BEFORE THE ENVIRONMENT COURT
AUCKLAND REGISTRY

ENV-2015-AKL-000-134

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal under Clause 14 of the First Schedule to the Act
BETWEEN	TRUSTEES OF MOTITI ROHE MOANA TRUST
	Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL

OPENING FOR MOTITI ROHE MOANA TRUST AND ROYAL FOREST & BIRD PROTECTION SOCIETY INC.

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MAY IT PLEASE THE COURT

INTRODUCTION

1 The Motiti Natural Environment Management Area[1] is recognised within the Bay of Plenty for its outstanding and high natural character; outstanding (ONFL) and significant landscape values; and significant cultural values.[2] It has the advantage of being spatially defined and relatively compact. Its' attributes are recognised in the RPS, to be given effect to by the proposed coastal plan. Fishing pressure within the Motiti NEMA has adverse impacts on natural character ("..fishing pressure modif[ies] natural character"[3]). Rules are required to protect these values. Because of the multiple values present, the Motiti NEMA is an appropriate place to start the new era of RMA jurisprudence for regional councils controlling fishing techniques and methods for lawful purposes.

2 The Regional Council (**Council**) has a legal duty under s30(1)(ga) RMA to maintain indigenous biodiversity within the Motiti NEMA "from adverse effects of fishing for defined purposes.[4] "Maintenance" sets a baseline approach; it is arguably a stronger duty (and no less directive) than "protection Council has a co-extensive duty under s8 RMA and the planning instruments to recognise and provide for Māori values including the relationship of Māori with taonga; and protect these from adverse effects of fishing for defined purposes. By omitting rules from the proposed coastal plan, Council breached this legal duty. It conflated duties owed under the RMA with duties and powers available to the Crown under the Fisheries Act.

3 S30(1)(ga) RMA imposes a duty not a discretion.[5] The extent of the duty (whether to protect from "adverse" effects of fishing or "significant" adverse effects of fishing) depends upon the values being protected in the coastal environment: if outstanding, then the higher standard of protection identified in Policies 13 and 15 NZCPS (and related provisions in the RPS and coastal plan) applies. If not outstanding, the threshold of avoidance relates to significant adverse effects. Policy 11 NZCPS applies a similar standard to avoidance: avoiding adverse effects to rare and threatened indigenous biodiversity; and avoiding significant adverse effects to important habitats

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[1] MNEMA but referred to as "Motiti NEMA" in these submissions.
[2] Attachments to evidence of Diane Lucas, Sheet 9.
[3] MRMT Casebook (**casebook**) tab 5
[4] Refer discussion below on the High Court decisions in *Attorney General v MRMT* [2017] NZHC 1429 (**1st HC decision**); [2017] NZHC 1886 (**2nd HC decision**).
[5] *Property Rights in New Zealand Inc v Manawatu-Wanganui Regional Council* [2012] NZHC 1272; *Ngāti Kahungunu v Hawkes Bay Regional Council* [2015] NZEnvC 50: discussed below.

of indigenous species. The line between the specific regime of the Fisheries Act and the more general RMA was identified by Whata J in the 1st HC decision at [109]. The RMA manages externalities of fishing outside the specialist focus of the Fisheries Act but within the RMA's broader definition of sustainability:

> "[109] Given this, the two Acts can be reconciled by affording primacy to the FA on the utilisation of fisheries resources and on the effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs. Regional councils then remain tasked with the management of the other effects or externalities of fishing on the environment as defined by that Act."

4 Council and the Crown oppose the proposed rules framework by relying on a combination of weak pragmatic and process arguments. These arguments do not respond to the intrinsic values that Council is under statutory duty to maintain, recognise and protect. The Crown's evidence appears to re-litigate the *vires* question. Andrew Hill's putative evidence is that there is no coverage left to the RMA; the ground is already covered by Fisheries Act mechanisms. MRMT denies the assertion, which does not reflect Whata J's framework.

5 Process complaints are overstated. The First Schedule process is a public process. Relief sought by MRMT has been publicly known from the outset. Council's failed strike-out application confirmed that it was within reasonable contemplation that scope included spatial planning controls over the Motiti NEMA.[6] Both Council and Crown play a representative role in any event. Scope of relief is also delimited by the duty to give effect to the RPS.[7] Control of fishing techniques and methods within the Motiti NEMA was signalled in the RPS, which the coastal plan must give effect to. Adverse impacts of fishing pressure were clearly identified. The RPS identifies, for the Motiti NEMA, that:

> "..There are numerous significant reefs and special places and habitats for many prized species [including fish, shark, octopus, crayfish, shellfish, kina]..Populations and biomass are severely impacted and threatened by commercial fishing and increasing recreational and charter fishing.."

