[2023] JMSC Civ.101

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020 CV 00615

BETWEEN	**CEAC OUTSOURCING COMPANY LIMITED**	**CLAIMANT**
AND	**NATURAL RESOURCES CONSERVATION AUTHORITY**	**1ST DEFENDANT**
AND	**NATIONAL ENVIRONMENT AND PLANNING AGENCY**	**2ND DEFENDANT**
AND	**NORTH EAST REGIONAL HEALTH AUTHORITY**	**3RD DEFENDANT**
AND	**SOUTHERN REGIONAL HEALTH AUTHORITY**	**4TH DEFENDANT**

IN OPEN COURT

Mr. Sundiatia Gibbs and Ms. Timera Mason instructed by Hylton Powell Attorneys-At-Law for the Claimant

Mr. Matthew Ricketts, Ms. Tameka Menzie for the 1st and 2nd Defendants

Heard: May 8, 9 and June 9, 2023

Section 13 (2) of the Constitution of Jamaica – Section 13 (3) (h) of the Charter of Fundamental Rights and Freedoms –– Whether the words equitable and humane should be read conjunctively – Whether inhumane treatment applies to a Company – Whether the parties are similarly circumstanced - Section 2 (4) of the Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprise, Construction and Development) Order, 1996 as amended in 2015– Compensatory and Vindicatory Damages

CARR, J

Background

[1] The Claimant company CEAC Outsourcing Company Limited **(CEAC)** is in the business of providing hazardous waste management services. They collect, transport, treat and dispose of medical waste. In November of 2018 they applied to the 2nd Defendant **(NEPA)** for a permit to construct a long-term site for the incineration of medical waste. The original proposal made by CEAC was rejected by NEPA and the reasons given for that rejection are set out below.

a) The close proximity of the sites to schools and public buildings.

b) The location of the sites in or near residential communities; and

c) The ambient pollution concentration levels.

[2] CEAC found a new location for their site and eventually obtained a permit from NEPA. Armed with the requisite permits CEAC went in search of potential customers/clients who they believed would need their services. Three of these potential clients (hospitals) did not engage the services of CEAC. Upon investigation it was discovered that the hospitals were disposing of medical waste without the requisite permits. Calls were made by the Manager of CEAC to NEPA advising them of the unlawful acts of the hospitals.

[3] NEPA in its defence to the claim argued that the hospitals were pre-existing facilities and that they were the subject of a policy decision made in 2016 wherein NEPA and the 1st Defendant **(NRCA)** would take no enforcement action against persons who they were in dialogue with or who had commenced applications for permits to be granted. The 3rd and 4th Defendants applied for the permits after the commencement of this claim.

[4] CEAC contends that NEPA's policy has breached Section 2 (4) of the Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprise, Construction and Development) Order, 1996 as amended in 2015 (**NRO**) and

Section 13 (3) (h) of the Charter of Fundamental Rights and Freedoms **(The Charter).** As a result, they seek an award for compensatory and vindicatory damages for the losses they have incurred.

The Amended Claim

[5] CEAC filed an Amended Fixed Date Claim Form on April 6, 2021, seeking the following orders:

1. An order of mandamus requiring the 1st Defendant and/or the 2nd Defendant to exercise enforcement powers under the Natural Resources Conservation Authority Act against the 3rd and 4th Defendants to prevent unlawful disposal of medical waste.

2. An order of prohibition preventing the 3rd and 4th Defendants and/or their agents from incinerating or otherwise disposing of medical waste without a permit issued under section 9 of the Natural Resources Conservation Authority Act.

3. A declaration that the 3rd and 4th Defendants have breached Section 9 of the Natural Conservation Authority Act.

4. A declaration that the 2nd Defendant's policy set out in its letter dated July 27, 2016, and later implemented, contravened the Claimant's right to equitable and humane treatment by a public authority in the exercise of any function, acknowledged by section 13 (3) (h) and guaranteed by section 13 (2) of the Constitution.

