EFFECTIVENESS AND LEGITIMACY OF DISPUTE RESOLUTION IN THE NEW ZEALAND ENVIRONMENT COURT

PROPOSALS FOR POLICY CHANGE, SCOPE FOR IMPROVEMENT, AND POTENTIAL OBSTACLES

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Role of the New Zealand Environment Court

[1] The New Zealand Environment Court is currently established under the Resource Management Act 1991 ("RMA"), and is a Court of Record. It is the successor to bodies established under earlier legislation, and can trace its origins to the early 1950s. The Court operates as an integrated part of the whole system under the Act, in ways I shall describe.

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

[2] The RMA was passed into law by the New Zealand Government in 1991. It took the place of longstanding planning legislation, and is broader than planning undertaken 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 represents a significant change from earlier legislation that provided for control and direction of development, to a more permissive system of management of resources, focussed on control of adverse effects of activities on the environment. It is quite a complex piece of legislation, with a strong, holistic environmental emphasis. Most environmental regulation in New Zealand comes from this Act. Indeed, the RMA replaced or amended no fewer than 50 older pieces of legislation.[1]

[1] The most elegant and comprehensive description I can find of the work of decision makers in this field is to be found in a book review by Dr Royden Somerville QC in the New Zealand Journal of Environmental Law Vol. 19, 2015, p335, of the text ***Environmental Law in New Zealand***, general editors Peter Salmon and David Grinlinton, Thomson Reuters New Zealand 2015.Dr Somerville's opinion was: *'Those practicing and making decisions in the field of environmental law are confronted with: the wide scope of the law; value-laden issues; private and public law principles; the influence of international law; the development of a New Zealand jurisprudence which incorporates Tikanga Maori; reasoning approaches centred on sustainability in decision-making which focus on the future and the obligation not to unfairly disadvantage future generations by over-exploitation of natural resources and irreversible environmental impacts from human activity; managing the challenges*

Sustainable management

[3] 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. The "**environment**" is very broadly defined to include all things natural, physical, and people, all of which are to be governed in an integrated fashion. Decision making therefore involves careful weighing up of the many facets, and the making of overall value judgements.

[4] The Act takes quite an ***enabling approach*** to 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. Cases in the Environment Court are largely on appeal from decisions of local government ("councils").

The purpose and principles of the RMA

[5] 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.

[6] The purpose of the Act is then informed by 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

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of significant global environmental risks; and the need for reflexive and sophisticated approaches, in the face of uncertainty when developing policy and planning instruments which are justiciable.

enhancement of public access to and along the coastal marine area, lakes and rivers; also relationships and culture of New Zealand's indigenous people, the Māori.

[7] Other matters of importance listed 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. New Zealand's highest Court, the Supreme Court, has held by majority that consent authorities including the Environment Court are not permitted in decision making, to take account of the effects on climate change, of burning fossil fuels; instead that activity is to be controlled or regulated under other legislation.[2]

The nature of the cases before the Environment Court

[8] The majority of cases before the Environment Court are appeals from decisions of councils, but there is some originating litigation. The categories of cases may be listed as: regional policy statements; plans; approvals; declarations; and enforcement.

Forward planning: Policy statements and plans

[9] Directed by the RMA, there are various subsidiary layers of legislation issued by central and local government, in a ***hierarchy*** of policy statements and plans as follows:

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

[10] The ***National*** instruments are issued by central Government, and the Environment Court does not have jurisdiction to entertain cases concerning the promulgation and contents of them. The ***regional*** policy statements are issued by regional councils, and the ***district*** plans are issued

[2] *Green Peace NZ Inc v Genesis Power Ltd* (2008) 15 ELRNZ15; and *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC; [2014] 1NZLR32

by district councils. Each of these layers of legislation is required to meet the directions of the layers above it.

[11] Forward planning is a feature of New Zealand environmental law that ensures great pro-activity of practice.

[12] 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 decisions on their submissions. This element of the Court's jurisdiction is unusual in the world, in environmental regulation.

Applications for consent

[13] 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 but only for those involved at the council level.