6 No party has challenged validity of identification of these values by the RPS as within scope of the RMA. They are to be given effect through policies and rules in the proposed coastal plan. The Environment Court confirmed, as early as 2014, that the relationship of tangata whenua with natural character values within the Motiti NEMA

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[6] *Motiti Rohe Moana Trust v Bay of Plenty RC* [2016] NZEnvC 240: casebook at tab 4
[7] Refer the discussion (in context of the proposed Auckland Unitary Plan) in *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [150]-[153].

(under NZCPS Policies 13 and 14) would be at issue for the proposed coastal plan process.[8]

7 Absence of cultural opposition is an important facet of this appeal and can be contrasted with the MV Rena resource consent process.[9] Absence of opposing cultural evidence supports (and does not detract) from MRMT's relief. By direction of the Court, relevant iwi authorities were served by MRMT with the *vires* fishing declarations sought in the Environment Court.[10] A logical consequence of those declarations (if granted) was that MRMT would pursue a rules framework to control fishing within the Motiti NEMA. The New Zealand Māori Council, and interested iwi and hapu, joined the proceedings. Other iwi authorities from within the Bay of Plenty elected not to.

8 MRMT is supported by Ngāti Mākino and Ngāti Ranginui and unopposed by any other iwi or hapu. Council and the Crown have no evidence to support their argument that Treaty settlements or customary interests are threatened by the proposed rules framework. It is a hypothetical objection. Overlapping claims under the Takutai Moana Act, unless and until resolved by the Crown or High Court, have no impact on jurisdiction under the RMA. Otherwise Council's rules framework in the CMA would be at risk from the same claims.

9 This appeal engages at least five elements of s6 RMA.[11] It is the culmination for the Appellant (**MRMT**) of 9 years litigation relating to recognition and protection of the significant cultural and biodiversity values of the Motiti Area within the RPS and proposed coastal plan. The **attached** chronology outlines relevant steps. Identified values are above and below the waterline; and are biotic and abiotic. The reefs, ecosystems, flora, fauna within waahi tapu and waahi taonga are vulnerable taonga, in terms of their cultural and indigenous biodiversity values, and merit recognition and protection from significant adverse effects of fishing, for lawful purposes. Council has breached its legal duty under s30 RMA by excluding methods, especially rules, to maintain, recognise and provide for these values.

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[8] *Motiti Rohe Moana Trust v Bay of Plenty RC* [2014] NZEnv C 239 at [9]-[13]: Casebook tab 7.
[9] Where there was both significant support and significant opposition; with the Court preferring the evidence of iwi and hapu in support. The mere fact of opposition was not determinative; the Court addressed the competing claims to mana whenua status.
[10] The relevant Court minute is **attached**. There were an extensive list of parties to be served, including LGNZ, iwi authorities and Marae on Motiti Island. Hugh Sayers will confirm in evidence that the Court's directions as to service were complied with.
[11] ss6(a)-(e); arguably also s6(f).

ISSUES

10 Planning issues are identified by Peter Reaburn in rebuttal evidence:

(1) Whether, given the state of the marine environment in the MNE and the Maori resource management issues relating to that area, a method that includes the introduction of further rules, specifically controlling fishing, will more appropriately achieve the objectives of the pRCEP (and implement the policies of higher order instruments).

(2) If the answer to that question is "yes", whether a spatial planning method is appropriate in the MNE.

(3) Having regard to the above, whether MRMT Option is then a more appropriate option than the Regional Council Option.

(4) In respect of MRMT Option, whether there are effectiveness, efficiency, effectiveness [sic] or cost issues that may affect whether that is an appropriate option.

(5) The extent to which the schedules in the pRCEP that describe the overlays applying to the MNE area need to be supplemented, and how that should be done. [12]

11 Issues in dispute between ecologists are largely identified in the table prepared by Dr De Lucca; in order to narrow issues in dispute, the **attached** table represents a response from MRMT's ecologists. These submissions address:

- Statutory framework
- S30 RMA
- NZCPS
- S8 RMA
- MV Rena consent memorandum
- Witnesses
- Relief

STATUTORY FRAMEWORK

12 The relevant statutory framework is the 2013 version of the RMA.[13] Relevant considerations include sections 30, 32, and 63-68 RMA, together with 1st Schedule provisions. In framing rules the Court must have regard to the actual or potential effects of activities on the environment; S68(5) relevantly allows for rules to be limited

[12] Peter Reaburn at [4.3]; this is a refinement of the issues identified by Jo Noble at [11] and [12] of her evidence.

[13] The Resource Legislation Amendment Act 2017 (**RLAA**) received royal assent on 18 April 2017. Transitional provisions under Schedule 2, clause 13 of the RLAA provide that where a proposed plan has been publicly notified but has not proceeded to the stage at which no further appeal is possible prior to the RLAA commencing, the proposed plan must be determined as if the RLAA had not been enacted.

in spatial extent.[14] Graeme Lawrence and Peter Reaburn undertake s32 RMA assessment, supported by other experts including Martin O'Connor. Three options are identified:

- status quo (supported by no party);
- Council's proposed amendments;
- MRMT's proposal.

