

THE CONSTITUTION, WORK, POWERS AND PRACTICES IN TRIAL AND PRE-TRIAL WORK OF THE ENVIRONMENT COURT OF NEW ZEALAND

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Introduction

[1] The messages I want to impart to you about my Court need to be seen in the context of a broad overview of New Zealand's Resource Management Act 1991 (the "RMA") which is at the heart of environmental law in my country. The constitution, work, powers and practices of the Court can only be understood in the context of that act as a whole.

Background – the legislative context

[2] The Court is established by this overall legislation, as successor to earlier tribunals and the Environment Court ordained by successive acts of parliament since the early 1950s. It is probably one of the oldest ECTs¹ in the World. The Court operates as an integrated part of the whole resource management system. The Court does not have its own separate Act as occurs in some countries around the World. This integration brings with it considerable advantages for efficiency and relevance of the work of the Court within the overall system.

[3] As a New Zealand Court we are supported administratively by the Ministry of Justice, but confer regularly with the Ministry for the Environment which administers policy in the RMA field. This administrative split can produce some interesting consequences at times, some good and some awkward.

¹ Environment Courts and Tribunals

New Zealand's Resource Management Act 1991 – a sophisticated regime for planning

[4] The RMA was passed into law by the New Zealand Government in 1991. It took the place of longstanding planning legislation (one main act and about 50 other pieces of legislation, and is broader than planning done in many other countries. The RMA governs the *environmental management of land, air, water, soil, and eco-systems throughout New Zealand's land mass, and its territorial sea (out to 12 miles from the coast)*. It applies the concept of *sustainable management* of natural and physical resources to planning and decision-making. It is quite a complex piece of legislation, with a strong, holistic environmental emphasis.

Sustainable management

[5] Essentially the approach of the RMA is to provide for a balance between environmental protection, and development and human use of land, air, water and soil.

[6] The “*environment*” includes things natural, physical, and people, and includes:

- (a) Eco-systems and their constituent parts, including people and communities; and
- (b) All natural and physical resources; and
- (c) Amenity values; and
- (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c). of this definition, or which are affected by those matters

[7] It is important to realise that all of the things that the Act sets out to govern are treated in an integrated fashion. Decision-making (which I shall describe in detail later) therefore involves a careful weighing of all of these matters against each other, and the making of overall value judgements. Many decisions of our Courts confirm this, and consistent with them are recent public Ministerial statements that some important economic endeavours such as tourism in New Zealand's breathtaking landscapes rely on wise stewardship of our environment.

[8] The RMA focuses on *managing the effects of activities*, rather than regulating the activities themselves. This is a big difference from the earlier planning legislation. The Act takes quite an *enabling approach* for activities like developments, and prescribes intervention only when environmental impacts will reach an unacceptable level. This can lead to some quite innovative approaches in environmental planning, but can lead to some complexities as well.

The purpose and principles of the RMA

[9] The ultimate **purpose** of the RMA is to “promote the sustainable management of natural and physical resources.” In section 5(2) this means:

Managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
- (c) Avoiding, remedying or mitigating any adverse effects on the environment.

[10] The purpose of the Act is then supported in subsequent sections 6, 7 and 8 concerning matters of ***national and other importance***. The matters of national importance include the preservation of the natural character of the coastal environment, wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development; also the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development; also the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna; also the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers; also relationships and culture of the indigenous people, the Māori.

[11] The other matters of importance include other indigenous cultural matters, the maintenance and enhancement of amenity values, the intrinsic values of eco-systems, the maintenance and enhancement of the quality of the environment, any finite characteristics of natural and physical resources, the effects of climate change, and the benefits to be derived from the use and development of renewable energy.

An overview of New Zealand’s environmental management mechanisms: plans, consents, and enforcement: the place of the Environment Court in the system

[12] Environmental management under the Act is underpinned by the purpose and principles that I have described, and given effect through detailed provisions in the Act itself, and subsidiary layers of legislation issued by the central NZ Government and Councils. The latter comprise a ***hierarchy*** of policy statements and plans as follows:

- *National Policy Statements*
- *National Environmental Standards*
- *Regional Policy Statements*
- *Regional Plans*
- *District Plans*

[13] The *National* instruments are issued by central Government. The *regional* policy statements are issued by regional councils, and the *district* plans are issued by district councils.

[14] Each of these layers of legislation is required to meet the demands of the layers above it.

