CHALLENGES AND CHANGES IN THE ENVIRONMENT COURT

Paper presented by Acting Principal Environment Judge Laurie Newhook

to

3rd Annual Environmental Law and Regulation Conference

Wellington, 16 and 17 April 2013

Recent initiatives for efficiency of process in the Environment Court

[1] I have been asked to speak today about recent and current enhancements of process in the Environment Court, and then to turn my mind to how prospective legislative changes might alter things further. In particular I have been asked to speak about the current role of the Court in the resource management system, and about whether it is possible to speed up processes in the Court.

[2] This section of my paper addresses recent and current initiatives.

[3] I want to start by making a fairly bold claim that I believe is accurate and can be backed up by statistical analysis and the views of others. In contrast to the situation about a decade ago, I believe it can now be said that the Environment Court is one of the most efficient parts of the resource management system in this country, and can also claim to have one of the best clearance rates of cases amongst all courts in New Zealand.

[4] The views of others are I believe manifold amongst submissions to the Discussion Paper on "RM3", and include some studies undertaken by the New Zealand Productivity Commission, and submissions by business and conservation groups. I will return to these things later in my paper.

[5] It wasn't always like this. Just over a decade ago, long delays were being experienced in Environment Court proceedings, and there was a

significant backlog of work, as noted by the Law Commission in its March 2004 report "*Delivering justice for all: a vision for New Zealand Courts and Tribunals*." There were real problems of resource in the Court. As also noted in that report, the government in 2001 allocated funding for the appointment of an additional judge, commissioner and support staff, and to enable enhancements to the Court's database, judicial support roles, and case management.

[6] Thus enabled, the Court embarked on a period of significant internal reforms and innovations that have steadily led to the real change in circumstance experienced today. Only last week a senior practitioner upbraided me in the street and, slightly tongue in cheek, complaining about the severe pressure being placed on his client, a resource consent applicant with a tourism proposal, to be ready to participate soon in a significant hearing before the Court within a few months after lodgment of the case.

[7] In that same report, the Law Commission commented on the desirability of certain potential internal reforms, including prioritising of the flow of cases, directing certain types of case to compulsory alternative dispute resolution, efficient early identification of issues in dispute, and fast tracking of certain kinds of case.

[8] As attendees of this conference will be aware, the Environment Court embraced the then relatively recent concept (internationally) of case management, which it has pursued increasingly robustly in recent years.

[9] I now turn to various aspects of the many strands of reform and innovation adopted, starting with mediation.

Mediation

[10] The Court has provided increasing levels of training to its Commissioners in mediation and other forms of ADR, and this aspect of the work of the Court now resolves something of the order of 70 percent of cases or topics in the Court within quite short order after the case has arrived. I say approximately, because the Court's database is not a

particularly efficient management tool, having been designed for other courts whose business focuses on the throughput of many small cases involving small numbers of parties. Nevertheless, I have confidence in the estimate, and indeed consider that the figure could be higher when one includes cases that settle some time after conclusion of mediation.

[11] The reference in the 2004 Law Commission report to the possibility of compulsory ADR, intrigues me. I have been asking the Ministry for the Environment to promote change to legislation that will make mediation or other forms of ADR compulsory in all cases except with leave of a Judge. The qualification about leave would be necessary because as is quite well known, some cases are not appropriate for mediation and should proceed directly to hearing.

[12] Members of the Environment Court are increasingly favouring somewhat more robust models of ADR than have traditionally been employed, and parties may increasingly experience this. That is, they may expect a range of styles suited case by case.

[13] The reason for introducing compulsion and employing techniques that are more robust than hitherto is simple. Litigation in the Environment Court involves significant elements of **public interest**. The litigation is not simply private interest, as occurs in most other civil courts.

[14] Included in "public interest" aspects, can be the need for particular kinds of infrastructure, the minimisation of substantial holding costs on the part of developers and infrastructure providers, and the protection of important parts of the natural environment as ordained in various provisions in Part 2 of the RMA.

