PRESENTATION TO STUDY TOUR DELEGATION FROM WUHAN UNIVERSITY, CHINA

Principal Environment Judge L J Newhook,
Environment Court of New Zealand.

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Causes of action in environmental cases, and procedural rules (Mr Cai's Main Questions 1 and 2).

Introduction: The place of the Environment Court in the New Zealand Court system.

[1] The Court is a standalone specialist Court which has all the powers inherent in a Court of Record. The Court is not a division of the District Court, but the Environment Judges are required also to hold warrants as District Court Judges. They exercise the latter warrant when sitting, as provided by the Act, in the District Court, to hear prosecutions under the RMA (more on this in Question 4).

[2] Environment Court decisions are subject to appeal in the High Court on points of law only; that is, there is no right of appeal on findings or assessments of factual issues and findings on matters of expert (eg scientific) opinion. There are provisions in the Act for appeals above the High Court, to the Court of Appeal and ultimately the Supreme Court, all subject to leave being granted. All of this comprises a significant number of layers of appeal, albeit limited in substance and subject to leave above the High Court.

The place of the Environment Court in the Resource Management system

[3] Most cases filed in the Environment Court are **appeals** against decisions of councils. In limited numbers of cases there are requests for interpretation of the

RMA or national, regional or local plans. The Court has wide powers in all these respects.

[4] The Environment Court also has enforcement powers.

[5] The Court's jurisdiction can be broadly divided into the following categories:

- Appeals from the decisions of councils in respect of resource consents and designations;
- Appeals concerning the content of regional and district planning instruments, including Regional Policy Statements;
- Appeals against the issue by councils of Abatement Notices;
- Applications for Enforcement Orders;
- Applications for Declarations about the application and interpretation of resource management law, the functions, powers, rights, and duties of parties, and the legality of acts or omissions.

[6] In exercising most of its functions, the Court is a judicial body exercising appellate jurisdiction over decisions of regional and district councils. It is not a planning authority, and does not have a policing role.

"Sustainable management"

[7] Very broadly, the approach of the RMA is to provide for a balance between environmental protection on the one hand, and development and human use of land, air, water and soil, on the other.

[8] The "***environment***" includes things natural, physical, and people, and includes:

> (a) *Eco-systems and their constituent parts, including people and communities; and*
>
> (b) *All natural and physical resources; and*
>
> (c) *Amenity values; and*

> (d) *The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c). of this definition, or which are affected by those matters*

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

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

Causes of Action: the types of cases in the Environment Court.

A. *Forward planning*

[11] Forward planning is a feature of New Zealand environmental law that requires 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 decision on their submissions).

B. Applications for consent

[13] The councils also have a role in receiving ***applications for resource consents*** (permissions) and making decisions on those applications, sometimes by administrative function without inviting comment from other parties, and sometimes

after public notification and invitation to other parties to make submissions. (There are rights of appeal to the Environment Court in the latter case).

[14] When considering applications for resource consent, the councils (and the Environment Court if there are appeals) have potentially to consider ***several different levels of activity status***, as prescribed in the regional or district plans. These levels are "*permitted*", *"controlled*", "*restricted discretionary*", "*discretionary,*" "*non-complying*" and "*prohibited*." Generally speaking, the lower down that list an activity status is, the harder it will be to get consent. Indeed, a consent cannot be granted at all for an activity that is described as *prohibited* in a regional or district plan.

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

C. Enforcement

[16] The regional and district councils also have functions of ***enforcement*** of the plans, and of environmental standards more generally, and they do this by bringing proceedings in the Environment Court. More discussion of this will be offered under Question 4.

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

[18] There is a fourth class of cases called **PROSECUTIONS**. These are heard by Environment Judges presiding in a "sister Court", the District Court. There are

different procedural rules and a different (higher) burden of proof for prosecutions, which we will discuss more in Question 4.

[19] An important feature of the first 2 classes of case is that the emphasis is on predictive decision-making based on expert opinion about future effects of activities on the environment, rather than on historical fact about past states.

Procedural Rules: The Nature of the Environment Court and an Introduction to its Processes

[20] I have worked to gain the best understanding I can of Mr Cai's Questions 1 and 2, and have come to the view that it is important to identify a strong underlying feature that is possibly a significant point of difference between the Chinese and New Zealand legal systems.