Enforcement and declaration cases

[14] The regional and district councils also have functions of ***enforcement*** of their plans, and of environmental standards more generally, and they do this by bringing proceedings in the Environment Court. The RMA also provides for another type of civil remedy in the Environment Court, the making of ***declarations***.

The Structure and Jurisdiction of the Environment Court of New Zealand

[15] There is one Environment Court for the whole of New Zealand. (New Zealand does not have provinces or states).

[16] I have already described the broad civil jurisdiction of the Environment Court. The Court does not itself have jurisdiction to hear criminal prosecutions; instead, these are carried out in parallel in the District Court, by the Environment Judges sitting there invoking their dual warrants. Neither does the Court presently hold a power of judicial review, but the Act provides for it in relation to decisions surrounding public (non-)notification, subject to the jurisdiction being triggered by Order-in-Council at an appropriate future time.

[17] Studies are underway between the Court and Executive arm of central government possibly to expand the jurisdiction of the Environment Court in a number of ways under many pieces of land-related legislation where dispute resolution is required, currently conducted before other courts, tribunals and administrative bodies. The potential is to create an even more broadly based Land and Environment Court.

Environment Judges

[18] The Environment Court can have at any time, up to 10 full-time Environment Judges (there are presently 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)[3]. The Judges have all previously been lawyers, mostly experienced in the area of environmental regulation and other litigation.

Environment Commissioners

[19] 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 such aspects of society as economic, commercial and business affairs, planning, science, engineering, design, Maori cultural matters, and alternative dispute resolution processes.

[20] There are presently 12 Environment Commissioners and 5 Deputy Environment Commissioners (part-time). These members undertake most of the alternative dispute resolution work of the Court, and when they sit with Judges to hear cases (usually 2 Commissioners on a panel chaired by a Judge), have an equal say in the outcomes.

Locations

[21] The Court has registries in three main cities, Auckland, Wellington and Christchurch, and conducts alternative dispute resolution and hearings for about half of its case load, in its courtrooms in those centres. The balance of the work of the Court is conducted in circuit locations around the country, both in and out of courthouses.

[22] Something less than 5% of the cases filed in the Court require a formal hearing on the merits. Most cases are settled by alternative dispute resolution, or by direct negotiation amongst

[3] RMA, s 250

parties, or are simply withdrawn for one reason or another. Mediation in fact resolves about 75% of all cases that arrive in the Court.

Approachability and efficiency

[23] A very significant point of difference from other jurisdictions is that the Environment Court has extremely wide powers of procedure. This offers us a major advantage in terms of efficiency and in offering access to justice. I set out the main provisions of s269, 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.

[24] 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.

[25] This means that Court sittings will to a degree follow the format found in other New Zealand civil Courts, but with a little less formality. For instance, rules about hearsay of factual evidence are often applied less rigidly. So, while reasonable decorum will attach to the running of hearings, there is often less formality and legalism than in other Courts. We consider that a particular advantage is that this offers a degree of fairness for our many self-represented litigants.

The Environment Court Practice Note

[26] Aided by s269 RMA, the Environment Court (and its predecessor the Planning Tribunal) has over the years issued Practice Notes. These were all consolidated in 2006, and updated in 2011. The 2011 Practice Note was significantly re-written and published at the end of 2014, after public consultation. 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.

Parties in the cases

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

[28] 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.

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

[30] 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 circumscribed by the Act. It is fair to say that rights of participation in past years have been quite broad, but have steadily been reduced by legislative amendment in the last decade. I will expand on this point shortly.

Case management by the Judges

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

[32] Case management 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 our legally-trained 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.

Judicial conferences

[33] 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.

[34] 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.

[35] Some of the business conducted in judicial conferences can almost resemble an interlocutory hearing, but without great procedural formality and documentation (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). Sometimes even less formality is observed with interlocutory arguments dealt with "on the papers," with no hearing or conference, but instead a Judge reading submissions and issuing a written decision. All approaches are informed by our broad powers deriving from s269, and undertaken in as prompt and efficient a manner as possible, absent as much procedural formality as befits the topic.