1. Forward planning

[15] Forward planning is a feature of New Zealand environmental law that ensures great proactivity of practice.

[16] As can be seen, regional and district councils each have a role in *forward planning*. That is they must issue draft plans and policy statements for public comment and submission (and appeals can subsequently be made to the Environment Court by people dissatisfied with a council's decision on their submissions).

2. Applications for consent

[17] The councils also have a role in receiving *applications for resource consents* and making decisions on those applications, sometimes by administrative function without inviting comment from other parties, and sometimes after public notification and invitation to other parties to make submissions. (There are rights of appeal to the Environment Court in the latter case).

[18] When administering applications for resource consent, the councils (and the Environment Court if there are appeals) have potentially to consider *several different levels of activity status*, as prescribed in the regional or district plans. These levels are “*permitted*”, “*controlled*”, “*restricted discretionary*”, “*discretionary*,” “*non-complying*” and “*prohibited*.” Generally speaking, the lower down that list an activity status is, the harder it will be to get consent. Indeed,

a consent cannot be granted at all for an activity that is described as *prohibited* in a regional or district plan.

[19] Each resource consent application must include an assessment of the effects (actual or potential) of the proposal on the environment. In the instances of *controlled* and *restricted discretionary* activities, the assessment will be limited to the matters over which the rules in the plans direct the discretion be focussed on.

3. Enforcement

[20] The regional and district councils also have functions of *enforcement* of the plans, and of environmental standards more generally, and they do this by bringing proceedings in the Environment Court.

[21] I will discuss the role of the Environment Court in all of these things later in this paper.

[22] By enforcement of environmental standards more generally, I am referring to the operation of ss15, 15A, 15B, 15C and 16 of the Act. These deal respectively with general controls over discharge of contaminants into the environment; restrictions on dumping and incineration of waste and other matters in the coastal marine area; discharge of harmful substances from ships and offshore installations; prohibitions in relation to radioactive waste or other radioactive matter, and other waste, in the coastal marine area; and a general duty on people to avoid unreasonable noise. These sections of the Act largely point to duties to comply with regulations, policy statements, and plans, but the obligations concerning noise under s16 go even further, and cast a more general duty to avoid making unreasonable noise.

Central Government roles

[23] *Central government* has two roles under the RMA. Parliament passed the Act into law, and initiates and passes any amendments. General administration, preparation of the National Policy Statements and Environmental Standards, and supervision of the work of Councils, is undertaken by a government ministry called the *Ministry for the Environment*. That Ministry provides policy advice, and works with councils and other agencies, to improve environmental outcomes. It has a staff of over 200.

[24] There is another government agency, the *Office of the Parliamentary Commissioner for the Environment*, which acts as a sort of watchdog. The Office is independent of the government itself, and has a small staff. It does not have a direct role under the Act, but has the power to

consider and prepare commentary on the performance of public bodies such as councils. It makes recommendations, and publishes reports about the quality of environmental regulation, such as the use of pesticides in wilderness and rural areas, rock fracturing in oil and gas exploration, fresh water quality and similar matters.

The Environment Court of New Zealand

[25] There is one Environment Court for the whole of New Zealand.

[26] By s247 of the Resource Management Act 1991 (“RMA”), the Environment Court is a Court of record. “Court of record” means that the whole of the proceedings of the Court comprise a record that is publicly accessible. With exceptions that I shall describe, that means in my country that all documentation filed with the Court, including evidence and exhibits in cases, and transcripts of proceedings heard in open Court, are fully available to parties in the case, members of the Court, and superior Courts on appeal, and to some degree for access by the public.

[27] Exceptions include that a Judge of the Court may make an order for confidentiality of certain aspects of proceedings, usually on the grounds of commercial sensitivity (but with carefully prescribed rights of access by parties in the case or their representatives); and Judges in all Courts have rights to limit the search-ability of materials that have not yet been used in Open Court.

Environment Judges

[28] The Environment Court can have, at any time, up to 10 full-time Environment Judges (presently there are 9) and some alternate Environment Judges (who sit with us occasionally and are otherwise members of other Courts such as the Maori Land Court and the District Court)². The Judges have all previously been lawyers, mostly working in the area of environmental regulation and other litigation.

