What is public Interest Litigation

- Described as Litigation for the protection of the public interest.
- Who decides what is in the public interest? Ultimately the Courts

Public Interest litigation

- Having fun as a lawyer?

- When was the last time you represented a pod of dolphins?

Look for opportunities

Think outside the box

“Another Local”

Climate Change

- Canadian Inuit Indians case

Inter American Commission on Human Rights: Principle Function of Promoting the observance and defence of human rights.

- The Right of indigenous peoples.
- The Right of use and enjoy property without undue interference.
- The Right to life, physical integrity of security.
- The Rights of people to enjoy the benefits of culture
- Relevance of international environmental law.
- Implication for State of the Relationship between Global Warming and Human Rights.

Rights of Indigenous Peoples

"Because indigenous peoples' traditional lands and natural resources are essential to their physical and cultural survival, the Commission and Court have acknowledged that environmental damage – like that being caused by global warming – can interfere with the rights of indigenous peoples to life and the cultural integrity."

Right to Use and Enjoy Property without undue interference

Right to use and enjoy property is guaranteed in the American Declaration and American Conservation and numerous other international instruments.

In the case of Indigenous peoples, both the Inter-American Court and this Commission recognized that the right to property guarantees the use of those lands to which indigenous people have historically had access for those traditional actions and livelihood, regardless of domestic title.

Belize Maya Case

The right to property is impeded *"When the State itself, or third parties acting with the acquiesces or tolerance of the State, affect the existence, value or enjoyment of that property."*

The Rights to life, physical integrity and security

"The Inter-American Commission has recognized that the realization of the right to life is necessarily related to and dependent upon one's physical environment. In the Yanomami case, the Commission recognized that allowing the construction of a highway through indigenous territory , leading to an influx of contagious deadly diseases that spread to the Yanomami, the government had failed to protect the integrity of Yanomami lands, thereby violating the Yanomami's rights to life, liberty and personal security. "

"The effect of global warming interferes with the realization of the right to life, physical integrity, and security throughout the hemisphere. For example, more numerous, intense and extreme weather events will result in more deaths from hurricanes, floods, and heat waves. Migration of species that cause malaria, dengue fever, and avian flue may spread these deadly diseases to areas of Americas where they were previously unknown. Inuit hunters are falling through the ice to their death more frequently as a result of the thinner ice in the Arctic."

"One of the most fundamental norms of customary international law is, in the words of the International Court of Justice, "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." Because the emission of greenhouse gases in one State causes harm in other States, this norm provides context for assessing States' human rights obligation with respect to global warming.

"This Commission's clear statement that global warming has implications for human rights could help motivate States to act more expeditiously to take actions to reduce greenhouse gas emissions. To that end, we encourage the Commission not to delay in issuing a report recognizing that there is a clear relationship between global warming and human rights and calling on nations to take appropriate action to mitigate global warming to reduce the risk of more egregious and widespread violations. Second, we suggest that the Commission develop a plan to monitor the impacts of global warming on indigenous and other vulnerable communities. Third, we suggest the Commission assist countries that are unable to meet their human rights responsibilities with respect to global warming."