Expedition in hearing work and decisions

[15] These sorts of issues are also driving our interest in getting to hearings more quickly, and issuing our decisions as expeditiously as possible after hearing. These can be challenging aspects of our work, particularly given that it is a fact that by and large the smaller and less complex cases are the ones most readily resolved in mediation and by

negotiation, and the diet of hearing work placed before the Court is increasingly that which concerns the large, complex, multi-party, multi-issue cases. These cases concern the likes of wind farms, mines, airports, roading infrastructure, hydro dams, and major residential and commercial development. Numbers of these cases are now arriving before the Court pursuant to the Direct Referral procedures the subject of recent legislative initiatives.

Conferencing of expert witnesses

[16] In recent years there has been another development in the area of narrowing the scope of hearings in order to minimise cost and delay. It is the conferencing of groups of expert witnesses. The practice has been undertaken in the Court, usually utilising the service of Environment Commissioners as facilitators, for several years. However, it concerned us that while the intentions were good, the outputs in some cases were patchy. Therefore, during 2012 under the auspices of the Resource Management Law Association, a senior planning consultant Dave Serjeant, Environment Commissioner Ross Dunlop, and myself, conducted a series of 11 workshops around New Zealand on the process. The workshop format was deliberately chosen, designed to generate the greatest amount of discussion and tap into as much experience as possible. Prior to the roadshow a discussion paper was prepared by a small team led by barrister Martin Williams, and sent out to participants. Introductory presentations were made by members of the steering group at each venue, followed by brief presentations by local practitioners, and then robust discussion amongst all participants and the panel.

[17] During the course of all sessions some common themes arose, but intriguingly new angles also floated up at each session, illustrating the depth of thought that participants brought to the workshops. The prior experience of attendees in this process reflected our own, that the quality of outputs tended to vary greatly from considerable to zero.

[18] The result has been confirmation of the need for better organisation and conduct of the process, in order to gain more consistency nationally, and better quality outputs. The steering group produced a report and

recommendations dated 18 February 2013, and a copy can be found on the website of the Environment Court.

[19] It is almost trite that the process of conferencing of experts should result in the saving of time and costs in the resolution of cases. That is, it should be **cost-effective**. Cost-effectiveness of this sort is difficult to measure empirically, but that did not discourage the steering group in its endeavours. The converse would be a risk of the process simply becoming another expensive layer in the litigation.

[20] A study of the report will show that the steering group has drawn on the products of the workshops to produce recommendations about the timing of conferencing in relation to proceedings overall; the early preparation of an Agreed Statement of Facts; the thorny question of whether conferences should proceed on the basis of "will-say statements" or instead on the basis of evidence-in-chief; the timetabling of conferencing; the role of counsel; the crucial need for good preparation; the detailed organisation of the conference meetings; the preparation of an agreed witness statement after conferencing; and the applicability of the process to the framing of conditions of consent.

[21] The Environment Court and the Resource Management Law Association are now proceeding to prepare some amendments to the Court's Practice Note (the existing one having been promulgated by update in 2011), and the production of a reasonably comprehensive Guideline for the organisation and conduct of the process. There will be public consultation about these things, probably alongside public consultation about other amendments that we believe are necessary to the Practice Note, in coming months.

The work of expert witnesses generally

[22] Members of the Court consider that there is an ongoing need for education of expert witnesses. This is regularly conducted in concert with professional associations such as the Resource Management Law Association, and when we speak at gatherings of other groups. There is a comprehensive section in the Court's Practice Note about the work of expert witnesses which is the central focus of the seminars and

workshops. Given the constant arrival of new practitioners in all areas, and the importance of the quality of the work to the cost efficient operation of the Court, the seminars and workshops provide timely introductions and reminders to this important area. The themes expounded are of course the need for true independence, objectivity, and avoidance of advocacy. An expert witness's main capital in his or her professional life is, after all, **reputation**.

Electronic enhancements

[23] We live in an electronic age. Or we hope we do. Ministry of Justice hardware and software supplied for use by the Judiciary is very old in ICT terms, with some packages heading for the date past which there will be no institutional support available. Senior officials in the Ministry are worried about this, with good reason. Judges are hopeful of seeing some urgent improvements to help with serious issues of speed, mobility, and reliability. These, of course, are difficult issues in times of fiscal austerity.

[24] There are major projects undertaken from time to time by which, at great cost, something new is delivered. An upgrade to the Ministry's Case Management System in the mid-2000s, to serve the Environment Court, was an example. It was not designed for our Court, and struggles to support the big, multi-party, multi-issue cases that have been coming to us in recent times. And, as I have said, it is a long way from being anything like a management tool.