13 Mr Reaburn correctly notes that there is a gap in the coastal plan framework. There are no rules managing the significant adverse effects of fishing on the relationship of Māori with taonga and maintenance of indigenous biodiversity:

> "5.13 If it is to be accepted that:
> (a) Fishing has and continues to result in significant adverse effects on marine ecology, including and affects indigenous biodiversity maintenance and / or
> (b) Fishing has and continues to result in significant adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua;
> I consider that the adverse effects arising from fishing must be avoided.
>
> 5.14 The only rules that touch on this issue are Rules DD 15 and 15A. They do not specifically address fishing, although they do manage disturbance, deposition and extraction in IDBA (A) and ONC areas which could occur as the result of some fishing activities. There are no other rules that manage fishing and no specific policy that relates to the control of fishing.
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> 5.15 Ms Noble notes that, when preparing the pRCEP, Council did not understand it had jurisdiction to control fishing activities. On that basis, it appears that consideration was not given to the major role fishing plays in degrading marine ecology and adversely affecting waahi tapu, waahi taonga and mauri. I consider that has resulted in an inadequate response to ensuring a method is in place to meet the plan's objectives and policies. In my view that is a gap that needs to be filled."

14 Both Graeme Lawrence and Peter Reaburn conclude that rules are required to give effect to the higher order directives, and to manage the significant adverse impacts of fishing on the outstanding and high biodiversity, natural character, landscape and cultural values within the Motiti NEMA. It is time for Council to move beyond continual (and arguably reductionist) "identification" of the Motiti NEMA characteristics and values, unenforceable absent a rules framework. In context of the agreed significant

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[14] (68)..A rule may—
(5) (a) apply throughout the region or a part of the region:
(b) make different provision for—
(i) different parts of the region; or
(ii) different classes of effects arising from an activity:
(c) apply all the time or for stated periods or seasons:
(d) be specific or general in its application:
(e) require a resource consent to be obtained for an activity causing, or likely to cause, adverse effects not covered by the plan.

adverse impacts of fishing to relevant RMA values, "protection" and "provision" requires a regulatory framework (and it is efficient and effective to have rules). That the BOP Regional Council is first mover to control fishing for lawful RMA purposes, creating scope for uncertainty[15] in terms of cost and public acceptance, does not diminish the responsibility.

15 No party has evaluated intermediary options but the Court has power to do so. For example:

- Prohibited status could be introduced on a staged basis, commencing at one or more waahi tapu (such as Otaiti where information on monitoring, costs and benefits of exclusion of fishing vessels is already available as a result of the MV Rena exclusion zone);
- Rules framework for waahi taonga could be limited to more invasive types of fishing (such as purse seining, dredging);
- A staged or adaptive approach is not supported by MRMT because it is not holistic and involves picking and choosing between waahi tapu; and the ecological evidence supports larger, more cohesive, marine protected areas, with at minimum areas of 3nM.

16 Section 290A RMA has limited relevance. Council's decision merits little weight. Council's decision was made prior to the Environment and High Court declarations on *vires* of fishing controls. There was minimal evidence before Council Commissioners and no ability to cross examine. Council has proposed different provisions to the decisions version.

S30 RMA: jurisdiction to control fishing

17 Regional councils cannot control land, occupation of coastal space or activities on the surface of water in the CMA to regulate fishing for the purpose (or object) of managing fishing or fisheries resources controlled under the Fisheries Act 1996 (**FA**).[16] But the FA does not purport to address, let alone control, all the effects of fishing on the wider environment (including people and communities).[17]

[15] MRMT does not accept the degree of uncertainty alleged.
[16] Section 30(2); 1st HC decision at [7].
[17] [8].

18 The sustainability function under the FA is focused on *biological sustainability of the aquatic environment as a resource for fishing needs*. By contrast, the RMA defines sustainability more broadly (to include protection) and environment more widely (ecosystems and their constituent parts (including people and communities), and all natural and physical resources).[18] The Acts envisage parallel, complementary and overlapping management of fishing and the effects of fishing, where:

a. the FA has primacy on *sustainable utilisation*, namely:

i. the *sustainable utilisation of fisheries resources* now and in the future; and

ii. the effects of fishing on the biological sustainability of the aquatic environment *as a resource for fishing needs*.

