

# Evolving Practice – The Environment Court of New Zealand

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## INTRODUCTION

Practice before the Environment Court is evolving. Recent innovations have included enhanced support for Judges through the appointment of case managers and hearings managers, digital recording of evidence, provision for Commissioner only hearings, the introduction of case management, increased use of alternative dispute resolution, and the introduction of a code of conduct for expert witnesses. Discussions about the circumstances in which evidence may be taken as read continue, and the recent debate on the review of the *Resource Management Act 1991* (“RMA”) posed difficult questions about judicial deference to Local Authority decisions. Most recently the first judgment of the Supreme Court on the RMA has posed serious questions about the independence of expert witness in certain situations. How these issues are resolved will have an impact on the role of expert witnesses before the Environment Court. They will be examined against the background of the reforms enacted by Parliament in the *Resource Management Amendment Act 2005* (“RMAA 2005”).

## HISTORICAL CONTEXT

The Environment Court of New Zealand provides an interesting example of the development of specialist courts and tribunals. Originally established as the Town and Country Planning Appeal Board under the *Town and Country Planning Act 1953*, it has made the transition from an Appeal Board to become a Tribunal under the *Town and Country Planning Act 1977* ("TCPA"), and most recently to become a full scale Court under the *Resource Management Amendment Act 1996* ("RMAA 1996"). Before 1953 the Minister of Works was responsible for determining appeals under the *Town and Country Planning Act 1926*.

From the outset the composition of the Town and Country Planning Appeal Board recognized the technical nature of the decisions that would need to be made in response to appeals against Local Authority decisions relating to the subdivision and zoning of land. For example, when reviewing the development of the planning appeal system Judge Sheppard (formerly Principal Environment Judge) noted that:

It was recognized that the Appeal Board would be dealing with matters largely of a technical nature; and that the chairman, as well as having a barrister's knowledge of the law, and being a judicial person, would need to have some general idea of the operations of town planning and local body administration. The members [of the Appeal Board] from the Municipal Association and the Counties Association would be selected for their local body knowledge, particularly of town planning. The chairman of the local town-planning committee would be suitable. An architect or a town planning officer would be of great value. Although the Board would have a great deal of legal work to do, its members would also require a general knowledge of administration.<sup>2</sup>

Subsequently, there has been little change in the composition of the Court which normally consists of a Presiding Judge sitting with two Environment Commissioners who are appointed as a result of their experience in resource management matters. The jurisdiction of the Town and Country Planning Appeal Board was expanded following enactment of the *Water and Soil Conservation Act* 1967. The significance of this event was also noted by Judge Sheppard:

What would prove to be a significant event in the development of the jurisdiction was the enactment of the *Water and Soil Conservation Act* 1967. Providing for the first time a coherent system for controlling the taking, discharge, and damming of [sic] nature water, the Act (as reported back from select committee) also empowered the Appeal Board to hear appeals from decisions of regional water boards. The original proposal had been for appeals to the National Water and Soil Conservation Authority, but the select committee had decided that the Appeal Board was the type of authority that would be right to protect the rights of the individual, and designed to bring about the correct use of land and the multiple use of water. The addition of that jurisdiction to the land use planning jurisdiction conferred by the *Town and Country Planning Act* 1953 provided the basis for evolution to the broader environment court functions of the Planning Tribunal.<sup>3</sup>

Under the TCPA the Town and Country Planning Appeal Board was replaced by the Planning Tribunal following “a full review and consolidation” of the legislation. The standing of the Planning Tribunal was also enhanced by its formal designation as a Court of record “which, in addition to the jurisdiction and powers conferred on it by [statute] ... shall ... have all the powers inherent in a Court of record”. Following the coming into force of the *Town and Country Planning Amendment Act* 1983 the chairmen of the various divisions of the Planning Tribunal were re-designated as Planning Judges.

