I TE KŌTI MANA NUI O AOTEAROA **SC 6/2022**
IN THE SUPREME COURT OF NEW ZEALAND

UNDER	the Resource Management Act 1991 (**RMA**)
IN THE MATTER	of an application for leave to appeal under section 73 Senior Court Act 2016
BETWEEN	**PORT OF OTAGO LIMITED** *Appellant*
A N D	**ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED** *Frist Respondent*
AND	**OTAGO REGIONAL COUNCIL** *Second Respondent*
AND	**ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED** *Third Respondent*
AND	**MALBOROUGH DISTRICT COUNCIL** *Fourth Respondent*

SUBMISSION FOR NGĀTI MARU RŪNANGA TRUST, TE ĀKITAI O WAIOHUA WAKA TAUA INCORPORATED, NGĀI TAI KI TĀMAKI TRUST AND NGĀTI TAMAOHO TRUST

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MAY IT PLEASE THE COURT

Introduction

1. Following the hearing of *Royal Forest and Bird Protection Society of New Zealand Incorporated* v *Waka Kotahi* ("EWL appeal"), Ngāti Maru Rūnanga Trust, Te Ākitai o Waiohua Waka Taua Incorporated, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust appear in this proceeding to address the effect of *Port Otago Ltd* v *Environmental Defence Society Inc* on the interpretation and application of the New Zealand Coastal Policy Statement 2010 ("NZCPS").

2. The approved question here is "whether the Court of Appeal was correct to dismiss the appeal against the decision of the High Court".[1] The question before the Court of Appeal was "did the High Court misapply the Supreme Court decision in *King Salmon*".[2]

3. The EWL and Port Otago appeals enable a determination on the correct *'King Salmon* position' in the RMA resource consent regime.

4. Ngāti Maru Rūnanga Trust, Te Ākitai o Waiohua Waka Taua Incorporated, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust support the submissions of Waka Kotahi.

5. In summary, we say:

   (a) The common shorthand references in the *King Salmon* discourse ('overall broad judgement' and 'environmental bottom lines') tend to distract from the evaluative exercise required under the RMA.

   (b) The NZCPS does not properly operate as an environmental bottom line/prohibition instrument precluding a contextualised/nuanced assessment in the consenting of activities in the coastal environment.

   (c) The NZCPS policies are not hierarchical. A doctrine of internal NZCPS policy primacy in the resource consent regime is antithetical to the architecture of

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1 *Port of Otago Limited v Environmental Defence Society Incorporated* [2022] NZSC 23.

2 *Port Otago Ltd v Environmental Defence Society Inc* [2020] NZCA 246; and *Port Otago Ltd v Environmental Defence Society Inc* [2021] NZCA 638, at [71]. We have referred to *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 as "King Salmon" throughout these submissions.

the RMA ('have regard to' not 'give effect to'). To do so would subvert the Treaty / Tangata Whenua policies.

(d) Environmental bottom lines are contrary to tikanga Māori.

(e) The policies (whether enabling, protective or neutral) are to be interpreted/applied in the context of the NZCPS as a whole (and in conjunction with the Objectives).

The EWL appeal

6. An issue for Ngāti Maru Rūnanga Trust, Te Ākitai o Waiohua Waka Taua Incorporated, Ngāi Tai ki Tāmaki Trust and Ngāti Tamaoho Trust in the EWL appeal was the Ngāti Whātua Ōrākei argument for the strict application of Treaty Principles as bottom lines and the inference that this gives weight to the 'avoid polices' in the NZCPS to avoid at all costs.

7. We said in the EWL appeal:

(a) Where the NZCPS is engaged (along with the Auckland Unitary Plan in that case), a full evaluation of the proposed activity with the relevant policies best gives effect (or takes account of) the Treaty Principle of active protection.

(b) The requirement to take account of Treaty principles and/or interpret the NZCPS through a Treaty lens will vary depending on the relevant Treaty principles and the tikanga/world views of the iwi involved and the context with which they are engaged.[3]

(c) Where the Treaty is engaged, the relevant principles will be a function of context. In cases involving the NZCPS, the Treaty principles typically include more than just active protection.[4] Treaty principles are non-linear and

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[3] See rationale for such an assessment in *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, at [54]-[55]; and *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at [558]-[562; and *Mason-Riseborough v Matamata-Piako District Council* (1997) 4 ELRNZ 31, at p47.

[4] *Mason-Riseborough v Matamata-Piako District Council* (1997) 4 ELRNZ 31, at p47; referring to *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC) and *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA). Also see Waitangi Tribunal, *The Ngai Tahu report* (Wai 27, 1991) Vol 2, at pp 215-248; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua fishing claim* (Wai 22, 1988), at p 195; Waitangi Tribunal, *Kiwifruit marketing report* (Wai 449 ,1995.), at pp 12-14; and Te Puni Kōkiri, *He Tirohanga ō Kawa ki te Tiriti*

recognise more than just active protection, drawing on the contextual factors that give life to active protection in the Treaty and tikanga context.