b. regional councils manage effects or externalities of fishing on the wider environment as defined by the RMA[19] They cannot exercise functions specified at s 30(1)(d) to regulate fishing for the purpose of managing *the utilisation of fisheries resources* or the effects of fishing on the biological sustainability of the aquatic environment *as a resource for fishing needs*.[20] But they are not prevented from exercising functions to control, when necessary, other effects or externalities of fishing activity on the environment.[21] They can manage the effects of fishing not directly related to *biological sustainability of the aquatic environment as a resource for fishing needs*.[22]

19 In particular, for effects on ***Māori values***:[23]

a. A regional council may exercise all functions in respect of matters Māori, provided they are not *inconsistent with the special provision made for Māori interests under the FA*[24] (see b. - d. below).

b. The FA's coverage is special when giving effect to *treaty settlements.*

c. RMA controls must be developed *in light of, among other things, FA provision for ensuring sustainability, including regulations relating to taiapure*.

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[18] [9] and [17].
[19] [10]-[12].
[20] [17] and [131].
[21] [13].
[22] [18], [109] and [132].
[23] [14]-[15] and [19].
[24] [119] and [133].

d. A council seeking to manage effects on Māori values must be careful not to *duplicate the functions performed under the FA*. A council seeking to recognise and provide for the relationship of Māori with their taonga must not *derogate from the provision for Māori rangatiratanga* made under Part 9 FA.[25]

20 For ***indigenous biodiversity***: s 30(2) does not prevent Council performing its s30(1)(ga) statutory function to maintain indigenous biodiversity.[26] A regional council will need to be satisfied that the exercise of the s30(1)(ga) function is *demonstrably necessary to maintain indigenous biodiversity per se*. [27]

21 For ***other effects***: RMA control on other fishing effects such as intrinsic values, wāhi tapu, navigation, natural landscape, and non fishing commercial or recreational activity (not an exclusive list) would likely fall outside the s 30(2) injunction.[28]

Where the line is drawn

22 The FA sustainability measures and the scheme of allocation in general are primarily directed to *biological sustainability of the aquatic environment in order to achieve a maximum sustainable yield.* The exceptions to this scheme are Māori interests and protected wildlife.[29]

23 For the kina barren case study:

a. Effects of harvesting snapper and crayfish on biological sustainability of the aquatic environment are subject to FA controls for the purpose of setting FA sustainability measures, quota allocation and quota management areas. To that extent, and subject to the Court's findings regarding indigenous biodiversity, the exercise of s30(1)(d) functions to control that effect is not permitted. But RMA controls are permissible insofar as the effects go beyond *biological sustainability of the aquatic environment as a resource for fishing needs, for example to effects on intrinsic values or character of a place*. [30]

b. That finding does not relate to s30(1)(ga) controls that are exclusively to maintain indigenous biodiversity, permissible within limits identified above.

Proof required

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[25] [129].
[26] [16].
[27] [129] and [134].
[28] [114].
[29] [107].
[30] [113].

24 *The need for separate additional RMA control* of the effects of fishing on the aquatic environment as defined by the FA must be clearly demonstrated, given the careful calibration undertaken by FA functionaries when setting sustainability measures, fixing a TAC, allocating fisheries stocks, providing for rangatiratanga or making regulations to give effect to the FA's purpose.[31]

Duty or discretion ?

25 As noted, maintenance of indigenous biodiversity is a **duty** on Council and not discretionary. The answers provided by Whata J in the 1st HC decision at [131]-[134] ("may") should be read in this light. The question before Whata J was validity and not whether individual duties under s30 are mandatory.

26 In *Ngati Kahungunu Iwi Inc v Hawke's Bay Regional Council* the Environment Court considered another s30 function involving "maintenance" of an element of the environment: s30(1)(c)(ii). The s 30(1)(c)(ii) function is control of the use of land for the purpose of the maintenance and enhancement of the quality of water in water bodies and coastal water. The Court found that:

> [28] The functions required of a regional council- and indeed its raison d'etre- are those of relatively high-level control of resources having regional, as opposed to immediately local, significance. Section 30 is key to considering what a regional council may do **and, more importantly in this context, what it must do....**
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> [29] So, in summary, it is a function of every regional council to control the use of land to maintain and enhance the quality of water in water bodies - ie including water in aquifers, and to control the discharges of contaminants into water (again, including water in aquifers). **This function is not optional - it is something a regional council is required to do, whether it be difficult or easy**.

27 Kōs J in *Property Rights in New Zealand Inc v Manawatu-Wanganui Regional Council*[32] noted that s 30(1)(ga) makes it a mandatory function of every regional council to establish objectives, policies and methods for maintaining indigenous biodiversity. The same stringency of obligation noted in *Property Rights* and *Ngati Kahungunu* applies under s 30(1)(ga) which requires **maintenance** of an element of the environment: in this case, indigenous biological diversity.

Strictly necessary

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[31] [130]

[32] Then Kōs J (now Kōs P) in *Property Rights in New Zealand Inc v Manawatu-Wanganui Regional Council* [2012] NZHC 1272.

