Commentary on the Environment Court of New Zealand

Introduction

Part 11 of New Zealand's Resource Management Act of 1991[1] entitled, "Environment Court" contains the following language: "There shall continue to be a court of record called the Environment Court which shall be the same court as the court called the Planning Tribunal immediately before the commencement of this section and which, in addition to the jurisdiction and powers conferred on it by or pursuant to this Act or any other act, shall continue to have all the powers inherent in a court of record."

Access to the Courts/Standing to Sue

The first issue this commentary will address is the availability of access to the courts by removing barriers to sue, and whether or not this legislation will enhance access to the courts (and justice). The first clause of Principle 10 of the Rio Declaration is that: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level."[2]

> The following persons may be a party to any proceedings before the Environment Court: (a) the Minister; (b) a local authority; (c) the Attorney-General representing a relevant aspect of the public interest; (d) a person who has an interest in the proceedings that is greater than the interest that the general public has, but the person's right to be a party is limited by section 308c if the person is a person A as defined in section 308A and the proceedings are an appeal against a decision under this Act in favor of a person B as defined in section 308A; (e) a person who made a submission to which the following apply: (i) it was made about the subject matter of the proceedings; and (ii) section 308B(2) and clauses 6(4) and 29(1B) of Schedule 1 was relevant to it; (f) a person who

[1] *Resource Management Act 1991 No 69 (as of April 1st 2011), Public Act*, New Zealand Legislation: Acts, http://www.legislation.govt.nz/act/public/1991/0069/latest/viewpdf.aspx (last visited May 17 2011)

[2] Principle 10 of the Rio Declaration on Environment and Development states the following: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.", Rio Declaration on Environment and Development, http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163 (last visited May 16, 2011)

> made a submission to which the following apply: (i) it was made about the subject matter of the proceedings; and (ii) section 308B(2) or clauses 6(4) or 29(1B) of Schedule 1 was relevant to it; and (iii) it was made in compliance with whichever of section 308(b)(2) or clauses 6(4) or 29(1B) of Schedule 1 was relevant to it.[3]

Scientific Knowledge

The next inquiry addresses the question of whether the Rules of Procedure for Environmental Cases facilitates the application of environmental science to decision-making.

The Environment Court consists of the following members: Environment Judges appointed in accordance with section 250 and Environment Commissioners appointed in accordance with section 254. With regard to Environment Judges, a person shall not be appointed or hold office as an Environment Judge unless he or she is, or is eligible to be, a District Court Judge. If an appointee is not a District Court Judge at the time of appointment as an Environment Judge, he or she shall be appointed as a District Court Judge at that time. When considering whether a person is suitable to be appointed as an Environment Commissioner or Deputy Environment Commissioner of the Court, the Attorney-General shall have regard to the need to ensure that the court possesses a mix of knowledge and experience in matters coming before the court, including knowledge and experience in, (a) economic, commercial, and business affairs, local government, and community affairs; (b) planning, resource management, and heritage protection; (c) environmental science, including the physical and social sciences; (d) architecture, engineering, surveying, minerals technology and building construction; (da) alternative dispute resolution processes; (e) matters relating to the Treaty of Waitangi and kaupapa Maori.

[3] This is outlined in Section 274, "Representation at proceedings" of the Resource Management Act 1991 No 69 (as of April 1st 2011), Public Act, New Zealand Legislation: Acts, http://www.legislation.govt.nz/act/public/1991/0069/latest/viewpdf.aspx (last visited May 17 2011)

Effectiveness

The next factor that must be evaluated is the extent to which the legal process protects nature and improves the environment instead of simply determining that one particular party prevails and the other party does not. The fourth clause of Principle 10 of the Rio Declaration states that, "Effective access to judicial and administrative proceedings, including redress and remedy shall be provided."

The extent of effectiveness can be evaluated through a careful reading and analysis of the Resource Management Act. "The fundamental, overarching substantive principle of the RMA is the 'sustainable management of physical and natural resources,' and the single express purpose of the RMA is to 'promote' sustainable management."[4] "A second hallmark of the RMA is the concept of effects-based management,[5] the notion that environmental regulation should focus on the environmental effects of activities rather than the activities themselves. Both of these concepts are described in more detail herein."

