[2026] JMFC Full. 04

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU2020CV04966

BEFORE: THE HONOURABLE MRS. JUSTICE S. WINT-BLAIR
THE HONOURABLE MISS JUSTICE A. THOMAS
THE HONOURABLE MRS. T. HUTCHINSON SHELLY

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

AND

IN THE MATTER OF A DECISION BY THE RELEVANT MINISTER TO APPROVE THE GRANT OF A LICENCE PERMITTING MINING AND QUARRYING OF BAUXITE, PEAT, SAND AND MINERALS AT RIO BUENO, DRY HARBOUR MOUNTAIN, DISCOVERY BAY, ST ANN

AND

IN THE MATTER OF AN APPLICATION FOR CONSTITUTIONAL REDRESS PURSUANT TO SECTION 19 OF THE CONSTITUTION

BETWEEN	**WENDY A. LEE**	**FIRST CLAIMANT**
AND	**MARTIN HOPWOOD**	**SECOND CLAIMANT**
AND	**ANNE HOPWOOD**	**THIRD CLAIMANT**

AND	**TRACEY D. SHIRLEY**	**FOURTH CLAIMANT**
AND	**KARLENE McDONNOUGH**	**FIFTH CLAIMANT**
AND	**PATRICIA DALE**	**SIXTH CLAIMANT**
AND	**ALEC HENDERSON**	**SEVENTH CLAIMANT**
AND	**SHERMIAN WOODHOUSE**	**EIGHTH CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**FIRST DEFENDANT**
AND	**THE NATIONAL RESOURCES CONSERVATION AUTHORITY**	**SECOND DEFENDANT**
AND	**BENGAL DEVELOPMENT LIMITED**	**THIRD DEFENDANT**

FULL COURT

Mr B. St. Michael Hylton, KC and Ms Daynia Allen instructed by Hylton Powell for the Claimants

Ms Annaliesa Lindsay and Ms Karessian Grey instructed by the Director of State Proceedings for the First Defendant

Ms Kimberly Myrie-Essor for the Second Defendant

Mr Abraham Dabdoub, KC instructed by Dabdoub, Dabdoub & Co. for the Third Defendant

Heard: May 26, 27, 28, 29, June 2, 3, 4, 5, 2025 & April 30, 2026

Constitutional law — Challenge to the environmental permit granted by the Minister of Economic Growth and Job Creation — NRCA refuses environmental permit — Forestry Department objects — Right to enjoy a healthy and productive environment likely to be breached — Right to property — Oakes Test — Comparative Law — International instruments — Decision of Minister and Environmental Permit struck down as unconstitutional - Declarations — Injunction

The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, sections 13(2), 13(3)(f)(ii), 13(3)(l)(ii), 13(3)(o),13(6) & 15

The Natural Resources Conservation Authority Act, sections 9(5), (6), 10(1), 31, 32 & 35

The Quarry Control Act, sections 8(1) & 9(1), (2)

The Town and Country Planning Act, sections 5 & 11

Town & Country Planning (St. Ann Parish) Provisional Development Order — Policies UC4, UC5, UC12 — "Undeveloped Coast"

WINT-BLAIR J

INTRODUCTION

[1] In resolving this landmark case, this Court recognises the need to balance economic development with environmental protection. To do this, the Court must fulfil its sworn duty to uphold the Constitution over all other laws and actions. In this case, the Court has not been asked to decide whether development is good or bad for Jamaica. The Court's task is much narrower and focused only on what the Constitution allows.[1]

[2] Before the Court is a constitutional claim regarding the grant of an environmental permit for a proposed mining and quarrying project in Bengal, St Ann, on what will be referred to as the Bengal lands in the Dry Harbour Mountain area. The main issue is whether the Minister of Economic Growth and Job Creation ("the Minister") acted within the Constitution when he allowed an appeal by Bengal Development Limited ("Bengal") against the Natural Resources Conservation Authority's ("NRCA") refusal to grant an environmental permit to the company.

[3] The constitutional question is whether, based on the evidence, the decision of the Minister to allow the appeal infringes, or is likely to infringe, the claimants' Charter

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[1] The Court has thoroughly reviewed all of the evidence and submissions from the parties in this case. This decision does not attempt to reproduce every detail of that which has been presented. The Court is grateful for the invaluable assistance of the King's Counsel.

rights and, if so, whether that infringement is demonstrably justified in a free and democratic society.

[4] Mr Hylton, KC, contends for the claimants that the Constitution prescribes that no State organ (which includes a Minister) shall act in a way that contravenes or is likely to contravene the claimants' rights guaranteed by the Charter. Consequently, these claimants are entitled under section 19(1) of the Constitution to seek redress from the Supreme Court if they believe a constitutional right has been or is likely to be contravened.

[5] The claimants assert that the decision of the Minister is and will result in a breach or likely breach of their rights under sections 13(3)(f)(ii), 13(3)(l), 13(3)(o) and 13(6) as guaranteed by section 13(2) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ('the Charter'). These rights are, respectively:

a. the right to live in any part of Jamaica;

b. the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage; and

c. the right to protection from degrading and "other" treatment.

[6] The claimants are a collective of concerned residents who assert that the proposed quarry to be operated in Bengal, St Ann, will cause irreversible damage to the fragile ecosystem and environment of the Dry Harbour Mountain area. They are also concerned about their livelihoods and property, which they believe will likely be affected by the quarry's operations. They all claim to have proprietary and other interests in lands within the permitted area and in the vicinity of the Bengal lands.

[7] The defendants, conversely, contend that the Minister's decision, made in the lawful exercise of his executive discretion, was aimed at economic growth. They

rely on section 15 of the Charter as giving Bengal the right to do what it wishes with its own property and contend that not only is the proposed activity lawful, but that the company acted lawfully in obtaining the environmental permit granted by the Minister. In addition, the Minister and NRCA operated within the statutory framework, as 76 conditions were attached to the permit to address any environmental concerns. It is the claimants who, they say, have failed to demonstrate an actual or likely constitutional breach based on the evidence in this case.

[8] For the reasons that follow, I hold that the claimants have established a likely breach of the constitutional right prescribed by section 13(3)(l) of the Charter and that the defendants have not justified that limitation.

[9] As the claimants did not seriously pursue the alleged breaches of the other rights pleaded, the Court has not entertained them. The decision of the Court means that the Environmental Permit for Mining and Quarrying (establishment of a Limestone Quarry and Crushing facility, Environmental Permit No. 2014-06017-EP00040) granted to Bengal as issued by the NRCA cannot stand.

BACKGROUND

[10] In 2000, an area of land between the Rio Bueno in Trelawny and Discovery Bay in Saint Ann, including the Dry Harbour Mountain, was zoned for special protection under the Town and Country Planning (St Ann Parish) Provisional Development Order, 1998, and confirmed in January 2000 by the St Ann Confirmed Development Order, 2000 (‘the zoned area’).

[11] The Bengal lands fall within the St Ann Development Order and the zoned area. The Development Order identified parts of the undeveloped coast between Rio Bueno and Discovery Bay as environmentally sensitive. It sought to preserve the area's natural character, including its vegetation, scenic quality, flora, fauna, and scientific value.

[12] Bengal is the registered proprietor of lands in the Dry Harbour Mountain area. It carries on the business of mining and quarrying and sought an environmental permit to undertake such activities on part of the lands it owns, which was referred to at trial as the permitted area.

[13] An environmental impact assessment study ("EIA") was undertaken by Bengal as required by the NRCA. Residents and other stakeholders objected to the proposed project. The NRCA, after consulting the relevant agencies and considering stakeholder objections, refused the application in May 2020.

[14] Bengal appealed the NRCA's refusal to the Minister under section 35 of the Natural Resources Conservation Authority Act, which it was entitled to do. The Minister allowed the appeal as he was entitled to do. The process employed by Bengal or the Minister on the appeal is not being challenged in this case. Any issues under the rubric of judicial review raised in submissions are viewed by this Court as res judicata, having been determined by the Court of Appeal in **Bengal Development Ltd v Wendy Lee et al.**[2]

[15] The environmental permit was granted by the NRCA and later issued with 76 conditions ostensibly intended to address the environmental and public health concerns raised in the NRCA's refusal and the Forestry Department's objections.

Relief sought

[16] The claimants seek declarations that the Minister's decision and the permit breach, or likely breach, their constitutional rights; a declaration that any such breach is not demonstrably justified in a free and democratic society; orders to strike down the permit; an injunction to restrain mining or quarrying under it; vindicatory damages; and costs on an indemnity basis.

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[2] [2025] JMCA Civ 19

Standing

[17] Standing was not challenged. The claimants are residents, landowners, business operators, and individuals who live and work near the subject lands. The claim involves the protection of environmental resources, public health, and the rule of law. These issues concern and are collectively part of the rights of all Jamaicans. The claimants share these rights with all Jamaicans. Their claim is closely connected to the rights of others, and any alleged breach of their rights can be understood in the context of the rights guaranteed not only to them as claimants but also to them as Jamaicans.

[18] The claim may be properly characterised as public interest litigation under the widened standing provisions as outlined in **Dayton Campbell v The Attorney General**,[3] a holding this Court recognises as widening the provision granting access to justice.

Summary of the parties' positions

The Claimants

[19] The claimants argue that each piece of documentary evidence, and the combined effect of all of it, clearly indicates a likely breach of their rights. They rely on the oral evidence of witnesses[4] and the agreed documentary evidence provided by the defendants.

[20] Five claimants submitted affidavits and were cross-examined at trial. They argue that the Minister's decision conflicts with the development order, the recommendations of the State's regulatory agencies, and Bengal's own EIA. They

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[3] [2025] JMFC Full 2

[4] Prior to trial, the Court permitted the 5th Claimant, Karlene McDonnough, to discontinue, having sold her property and no longer living in the relevant area. The 6th claimant, Patricia Dale, filed no affidavit and took no active part. The 4th Claimant, Tracey Shirley, filed affidavits but did not attend trial; those affidavits are not relied upon.

contend that issuing the permit is likely to cause irreversible environmental damage to themselves and the wider area. They rely on the NRCA's refusal, the Forestry Department's objections, admissions in Bengal's EIA, the land's physical features, its proximity to environmentally sensitive zones, and potential impacts from blasting, dust, habitat loss, as well as groundwater issues.

[21] They argue that the defendants cannot prove that the 76 conditions relied on by the Minister offer any meaningful protection against a breach of their rights, nor can a likely breach be justified under the **Oakes**[5] test.

[22] Mr Hylton KC responds to Mr Dabdoub, KC's submission that this claim is premature by contending that the environmental permit represents a key regulatory step in the process toward quarry operations and that the Constitution protects against both actual and likely infringements. Therefore, the Court is justified in intervening before any irreversible damage takes place.

[23] In cross-examination, Mr Dabdoub, KC, submitted that the claimants were driven by racial bias. The court intervened to firmly and clearly state that such unfounded accusations were unacceptable and that we would not entertain any such submission, particularly as there was no evidence of it. That submission was summarily dismissed, and this Court has disabused its mind of it.

[24] The claimants relied on the cases of the **Bulankulama and Others v Secretary, Ministry of Industrial Development**,[6] **Julian Robinson v The AG,**[7] **Dale Virgo and ZV (by her mother and next friend Sherene Virgo) v Board of Management of Kensington Primary School and others**,[8] inter alia. They seek the application of the precautionary principle from international environmental law,

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[5] R v Oakes (1986)1 SCR 103
[6] [2002] 4 LRC 53
[7] [2019] JMFC FULL 04
[8] [2024] JMCA Civ 33

which calls for preventive measures in the face of likely environmental harm, regardless of the certainty of the scientific position.

The First Defendant

[25] The Attorney General's ("AG") position is that the Minister acted lawfully under the statute and that the permit conditions significantly reduced any likely breach of rights or risk. Further, the Court should not lightly overturn a ministerial decision which section 35 of the NRCA Act says is final.

[26] In applying the **Oakes** test, the AG contends that the environmental permit, issued with 76 conditions, was properly granted under the NRCA Act and is justified. The 76 conditions must be fulfilled before any activities begin, and additional approvals are needed. The Ministry of Transport and Mining denied the quarry licence by letter dated June 28, 2022 (after this claim was filed). This means that an environmental permit does not guarantee a quarry licence. The claimants led no evidence that a quarry licence was or is likely to be granted. Therefore, there is no certainty that quarry activities will take place.

[27] It was argued that mining allows for economic development, tax revenue, foreign exchange earnings, and employment. The permit is only one step in the process of allowing mining to take place, and as the claimants have not shown that their concerns are likely to be actualised, they have failed to prove an actual or likely constitutional breach.

[28] The AG relied on the interpretation of the right in section 13(3)(l) as outlined in **Linton Berry v The AG**[9] and on **Julian J. Robinson**, **Attorney-General v Jamaican Bar Association** for the approach of the Court in the construction of the constitutional provision under review.

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[9] [2021] JMFC Full 05 at [29]-[37]

The Second Defendant

[29] The NRCA argued that the Minister overruled its initial refusal and that the Authority subsequently followed his directions. The NRCA maintained its original reasons for refusing the application, recommending that the appeal be denied, and relying on its documented position for refusal of the permit.

[30] At trial, the NRCA called no evidence and relied on sections 3, 4, 9, and 35 of its parent statute, as well as its submissions. In a letter dated May 8, 2020, the NRCA gave its reasons for refusing to issue the permit, which are discussed later.

[31] Section 35 of the NRCA Act sets out the appeal process for applications in which an environmental permit or licence is refused, or any of the conditions are deemed unsatisfactory to the applicant. It provides that, upon appeal, the relevant Minister's decision is final.

[32] The NRCA submitted that the claimants' affidavits and other evidence presented to the Court do not challenge the NRCA's process nor its refusal. Under section 35 of the NRCA Act, the permit must be granted once an appeal is allowed, in accordance with the Minister's decision. There is no evidence that the NRCA acted unlawfully in issuing the permit.

[33] The 76 conditions attached to the permit were designed to address all the concerns raised by the various authorities and include mitigation measures to ensure maximum environmental protection. It was submitted that the claimants have failed to establish any breach, or even a likely breach, by the NRCA.

The Third Defendant

[34] Bengal’s position is that it acted within a lawful industry, which permits quarrying as a regulated commercial activity. It was stridently argued that, as the registered owner of Bengal lands, its property rights under section 15(3) of the Charter must be respected by the claimants. Bengal admits that the claimants have rights under

the Charter; however, the Court must strike a balance between the claimants' environmental rights and Bengal's property rights. When competing rights arise, the Court must balance them based on the principle of proportionality.

[35] The claimants have provided no evidence that Bengal breached its constitutional rights or failed to comply with the NRCA Act when applying for the permit, as set out in the affidavits of Kashif Sweet and Dr Carlton Campbell. Further, the NRCA Act has not been declared unconstitutional.

[36] None of the claimants' affidavits state or recognise that the Minister and the NRCA set out the 76 conditions to mitigate against risks. The Minister and the NRCA were exercising their statutory powers, and each recognised the conflicting rights protected by the Constitution when issuing the permit. The 76 conditions were designed to safeguard and balance these competing rights.

[37] There is no credible evidence indicating that the NRCA's authority to issue the permit or the Minister's decision on appeal was flawed, irregular, illegal, irrational, or unjust in a free and democratic society. In any event, the defendants submit that a presumption of regularity exists. This presumption establishes that both the NRCA, in issuing the permit, and the Minister, in making his decision on appeal, acted within the authority granted by the NRCA Act, applying the legal principle of omnia praesumuntur rite esse acta.

[38] The Minister's decision to grant the appeal under section 35 of the NRCA Act is final and therefore remains in effect. The challenge in this claim is really to the lawful activities of the third defendant, which do not infringe the claimant's rights. Consequently, the permit is valid, existing, and lawful.

[39] Additionally, no quarry licence has been issued, nor have operations begun, and the 76 permit conditions demonstrated that any likely interference with the claimants' rights is minimal and justified.

[40] Further, the claim was premature because further approvals were required before quarrying could begin. It is submitted that all the claimants' affidavits ignore the fact that the permit only authorises Bengal to apply for a quarry licence in accordance with the provisions of the Quarries Control Act.

[41] Rather than filing a constitutional claim, the alternative remedy was to lodge an objection with the Minister of Mining against the grant of a quarry licence to Bengal, given that the Minister has the power to refuse the grant even after an Environmental Permit is issued.

[42] King's Counsel relies on the cases of **P.(D.) v S.(C.)**[10] and **Syndicated Northcrest v Amsalem**[11] for the contention that no right is absolute. **Dagenais v Canadian Broadcasting Corp**[12] was cited in support of the submission that there is no hierarchy of rights within the Charter, and **AG v JAMBAR**[13] and **Dale Virgo** for the approach of the court.