28 This is not part of the statutory test and arguably does not form part of the binding decision (*ratio*).[33] Appropriateness (and related tests under s32) is the correct threshold. MRMT can satisfy a "strictly necessary" threshold if required on a correct reading of Whata J's 1st and 2nd decisions. Whata J in the 2nd HC decision arguably distances himself from the "strictly necessary" approach.

Environment Court declaration

29 The reasoning in the original EC declaration[34] was essentially confirmed by the High Court; albeit the declarations were seen as overly broad. At [8] the Environment Court noted the "*core issue*": "*the interface between the Fisheries Act 1996 and the Resource Management Act 1991, and particular the application of s30(2) of the Resource Management Act…*"

30 At [10] the Court identified that the regimes of the 2 Acts are "*intended to work in tandem*" and "*are aware of, and attentive to, the other*". The relationship between the two Acts is not one "*where one statute could be said to impliedly repeal the other, or that there is intended to be a lacuna between the two Acts*". The Fisheries Act is "*not to be regarded as a code*": at [14] (relying on *Reay v Minister of Conservation*[35]).

31 Overlap in control must be considered by decision makers under each Act: at [16]. s6 Fisheries Act does not affect jurisdiction to include controls of the nature listed (going to allocation and occupation); instead enforceability: at [22]. s30(2) RMA creates a jurisdictional bar: at [23]; but for reasons explored by Whata J, this does not preclude an RMA response.

S8 RMA

32 MRMT's appeal raises matters of national importance to Māori. These include:

- S6(e) RMA: relationship of Māori and their culture and traditions with indigenous biodiversity in ancestral waters;
- S7(a) RMA: exercise of kaitiakitanga by tangata whenua over taonga species and habitat in the coastal marine area;
- S8 RMA: active protection of taonga species and habitat in the coastal marine area as recognised Treaty principle;

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[33] Refer 2nd HC decision at [23c]; Whata J preferred the formulation at [107]-[114] and [129]-[130] of the 1st HC decision.
[34] *Motiti Rohe Moana Trust v Bay of Plenty* RC [2016] NZEnvC 240; Casebook: tab 3
[35] [2014] NZHC 1844 at [46]

- S8 RMA: restoration of mauri in coastal marine area, also part of the duty of active protection of taonga;
- These are "strong directions" per *McGuire*.[36]

33 s8 RMA remains relevant under *King Salmon*.[37] Relevant Treaty principles are identified in the *MV Rena* decision[38] at [106]-[107]; and by the Waitangi Tribunal interim report on MV Rena at pp4-8. Kaitiakitanga and active protection of taonga are key principles engaged by MRMT's appeal. The duty of protection is greater where the taonga is in a vulnerable state.[39]

34 Principles apply at two levels:

- S8 RMA expressly requires decision-makers, in exercising functions, to have regard to Treaty principles. This relevantly applies to regional councils exercising functions under s30 RMA when setting objectives, policies and methods for proposed coastal plans;
- The constitutional or macro-level principle that, when interpreting legislative provisions for exercise of public law powers, the Court should prefer the interpretation that best reflects Treaty principles, unless precluded by express wording.[40]

35 The Environment and High Courts correctly found that it is lawful for regional coastal plans to include rules that control fishing techniques and methods.[41] Lawful purposes include maintenance of indigenous biodiversity; and recognition of cultural and spiritual relationships between tangata whenua and taonga species or habitat in the CMA.

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[36] Lord Cooke in *McGuire v Hastings District Council* [2002] 2 NZLR 577, 594 paragraph [21]: "These are strong directions, to be borne in mind at every stage of the planning process. The Treaty of Waitangi ... and the other statutory provisions quoted do mean that special regard to Maori interests and values is required in such policy decisions as determining the routes of roads.."

[37] *EDS v New Zealand King Salmon Company* Ltd [2014] NZSC 38, [2014] 1 NZLR 593 at [88]: "..Moreover, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind, including when giving effect to the NZCPS..."

[38] *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73

[39] Confirmed by the Privy Council in *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)

[40] MRMT reserves its position as to whether the law has evolved to give greater recognition to Treaty principles in circumstances where these conflict with express wording, such as the HC decision in *Glenharrow Holdings Ltd* [2003] 1 NZLR 236 (HC); affirmed on different grounds by the CA in *Glenharrow Holdings Ltd v A-G* [2003] 2 NZLR 328.

[41] Casebook tab 3

Unlawful purposes involve control of fisheries and fishery resources for human utilisation now or in the future, [42] the latter being Fisheries Act purposes.