Environment Commissioners

[29] Environment Commissioners are appointed to the Court under the RMA, as “persons possessing a mix of knowledge and experience in matters coming before the Court, including knowledge and experience in:

² Section 250 RMA

- (a) *Economic, commercial and business affairs, local government and community affairs.*
- (b) *Planning, resource management and heritage protection.*
- (c) *Environmental science, including the physical and social sciences.*
- (d) *Architecture, engineering, surveying, minerals technology, and building construction.*
- (da) *Alternative dispute resolution processes.*
- (e) *Māori cultural matters*³.

[30] There are presently 12 Environment Commissioners. There are also 5 Deputy Environment Commissioners who participate in the work of the Court part time, and who also have specialist skills that are of considerable value in the work of the Court⁴.

[31] Section 259 RMA authorises the Principal Environment Judge to appoint as a special advisor a person who is able to assist the Court in a proceeding before it. That person is not a member of the Court (in the deliberative sense) but “*may sit with it and assist it in any way the Court determines*”, which offers quite a bit of scope in the process sense.

Locations

[32] The Court operates registries in three main cities: Auckland, Wellington and Christchurch. It has a Registrar overseeing the administration on a national basis, and a Deputy Registrar in each of the 3 centres.

[33] The Court’s Registry staff are usually law graduates with specialist knowledge in environmental law, which considerably assists the work of the Judges and Commissioners.

[34] The Court maintains courtrooms in each of those 3 centres, and a fairly high percentage of the business of the Court is conducted at those 3 bases. Nevertheless, a considerable amount of the hearings and mediation work of the Court is conducted at circuit locations around the country,

³ Section 253 RMA.

⁴ Also pursuant to section 253 RMA.

both in and out of courthouses⁵. For instance the Court often sits in courthouses of the District Court and the Māori Land Court, and also in hotel conference rooms, community halls, and similar venues. Such places are used for both Court sittings and conferences, and for the mediation function of the Court, of which more, later. A consequence of this is that we travel extensively for our work around NZ, for instance my division last year heard an appeal about a proposal for a vast water storage dam in the South Island, and another concerning a proposal for a boat marina in a bay at a small island near Auckland (consent refused December 2015).

[35] It is worth noting that a very small proportion of the cases filed in Court (less than 5%) are ever the subject of a hearing on the merits. Most cases are settled during the process of mediation, or by direct negotiation amongst parties, or are simply withdrawn for one reason or another. Mediation in fact resolves about 75% of all cases that arrive in the Court.

The Nature of the Court and an Introduction to its Processes

[36] Most cases filed in the Environment Court are *appeals* against decisions of councils. Some other cases are originating, for instance seeking interpretation of the RMA or national, regional or local plans. The Court therefore has wide powers to review decisions of councils and to interpret legislation.

[37] In the last 5 years the Court has held a “first instance” jurisdiction called Direct Referral, where an applicant for resource consent persuades a council to move the case directly to the Court for hearing purposes. This usually results in the Court managing and hearing larger numbers of parties than get involved in appeals from council decisions. We have developed many techniques to maintain efficiency as well as good access to justice. Some of these techniques are electronic, and I addressed a conference of Courts administrators in Australia last year about them, with emphasis on avoiding injustice to self-represented litigants who have limited access to computers or limited skills. This is a significant topic in its own right.

[38] The marina case just mentioned was a Direct Referral case in which there were 310 parties, but the great majority thankfully joined forces under the umbrella of a local community group.

[39] The Environment Court also has enforcement powers, similar to the issuing of injunctions in the general civil courts. Environment Judges also sit in another court, the District Court, to hear

⁵ Section 271 requires (“shall”) the Court to conduct hearings and conferences at a place as near to the locality of the subject-matter to which the proceedings relate as the Court considers convenient unless the parties otherwise agree.

criminal prosecutions under the RMA for alleged wrongdoings, for instance alleged breaches of the Act or of regional or district plans.

[40] The Court has extremely wide powers of procedure. I set out s269 RMA in its entirety, before commenting on it:

269 Environment Court Procedure

- (1) Except as expressly provided in this Act, the Environment Court may regulate its own proceedings in such a manner as it thinks fit.
- (2) Environment Court proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency.
- (3) The Environment Court shall recognise *tikanga Māori* where appropriate.
- (4) The Environment Court may use or allow the use in any proceedings, or conference under s267, of any telecommunication facility which will assist in a fair and efficient determination of the proceedings or conference.

[41] The Judges of the Court have interpreted s269 as meaning that the Court is considered to be publicly accessible or “user friendly”, commensurate nevertheless with efficiency, fairness to all, and due respect to the institution.