THE EVIDENCE

[43] The Permit

All the parties agree on the facts surrounding the history of the impugned environmental permit. Bengal applied under the NRCA Act for the grant of an Environmental Permit for Mining and Quarrying (establishment of a Limestone Quarry and Crushing facility, Environmental Permit No. 2014-06017-EP00040) on property registered at Volume 1431, Folio 627, in Bengal, Saint Ann.

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[10] [1993] 4 S.C.R. 141 at 182
[11] [2004] 2 S.C.R. 551 at [61]
[12] [1994] 3 S.C.R. 835 at 877
[13] At paras [24]-[26], [76]

[44] The NRCA required Bengal to prepare an EIA, which was done by Dr Carlton Campbell of C L Environmental Consultants. The NRCA requested several revisions to that report, and Bengal complied.

[45] The application was processed. The NRCA Board refused Bengal's application by letter dated May 8, 2020. Bengal requested an appeal of the NRCA's decision by letter dated May 21, 2020, to the Minister of Economic Growth and Job Creation under section 35 of the NRCA Act.

[46] In July 2020, Minister Leslie Campbell granted the appeal, overturning the NRCA's refusal. On October 30, 2020, the Honourable Prime Minister, who also serves as the Minister of Economic Growth and Job Creation, issued a letter stating that he had "decided to allow the appeal and set aside the decision of the NRCA regarding the matter."

[47] The Environmental Permit No. 2014-06017-EP00040 was granted under Section 35 of the NRCA Act on November 5, 2020. It authorises Bengal to undertake "mining and quarrying (terrestrial, riverine and marine) of bauxite, peat, sand, minerals— including aggregate, construction and industrial materials, metallic and non-metallic ores".

[48] Following the Minister's directions, the NRCA amended the permit to include 76 conditions**,** including an environmental performance bond and transportation to and from the quarry, inter alia, issuing it on December 17, 2020.

[49] The 76 conditions encompassed the protection of fauna and flora, air quality assessment and fugitive dust control, archaeological protection and the protection of artifacts, drainage, construction of access and haulage roads, water supply, protection of water resources, solid waste disposal, prohibited burning, quarry restoration and rehabilitation, and the establishment and construction of quarry benches. All these measures were said to be carefully designed to mitigate the effects Bengal's operations will have on the environment.

THE ORAL EVIDENCE

[50] Wendy Lee is a biologist with a degree in Wildlife Conservation, an environmental educator, and a birding guide who has campaigned for many years to protect the area, including Bengal Land. She agreed that she does not live near the proposed quarry site and that a Green Paper is a policy document, not law. Before 2024, Bengal was not designated as a protected area. She also agreed that the permit process requires additional approvals, that objections can be raised against future mining applications, and that Bengal has a constitutional right which must be balanced against the rights of other stakeholders. She said she had objected to the dust nuisance caused by Noranda bauxite but had not pursued legal action. She presented no medical evidence, accepted that the permitted lands are not subject to the Ecologically Sensitive Area ("ESA"), and acknowledged that forestry approval was needed before a quarry licence could be issued. She further accepted that the EIA addressed some of her concerns and that some of the Forestry Department's issues were managed by the 76 conditions, but maintained that there is a constitutional right to the protection of the ecological heritage and remained opposed to any quarrying because of what she described as the unmitigable adverse impacts on the forest ecosystem, including the loss of endemic wildlife and ecological services.

[51] Martin Hopwood and Anne Hopwood both gave evidence that noise, dust, traffic, and environmental degradation arising from the proposed operations would affect them, their property, and their farming efforts. Mr Hopwood said that Bengal Farm is adjacent to the permitted lands; that he and his wife operate a quarry in Trelawny; that they do not reside at Bengal Farm but live closer to their quarry, which currently holds a licence for marl extraction; and that there had previously been a marl quarry on the permitted lands, operated by Jose Cartellone, involving stone mining and crushing, to which he did not object. He said that he inherited the quarry from Jose Cartellone; that fill material from his quarry is transported by trucks; that, during the last inspection, the quarry was found to need benching,

which had not yet been completed; and that no approvals or permits, apart from those from the NRCA, had been obtained. Mrs Hopwood agreed that she and her husband hold a quarry licence with 17 conditions, similar to those of Bengal, and that her licence, which permits quarrying, mining, and filling, is less strict than Bengal's permit. She said that the land where her quarry is located is not adjacent to the proposed quarry lands; that her quarry is authorised for limestone, as is Bengal's; that she faces no limits on the number of trucks, no restrictions on the time of day, and no specific limits on dust, extraction techniques, or noise; and that she is required to rehabilitate quarried areas to the satisfaction of the Commissioner of Mines.

[52] Dr Shermian Woodhouse is a physician and radiation oncologist. Her residence across the road from the Bengal Land was purchased over 25 years ago and is now a rental villa, with the intention that she would spend more time there as she advances in age. She relied on the residential covenant and zoning that protect the area as "Undeveloped Coast". She said that she is entitled to rely on the Government and planning laws, which zone areas for particular purposes. She gave evidence that inhalation of limestone dust may cause irritation, bronchitis, worsening asthma and emphysema, long-term irreversible lung disease, possibly cancer, and may worsen heart disease if particles enter the bloodstream. She expressed concern that dust and pollution from the quarry would affect her villa's operations and said that, because of the Development Orders, the permit ought not to have been granted. She also accepted that she was aware of the 76 conditions and agreed that they balanced the competing interests. She agreed that one of the specific conditions concerns flora and fauna and that the dust originated from quarry activities about 20 years ago, not from Bengal, which is not in operation. The ESA is not part of the environmental permit, and a significant landmass is designated as Bengal's ESA. No constitutional claim or injunction had been filed against the former quarry operators or any bauxite company, although there had been issues with the earlier stone quarry, such as dust nuisance.

[53] Alec Henderson has a residence in Orange Valley, Trelawny, and a villa at Bengal Beach named “Sleepy Shallows”, described as the nearest residence to the road and the closest beach house to the proposed site, approximately 600 metres away. He expressed concern about the risks associated with blasting, crushing, loading, vehicular traffic, and limestone dust. He said the proposed quarry would negatively affect his health and that of his family and would likely damage the villa and pool. He stated that, although he does not currently reside there, he plans to do so upon retiring in the next decade. His affidavit disclosed no staff complaints about daily trucks causing a problem, no legal action against truck operators, and no evidence of negative business impact.

[54] A common feature of the evidence of Mr Hopwood, Mrs Hopwood, Mr Henderson, and Dr Woodhouse was that they all agreed that, even with the environmental permit, Bengal would require further approvals before operations could commence, and that the company needs a mining licence, which they can object to.

[55] There was also substantial overlap in the admissions made by those witnesses in cross-examination. Mr Hopwood accepted that, although Noranda’s bauxite mining affects him, he never challenged it and submitted no written complaints; that no activity has occurred since December 2020; that there is currently no noise or dust nuisance; that the quarry is not in an area declared as an ESA; and that he has no scientific reports to support any of his concerns. None of these witnesses relied on expert evidence in response to the EIA, and none provided any medical, financial or valuation evidence. None had complained about dust, and the quarry is not in an environmentally sensitive area. (“ESA.”)

[56] Ms Guthrie gave oral evidence on behalf of the Government. She is an environmental scientist with a Master’s degree in Environmental Chemistry and is the Head of the Government’s Environment Branch. She is also the Government’s focal person in respect of the Kunming-Montreal Biodiversity Framework and was part of the consultative process for developing the Overarching Policy on

Jamaica's Protected Area System. Ms Guthrie was unable to speak to the map she produced in evidence or explain why she asserted that the permitted area was excluded from the NRCA's definition of an ESA. She detailed the considerations for ultimately declaring an ESA as a protected area under the NRCA Act, including its flora and fauna, natural assets, hydrological and geological factors, and the identification of an ESA.

[57] She clarified that ESAs are not legally declared protected areas because no law recognises an ESA; instead, fifteen ESAs have been identified for protection under the law or for enhanced protection measures to conserve their ecological integrity. These fifteen ESAs were declared by the Prime Minister to meet the targets of the Kunming-Montreal Framework. She noted that protected areas are classified under various statutes, and that the Bengal ESA, as outlined in the Green Paper, included the permitted area. Finally, she admitted that Bengal's proposed mining activities conflict with the St Ann Development Order.

[58] ESAs are designated in line with the Kunming-Montreal Framework; however, even after they are declared, additional steps are needed to establish them as legally protected areas. The policy referred to in the Prime Minister's press release referred to "Bengal St. Ann" and included the permitted area.

[59] In cross-examination, she said ESAs are different from protected areas, and that for Bengal, further approvals are required before quarrying can begin. She described environmental abuse as harmful acts against the environment, such as air pollution and unnecessary destruction, especially in the absence of regulatory controls. She agreed that the ecological heritage is valuable and should be preserved for future generations, including hydrological and forest resources.

[60] Kashief Sweet for Bengal provided evidence seeking to explain the difference between quarrying and mining operations. He said that Hopwood's quarry is nearby and involves similar operations. Bengal is a direct competitor in the extraction of limestone for construction, so the Hopwoods' evidence is based on a

desire to protect their business against Bengal. Bengal had complied with all legal requirements in its application for a quarry licence.

[61] Bengal has the right to use its property and any resources on it as it chooses within the law. This claim prejudices that right. In cross-examination, Mr Sweet admitted that the permit allows the company to quarry as well as to mine. When asked what was planned for the property after the permitted operations take place, he said the company had changed its plans "*due to the disruption of this case to our mining efforts. The Company is considering alternative use cases at the current moment."*

[62] Dr Carlton Campbell is an Environmental Scientist who prepared the EIA in evidence in compliance with the recommendations of the National Environmental Planning Authority ("NEPA"). He refuted the likely increase in noise levels from Bengal's trucking operations, stating that noise modelling shows the company would be compliant with NRCA daytime standards. He also said that blasting was conducted within a 1 km radius and that there was no impact on dwellings, including Dr Woodhouse's.

[63] In cross-examination, he explained that the purpose of an EIA is to provide technical guidance or information for a regulatory agency to make decisions about a project, and that the EIA describes the project and its potential environmental impact. He agreed that the Prime Minister's press release is incorrect, as mining had been permitted on 50 hectares of previously mined land, not just on areas that were previously disturbed. The previous mine covered 6 hectares, and an additional 3 to 4 hectares were used for cattle rearing, logging, and bird shooting. He said that the company's plans for further development of the 50 hectares are for renewable energy once it is rehabilitated.

[64] He accepted that the quarry operations would result in habitat loss for the core dry limestone forest and of all endemic, rare, and threatened species within it, and that ecosystem services provided by the dry limestone forest, such as a habitat for fauna, carbon sequestration, oxygen production, filtration of water draining to the

sea, and subsequent reef systems, would also be lost despite rehabilitation upon completion of mining and quarrying operations.

[65] He further admitted that the permitted area fell within the St Ann Development Order, specifically under the Undeveloped Coast, as he was aware of policies UC4 and UC5 but considered them superseded by the National Mineral Policy. He viewed the development as consistent with UC4 because the property was over 500 acres and only 50 hectares (120 acres, or 20%) would be impacted. He said that the dry limestone forest comprised 38% of the vegetation in the 50 hectares, and that it would be consistent with UC5 because the Forestry Department was wrong to state that 59% of the 50 hectares was tall open dry limestone forest.

The Affidavit of Ms Nicole O'Reggio

[66] This witness was the Director, Environment Policy Development and Monitoring in the Environment and Risk Management Branch of the Ministry of Housing, Urban Renewal, Environment and Climate Change. She did not attend for cross-examination, and her affidavit was relied upon by the First Defendant.

THE DOCUMENTARY EVIDENCE

The Town and Country Planning (St. Ann Parish) Provisional Development Order, 1998, confirmed January 2000 ("the Development Order")

[67] The Town and Country Planning Authority ("the Authority") issued a Development Order under section 5 of the Town and Country Planning Act ("the TCPA"). The Bengal Land is subject to this Development Order, as there is no evidence that it has expired or been varied. Anyone wishing to develop land may apply to a local planning authority. Under section 11 of the TCPA, the Authority must consider the provisions of the Development Order when making its decision.

[68] Bengal obtained the permit under the NRCA Act. Section 31 of that Act provides that the grant of a permit under the Act "does not dispense with the necessity of

obtaining planning permission where such permission is required under the Town and Country Planning Act". There is no evidence before the Court that Bengal applied for or obtained planning permission under the TCPA Act.

[69] The Development Order recognises ESAs and aims to protect them by restricting development within these zones it outlines the relevant area and states the purpose of the policies as follows:

> *"The Undeveloped Coast*
>
> *The coastal area of St Ann lies between White River to the east and Rio Bueno to the west. The undeveloped portions are mainly the sections on the southern side of the main road from Bengal Bridge to Discover Bay.... These areas consist mainly of agricultural lands, large deciduous forest stands, and shrub-covered areas.*
>
> *The objective of the policies is to protect as much as possible the existing natural character of the undeveloped coastline, including coastal rock formations, wetlands, flora and fauna, caves, etc. The section of the coast from Rio Bueno to Discovery Bay consists of areas with trees and other coastal vegetation, which are of scenic value. Since the area is predominantly limestone outcrop, the vegetation would have established itself over many years and would take a long time to re-establish if destroyed."*

[70] Policies UC4, UC5, and UC12 directly relate to the Bengal Lands and state:

> *"Policy UC4*
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> *Only those forms of development which will not result in any significant alteration to the existing topography or any reduction in significant stands of vegetation will be permitted.*
>
> *Policy UC 5*
>
> *No development will be allowed in these wooded areas, which would adversely affect the homogeneity or integrity of these areas.*
>
> *Policy UC 12*
>
> *Development will not be permitted along the undeveloped coast if it materially detracts from the unspoilt scenic quality or scientific value of the area."*

The letter from the Forestry Department dated February 24, 2020

[71] The Forestry Department is the government department responsible for protecting Jamaica's forest resources. It is in the Ministry of Economic Growth and Job Creation. Gillian Guthrie confirmed that the Forestry Department is the Government's expert in matters related to forests. That department was consulted regarding Bengal's application for an environmental permit. By a letter dated February 24, 2020, the department opposed the application in trenchant terms, criticising the EIA and stating categorically that it had not been consulted:

> *"**The Forestry Department (the Agency) was not a part of the process to develop the Terms of Reference that guided the completion of the captioned Environmental Impact Assessment (EIA).** The level of attention which is paid to forests in the EIA clearly reflects this exclusion, as **cursory attention was paid to the devastating impact that the expansion of the quarry in the captioned location (hereinafter referred to as the "Area of Interest") would have on the verdant forest resources found in the environs of the proposed quarrying activity.** (Emphasis added.)*
>
> *It is unfortunate that the point at which the Agency's technical input is being sought, is **after the completion of this voluminous document, as though it explores the impact of the quarrying operations, it does not propose feasible and effective mitigation measures geared towards minimizing the overall negative impact of the quarry on these forested areas.***
>
> ***…Colloquially this unique naturally occurring mature limestone forest is referred to as woodland/scrub. This type of forest cover is pivotal in maintaining associated aquifers, which are an important source of groundwater for the North Coast….***
>
> *…**Historically, we have yet to see a quarry site that has been decommissioned and successfully reforested/adequately re-vegetated…***
>
> *…It should be noted that the proposal to transport topsoil to facilitate replanting efforts requires a significant amount of material. The volume of topsoil required to facilitate the preferred soil thickness of 30 to 45 cm (12 to 18 inches) necessary to reasonably sustain vegetation growth **could result in secondary environmental damage occurring at another site.***

> *…In light of the foregoing, the Agency hereby registers its strong objection to the proposed expansion of the quarrying and mineral processing activities at the Rio Bueno Quarry." (Emphasis added)*

[72] The Forestry Department was highly critical of the proposed mitigation measures in the EIA, stating that "*conducting a study alone does not constitute mitigation*" and noting the potential loss of over 130 species across 50 plant families. The 9 proposed species were described as "*woefully inadequate*" for restoring the area's biodiversity, among other criticisms.

The NRCA

[73] The NRCA's position is that the Minister overruled both its refusal and its Appeal Report. In its Appeal Report, the NRCA stated that further studies were needed and identified the factors listed below, among others.

[74] This Court notes that the Appeal Report included a list of the proposed mitigation measures, but nevertheless concluded by recommending that the application be refused for these reasons, among others:

1. The proposed development is contrary to the Development Order. Quarries must be located in quarry zones and will not be permitted in any other zones - Policy M6.

2. The "nature, size, scale and intensity" and concluded the proposed quarry: "will have a deleterious effect on the environment in general and the surrounding uses".

3. "The impact and loss of biodiversity and natural resources in an area of environmental significance and unique biodiversity is irreplaceable. The quarry is located in an area that has porous limestone and is part of two watersheds; the underground hydrology will be impacted."