36 The RMA is familiar with overlapping functions and purposes: both intra-Council[43] and inter-Council.[44] It is also familiar with functional overlap as between different statutory frameworks.[45] Parliament has turned its mind to, and particularised, unlawful functions in s30(2). It could have adopted a blanket prohibition in s30(2) but instead focused on functions stated in s30(1)(d)(i)(ii)(vii). Regional council functions not referred to in s30(2) are not captured. This reflects the statutory premise that words are taken to mean what they say: s 5 *Interpretation Act 1999*.[46]

37 The coverage of the Fisheries Act "*..is special when giving effect to Treaty settlements...*"[47] The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 was a full and final settlement of commercial fishing rights. Treaty principles still apply in relation to non-commercial fishing rights: refer preamble at (viii) and s10 of the 1992 Settlement Act.[48] MRMT has an extant claim against the Crown before the Waitangi Tribunal.[49]

38 Part 9 FA provides for Taiapure-local fisheries and customary fishing. Its object is to make better provision for rangatiratanga and Article II Titiri [te Tiriti] O Waitangi in respect of estuarine or littoral coastal waters of special significance to iwi or hapu as a source of food or for spiritual or cultural reasons. It does this by providing for identification of Taiapure-local fishery areas, which are managed by a committee, and which can be subject to specific regulations. Regulations relate to customary food gathering and the special relationship between tangata whenua and places of importance for customary food gathering. Part 9 also provides for temporary closure of a fishery or restriction on fishing methods to recognise and make provision for the use and management practices of tangata whenua in the exercise of non-commercial fishing

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[42] *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438.
[43] Such as s30(1)(c) and s30(1)(ga) RMA
[44] Such as overlapping functions between district and regional councils for maintenance of land-based indigenous biodiversity, reflected in planning instruments which may have rules covering the same activities. See for example *Canterbury RC v Banks Peninsula DC* [1995] 3 NZLR 189 (CA).
[45] Environment Court at [39], CB13. Refer examples in Forest & Bird submissions at [46]
[46] Discussed in *Federated Farmers of New Zealand v Manawatu Wanganui Regional Council* [2011] NZEnvC 403 at [4]; affirmed on appeal in *Property Rights of New Zealand Inc v Manawatu-Wanganui Regional Council* [2012] NZHC 1272
[47] Whata J in 1st HC decision at [14]
[48] Casebook tab 10
[49] Refer Umuhuri Matehaere rebuttal.

rights. Provision for rangatiratanga and Article II of the Treaty is not equivalent to the duty to have regard to Treaty principles under s8 RMA; and s8 is not limited to rangatiratanga.

39 Interpretation of purpose and function in s30 RMA is contextual. Part of this context is the relationship between Māori and indigenous biodiversity, as expression of tikanga and matauranga Māori; it also speaks to s6(e), s7(a) and s8 RMA purposes that express ancestral relationships with coastal waters and taonga. These are not "for the purpose of managing fish or fishing resources".

40 There is no direct equivalent to s8 RMA. Part 9 refers to rangatiratanga and Article II but uses the words "making better provision" which is non-exclusive in wording.[50] It does not preclude recognition of Treaty principles not addressed by methods stated in Part 9. Section 5 Fisheries Act requires consistency with the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.[51] As a starting point, the purposes referenced in the Settlement Act are unrelated to the purposes identified in s6(e) and s7(a) RMA, and have no contextual connection to the substantive role of s8 RMA. The statutory context is quite different, relating to settlement of commercial and non-commercial rights held by Māori in relation to fishing. In contrast, s6(e) and s7(a) RMA is relational and "relationship" focused.[52] Crown evidnce seems to conflate different "purposes" arising in different statutory contexts.

41 Perhaps more relevantly, settlements reached are "subject to" Treaty principles. Preamble to the Settlement Act confirms that Treaty principles continue to govern the relationship of Crown to Māori in relation to matters covered by the settlement. The preamble is given legal status by s3 of the Settlement Act:

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[50] 174 Object
The object of sections 175 to 185 is to make, in relation to areas of New Zealand fisheries waters (being estuarine or littoral coastal waters) that have customarily been of special significance to any iwi or hapu either—
(a) as a source of food; or
(b)for spiritual or cultural reasons,—
better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi.

[51] 5 Application of international obligations and Treaty of Waitangi (Fisheries Claims) Settlement Act 1992
This Act shall be interpreted, and all persons exercising or performing functions, duties, or powers conferred or imposed by or under it shall act, in a manner consistent with—
(a) New Zealand's international obligations relating to fishing; and
(b) the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992."

[52] "Rights" and "relationships" may overlap but are conceptually distinct.

...(viii) the implementation of the deed through legislation and the continuing relationship between the Crown and Maori would constitute a full and final settlement of all Maori claims to commercial fishing rights and would change the status of non-commercial fishing rights so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect but would continue to be subject to the principles of the Treaty of Waitangi and give rise to Treaty obligations on the Crown.