The role of expert witnesses

[36] The majority of cases in the Environment Court these days involve consideration of many topics in respect of which specialist professional evidence is 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.

[37] 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.

[38] The Court has an expectation that expert witnesses will be independent, objective, and entirely professional. Experts must avoid being advocates, and must provide their own professional opinions, not those of the party hiring them. Conflicts of interest must be avoided.

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

[40] Increasingly, groups of expert witnesses are required to conduct conferences, usually facilitated by one of the Court's Environment Commissioners, 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 as one step in the course of a timetable for preparation for hearing.

Recent innovations in the NZ Environment Court

Significant improvements in outputs

[41] In contrast to the situation about a decade ago, it can now be said that the Environment Court is one of the more efficient parts of the resource management (planning) system in the country, and can also claim to have one of the best clearance rates of cases amongst all courts in New Zealand.

[42] In recent times we have been studied by the Productivity Commissions of both Australia and New Zealand, and the reports have been very positive. These reports contrast with an earlier report (in 2004) by the New Zealand Law Commission entitled "*Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*", which noted the existence of real problems of backlog in the Environment Court in the 1990s and early 2000s.

[43] There have been many factors contributing to this turnaround. First, the deluge of appeals about policy statements and plans in the 1990s, as councils came to grips with the significant new legislative approach in the RMA, is a thing of the past. At the same time the Court has introduced initiatives such as robust case management, greater and more sophisticated use of alternative dispute resolution, conferencing of expert witnesses, cheap and cost-effective electronic innovations, and the employment of law graduate recruits in many of the registry support roles. Section 269 RMA has given our Court a considerable advantage over jurisdictions beholden to strict legislative processes, Regulations, and Rules Committees.

Electronic innovations

[44] Increasing use of technology is proving to be highly effective, which is appropriate in this day and age.

[45] The initiatives I am about to describe are the use of iPads during hearings and for deliberation and decision-writing work; and the use of the Court's website for interactive exchange of evidence and other materials amongst parties, filing documents in Court, and communications by and to the Court during a case.

iPads

[46] A few years ago the Court trialled iPads in conducting hearings of large cases, a proposal for a coal mine in an ecologically sensitive wilderness area; a large wind farm; and a proposal for a major sports facility. Parties and counsel were given advance notice, as hearings have a tendency to move at a fast pace when such equipment is employed. The iPads were loaded with an appropriate document management application (GoodReader), and counsel and key witnesses equipped themselves similarly.

[47] As confirmed by surveys of members of the Court and parties then conducted, this approach was a tremendous success. Hearings proceeded at a significantly faster pace, with all pre-lodged evidence and submissions being uploaded to the iPads, and pre-read by all participants. Counsel confidently cross-examined witnesses from notes, and from references and cross-references contained in the electronic materials. They advanced submissions to the Court from an iPad instead of floundering through piles of paper contained in countless folders. New materials becoming available during the course of the trial, including the transcript, were steadily uploaded to the iPads and again could be easily referred to by members of the Court and parties.

[48] Minor difficulties and inconvenience were initially experienced with the uploading of materials, but we commenced using a fully encrypted File Transfer Protocol (FTP) to good effect.

Interactive use of the Court's Website

[49] The Court's website has a somewhat old-fashioned look and feel, but has recently been adapted to allow the exchange of evidence amongst parties and to assist lodgements in Court, all to lessen the need to create very large volumes of paper. This innovation has been very successful, even though it does not amount to a full eFiling system. The system works extremely effectively in cases involving dozens or even hundreds of parties.

[50] It has been important to avoid disadvantaging parties who do not have access to computers and email systems, or whose skill levels in the electronic world are low. A handful of parties in one large case operated in a paper-based fashion, and others were able to access dedicated computer terminals at the local office of the council with guidance from council staff on the use of the equipment. The majority however operated electronically from their places of business or home, and greatly appreciated the innovation.

Electronic filing pilot ?