4. The quarry will "exacerbate the air quality impacts on the air sheds" and "may have a deleterious effect on public health, particularly from noise and dust pollution".

5. The "unprecedented number of objections received from residents….as well as stakeholders…" (40 out of 70 attendees at a meeting.)

6. The Forestry Department's position, the absence of sufficient mitigation and the irreversibility of loss.

7. The ecological and historical importance of the forest is that it is believed to be in virtually the same condition as it was when Columbus sailed into the nearby harbour in 1494.

8. The area is characterised by raised fossil reefs, wave-cut limestone terraces, dramatic limestone cliffs and caves. The Discovery Bay Marine Laboratory uses the area for research and field education.

9. Policies UC1, UC4 and UC5 apply.

[75] The report further quoted the proviso to section 9(5)(b) of the NRCA Act:

> *"The Authority shall not grant a permit if it is satisfied that any activity connected with the enterprise, construction or development to which the application relates is or is likely to be injurious to public health or to any natural resources."*
>
> The application must be refused under section 9(5) as it is: *"likely to be injurious to public health and to natural resources".*

[76] The NRCA did not call any witnesses at trial, nor did it depart from its initial refusal dated May 8, 2020, or alter its stance in its appeal report. The NRCA's position is that the Minister made his decision, and the Authority thereafter acted in accordance with his directions by issuing the permit.

The Green Paper

[77] In March 2024, the Government of Jamaica introduced the Overarching Policy for Jamaica's Protected Areas System, also known as the Green Paper, with press statements from the Prime Minister. This claim had been filed before the government announced that comprehensive policy. The Prime Minister formally presented the Green Paper and notified the public that five areas, including the "Bengal lands," had been designated as ecologically sensitive areas (ESAs) and were to receive increased protection.

The Environmental Impact Assessment study

[78] This report was prepared by consultant Dr Carlton Campbell, who gave oral evidence. The EIA spoke to the importance of the forest and stated that additional research was necessary to identify endemic species:

> *"The forest is also a potential source of commodities such as oxygen, medicine, oils and resins, among other things. It represents a genetic resource for rare and endemic species that are necessary for facilitating the adaptation of our coastal environment to the effects of climate change."*
>
> ***… "It's worth noting, however, after mining operations have ceased, the proponent aims to further develop the property".***
>
> …
>
> *"*As *stated before, all extraction will occur on the premise of land preparation for further development purposes identified by the proponent".*

[79] The EIA acknowledged difficulties relocating species, noting that "this, however, is very difficult because of the substrate, which renders the removal of some of these species without damage and loss impossible."

[80] Under "Hydrology of the Proposed Development", the EIA stated:

> *"The proposed development is located in a small wasteland which is wedged between the Rio Bueno watershed to the west and by the Dry Harbour Gully Watershed to the east, in a sub watershed of about 9.6km² with no apparent river or gullies or surface drainage (Figure 4-9)."*

> *"Karst systems are very vulnerable to groundwater pollution due to the relatively rapid rate of water flow and the lack of a natural filtration system."*

[81] It recognised the negative impacts on hydrology and the water column caused by groundwater contamination, sedimentation, pollutants from the site, and other factors. The EIA described a 'Social Impact Area ("SIA")' as the estimated spatial extent where the project's effects on nearby communities are expected to occur. A map shows the claimants' properties are located within that SIA.

[82] Under "6.2.1.3 Rock Blasting", the EIA admitted:

> "*Blasting is expected to occur. As a result: Fragments of rocks will be propelled into the air by explosions on site. These rocks will create hazards if they are propelled into nearby residences, resulting in harm or death. Fumes (toxic and non-toxic) are released into the atmosphere as a result of using explosives for blasting. Residences may be temporarily affected by dust and fumes within 100 metres. Deposited dust may affect local residents as cars, homes or any surfaces may have visible deposition."*

The Prime Minister's statement

[83] In a press release dated November 12, 2020, the Honourable Prime Minister stated the following:

> "*As is established under section 35 of the NRCA Act, the applicants appealed the decision of the NRCA. The matter was considered by the then Minister without portfolio in the Ministry of Economic Growth and Job Creation, Hon. Leslie Campbell. The Minister in a transparent manner, considered the submissions and sought technical advice. As the process allows, submissions in the appeal were heard from both the NEPA technical team and the applicants. The Minister, in hearing the appeal examined several factors, including how the NRCA arrived at its decision, land management and use, minerals and environmental enterprises as economic drivers, mitigation measures to prevent or reduce environmental and health hazards, the regulatory and enforcement capacity of the regulator, and the specific development proposal of the applicant."*

[84] The press release further states:

> *"Based on the environmental stipulations, Bengal Development Limited is directed to restore the land, replant trees and engage in other activities that*

> *would protect and improve environmental management, and establish wide buffer zones, among the over 70 conditions that have been imposed on them. It was therefore concluded that the measures put in place would mitigate for impact on species biodiversity for the area and ensure greater management of the total acreage. Mining has only been permitted on the disturbed marginal areas of the land which already has been mined and amounts to approximately 20% of the total area applied for. The remaining 80% of the 52 acres will continue to be untouched and form part of the forested cluster in the parish. The developers are required to obtain a mining licence from the Mines and Geology Division…*

[85] The Hon. Prime Minister recognised and accepted that sustainable development is the way in which environmental rights and economic development are intertwined, for the press release ends with:

> *"...we have found a sustainable solution to preserve and protect our environment while at the same time pursuing our economic and social well-being."*

ISSUES

[86] The principal issues are these:

1. Whether the claim is premature.
2. Whether there is an alternate remedy.
3. *Omnia praesumuntur rite esse acta*
4. Whether the evidence establishes an actual or likely breach of the pleaded Charter rights.
5. Whether the defendants have shown that the limitation is demonstrably justified in a free and democratic society; and
6. What relief, if any, should follow.

ANALYSIS

The Approach of the Court

[87] The law is straightforward, rights under the Charter are guaranteed, and any limitation must be demonstrably justified in a free and democratic society. The

Oakes test governs justification in our jurisprudence (see the Privy Council decision in The **AG v JAMBAR)**.[14] In **Dale Virgo**,[15] Brooks P. analysed the principles outlined in various authorities, including Sykes, C.J.'s dictum in **Julian Robinson** and stated that the burden of establishing that a defendant's acts derogate from a constitutionally guaranteed right lies on the claimants. The burden is "the civil standard, and the court should give a generous and purposive interpretation to the provisions".

[88] If the breach is established, the burden then shifts to the defendants to justify their actions. The burden on the defendants to justify their actions will be at the higher end, "closer to the fraud end of the spectrum of proof". The defendants must show that "the objectives of the law or action relate to concerns which are pressing and substantial in a free and democratic society and secondly that the means chosen to address those objectives are reasonable and demonstrably justified, in other words… proportionate…" The Court of Appeal said that "if there is a tie between the claimant's assertion of a breach of the Charter right and the State's proclamation that it is demonstrably justified, the claimant must succeed because the violator can only succeed if the violation is clearly justified."

Is the claim premature

[89] Mr Dabdoub, KC, argued that the claim is premature, as the evidence shows that Bengal must obtain additional approvals before it can commence operations; neither mining nor quarrying has commenced on the Bengal lands, as no mining licence has been issued to the company.

[90] I agree with King's Counsel that to answer this question, the Court must consider the evidence. However, **as a matter of law**, section 19 of the Charter is not

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[14] [2023] UKPC 6 at paras 76 and 77.
[15] [2024] JMCA Civ 33

confined to completed breaches. It extends to situations in which a contravention of the Constitution is "*likely*" to occur. This means that a court presented with evidence of completed irreversible environmental harm has arrived too late to enforce the law, thereby providing no meaningful constitutional protection. Section 19 contemplates preventive access to constitutional redress where an action is taken that creates a sufficient likelihood of infringement.

[91] The Court of Appeal in **Bengal Development Company Limited v Wendy Lee & Ors**[16] discussed this point, stating that the inclusion of the word "*likely*" in the redress clause of the Charter allows the claimants to bring a claim before any actual harm takes place. Further, the Court of Appeal in that case has already stated that the right under review has been engaged. This means the Court has moved beyond engagement and is concerned with whether the right has been breached, or is likely to be breached, on the evidence presented. The case of **Julian Robinson** settles the question, given the low threshold that the claimants must surmount.

[92] In **Southern Trelawny Environmental Agency & Anor v AG & Ors**[17] the Court acknowledged that environmental harm may infringe the claimants' Charter rights and that such claims must be supported by proper pleadings and evidence.

[93] The nature and scope of the right will be discussed below. Given the Minister's recognition that a sustainable solution was required, step one was the most important, as it signalled a risk that the right to a healthy and productive environment could be infringed.

[94] The only way to determine whether the Minister had, in fact, made a decision that could be described as a sustainable solution was to bring a claim in which the

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[16] [2025] JMCA Civ 9
[17] [2023] JMSC Civ 39

effect of that decision would be examined for its constitutionality. For the foregoing reasons, the claim cannot be said to be premature.

Alternate remedy

[95] Regarding the submission that an alternate remedy existed, namely, that the claimants could have filed an objection with the Minister of Mining against the issuance of a quarry licence to Bengal, since the Minister of Mining may refuse to grant it even after an environmental permit is granted, Section 19 requires the Court to consider any alternate adequate means of redress. Still, it does not compel the Court to decline constitutional jurisdiction where the complaint is that a decision likely to lead to a breach of the right has already been taken.

[96] The adequacy of the proposed alternate remedy is arguable, however, as the submission did not go so far as to advert the mind of the Court to the suitability of the alternate remedy proposed, the Court did not go so far as to consider it.

Omnia praesumuntur rite esse acta

[97] This principle may be a useful starting point in ordinary public law. But it is no answer in a case in which the evidence raises constitutional issues. In this case, the Court of Appeal has already said that the issuance of the permit engages the right.[18] This means that holding has displaced the presumption.

[98] But first, it is to be noted that this Court does not create environmental policy, nor is it focused on whether development is desirable as a matter of policy. Policy remains the responsibility of the Executive and the Legislature, not the Courts. A policy is not a legitimate external aid to statutory interpretation, though it might be relevant to the exercise of a statutory power.

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[18] **Bengal Development Ltd v Wendy Lee et al.** at para 117

Ministerial discretion under section 35 of the NRCA

[99] Mr Dabdoub, KC, also submitted that the Minister's decision under section 35 is final and should not lightly be disturbed. While it is true that the section grants that power, the word "*final*" as used in the section does not exclude constitutional scrutiny. It was argued that the Minister made a lawful decision in the exercise of his statutory power, however, if the effect of that statutory power resulted in a breach or likely breach of a Charter right which is not demonstrably justified, the Court is not only entitled to intervene, but is duty-bound to do so. It is the court that hears the case, which is responsible for deciding whether a claimant's constitutional rights have been contravened. The lawfulness of the process is not under review and is irrelevant to the **Oakes** analysis to be undertaken by the Court in a constitutional claim.

Burden of proof

[100] The requirement for, and burden of proof on, a claimant who makes this allegation is set out in the case of **Julian Robinson**, which states that the standard of proof is on the claimant on a balance of probabilities, but at the lower end. It is clear that a claimant need not await the completion of environmental harm before seeking redress under the Charter. The threat must be proven on a balance of probabilities, with credible evidence, and be reasonably foreseeable, which means neither speculative nor hypothetical. The claimants must demonstrate a real risk of environmental harm or ecological degradation that affects the enjoyment of the right. If the risk is too remote, then it would not engage the right.

What the right does not guarantee

[101] The right does not guarantee environmental perfection. It does not create a right to freedom from inconvenience, nor does it prevent aesthetic displeasure or grant freedom from irritation over trivial environmental disturbances. The right is not

engaged by every trivial environmental problem or issue, but by abuse, damage, or degradation or the threat of harm or damage to the environment.

13(3)(l) – the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage

The Nature and Scope of Section 13(3)(l)

[102] Section 13(3)(l) contains three active sentences:

1. The enjoyment of a “healthy and productive environment.”

2. Protection against the “threat” of injury or damage from environmental abuse

3. Protection against the “threat” of injury or damage from degradation of the ecological heritage.

[103] The scope of the right guarantees protection with the aim of preserving what exists now so that future generations can enjoy the same rights. The right concerns environmental conditions that materially endanger health, cause damage, or expose people to harm. The text of the provision, with the deliberate use of the word “*threat*,” demonstrates the intention of the legislature that redress under the Constitution be both preventative and protective.

[104] Reading the words “*healthy and productive environment*” together in context suggests that “*healthy*” relates to environmental conditions that support human health and stability.

[105] “*Productive*” signifies how the natural environment works, how humans work it, and how they work in it. It includes development. Productive does not mean, nor does it imply, economic exploitation with a singular, linear focus only on economic gains.

[106] Instead, in my view, productive signifies sustainable development, that which sustains human life, supports community activities, promotes well-being, all the while preserving natural resources.

[107] "*Ecological heritage*" adds an intergenerational dimension to the right. Heritage refers to what must be preserved. The right safeguards our heritage, which our ancestors preserved for our enjoyment and which we have an obligation to preserve for future generations to enjoy.

[108] In construing the right in this manner, it may be said that section 13(3)(l) imposes both negative and positive obligations. Negatively, the State must avoid taking action that is likely to cause, or that causes, ill health, environmental harm, or ecological degradation. Positively, environmental decision-making is constitutional if it does not lead to environmental harm.

[109] To achieve this, positive obligation decision-makers must assess the environmental impact of proposed decisions or actions about development by considering all reasonably foreseeable and cumulative risks presented to them by regulators, stakeholders, and scientists. They must demonstrate that environmental protection and economic development are compatible objectives, not competing ones, applying the precautionary principle when uncertainty exists and the risk of serious harm is present or likely to be present. These considerations stem from their constitutional duty to protect people and the environment, and from Jamaica's international obligations under international law.

Sustainable Development

[110] Section 13(3)(l) exists within a constitutional framework that recognises development as legitimate, justifiable, and sustainable. This gives rise to the term sustainable development, as defined in international law. Section 13(3)(l) and sustainable development are compatible, and so may be said to be intertwined for these reasons:

1) The words "*healthy*" and "*productive*" in the text of the provision are joined by the conjunction "*and*" between them. The inclusion of "*and*" conveys harmony and agreement, suggesting that the words "*healthy* ***and*** *productive*" are meant to be read together.

2) Development requires a "*healthy and productive environment*", and the environment will, in turn, always be developed; there is not one without the other. Development cannot take place on a deteriorating environmental foundation. Unrestricted growth is likely to damage the environment, and environmental damage obstructs development. Increasing developmental demands would seem to me to demand increased environmental protection.

3) The legislature specifically included the word "*productive*" in the provision, and, in construing the right broadly and purposively, there is no reason to exclude the legislative intent that "*productive*" means the sustainable development of the environment.

4) It would make no sense if the same Jamaicans who are to be productive were too sick to enjoy their communities, their country, or the fruit of their labour because of the manner in which development was undertaken around them. What Parliament intended when it drafted the provision was that Jamaicans should live in a healthy environment and be a healthy and productive population.

5) Environmental protection is an enforceable constitutional right. Without this, the irreversible character of environmental damage threatens health, water, food security, and perhaps even the life of a society.

6) Jamaica, as a member of the United Nations, can hardly ignore international law concerning environmental action; nor has this nation done so when our international positions taken are considered, as discussed below.

[111] International law and Jamaica's participation in it, although mentioned as one of the reasons for adopting sustainable development as the interpretive framework for the right, cannot, singularly, be used to determine this interpretation. It is used by this Court in its examination of the provision for a true construction in harmony with our jurisprudence and that of other nations with similar constitutional provisions. While the principles from international conventions and instruments not incorporated into Jamaica's domestic law are not legally enforceable, they are referenced in this decision to interpret the scope and nature of the right, which is joined to sustainable development, as discussed below.

Comparative Jurisprudence

[112] In the case of **Bulankulama and others v Secretary, Ministry of Industrial Development and Others**[19] the Sri Lankan Government planned a 30-year phosphate mining agreement with a U.S. company in Eppawala, risking the displacement of 12,000 people and endangering the historic Jaya Ganga irrigation system. The petitioners claimed that the project would cause irreversible environmental damage and infringe their rights to equality, lawful occupation, and freedom of movement under the Sri Lankan Constitution.