The Planning Tribunal was re-constituted as the Environment Court by the RMAA 1996, and the Planning Judges and Planning Commissioners were re-designated as Environment Judges and Environment Commissioners. At the same time the jurisdiction of the Court was expanded further by amending s 278 of the RMA to provide the Environment Court with the same powers as the District Court in the exercise of its civil jurisdiction. The effect of this provision has been most readily observed in relation to the range of interlocutory orders (e.g. discovery) which can be made by the Court in relation to the management of proceedings. More recently, the Law Commission has recommended that the Environment Court should become part of the Primary Court structure “due to the public importance and complexity of a significant proportion of the work that comes before it”.<sup>4</sup> Whilst the Government has accepted the Law Commission’s recommendations regarding the amalgamation of a number of specialist courts and tribunals under an umbrella body similar to the Victorian Civil and Administrative Tribunal, it has rejected the recommendations relating to the Environment Court and no changes in relation to the administrative arrangements for the Court are currently proposed.

In his review of the planning appeals system Judge Sheppard concluded that the establishment of the Environment Court has been a notable success. He stated that:

Over forty years of hearing and deciding appeals, the Tribunal has established a practice of open and patient hearings, and reasoned decisions that have normative value for primary decision-makers and professional advisers. As envisaged in 1953, it continues to travel all parts of the country, view schemes, hear evidence in the locality, and give decisions. It continues to hear appeals about subdivisions, and to decide questions of a technical nature. That the Tribunal has been entrusted with increased jurisdiction and judicial powers demonstrates the acceptance in this country, as elsewhere, of a



multi-disciplinary specialist court to review planning and resource management decisions on the merits. The original intentions when the Appeal Board was first set up have been fulfilled and have been surpassed.<sup>5</sup>

Whilst a cynical person could regard these comments as self-serving, it is for note that Professor Malcolm Grant has also identified a high level of satisfaction regarding the work of the Court from a wide range of stakeholders. For example, he observed that:

We encountered a common perception amongst the practitioners and groups we spoke to that the calibre of the judges is high, and the intellectual standards of the Court more than satisfactory. The calibre of its decision-making is seen as being on a par with the High Court, and this is probably borne out in the relatively low success rate of appeals to the High Court from the Environment Court.<sup>6</sup>

However, since 1991, the Environment Court has come under pressure from increased workload, and has been subject to criticism about delays in the processing of appeals. The number of cases waiting for a hearing rose from 500 in 1993/94 to a peak of 3,000 in 2000/01. The increase in workload arose primarily from appeals lodged against district and regional plans prepared under the RMA, which accounted for 51% of the Court's workload. Increasing dissatisfaction with the speed of decision-making by the Court during this period was not surprising, given the historic under-funding of the Court by previous Governments. Subsequently, as noted below, a funding package of \$1.2 million per year for a period of four years announced in May 2002 has increased the capability of the Court by enabling the appointment of additional judges and the provision of enhanced administrative support. However, notwithstanding these initiatives and the consequent reduction in the number of cases waiting for a hearing, criticism of the decision-making process under the RMA has continued.

## **PROCEDURE UNDER THE RMA**

The Environment Court was constituted by the RMAA in 1996. It is a Court of record comprising 7 Environment Judges and 16 Environment Commissioners, together with 3 Alternate Judges and 4 Deputy Commissioners. The Court is administered by the Ministry of Justice and has registries in Auckland, Wellington, and Christchurch. It holds sittings throughout New Zealand which are usually constituted by one Judge and two Commissioners. As a result of the additional funding provided for the Court since 2002 each Judge is now supported by a Case Manager and a Hearings Manager. The provision of additional funding has also allowed the Court to invest in digital recording equipment which is estimated to produce a saving of 40% on hearing times.

Most of the Court's work involves public interest questions related to resource management and environmental law. The Court's jurisdiction under the RMA includes hearing appeals against decisions on submissions regarding policy statements and plans prepared by Local Authorities, hearing appeals against decisions on resource consent applications, hearing applications for declarations, hearing applications for enforcement orders, hearing appeals against abatement notices. In addition to its jurisdiction under the RMA, the Court also has jurisdiction to determine matters under other statutes including objections to the compulsory taking of land under the *Public Works Act* 1981, appeals about archaeological sites under the *Historic Places Act* 1993, appeals about felling beach forests under the *Forests Act* 1949, objections to road stopping proposals under the *Local Government Act* 1974, and objections regarding access to limited access roads under the *Transit New Zealand Act* 1989. Criminal jurisdiction under the RMA is exercised in the District Court by Environment Judges who also hold warrants to sit as District Court Judges.