As defined in section 5(2) of the RMA: "sustainable management" 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 well-being, and for their health and safety while:

[4] RMA §5(1) ("The purpose of this Act is to promote the sustainable management of natural and physical resources.") as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 11 (2002)

[5] Although the RMA does not use the term "effects based management," the Environment Court and New Zealand practitioners and scholars have often described the general approach of the RMA as "effects-based". See, e.g. Nugent Consultants Ltd. v. Auckland City Council [1996] N.Z.R.M.A. 481; St Lukes Group Ltd v. North Shore City Council [2001] N.Z.R.M.A. 412 as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 14 (2002)

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 of activities on the environment.[6]

The Resource Management Act emphasizes effects-based management in several ways. First, the definition of sustainable management incorporates the notion that adverse effects on the environment should be avoided, remedied or mitigated.[7] The RMA then separately imposes a specific duty on all persons to avoid, remedy, and mitigate adverse effects of activities on the environment.[8] Further, when adopting environmental and resource management plans,[9] government authorities must consider the environmental effects and alternatives to specific plan provisions.[10] Finally, to facilitate effects-based management, the RMA adopts an environmental impact assessment scheme in which proponents of individual projects requiring permits, whether public or private, must submit to the permitting authority an assessment of environmental effects.[11] The actual and potential effects of the proposed activity are essential considerations for

[6] RMA §5(2) as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 12 (2002)
[7] RMA §5(2)(c) as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 15 (2002)
[8] RMA §17 as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 15 (2002)
[9] Refer to the footnotes 79-93 and accompanying text in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 15 (2002)
[10] RMA §32 as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 15 (2002)
[11] RMA §88(4) as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 15 (2002)

government authorities in determining whether to subject a development application to public review, and ultimately whether to grant the requested resource consent (permit).[12]

Procedural Elements

Procedural issues with respect to the environmental courts and tribunals can be evaluated in a variety of ways. This includes general accessibility, the costs in creating environmental tribunals, the efficiency or lack thereof when multiple states in one country have to create environmental tribunals, the existence of an appellate system, the issue of transparency, the existence of online electronic filing systems to make access to the courts logistically easier, and global transparency as a whole. The second clause of the Rio Declaration is "that at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous activities in their communities and the opportunity to participate in the decision-making process."

The Environment Court has the same power, duty, and discretion with respect to a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought. The Environment Court may confirm, amend, or cancel a decision to which an appeal relates. The Environment Court may recommend the confirmation, amendment, or cancellation of a decision to which an inquiry relates. Nothing in this section affects any specific power or duty the Environment Court has under this Act or under any other Act or regulation.[13]

[12] RMA §94 (public notification), §§104 and 105 (considerations for granting consents Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 15 (2002)
[13] Section 290 of Part 11 of the Resource Management Act of 1991 entitled, "Powers of court in regard to appeals and inquiries" contains information on appeals, Resource Management Act 1991 No 69 (as of April 1st 2011), Public Act, New Zealand Legislation: Acts, http://www.legislation.govt.nz/act/public/1991/0069/latest/viewpdf.aspx (last visited May 17 2011)

Access To Information

The concept of access to information is that whereby the public is given access to information that is being decided by a particular court or jurisdiction. The third clause of Principle 10 of the Rio Convention is that "States shall facilitate and encourage public awareness and participation by making information widely available." The objective of the Aarhus Convention[14] is that in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

All hearings of the Environment Court shall be held in public except as provided in subsection (2). The Environment Court may (a) order that any evidence be heard in private; and (b) prohibit or restrict the publication of any evidence if it considers that the reasons for doing so outweigh the public interest in a public hearing and publication of evidence.

Traditional measures

How does this legislation/tribunal/court address traditional concerns expressed by courts that litigation is costly and wastes time?

"The Registrar may waive, reduce, or postpone the payment to the court of any fee prescribed by regulations made under this Act." The powers in subsection (1) may be exercised only if, (a) the person responsible for paying the fee is unable to pay the fee in whole or in part;

[14] Introducing the Aarhus Convention, UNITED NATIONS ECONOMIC COMMISSION OF EUROPE, http://www.unece.org/env/pp/ (last visited May 16 2011)

or (b) in the case of proceedings concerning a matter of public interest, the proceedings are unlikely to be commenced or continued if the powers are not exercised.[15]

The Environment Court shall hear together two or more proceedings relating to the same subject matter unless, in the court's opinion, it is impractical, unnecessary or undesirable to do so.[16]

The Environment Court shall hear and determine all proceedings as soon as practicable after the date on which the proceedings are lodged with it unless, in the circumstances of a particular case, it is not considered appropriate to do so. The registrar shall give not less than fifteen days notice of the time and place fixed for a hearing to every party to the proceedings concerned, except that an Environment Judge may reduce that period in any particular case if he or she thinks fit. If a person who has initiated proceedings before the court fails without sufficient cause to appear before the court at the time and place fixed for the hearing, the court may dismiss the proceedings.

History

A final factor one must consider when analyzing environmental acts creating environmental tribunals is that of the rationale which led to the creation of the environmental tribunal.