(d) There is no inherent hierarchy in the Treaty principles, or the world view as between iwi.

(e) As s8 RMA sits within the cascading Part 2 considerations, the relevance, weight and importance of any Treaty principle as seen through the respective iwi lens is highly nuanced.[5] This reflects the nature of the RMA processes and multitude of relevant considerations.

The impact of the Court of Appeal decision

8. The Court of Appeal held *King Salmon* confirms that the effect of the avoid policies in the NZCPS lend themselves towards a prohibition/veto or absolute avoidance (at all cost) approach in all circumstances, where an activity/project does not avoid adverse effects. Consequently, Policy 8 is subservient to the directives of the avoid policies.[6]

9. The impact of these findings are twofold. First, if policies are interpreted on an intensity of language (directives), this would subvert the Treaty /Tangata Whenua policies (such as Policy 2) because of the policy construct (and choice of verbs). For example, the provision of public open space in Policy 18 is not to be given primacy over Policy 2 simply because the policy wording is given a non-policy or rule/regulation-based application. Rather, if Policy 18 is to trump Policy 2 that is to be as a result of evaluating all relevant considerations.

10. Second, entrenching the meaning and interpretation of the NZCPS (as environmental bottom lines) conflicts with the complexities and realities of the RMA in practice and in Te Ao Māori. It further disregards the objectives of the NZCPS.

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o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal (2002), at pp 74-106 https://waitangitribunal.govt.nz/treaty-of-waitangi/principles-of- waitangi/principles-of-the-treaty/.

5 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC), at [9] line 34 and [21]; also see the discussion in *Tūwharetoa Māori Trust Board v Waikato Regional Council* [2018] NZEnvC 93, at [90]-[124] and specifically [129]; *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whai Maia Ltd* [2020] NZHC 2768, at [69]; and *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73, at [82].

6 *Port of Otago Limited v Environmental Defence Society Incorporated* [2022] NZSC 23, at [82].

Not all situations are the same and each requires its own contextual evaluation – this approach is consistent with tikanga Māori.[7]

No NZCPS hierarchy

11. The avoid policies in the NZCPS are not a prohibition or veto such that where activities cannot avoid adverse effects they can never receive a resource consent in the coastal environment. To interpret and apply them in this way (absent the NZCPS Objectives) embeds a hierarchical approach.

12. For instance, Policy 2 has a number of strong policy directives (footnotes omitted and emphasis added):[8]

> **Policy 2 The Treaty of Waitangi, tangata whenua and Māori heritage**
>
> In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:
>
> (a) **recognise** that tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;
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> …
>
> (d) **provide** opportunities in appropriate circumstances for Māori involvement in decision making, for example when a consent application or notice of requirement is dealing with cultural localities or issues of cultural significance, and Māori experts, including pūkenga2, may have knowledge not otherwise available;
>
> …
>
> (f) **provide** for opportunities for tangata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment through such measures as:
>
> (i) bringing cultural understanding to monitoring of natural resources;
>
> (ii) providing appropriate methods for the management, maintenance and protection of the taonga of tangata whenua;
>
> (iii) having regard to regulations, rules or bylaws relating to ensuring sustainability of fisheries resources such as taiāpure, mahinga mātaitai or other non commercial Māori customary fishing; and
>
> (g) in consultation and collaboration with tangata whenua, working as far as practicable in accordance with tikanga Māori, and recognising that tangata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:

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7 Also see s10 Legislation Act 2019.

8 Policy 2 NZCPS.

> (i) recognise the importance of Māori cultural and heritage values through such methods as historic heritage, landscape and cultural impact assessments; and
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> (ii) **provide for the** identification, assessment, **protection** and management of areas or sites of significance or special value to Māori, including by historic analysis and archaeological survey and the development of methods such as alert layers and predictive methodologies for identifying areas of high potential for undiscovered Māori heritage, for example coastal pā or fishing villages.

13. Likewise, Policy 6(1)(a) - **recognise** that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, and the extraction of minerals are activities important to the social, economic and cultural well-being of people and communities[9] – is a strong policy directive. However, under the Court of Appeal Decision, Policy 6 could trump Policy 2 if and when a situation arises where these two policies conflict, without the decision-maker attempting to reconcile the conflict through an evaluative process.[10]

14. Similarly, Policy 6(1)(d) - **recognise** tangata whenua needs for papakāinga, marae and associated developments and make appropriate provision for them[11] – could be trumped by Policy 16 which relates to the **protection** of surf breaks for surfing. Such a situation cannot have been intended when the NZCPS was promulgated.[12]

15. Further, reading a hierarchy into the NZCPS displaces the Objectives from having any relevance to the interpretation and application of the policies in any one context. Setting the Objectives aside, effectively rendering them meaningless, conflicts with the range of matters and consideration set out in Part 2 RMA, that are articulated in the Objectives of the NZCPS (as they relate to the coastal environment). This means that policies are viewed solely on their isolated directive strength of wording and without the necessary reconciliation, and contextual evaluation exercise that (as Miller J stated) was contemplated by the majority in *King Salmon.*[13]

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9 Policy 6 NZCPS.
10 As stated by Miller J at [111]-[113] of the Court of Appeal decision.
11 Policy 6 NZCPS.
12 Policy 16 NZCPS.
13 *Port of Otago Limited v Environmental Defence Society Incorporated* [2022] NZSC 23, at [113].