The Court has power under s 269 of the RMA to regulate its own proceedings.

Where proceedings relate to the same subject matter the Court is required to hear matters together unless it would be impractical, unnecessary, or undesirable to do so. Parties may appear in person or be represented by counsel. Significantly, the Court is not bound by the rules of evidence and may receive any material that it considers to be relevant to the determination of proceedings.

Practice Notes have been issued by the Court as a guide to procedure, which should be followed unless there is a good reason for departing from them. The current Practice Notes issued in 1998 cover various aspects of procedure before the Court including:

- Appeals lodged out of time;
- Waiver of service;
- Multiple consents;
- Pre-hearing conference;
- Callovers;
- Setting down appeals for hearing;
- Priority hearings;
- Adjournments;
- Withdrawals and consent orders;
- Witness summonses;
- Statements of evidence;
- Exhibits;
- Planning instruments;
- Procedure at appeal hearings;
- Presentation of evidence;
- Costs.

The Practice Notes have been supplemented recently by specific Practice Notes issued on Case Management and Alternative Dispute Resolution and Expert Witnesses in 2004 and 2005.<sup>7</sup>

The Practice Notes on Case Management provide a timetable for the hearing of appeals within 6 months of lodgement unless the proceedings are placed on hold by consent of the parties and the Court pending resolution of the proceedings. A strong emphasis is placed on the resolving appeals by negotiation or mediation at an early stage. Generally, parties can now expect that appeals will be set down for hearing after 3 months if the proceedings have not been resolved. Standard directions are also given for managing the proceedings which require the respondent Local Authority to lodge a memorandum with the Court within 50 working days of receiving directions, after consulting with other parties, regarding:

- The steps taken to negotiate or mediate;
- The outcome of any negotiation or mediation;
- Provision of a list of any unresolved issues;
- Provision of a list of the witnesses (including their names and expertise) to be called by the parties;
- The timetable for exchange of evidence including provision for meetings of experts to narrow the scope of unresolved issues;
- An estimate of hearing time;
- Whether the appeal is suitable for hearing by a Judge or Commissioner alone;
- The need for an interpreter.

Proceedings before the Court are usually conducted *de novo* where the Court has the power to hear matters afresh. However, the Court's power under s 269 of the RMA to regulate its own proceedings and its general jurisdiction under s 278 of the RMA allows a flexible approach to be taken in relation to the conduct of proceedings in appropriate cases. For example, in *Transwaste*

*Canterbury Ltd v Canterbury Regional Council* [C29/2004] relating to the proposed Kate Valley Landfill the Court departed from the *de novo* approach. The case proceeded by way of a limited hearing in which the Court did not hear evidence on all matters relevant to the application. In doing so the Court relied on the report prepared under s 42A of the RMA by the planning officer employed by the Local Authority regarding the background to the application. The Court was also assisted by a carefully reasoned decision from experienced Independent Commissioners to whom decision making at first instance had been delegated by the relevant Local Authorities. The quality of that decision enabled the Court to rely on the conclusions reached by the Independent Commissioners on the matters not in dispute, and to focus on whether it would be “appropriate” to reach a different conclusion from the Independent Commissioners on the matters in dispute. Judge Smith concluded:

[48] ... It is clear that the Act is intended to provide an expeditious appeal process from the decisions of local authorities. Where the parties accept that many aspects of the appeal are not in dispute, it would seem counter-productive that the Court must undertake an exhaustive examination of matters where the parties are agreed on the outcome.