[21] As I understand the Chinese legal system (although I acknowledge that my understanding is limited), matters of process are governed by a "Roman Law" approach gained from systems in European countries. In contrast, New Zealand legal process has derived from the British "Common Law" system.

[22] I understand the Roman Law approach to be very "Inquisitorial", that is with the Judge making much of the enquiry needed to determine the case. The Common Law system is more "Adversarial", that is the lawyers are given the task of framing the case and proving facts and law, subject to guidance given by Rules of Court and the Judge.

[23] Interestingly, procedures in the NZ Environment Court can be considered to be somewhere in between, or a blend of the 2 systems. This is because of the predictive nature of much of the work of NZ environmental decision-makers as described in paragraph [19] above.

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

[25] An important point to make is that we do not have lots of procedural rules like most other NZ Courts, and most Courts in other countries. The Environment Court instead has been granted by Parliament, extremely wide powers of procedure and wide discretions. The key to this is s269 RMA, which I set out before commenting on it:

> ***269 Environment Court Procedure***
>
> *(1) Except as expressly provided in this Act, the Environment Court may regulate its own proceedings in such a manner as it thinks fit.*
>
> *(2) Environment Court proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency.*
>
> *(3) The Environment Court shall recognise* tikanga Mäori *where appropriate.*
>
> *(4) The Environment Court may use or allow the use in any proceedings, or conference under s267, of any telecommunication facility which will assist in a fair and efficient determination of the proceedings or conference.*

[26] 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.

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

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

Several different process streams

[29] In recent years the adjudication function of the Court has taken on a fairly different complexion from earlier times. Now, a smaller percentage of cases before

the Court require resolution by hearing, and more by mediation or other alternative dispute resolution processes. Where hearings are required, the Court is increasingly confronted with large, multi-party, multi-issue causes, including on direct referral from Councils (a type of case discussed elsewhere in this Review) which can sometimes encompass hundreds of parties and many dozens of key issues. Hearing time before the Court is therefore increasingly devoted to these larger cases, many of the smaller ones having been resolved by alternative dispute resolution methods.

[30] The Court and its predecessor Tribunals have for many years published and maintained a **Practice Note** after public promulgation of drafts and consideration of submissions by interested persons. It has regularly revised the Practice Note over the years. The Court's **Practice Note** sets out procedures for the various types of case resolution undertaken by the Court**. The Practice Note is far more important for guiding the processes of the Environment Court than Rules or Regulations**, although some sections of the RMA set out processes that have to be followed. Where they don't, the Court makes use of s269 above, with all the flexibility that it offers.

New Practice Note in 2014

[31] The latest revision was published during 2014 and came into effect on 1 December. It replaces all earlier Practice Notes. 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.

[32] 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.

[33] There are three appendices:

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

[34] A note at the commencement of the Practice Note reminds interested persons of the address of the Court's website at http://www.justice.govt.nz/courts/environment-court

[35] The note advises that the Court's **website** may prove to be a useful additional resource, particularly for those unfamiliar with the Court's staff, locations and procedures; that it offers contact names and addresses; and that it may be used for interactive purposes in particular cases. The latter aspect is discussed in more detail elsewhere in this Review.

Case management tracks

[36] As will be seen from the Practice Note, the Court operates three tracks for case management. In summary, the Standard Track is for relatively straightforward cases, the Priority Track is for more urgent cases such as Enforcement proceedings and cases where the Court directs priority resolution; and there is a Parties' Hold Track. The latter is used when parties are not actively seeking a hearing, for example to allow an opportunity to negotiate or mediate, or when a fresh plan variation or change needs to be promoted by a local authority so as to meet an issue raised in an appeal. Such cases are regularly reviewed by a Judge to assess whether they need to move to another track and be actively progressed.

[37] Progress through any of the Tracks is overseen by robust and proactive case management methodology, the more so in recent years. Each Judge on the Court is allocated a geographic area to oversee, and robust case management is at the heart of the work of the Court.