[42] This means that Court sittings will to a degree follow the format found in other New Zealand civil Courts, but sometimes with a little less formality. For instance, rules about hearsay of factual evidence are often less rigidly applied. So, while reasonable decorum will attach to the running of hearings, there may be less formality and legalism than can be found in other Courts. This can be helpful to self-represented parties.

[43] Court hearings on appeals from decisions of councils are conducted “afresh”, so that the Court will want to receive the evidence and submissions presented to it, and will be little interested in what was said by any of the parties in the earlier hearing before the council. (The Court is however, by s290A RMA, required to have regard to the decision of the council or its hearing commissioners).

Independence

[44] The Court is to provide a *fully independent system of appeals from decisions of councils*. Like all New Zealand Courts, the Environment Court has no links whatever with other bodies, political or otherwise. Hence it has no links with councils, government departments, other authorities, infrastructure providers, and the like. It should also be remembered that Courts are a constitutionally separate arm of our system of government, and once set up by Parliament through

relevant statutes such as the Resource Management Act (and subject to further amendment by legislation), are generally free from intervention and direction by Central Government Executive.

[45] It must therefore be stressed that there is no presumption in favour of any earlier decision being appealed against. No party has any particular legal burden of proof as often occurs in other Courts, although each party will have the evidential burden of establishing matters of fact and expert opinion which are advanced by it, and should put forward a proper evidential basis to support the contentions and submissions that it makes.

[46] Some parties who are not represented by a lawyer or another professional come to Court with some level of expectation that the Judge will offer them a high level of assistance in the presentation of their case, because of a perceived imbalance of money and power between themselves and those who are represented by professionals. This is a difficult issue for us. We recognise the imbalance, and will often offer some limited advice in the interests of keeping hearings moving forward efficiently and without undue delay. The advice is not provided as a free legal aid service. Fairness to all parties is important. There is in fact a legal assistance fund, run by a committee of experienced practitioners supported and funded by the Ministry for the Environment. Community groups may apply to that fund for assistance, and the strength and public interest aspects of their cases will be examined by the committee when their application is considered.

[47] In recent times, in Direct Referral cases, we have employed independent Process Advisors to submitters, in the same way as occurs before Boards of Inquiry into matters of national significance, supported by the Environmental Protection Authority. This has worked particularly well in some very large cases, a notable example of which was the marina case, (with the majority of the 310 parties, mostly self-represented, being persuaded by the Process Advisors to coalesce under the banner of a well-funded community group). The Process Advisors also offered considerable advice about Court processes, pre-hearing and hearing.

Parties in the cases

[48] Who can file an appeal in the Court, and who can become a party?

[49] A person or body that made an application to a council or sought a plan change, can, if they do not like the council's decision, file an appeal with the Environment Court. So too can a party who was involved in the case before the council.

[50] The council is of course authorised to defend its decision, so is automatically a party.

[51] Other people or bodies can join the appeal proceedings as parties if they had been a party (“submitter”) before the council, or can demonstrate that they have a relevant interest in the case that is greater than the general public. These rights of entry to proceedings are carefully limited by the Act, and are further restricted by legislation from time to time. Rights of access to justice in the Environment Court are an interesting topic in their own right, but that is beyond the scope of today’s paper.

The Environment Court Practice Note

[52] Over the years the Environment Court (and its predecessor the Planning Tribunal) has issued Practice Notes. These have all been consolidated in recent years, the latest having been published in 2014 after public consultation was conducted. The current Practice Note is available on the website of the Environment Court at:

<http://www.justice.govt.nz/courts/environment-court/documents/environment-court-practice-notes-2014>

Its introductory provisions record that it is not a set of inflexible rules, but is a guide to the practice of the Court to be followed unless there is good reason to do otherwise.

The topics addressed in the Practice Note are, broadly:

- Communication with the Court and amongst parties;
- Lodging appeals and applications;
- Direct referrals;
- Case management;
- Alternative dispute resolution;
- Procedure at hearings;
- Expert witnesses;
- Access to court records;
- Glossary of terms.

There are three appendices:

- Lodgement and use of electronic documents;
- Protocol for court-assisted mediation;
- Protocol for expert witness conferences.

Case management by the Judges (the pre-trial work of the Court)

[53] Part 4 of the Practice Note concerns case management.