5. A declaration that the 2nd Defendant's decision not to enforce the Natural Resources Conservation Authority Act against the 3rd and 4th Defendants in the same manner in which they enforced it against the Claimant contravened the Claimant's right to equitable and humane

treatment by a public authority acknowledged by Section 13 (2) of the Constitution.

6. A declaration that neither the manner nor the extent of the abrogation, abridgment or infringement of the aforementioned constitutional right is demonstrably justified in a free and democratic society.

7. Vindicatory damages arising from the breach of the Claimant's constitutional rights.

8. A declaration that the 2nd Defendant's stated policy of allowing entities to operate existing waste disposal facilities without a licence, is a breach of section 2(4) of the Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprise, Construction and Development Order, 1996 as amended.

9. Costs.

10. Such other remedy as the court thinks fit.

[6] A notice of discontinuance was filed in respect of the 3rd and 4th Defendants on May 1,2023. Counsel Mr. Gibbs, on behalf of CEAC agreed that in those circumstances paragraphs 1, 2 and 3 of the Amended Claim would become irrelevant.

[7] At the commencement of the hearing, an application was made to further amend the claim to include a claim for compensatory damages. Counsel Mr. Ricketts opposed the application on the basis that NEPA and the NRCA would be prejudiced as he did not have an opportunity to address these issues in his submissions. I indicated to Counsel that I was prepared to allow him until the following day to make his submissions on the area given the late notice of the application. Mr. Ricketts agreed that this would cure the prejudice however, he had no instructions to consent to the application.

[8] I ruled that the application would be permitted for the following reasons:

a) There was ample evidence contained in the affidavit of the representative for CEAC that the company had potentially suffered financial loss because of what they contended was a breach of their constitutional rights.

b) There was an expert appointed by the court who specifically quantified this potential loss, and that report formed a part of the evidence before the court by way of a court order.

c) The prejudice to the defendants could be cured by giving counsel for the defendants an opportunity to address the court on the issue of compensatory damages.

Paragraph 7 of the Amended Fixed Date Claim Form was therefore amended to read: *"Compensatory and vindicatory damages arising from the breach of the Claimant's constitutional rights."*

Issues

[9] There are four main issues in this case:

a) Did NEPA's policy as set out in a letter dated July 27, 2016, breach Section 2(4) of the NRO as amended in 2015?

b) Did NEPA'S implementation of its policy as set out in the letter dated July 27, 2016, contravene CEAC's right to equitable and humane treatment as set out in the Constitution?

c) Did NEPA's failure to enforce the provisions of the NRCAA in respect of the North East Regional Health Authority **(NERHA)** and the Southern Regional Health Authority **(SRHA)** in the same way it was enforced

against CEAC contravene CEAC's right to equitable and humane treatment as set out in the Constitution?

d) Is CEAC entitled to compensatory and/or vindicatory damages arising from the breach of these rights?

Analysis and Discussion

Did NEPA's policy breach Section 2 (4) of the NRO as amended in 2015?

[10] Section 2 of the NRO as amended in 2015 states:

> *2) A person who is on the 1st day of April, 2015, engaged in undertaking any category of enterprise, construction or development to which the requirement for a permit did not apply before that date and who seeks to continue carrying out that undertaking shall not later than one year after the 1st day of April. 2015, apply to the authority for a permit to do so.*
>
> *3) If an application is made by a person pursuant to subparagraph (2), the person may continue to carry out the relevant enterprise, construction or development until that person's application is determined.*
>
> *4) If an application is not made by a person pursuant to paragraph (2), the person's ability to lawfully provide the relevant enterprise, construction or development shall cease at the end of the one-year period referred to in that paragraph.*

[11] The categories of enterprises in Column A of the NRO included, *"construction and operation of solid waste treatment and disposal facilities including waste disposal, installation of incinerator, chemical landfills or systems for the destruction, reprocessing or recycling of such wastes. Construction and operation of hazardous*

waste removal, storage, transportation, treatment or disposal facility (mobile and fixed)."[1]

[12] It is the evidence of Christopher Burgess on behalf of CEAC[2], that medical waste can fall within the category of hazardous waste. The disposal of that waste must conform with the standards required by the NRCA.