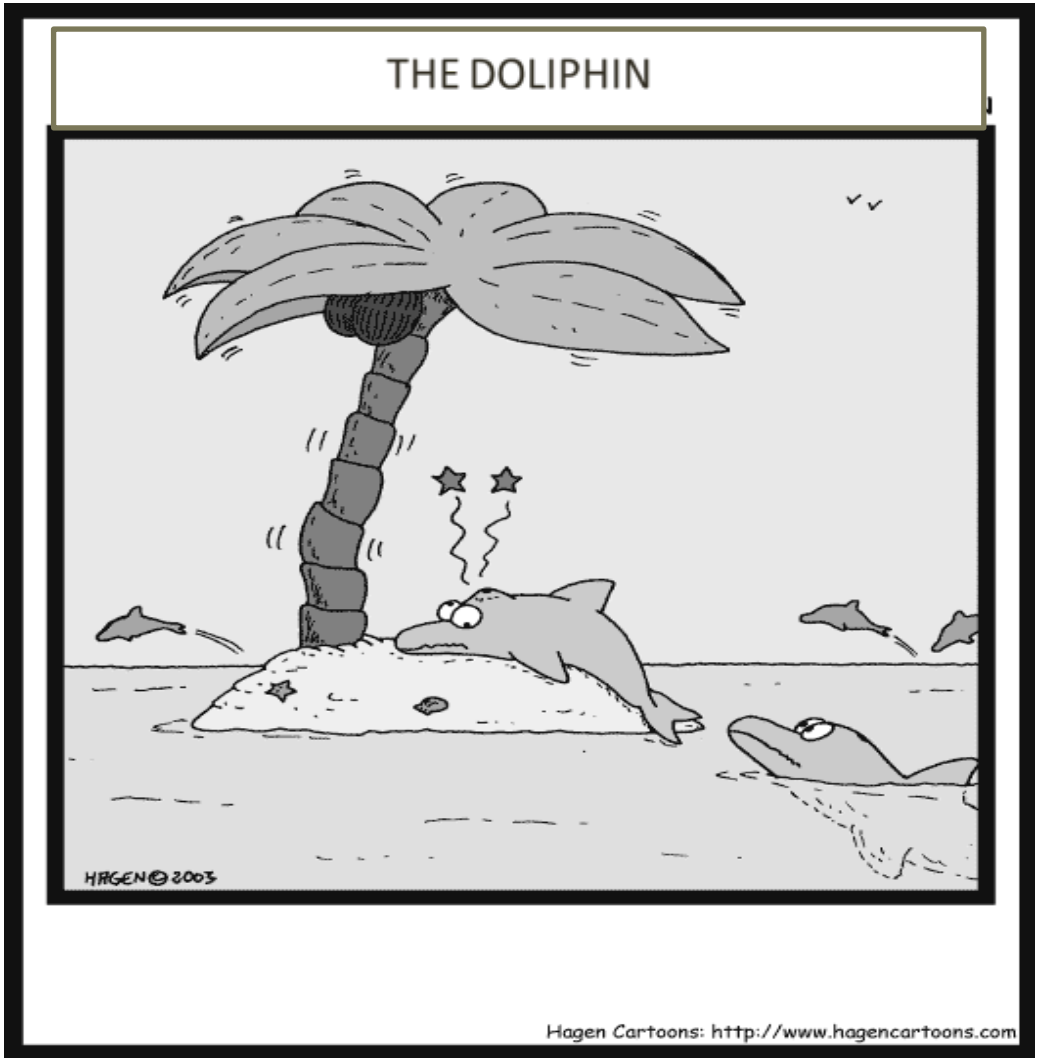
You don't have to win to win

- Sometimes the case just needs to be argued and the case made.
- A case is the first step
- Must be prepared to lose.

Petition Dismissed

The Petition has nonetheless been praised as one of the first climate change cases linking global warming with the violation of Human Rights.

But winning is fun too



R v Secretary of State of Trade Industry *Ex parte Greenpeace*

(Nature Conservation) (4 days JR hearing) (10 oil companies joined)

Case concerned North East Atlantic Ocean off the coast of Scotland

Secretary of State power granted licences to companies to search and bore for oil – exploration licences.

The Challenge

The areas to be licensed lay outside the 12 mile limit of UK waters but within the area of the UK Continental Shelf. European Council Directive 92/43 on the Conversation of natural habitats and of wild fauna and flora obligated member states to pass domestic legislation. The Directive was issued on May 21, 1992.

National Legislation

Conservation (Natural Habitat) Regulation 1994 – expressly stated that it applied only to the 12 mile limit.

Accordingly Secretary of State did not consider the regulations when issuing exploration licences but stated he did have regard to other environmental obligations.

Greenpeace contended that the Secretary of State had fallen into fundamental legal error in that the Directive properly construed required domestic legislation to extend to the UKCS and on that basis he had particular responsibilities towards cetaceans (whale, porpoises and dolphins.) and a particular species of reef forming coral

Court adopted a purposive interpretation and gave the Directive the wide scope argued for by Greenpeace.

Greenpeace provided evidence that the habitat of cetaceans and reefs (lophelia petusa) were likely to be in the areas offered for oil exploration –

Reef forming coral – deep water reef forming coral – species under directive that would be designated SAC (Special Areas of Conservation under the Directive).

Greenpeace then provided evidence of the adverse effects of drilling and exploration in those areas.

Judge therefore concluded that

The reefs came within the Habitats Directive as "species of community interest in need of strict protection. And that

exploration activities will be at least likely to have an adverse affect on the reefs – in possible SAC's.

Very interesting comments about delay – duty to apply promptly.

Decided that even though application was late – it was in the public interest to allow an extension of time.

Held

The habitats directive applies to the UKCS and the superjacent waters up to a limit of 200 nautical miles from the baseline from which the territorial sea is measured.

The Mox case

- Here’s one I prepared earlier
- My chance for glory

Greenpeace and Friends of the Earth – Secretary of State for Environment Food and Rural Affairs.

THE MOX CASE

Background

Fuel from nuclear reactors is made from enriched uranium oxide.

Waste product is sent for reprocessing – plutonium is reclaimed

Reprocessing is carried out at Sellafield Thermal Oxide Reprocessing Plant (THORP)

Plutonium – which, belongs to the customer, is returned or stored.

Nuclear reactors can operate using a fuel known as MOX which is a mixture of Plutonium Oxide and Uranium Oxide –

Manufacture of MOX enables reclaimed plutonium to be recycled.

Saves on extraction of Uranium and saves on storage of plutonium.