[54] Case management is a relatively modern concept in courts internationally, and has been strongly embraced in the New Zealand Environment Court in the interests of prompt and efficient resolution of cases, and cost efficiency. The Judges, with the support of Registry staff, operate a closely diarised system by which the various steps and stages in a case will be the subject of directions from the Judge, and required actions by parties.

Case management tracks

[55] The Court operates case management tracks, a *Standard Track* for straightforward cases, a *Priority Track*, the name of which is self-explanatory; and a *Parties' Hold Track*, to which a case may be adjourned by agreement of the parties or direction of a Judge, for other proceedings to catch up, during mediation, or for other purposes.

[56] Every case filed in the Court will be allocated to one or other of these tracks as soon as it arrives. A case can be moved from one track to another during the life of the proceeding.

[57] Greater detail concerning the three tracks can be found in paragraphs 4.4, 4.5 and 4.6 of the 2014 Practice Note.

Judicial conferences

[58] Clause 4.7 and 4.8 of the 2014 Practice Note cover Judicial or “pre-hearing” conferences. These are usually conducted by telephone at an appointed time, or in a courtroom if the parties are too numerous for a phone conference or if the issues are particularly complex.

[59] Virtually all aspects of judicial conferences are designed to keep proceedings moving fairly and efficiently, particularly if it appears that there will be a need for a hearing.

[60] Some of the business conducted in judicial conferences can almost amount to the conduct of an interlocutory hearing (held to enable determination of a preliminary point that will assist the course of the proceeding overall; for instance, concerning somebody's application for a time waiver, or an application to strike out a party or a topic, or to resolve a legal jurisdictional issue).

[61] Sometimes interlocutory arguments will be dealt with “on the papers,” which means no hearing or conference, but instead parties filing submissions, and a Judge considering those submissions and issuing a written decision.

The role of expert witnesses

[62] The majority of cases in the Environment Court these days involve consideration of many topics in respect of which specialist professional advice is available, and evidence offered by experts in many fields. Examples include engineering in its many branches, landscape, economics, Maori cultural issues, ecology in its many branches, social issues, and many others.

[63] The Court has high expectations concerning the quality of work by expert witnesses, and there is an entire section in the Practice Note (Part 7) setting these out.

[64] In addition, many papers have been written about the topic, and most professionals in New Zealand who are regular expert witnesses before the Environment Court, are familiar with both the relevant provisions of the Practice Note, and these papers.

[65] The Court has an expectation that an expert called by a party will be independent, objective, and entirely professional. Questions can also arise as to the extent of relevant expertise and experience in relation to any given topic in the case. Experts are required to avoid being advocates, and to provide their own professional opinions, not that of the party who hires them. Conflicts of interest must be avoided.

[66] Expert witnesses have an overriding duty to assist the Court impartially, free from direction from their client.

[67] Increasingly, groups of expert witnesses are required to conduct a conference, often facilitated by an Environment Commissioner, for the purpose of reaching professional agreements where possible, and narrowing issues to cut down the length of a hearing, and thereby reduce the cost of cases. These conferences are held during the course of operation of a timetable for preparation for hearing, often between the evidence-in-chief stage and that of rebuttal evidence.

[68] The 2014 Practice Note has as an Appendix, a protocol for the conduct of these conferences.

[69] Processes for the conferral of groups of expert witnesses have become more refined in recent times. In 2012 the Court conducted workshops with the Resource Management Law

Association in 11 centres around New Zealand for the purpose of refreshing the Practice Note and issuing some guidelines about process for expert conferencing. A paper on that subject can be found on the Court's website. The "learnings" from those road-show sessions substantially informed the content of the Part 7 and Appendix 3 of the 2014 Practice Note.

The conduct of hearings (the trial practices of the Court).

[70] I refer to Part 6 of the 2014 Practice Note, entitled *Procedure at Hearings*, and will set out some of its paragraphs and offer commentary.

[71] Paragraph 6.1 deals with the order of presentation by parties in a hearing. It reads as follows:

4.1.1 The Court usually conducts an appeal against a decision on an application for a consent or permit as a complete rehearing. In the case of a directly referred application, the hearing will be the first occasion on which the evidence has been heard and been available for challenge by opposing parties. The Court will normally hear first the person who applied for the consent or permit - followed by the parties who support the grant. Then the Court will hear the parties who oppose the grant of the consent, approval, or permit.