[113] Amerasinghe, J, writing for the Supreme Court of Sri Lanka, said that the state clearly has the right to utilise its natural resources, provided it does so in accordance with its own environmental and development policies.[20] Rational planning is crucial for balancing development needs with environmental protection.[21] Humans are the focal point of sustainable development concerns. They have the right to a healthy, productive life in harmony with nature.[22] To realise

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[19] [2002] 4 LRC 53
[20] See Principle 21 of the U.N. Stockholm Declaration (1972) and Principle 2 of the U.N. Rio de Janeiro Declaration (1992).
[21] Principle 14, Stockholm Declaration
[22] Principle 1, Rio de Janeiro Declaration

sustainable development, environmental protection must be an integral part of the development process and not be treated separately:[23]

> *"…It has been the policy of successive governments during the past three decades that the Eppawela mineral deposit should be put to use. In fact, Lanka Phosphate Ltd., the 6th respondent, under a licence issued by the Geological Survey and Mines Bureau has been mining about 40,000 metric tons of rock per annum for crushing and marketing to enterprises making fertilizer. That modest operation, the petitioners explain, caused them no concern. However, in view of the escalation of the amount to be mined under the proposed agreement to 26.1 million metric tons within thirty years from the date of the signing of the agreement, the petitioners fear (a) that existing supplies will be exhausted too quickly, and (b) that the scale of operations within the stipulated time frame will cause serious environmental harm that would affect their health, safety, livelihood as well as their cultural heritage. The petitioners do not oppose the utilization of the deposit. However, they submit that the phosphate deposit is a*
>
> > *"non-renewable natural resource that should be developed in a prudent and sustainable manner in order to strike an equitable balance between the needs of the present and future generations of Sri Lankans".*
>
> *In my view, due regard should be had by the authorities concerned to the general principle encapsulated in the phrase 'sustainable development', namely that human development and the use of natural resources must take place in a sustainable manner.*
>
> *There are many operational definitions of 'sustainable development', but they have mostly been variations on the benchmark definition of the United Nations Commission on Environment and Development, chaired by Gro Harlem Brundtland, Prime Minister of Norway, in its report in 1987….. development that meets the needs of the present without compromising the ability of future generations to meet their own needs".*
>
> *Some of the elements encompassed by the principle of sustainable development that are of special significance to the matter before this court are, first, the conservation of natural resources for the benefit of future generations – the principle of inter-generational equity; second, the exploration of natural resources in a manner which is 'sustainable' or*

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[23] Principle 4, Rio de Janeiro Declaration

'prudent' – the principle of sustainable use; the integration of environmental considerations into economic and other development plans, programmes and projects — the principle of integration of environment and development needs.

International standard setting instruments have clearly recognized the principle of inter-generational equity. It has been stated that humankind bears a solemn responsibility to protect and improve the environment for present and future generations. (Principle 1, Stockholm Declaration) . The natural resources of the earth including the air, water, land flora and fauna must be safeguarded for the benefit of present and future generations. (Principle 2, Stockholm Declaration). The non-renewable resources of the earth must be employed in such a way as to guard against their future exhaustion and to ensure that benefits from such employment are shared by all humankind (Principle 5, Stockholm Declaration) the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. (Principle 3, Rio De Janeiro Declaration). The inter-generational principle in my view, should be regarded as axiomatic in the decision making process in relation to matters concerning the natural resources and the environment of Sri Lanka in general, and particularly in the case before us. It is not something new to us, although memories may need to be jogged.

Judge C.G. Weeramantry, in his separate opinion in the Danube case (Hungary v. Slovakia), (supra), referred to the "imperative of balancing the needs of the present generation with those of posterity"…

…The call for sustainable development made by the petitioners does not mean that further development of the Eppawela deposited must be halted. The Government is not being asked, to use learned counsel's phrase to 'sit back and do nothing'...

…Sustainable development requires that non-renewable resources like phosphate should be depleted only at the rate of creation of renewable substitutes. What is the known renewable substitute for phosphate? Herring and Fantel, as we have seen, refer to a " continuing phosphate demand. " Does the first respondent assume that plants will need no phosphorous? On that matter, prof. O.A Illeperuma of the Department of Chemistry, University of Peradeniya, with some asperity, had this to say (P11):

> *"There are some wisecracks who say that scientists will develop new plants which will grow without phosphorous. Anyone with even a rudimentary knowledge of science knows that phosphorous is an essential component of our bone structure and when such varieties of cash crops are indeed possible then we will have humans with no bones who will probably move around like jellyfish!…"*

[114] The Supreme Court of Sri Lanka held that there was a likely breach of the petitioners' fundamental rights. The government exercises the power of a trustee of the nation's resources in trust for the people, both present and future generations. The executive cannot dispose of or exploit national resources in a manner which is inconsistent with its fiduciary duty to its people. In doing so, decisions concerning the environment have to consider the rights of future generations, be subject to constitutional scrutiny, be transparent, be rational, and be in the public interest. Decisions must reflect the principles of sustainable development and be made after scientific evaluation. The proponent was ordered to undertake a comprehensive exploration and publish its scientific study before approval was granted.

[115] In the **Gabčíkovo-Nagymaros project (Hungary/Slovakia) (the Danube case)**,[24] General List N 92, 25 September 1997, a case decided by the International Court of Justice ("ICJ"), Hungary and Slovakia signed a Treaty in 1977 to provide for the construction and operation of a System of Locks by the parties as a "joint investment" designed to attain "the broad utilisation of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties."

[116] The joint investment was primarily intended to generate hydroelectric power, enhance navigation along a section of the Danube, and safeguard flood-prone areas along its banks. Additionally, under the Treaty, the contracting parties committed to maintaining water quality in the Danube and to ensuring that environmental protection obligations linked to the construction and operation of the Locks system were upheld. One State wanted to opt out of the Treaty while the other did not. The ICJ was asked to determine whether the Treaty was still in

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[24] General List N 92, 25 September 1997

existence, whether it had been terminated, whether both countries had breached its terms, whether each was entitled to compensation for the breach of the other, and, lastly, whether they ought to use the mechanism of the Treaty itself to resolve the dispute. The Court ordered that both parties were to consider the impact of the project and negotiate terms to protect the environment, saying:

> *"It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing - and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature.*
>
> *The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.*
>
> *…new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past…*
>
> *For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river."*

[117] Judge Weeramantry, Vice-President of the Court, concurred with the Court's main conclusions but, in a separate opinion, held that the rights to development and to environmental protection are both established principles of international law. He said they cannot coexist without a legal principle that reconciles them, and that principle is sustainable development, itself a recognised principle of modern international law. The Court should draw on the wealth of global human experience in developing the sustainable development principles, as humanity has long balanced development and environmental protection. Sustainable development is

not a new idea, and a wealth of global experience from different cultures supports its present-day development, such as:

> "*… the trusteeship of Earth's resources, intergenerational rights, the protection of flora and fauna, respect for land, optimising the use of natural resources while maintaining their regenerative capacity, and the concept that development and environmental protection should proceed simultaneously."*

[118] In the case of the **Fuel Retailers Association of South Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga province et al**[25] the court reviewed section 24 of the Constitution of South Africa which contains a provision similar to section 13(3)(l) of our Charter.

[119] Section 24 of the Constitution of South Africa deals with the environment and proclaims the right of everyone—

> *"(a) to an environment that is not harmful to their health or well-being; and*
>
> *(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—*
>
> *(i) prevent pollution and ecological degradation;*
>
> *(ii) promote conservation; and*
>
> *(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."*

[120] There is also express recognition in South Africa's Constitution, as in Jamaica's, that the protection conferred by the right extends for the present to future generations. In this context, both the Constitutions of Jamaica and South Africa

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[25] [2007] ZACC 13

have made sustainable development principles a part of the law. The South African Court, at paragraph 75 of the judgment, said:

> *"…The very idea of sustainability implies continuity. It reflects a concern for social and developmental equity between generations... This concern is reflected in the principles of inter-generational and intra-generational equity which are embodied in … section 24 of the Constitution…"*

[121] **Fuel Retailers** is also similar to the case at bar because the South African Court had to determine the legality and constitutionality of an environmental authority's decision granting approval for a development that posed a significant risk of environmental harm.

[122] The legal framework in South Africa is comparable to that of Jamaica, as South Africa's Environment Conservation Act ("ECA") and the South African National Environmental Management Act ("NEMA") are similar to our NRCA Act. In section 9(5)[26] Under the NRCA Act, the relevant authority must have regard to environmental considerations before granting approval.

[123] In **Fuel Retailers**, the Department of Agriculture, Conservation and Environment in Mpumalanga granted approval under section 22(1) of the ECA to build a filling station on a property in White River, Mpumalanga. Section 22(1) of the ECA prohibits activities that could harm the environment without written approval from the MEC for Agriculture, Conservation, and Environment, as designated by the Minister. The applicant had to submit a report on the environmental impact before approval; the authority may accept or reject it and set conditions. Building a filling station requires authorisation under section 22(1).

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[26] Section 9(5)(b) of the Natural Resources Conservation Authority Act requires the authority, in considering an application for a permit, to "have regard to all material considerations including the nature of the enterprise, construction or development and the effect which it will or is likely to have on the environment generally, and in particular on any natural resources in the area concerned".

[124] The Fuel Retailers Association of Southern Africa, an incorporated organisation, challenged the approval decision on multiple grounds. In determining a mixed case of administrative and constitutional law on the issue of sustainable development, Ngcobo, J, held:

> *"…that under section 24 of the Constitution environmental protection was not limited to trees and water sources* ***but included sustainable development****. Sustainable development was not a policy preference but a constitutional requirement. It required a balance between environmental protection, socioeconomic needs and economic development. Environmental authorities must consider whether the development will contribute to long term sustainability, cause avoidable waste or economic inefficiency and whether the cumulative impacts have been properly assessed. The NEMA had considered the application as one concerning physical environmental harm, such as traffic and noise, and failed to consider whether the development was economically sustainable or unnecessarily duplicative, which was an error, and its failure could undermine sustainability." (Emphasis added)*

[125] Significantly, the Court recognised that economic sustainability is an environmental concern and highlighted sustainable development as a key environmental factor. The learned judge said this of sustainable development:

> *"Sustainable development*
>
> *[44] What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable "economic and social development". Economic and social development is essential to the well-being of human beings. This Court has recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution.*
>
> *But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked. And as has been observed—*
>
> > *"[E]nvironmental stresses and patterns of economic development are linked one to another. Thus agricultural policies may lie at the*

> *root of land, water, and forest degradation. Energy policies are associated with the global greenhouse effect, with acidification, and with deforestation for fuelwood in many developing nations. These stresses all threaten economic development. Thus economics and ecology must be completely integrated in decision making and lawmaking processes not just to protect the environment, but also to protect and promote development. Economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind."*

[45] The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing "ecologically sustainable development and use of natural resources while promoting justifiable economic and social development". Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.

The concept of sustainable development in international law

[46] Sustainable development is an evolving concept of international law. Broadly speaking its evolution can be traced to the 1972 Stockholm Conference. That Conference stressed the relationship between development and the protection of the environment, in particular, the need "to ensure that development is compatible with the need to protect and improve [the] environment for the benefit of their population" The principles which were proclaimed at this conference provide a setting for the development of the concept of sustainable development. Since then the concept of sustainable development has received considerable endorsement by the international community. Indeed, in 2002, people from over 180 countries gathered in our country for the Johannesburg World Summit on Sustainable Development (WSSD) to reaffirm that sustainable development is a world priority.

[47] But it was the report of the World Commission on Environment and Development (the Brundtland Report) which "coined" the term "sustainable development". The Brundtland Report defined sustainable development as "development that meets the needs of the present without compromising

the ability of future generations to meet their own needs." It described sustainable development as—

> *"[i]n essence . . . a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations".*

[48] This report argued for a merger of environmental and economic considerations in decision-making and urged the proposition that "the goals of economic and social development must be defined in terms of sustainability". It called for a new approach to development - "a type of development that integrates production with resource conservation and enhancement, and that links both to the provision for all of an adequate livelihood base and equitable access to resources." The concept of sustainable development, according to the report, "provides a framework for the integration of environment[al] policies and development strategies".

[49] The 1992 Rio Conference made the concept of sustainable development a central feature of its Declaration. The Rio Declaration is especially important because it reflects a real consensus in the international community on some core principles of environmental protection and sustainable development. It developed general principles on sustainable development and provided a framework for the development of the law of sustainable development.

[50] At the heart of the Rio Declaration are Principles 3 and 4. Principle 3 provides that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." Principle 4 provides that "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." The idea that development and environmental protection must be reconciled is central to the concept of sustainable development. At the core of this Principle is the principle of integration of environmental protection and socio-economic development.

…

[54] The concept of sustainable development has received approval in a judgment of the International Court of Justice. This much appears from the judgment of the International Court of Justice in ***Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*** *where the Court held—*

> *"Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of the pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."*

[55] The integration of economic development, social development and environmental protection implies the need to reconcile and accommodate these three pillars of sustainable development. Sustainable development provides a framework for reconciling socio-economic development and environmental protection. This role of the concept of sustainable development as a mediating principle in reconciling environmental and developmental considerations was recognised by Vice-President Weeramantry in a separate opinion in ***Gabčíkovo-Nagymaros****, when he said—*

> *"The Court must hold the balance even between the environmental considerations and the development considerations raised by the respective Parties. The principle that enables the Court to do so is the principle of sustainable development."*

[56] It is in the light of these developments in the international law of environment and sustainable development that the concept of sustainable development must be construed and understood in our law.

…

[78] …Environmental concerns do not commence and end once the proposed development is approved. It is a continuing concern. The environmental legislation imposes a continuing, and thus necessarily evolving, obligation to ensure the sustainability of the development and to protect the environment. As the International Court of Justice observed—

> *"in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage."*

…

[93] Our Constitution does not sanction a state of normative anarchy which may arise where potentially conflicting principles are juxtaposed. It requires those who enforce and implement the Constitution to find a balance between potentially conflicting principles. It is founded on the notion of proportionality which enables this balance to be achieved. Yet in other situations, it offers a principle that will facilitate the achievement of the balance. The principle that enables the environmental authorities to balance developmental needs and environmental concerns is the principle of sustainable development."

International Instruments

[126] Jamaica was a part of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean. This commitment was made at the United Nations Conference on Sustainable Development held in Rio de Janeiro in June 2012. Jamaica was also involved in the negotiations for and later signed the Escazú Agreement on September 26, 2019, a binding regional accord stemming from Principle 10 of the Rio Declaration. Jamaica was the sixth signatory to the Agreement, which has not yet been ratified.

[127] Five of the relevant principles from the Rio Declaration are:

"*Principle 1: Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.*

Principle 2: States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 3: The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

Principle 4: In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

> *Principle 10: Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided".*

[128] Principle 15 of the Rio Declaration states:

> "*In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack or full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."*

[129] Article 3 of the Escazú Agreement lists 11 guiding principles for implementing the Agreement, including: general principles of law (Article 3 (d) good faith); principles of good governance (Article 3 (b) transparency and accountability); principles of classic international law (Article 3 (i) state sovereignty, Article 3 (j) sovereign equality); **principles of human rights law** (Article 3(a) equality and non-discrimination); **principles of environmental law and sustainable development** (Article 3 (e) principle of prevention, Article 3 (f) **precautionary principle**, Article 3 (g) **intergenerational equity**); and principles specific to the access rights regime (Article 3 (h) principle of maximum disclosure).

[130] Justice Amerasinghe in **Bulankulama** spoke of the "progressive shift" from the preventive principle recognised in Principles 6 and 7 of the Stockholm Declaration, which was based on the idea that pollution should be prevented from entering the environment only when it threatens to exceed the environment's capacity and become harmful, holding that the precautionary principle reverses the assumption in the Stockholm Declaration. This principle is accepted in Jamaica's international positions on the environment.

[131] In Jamaica, when Parliament enacted the provision which conferred the right to enjoy a healthy environment, simultaneously with the right to enjoy a productive environment, it must have considered the use of the valuable natural resources Jamaica has been blessed with. Based on the foregoing, I hold that the nature and scope of the right includes the principle and is interconnected with the principle of sustainable development, and that the text of the right in section 13(3)(l) has expressly codified this principle.

[132] In analysing and construing the right to mean intertwined with sustainable development, the Court is not saying that any sector of the economy or industry is to be shut down or excluded from applying for permits related to natural resources, nor is the Court saying that the country's natural resources cannot be extracted (the principle of sustainable use and exploitation of natural resources).

[133] What the Court is saying is that, under the supreme law, development must be sustainable because the Constitution requires the State to balance preserving natural resources for the benefit of both present and future generations (the principle of intergenerational and intragenerational equity) with social and economic development. These economic and developmental objectives should not be seen as competing with environmental rights, as they are compatible and entangled.

[134] To interpret the nature and scope of the right in this way would seem to me to be more in keeping with the text of the provision, the legislative intent and the position in modern international law.

Section 15 of the Charter

[135] This section protects against the compulsory acquisition of property except in accordance with law. It does not permit land to be used as the owner desires it without more. The owner of land is subject to the laws of Jamaica and regulatory controls which restrict land use; this is not the same as expropriation.