The complex and technical nature of resource management means that expert evidence is generally critical to the determination of appeals. In cases where the Court is required to determine conflicts between expert evidence the Court will consider the credentials of the witness, the knowledge and experience of the witness in relation to the subject matter of the appeal, and the impartiality of the witness. Failure to qualify a witness as an expert will result in the witness being unable to give opinion evidence. Direct rather than inferential evidence will be preferred.

The decision in *Shirley Primary School v Telecom NZ Ltd* [1999] NZRMA

66 which involved a proposal by Telecom to establish a cellular radio base station on land adjacent to the School provides a useful case study of how evidential issues are determined by the Court. At issue was whether the proposed activity would cause adverse health effects. Determining this issue required the Environment Court to consider the evidential burden and standard of proof required, the relevance of matters of perception, and the reliability and admissibility of expert evidence in RMA cases.

When considering the burden of proof and the admissibility of evidence in environmental cases the Court referred to the statutory purpose of the RMA. The Court found that the purpose of the RMA, sustainable management, means that in every appeal against the grant of consent that there is only one ultimate question to be answered “will the purpose of the Act be fulfilled”? As a result the Court concluded in relation to the standard of proof that:

... a standard of proof on the balance of probabilities may be unreal [when making decisions about future events, e.g. the possibility of adverse health effects from the cellsite].<sup>8</sup>

The Court therefore held that whether a risk exists will be a matter of “judgment” rather than a question of proof to which the civil standard should apply.

In relation to the burden of proof the Court found that there is a “persuasive” burden on the applicant to prove his or her case. Beyond that, the Court found that there is a “swinging” burden of proof in resource management cases in that the burden of proof will remain with the party who will fail to prove his or her case without (further) rebuttal evidence being adduced. Since the ultimate issue in every appeal will be whether the grant of consent will meet the single statutory purpose of sustainable management, the Court will be entitled to refuse consent even if no contrary evidence is heard if it concludes that granting consent would not promote sustainable management.

When considering the admissibility and reliability of expert evidence the Court considered that the issue of reliability of evidence under the RMA is more likely to go to the weight to be given to the evidence rather than the admissibility of the evidence. For example, the Court held that:

... almost all evidence in the Environment Court relates to the future and thus has an hypothetical element. Before an hypothesis can be considered by any Court, there must be a basic minimum of evidence to support it. But in the case of any hypothesis about a high impact a scintilla of evidence may be all that needs to be established in the Court's mind to justify the need for rebuttal evidence. In other words that evidence, slight as it may be, is enough to raise a reasonable doubt in the mind.<sup>9</sup>

Additionally, the Court found that issues to consider when evaluating expert evidence include the strength of qualifications and duration and quality of experience of the witness, the reasons for the witness' opinions (e.g. consistency, coherence, and presentation), and the objectivity and independence and comprehensiveness of the evidence (e.g. the ability of the witness to take account of matters which do not favour his or her opinion). In relation to matters of "hard" science the Court found that it will be critical that the research or papers relied on should be able to demonstrate that:

- The techniques used are reliable;
- The error rates are known and published and that the research is statistically significant;
- The research papers have been peer reviewed and published;
- The research is repeatable and has been replicated.

Finally, the Court found that the importance of psychological effects or matters of perception is dependent on an objective assessment of risk:

In our view if a Council or the Court finds that there is an unacceptable risk of adverse physical health effects then it is likely to refuse consent anyway. If the risk is acceptable then the fears of certain members of the community or even of sufficient people to be regarded as a "community" would be unlikely to persuade the Council or at least the Court that consent should be refused, because an individual's or the community's stance is unreasonable.<sup>10</sup>

The role played by expert witnesses in environmental litigation was also emphasized by Skelton & Kerr who found that:

An expert witness is expected to demonstrate certain qualities. These are usually identified as objectivity, integrity, credibility and independence.<sup>11</sup>

More recently the Court has issued the Practice Notes on Alternative Dispute Resolution and Expert Witnesses. The Practice Notes include a Code of Conduct for Expert Witnesses based on the Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia.<sup>12</sup> The Code of Conduct imposes the following duties on expert witnesses:

- An overriding duty to assist the Court impartially;
- Not to act as an advocate for the party engaging the witness;
- The statement of evidence must:
  - Include his or her agreement to comply with the code;
  - State their qualifications;
  - Describe the ambit of the evidence and the witness' expertise;
  - State the reasons for the opinions expressed;
  - State whether any material facts have been omitted;
  - State the literature or material used to support the opinions;
  - Describe any tests or investigations relied on, and state the



qualifications of the person who undertook them (if different from the witness);

- Quote sparingly from statutory instruments;
- If the evidence would be incomplete or inaccurate without some qualification, then it must be qualified;
- If the opinions are not firm or concluded this must be stated in the evidence;
- Any changes to the witness' opinions must be communicated immediately to the party calling the witness.

Failure to comply with the Code will prevent the evidence from being adduced in any proceedings without leave of the Court. Whilst there is a popular perception that expert witnesses are “hired guns” who will “conveniently provide opinions to support a client’s case because they are being paid to do so” the small pool of experts in New Zealand practicing in the professional disciplines relating to resource management means that although it may not be “unknown” for some witnesses to behave in this way, those who do will tend to be well known to Local Authority decision makers and the Court with the result that their “integrity” and “credibility” is likely to be measured accordingly.<sup>13</sup>

## **RMA REVIEW**

On 12 May 2004 Associate Minister for the Environment, David Benson-Pope, launched a review of the RMA. The review highlighted a number of concerns about the decision making process under the RMA including lack of certainty for applicants, delays, and costs.<sup>14</sup> In addressing these concerns the explanatory note to the *Resource Management and Electricity Legislation Amendment Bill* boldly stated that:

The changes [in the Bill] focus on improving the quality of decisions and processes by increasing certainty and reducing delays, [and] costs ... while ensuring appropriate public participation and the meeting of environmental objectives.<sup>15</sup>

The most radical change proposed by the Bill as introduced into Parliament related to the Environment Court. It proposed that there should be a move from *de novo* hearings where the Court has the power to hear matters afresh, to appeals which proceed by rehearing focused on the evidence presented at the Local Authority hearing and with limited powers for the Court to admit new evidence. However, there was no sound policy justification for these changes, and they were likely to be unworkable in procedural terms.

The changes appeared to be motivated by historic concerns about delays which occurred in the Environment Court in relation to the speed at which appeals were disposed of. Accordingly, no account appeared to have been taken of the increased performance by the Court since additional funding was provided in 2002 which has enabled the appointment of additional Judges and the provision of enhanced administrative support, and has resulted in the number of cases awaiting a hearing being significantly reduced from 3,000 in 2001 to around 1,400 in 2004. Since 2004 the number of cases awaiting a hearing has remained stable.

More importantly, the changes proposed in the Bill failed to take account of further improvements in Environment Court processes including the provision made for Commissioner only hearings by the RMAA 2003, the issue of Practice Notes on case management and mediation and expert evidence, and the impending increase in filing fees and the charging of daily hearing fees. The experience derived from providing additional funding for the Court in 2002 demonstrates that improvements made to Court processes have the capacity to deliver significant results but require a lead in time before an appreciable difference can be discerned. Accordingly, the further changes to

Environment Court processes proposed in the Bill were unwarranted until the latest improvements in Court practice had been implemented and their success has been monitored.

In particular, the provisions in the Bill which sought to preclude the admission of new evidence in Environment Court proceedings were likely to be unworkable in practice. For example, it was proposed that parties should rely on the evidence given at the Local Authority hearing. However, this approach failed to acknowledge that the Local Authority plays differing roles at the different procedural stages of consent processing, i.e. as decision maker at first instance and as a party to proceedings before the Court. As a result the proposed changes would have required Local Authorities to seek leave from the Court in order to present evidence in any appeal proceedings. Similarly, community and environmental groups who make submissions at Local Authority hearings rather than presenting evidence because legal aid is not generally available at that stage would also have been required to seek leave before evidence could be presented. Applicants would also have been placed in a similar position in cases where amendments are made to the proposed activity in response to submitter concerns, again leave would have been required from the Court before fresh evidence could be tendered about the revised proposal. Currently, leave is not required for evidence to be presented in these situations. As a result the provisions in the Bill would have been likely to increase the work load of the Court and result in increased costs and delay for the parties in dealing with procedural applications, rather than placing increased emphasis on achieving good environmental outcomes.