The order of parties in complex cases can vary, and is a matter for the hearing Judge. Wherever possible, the order of parties should be discussed at a pre-hearing conference, or made the subject of prior directions. If in respect of a particular appeal or group of appeals it appears that it will be helpful for the Court to first hear the Council before the applicants or other parties who would ordinarily commence, the Court may so direct. This will often occur in hearings on plan or policy statement appeals.

4.1.2 In proceedings where there is a burden of proof upon a particular party, for instance enforcement proceedings, the Court will usually hear that party first.

Presentation of evidence

[72] Clause 6.3 of the 2014 Practice Note concerns the *presentation of evidence*. It provides for use of electronic or hard copy statements, directions about the manner in which evidence will be given, likelihood of the Court pre-reading the evidence before commencement of the hearing rather than having witnesses read their statements aloud in Court, and other matters.

[73] Where the Court pre-reads the evidence, the witness, when called, will confirm his or her statement of evidence as correct, and cross-examination will immediately follow unless there are corrections to be made and/or supplementary matters that have arisen earlier in the hearing which the witness should have the opportunity to address.

[74] It has become the almost invariable practice for the Court to pre-read all the evidence pre-logged in the case, rather than having each witness read out his or her prepared statement in open

court. The court will therefore hear submissions from the advocates, and then the questioning of the witnesses. The court will also question most witnesses itself after the advocates have done so.

[75] Questioning of witnesses is one of the areas of some complexity and difficulty not only for parties who are not represented by a professional, but even for professionals themselves at times! Another issue is that the time for questioning witnesses is not the time for making statements. Self-represented parties not familiar with Court processes often struggle with this.

[76] Paragraph 4.4 of the 2011 Practice Note concerns the viewing by the Court of a site or area at issue, and it provides as follows:

4.4.1. In many cases, it is helpful for the members of the Court to view the site and locality at issue. In general, the taking of a view assists the Court to better understand the evidence presented in Court. The Court will normally confer with the parties about visiting the site, timing, a suggested itinerary, and other relevant details that the parties or the Court may raise.

4.4.2. If the taking of a view presents the Court with additional or different information to that provided in Court, or information that no witness has correctly or accurately addressed in evidence, and the Court considers that the information might influence it in making its decision, the parties will be consulted to ensure that they have an opportunity to explain or comment upon the information concerned before the case is determined.

[77] The Court will discuss in conference with the parties in open Court, the details for inspection of sites and localities, particularly in cases where the Court will undertake those inspections without being accompanied by the parties (the majority of cases). Care must be taken to ensure that the process is open, thorough and fair.

Exhibits

[78] Paragraph 4.17 of the 2014 Practice Note deals with the issue of exhibits, and stresses a common approach by parties where possible, quality, manageable presentation, indexing and the like.

What the Court considers in reaching a decision

[79] The guiding principles on this are found in many sections of the Resource Management Act that provide matters to be considered concerning the preparation of Policy Statements and Plans, and consideration of resource consent applications and enforcement applications. Above all is Part 2 of the Act, the purpose and principles of the legislation.

[80] For today's purposes, let me summarise and say that beyond the legal technical requirements, the Court will confine its inquiry to the evidence presented to it, the submissions, and exhibits lodged, to the extent that they are relevant to the jurisdiction of the case. The jurisdiction of any case is set largely by the primary documentation which includes the appeal document, relevant submissions and further submissions filed previously with a Council, the Reply document filed by the Council, the notices by other parties under s274 RMA (again to the extent that the matters covered in those notices are relevant to the case at hand), and relevant provisions of Policy Statements, Plans, and other statutory instruments.

[81] I stress that the Court will be considering only matters of relevance that are offered to it in evidence and submissions that can be tested in Court. For instance, we take no account of things that we read in newspapers or see on television! Members of the Court are entitled to bring their own worldly experience to a case, but in doing so must put the issues to the parties and relevant witnesses in open Court. The Court is, and must be trusted to be, a truly independent body.

The Court's cost regime and security for costs

[82] By section 285 RMA, the Court may order any party to pay costs to another party, or to the Crown, to help offset expenses incurred in the hearing. Any party can make an application for costs, and any party involved in an Environment Court appeal can be liable for costs. Unlike in other Courts, there is no rule or general practice that says that an unsuccessful party to an appeal must pay the other party's costs. However, in the case of matters that are directly referred to the Court, there is a presumption that a significant portion of the cost to the Court of the process will met by the applicant.

