successful Launch.

It gives me great pleasure to make brief remarks, in Port of Spain, on the importance of an Environmental Court because, in my view, Trinidad and Tobago could reasonably lay claims to being the home of environmental law in the Caribbean.

Role of Port of Spain in Environmental Policy

After all, it was here, in Port of Spain in 1989, over fifteen years ago, that CARICOM convened the First Ministerial Conference on the Environment that produced the Port of Spain Accord.¹ Like the Launch this morning, a primary objective of that Conference was to "increase appreciation of the significance

¹ For text, see Winston Anderson, *Caribbean Instruments on International Law*, (Stone Publications, 1994), at p. 502.

of the issues and needs relevant to management and protection of the ... environment.” The Conference identified priority issues and problems and agreed that one of the strategic approaches to their solution was the “development of legislative frameworks adequate to the requirements of sound environmental management, and the required machinery for their enforcement.”

The recommendations from the Port of Spain Accord, as well as its partner the Consensus, agreed two years later in 1991, again in Port of Spain, receive virtual ratification at the 1994 United Nations Global Conference on the Sustainable Development of Small Island Developing States (UNGCSIDS) held in Barbados from April 25 to May 6, 1994. This Conference, which adopted the Barbados Declaration and Programme of Action (POA), was in turn reaffirmed at the recently held Mauritius Conference from January 10-14, 2005.

Trinidad and Tobago also holds the distinction of being the Caribbean Community Member State with, arguably, the most advanced environmental legislation in the region. The Environmental Management Act 1995 (as repealed and replaced by the Environmental Management Act 2000) creates vanguard institutions and procedures for the wise use of the country’s environmental assets. One of these structures is the Environmental Commission (EC), a specialist tribunal that handles some environmental disputes arising under the EM Act. Following the Trinidad and Tobago lead, the Environmental Protection Act of Guyana established the Environmental Appeals Tribunal (EAT) for that country. Both the EC of Trinidad and Tobago and the EAT of Guyana are expressed to be superior courts of record, having power to enforce their own orders and judgments and to punish contempt as the High Court.

There is some debate over whether these bodies may be properly classified as environmental courts *per se*. A comparative study of environmental courts and tribunals in 11 jurisdictions was presented in a 1999 Report of the Department of Land Economy of Cambridge University. That Report identified

some ten criteria that define the general conception of an environmental court, and without going into details, I think it fair to say that both the Environmental Commission of Trinidad and Tobago, and the Environmental Appeals Tribunal of Guyana manifest several of these characteristics.

In any event, the existence of these specialized environmental tribunals raises the questions: do we really need an environmental court? What is the importance of have such a tribunal?

Mr. Chairman, I think that there are several senses in which an environmental court may be seen as relevant and important to the task of securing environmental protection.

Completing the Architecture of Environmental Management

In the **first** place, the environmental court may be seen as part of the architecture of institutional management of our environmental assets. In a sense it completes the institutional arrangements for environmental management.

A survey of *Environmental Laws of the Commonwealth Caribbean*, commissioned towards the end of the 1980s by the Caribbean Law Institute at Cave Hill, UWI, revealed that there were serious institutional deficits in respect of environmental management in the region.

Since the publication of that Survey in 1991, significant efforts have been made to redress this problem by creating **lead environmental agencies** with administrative/executive powers and functions.

The first administrative agency created was the Natural Resources Conservation Authority (NRCA) established under the Natural Resources Conservation Act 1991 of Jamaica. This was followed by the creation of roughly similar agencies in Belize (by the Environmental Protection Act 1992); Trinidad and Tobago (Environmental Management Act 1995; as replaced by

the Environmental Management Act 2000); St. Kitts/Nevis (National Conservation and Environmental Protection Act 1996; which substantially revised the earlier 1987 effort); and the Environmental Protection Act 1996 of Guyana.

An essential purpose of this legislation was to overcome the traditional fragmentation in environmental regulation by institutionalizing broad-based environmental management. In the words of the Jamaica legislation, the environmental agency there was to take “such steps as are necessary for the effective management of the physical environment ... so as to ensure the conservation, protection and proper use of its national resources.”²

Apart from the administrative agencies, modern environmental legislation also makes provision for the **financial institutions** necessary to support environmental management through the establishment of an Environmental Trust Fund.³ Resources come into the Funds from subventions from Government; monies collected by the administrative agencies as fees, payment for services rendered; grants from foreign governments and international organizations; loans from local or foreign lenders; endowments and private contributions. The resources of the Funds are, generally speaking, exempt from taxes and must be used to fund the operations of the administrative body.

The **judicial arrangements** form the third pillar of the institutions arrangements. A major criticism of the pre-1990 regime was that judges were not always attuned to environmental concerns; that they sometimes took the environment for granted and did not provide adequate relief in respect of environmental damage.⁴ The post-1990 environmental legislation thus creates judicial bodies for environmental adjudication in Trinidad and Tobago and Guyana.

² Jamaica

³ Expressly in Trinidad & Tobago (Part VII), and in Guyana (Part IX); implicitly in Jamaica, Part II).

⁴ (Me (foot-note): see Sax' article).

The legislative scheme suggests these environmental tribunals are specialised courts, and as such they have specialist tools to oversee efficient environmental management. This means that the Criminal law with its emphasis on *remedial* control, i.e., with its emphasis on punishing the abuser of the environment is still used, but as a last resort. Regulation by environmental tribunals aims to be *preventive* by, for example, stopping pollution before it occurs.

Accordingly, environmental tribunals oversee the award of permits to undertake development or licenses to discharge pollutants; and ensure that such conditions are attached as may be necessary to enforce broad environmental standards. Infractions may result in revocation, termination or suspension of the permit or license. In this way the environmental tribunal exercises regulatory control over economic activity. Other effective enforcements tools include the Notice (issued in respect of environmental infractions) and the Cessation Order, (which allows remedial work to be done and charged against the person in default).