Significantly, the explanatory note to the Bill commented on the cost to Government of special legislation to fix specific issues relating to the RMA. Should the changes proposed in the Bill have become law and proved to be unworkable further Parliamentary time (beyond the time taken for enactment of the RMAA 2005) would have been required to fix the problem.

## JUDICIAL DEFERENCE

The Bill was reported back from the Local Government and Environment Committee of the House of Representatives on 20 June 2005. The Committee recommended by a majority that the Bill be passed with amendments. Significant amendments were proposed regarding the provisions in the Bill dealing with consent processes and decision making by Local Authorities and the Environment Court. In particular, the Committee stated:

The bill as referred to the select committee proposes radical surgery to council and appeal processes for consents and plans. This was almost universally opposed by all sectors, be they councils, developers, environmental groups, business groups, and interest groups such as the Law Society. The majority of us consider it was clear from submissions that much of the criticism of the Resource Management Act is outdated and overstated. With the extra funding given to increase the number of Environment Court Judges, delays on appeals have been reduced hugely to reasonable times. Except where the parties agree to delay while they try to mediate a solution, appeals are now more often than not given a hearing date within 3 months.<sup>16</sup>

Notwithstanding the conclusion reached by the Committee, the issue of when and under what circumstances the Court should “defer” to the Local Authority decision on appeal (raised by the review) remains for determination. The RMAA 2005 (as amended following the Committee’s recommendations) amends the RMA by inserting the following section:

**290A Environment Court to have regard to decision that is subject of appeal or inquiry**

In determining an appeal or inquiry, the Environment Court must have regard to the decision that is the subject of the appeal or inquiry.<sup>17</sup>

The new section provides a considerable improvement on the proposal in the Bill as introduced into Parliament to limit the Court's powers to admit new evidence (discussed above). However, despite provision made in the RMAA 2005 for accreditation of Local Authority decision makers it remains doubtful whether the quality of Local Authority decisions will in all cases be such that the Court would be able to rely on them. Similarly, when considering the issue of judicial deference the most relevant consideration will be a comparison between:

... the expected competence of the decision-maker in relation to the specific issue or issues and the court's own expertise matched against that of the designated decision-maker.<sup>18</sup>

In an environmental context, this test effectively requires participation by appropriately qualified Independent Commissioners in the decision making process at Local Authority level, if it is intended to place more reliance on Local Authority decisions on appeal. As a result there was a credible argument that no amendment should have been made to the Court's powers on appeal until the role of Independent Commissioners in the Local Authority decision making process has been properly addressed. However, it is possible that this issue may, in practice, be addressed by the Court in the weight accorded to particular Local Authority decisions following the precedent set by Judge Smith in the *Transwaste Canterbury* case referred to above.

## **DECLARATIONS ON NOTIFICATION DECISIONS**

Notification of resource consent applications is a vexed issue because the decision by a Local Authority to determine an application without notification removes the opportunity for the public to participate in the decision making process by making submissions on the application or lodging appeals with the

Court against the grant of consent. Although decisions about notification can be challenged by judicial review concern has been expressed by community and environmental groups about the cost of such proceedings and access to environmental justice. Provision has therefore been made in s 310(ga) of the RMA (inserted by the RMAA 2005) for the Environment Court to make a declaration as to whether an application for consent should have been notified. Provision is also now made in s 313 of the RMA for interim orders to be made preserving the status quo, and in cases where a declaration is made in favour of an affected person for orders to be made setting aside the original decision of the Local Authority. The Select Committee recommended that these provisions be amended so as to more “closely [align] the Environment Court’s powers to those of the High Court on judicial review”.<sup>19</sup>