[136] Nothing in the relief sought by the claimants or in the conclusion reached by this Court can be viewed as the compulsory acquisition or expropriation of Bengal's land by means of Court order. What is being reviewed in this claim is the permission to carry out the proposed lawful activity within a regulated industry in the desired location.

[137] Section 15 does not transform the permit granted by the Minister into a constitutional entitlement. Nor does it mean that the Court is to elevate private development over environmental protection in balancing the rights of all the parties. To treat section 15 otherwise would distort the meaning of the right within the context of the entire Charter of Rights. It would mean that whenever a regulator or Court prevents an environmentally harmful development, the landowner could recast that refusal as a constitutional deprivation of property, which is not the meaning of section 15.

[138] I accept that the Constitution requires the Court to bear in mind that all the parties have the same rights, and Bengal highlights its property rights in this trial. No Charter right is absolute. Bengal asserts its property rights, but this assertion does not answer the claimants' case because, in this claim, the real question concerns the effect of the action of State organs. Bengal's reliance on section 15 fails.

Whether there is a likely infringement of the right

[139] The claimants are not required to prove that quarry operations have begun or that there is actual pollution of the air or water emanating from or likely to emanate from the quarry operations. Their burden is to show, by evidence, a breach or a likely breach of the pleaded right to the required standard of proof.

[140] Having assessed the evidence raised by the claimants, I find that the oral evidence of the claimants can arguably be accepted as the beliefs and concerns of lay witnesses; they admitted that they were not supported by any independent scientific, medical, financial or other evidence; however, that was not the entirety

of their case. The claimants did not present a case supported by expert evidence they had personally obtained; instead, they relied on the expert evidence presented by the defendants to bolster their case.

[141] The earlier quarry operations are immaterial, as there is no evidence from the environmental regulators before this Court concerning the Cartellone quarry. The line of questioning about competition and that earlier quarry was solely aimed at assigning a motive for bringing the claim which is irrelevant. Mr Sweet's testimony regarding competition reflected his personal belief, just as any evidence of competition from the Hopwoods would have been theirs had it been adduced.

[142] There is evidence that, after the permit process, the Government tabled the Green paper for enhanced protection of the wider Dry Harbour Mountain and Bengal area. Also, there is correspondence from the Ministry of Mining stating that a quarry licence would not be issued based on the Government's intention to designate the area for increased protection. I do not treat that Green Paper or the ministry correspondence as decisive of the issues before the Court, as these came about after the permit had been issued. Still, they form part of the overall record and are consistent with the environmental concerns earlier expressed by the NRCA and the Forestry Department.

[143] To determine the weight to be assigned to the evidence presented by the claimants, the Court is not obliged to choose between their viva voce evidence and the agreed documentary evidence, as all the evidence, when taken together, meets the threshold requirement of proof. I find that the claimants have established by evidence a likely infringement of the pleaded right under section 13(3)(l).

The Oakes analysis

[144] Where a constitutional right has been infringed, or is likely to be infringed, the court must determine whether that infringement is demonstrably justified in a free and

democratic society. The burden is on the party seeking to justify the infringement to satisfy the **Oakes** test to the standard of proof already discussed.

[145] As regards the first limb of the **Oakes** test, I am prepared to accept that economic development, employment, revenue generation, and the productive use of land may, in principle, amount to important and substantial objectives. I also accept that, in some cases, evidence of anticipated economic benefit may not be supported by exact data or statistics, and that an assertion of economic growth has to be projected to some degree.

[146] That is only the first stage of the enquiry, which does not dispose of the issue. It is not enough to say that the proposed development is important. The defendants are still required to demonstrate that the way they chose to pursue that objective was rational, that it impaired the right no more than reasonably necessary, and that the measure was proportionate. It is at those stages that the defendants' justification fails. On this evidence, the defendants face many difficulties which cumulatively fail to surmount the requirements of this limb of the test.

[147] The main challenge here is understanding the rational connection. While there might be a general connection between quarrying and economic activity, that is not the issue. What is really important to understand is whether, given the evidence, approving quarrying on this specific parcel of land was a rational way to achieve that goal without harming people and the environment.

[148] The decision supported development on land where the available evidence plainly showed significant environmental risks and a clear conflict with planning and environmental laws. There was no evidence presented to this Court as to why this proposed development had to happen in that particular locale, what made that parcel of land suitable for quarrying despite the many and varied concerns, or why the Minister approved the permit for that specific location, given this evidence.

[149] The second difficulty is the NRCA's position on the application and appeal, which this Court finds highly significant. The Authority expressly stated that the proposed development should not be approved and identified the likely harm to natural resources and public health. The NRCA relied on section 9(5) of the NRCA Act, which provides that a permit must not be granted where the activity is or is likely to be harmful to natural resources or public health. The position that section 9(5) applied was the NRCA's formal position, the statutory body charged with environmental protection. That position was before the Minister in two separate documents. He was therefore not dealing with a neutral or incomplete record. He was dealing with a record in which the statutory regulator had decisively concluded that the permit ought not to be granted.

[150] The third difficulty is the nature of the Forestry Department's objection, which the NRCA also relied on. The Forestry Department identified the irreplaceable loss of dry limestone forest, the failure of post-quarry reforestation efforts at quarry sites, and the ecological services the forest provides, including habitat, carbon sequestration, oxygen production, and water filtration. These concerns went to the character of the land, the nature of the likely loss, and the inability to restore what would be destroyed. The evidence shows that the risk of environmental harm was serious and that some of the harm likely to be caused could not be reversed. The effect of the grant of the permit was therefore directly relevant to the question of whether the proposed activity could be permitted consistently with the right asserted.

[151] The fourth difficulty is that Bengal's own EIA did not remove those concerns. It reinforced many of them. The EIA described the forest as a vital genetic resource for rare and endemic species. It admitted that the operations would include drilling, blasting, and limestone mining. It recognised that blasting could create hazards by propelling rock fragments into the air, releasing fumes, and affecting nearby communities through dust and deposition. It also recognised habitat destruction for endemic flora and fauna, ecosystem loss, and the vulnerability of the karst

groundwater system. Importantly, it stated that the permitted area lies between two watersheds and that karst systems are particularly susceptible to groundwater pollution because water moves quickly through karst systems and there is little natural filtration. Bengal's own admissions clearly affirm the regulators' objections rather than contradict them. This means the regulators and the EIA all point to some of the same risks.

[152] The fifth difficulty is that the 76 conditions do not cure the problem. They cannot establish a rational connection when the underlying activity is likely to be harmful. Nor do they transform likely irreversible environmental harm into constitutionally acceptable minimal impairment merely by being attached to the permit. At most, they show that the Minister recognised the environmental risks identified by the regulators were serious. But recognition of risk is not the same as justification for authorising the very activity giving rise to it.

[153] The sixth difficulty concerns the defendants' reliance on the 76 conditions attached to the permit. Those conditions undoubtedly show an effort to regulate the activity and to require further steps before operations commenced. However, the number of conditions, or their mere presence, does not answer the constitutional question confronting the Minister. Whether those conditions were sufficient to meet the risks already identified by the NRCA, the Forestry Department, and the EIA is not known to the Court, as there is no evidence that the documentary evidence was outweighed by any independent evidence that the conditions imposed could adequately address the identified risks. The conditions are being treated as self-corroborating by this Court, as they cannot be said to establish a rational connection merely because they are said to address the risks by the issuing body.

[154] The seventh difficulty is that the decision was inconsistent with the planning and zoning law. The St Ann Development Order, derived from the Town and Country Planning Act, establishes a legal framework to protect sensitive areas. The NRCA plainly said that the proposed quarry was not in a quarry zone and would conflict with the development policies for the area. This was specifically pointed out to the

Minister by the NRCA. At the time the permit was granted, the land had not been rezoned, and this was necessary under the law before the permit could be granted to bring the proposed activity within the Development Order.

[155] There was no evidence that the area had been rezoned to permit quarrying. There was no evidence of an amendment to the Town and Country Planning Act, no evidence of any amendment, variation, or lapse of the Development Order, and no evidence that the local planning authority had received an application from Bengal for planning approval. The Minister could not have given directions to the local planning authority regarding Bengal lands in light of this. Therefore, none of the 76 conditions could cure this incurable legal defect.

[156] The conditions attached to the permit could not legalise development that breaches the law. The conditions could not rezone the area, nor could they convert a land use which the planning law did not permit into one which it did. The conditions could not replace the legal protections which zoning controls provide. The legal framework, therefore, remained exactly as the NRCA said it was: the proposed quarrying activity was not authorised by the applicable planning laws.

[157] The Attorney General submitted that paragraph 7(2) of the Development Order authorised the Minister to approve developments even if they conflicted with the policies in the Development Order. I am unable to accept that submission. Paragraphs 7(1) and (2) of the Development Order provide:

> *"(1) Subject to sub-paragraph (2) of this paragraph, no development of land within the area to which this Order applies shall take place except in accordance with this Order.*
>
> *(2) The local planning authority may subject to such conditions as may be specified by directions given by the Minister under this Order grant permission for development which does not appear to be provided for in this Order and is not in conflict herewith."*

[158] These provisions do not authorise development that is inconsistent with the Order itself. Paragraph 7(2) expressly states the opposite. The power only applies where

the development is not in conflict with the Order. The documentary evidence in this case showed that the proposed quarry operations would be inconsistent with policies restricting that type of development in that area. Ms Guthrie admitted that the proposed quarry conflicted with the Development Order. The assertion by Dr Campbell of a National Mineral Policy does not assist and is rejected. No such policy was before the court, and even if it had been, it could not override an instrument having the force of law under the Town and Country Planning Act.

[159] The eighth difficulty lies in the Minister's treatment of the environmental evidence. The concerns before him were considerable and wide-ranging. They covered biodiversity, hydrology, air quality, public health, scenic value, and the impossibility of restoring the lost forest area despite any post-quarry rehabilitation efforts. The NRCA is the body charged by law with environmental protection; its contemporaneous assessments, therefore, carried substantial weight.

[160] This court is not saying that the Minister was bound to agree with the NRCA. But once he chose to disagree with the Authority's considered conclusion, there had to be a clear, evidence-based, reasoned justification for doing so. There had to be something in the materials explaining why the Authority's conclusion under section 9(5) was wrong, overstated, or sufficiently answered. There is no such reasoning before the Court. The Minister hearing the appeal remained bound by the Constitution while performing his statutory role under section 35 of the NRCA Act. It was his responsibility to give this court the opportunity to examine the reasons for his decision, because legal validity grounded in technical advice is distinct from constitutional validity grounded in the law.

[161] The ninth difficulty is that, based on the evidence, the 76 conditions seem to be an attempt to manage risk after the regulators had already determined that the risk was not sufficiently mitigated on paper. The evidence indicates that the NRCA and Forestry Department warned that the mitigation measures for the forested areas were inadequate. If the conclusion was that the proposed measures were

insufficient, then imposing conditions after the grant of the permit requiring Bengal to take additional steps could not justify granting it.

[162] In these circumstances, the permit, in effect, authorised the activity that was deemed harmful. Many of the conditions mandated additional plans, future compliance, and further approvals—regulations to be followed after the permit was granted—but the law requires that applications are approved only when regulators are satisfied beforehand, not afterwards. These conditions also do not address whether the permit should have been granted in the first place.

[163] The tenth difficulty is that the Minister, in substance, delegated the sustainable development enquiry that the Charter required him to address. Under section 35 of the NRCA Act, it was the Minister who was required to satisfy himself that the permit ought to be granted. The NRCA had already consulted the relevant agencies and considered their recommendations. In this case, by granting the permit subject to Bengal's obtaining further approvals before commencing operations, the practical effect was that other State agencies were being left to supply, after the grant, material which was already available before the grant. The permit was granted before the very matters said to justify it.

[164] That was problematic for another reason. A proposed development may satisfy the technical requirements of other agencies and yet still fail from an environmental standpoint. Section 4 of the NRCA Act assigns to the Authority responsibility for the management, development, conservation, and care of the environment, and section 4(d) requires it to advise the Minister on matters of general policy relating to those subjects. Environmental advice and objections needed to be considered prior to approval, not afterwards. The permit was granted before the materials justifying it were provided.

[165] In her affidavit, Nicole O'Reggio said that she believed the 76 conditions were arrived at after consultations with various stakeholders, taking into account the environmental concerns they had raised and seeking to address them with

recommendations. That evidence does not resolve the defendants' difficulty. Any such technical recommendations had to meet the NRCA's requirements. There is no evidence that anything had changed in the evidential record save that on appeal, the Minister granted the permit. Her affidavit does not identify any new environmental assessment, any revised regulatory recommendation, or any evidence showing that the earlier objections brought by the various stakeholders had been resolved or withdrawn.

[166] For all of these reasons, I conclude that the defendants have provided no evidence demonstrating a rational connection between the decision and the restriction of the right. I find that the rational connection is too weak to materially advance the issue of justification.

[167] The defendants also fail on the ground of minimal impairment. Less harmful alternatives existed. The Minister could have upheld the NRCA's refusal, required further studies or further scientific evidence showing that the identified risks could genuinely be mitigated before the permit was granted. There is no evidence that he sought an independent expert who having reviewed the EIA and other materials, proposed the 76 conditions that the NRCA then accepted. Instead, the permit was granted first, and the unresolved objections were left to be dealt with later through conditions.

[168] A condition that cannot realistically be fulfilled is not a safeguard. The conditions were based on the assumption that the identified risks could be managed, but the NRCA and the Forestry Department had already concluded otherwise. In that context, the assumption was erroneous, and the conditions did not reduce the impairment to what was reasonably necessary. They merely attached future obligations to a permit that, from the evidence, ought not to have been granted.

[169] The NRCA itself could have imposed conditions when it first considered the application, had it thought conditions were enough to prevent the identified risks of harm. It did not do so; rather, it recommended refusal of the permit and dismissal

of the appeal rather than mitigation by conditions. That is an important unchallenged fact. It shows that the Authority did not regard conditional approval as a satisfactory response to the environmental risks.

[170] Given that the Minister had been advised of the sensitive nature of the area, it was open to him to insist that the NRCA and Forestry Department be satisfied before the proposed development proceeded and, if they were not, to refuse the appeal. On the evidence, the defendants have therefore failed to establish that the limitation impaired the right no more than was reasonably necessary.

[171] The defendants also fail on proportionality. At this point in the test, the Court must weigh the benefits of the measure against its harmful effects. The benefits asserted by the defendants relate to economic development, employment, and the productive use of private property. Those may be legitimate objectives. On the evidence in this case, the balance favours the protection of the asserted constitutional right. The benefits advanced by the defendants were broadly economic and developmental, but they were general and unquantified. The risk of harm, by contrast, was serious, permanent, and supported by evidence. In this case, the regulators' evidence weighed heavily, and the Court cannot conclude that the alleged economic advantages outweighed the likely environmental harm. In light of this, the Court cannot treat the claimants' and defendants' statements of case as equally supported by the evidence.

[172] The right under review includes sustainable development in its construction and application. This means that the environment and development are not on opposite sides. Development must proceed in a manner consistent with the protection of the environment and the rights protected by the Charter. The proportionality limb has therefore not been demonstrated.

[173] This judgment does not represent judicial opposition to development. It affirms that development must proceed in accordance with the Constitution and the law. This Court is responsible for enforcing the Constitution. The environmental authorities

are responsible for protecting the environment and for balancing the conflicting principles of development and environmental protection.

Liability

[174] The constitutionality of the Minister's decision to grant the permit would be required to pass the proportionality test approved by the Privy Council in **The Attorney General v The Jamaican Bar Association**[27] The claimants established, by evidence, that under the Charter their rights are likely to be breached as a result of the Minister's decision.

[175] A policy is what the government wants to do. A law has to be obeyed. The defendants cannot say, "this is our policy," and use that to limit a constitutional right. No law or policy can provide a statutory defence to circumvent the supreme law, which is the Constitution. The Minister's decision impacted the NRCA despite its objections. The NRCA authorised the activity, which is likely to breach the right, by issuing the permit. A decision which has the effect of bypassing the law means the limit on the right cannot be said to be one based on law; it is one based on choice. This is constitutionally impermissible.

[176] Neither the Attorney General nor NRCA provided any evidence that the likely breach is demonstrably justified in a free and democratic society. The actions of the State organs in this claim are found to be likely to contravene the right under review. The claimants are therefore entitled to constitutional relief against the Attorney General and NRCA.

[177] The claim was brought against Bengal because, under the Constitution, private individuals or juristic persons can be sued via the Charter's horizontal application in section 13(2). The claimants demonstrated that Bengal is, both in fact and in

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[27] [2023] UKPC 6 at paras. 76 and 77 (derived from the Canadian case of **R v Oakes** [1986] 1 SCR 103).

law, subject to the Charter with respect to the right likely to be breached. This is because any activities arising from the challenged permit would be carried out by Bengal. Bengal applied for the permit, and the permitted activities (including adherence to imposed conditions) were shown to be the very actions likely to breach their constitutional rights. The claimants are therefore entitled to seek constitutional relief against Bengal.