[25] That is the gloomy side. There is also a brighter side. Ministers from the PM down have, in the last couple of years been calling for cheap and cheerful ICT solutions. There are solutions that can assist the Environment Court to streamline and speed up processes for the obvious end good. With, happily, strong support from Ministers, there has been a number of Judge-led innovations commenced in the last couple of years:

- The Environment Court has a website which, despite its clunky look and feel, has been adapted to enable parties in a very large plan appeal case in Auckland to exchange evidence. We hope to

see more of this, but need to make progress in connection with the third bullet point below.

- Two divisions of the Court have run pilot trials of i-Pads to conduct major hearings. Each of the three panel members in the two divisions was issued with an i-Pad, as was our hearing manager in each case. Processes have been developed to overcome initial difficulties with uploading materials, with Government embracing cloud technology. My division used i-Pads in the **Buller Coal** hearing that extended for more than a month late last year. Judge Harland's division trialled them in the case concerning a **Hurunui** wind farm proposal. Surveys of members of the Court and support staff have indicated that the trials were a huge success. Counsel for the major parties also used i-Pads, and were able to move with the Court at a much greater pace than traditional paper-based hearings. Further development of use of this technology will also be, to a degree, dependant on the next bullet point.

- The Court would like to move urgently to pilot electronic filing. Several years ago it was selected by all benches and the Ministry, to run a pilot for civil courts. That project was cancelled (entirely with justification) in the 2011 Budget, because it was an unaffordable, process-laden project likely to produce yet another home-grown system whose ultimate success could not necessarily be guaranteed. I have since discovered some cheap and cheerful examples of the "art" in Australia. One is operating in one of the lists in the Supreme Court of Victoria, processing cases rather similar to our own. For a cost in low-five figures, a part of one of our registries could pilot a similar, off-the-shelf system. We have been the subject of a work-flow and business study by an international ICT (Courts) expert, and have implemented that consultant's recommendations to ready ourselves to conduct a pilot (and achieve efficiencies and national consistency in any event). I'm likely to be on the lookout for Ministerial support to get on with this one, because we don't seem to be going anywhere fast! I might add that the system implemented in the Supreme Court of Victoria was, 6 months after commencement of the trial, set up as "business as usual" across all cases in the List, for very little extra

cost. A Court as small and agile as the Environment Court is the ideal test bed for these sorts of innovations, and I hold the view that successful implementation of e-filing should contribute to further and necessary enhancements of the systems described in the previous two bullet points.

[26] Visitors to our Registries and Chambers are flabbergasted at the quantities of paper that confront them. This, however, wouldn't come as anything of a surprise to our regular "customers." It really is necessary to wage war on paper. Why shouldn't it be thought efficient to be able to save many days of hearing and at the same time to be able to avoid lugging around the countryside, twenty, thirty, or more lever-arch folders of material per panel member? Yes, there are mild security issues around use of i-Pads, but care in the manner of use of them can limit the risks, and are frankly not hard to implement. I look forward to the day when all members of the Court and their hearing managers run cases (particularly the larger cases) through i-Pads, evidence is exchanged amongst parties via a web portal and lodged in the Court electronically, and material uploaded seamlessly to the tablets. I reiterate, because the point is important, a small and agile court like the Environment Court is the ideal place to pilot these systems for the benefit of courts across the spectrum.

Other techniques

[27] I have spoken publicly from time to time about the concurrent giving of evidence by groups of experts (colloquially called in Australia "hot-tubbing"). I do not intend to spend time on this today, but anyone interested can make reference to a paper that I presented at the RMLA annual conference in Hamilton in October 2011, which can be found on the Environment Court's website. The paper is called "*Alternative Dispute Resolution: Thinking Outside the Square*."

[28] The technique, although not used often, can sometimes successfully bring to a head the resolution of issues left unresolved after expert conferencing.

[29] Judicial settlement conferences are also used from time to time to remove final roadblocks to resolution of issues unresolved after mediation or expert conferencing, or at least to further narrow issues and thereby save time and cost. I enjoy telling the story of one I conducted a bit over a year ago, where senior counsel entered the courtroom at the start of a settlement conference snarling at each other and loudly advising that the case was incapable of settlement. I derived particular satisfaction from having the final handful of issues fully resolved by lunchtime.