[51] The Environment Court has long had a desire to pilot electronic filing on behalf of all civil courts in NZ. Twice in the last decade we have been selected to undertake this, but cost and governmental changes of mind have curtailed the efforts. We were selected because our Court is small, relatively nimble of process, and maintains a clear geographical "docket" approach to case management. It is fair to say that progress over a decade has been disappointingly slow, and I anticipate having to continue to use our "cheap and cheerful" electronic systems for some time into the future.

Process advisors

[52] Using the Court's very wide powers in s269 as outlined, we have in recent years, in large cases, employed independent Process Advisors to Submitters. This has worked particularly well in some very large cases, a recent example of which was a proposal for a boat marina near Auckland. In that case the majority of the 310 parties, mostly self-represented, were persuaded by the Process Advisors to coalesce under the banner of a well-funded community group. They were also given considerable advice about Court processes, pre-hearing and during the hearing, by those Advisors. This approach greatly helped the pace and efficiency of matters at all stages.

Legislative changes to access to justice in the Environment Court

[53] Through the early life of the legislation (RMA and predecessor statutes), there was reasonably liberal access by parties to the Environment Court on appeal. This has been somewhat reduced in the last decade, the reasons being expressed by government to be a need for efficiency, timeliness, and lessening of cost.

[54] It is not appropriate for Judges to express opinions on how best to achieve those benefits, but can say that I accept that the sentiments are in themselves understandable. They do however seem to be misplaced and unnecessary.

[55] The consequent tendency has been to diminish access to Justice, through legislative amendments that have restricted (amongst other things) public notification of numbers of kinds of proceedings lodged with councils, particularly many kinds of application for resource management (planning) consent.

[56] There is a Bill currently before the New Zealand Parliament, in which further such restrictions are proposed. I refrain from commenting on the rights or wrongs of such, but the trend with these further changes (with some minor exceptions) is to further diminish access to justice in the Environment Court.

[57] It may be thought from my descriptions of improvements in outputs from the Court in recent years, and the continuing use of innovations to enhance efficiency and access to justice, that legislative changes of this sort are not truly needed in order to ensure efficiency in the Environment Court.

[58] One of the currently proposed amendments would, if passed into law, offer a new plan making process which would carry somewhat more limited appeal rights than are presently provided in the RMA. Those newly proposed appeal rights are very similar to a process that has recently been followed in a major plan re-writing exercise in New Zealand's largest city, Auckland. Instead of the traditional processes of hearings of submissions by citizens to the draft plan, followed by rights of appeal to the Environment Court if dissatisfied with council decisions, a different process has been established. Hearings at council level are instead conducted by an Independent Hearings Panel which is required to make recommendations to the council which are then subject to decisions by the council. In situations where the recommendations of the panel are accepted by the council, appeals can be brought only on points of law (not merits). In situations where the recommendations of the panel are not accepted, and in some other limited cases, merits appeals can be brought to the Environment Court.

[59] The work of the Independent Hearings Panel in the Auckland process is not yet completed, and it remains to be seen what numbers of appeals of the two types, will emerge. The overall process has been described by many commentators as complex, high pressured, and stressful. Although we on the Court have no direct knowledge about this, we are given to understand that many interested parties have felt marginalised, and have ceased to participate. We have offered a suggestion to government that it would be appropriate for the Auckland process to be concluded and objectively analysed as to advantages and disadvantages in comparison to traditional and other planning processes, before being taken further.

Is such change underpinned by the need for efficiency, or by something else?

[60] The New Zealand Environment Court is apparently one of the very few courts in the world that receives appeals about substantive issues in the preparation of local government planning instruments. It is important to remember however that the Court does not have an involvement in the preparation of the more "senior" instruments, national policy statements and national environmental standards. The latter two types of national instrument provide strong guidance for councils, parties, and the Environment Court, in considering the contents of the "lower order" regional and district plan and policy instruments. The Court is also invariably fully informed about matters of regional and district policy, internally within the instruments under appeal, by other policy documents created by local and central government, and by expert evidence adduced by the councils and others.

