NEW HORIZONS IN THE ENVIRONMENT COURT:

Innovations in Dispute Resolution in Environmental Disputes

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Introduction – The nature of environmental disputes in NZ

During the last decade, alternative dispute resolution processes have become embedded in the work of the Environment Court, to the point where they now resolve approximately 75% of the caseload. Mediation has been the principal for of ADR, but different styles have come to be employed, some of which could be said to resemble other forms of ADR entirely.

ADR techniques are routinely employed across the board by the Commissioners, and also the Judges.

It is necessary to start by describing the nature of the cases that come to the Environment Court to be resolved, whether by ADR methods, or by hearing.

There are essentially three classes of case:

(a) Disputes about proposed policy statements and plans promulgated by regional or district councils;

(b) Disputes relating to applications for resource consent or designations for public works;

(c) Enforcement proceedings.

The first two classes of case comprise, according to our statistical analysis, approximately 95% of the cases filed in the Environment Court each year.

The handful of enforcement proceedings are the only cases that bear much resemblance to the civil case work in other courts, particularly the High Court and the District Court. That is, it is only the enforcement cases that are heavily dependent

on analysis of historical fact. Furthermore, it is really only the enforcement cases that routinely involve very small numbers of parties, often only two or three.

Put round the other way, 95% of the work in the Environment Court differs markedly from that in the general civil courts on account of the following qualities.

First, the subject matter is almost entirely predictive, relating to future events, activities, plans, and effects on the environment (the latter being very broadly defined in the Resource Management Act 1991). This means that the work of the parties and the Court in the cases is much more heavily dependent on expert opinion and principles of law, than they are on historical fact. They routinely involve prediction, relative probability, analysis of potential risk, and sometimes the application of scientific modelling.

Secondly, the cases are often multi-issue, and hence have multi-disciplinary professional input. Examples include the many branches of science, the many branches of engineering, social, economic, Māori cultural, heritage, architecture, urban design, landscape, and planning/resource management.

Thirdly, most cases involve multiple parties and many people representing those multiple parties in many capacities. Examples of parties in our cases include public authorities (central, regional, and district government, and council-controlled organisations); Māori (iwi, hapu, marae committees); NGOs; community groups; and individuals. Many cases involve dozens, sometimes even hundreds, of parties. In cases with large numbers of parties and large numbers of issues, some parties will be focussed on some issues, and some on others. The permutations can be considerable.

Fourthly, there are strong elements of public law and public interest running through the cases, particularly those that concern proposed policy statements and plans. That is, while there are often flavours of private dispute, public interest matters underpin the interests of many parties in the cases.

Given the wide-ranging technical nature of issues in cases in the Environment Court, many types of professional are appointed to it as Commissioners. There are presently about twice as many Commissioners as Judges, and panels that sit to hear cases are generally presided over by a Judge and two Commissioners. All three panel members have an equal say in the outcome.

Section 253 of the RMA provides a list of types of knowledge and experience that is sought in commissioner-appointment processes. They are:

(a) Economic, commercial and business affairs, local government and community affairs;

(b) Planning, resource management, and heritage protection;

(c) Environmental science, including physical and social sciences;

(d) Architecture, engineering, surveying, minerals technology and building construction;

(da) Alternative dispute resolution processes;

(e) Matters relating to the Treaty of Waitangi and kaupapa Māori.

In addition to their sitting responsibilities, Commissioners undertake almost all of the ADR. I will shortly talk about the different kinds of ADR on offer, but note at this juncture that there are two broad classifications, ADR amongst parties, and facilitated conferencing of groups of expert witnesses. The Commissioners are trained primarily in mediation, but with assistance from the Environment Judges, have steadily developed techniques and experience in facilitating conferences of groups of expert witnesses, and have broadened the ADR work and techniques. All of these endeavours contribute strongly to the settlement rate of cases in the Environment Court. Also of value, where cases do not fully settle, issues are often narrowed by these processes, prior to hearing.

The beauty of having available nearly 20 professionals, the Commissioners, who are invariably senior and respected members of their individual professions, is that we can deploy particular Commissioners on a "horses for courses" basis. We consider this to be particularly important given the strongly predictive nature of the cases, based substantially on expert evidence from specialised witnesses called by the parties.

The members of the Court are conscious that "time is money", particularly around holding costs for developers and infrastructure providers. Resolution of cases by ADR methods assists strongly in meeting the need for expedition.

Alternative dispute resolution

Section 268 of the Resource Management Act contains a broad power for the Court to initiate "*for the purpose of encouraging settlement*," mediation, conciliation and other procedures designed to facilitate resolution before or during a hearing. That

provision has a "voluntary" flavour about it ("*with the consent of the parties…*"), however the Court takes the view, encouraged by other substantive and procedural sections of the Act and given the regular presence of significant public interest issues, that its approach along a spectrum of "voluntary" to "compulsory", should tend towards the latter. The Court's new Practice Note (in force from December 2014) makes this approach clear.

ADR is a free service in the Environment Court, run principally by the Commissioners.

As experience with ADR has grown in recent years, the Practice Note has been updated from time to time. The most recent version, just referred to, contains a significant section on alternative dispute resolution, and a major protocol for Court-assisted mediation. The latter is an appendix within the Practice Note.

So, too, is there a protocol for expert witness conferences, techniques for which have been developing strongly in the last two or three years, and whose refinements are now found in that new protocol.

The Practice Note records that ADR techniques are often highly cost-effective compared to proceeding to a full hearing before the Court, and that outcomes may also be reached which would be beyond the jurisdiction of the Court in a hearing. These can be achieved by way of "side agreements" that will not become part of any order ultimately issued by the Court.

The approaches that members of the Court have been developing in recent years now go well beyond voluntarily-approached mediation, followed by traditional hearings where the case has not settled. Commissioners and Judges now regularly employ their environmental law skills, experience and ADR training, to offer processes that, while they may not be expressly described as such while running, strongly resemble collaboration, joint fact-finding, expert conferencing, third party assessment, interest-based negotiation, expert determination, conciliation, and judicial settlement conferences. The last named is the province of the Judges, who have also been instrumental in undertaking, during the course of hearings, what the Australians call "hot-tubbing" of groups of expert witnesses. The Judges also employ case management techniques during the life of each case that encourage parties to find and own solutions, a kind of instinctive and constant ADR approach.

Early in life someone drummed into me, that "if a job is worth doing it's worth doing properly". My take on that, these days, is that preparation is everything. ADR can

be highly successful (it resolves approximately 75% of cases in the Environment Court), but rigorous preparation must be demanded of parties, experts, lawyers and members of the Court themselves.

The Court is fortunate to hold statutory encouragement to offer considerable flexibility in the regulation of its proceedings. One manifestation of this is its Practice Note, developed "in house" as skills and experience grow. 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. This also means that as experience grows, and before any new version of the Practice Note is issued, the Court can offer flexibility and improvements in process. These benefits are regularly employed in our ADR work and facilitated conferencing of expert witnesses.

The Practice Note can be found on the Court's website at: http://www.justice.govt.nz/courts/environment-court/legislation-and-resources/practice-notes