Resolution of appeals on proposed Plans and Policy Statements

[30] Great progress has been made in the last few years with timely processing of these cases. It is true that up to a decade ago and beyond, groups of appeals tended to take some years to become resolved. In the very early stages this was probably on account of the absence of the then yet-to-be-invented technique of robust case management by Judges, and under-resourcing of the Court. At a closer point in time, the members of the Court came to realise that, even within the context of case management, respondent Councils were being allowed way too much time to work slowly with parties to endeavour to negotiate solutions, and/or engage in a further flurry of promulgation of statutory instruments, adding layer upon layer of substantive complexity and process. Rodney District planning instruments were a classic example of this a few years ago.

[31] For those interested, there is a paper on the Court's website that I produced in mid-2012 contrasting some of those older experiences of processing these cases, with the more modern approach now adopted. Once again, our database was incapable of offering quality information, so legally qualified members of our staff and myself considered the contents of hundreds of files to undertake an analysis of the progress of cases through mediation, minutes, memoranda, pre-hearing stages, and ultimate resolution by hearing in the limited number of cases where that was necessary. The paper is called "*Current and Recent Past Practice of the Environment Court Concerning Appeals and Proposed Plans and Policy Statements*." Some groups of recent appeals have been the subject of a high level of resolution (of the order of about 80 %) within

10 or 11 months of being lodged, in some recent instances. The Court has moved quickly into hearing mode to resolve remaining issues, and an overall period of approximately two years is emerging as a sensible target time to achieve complete or virtually complete resolution of these groups of appeals. It is disappointing to hear continuing talk around the traps of "*10 years to final plan resolution when the Environment Court gets involved*". That is ancient history at best, and occurred long ago for the reasons mentioned.

[32] These improvements are being brought about by the more robust processes of case management and mediation now being employed, and a refusal to simply leave things over to Councils to dictate progress. Further refinements can be expected, particularly if we are successful in sponsoring legislation to make mediation compulsory in almost all cases.

[33] An issue in respect of which we are currently out to public consultation prior to a possible change to the Court's Practice Note, is a tightening up on the requirement that all parties be represented at mediation by persons with full delegated authority to settle. It has, for instance, been our experience, particularly with groups of plan appeals, that when Councils are represented in mediations by politicians or senior officers with full knowledge of cases and full delegated authority to settle, enormous progress is made in the direction of consent orders for signing off by the Judges. Where Councils (and some other large parties) are not so represented, matters go on a "merry-go-round" of consideration by regulatory committees and the like, and mediations can be re-convened more than once while all this occurs over many months. Not only are many parties upset about the cost and delay of this, but indeed some are significantly dissuaded from the mediation process because of the lack of faith in it on account of such strategies.

[34] Anyone interested in this issue can click the link "*Consultation on Practice Note*" on our website, and lodge responses by 31 May 2013.

[35] As I have mentioned, this process is likely to be repeated quite soon concerning a number of other desirable amendments we are considering for the Practice Note.

Other recent initiatives

- **Consultation with professions about practice and process improvements**
  After each of the workshops on expert conferencing, discussions were held with local practitioners in each of the 11 centres that we visited, about prospective improvements. Much was learned by members of the Court and by practitioners, and a lot of these things will feed into amendments soon to be made to the practice note.

- **Internal education and induction processes**
  We have recently revamped our Education Committee which is working on improvements to induction processes for new Commissioners and Judges, and other continuing education initiatives over and above those offered to us by the Institute of Judicial Studies that serves all Courts.

- **Direct referrals**
  There seems to be something of an increasing flow of these cases, and the Reform Bill currently before Parliament suggests that there may be some more. We have worked hard to develop processes, and have the intention of producing guidelines on consultation with relevant professions to further enhance and streamline them. There has been the occasional procedural hiccup, but by and large those who have participated in these cases have been complimentary of the speed within which hearings have been reached, and the overall approach undertaken by the Judges and Commissioners. We have sought a number of amendments to the 2009 legislation to cure defects and offer further streamlining, and a number of these feature in the Reform Bill currently before the House. We have done the same in relation to procedures under Part 6AA of the Act, in relation to Boards of Inquiry, many of which are chaired by Environment Judges and on which Environment Commissioners sometimes also serve.