Sympathetic hearing of environmental concerns

In the **Second** place, environmental tribunals may be seen as providing the forum where environmental considerations are properly and sufficiently taken into account in the decision-making process.

A perception exists, whether real or imagined, that many of our judges place a higher value on economic development than environmental protection and that this influences their selection of the final decision from the variety of possibilities that exist. This perception has been strengthened by several environmental law decisions. The anecdotal reports of the undisguised anger of a Trinidad and Tobago Magistrate when asked to try a man for contravention of the *Wild Birds Protection Act* whose only crime was, in the words of the Magistrate, “trying to feed his family”. The fact that the first three attempts by Caribbean nationals to have the courts review official decisions that, allegedly, cause unlawful harm to the environment, were dismissed on

the ground that the applicants lacked standing. The fact that the first judicial comment upon the workings of an administrative body established under the modern umbrella-type legislation was widely cited in the Jamaican Press as evidence of the court's preference for commerce over the environment.

It is noteworthy that this perception of lack of judicial zeal towards environmental protection is not confined to the Caribbean judiciary. Similar criticism was levelled against American judges in the 1970s by the well-known environmental law, Professor Joseph Sax of the University of Michigan Law School. At the international level, persistent criticism led to the establishment of an Environmental Chamber to the International Court of Justice, staffed by judges with particular expertise or interest in the field.

What the environmental court could bring to the table, therefore, is an added sensitivity to environmental issues. Illustrations from just two areas may make the point.

First, there is a well-known debate concerning the proper role of the law of torts in environmental management. The law of tort, such as nuisance law is essentially aimed at protecting individual rights or rights relating to property. The protection offered to landowners against unreasonable injury to their land has obvious environmental implications, but was not designed to promote environmental preservation as we understand that notion today.

Many judges in the "general" courts who have considered this issue have clearly been reluctant to develop tort law in this way. This reluctance was exemplified in *Boomer v. Atlantic Cement Co.*, decided in 1970 by the Court of Appeals of New York. The court expressly refused to allow private litigation in nuisance to be used as a tool to effect broad control of air pollution. Establishment of broad environmental standards was said to be beyond the jurisdiction of one private lawsuit and a direct responsibility for government. The House of Lords in England came to a similar conclusion in a case in water pollution: *Cambridge Water Co. Ltd., v. Eastern Counties Leather plc* (1994).

Another example arises from the reluctance is evident in the related question of standing to bring common law actions to vindicate environmental rights. The requirement in most common law actions, to demonstrate some sort of proprietary interest or show special damage, remains a judicially self-imposed obstacle to environmental actions. After some indications of willingness by the English Court of Appeal to relax the requirement, the fundamental cautiousness was reinstated in the House of Lords decision in *Hunter v. Canary Wharf (1997)*, where the House returned the law of private nuisance to its original position of protecting only property rights holders.

These are two areas, then, in which an Environmental Court could make a big difference.

Limits to our environmental tribunals

Unfortunately, our environmental tribunals have been constructed in such a way as not to encourage judicial development of the common law in these areas. For example, the jurisdiction of the EC, being restricted as it is to consideration of the operation of the EM regime, would appear to rule out the competence to pronounce upon the applicability of tort law to environmental protection.

Also, access to the environmental tribunal, although wide is not unrestricted. The Environmental Commission does have a jurisdiction with respect of **direct private party actions** instituted under section 69; a provision that gives individuals or groups expressing a general interest in the environment or a specific concern with respect to a claimed violation of the Act. However, the right to start a private party action is limited to claimed violations of specified environmental requirements in section 62.

Furthermore, actions designed to scrutinize the stewardship of the EMA itself in the conduct of its statutory duties appear not to fall within the ambit of direct party actions. For example, if a member of the public is dissatisfied with the

grant of a particular licence, certificate or permit such a person may not be able to seek redress at the Environmental Commission but rather the general courts under traditional judicial review (See *Fishermen and Friends of the Sea, 2002*).

In these regards, and others, there may be a case for revisiting the legislation with a view to empowering the environmental tribunal to play a more vigorous role in shaping a distinctive environmental jurisprudence.

So, there are limits to what has been attempted, even in the foremost “environmentalist” CARICOM State. However, this must not belie the advance that the establishment of the Environmental Commission represents. Its orders will be respected and supported in the “general” courts. Even with regard to less circumstanced tribunals (such as the Commission established under the NRCA of Jamaica), the general courts will act in their support. As said in the Canadian case of *R. v. Consolidated Mayburn Mines Ltd. (1996)* with regard to the respect to be given to the Order of an Environmental Appeals Board:

“Like court orders, administrative orders deserve to be respected and obeyed. Administrative bodies – be they public officials such as the Director, or tribunals such as the Environmental Appeals Board – regulate countless activities in society. Regulation of these activities is essential for the protection of individuals and groups in our society and for the prevention of harm to societal interests. The orders and decisions issued by administrative bodies thus form an important part of our law. Unless these orders and decisions are respected the orderly functioning of regulatory justice will suffer.”

Accordingly, in pointing the way towards a forum in which environmental and developmental issues meet on equal footing and are given equal weighting, I believe that Trinidad and Tobago has done a service to the whole region. It is now a matter for the Environmental Commission, within the limits of the mandate it has been given, to define and develop an environmental

jurisprudence that will inspire other jurisdictions within the Community to wiser and more sustainable use of our environmental assets.

I wish you a successful Launch and may the information you disseminate be of tremendous benefit to the region.

Thank you.