[13] The company investigated the methods used by hospitals under the authority of NERHA and SRHA, it was discovered that they were disposing of their waste in incinerators on the compound of the regional hospitals located in May Pen, St. Ann's Bay, and Mandeville. It was also found that the hospitals were utilizing these incinerators without a permit under the NRCAA.

[14] There is no dispute that at the time of the filing of the claim the hospitals had not submitted applications for environmental permits in accordance with Section 2(2) of the NRO.

[15] NEPA relied on a policy letter that was dated July 27, 2016, in which it outlined special arrangements to facilitate applicants under the newly amended NRO. The letter was in response to one which was penned on behalf of the Jamaica Manufacturer's Association dated May 31, 2016, and was addressed to that association as well as the Jamaica Exporters Association, the Private Sector Organization of Jamaica, and the Jamaica Chamber of Commerce. The letter addressed the issue of the amendment to the Natural Resources Regulations and the NRO which effectively removed a clause which had previously permitted an exemption to pre-existing facilities who were not required to have a permit for operation.

---

[1] Column A paragraph 21 of the Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprise, Construction and Development) (Amendment) Order, 2015.

[2] 3rd Affidavit of Christopher Burgess in support of fixed date claim form filed March 23, 2020 paragraph 5.

[16] In brief, the pre-existing facilities were never required to obtain an environmental permit to operate their businesses or to pursue construction of facilities, they may have only been required to upgrade the standards of their facilities when applicable[3]**.** The legislation which previously existed limited the requirement for an environmental permit to specific enterprises. Under the NRO those categories were widened. In the said letter Mr. Peter Knight the Chief Executive Officer/Government Town Planner from NEPA indicated that they were aware of the concerns raised by the various groups and wished to maintain its support to the sectors. The letter continues at paragraph 3:

> *"Having outlined the antecedents to the amendments, and in response to the industry/commerce concerns, and wishing to maintain the support to the sectors the NEPA has decided to respond unambiguously by providing a special arrangement to facilitate such applications as follows:*
>
> *i. The NEPA will accept applications with the basic supporting documents. The application must be made using the prescribed application form, be accompanied by the required proof of ownership and the payment of the requisite fees.*
>
> *ii. Should the applicant be not in possession of the requisite proof of ownership for the facility, the applicant will indemnify and hold harmless the Natural Resources Conservation Authority/Town and Country Planning Authority (NRCA/TCPA) and the Government of Jamaica against any possible legal action.*
>
> *iii. All applications received meeting the stipulations at (i) and (ii) will be processed and a recommendation made to the NRCA/TCPA for decision.*
>
> *iv. …*

[3] Affidavit of Peter Knight in answer to application for Judicial Review filed September 1, 2020, paragraph 6

v. The agency will not take any enforcement action against any entity with whom (a) dialogue has commenced or (b) application(s) have been submitted for consideration.

The foregoing shall not apply in circumstances where the operation is otherwise in breach of the planning and environmental laws and there is a need for enforcement intervention.

[17] The letter provides that persons in breach of the statutory requirement will be the beneficiary of this special arrangement if they have either been in negotiations with the agency or had an application which was submitted to the agency.

[18] Mr. Knight in his affidavit stated that this special arrangement would not apply to future facilities, as NEPA would enforce the policy requiring an application for environmental permits and licences, the policy was therefore not applicable to CEAC.[4]

[19] Section 2 (2) of the NRO gave all enterprises a year to make their applications for permits. If they failed to do so, then in accordance with Section 2(4) the person's lawful ability to provide the enterprise would cease.