[178] The Charter expressly protects environmental rights and the environment itself. The claimants have established a likely breach of their right under section 13(3)(l). The defendants have failed to show that the limitation is demonstrably justified in a free and democratic society, and I so find. Given the conclusion of the Court, it is unnecessary to discuss the other pleaded rights which were not seriously pursued by any of the parties.

Remedies

[179] A declaration without consequential relief would be inadequate in this case. The constitutional breach found by the Court was inherent in the Minister's decision to allow the appeal and in the resulting permit. The appropriate remedies are the grant of a declaration and an injunction. The evidence speaks repeatedly of likely irreversible harm. The Court finds that the permit is unconstitutional; thus, this Court will restrain mining or quarrying pursuant to it.

[180] I do not consider this an appropriate case for vindicatory damages. I agree with the decisions of my learned sisters on vindicatory damages.

[181] Costs should follow the event. Given the public-interest character of the proceedings, the Court will hear submissions on paper as to the precise form of the costs order, including whether costs should be awarded on the indemnity basis.

THOMAS J

[182] While for the most part, I agree with the decision of my learned sisters, I wish to add a few comments of my own.

[183] The claimants in this matter reside or have proprietary interest in the Bengal Area of St Ann. The 2nd Defendant, the Natural Resource Authority Conservation Authority (NRCA), is the entity established under the **Natural Resources Conservation Authority Act ('the NRCA Act')** with the primary function of protecting Jamaica's environment, and the conservation of it natural resources. It is also empowered by the ***NRCA Act*** to grant or refuse applications for permits for mining and quarrying, inter alia, on certain lands. The Act also makes provision for persons who are dissatisfied with the decision of the NRCA to appeal to the Minister of Economic Growth and Creation (the Minister). The 3rd Defendant, Bengal, is a registered overseas company which, by virtue of its registration under the ***Companies Act of Jamaica***, is permitted to carry on business in Jamaica. It is the registered proprietor of land situated in the Dry Harbour Mountain, Discovery Bay, in the parish of Saint Ann.

[184] In 2000, an area of land, to include the Dry Harbour Mountain, in St Ann was zoned for special protection by the ***Town and Country Planning (St Ann Parish) Provisional Development Order, 1998***. This was confirmed in January 2000 by the ***St Ann Confirmed Development Order, 2000*** ('the zoned area').

[185] On the 3rd of March 2014, Bengal submitted an application to the NRCA for a permit to engage in mining and quarrying activities on a portion of its lands. When the application came up for consideration, the NRCA requested Bengal to conduct an environmental impact assessment (EIA) in relation to the proposed site and provide them with that report. Residents and stakeholders in the surrounding areas of the proposed site, including the claimants, having been made aware of Bengal's application, raised concerns about the proposed mining and quarrying

operations. They signed letters objecting to any grant of a permit to Bengal's application.

[186] In a letter dated May 8, 2020, the NRCA informed Bengal of its refusal to grant the permit they requested. The said letter outlined the reasons for refusal. Among the reasons cited are (i) "The proposed development is contrary to the provisions of policies UC4 and UC5. The St. Ann Confirmed Development Order, 2000; (i) The area is not a designated quarry zone. (iii)A quarry of this nature, size, scale and intensity will have a **deleterious impact on public health and on the environment.**

[187] Bengal in the exercise of its rights under **section 35** of the ***NRCA Act*** appealed the decision of the NRCA to refuse its application to the Minister. Having considered the appeal, the Minister allowed the appeal paving the way for the issuance of an environmental permit (herein after referred to as the permit) to Bengal to undertake mining and quarrying on the proposed quarry site. This permit was issued on the 5th of November 2020. It was thereafter amended on the 17th of December 2020. The permit was granted subject to 76 conditions being satisfied by Bengal.

[188] The claimants in the instant case have brought this claim against the defendants, contending that the Minister's action in overriding the NRCA's decision, allowing Bengal's appeal, thereby authorising the issuance of a permit to Bengal to carry out mining and quarrying operations, is likely to breach their constitutional rights to:

> "Enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage" – (section 13(3)(l) of the Constitution);

"Reside in any part of Jamaica – (section 13(3)(f)(ii) of the Constitution); and protection from degrading 'other treatment' – (sections 13(3)(o) and (6) of the Constitution.)

Issues

[189] The main issues which I will comment on are:

1. Whether the issuance of the permit by the Minister to Bengal to engage in quarry operations at the proposed site is likely to breach the claimants' constitutional rights

2. If issue (i) is proven, whether such a breach is demonstrably justified in a free and democratic society.

3. If (ii) is not proven, whether the permit is null, void and of no effect.

4. Whether the Claimants are entitled to damages

The Law

[190] Section 19 of the Constitution is the provision that gives a citizen the right to invoke the power of the court on his or her behalf to uphold rights guaranteed by the Constitution. The provision allows actions to be brought where any of the fundamental rights and freedoms guaranteed by the Charter of Fundamental Rights and Freedoms under the Constitution "has been or is likely to be contravened in relation to him." The provisions of Section 13(1) (a) place an obligation on the State to "promote universal respect for and observance of human rights and freedom." The provisions of Section 13 (i) (b) endow all persons in Jamaica with the entitlement to "to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society"

[191] The claimants' standing in this matter is established by virtue of them being residents and or being persons with business interest in the area, but more importantly, as citizens of Jamaica, they derived the right to bring a constitutional challenge to a decision of the State in a matter that touches and concerns the public interest. The court, in the case of **Dayton Campbell v the Attorney General**, [2025] JMFC Full 2, the Full Court explains that any citizen can raise a constitutional challenge to a decision of a public authority, in the public interest, as the benefit will not only be that of the claimants but also of the wider public. In the instant case, the nature of the pleadings is such that it can be described as a public interest litigation. That is, considering the fact that the benefits of the protection of Jamaica's ecological heritage extend to the wider public.

[192] There is no dispute between the parties that the rights that the claimants have alleged, that are in danger of being breached by the Minister's orders, are rights that are guaranteed by the Constitution, "to the extent that these rights and freedoms do not prejudice the rights and freedoms of others". (See Section 13 (1) (c)). It is also not in dispute that, as it relates to the aforementioned rights and freedoms "save only as may be 'demonstrably justified in a free and democratic society, Parliament is prohibited from passing any law; and organs of the state are prohibited from taking any action which abrogates, abridges or infringes these rights". (See Section 13 (2))

Burden and Standard of Proof

[193] In this case, as in all constitutional claims involving the derogation of citizens' rights by the State, the burden of proof is twofold. In the first instance, the burden lies on the individual alleging that his or her rights have been or are about to be infringed to prove, on the balance of probabilities, that the defendants' actions have or will result in a contravention of his or her constitutionally guaranteed rights. In the case of **Julian Robinson V The Attorney General** [27] the Chief Justice opined that the claimant's burden lies at the lower end of the scale. The court also held the view

that a purposive and generous interpretation should be applied to the constitutional provisions.

[194] In the case of **Attorney General and another v The Jamaican Bar Association**, [2023] UKPC 6, the issue before the court was whether certain aspects of the **Proceeds of Crime Act**, which by **Affirmative Order** under section 4 ("**the Attorneys Order**"), became applicable to attorneys-at law, breached theirs and their clients' guaranteed rights of privacy, liberty and freedom from search without demonstrable justification. In addressing the burden and standard of proof, their Lordships at paragraph 26 had this to say:

> *"... both the Full Court and the Court of Appeal approached their task by the application of the principles set out in the decision of the Canadian Supreme Court in* ***R v Oakes [1986] 1 SCR 103****. In short, the burden of establishing that legislation derogates from a constitutionally guaranteed right lies on the claimant for redress, whereas the burden of establishing demonstrable justification lies on the State."*

[195] Therefore, as it relates to the issues in the instant case, this court must first determine whether the claimants have proven on a balance of probabilities that the effect of the permit issued under the Minister's authority to the 3rd defendant is likely to breach their rights as alleged. If the likelihood of breach is established , the burden then shifts to the defendants to justify their actions. The burden on the defendants to justify their actions will be at the higher end of the spectrum.

Whether the Claimants have proven on a balance of probabilities that their Constitutional Rights are Likely to be infringed

[196] The claimants, in asserting that their rights are likely to be infringed if mining activities are allowed to be embarked upon under the permit issued by the NRCA under the directions of the Minister, have placed reliance on documentary evidence authored by State entities, as also by the defendant Bengal. Ms Wendy

Lee, in particular, has stated that, in addition to a mixture of studies by herself and independent persons, she places reliance on the letter of the Forestry Department (a State Agency) objecting to the grant of the permit to Bengal, Bengal's EIA and the NRCA Report. On cross-examination, she asserts that: "Even the Forestry Department has said that the impacts of the quarry on the forest ecosystem cannot be mitigated"

[197] Both counsel for the 1st and 3rd Defendants are of the view that the claimants have placed no evidence before the court which is capable of establishing that their constitutional rights are likely to be infringed by the action of the Minister. However, in my view, it is perfectly acceptable for the claimants to rely on assertions of the State agencies and Bengal, which can be considered as an acknowledgement by each of these entities of the likely negative impact of the proposed mining activities on their constitutional rights. As such, I view the examination of the content of these documents as a crucial determinant to the resolution of the issues under consideration.

[198] The NRCA's reasons for its initial refusal to grant the permit to Bengal, reasons which were also maintained in its Appeal Report to the Minister, are outlined as follows:

> *"1. The proposed development is contrary to and not in keeping with the provisions of the* ***St. Ann Confirmed Development Order, 2000****. More* ***specifically, policies UC4 and UCS****.*
>
> *2. The area is not a designated quarry zone*
>
> *3. A* ***quarry of this nature, size, scale and intensity*** ***will have a deleterious effect on the environment in general and the surrounding uses. The impact and loss of biodiversity and natural resources in an area of environmental significance and unique biodiversity is irreplaceable. The quarry is located in an area that has porous***

limestone and is part of two watersheds*, the underground hydrology will be impacted.*

4. ***The development will exacerbate the air quality, impacts on the air shed.*** *Also, the development* ***may*** ***have a deleterious impact on public health particularly from dust*** *and noise generation.*

5. The unprecedented number of objections received from residents who reside in the surrounding areas as well as stakeholders with particular interests in the area.

6. The comments from key partner, the ***Forestry Department*** *that while, the environmental impact assessment* ***"explores the impact of the quarrying operations it does not propose feasible and effective mitigation*** *measures* ***geared towards minimizing the overall negative impact of the quarry*** *on the forested areas" (Emphasis mine)"*

[199] In its letter in which it expressed strong objections to the grant of the permit; commented on the inadequacy of the proposed mitigations measures outlined by Bengal in its EIA; the Forestry Department noted inter alia:

"The EIA touched on the activities and expected negative impacts that could reasonably be expected if the proposal was implemented as is, as well as preferred alternatives. However, except for the No. Action Alternative (section 8.2), ***all the proposed responses will result in significant, If not, total loss of forest cover, species loss and by extension habitat loss and degradation of the existing landscape****. (emphasis mine)*

Mention is made of the reforestation / re-vegetation efforts post commissioning of the quarry. ***Historically we have yet to see a quarry site that has been decommissioned and successfully reforested / adequately re vegetated.*** *This is due to several factors, key among them*

being the fact that the substrate material 5 ran limestone and is essentially devoid of organic material, the likelihood of a successful restoration initiative being undertaken, which results in the survival and establishment of the planted species, is extremely low." (emphasis mine)

[200] In its Environmental Impact Assessment Report in support of its application to the NRCA for the grant of the permit, titled "***Environmental Impact Assessment revised Final No.3 dated May 2019, by Bengal Development Ltd***", certain assertions of Bengal are relevant to these discussions. I will highlight those I consider most significant. Under the caption "***6.1.1 Air Quality***. The report noted that:

"Site preparation has the potential to 2 folded direct negative impact on air quality. The first impact is air pollution generated from construction equipment and transportation. The second is fugitive from dust from the proposed construction area and raw material on site "Fugitive dust has the potential to affect the health of construction workers the resident population and the vegetation"

[201] Under the caption **6.1.3.2, Health and Safety Concerns**, it noted that

"Fugitive dust has the potential to affect the health of the resident population"

[202] Further under the caption 6.2.1.3 Rock Blasting, Bengal reported that:

"Blasting is expected to occur. As a result:

"Fragments of rocks will be propelled into the air by explosions on site These rocks will create hazards if they are propelled into nearby residences resulting in harm or death. Fumes (toxic and non-toxic) are released into the atmosphere as a result of using explosives for blasting.

Residences may be temporarily affected by dust and fumes within 100 metres. Deposited dust may affect local residents as cars, homes or any surfaces may have visible deposition".

[203] It is apparent from the contents of the afore-mentioned documents that not only NRCA and the Forestry Department but Bengal themselves have admitted that the proposed quarry operations have the potential, not only to adversely affect the health of persons residing or conducting business in the area, but also to have a detrimental effect on the ecosystem. There are palpable admissions that.

[204] Fugitive dust has the potential to affect the health of the resident population. Blasting operations are expected to result in the propelling of fragments of rocks, which will create hazards resulting in harm or death if propelled into nearby residences. Toxic fumes are expected to be released into the atmosphere as a result of using explosives for blasting. The impact and loss of biodiversity and natural resources in an area that is of environmental significance and has unique biodiversity is **irreplaceable**.

[205] Consequently, in my view these are sufficient materials on which it can be found that there were acknowledgements on the part of the defendants that the proposed mining activity under the permit issued under the authority of the Minister is likely to breach the constitutional rights of the claimants; and in particular the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage, guaranteed by section 13(3)(l) of the Constitution.

[206] The defendants deny that the proposed quarry and the mining activities that the 3rd Defendant is permitted to carry out by the issuance of the permit are likely to breach any constitutional right of the claimants. The Attorney General submits that the claimants have not advanced any evidence in support of the claim that the permit subject to the 76 imposed conditions has infringed any of the constitutional rights alleged or is likely to infringe these rights. Counsel further argues that the

claimants have not provided any evidence to prove the implications and the impact on the environment if the activities permitted by the permit, subject to the 76 imposed conditions, are undertaken, such that it will infringe their constitutional rights.

[207] Counsel for the third defendant asserts that there are two competing constitutional rights at play. These, he submits, are (i) the right guaranteed under section 15 and the rights under section 13. However, on my examination of the provisions of the Constitution, I share the view of King's Counsel Mr Hylton that the right that is guaranteed under section 15 is the right to the ownership of property. ***Section 15. (1)*** provides:

> *"No property of any description shall be compulsorily taken possession of and no interest in or right over property of any' description shall be compulsorily acquired except by or under the provisions of a law that-*
>
> *(a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and*
>
> *(b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of-*
>
> *(i) establishing such interest or right (if any);*
>
> *(ii) determining the compensation (if any) to which he is entitled; and -*
>
> *(iii) enforcing his right to any such compensation"*

[208] However, **Section 15 (3),** clearly makes provision for restriction on the use of property. The section reads:

> *"(3) Nothing in this section shall be construed as affecting the making or operation of any law so far as it- makes such provisions as are reasonably required for the protection of the environment; or*

(b) provides, for the orderly marketing or production or growth or extraction of any agricultural product or mineral or any article or thing prepared for the market or manufactured therefor or ***for the reasonable restriction of the use of any property in the interests of safeguarding the interest of others*** *or the protection of tenants, licensees or others having rights in or over such property.*"

[209] There is nothing on the claimants' case that can be construed as a challenge to the right of Bengal to assert ownership over its property. The challenge that the claimants have mounted against the issuance of the permit is an objection to use, and not ownership. Counsel himself has acknowledged in his submissions that there is no unlimited right of use to property that is guaranteed under the Constitution.

[210] In essence, the right to use property as one chooses is not a guaranteed right under the Constitution but is subject to restrictions imposed by State law for objectives recognised by the Constitution. In fact, it is by virtue of **section (15) (3)(a)** and **(b)** that the State derives the constitutional authority to; pass legislation such as the **NRCA Act,** the **Town and Country Panning Act**; to promulgate provisions such as the **Development Orders**, to declare ESA(s): to establish the NRCA and NEPA. Essentially, a constitutional challenge could not have been mounted on the mere fact of the NRCA's refusal to grant the permit for quarry operations, as there is no constitutional right to operate a quarry.

[211] Counsel has also placed much emphasis on the fact that the 3rd defendant has not yet obtained a licence, suggesting that the claimants had the option of filing an objection to the Minister of Mining for him to refuse the grant of the licence. However, considering the fact that the grant of the permit, is the first step to obtaining the licence, it is my view that once steps have been initiated, in a process, which if allowed to continue, will result in a breach of the claimants' constitutional

rights, the requirement under the constitutional provision of “likely to be contravened “under section 19 has been satisfied.