In relation to the role of expert witnesses in environmental litigation the comments made by the Supreme Court in *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17 in its first decision under the RMA, where it was required (on further appeal from the High Court on judicial review) to determine whether the Local Authority had sufficient information to decide the notification issue properly, will have a bearing on how the new statutory provisions are interpreted. In *Westfield* the applicant had submitted an economic analysis, prepared by consultants, of the impact of proposed retail development on existing centres which was described by the High Court as “superficial” together with a report from a specialist retail leasing agency which was considered to be “even more flimsy”. The Supreme Court observed:

[114] ... The statutory requirement is that the information before the consent authority be adequate. It is not required to be all-embracing but it must be sufficiently comprehensive to enable the consent authority to consider ... matters on an informed basis.

[115] The statutory requirement addresses more than the scope of

the information. The consent authority must necessarily be satisfied as well that the information is reliable, especially so where an expert opinion is tendered. The authority will need to consider whether the author of the opinion is both appropriately qualified to speak on the subject and sufficiently independent of the applicant so as to be seen as giving expert advice rather than acting as an advocate for the applicant.

Additionally, in relation to the report produced by the specialist retail agent the Supreme Court stated:

[121] ... Whether he could be described as an expert on the subject of environmental effects on existing shopping centres is a matter of doubt. Furthermore, he was the leasing agent for Discount Brands [the applicant] and, as such, had a financial interest in the successful completion of its development.

The comments made by the Supreme Court in the *Westfield* decision reinforce the duties imposed on expert witnesses by the Code of Conduct. As a result the decision is likely to have general and wide ranging effect on decision makers at both Local Authority and Environment Court level, particularly in view of the transfer jurisdiction for review of notification decisions from the High Court to the Environment Court.

## **UNRESOLVED BUSINESS: TAKING EVIDENCE AS READ**

Currently, the Practice Notes provide for evidence to be given in the form of written statements of evidence which are required to be circulated to the parties in advance of the Court hearing, and are then read in full by the witness before cross-examination. A different approach has, however,

been developed by the division of the Court headed by Judge Jackson. In Christchurch, it is now usual for statements of evidence to be circulated earlier and lodged with Court one week before the hearing. This procedure allows the Court to read the evidence prior to the hearing. After the witness has been called he or she simply confirms their statement as “true and correct” and is then open to cross-examination by opposing counsel. This procedure is similar to that adopted in civil Courts in the UK, in the Federal Courts in the USA, and in the Federal Court and certain other Courts in Australia.<sup>20</sup> Judge Jackson summarized the benefits of this method of giving evidence as follows:

Is it not preferable, at least for an expert witness, for them to know that their evidence has been read previously and that the Court has had some opportunity to reflect on it before the witness becomes available for cross-examination by counsel and questions by the Court? Even if the evidence is well written, expert evidence on very complex issues may well be equally complex itself. It may require backtracking, cross-references to other parts of the evidence, re-reading of some sentences or paragraphs, and time (different for each reader or listener) to study figures, tables and diagrams. Further there are particular problems in reading planning evidence which requires, in anything other than simple cases, constant checking of the evidence against the relevant provisions of the plan(s) read “as a whole” (i.e. all the relevant parts) before the evidence can be assessed for its utility.<sup>21</sup>

It is estimated that the procedure adopted by the Court in Christchurch may reduce hearing time by 30% to 50%. Although more time will be required in preparation for a hearing by the members of the Court, the time saved during the hearing will provide a “significant” saving in the costs incurred by the parties. To date no formal decision has been taken by the Court in terms of adopting this procedure more widely. The procedure adopted by the Court in Christchurch has, however, been criticized by a former Environment Judge:



In my opinion this practice is highly undesirable and should not be followed except in a genuine case of emergency, and even then only sparingly. In other words it should be very much the exception rather than the rule. There is a respectable argument for the view that it is inimical to the generally understood concept of an open and public hearing before a Court. It can also present difficulties, not only for the witness, but also for cross-examining counsel. The Court itself might also experience difficulties if the evidence-in-chief is not readily understood or if it contains material that the Court would not normally allow to be introduced or to which another party may take exception. Then too, speaking as a former Judge, no matter how hard one tries to avoid this, first impressions are often the ones that stick. Again, in my opinion, it is undesirable to form impressions about evidence whether it be expert or non-expert without seeing and hearing the witnesses give that evidence.<sup>22</sup>