By the way MOX is also less attractive to terrorists.

Facts

Between 1994-1996 BNFL constructed a MOX fuel plant at Sellafield to enable it to manufacture MOX fuel – SMP (plant).

Nov 1996 Environment Agency – began consultation to decide if the Manufacture of MOX was justified. Justification was required under EC Directive

" Directive 96/29/EURATOM (Force May 2000)

that the decision be justified by reference to its detriment – justification of a practice goes beyond radiological protection – social and economic factors also have to be taken into account."

EA 1998 published its proposed decision – was justified – but referred to the Secretaries of State:

Environment Agency was unhappy - sunk costs ignored.

"The [EA] received the application from BNFL in November 1996, when construction of the MOX plant was virtually completed and after the capital costs (£300 million) had been incurred. It is unsatisfactory that the [EA] has no powers under the Radioactive Substances Act 1993 to require an application to be submitted for a new plant prior to its construction. The time at which an application is received is crucial to the [EA's] involvement in the regulation of new plant. The [EA] is dissatisfied that it was unable to consider the full economic case for the MOX plant. It is seeking a change in the legislation to prevent a similar situation occurring in future."

The EA's concern was that the construction costs had to be disregarded in accordance with standard economic practice in assessing the economic case for SMP because by the time the application was made those costs had "sunk costs". It is this disregard which was said to be unlawful so as to vitiate the decision under attack."

11 June 1999 Secretary of State: were provisionally in favour but concluded they needed further consultation on the economic case for it.

Consultation carried out – consultants produced a report.

3 October 2001 the decision Application was lodged 5 October 2011

Classic Approach [Economic]

Forget sunk costs. Sunk costs are like spilled milk. They are past irreversible outflows. Because sunk costs are bygones, they cannot be affected by the decision to accept or reject the project, and so they should be ignored."

We argued justification was not a commercial decision – it was a decision about a particular practice – question needed to be approached as regulators.

Secondly: a perverse disincentive against early application for approval.

We lost Judges agreed with BNFL but we did get this

39. Of course it makes sense for approval to be sought and the issue of justification to be decided as soon as reasonably possible. In the first place it is obviously desirable that before prospective operators expend large sums of money the should know whether their projects will be approved. But in addition the policy which plainly underlies Article 6 will best be served by early decisions-making so that unprofitable schemes, unless justifiable on other grounds, can be avoided rather than (as theoretically could happen) permitted because of sunk costs and late decisions.

Opportunities here in Fiji

1. Judicial Review of Decisions under the High Court Rules.
2. EMA presents some significant opportunities: Civil Claims and Damages.

Section 50 of EMA

50.-(1) A person who has suffered loss which includes contracting health-related problems as a result of any pollution incident may institute a civil claim for damages in a court, which may include a claim for-

(a) economic loss resulting from the pollution incident or from activities undertaken to prevent, mitigate, manage, clean up or remedy any pollution incident.

(b) loss of earnings arising from damage to any natural resource.

(c) loss to or of any natural environment or resource; or

(d) Costs incurred in any inspection, audit or investigation undertaken to determine the nature of any pollution incident or to investigate remediation options.

(2) A claim under this section may be set off against any compensation paid section 47(2).

S.54(1)

Any person, may institute a court action to compel any Ministry, department or statutory authority to perform any duty imposed on it by this Act or a scheduled Act.

Note: any person. No requirement for standing?

The Adams family provision

"I put it to you ……"

S.54(2)

Where harm is caused by the emission of a pollutant or waste from a vessel, aircraft, facility or thing and the owner cannot be located or is not known, a charge for an offence or a claim under this Act may be initially instituted in the name of the vessel, aircraft, facility or thing until the owner is identified.

Environment Management Regulations (EIA process)

S. 17/regulation 41. The Environment Register – must be maintained. We could bring an action pursuant to S.54(1)?

Environmental Impact Assessment

S.31(4) A person who disagrees with a decision of the EIA administrator or approving authority under S.51(1) may, within 21 days from the date of the decision appeal to the Environment Tribunal.

Again – "A person" – does that amount to any person? Seems to run very very wide.

Can we force the creation of the Environmental Tribunal by using S. 54(1)?

51. If a corporation commits an offence under this Act, a director, officer, employer or agent of the corporation who directed, authorised, assented to, acquiesced in or participated in the commission of the offence also commits the offence, and is liable to the penalty prescribed for the offence, whether or not the corporation has been prosecuted or convicted.

Links

- http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2001/1847.html&query=title+%28+friends+%29+and+title+%28+of+%29+and+title+%28+the+%29+and+title+%28+earth+%29&method=boolean

- http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2001/1847.html&query=title+%28+friends+%29+and+title+%28+of+%29+and+title+%28+the+%29+and+title+%28+earth+%29&method=boolean

And Finally why we do it?