[20] There is no ambiguity in the section, there is no provision for an extension of time to make their application outside of the one-year period. Once they fail to comply with the timeline provided, they are deemed to be operating unlawfully.

[21] NEPA's special arrangement as set out in the letter resulted in the agency's failure to enforce the law as set out in Section 2 (4). The use of the incinerators at the hospitals after 2016 was unlawful. Section 9 (2) of the NRCAA provides that no person who wishes to undertake an enterprise construction or development of a

[4] Affidavit of Peter Knight in answer to application for Judicial Review,filed September 1, 2020, paragraph 10

prescribed description or category can do so without a permit. Section 9 (4) goes further to indicate that where the activity connected with the enterprise is likely to result in the discharge of effluents the application must be accompanied by an application for a licence to discharge effluents. Any person who contravenes section 9(2) is guilty of an offence.[5]

[22] A statutory authority or regulatory agency is confined to abide by the statute which governs it. There was no basis in the legislation for the policy that was instituted and implemented by NEPA.

[23] As per the affidavit of Mr. Knight[6]:

> *"The Natural Resources Conservation Authority…and the NEPA …administer a number of statutes. This is inclusive of the laws relating to the processing and issuing of permits and licences, the enforcement of same, as well as the prosecution of facilities and developments operating outside of the framework."*

[24] It was the duty of the agencies to uphold the law not to deviate from it. The policy permitted the agency to stay enforcement proceedings in relation to specific operations.

[25] It is noted that enforcement action was taken against the hospitals in January of 2020, four years after the time stated by the NRO. However, instead of serving a cessation order the decision was taken to issue warning letters giving the hospitals time to make their applications and thereby remedy the default [7]. This approach Mr. Knight said was in keeping with the policy as set out in the 2016 "regime".

---

[5] Section 9 (7) of the Natural Resources Conservation Authority Act
[6] Ibid Para. 5
[7] Ibid. para. 36

[26] NEPA used that "regime" to justify their failure to enforce the law even after the stated period of a year. Further, based on the evidence of Mr. Knight the policy was used to justify the failure to issue cessation orders in 2020.

[27] The policy was a clear breach of the law and contravened the mandate of the agencies. I find that CEAC has satisfied me that the policy set out in the letter of 2016 was in breach of Section 2 (4) of the NRO as amended in 2015.

[28] The declaration sought at paragraph 8 of the Amended Fixed Date Claim Form is granted with an amendment. Section 2 (4) of the NRO speaks to a permit, the amended claim form speaks to a licence. In keeping with the statute, the order will be made to reflect a permit and not a licence.

[29] It is declared that the 2nd Defendant's stated policy of allowing entities to operate existing waste disposal facilities without a permit, is a breach of Section 2 (4) of the Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprise, Construction and Development) Order, 1996 as amended.

Did NEPA'S implementation of its policy as set out in the letter dated July 27, 2016, contravene CEAC's right to equitable and humane treatment as set out in the Constitution.

[30] Section 13 (2) of The Charter states:

> *"Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society -*
>
> *(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and*
>
> *(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges, or infringes those rights."*

Section 13 (3) (h)

> *"the right to equitable and humane treatment by any public authority in the exercise of any function."*

[31] Section 19 (1) and (3) of The Charter reads, in part, as follows: -

> *"If any person, alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to same matter which is lawfully available, that person may apply to the Supreme Court for redress.*
>
> *The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled."*

[32] The Constitutional provisions guarantee the rights as set out in 13 (3) (h). In interpreting Constitutional provisions that protect human rights the court must adopt a generous and purposive approach.

[33] Mr. Ricketts submitted that it is questionable that CEAC is a "person" entitled to the protection of the Constitution. This issue was explored by Wint – Blair J in **Southern Trelawny Environmental Agency and Clifford Barrett v The Attorney General of Jamaica, Noranda Jamaica Bauxite Partners II and New Day Aluminium (Jamaica) Limited**[8]

[34] In this case, the court addressed the issue of whether the word "person" as used in Section 19 (1) of The Charter included the legal person such as a company. The court's starting point was to highlight the definition of person as found in the Interpretation Act and to indicate how the words under the act are assigned their meaning.