The debate about the circumstances in which evidence may be taken as read was not a feature of the recent RMA review. It is however clear that, notwithstanding the criticism by Skelton & Kerr, there may be “significant” advantages in adopting this procedure more widely, particularly where this would assist speed of decision without conflicting with the ultimate role of the Court in ensuring that any decision to grant resource consent will promote sustainable management of natural and physical resources.

## **CONCLUSIONS**

Practice before the Environment Court has evolved considerably in the period since 1991. Expert evidence, whether scientific or evaluative, now dominates proceedings before the Court due to the increased complexity of resource management issues. The Court has been required to make greater use of

its power to regulate its own procedure to increase the speed of decision making and reduce the backlog of cases awaiting a hearing. As a result more emphasis is now placed on mediation and early resolution of cases than hitherto. The Court has also departed significantly from a standard approach to hearing appeals afresh to a more flexible approach which defers to Local Authority decisions, in appropriate cases, on matters that are not in issue or where having regard to the Local Authority decision will not conflict with the Court's ultimate role under the RMA. Inevitably, the changes in Court practice since 2002 have placed expert evidence and the important role played by expert witnesses under greater scrutiny, and there is an increased need to ensure that witnesses are both appropriately qualified and independent of the applicant for consent. These twin qualities of expert witnesses have been recognized in the *Shirley* and *Westfield* decisions and emphasized in the Code of Conduct. The pressure on the Court to adapt its practice in a flexible manner to achieve both speed of decision and sustainable outcomes is unlikely to diminish, particularly in light of the amendments made to the RMA to expand the Court's jurisdiction<sup>23</sup> to include review of Local Authority decisions about notification of resource consent applications. As a result the role played by expert witnesses in the decision making process is likely to remain in the spotlight.

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- 1 This paper was originally given at the National Environmental Law Association Conference, July 2005, in Canberra, and has subsequently been revised to reflect the changes made to the Resource Management Act 1991 by the Resource Management Amendment Act 2005
  - 2 Sheppard, DFG *Forty Years of Planning Appeals* May/June 1995 Resource Management News 20
  - 3 Ibid
  - 4 Law Commission *Delivering Justice for All* Report 85 (2004) 219
  - 5 Sheppard at 25
  - 6 Grant, M *Environmental Court Project: Final Report* (1999)
  - 7 See generally as to procedure before the Environment Court - District Court Rules 1992 (Reprinted with amendments incorporated as at 30 April 2004); Environment Court *Practice Notes* (1998); Environment Court *Practice Note on Case Management* (2004); and *Environment Court Practice Note on Alternative Dispute Resolution, Expert Witnesses, and Amendment to Practice Note on Case Management* (2005)
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- 8 [1999] NZRMA 66 at 100-101
- 9 *Ibid* at 108
- 10 *Ibid* at 125
- 11 Skelton, P and Kerr, C *Working more effectively in a Legal Environment under the Resource Management Act* (2000) at 28
- 12 *Ibid* at 29 & 53-57
- 13 *Ibid* at 28
- 14 Ministry for the Environment *Improving the RMA 2004: the scope of the programme* (May 2004) 2
- 15 Bill 2004 at 1
- 16 Select Committee 2005 at 1-2
- 17 Amended Bill 2005 at 96
- 18 Dyzenhaus, *The Unity of Public Law* (2004) at 52
- 19 Select Committee 2005 at 17
- 20 Jackson JR *A Note on Methods of Giving Evidence in the Environment Court* Issue 2 Volume X July 2002 *Resource Management Journal* 28 at 30-31
- 21 *Ibid* at 29-30
- 22 Skelton & Kerr at 37
- 23 As from a date to be appointed by the Governor-General by Order in Council