3. Interpretation of Act generally
It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the agreements expressed in the Deed of Settlement referred to in the Preamble.

42 The Fisheries Act is therefore:

(a) intended to be subject to Treaty principles;

(b) alternatively, it should be read in light of Treaty principles;

(c) provisions such as Part 9 and the Settlement Act do not exclude Treaty principles. [53]

43 This answers the Crown's argument that fishery management under other statutes, including the RMA, has potential to undermine agreements recorded in the Settlement Act, or non-commercial management methods such as mataitai. This is conflation of unrelated purposes or considerations.

44 If the Crown's hypothetical is correct, and there is direct or indirect impact on quota allocated to Māori as a result of rules that control fishing techniques and methods in regional coastal plans, then this is a consequentialist argument and does not go to jurisdiction. It is not reason to fail to recognise matters of national importance and mandatory considerations in s6(e), s7(a) and s8 RMA. Failure to maintain indigenous biodiversity has caused adverse effects to mauri, and ancestral relationships of Māori to coastal waters and taonga species and habitat.

45 Under the RMA, Treaty principles continue to apply in relation to the relationship of Māori with taonga species including their ability to exercise kaitiakitanga through prohibiting fishing within spatially defined areas to maintain and protect those species. There is no overlap or derogation from the 1992 Settlement Act. As with a marine reserve or protected area, Māori (and all other persons) will be unable to fish within waahi tapu at the Motiti NEMA absent a plan change. They can fish elsewhere. This is the normative and practical effect of rules imposed under s15 RMA.

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[53] Environment Court at [15]

46 While a merits point, Dr Grace's evidence confirms that, absent intervention through rules in a coastal plan, there may be no direct relationship between tangata whenua and taonga species, when species are fished out of existence in a particular area.[54]

NZCPS

47 *King Salmon* introduced a rebuttable presumption to Part 2 RMA. Ss5, 6 and 7 RMA[55] are to be disregarded for plan change processes in the coastal environment,[56] absent incompleteness, invalidity or coverage.

48 Emerging case law has applied that rebuttable presumption to higher order instruments. It is submitted that is an incorrect extension of *King Salmon*. The rebuttable presumption does not apply to higher order instruments.[57] Instead, the higher order instruments (NZCPS) remain as mandatory considerations in consequence of s75(3) RMA. This ensures a checks and balances approach, when evaluating lower order provisions.[58] An alternative view is that, where there is disagreement as to the meaning of objectives and policies at RPS or coastal plan level, then the NZCPS should be considered to assist in resolving ambiguity or context of the meaning of words.

49 Pending clarification by the High Court, the prudent approach is to consider the NZCPS as well as RPS. In any event, there is a "gap" at the methods level of both RPS and proposed coastal plan; there are objectives but not specific policies and methods to address adverse impacts of fishing on maintenance of indigenous biodiversity and Māori values. This creates "incomplete coverage" on *King Salmon* principles. The proposed coastal plan is incomplete anyway, in terms of this topic. MRMT is seeking new objectives and policies as well as methods.

50 The NZCPS is not incomplete because Policies 2, 11, 13 and 15 address:

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[54] Referencing kina barrens, functional absence of hapuku.
[55] But not s8 RMA, which sits in a different category of procedural and substantive relevance: *King Salmon* at [88].
[56] The *Davidson* debate, as to relevance of Part 2 RMA to resource consents, is not at issue.
[57] Counsel recognises competing authority such as *Appealing Wanaka v QLDC* [2015] NZEnvC 139. The appropriateness of that approach has been the subject of an appeal heard recently by Wylie J in relation to the treatment of regionally significant infrastructure in high value natural areas under the Bay of Plenty proposed coastal plan (*Royal Forest & Bird Protection Society Inc v Bay of Plenty Regional Council*).
[58] Noting *Transpower* [2017] NZHC 281 per Wylie J at [101].

- Māori relationships with coastal waters, taonga and fisheries, protected under treaty principles;
- Rare and threatened flora and fauna;
- Indigenous biodiversity, including taonga fish and seabird species, as biotic elements of natural character;
- Indigenous biodiversity, including taonga fish and seabird species, as biotic elements of landscape;
- Cultural landscape values.