---

[8] [2023] JMSC Civ 39

[35] Section 3 of the Interpretation Act states that "person" includes a corporation either aggregate or sole and any club, society, association, or other body of one or more persons. The Section also outlined that the words within the Act hold the definitions which have been assigned to them unless there is something in the subject or context inconsistent with such construction or unless otherwise expressly provided for.

[36] On an examination of the law, the court found that the use of the word "person" in the Constitution of Jamaica includes and always has included a body corporate, the definition of same having been expanded by the Interpretation Act[9].

[37] I agree with that position, and I find that CEAC has the protection of the Constitution.

[38] Mr. Ricketts in his written submissions argued that section 13 (3) (h) should be read conjunctively. CEAC would have to establish that the treatment was both inequitable and inhumane. The definition of inhumane, he argued, was "without compassion for misery or suffering, cruel." This definition could not be applied to a company. It was his contention that the provision could only apply to a natural person. Additionally, it was also submitted that for CEAC to establish that their constitutional rights under this section was breached they would have to show that they and the pre-existing facilities singled out by the policy were similarly circumstanced.

[39] Mr. Gibbs submitted that the court should move away from the previous decisions which suggested that the section should be read conjunctively. It was argued that this was not the intention of the framers of the constitution and that the words should be read disjunctively. CEAC would therefore only be required to show that they were treated inequitably. As such the fact that the claimant is a company

---

[9] [2023] JMSC Civ. 39 para. 197

would not be a bar to the protection offered by the Constitution. Mr. Gibbs referred to other provisions under The Charter which he said were comparable to this one such as the right to peaceful assembly and association which he said ought to be read disjunctively as the framers could not have intended that a person seeking redress would have to satisfy both the fact of the peaceful assembly and the association.

[40] I find that the words equitable and humane are to be read conjunctively. The dictionary defines conjunctive as "relating to or forming a connection or combination of things." In adopting a generous and purposive interpretation of the section I find that the words are to be used together to describe the right that is to be protected. The authorities must be fair and compassionate in dealing with persons. I adopt the view of Beswick J in the case of **Rural Transit Association Limited v. Jamaica Urban Transit Company Limited, The Commissioner of Police and the Attorney General**[10], she stated *"In my view "equitable and humane" should be viewed as being very similar descriptions."*

[41] The Courts have also upheld and posited the view that the appropriate test to be applied in determining whether there was a breach of Section 13 (3) (h), and similar provisions in related jurisdictions, is that which is set out in **Bhagwandeen v. Attorney General of Trinidad and Tobago**[11]. The principle which was laid down is that an applicant's success in establishing a breach of this right is dependent on evidence that supports a conclusion that the parties were similarly circumstanced. Lord Caswell stated:

> *"A Claimant who alleges inequality of treatment or its own synonym discrimination must ordinarily establish that he has been or would have been treated differently from some other similarly circumstanced person or persons."*

---

[10] [2016] JMFC Full 94 at para. 120
[11] (2004) 64 WIR 402

[42] This approach is a rational one since equal does not mean equitable. Parties can be equal in one sense yet be treated inequitably in another, because of their circumstances. Equality suggests that persons, or in this case, companies/enterprises are treated the same way despite their differences. Equitable denotes the provision of a level playing field which is subject to circumstances. The Court is not asked to treat with the question as to whether the policy was equally applicable to all but instead, whether it was equitable.

[43] CEAC would have to establish that they were treated unfairly and without compassion to establish that their right under The Charter was infringed. I do not find that there is any evidence before this court to substantiate such a finding. The policy implemented by NEPA was with a view to affording those enterprises who had previously operated without environmental permits or licenses, in accordance with the law at that time, the opportunity to rectify their status. The policy treated all those enterprises equitably. In exercising its function, the objective was to encourage compliance.