[61] The Court is therefore significantly constrained in decision-making about planning instruments under appeal. Despite suggestions by some commentators, it has anything but a free hand to make policy. It is simply required to make value judgments, and weigh various issues against each other, informed by the evidence brought to it and based on the RMA, and directions given by the senior instruments.

[62] The New Zealand Environment Court cannot be considered in any objective sense an "activist" court. New Zealand is not possessed of a Constitution to trump ordinary legislation. The RMA, the national planning instruments, and decisions of higher Courts on appeal, ensure that decision-making at Environment Court level is kept constrained on a largely predictable path.

[63] There is another aspect of the work of the Court contributing something of a constraint. Decisions are not solely made by Judges. As I recorded previously[4], Commissioners (usually 2) sit with a Judge on a panel to hear cases and have an equal say in the outcome. The Commissioners are highly skilled non-legal professionals generally at the peak of their careers, and parties can be assured that the deliberation process amounts in effect at times to a vigorous peer-review of decisions in course of preparation!

[64] Despite all these constraints and principles, complaints are heard in some quarters suggesting that the Environment Court is a "non-elected body that makes policy". I resist such suggestions for the reasons I have just set out, and observe as well that many members of New Zealand society appreciate the presence of checks and balances in a system designed ultimately to

[4] In paragraph [20]

serve the purpose of the RMA, the sustainable management of natural and physical resources in terms I described early in this paper.

[65] It is appropriate here to offer comments on a specific aspect of plan appeal work by the Environment Court, which in my view points strongly to the desirability of the jurisdiction being retained in the interests of fairness and access to justice.

[66] This aspect concerns quality of plan preparation and drafting. It is the experience of the Environment Court that this activity invariably falls short at council level, often to a notable extent. There are many decisions of the Court on plan appeals where it can be seen that opportunity has been taken by it to improve the instruments by bringing internal consistency and clarity of wording, removing unlawful content, and ensuring adherence to the policy direction of senior instruments, amongst other things. The Court is aware that some instruments improved in these ways have opened the way to subsequent ease of consenting developments, with commensurate reduction in time and cost. One of many examples is a pair of decisions of the Court in 2006 concerning plan changes about extraction of geothermal energy in New Zealand's central North Island[5]. The Court has been informed subsequently that consenting of major geothermal developments has been considerably assisted and quickened by the plan provisions having been extensively improved during the appeal process.

Is there an issue about justiciability of "issue polycentricity"?

[67] In recent times there have been writings deriving from thinking advanced over 50 years earlier by Michael Polanyi[6] and Lon Fuller[7].

[68] Drawing particularly on the work of Fuller, some authors have written that disputes about resource allocation amongst other things are unsuitable for adjudication by courts due to the presence of complex issues and interdependent interests being involved.

[69] I do not consider that disputes adjudicated by the New Zealand Environment Court exhibit the hallmarks described in the writings. Alternatively any potential difficulties are more than adequately anticipated and controlled by the legislative regime of the RMA. Further, I consider that the writers' opinions can be distinguished from the circumstances of cases in our Court because the former have tended to focus on judicial review activity by courts, rather than merits

[5] *Geotherm Group Limited* Decisions A 47/06 and A151/06 (Environment Court)
[6] *The Logic of Liberty: Reflections and Rejoinders (*Routledge and Kegan Paul, London *1951)*
[7] *The forms and limits of adjudication* (1978-1979) 92 Harvard L Rev353-1st written in 1957 and revised in 1959 and 1961 and published posthumously.

appeals, particularly in the UK where there is emphasis on administrative decision-making in planning. There is also the factor about which I have written above[8], that Court Commissioners qualified and experienced in relevant professions other than law and having an equal say in the outcome of cases, sit in hearings with presiding Judges.

[70] Fuller argued that a polycentric problem is one that comprises a large and complicated web of interdependent relationships, such that a change in one factor can produce an incalculable series of changes to other factors. His primary concern appeared to be that the more that decisions had the potential to affect large numbers of unrepresented persons, the more adverse might be the integrity of the adjudication. Some writers including Jeff King of Keble College Oxford[9] note that some writers appear to feel that polycentricity is foremost about complex subject matter, but he responds that something can be complex without being polycentric.