[83] In determining an application for costs, the Court has discretion to decide whether it is reasonable to award costs, and to determine the appropriate amount. Costs awards are based on the costs actually incurred, and a party applying for costs will usually be asked to provide the Court with the relevant invoices setting out the costs and expenses incurred. Costs can be indemnity costs (full costs) or a lesser amount of costs awarded at the Court's discretion. Fairly common awards (where it is necessary to award costs at all) amount to approximately 25% to 33% of proved and relevant costs incurred by another party or parties.

[84] The purpose of awarding costs is to compensate a party for costs incurred where it is fair to do so. Costs are not intended to penalise an unsuccessful party or to discourage people from participating in appeals. The Court will only award costs if it decides that is justified in the circumstances of the case, and will determine each costs application based on its merits.

[85] The Act provides for the Court to make an order for security for costs. Security for costs may be requested if it is suspected that the person bringing the appeal may not have sufficient financial resources to pay costs should their appeal be unsuccessful and an award of costs later made against them. The Court does not have to grant any request for security for costs and will consider the interests of all parties before doing so. Even if an order for security of costs is granted and the appeal is lost, this does not automatically mean that costs will be awarded.

Alternative Dispute Resolution in the Environment Court (primarily mediation).

[86] Mediation is a voluntary process for parties in dispute to come a solution with help from a facilitator, and is therefore quite different to hearings or trials that impose solutions. Mediation is authorised by s268 RMA, and is a free service of the Court. It is conducted by the Court's Commissioners, who are fully trained in the technique and very experienced. Mediation is conducted very early in the life of most cases, and results in resolution of approximately 75% of all cases filed in the Court.

[87] There is an extensive section in the 2014 Practice Note on "Alternative Dispute Resolution" (of which mediation is the principal type in the Environment Court). There is also an Appendix containing a Protocol for Court Assisted mediation.

[88] Mediation is not compulsory, and a party can refuse to agree to go to mediation. But mediation is strongly encouraged by the Judges because, even if a case is not capable of full settlement, some aspects can get resolved, thus narrowing issues in dispute and reducing Court hearing time and cost to all parties. Furthermore, the Court encourages parties to understand that there are often many ways of viewing any particular problem and how it might be resolved. Resolution of cases can sometimes be quite innovative. For instance, side agreements on other matters outside the dispute (that do not get shown to the Judge) are sometimes entered into.

[89] Matters discussed during mediation are confidential to the parties. Only the written signed outcome from mediation can be reported to the Court. This confidentiality is important for the process. It means a party can make offers or suggestions aimed at resolving the matters without fear of later adverse consequences.

[90] If agreement on all matters is reached, a Consent Memorandum is drawn up either at the mediation or afterwards by one of the lawyers or parties present. Once the wording is agreed by all the parties and signed, it is sent to a Judge requesting that a Consent Order be made. In considering a draft consent order the Court will ensure that the result conforms to the requirements of the Resource Management Act, and on rare occasions might not be signed off by the Judge.

[91] Mediation is certainly much less expensive than a court hearing with its witness expenses, legal costs and the risk of an award of costs by the Court. Mediation is a process that also offers opportunity for a wider range of solutions than are possible in a Court decision.

[92] Parties can represent themselves and often do. They can bring supporters to help them, and they can bring expert witnesses and their lawyer.

Conclusion

[93] I believe that the New Zealand Resource Management system is almost unique in the world as a regime for governance of planning of land, water, and air, based on the principle of sustainable management of natural and physical resources for the future. The Environment Court has a major part to play in its administration. There is now a considerable body of case law that has developed over the 25 years since the Act was first passed.

[94] The Environment Court is a specialist Court whose Judges were previously lawyers practicing in the resource management field, and whose Commissioners were professionals in their own fields like engineering, planning, ecology, economics and the like. In my view specialisation is important for good environmental regulation and for advancement of knowledge about it.

[95] Also of importance for our system are having (hopefully) clear laws in legislation and in the national, regional and district planning instruments. The Court has also set up detailed rules about its procedures, published in its Practice Note, so that parties can work efficiently and cases can be resolved as quickly as possible.

[96] Any expressions of view in this paper are those of the author, and cannot be taken to be interpretation or statements of law or policy on the part of the Environment Court.

Laurie Newhook,
Principal Environment Judge, Environment Court of New Zealand,
June 2016.

Website reference for Environment Court of New Zealand:

<http://www.justice.govt.nz/courts/environment-court>