[212] In essence, the claimants did not have to await the actual breach once there was evidence that initial steps had been taken. Counsel raised the points that the claimants have produced no medical evidence or scientific evidence of the impact the proposed quarry would have on their health. However, while medical or other scientific evidence may have bolstered the claimants’ case, as I have previously indicated, in the face of previous acknowledgement from the defendants that an adverse effect on health is a likely consequence of the proposed quarry, there is no necessity for the claimants to produce other evidence to establish that which had already been confirmed by the defendants.

[213] Another point raised by Mr Dabdoub is that the Hopwoods have failed to establish that the operations of the proposed quarry would have any negative impact on their health, as Mr Hopwood admits that their residence is not in close proximity to the proposed quarry. However, the unchallenged evidence of Mr Hopwood is that they own and operate a farm close to the proposed quarry site. As such, they are persons who are likely to suffer harm or injury to their health. from the adverse effects of the proposed quarry. Counsel is also relying on the fact that Mr Hopwood admitted that a Jose Cartelone operated a stone quarry on the said land and that he never objected to this operation.

[214] In my view, this is not a relevant consideration before this court. There is no evidence that the size scale and nature of the previous quarry were the same as the proposed quarry. Additionally, the fact that a breach of a citizen’s constitutional right occurred without any objections being raised is no justification or defence, where the citizen seeks to assert his right against another breach or continuation of the previous breach.

[215] Nonetheless, my own view accords with that of Mr Hylton, that in submitting that the claimants have failed to present “any credible evidence that the Minister’s

decision is not justifiable in a free and democratic society", counsel Mr Dabdoub has misconstrued the principle applicable to the burden of proof in constitutional claims dealing with the derogation of the State from an individual's constitutional rights. In my discussion on the burden and standard of proof, I have already highlighted the authorities which establish that the claimants have proven that their rights are likely to be infringed, it is the burden of the state to prove that the Minister's actions are demonstrably justified and not that of the claimants to disprove that the actions of the Minister are demonstrably justified in a free and democratic society.

[216] Counsel also posits that "in acting in accordance with this statutory framework the minister must be presumed to have taken into account all factors such as the public interest the environment health ecological heritage and in doing so creating a balance between the constitutional rights of both the claimants and a third defendant that ensuring that the rights and freedom of the claimants do not prejudice the right and freedom of this third defendant" In asserting the principle of the maxim omnia praesumuntur rite esse acta, he relies on the case of **The Attorney General v Danhai Williams** [1977] UKPC 22.

[217] In that case, Mr Williams challenged the validity of a warrant issued to a member of the JCF to search his premises under the **Customs Act**, on the basis that the search breached his constitutional right to freedom from search of his person or property except with his consent. The warrant gave the officer the authority to "search persons and to seize articles" However, no individual was searched, and there was no mention of the search of persons in the Act.

[218] Items to include, a cellular phone, and pocket calculators were seized. One of issues raised before the court was whether the justice had before him information upon which he could have been satisfied that the police officer "had reasonable cause to suspect." On the face of the warrant, there was a recital of the Justice of the Peace that he was "satisfied that there was good reason to believe the unaccustomed goods were on the premises." It was contended that the warrant

had no express reference to the statutory power under which it was issued and that it purported to authorize the search of people upon premises when the section conferred no such power. It also authorized the seizure of goods and other articles when the section refers to books and documents. The question was whether these matters affected the formal validity of the warrant. The Constitutional Court found that despite this, the warrant was validly issued. The Court of Appeal ruled that the warrant was invalid.

[219] The Privy Council decided that, the reference in the warrant to the search of persons, which was not mentioned in the provision under the Act, and the seizing of items not listed in the relevant provisions, did not render the warrant invalid so as to make the seizure of the items that fell within the scope of the Act and mentioned in the warrant unlawful, so as to take it out of the scope of the exception within the constitutional provision. That the right that was being asserted was subject to the limitation that freedom can be restricted "in the interest of public revenue" and for the purpose of detecting a crime.

[220] It was within this context that their Lordships urged at paragraph 44 that:

> *"Although the court may sometimes feel frustrated by their inability to go behind the curtain of the recital that the justice was duly satisfied and to examine the substance of whether reasonable grounds for suspicion existed the lordships think that it would be wrong to try to compensate by creating formal requirements for the validity of a warrant which the statute itself does not impose."*

[221] The maxim "omnia praesumuntur rite esse acta, expressed as the presumption of regularity, that is, the presumption that decisions are validly made, is a foundational common law principle generally applied in administrative and probate law. In public law, as in the aforementioned case, it is generally raised in circumstances where the correctness of a procedure adopted by a public authority is being challenged. The essence of the presumption simply stated is this, in the

absence of evidence to the contrary (a) something which should have been done was in fact done, (b) it was done applying the correct procedure. (See also the case of **Mordue v Secretary of State for Communities and Local Government and others** [2015] EWHC 539 (Admin) at page 47).

[222] In the instant case, there is no assertion from the claimants that the Minister acted ultra vires his powers under the Act. The substance of their claim is that, despite he being vested with the power under the NRCA Act to make the decision that he did, when that decision is put into effect, it is likely to breach their constitutional rights. Considering the fact that the regularity of the decision of the Minister is not being challenged, I subscribe to the view of King's Counsel Mr Hylton that the principle of the presumption of regularity is not applicable in these circumstances.

[223] In fact, in the case of **Attorney General and another v The Jamaican Bar Association**, at paragraphs 24 to 26, the Judicial Committee of the Privy Council cautioned against heavy reliance on this principle in light of the fact that the constitution placed on the State the burden of proving that any derogation from a citizen's right is demonstrably justified. The court made the observation that:

> *"24. An application to the court for redress under section 19 of the Constitution of Jamaica, based on an allegation that legislation violates rights and freedoms guaranteed by the Charter without demonstrable justification, usually requires the court to engage in two processes of interpretation (which may be iterative) and (if justification is alleged) a process of legal evaluation. All those processes require to be undertaken in context, and there may be disputes of fact about that context, although not in these proceedings. The general principles to be brought to bear for this task are clearly set out in the recent opinion of* ***the Board in Day v Governor of the Cayman Islands*** *[2022] UKPC 6 at paras 34-38 and need no repetition*

25. Both the Charter and the allegedly offending legislation must each be interpreted to ascertain whether there is any incompatibility between them. For this purpose there is no particular magic in interpreting one before the other. The process may be iterative in the sense that, for example, an apparent incompatibility may be resolved by a further analysis of the meaning of the legislation so that in the case of some ambiguity an interpretation which gives rise to no incompatibility may be preferred over one which does.

26. "It is in this context that recourse to the presumption of constitutionality originally established in ***Hinds v R*** *(1975) 24 WIR 326, [1977] AC 195 (namely that Parliament is not lightly to be taken to have intended to legislate in disregard of constitutional rights) may be of some assistance. But since the Constitution preserves the right of Parliament to derogate from the rights and freedoms guaranteed by the Charter where to do so is demonstrably justified this presumption needs to be used, if at all, with some caution".*

[224] Pertinently, however, is the fact that the defendants are relying on the provisions of the **NRCA Act** in support of their position. It is not in dispute that the claimants have raised no challenge to the constitutionality of this legislation. A detailed examination of the **NRCA Act** reveals the following: While acknowledging the need for economic growth and development, it establishes procedures for the proper safeguards for the protection of the environment, guaranteed by the Constitution.

[225] Of relevance to the instant case is that while the **NRCA** is given a general discretion under **Section 9(6)** to grant a permit subject to conditions; or refuse the grant of a permit; under **section 9 (5) (b)** it has absolutely no discretion to grant a permit if it is satisfied that the activities to be carried out relative to that permit would injure public health and the natural resources. The relevant sections read:

"9 (5) In considering an application made under subsection (3) the Authority-

(a) shall consult with any agency or department of Government exercising functions in connection with the environment; and

(b) shall have regard to all material considerations including the nature of the enterprise, generally, and in particular, on any natural resources in the area concerned,

And the Authority shall not grant a permit if it is satisfied that any activity *connected* ***with the enterprise, construction or development to which the application relates is or is likely to be injurious to public health or to any natural resources****. (emphasis mine)*

(6) The Authority may -

(a) grant a permit subject to such terms and conditions as it thinks fit; or

(b) refuse to grant a permit, and where the Authority refuses to grant a licence it shall state in writing the reasons for its decision and inform the applicant of his right under section 35 to appeal against the decision"

[226] In my view, this provision reinforces the constitutional protection that the NRCA, in the execution of its mandate, must not only acknowledge but also give due regard to. Having examined the NRCA's appeal report, it is apparent that its decision to refuse the issuance of the permit to Bengal was not one that was arrived at lightly but one in which much time and effort were invested. There were consultations, discussions, and investigations involving relevant stakeholders to include the claimants and Bengal. The decision was not arrived at on a preliminary investigation, but after a comprehensive in-depth investigation. There is no indication that any report, scientific or otherwise, was ever adduced to

challenge or refute the NRCA's Report, and as aptly pointed out by Mr Hylton, the NRCA has to date not resiled from this position.

[227] In opposing the claim, counsel for the 1st Defendant relies on the case of **Ashton Evelyn Pitt v The Attorney General of Jamaica and Ors** [2018] JMFC Full 7. However, that case is easily distinguished from the case at bar. In that case, the claimant, Mr Pitt, was a resident of, and the registered proprietor of three parcels of land adjoining the defendant's property in Llandilo, Westmoreland. The claimant sought to challenge the decisions of the NRCA and the Town and Country Planning Authority to grant approval to the defendant, Mr Andrew Williams, which allowed him to construct and operate a petroleum storage and dispensing facility as well as a block manufacturing facility on is property neighbouring that of the claimant. One of grounds on which Mr Pitt, based his challenge was that in issuing the permit the State agencies breached his rights pursuant to sections **13(3)(g); 13(3)(h); 13(3)(j)(ii); 13(3)(l) and 13(3)(q), r, of Chapter III of the Jamaican Constitution**.

[228] At paragraph 11, the court made the observation that:

> *"The development is guided by the Town and Country Planning (Westmoreland Parish) Development Order (Confirmed), 19781. Based on this Order, NEPA (through its unit, the Development Assistance Committee) took the view that the proposed site for the development was not zoned for any specific use and, as such, there were no zoning restrictions on the type of development that could be allowed. Pursuant to the said Order 2, applications for developments in unzoned areas are to be given individual consideration."*

[229] The distinction is this, in the case at bar, the Development Order of 1999, which was confirmed in 2000, restricts certain kinds of activity in the area in issue. It prohibits any activity that would significantly alter the existing natural topography of undeveloped coastal areas to protect their physical character and natural

beauty. It also prohibits developments negatively impacting the ecological integrity of the coastal forest. It specifically restricts activities that remove significant forest cover or damage biodiversity. (See Policy UC 4 and UC5).

[230] This is, in fact, one of the grounds on which the NRCA based its refusal to grant the permit, prior to its decision being overturned by the Minister on appeal. . In the **Pitt** case, in assessing the claim under **section 13(3(1) of the Constitution**, that is, the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage, at paragraph 130, the court noted that

> *"The whole thrust of the Natural Resources Conservation Authority Act and the establishment of NEPA is a thrust towards sustainable development and laws that should operate to protect the environment, if the proper procedures and guidelines are adhered to. As mentioned previously, the permits reflect that certain environmental issues were taken into consideration by the authorities to ensure a certain level of protection and safety for the residents. These can be categorized as substantive rights. In relation to procedural rights, the claimant had access to information and the claimant's presence in the court speaks to access to justice".*

[231] In my view, in the instant case, in their initial refusal to grant the permit, the NRCA was adhering to its mandate to strike the appropriate balance between protection of the environment, while not stifling sustainable development, when having assessed the relevant considerations, including the environmental issues, and weighed the relevant factors, including the likelihood of the negative impact on the health of the residents they concluded that granting the permit" will have a deleterious effect on the environment" and made the informed decision to deny the request.

[232] It is clear that they were of the view that even the implementation of procedures and guidelines would not have alleviated the negative impact, hence their refusal

to grant the permit. They equally presented this argument to sustain this position on appeal. There is no indication that any of the defendants, whether before the Minister or in these proceedings, have raised any issue that there was any error in the findings of the NRCA or the Forestry Department. In **Ashton Evelyn Pitt v The Attorney General of Jamaica and Ors**, the court found that no evidence was presented that toxic material had been or was likely to be deposited in the soil. At paragraph 133, the court stated:

> *"… based on a common concept of substantive and procedural rights, it is certainly not evident that the claimant's rights under this section have been breached. There is no evidence that toxic material has been or is likely to be deposited in the soil, air and waterways in the environment around the development. Dr Kerrine Senior has given unchallenged expert evidence in this regard as to the nature of LPG. The permits also speak to ongoing monitoring of the development and while consultation is an issue that may still have to be resolved, there is no evidence to maintain that the defendants either directly or indirectly (by virtue of nonintervention) have allowed the existence of threats to the health and environment of the citizens in the affected community.*

[233] On the contrary, in the instant case, there is ample evidence based on documents and information generated by the NRCA, namely, the letter of refusal to Bengal, the NRCA's appeal report, the letter from the Forestry Department, that allowing the third defendant to undertake quarry operations is likely to have a negative impact on the health of persons who reside and conduct business in the area. There is also sufficient evidence to establish that the operations will have a "deleterious effect on the environment" even with monitoring and the implementation of guidelines. As such, I find that the claimants have proven on a balance of probabilities that the permit granted by NRCA under the authority of the Minister is likely to breach their rights to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse

and degradation of the ecological heritage guaranteed by section 13(3)(l) of the Constitution.

Whether the Defendants have discharged their burden on a balance of probabilities at the higher end of the scale that the issuing of the permit that is likely to breach the rights of the Claimants is demonstrably Justified

[234] Counsel, Ms Lindsay submits on behalf of the State that the legitimate purpose being carried out by the grant of the permit is to stimulate growth and development by generating revenue and creating jobs. She further submits that permitting mining via the grant of the permit is rational and connected to that purpose because the substance being mined has economic value and the work that will be done to extract the substance means that citizens of the country will be employed.

[235] However, all this legal argument is unsubstantiated by the evidence. The State has not, through any witness, presented any evidence before this court in support of these submissions. The witnesses called by the state are Ms Gillian Guthrie and Ms Nicole O'Reggio. In my view, the value of Ms Guthie's evidence as it relates to the issues under consideration is that the permitted area does not fall within the Ecologically Sensitive Area (ESA) declared by the Prime Minister.

[236] Ms. O'Reggio acknowledges that NRCA's refusal of Bengal's application for the permit was based on, "environmental concerns such as the impact of the activities on the environment in general, the biodiversity and the natural resources in the area, air quality; public health" This is clearly based on the NRCA's report of the deleterious effect that the proposed mining activities by Bengal may have on the environment and public health. She makes assertions regarding the intended purpose of the 76 conditions attached to the permit.

[237] She contends that the conditions are "intended to provide protection of the environment and mitigate possible threat or injury to the environment or public health". However, while acknowledging the aforementioned risks she has offered

no justification for the State to allow Bengal to embark on the proposed mining activities.

[238] In his “Press Release” of November 12, 2020, captioned “ STATEMENT FROM THE PRIME MINISTER ON BENGAL LANDS, the Honourable Prime Minister made the comment that: “ The Minister in hearing the appeal examined several factors how the NRCA arrived at its decision, land management and use, mineral and environmental enterprises as economic drivers, mitigation measures to prevent or reduce environmental and health hazard ; the regulatory and enforcement capacity of the regulator and the specific developmental proposal of the applicant “

[239] However, in my view, this statement amounts to a sweeping generalisation, which lacks the necessary specificity in order to rise to the evidential standard required, to satisfy the burden placed on the State to demonstrably justify the derogation from a citizen’s constitutional rights. There is no evidence on how the proposed mining by Bengal will drive the local economy. The State has provided no details of its impact on employment or improvement of the livelihood of the citizens in the area in order to sufficiently connect it to a national economic objective.

[240] While it can be accepted that mining can stimulate economic growth and development in any country, considering the fact that the Constitution places a high burden on the State to justify the breach of citizens’ constitutional rights, it is not for the court to relieve the State of this burden by making general assumptions regarding the State’s reason for breaching any citizen’s constitutional rights. The State has the responsibility to place before the court justifiable reasons for this breach.

[241] In the instant case, it having declared, areas immediately bordering the permitted area as an ESA, and where there is no evidence distinguishing the ecology of the declared ESA from the permitted area, it is even more incumbent on the State to justify what is so uniquely special, different, and significantly important about the

permitted area that it should be distinguished from the declared ESA; and why there was a necessity to disregard the Development Order in relation to the permitted area. In essence, the State must present cogent evidence to justify the impending breach.