The Environmental Court was not a creation of the RMA (Resource Management Act). It has existed in some form since the earliest days of land use planning in New Zealand. The

[15] This can be found in subsection 281A of Part 11 of the Resource Management Act, Resource Management Act 1991 No 69 (as of April 1st 2011), Public Act, New Zealand Legislation: Acts, http://www.legislation.govt.nz/act/public/1991/0069/latest/viewpdf.aspx (last visited May 17 2011)
[16] Section 270 of Part 11 of the Resource Management Act, Resource Management Act 1991 No 69 (as of April 1st 2011), Public Act, New Zealand Legislation: Acts, http://www.legislation.govt.nz/act/public/1991/0069/latest/viewpdf.aspx (last visited May 17 2011)

New Zealand history of independent appeal courts addressing environmental matters began with the establishment of the Appeal Boards under the Town and Country Planning Act of 1953 for the purpose of adjudicating land use disputes under town planning schemes.[17] The New Zealand Parliament sought to create a specialist tribunal, "more or less judicial" in nature that would ensure "justice as between the people and the [planning] authority."[18] Chaired by a barrister, the Board operated as a professional, full time, multi-disciplinary body that would resolve individual land use disputes on the basis of evidence received at hearings held around the country.[19] The first planning appeals were heard in February 1955. By the mid-1960's, the Planning Appeal Board had developed a substantial body of case law establishing land use planning principles applicable to rural, residential, commercial and industrial zones and to nature reserves.[20]

Commentators recognized that the unique position of these specialist planning appeal boards derived from the nature of the issues they addressed, their probing scope of review, and the expertise that they had brought to the task. R.J. Bollard (now a retired Environment Court Judge), for example, suggested that the Boards' decisions were often "of far greater import" than ordinary court decisions because they involved issues of widespread public interest, precedential value, and large sums of money.[21] He further observed that the nature of the appeal board hearings differed from ordinary judicial proceedings in at least one important respect: the boards

[17] Town and Country Planning Act of 1953 as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court 29 Ecology* L.Q 26 (2002)
[18] David Sheppard, Forty Years of Planning Appeals, Resource MGMT. NEWS, May/June 1995, at 20 (citing 299 Parliamentary Debates at 809-10 (1935) as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 26 (2002)
[19] Id. (citing 299 Parliamentary Debates at 689(1953)) Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 26 (2002)
[20] Id. Due to increasing caseloads in the 1960s, the Planning Appeal Board was twice supplemented by additional appeal boards, Id. as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment* Court 29 Ecology L.Q 26 (2002)
[21] R.J. Bollard, The Important role of Town and Country Planning Boards, N.Z. L.J. 233 (June 5, 1973), as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 27 (2002)

exercised the power of de novo review on questions that inevitably involved conflicts between public interests and private rights.[22] As Bollard summarized:

> The outcome of an Appeal Board hearing reflects the planning and administrative experience of Board member, enabling them properly to assess the evidence adduced (the extent and quality of which varies from case to case), and to foresee the overall effect of a planning decision beyond the bounds that the individual may conceive as the owner of the land under consideration. What may seem illogical to the individual appellant, may be quite logical in terms of wider planning concepts and experience.[23]

Thus, the New Zealand Parliament bestowed upon the Appeal Boards the responsibility of protecting the public interest by applying expert knowledge and "enlightened opinion" to an essentially judicial function of determining individual rights regarding land use.[24]

In the late 1970s, the New Zealand Parliament validated and expanded the Planning Appeal Board model by consolidating the boards into a single Planning Tribunal and elevating the tribunal's status to a court of record, following the passing of the Town and Country Planning Act of 1977.[25] Except for a period in the early 1980s when the power of the Planning Tribunal to review certain large-scale projects was curtailed,[26] no major changes were made to

[22] Id. at 234 as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 27 (2002)
[23] Id. as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 27 (2002)
[24] Id. (citing Turner and Others v. Allison and Others, N.Z.L.R. 833,843 (1971)), as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 27 (2002)
[25] Politics and Planning: The Independence of the Environment Court-Judge John Bollard, New Zealand Planning Institute 2007 Conference, Wednesday 28 March 2007 as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 27 (2002)
[26] The expanding role of the Planning Tribunal was briefly checked by the National Development Act of 1979. Sheppard, supra note 8, at 22-23. In order to streamline environmental review, Parliament relegated the Planning Tribunal to an advisory role on certain development projects, called "Think Big" projects, that were deemed vital to the nation's strategic interest. After an inquiry into the merits of granting consents for such projects, the Planning Tribunal could merely recommend to the Minister of National Development whether the project should proceed and, if so, under what conditions. Ultimate authority, however, rested with the executive Government, which had no obligation to follow the Planning Tribunal's recommendations. The Parliamentary debates regarding the proper role of the Planning Tribunal (as opposed to the democratically accountable elected officials) in deciding the fate of the Think Big projects reflected a growing wariness of the Planning Tribunal's expanding authority. The National

the Planning Tribunal until the RMA was enacted in 1991. The present-day Environment Court replaced the Planning Tribunal as a result of the Resource Management Amendment Act 1996.

Development Act was repealed in 1986 as cited in Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court* 29 Ecology L.Q 27 (2002)