[71] I hold the view that much litigation in courts around the world in the modern age is increasingly complex. Indeed, I think this is trite.

[72] It must also be acknowledged that much complex litigation has the potential to impact unrepresented persons. A notable example is adjudication of human rights issues; but at the more mundane end of the spectrum simple issues of statutory interpretation can potentially have wide impacts.

[73] As recognised regularly in Rules of Court, and in Practice Notes such as those in our Court, techniques are available to identify and place argument before courts concerning interests of unrepresented persons. Courts like my own routinely appoint *amicus curiae*, and there is additional power available to the New Zealand Environment Court under s259 RMA, where it may appoint special advisors to assist it.

[74] I also offer the thought that the very nature of litigation under the Resource Management Act is not one focusing exclusively or even primarily on private interests, but is almost invariably heavily laced with matters of public interest. I think there can be little argument that in a democracy, society should not shrink from adjudication of matters of public interest for reasons of complexity or difficulty.

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[8] In paragraph [63].
[9] Draft paper sighted, dated 12 November 2006, possibly unpublished.

[75] I have noted a recent writing by Stefan Theil, a PhD candidate in law at the University of Cambridge[10]. Theil makes the point that polycentric issues are abundant in modern life and courtrooms. He argues that while polycentricity is pervasive in modern legal adjudication, there is no clear evidence that entrusting such questions to courts is any less suitable than alternative modes of resolution. Further, that while polycentricity may well encourage some level of judicial constraint, it is not appropriate to reject the adjudication of polycentric issues, including those involving environmental protection, for the reasons advanced by some writers.

[76] I return to New Zealand environmental law regulation. If polycentricity presents problems for adjudicators (which I consider not correct), such are very substantially answered in New Zealand environmental law by the presence of checks and balances of process at all levels, particularly in the Environment Court, and the direction increasingly offered by national policy statements and environmental standards.

[77] I reiterate the point that many members of New Zealand society appreciate the presence of checks and balances in a system designed ultimately to serve the purpose of the RMA, and protect the many interests of citizens in a principled way. Media reports of proceedings before the Select Committee of Parliament about submissions on the current Amendment Bill, (by a range of submitters, from industrialists to environmental advocates) attest to this[11]. Many commentators will confirm the integrity and ability of the New Zealand Environment Court to offer these checks and balances.

Conclusion

[78] The New Zealand Resource Management system is an acknowledged cutting edge regime for governance of planning for 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 a considerable body of case law that has developed over the 25 years since the Act was first passed.

[79] The Environment Court is a specialist Court whose Judges were previously lawyers practicing in the resource management field, and whose Commissioners are professionals in their own fields such as engineering, planning, ecology, economics and the like. In my view

[10] S Theil, *Polycentricity - a fatal objection to the adjudication of environmental rights?* UK Const. L. Blog (10 September 2015) (available at http://ukconstitutionallaw.org)

[11] See for instance, *The New Zealand Herald*, Business Section, Friday 6 May 2016, p2.

specialisation is appropriate for good environmental regulation and for advancement of knowledge about it.

[80] Also of importance is that the Court is enabled to prepare its own detailed procedural rules, published in its Practice Note, with the result that parties can work efficiently and cases can be resolved as quickly as possible.

[81] The emphasis on relative informality commensurate with the importance or complexity of a case is helpful in prompt resolution of the litigation.

[82] Inexpensive innovations in processes and electronic systems, encouraged by the very broad discretions given us by s269 RMA, have enabled our Court to become more accessible, user-friendly and efficient in the disposal of cases.

[83] An almost unique jurisdiction in world terms is that of adjudication on regional and district planning instruments. I have offered reasons for this being appropriate. Further, I consider that the practice does not invoke problems of "issue polycentricity", if that term can even be applied to the work.

[84] Any expressions of view in this paper are those of the author, and cannot be taken to be interpretation or statements of law 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