[242] Regarding the issue of proportionality, the counsel for the State is of the view that the 76 conditions attached to the permit satisfy the proportionality test. However, I do not consider it necessary to examine the details of these conditions at this stage. This is in view of my comprehension of the law that the proportionality test is the second limb that the court is required to apply in determining whether the State has proven that the infringement of the citizen's right is demonstrably justified in a free and democratic society.

[243] This only arises after the State establishes that there was a significant and important objective to which the granting of the permit is rationally connected, the benefit of which warrants the limitation on the claimants' constitutional rights. In my view, there seems to be a misconstruction of the law by the defendants, in particular the 1st and 3rd defendants, in this regard. Where the State fails to prove the existence of a sufficiently important national objective attached to the grant of the permit, the effect of which is likely to breach the claimants' constitutional rights, there is no necessity to go on to consider the other elements that must be established by the defendants to justify a breach of the claimants' constitutional rights.

[244] In the **Attorney General and another v The Jamaican Bar Association** paragraph 76, the Privy Council endorsed the summary of the Court of Appeal with regards to the applicable test outlined in **R v Oakes** [1986] 1 SCR 103, for the acceptable justification by the State, for limiting a fundamental right guaranteed by the constitution. That portion of the judgment reads:

> *"…there are two central criteria to be satisfied in order to establish that a limit is demonstrably justified in a free and democratic society. The first is*

that the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The standard must be high in order to ensure that objectives, which are trivial or discordant with the principles integral to a free and democratic society, do not gain the constitutional protection afforded by the justificatory criterion.

"The second criterion is that once a sufficiently significant objective is recognized, the party invoking the exception must show that the means chosen are reasonable and demonstrably justified. This, it is said, involves a form of proportionality test. The proportionality test comprises three important components, which are: the measures must not be arbitrary, unfair or based on irrational considerations."

[245] Further at paragraph 77 the court stated:

"This test is similar to that which the Board recently described as "the modern conventional approach to issues of proportionality" in ***Suraj v Attorney General of Trinidad and Tobago*** *[2022] UKPC 26, [2022] 3 WLR 309, at para 51. This involves asking in relation to the relevant measure:*

(i) whether its objective is sufficiently important to justify the limitation of a fundamental right.

(ii) whether it is rationally connected to the objective;

(iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these

matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. See Huang v Secretary of State for Home Department [2007] 2 AC 167, para 19 (Lord Bingham of Cornhill) and ***Bank Mellat v HM***

Treasury *(No 2) [2013] UKSC 39, [2014] AC 700, paras 20 (Lord Sumption) and 73-74 (Lord Reed).”*

[246] The 76 conditions attached to the permit were no doubt imposed with an intention to lessen the impact of the constitutional breaches. While these measures may or may not serve the intended purpose, the State must first discharge its burden of proving, the existence of a significant and important objective and that there is a rational connection between the grant of the permit and that objective before the court can go on to consider whether a less intrusive measure could have been used and whether a fair balance has been struck between the rights of the individual and the interests of the community (the proportionality test).

[247] This the State has failed to do. It has provided no explanation of what was so uniquely significant and important about the permitted area that mining activities should be permitted there, contrary to its own Development Orders, and the likely breach of the guaranteed constitutional rights of the citizens. Besides the vague allusion by the Honourable Prime Minister, the State has failed to establish any important and rational connection between mining in the permitted area and any national economic objective. This is against the background that this permitted area is directly adjacent to the area that the State has deemed an ESA. Moreover, there is no indication as to what makes it distinguishable from the larger, bordering areas that are considered to be ecologically sensitive.

[248] Consequently, I find that the claimants have proven that the grant of the permit under the authority of the Minister to Bengal to embark upon mining activities at the proposed quarry site is likely to breach their constitutional rights. I find that the State has failed to prove that the grant of this permit is demonstrably justified in a free and democratic society

Damages

[249] On the issue of damages, the pivotal point is that expressed in the cases such as **James v Attorney General of Trinidad and Tobago** [2010] UKPC 23 at paragraph 37; and **Inniss v Attorney General of St Christopher and Nevis** [2008] UKPC 42, at paragraph 21; that "there is no constitutional right to damages". In some cases, a declaration that there has been a violation of the constitutional right may be sufficient satisfaction for what has happened. In others, it will be enough for the court to make a mandatory order. (See the case of **Seepersad v The Attorney General of Trinidad and Tobago and Panchoo v Same** [2013] 1 AC 65, at paragraph 38).

[250] The **Attorney General v Ramanoop** [2005] 2 WLR 1324 is a case from Trinidad and Tobago that went on appeal to the Privy Council. In paragraph 17 the Board offered the following guidance:

> *"17. Section 14 recognizes and affirms the court's power to award remedies for contravention of Chapter I rights and freedoms. This jurisdiction is an integral part of the protection Chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the State's violation of a constitutional right. This jurisdiction is separate from and additional to ('without prejudice to') all other remedial jurisdiction of the court.*
>
> *18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words.*
>
> ***If the person wronged has suffered damage, the court may award him compensation**. The comparable common law measure of damages will*

often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under s 14 is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law.

19 An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. 'Redress' in s 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions 'punitive damages' or 'exemplary damages' are better avoided as descriptions of this type of additional award."

[251] Counsel for the claimants has not produced any authority to support his claim for damages, in which an award for vindicatory damages was made in circumstances where the breach has not yet occurred. In my view, this award is only made to vindicate the infringed right where damage is proven and where there is a necessity to reflect the sense of public outrage, the importance of the right, and to deter further breaches. (See also the case of **Merson v Cartwright and another** [2005] UKPC 38,)

[252] As was stated by Laing JA (acting) in the case of **The Attorney General of Jamaica V Clifford James** [2023] JMCA Civ 6 at paragraph 50 :

"What is important in determining whether an award of vindicatory damages is appropriate is the nature of the breach and the circumstances related thereto. Each case must, therefore, be considered on its own unique facts and be viewed relative to the range of ways in which the particular constitutional right involved may be infringed"

[253] Therefore, as in the instant case where the court is called upon to intervene to prevent any breach, this intervention would have prevented any possible deplorable abuse of power. Furthermore, in circumstances where the infringement has not yet occurred, the court has intervened to prevent any infringement; where any deplorable abuse of power has been averted, it has not been established that any damage has been sustained; the elements that would attract public outrage have been eliminated. As such, I am of the view that there is no necessity for an award of vindicatory damages. In my view, declarations and an injunction will suffice.

HUTCHINSON-SHELLY, J

[254] I have read the draft Judgments of my sisters and agree with their conclusion that the Claimants have proved on a balance of probabilities that the permit granted by **Natural Resources Conservation Authority Act** ("NRCA"), under the directive of the Minister, is likely to breach their rights to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage guaranteed by section 13(3)(l) of the Constitution. While I agree with their conclusion, I also wish to make brief comments of my own.

[255] I am satisfied that the evidence presented to the Minister on Appeal by the NRCA, on which the Claimants heavily relied, proves that the decision by the Minister that the permit should be granted and the issuance by the NRCA is likely to infringe their constitutional right as provided in Section 13(3)(1). While I recognise that the Minister had the power, pursuant to the NRCA Act, to overturn the NRCA's

decision on appeal, the remit of this Court is to examine whether a breach of the Claimants' constitutional right has occurred, or is likely to occur, with this decision and not a Judicial Review of the Minister's power.

[256] My findings in this regard are grounded in the very findings and concerns raised by the **NRCA** as the basis for the initial refusal of the permit, a position which they maintained on appeal. I agree with and adopt the view of my sisters, that, 'in the instant case, in their initial refusal to grant the permit, the NRCA was adhering to its mandate to strike the appropriate balance between protection of the environment, while not stifling sustainable development, when having assessed the relevant considerations, including the environmental issues and weighed the relevant factors, including the likelihood of the negative impact on the health of the residents, they concluded that granting the permit 'will have a deleterious effect on the environment" and made the informed decision to deny the request'.

[257] There was no evidence presented before this Court that the conclusions presented in the Forestry Department's report were challenged on appeal, neither were they challenged before this Tribunal. While the 1st Defendant relied on the evidence of Ms Guthrie, her evidence was largely in relation to the production of a map that purported to show the area of dispute (the permitted area) as well as the surrounding area designated as an ESA (ecologically sensitive area) by the Prime Minister. The usefulness of her evidence was limited, however, as she was not the individual who had prepared this map, and she referred to an unnamed individual at NEPA as the individual who would have done so. She also stated that the person who prepared it would have taken into account the policy guiding such designation. Ecologically, she was unable to speak to any differences between the ESA and the Permitted Area.

[258] I was also unable to find that the 3rd Defendant had provided evidence during the course of said appeal, other than that which had been considered by the Authority, which raised any challenge to the concerns advanced by the Forestry Department.

[259] As such, I find that this Court has before it sufficient evidence on which a finding can properly be made that if quarry operations were to be undertaken by the 3rd defendants, it would have an adverse effect on the Claimants and a deleterious effect on the environment as a whole, even with monitoring and the implementation of guidelines.

[260] In arriving at my conclusions, I gave careful consideration to the issue whether the breach would (if it did occur) be demonstrably justified. While Counsel for the 1st Defendant made robust submissions on the economic benefits associated with the grant of the permit and operation of the quarry, I agree that the strength of these submissions was wholly undermined by the absence of any evidence in support of this assertion. I agree with the comment of my sister, Thomas J, that the affidavit of Ms Guthrie does not assist in this regard.

[261] In respect of the remarks of the Honourable Prime Minister delivered on the 12th of November 2020, I note that he was not the Minister who considered the appeal and that Minister gave no reasons for his decision. In my consideration of the Prime Minister's remarks, I carefully weighed whether they could be considered as having established an objective that could demonstrably justify the breach or likely breach of the Claimants' constitutional rights. While the stated objectives in respect of economic growth and development are admirable, they would properly be described as aspirational as opposed to evidential. There was no evidence presented in respect of these assertions, whether feasibility studies or other data which support the economic and developmental benefits expected. Accordingly, I find that this argument falls short of the evidential burden required to satisfy this requirement.

[262] In relation to the position of the 3rd Defendant, there was no challenge by the Claimants to his right to property. The Court was merely asked to determine whether this right was unbridled or subject to limitations. I agree with and wholly endorse the views and reasoning of my sisters that any such right was subject to limitations. In the circumstances, I am not persuaded that the 3rd Defendant's right

to use their property as they wished could be said to establish an objective that would demonstrably justify the likely breach of the Claimants' rights.

[263] I agree that the Defendants have failed to meet their burden, and based on the guidance provided in **R v Oakes** [1986] 1 SCR 103, which has been discussed in the judgments of my sisters, it is my considered view that there is no requirement for the Court to consider whether this breach is proportionate.

[264] I am satisfied that Judgment should be entered in favour of the Claimant against all three Defendants.

DAMAGES

[265] In addition to the declarations and injunction sought, the Claimants have also asked for an award of constitutional (vindicatory) damages. The decision of **Attorney General of Trinidad and Tobago v Ramanoop** [2005] 66 WIR 334 was cited by Counsel and has been discussed in detail by Thomas J. The Court also notes the reference to **Merson v Cartwright** [2005] 67 WIR 17 and the guidance provided in both authorities has been considered in these remarks.

[266] The Claimants argued that an award of vindicatory damages is justified for a number of reasons, as summarised below:

a. Bengal's Land is in an area zoned as a no quarry zone and subject to a Development Order prohibiting same.

b. In the course of processing Bengal's application for the permit, the **NRCA** held public consultations to obtain the views of persons who would be most directly affected by the proposed mining.

c. At one such meeting, the **NRCA**'s Representative highlighted the importance of the meeting and indicated the outcome would be submitted to the **NRCA** to guide the decision-making process.

d. The **NRCA** rejected Bengal's application for a permit based on a number of reasons to include 'the unprecedented number of objections received from residents of surrounding areas.'

e. The Claimants were not notified of Bengal's appeal; neither were they provided with the grounds or permitted to participate in submissions or the hearing of the appeal.

f. The Minister allowed the appeal despite the permit contravening the Development Order.

g. The Minister's decision to allow the appeal was not made public. The Claimants only became aware 4 months later when advised by the NRCA. They were provided with no reasons for the decision and informed by NRCA that no information could be provided by them.

h. Late disclosure of documents by Bengal and NRCA more than 4 years after the claim was filed, a few days before the start of the trial. Disclosure by the Ministry in respect of the appeal is still outstanding in violation of established precedent (See for e.g. the decision in **Julian Robinson v The Attorney General of Jamaica** [2019] JMFC Full 04).

[267] The Claimants contend that these factors taken together outline a sound basis for this award.

[268] In submissions filed on behalf of the 1st Defendant, Ms Lindsay submits that the evidence before the Court shows no breach of the Claimants' constitutional rights and, accordingly, no such award should be made. Counsel further submitted that there is no evidence of the effect of any such breach which could assist the Court to properly quantify any damages claimed.

[269] In my examination of the submissions, I gave careful consideration to the factors highlighted by the Claimants as reasons for an award of vindicatory damages.

While the Court appreciates their frustrations, especially the apparent 'lack of transparency' which shrouded the appellate process and continued thereafter, the law is clear as to what the Claimants must show in order to persuade the Court to make such an award per paragraph 18 of **Ramanoop**:

> *"18. When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words.* ***If the person wronged has suffered damage, the court may award him compensation****. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under s 14 is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law." (emphasis added)*

[270] It is my understanding of the Board's remarks that the criteria for such an award of compensation would be the suffering of damages by the individual. The reasoning of the Court in **The Attorney General of Jamaica v Clifford James** [2023] JMCA Civ 6, which was examined by Thomas J, lends cogent support to this interpretation. While the Claimants accept that no damage has actually been suffered, they argue that the conduct of this matter by the Defendants justifies the award against them. While the argument is attractive, it departs from established precedent on the issue.

[271] Additionally, if the Court were to be so inclined to make such an award, it is faced with the challenge as to what would be an appropriate award given the absence of evidence in this regard. The Court's remarks in **Merson v Cartwright** supra is instructive on this issue, where Lord Scott explained the purpose of a vindicatory award as follows:

> *"The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression.* ***'The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement***

> ***and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right, in other cases an award of damages including substantial damages may seem to be necessary****." (emphasis added)*

[272] In the circumstances before us, the Claimant has sought to have the Court act to prevent the infringement of their rights. The result of which means that no such infringement or damage has as yet occurred. It is for these reasons that the Court finds that the instant claim would properly be one of those cases in which the declaration and injunction would suffice to vindicate the right which was likely to be breached.

WINT- BLAIR J

Orders

[273] The Court makes the following orders:

1. Judgment for the Claimants against each Defendant.

2. The decision of the Minister of Economic Growth and Job Creation and the Environmental Permit No. 2014-06017-EP00040 granted on November 5, 2020, as amended on December 15, 2020, by the Second Defendant to the Third Defendant to permit mining and quarrying of bauxite, peat, sand and minerals at Rio Bueno, Dry Harbour Mountain, Discovery Bay, St Ann are struck down as unconstitutional, void and of no effect.

3. The Court grants an injunction restraining the Third Defendant, whether by itself, its employees, servants and/or agents, from starting or continuing to carry out any mining, quarrying or other activities on the Bengal lands pursuant to or in reliance on Environmental Permit No. 2014-06017-EP00040 granted on November 5, 2020, as amended on December 15, 2020.

4. Written submissions on costs shall be filed and exchanged within 14 days of the delivery of this judgment.

[274] The Court makes the following declarations:

1. The decision of the Minister of Economic Growth and Job Creation to overrule the Second Defendant's decision to refuse the Third Defendant's application to permit mining and quarrying at Rio Bueno, Dry Harbour Mountain, Discovery Bay, St Ann, is likely to breach the right acknowledged by section 13(3)(l) and guaranteed by section 13(2) of the Constitution.

2. That Environmental Permit No. 2014-06017-EP00040 granted on November 5, 2020, as amended on December 15, 2020, by the Second Defendant to the Third Defendant to permit mining and quarrying of bauxite, peat, sand and minerals at Rio Bueno, Dry Harbour Mountain, Discovery Bay, St Ann is likely to breach the right acknowledged by section 13(3)(l) and guaranteed by section 13(2) of the Constitution.

3. That the mining and quarrying of bauxite, peat, sand and minerals at Rio Bueno, Dry Harbour Mountain, Discovery Bay, St Ann is likely to breach the right acknowledged by section 13(3)(l) and guaranteed by section 13(2) of the Constitution.

4. That neither the manner nor the extent of the likely breaches of the said constitutional right is demonstrably justified in a free and democratic society.

Wint-Blair, J

Thomas, J

Hutchinson-Shelly, J