[44] The fact that the Claimant was not a beneficiary of that policy does not make it unfair or cruel, as a new enterprise they were compelled to act in accordance with the law as it stood. They did not fall within the exception and could not be compared with existing enterprises. The declaration sought at paragraph 4 of the Fixed Date Claim Form is therefore refused.

Did NEPA's failure to enforce the provisions of the NRCAA in respect of the North East Regional Health Authority (NERHA) and the Southern Regional Health Authority (SRHA) in the same way it was enforced against CEAC contravene CEAC's right to equitable and humane treatment as set out in the Constitution.

[45] This issue although similar in nature to that which was discussed previously is slightly different. The evidence of Mr. Christopher Burgess is that CEAC was held to a higher standard than that of the NERHA and the SRHA. In rejecting his proposal for a permit NEPA advised that the proposed facility was too close to

schools, public buildings, and residential communities.[12] In his affidavit he outlined some of the geographical findings of Mr. Howard Coxe, COCL's Business Development Manager.

[46] In contrast, the May Pen Hospital operated an incinerator that was within fifty (50) metres of the playground of the Denbigh Primary School and within ninety – six metres (96m) of a residential community[13]**.** The expert report of Andre St. Aubyn Gordon confirmed that the incinerator stack was within one hundred meters (100m) of six buildings including a school and administrative buildings one to three of the hospital[14].

[47] The expert report revealed that the incinerator stack at the Mandeville Hospital was within one hundred meters of six buildings which included buildings one to four of the Hospitals Administrative building and the Mandeville Seventh Day Adventist Church[15]. Mr. Howard Coxe reported that the incineration facility is thirty – six meters (36m) from commercial property and the smell is detectable from the parking lot which is located seventeen meters from the facility[16].

[48] The St. Ann Hospital's incinerator was located a few metres away from wards at the premises, and one hundred and twenty metres (120m) away from a Roman Catholic Church[17]**.**The expert reported that the incinerator stack was within one hundred meters of a church and Buildings one to six[18].

---

[12] Supra. Para. 8
[13] Supra, paragraph 18(b)
[14] Expert Report of Andre St. Aubyn Gordon filed on March 1, 2022, paragraphs 18-19

[15] Supra, paragraph 11- 12
[16] Supra, paragraph 21(b)

[17] Affidavit of Chrisopher Burgess filed on September 1, 2020, paragraph 19 (b)
[18] Expert Report of Andre St. Aubyn Gordon filed March 1, 2022, paragraph 26

[49] None of these hospitals which were directly under the administration of NERHA and SRHA had permits up to March of 2020.

[50] It was submitted that the failure of the Defendants to enforce the legislation resulted in inequitable treatment, as CEAC contends that the hospitals are similarly circumstanced and ought not to be treated as pre-existing facilities but as facilities which were now applying for a permit for the first time.

[51] The evidence in support of this submission came from the witnesses for the hospitals. Ms. Fabia Lamm in her affidavit[19] outlined that the incinerator operating at the St. Ann's Bay Regional Hospital is over twenty years old. In a letter dated March 16, 2020, from NRHA addressed to Mr. Burgess, the installation date of the incinerator facility was given as 1998 July and the commission date was 2000 January[20]. Mr. Michael Bent, the regional director of SRHA, outlined in his affidavit that the Mandeville Regional Hospital and the May Pen Hospital dispose of biohazard waste using an incinerator[21]**.** He did not give a date as to when the incinerators were installed at these facilities. However, Mr. Burgess made a request under the Access to Information Act, and he received a response from SRHA[22]**.** In answer to the question "*date when facility was commissioned (Mandeville Regional and May Pen Hospitals)"*, the response was *"Mandeville Regional Hospital 2000 and May Pen Hospital 1999".*