[38] As noted by the Registrar in his latest Annual Report to Parliament, the Court has in recent years been successful in reducing the life of cases to the point where there is now no backlog of cases awaiting either mediation or, where necessary, hearing, or other court time. As he also points out, the Court continues to dispose of more cases than are being filed year on year. His report describes a highly cooperative process between the judiciary on the one hand and the specialist

registry staff on the other, driving efficiency and timeliness to earlier and less costly resolution of cases. Other factors at play are described elsewhere in this Review.

Adjudication by hearing

[39] Considerable emphasis is placed on pre-hearing case management activity by Judges, and preparation for hearing by parties and members of the Court. A strong focus by the Court is brought on pre-hearing conferences, the setting of timetables, and monitoring of progress by the parties. The purpose of these conferences is to ensure proper preparation for the fair and efficient hearing of cases. Directions may be given about the resolution of preliminary questions, timetables for the exchange of evidence, and the date and duration of the hearing. Reliable estimates of hearing time are required from counsel. All parties are to attend or be represented at the conferences by someone thoroughly familiar with their position and the submissions and evidence to be given. Many such conferences are conducted by telephone, but some occur in Court for logistical reasons such as sheer number of parties.

[40] There is a particular focus in the Practice Note on cooperation in the preparation of evidence, to ensure that proceedings are dealt with in a focussed way. Parties are required to supply statements of agreed issues of relevance and importance to the case, and a statement of agreed facts. They are also required to provide an agreed dossier of copies of relevant provisions of planning documents and any other documents common to the parties' cases. The Court stresses succinctness and the avoidance of repetition, aided by efficient cross-referencing, tabulation, and indexing.

[41] The Practice Note contains detailed provisions about preparation of statements of evidence, again stressing succinctness, focus, relevance and the avoidance of repetition.

[42] It is the almost unvarying practice of the Court in recent times, that the Judges and Commissioners rostered to hear a case will read all the evidence and other materials ahead of the commencement of the hearing. It is now most unusual for any evidence to be read out in court. The length (and therefore also cost) of hearings has been very substantially cut by the use of this approach.

[43] Use of electronic media, both in preparation for hearings, and during hearings themselves, is described elsewhere in this Review. The use of the Court's website for interactive exchange of evidence, and the use of electronic tablets for accessing case materials before, during and after hearings, has further considerably streamlined the progress of cases and caused substantial reduction in volumes of paper materials.

[44] The involvement of self-represented parties can raise a tension between efficiency/speed of disposal of cases, and ensuring that such parties (and indeed all parties) are treated fairly. The Court finds it helpful to guide self-represented parties on matters of process to some degree in the interests of keeping cases moving, but fairness to other parties requires that the Court stop short of offering self-represented parties legal and other substantive advice. The Court is required to adjudicate matters, not advise parties about them. More information on how the Court endeavours to meet the needs of such parties will be found in the sections of this Review on Direct Referral cases, and electronic initiatives.

Direct referrals

[45] The 2009 Amendment to the Resource Management Act introduced sections 87C to 87 I, making provision for an applicant for resource consent to request from a council a decision to refer the matter directly by the Environment Court, without first being decided by the council or commissioners appointed by it.

[46] Applicants commenced using this process from the beginning of 2010, and a relatively small but steady number of cases has been lodged in the Court since then. The cases tend to comprise proposals for larger commercial or infrastructural activities, and accordingly have been treated by the Court as requiring some reasonably high degree of priority to process, hear and determine.

[47] Consent authorities presently have discretion under s87E RMA, to refer a case directly to the Environment Court. In 2013 an amendment was made to the section for the purpose of limiting this discretion of consent authorities in certain ways, but the provision was not to take effect until after Regulations had been promulgated. The Ministry for the Environment has subsequently sought and received submissions on the topic, but Regulations have not yet been promulgated. Members of the Court consider that in its current situation the Court and parties

would not be overwhelmed if the limitation involving a need for Regulations to be passed was removed in any new amending legislation.