51 The NZCPS acknowledges overlap with other statutory regimes, but maintains its stance of recognition or protection of indigenous flora and fauna:

- Preamble refers to "continuing decline in species, habitats and ecosystems..under pressure from..use". "Use" in the CMA includes fishing techniques and methods.
- Objective 1 refers to protecting representative or significant ecosystems and maintaining diversity of indigenous coastal flora and fauna. Fishing reduces diversity and harms ecosystems;
- Objective 2 envisages spatial identification of "areas" where use (here, fishing) is inappropriate;
- Objective 3 protecting characteristics of "special value" to tangata whenua (special value includes relationships with taonga species);
- Objective 6 (usually relied on as the orthodox "enabling" objective) isays that protection of "habitats of living marine resources" contributes to wellbeing;
- Policy 2(a) confirms that Māori have cultural relationships with areas that they have fished for generations;
- Policy 2(f) says that "regard" is to be given to FA regulations for taiāpure, mahinga mātaitai and customary fishing. "Regard" does not mean that the FA regime trumps or overrides regulatory response under the NZCPS or planning instruments;
- Policy 4 allows for co-ordinated management with MPI where control "could cross administrative boundaries" or be "relevant to resource management". MPI is not named, but words such as "particularly" and "such as" confirm that it is not limited to other councils or DOC;
- Policy 6(j) refers to appropriate "buffer areas" for sites of significant indigenous biodiversity; again this confirms the spatial planning focus of the NZCPS and that

larger areas such as those proposed for waahi tapu can legitimately perform a "buffer" function;

- Policy 7(2) refers to setting thresholds to avoid cumulative impacts, which includes the kina count proposed for waahi taonga;
- Policy 11(a)(vi) imposes an RMA avoidance requirement on areas protected under other legislation;
- Policy 18 refers to active and passive recreation of the CMA, which includes fishing but also non-extractive activities such as diving, snorkelling, boating.

52 The Court is familiar with the wording of Policies 11, 13 and 15 and directive language used. That directive wording requires avoidance of:

- adverse effects of fishing on the identified values within the Motiti NEMA (for "rare or threatened" flora and fauna under P11; ONC under Policy 13; ONL or ONF under Policy 15). The standard of avoidance under *King Salmon* is adverse effects that are not minor or transitory;
- significant adverse effects of fishing on the identified values within the Motiti NEMA (habitats of indigenous species important for cultural purposes under P11(b)(iv) or habitats important to migratory species under P11(b)(v) or ecological corridors under P11(b)(vi); high natural character under P13(b); "other" landscapes under P15(b)).

53 Policy 2(f) refers to expression of kaitiakianga over fisheries. The relationship of kaitiakitanga cannot be exercised where taonga species are functionally extinct (hapuku) or viability for future generations is threatened.

54 All planners have considered the NZCPS in their evidence. Mr Lawrence has addressed the detail of the relevant RPS provisions. The RPS attributes for the Motiti NEMA are particularly important and must be give effect to at methods level in the coastal plan. These refer to the impacts of "fishing pressure" in a number of places.

MV RENA CONSENT MEMORANDUM

55 All parties have agreed that any relief granted on MRMT's appeal will not affect in any way the outcome of the MV Rena resource consent process. This is recorded in the consent memorandum held by the Court including the appropriate wording. To the extent necessary, MRMT once again affirms its agreement to that position.

WITNESSES

56 Witness order has been affected by availability issues.[59] The following order is proposed:

Ecologists
Dr Roger Grace
Dave Guccione
Dr Phil Ross
Dr Nick Shears [Tuesday]
Vince Kerr [Weds]
Professor Simon Thrush [Weds]

Cultural
Umu
Nepia
Kepa
TA
Hugh

Landscape/Planning
Diane Lucas
Graeme Lawrence

Forest & Bird [currently Tuesday]
Dr Rebecca Stirnemann
Peter Reaburn

57 The RPS and proposed coastal plan require that cultural evidence is validated by a recognised specialist in tikanga, whether kaumatua, kuia or pukenga:

> Policy IW 5 Decision makers shall recognise that only tāngata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Those relationships must be substantiated for evidential purposes by pūkenga, kuia and/or kaumātua.

Both Mr Ranapia and Mr Umuhuri qualify; and have previously given evidence to this Court as to the relevant cultural values. Te Atarangi Sayers whakapapa's to Ngāi te Hāpu and is also qualified to give cultural evidence.

58 This appeal overlaps with the Iwi Resource Management topic. Because of the different composition of the Court, MRMT has produced statements of evidence relating to earlier topics.

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[59] Counsel is instructed that Dr Nick Shears is available on Tuesday; Professor Thrush and Vince Kerr are only available on Wednesday. Peter Reaburn and Dr Rebecca Stirnemann are available on either Tuesday or Wednesday, currently scheduled for Tuesday.

RELIEF

59 This will be addressed in greater detail in closing. Mr Lawrence has modified MRMT's relief to address planning evidence raising overlap with existing rules. A marked-up version is attached.

60 This is the first case to look at the merits question.[60] An interim decision is appropriate, especially given outstanding applications for leave to appeal at Court of Appeal level.

Dated this 27th day of November 2017

RB Enright / RG Haazen
Counsel for MRMT / Royal Forest & Bird

[60] Identified in the 2nd HC decision at [21].