[52] Under the heading Status Report of Incinerator Mandeville Regional Hospital read the following: "*The Mandeville Regional Hospital has an incinerator designed by "Crawford Equipment & Engineering Co." and purchased in 1998"*. The status

---

[19] Affidavit of Fabia M. Lamm in response to 3rd Affidavit of Christopher Burgess in support of Fixed Date Claim Form filed September 1, 2020, para. 4

[20]3rd Affidavit of Christopher Burgess in support of Fixed Date Claim Form filed March 23, 2020, para. 31 Exhibit CB3

[21] Affidavit of Michael Bent in response to 3rd Affidavit of Christopher Burgess in support of Fixed Date Claim Form filed September 1, 2020, paragraph 4.

[22] Supra. 17. Exhibit CB3

report for May Pen Hospital indicates that the *"May Pen Hospital has a Brule Incinerator which was installed and commissioned in 2000"*.

[53] In his submissions Mr. Gibbs asked the court to find that in accordance with the 1996 Order and the evidence previously outlined, the hospital incinerators were not pre-existing facilities as they came into operation after the 1996 Order. Section 2 (1) of the 1996 Order states.

> *Subject to subparagraph (2) except under and in accordance with a permit issued by the Authority, no person shall from and after the 1st day of January, 1997, undertake any of the categories of enterprise, construction or development specified in Column A of the Schedule, within the area specified in Column B thereof.*

[54] Hazardous waste storage, treatment and disposal facilities are listed under Column A. It was argued that the exemption in the NRO applied to facilities that were in existence prior to 1997. The hospital incinerators would therefore not benefit from that exemption.

[55] Whereas I agree with Mr. Gibbs that the hospitals were not pre-existing facilities under the Act I cannot accept the view that they should be treated in similar manner to that of CEAC. CEAC applied for a permit to construct potential long-term sites for incineration in 2018. This was several years after the NRO. At that time, they had no facility in place. The hospital incinerators were in operation from as far back as 1998-2000. They might not have been in compliance with the 1996 Order, but no action was taken in the form of enforcement, and they continued to operate. What is evident is that they existed prior to the NRO. I cannot find that a facility which was in existence prior to the commencement of the NRO can be treated in the same way as a facility which came into existence four years after.

[56] Further, as hospitals it is expected that they would generate medical waste. They would of necessity be required to have methods to dispose of that waste. Whether the incinerators were operational prior to the NRO or not the fact is that on this

basis alone they are not similarly circumstanced to CEAC. The hospitals are not in the business of disposing of medical waste, instead they are obliged to do so to prevent the spread of infectious diseases. The two entities are not similarly circumstanced. They serve different purposes and fulfil different objectives.

[57] It is also clear from the discussion above that it would have to be established that NEPA's treatment in relation to the hospitals resulted in cruelty towards CEAC. I do not find that the failure to institute enforcement proceedings against the hospital in the same way that CEAC was asked to comply with the legislation was cruel, rather I find that it was a necessity given the circumstances. CEAC was a new facility being built specifically for the purpose of engaging in the business of disposing of hazardous waste, the requirements and the standard must be higher given the NRO.

[58] In summary CEAC has failed to meet the threshold test required to establish a breach of their constitutional rights.

Is CEAC entitled to compensatory and/or vindicatory damages arising from the breach of these rights.

[59] Having found that CEAC's rights have not been breached there is no entitlement to either compensatory or vindicatory damages.

Orders:

1. It is declared that the 2nd Defendant's stated policy of allowing entities to operate existing waste disposal facilities without a permit, is a breach of Section 2 (4) of the Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprise, Construction and Development Order, 1996 as amended.

2. The declarations sought at paragraphs 1, 2, 3, 4, 5 and 6 of the Amended Fixed Date Claim Form filed on April 6, 2021, is refused.

3. The claim for vindicatory and compensatory damages are refused.

4. Each party is to bear their own costs.