[48] In 2014, four Direct Referral applications were lodged, the first in March and the last in July. Two were the subject of decisions issued by the Court within six months, the third within eight months; the fourth was the subject of settlement with all parties bar one, and a hearing conducted within six months of lodgement. In all of these cases mediation and expert witness conferencing resolved all or most of the issues. Section 87G RMA appears to require a hearing of cases directly referred, but in cases where alternative dispute resolution has secured complete agreement amongst the parties, the hearing is necessarily something of a formality. The policy reason for this appears to be that the proceeding is one at first instance, but the true need is a little difficult to gauge.

[49] In one of the cases, involving a proposal for a significant expansion of a commercial quarry strongly opposed by local residents, all issues were resolved by the Court's alternative dispute resolution processes. An online industry newsletter "*Inside Resources – Mining and Quarrying Intelligence*" reported the applicant as saying that the Court was very efficient in processing the application, and was very succinct and clear on a number of complex issues.

[50] Lest a wrong impression be created, difficult issues can arise in direct referral cases as in any case, such that even if the Court commences a hearing at a reasonably early time, steps may become necessary that have the effect of prolonging the life of the case.

[51] It is a recognised feature of direct referral cases that the Court may order a party to pay to the Crown all or any of the Court's costs and expenses. For the guidance of parties, the Registrar maintains an informal scale of such costs that are discussed with parties from time to time, usually applicants. Bearing in mind that the discretion to award costs is ultimately that of the Court under s285(3) RMA, the pattern in the direct referral cases concluded in the last four years has been that agreement has been reached between an applicant and the Registrar at a relatively conservative level.

[52] The direct referral process can provide an avenue for speedy determination of complex cases, but it is considered that applicants need to have their cases extremely well prepared if they are to avoid "road blocks" along the way, because

they will not have the usual benefit of a first instance hearing before a council or hearing commissioners as a "filter."

[53] The Court has developed techniques for managing extremely large numbers of parties in these cases, particularly including the appointment by the Court of process advisors to submitters to enable the proceeding to move forward quickly without at the same time inappropriately disadvantaging parties. An example is a recent case about a proposal for a boat marina near Auckland, where the majority of 310 submitters were encouraged to coalesce their interests under the umbrella of a community organisation formed to oppose the application. The Court has also developed electronic processes to assist it and the parties to manage what could otherwise be tremendous quantities of paper materials.

Mediation

[54] Section 268 RMA contains a broad power for the Environment Court to initiate, "*for the purpose of encouraging settlement*", mediation, conciliation, or other procedures designed to facilitate resolution before or at any time during the course of a hearing. The Court makes significant, and increasing, use of these powers.

[55] The section has a "voluntary" flavour about it, recording that ADR may be carried out "*with the consent of the parties and of its own motion or upon request…*"

[56] However, litigation in the Environment Court is not just about resolving private disputes. Almost all cases are laced with significant public interest issues as well. Not only does this factor drive the Court to ensure early resolution of proceedings, but it colours its approach along the "voluntary" to "compulsory" mediation spectrum, somewhat in the direction of compulsion.

Other alternative dispute resolution

[57] The Practice Note records that the Court actively encourages ADR, and in addition to mediation will offer conciliation, conferences of expert witnesses, expert determination, and judicial settlement conferences. While the ADR work of the Court is mainly conducted by its Commissioners who are specially trained in the process for resource management cases, Judges can get involved, and there is provision for outside specialists to be engaged as well.

[58] The Practice Note advises 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.

[59] In recent years the commissioners have been trained and have developed experience in facilitating, on a fully independent basis, conferences of expert witnesses. The emphasis in such work is not to foster compromise, but to have experts in their appropriate groups debate objectively and scientifically, differences amongst them, for the purpose of reaching agreements and/or clarifying issues on which they do not agree. These conferences are conducted in the absence of influence by parties, although counsel are assigned particular obligations in readying the witnesses for the conference, explaining the procedures to them including their duties of independence and objectivity, and assisting their clients to understand the process. Increasingly, these conferences are successful in resolving significant numbers of issues canvassed in expert evidence in cases, with resulting saving in hearing time, and of course therefore also the cost of litigation. Good preparation by those involved is crucial to good outcomes, and the Court stresses this in the course of case management.

[60] The judges have developed techniques to further assist cost-effective resolution of cases in some instances where mediation and/or expert conferencing has got stuck over particular issues, for instance a Judicial Settlement Conference.