- **Litigation skills course**
  We are arranging with RMLA, NZLS, and ADLS, a series of workshops, with the assistance of some of our most senior regular

counsel. The RMA regime is heavily based on hearing of expert evidence, predictive judgments, the making of findings in these areas, and the exercise of statutory discretions by the Court, so the content of the course will be somewhat different from the NZLS annual *Litigation Skills* courses, while however complementing them. We wish to hammer the issues of focus, succinctness, relevance, economy and accuracy of cross-examination, and focussed presentation.

Is it possible to speed up processes in the Court?

[36] In a word, yes. As you have heard, there are numbers of initiatives on the go and proposed that we think are worth pursuing. Some need a legislative boost, others we are advancing ourselves, and others need some limited capital and operational funding.

Where to from here ?

[37] My paper thus far has discussed several continuing, current, and forthcoming initiatives. Those are mostly within the powers of the Court in connection with organisation of its work, and do not require legislative attention.

[38] One matter in respect of which we have sought legislative attention, and which features in the reform bill currently before the House, is attention to some provisions of the Act that relate to efficiency. We recommended to the Ministry for the Environment that s269(2) RMA and clause 15 of the First Schedule (sub-clause (1)) could usefully emphasise cost-effectiveness of process, in addition to fairness, efficiency, and a timely approach to resolution of matters in dispute. What will be cost-effective will vary from case to case, but can be closely attended to in a small hands-on Court jurisdiction conducting robust case management by the Judges operating a "docket" or geographical approach to management of the work.

[39] As I have mentioned, there is legislation before the House, and a Discussion Paper, each of which have been the subject of public submissions in recent times. Judges are limited in the extent to which

they can participate in debates about matters of central government policy, for constitutional reasons. I therefore am unable to participate in the considerable debates about proposals in the Discussion Paper to amend sections 6 and 7 of the RMA.

[40] Judges of the Environment Court are, however, consulted from time to time by officials of the Ministry for the Environment about matters of current process, available enhancements to those, and future possible processes in respect of which legislative amendment could help. We must refrain from entering public debate about whether such amendments are necessary or desirable. We do compare and contrast current and possible future processes, and consider that we have our eye on the efficiency ball as much as anyone.

[41] Hence, we must leave it to others to conduct any debate with rigour. Naturally we read the public statements of others, including submissions to the Bill and the Discussion Paper. We have noted with interest, for instance, a submission by Business NZ, the country's largest business advocacy group, that appears strongly support the retention of merit appeals and *de novo* methodology. Similarly, on the part of some conservation groups like the Environmental Defence Society Inc. We do ourselves however need to stand back from the debate.

[42] For constitutional reasons we must content ourselves with offering public information about what we do, how we do it, and with what result, in order that that may be placed in the overall mix when others debate issues of access to justice, efficiency, and cost effectiveness. We have noted with interest some studies by the NZ Productivity Commission into Local Government Regulation, and most recently (commencing last month) RMA appellate procedures and appeals. One interesting feature that emerges from the detailed work in those reports, is a figure that we are able to take and use, supplementing it with information extracted from the Court's database.

[43] It is our understanding from the researchers at the Productivity Commission that something of the order of approximately 1.5% of the hearing business of Councils finds its way into appeals being lodged with the Environment Court. Then, by interrogating our database to the

extent that we can, it appears that approximately 17% of the topics the subject of appeals on both resource consents and plans, requires hearing time. Simple mathematics tells us that 17% of 1.5% produces a figure of 0.255% of all Council hearing work needing hearing time in the Environment Court. The figure should be capable of being driven lower by increasing use of robust filters such as compulsory mediation, increasingly hands-on styles of Alternative Dispute Resolution, and increasing refinement of other processes described in the Court's Practice Note for early identification and narrowing of issues, further narrowing of them through expert conferencing and other forms of ADR such as Judicial Settlement conferencing. Is there a problem? That is a question that members of the Court are not entitled to answer, but I hope we have been able to provide information that will assist others to do so.

Laurie Newhook
Acting Principal Environment Judge