16. In effect, the avoid policies trump the tikanga and values within any proposal that are relational and context dependent.[14] This has the further consequence of side-lining the positive engagement of the directives in other policies, such as Policy 2 or 6(1)(d) in favour of the avoid polices – importantly this would be so in every circumstance regardless of any other consideration.

17. For example, any adverse effect on a surf break would trump an aquaculture proposal for the rearing of a taonga species or the construction of a tauranga waka complex.

18. This cannot be correct. Tikanga as law is commonplace in most if not all contemporary RMA contexts. If the Court of Appeal intended that the avoid policies would have this effect, it did so without reference to or consideration of the meaning, weight and importance of tikanga Māori in RMA processes and decision making. An example of why the decision is problematic when tikanga is applied can be seen in the evidence of Karen Akamiria Wilson before the Board of Inquiry in the EWL proceedings regarding the inconsistency of environmental bottom lines with tikanga:[15]

> Te Ākitai has a particular world view when it comes to making decisions about things that may have an impact on our taonga.
>
> We do not have environmental bottom lines as such. To us, this is a Pākehā construct and, in our view, the wrong way to look at things from a Māori perspective. We have tikanga. Implicit in that is our role as kaitiaki and, implicit in that is, the concept of manaakitanga.
>
> In essence, there must be a balance between all things. If a balance is struck that aligns with our tikanga and our role as kaitiaki…

19. To give such force to a Policy Statement (that took effect 12 year ago) in a way that goes beyond the purpose of a Policy Statement and its intended role within the

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[14] See comment in *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2021] NZSC 127, AT [297], which makes the point that tikanga and customary values are relational.

[15] Supplementarty Statement of Evidence of Karen Akamiria Wilson at [9]-[11]. EWL Appeal common bundle reference [315/83 **315.03872**].

overall resource consenting scheme, as well as without an evaluation of the implications on tikanga, is highly troubling for the Treaty Partner.[16]

Reconciliation of Policies through a Contextual Evaluation

20. We agree that the NZCPS policies are to be assessed and evaluated in context and their level of directive intensity is nuanced by the context in which they are being engaged. Where policies are in tension or conflict with one another, a decision maker is to reconcile that conflict in a way that best meets the objectives and policies as a whole as well as (where relevant) Part 2 RMA.

21. The purpose of the NZCPS is to state objectives and policies in order to achieve the purpose of the RMA in relation to the coastal environment of New Zealand.[17] The Privy Council has linked the purpose of the RMA with the cascading directives in ss 6, 7 and 8:[18]

> …The Act has a single broad purpose. Nonetheless, in achieving it, all the authorities concerned are bound by certain requirements and these include particular sensitivity to Maori issues. By s 6…By s 7…By s 8…these are strong directions, to be borne in mind at every stage of the planning process.

22. Part 2 is worded in a way that requires a contextual approach to decision making under the RMA. For instance, s 6(e) directs that to achieve the purpose of the Act, those exercising functions and powers must "recognise and provide for the relationship of and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga". There are situations where numerous relationships require the promises of s 6, in parallel, combination or simultaneous to each other. These relationships can be to all or one of the s 6(e) matters. Some may require protection, while others may require recognition, and there could be instances were s 6(e) is complied with all together.

23. Further, s 6(e) is one of eight matters of national importance that must be recognised and provided for. These are not ranked from most important to least but are set up to be engaged as the context requires. Section 6 matters are often in conflict in individual cases. For example, s 6(d) which relates to the maintenance and enhancement of public access to and along the coastal marine area, lakes, and

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16 s 56 RMA; also see *King Salmon* at, [30].
17 s 56 Resource Management Act 1991.
18 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC), at [21].

rivers could be engaged by a project in a positive way (the resource consent aims to extend or reinforce pre-existing access to the coastal marine area for the general public). However, that extension or reinforcement could mean a wahi tapu or urupā located in the coastal environment comes under threat. A decision maker could not determine the case without understanding the proposal as a whole, and after hearing the evidence, reconcile any conflict (potentially through conditions). Therefore, Part 2 and the RMA generally are nuanced by the context in which they apply. This is consistent with the Privy Council's acceptance that:[19]

> ..unless they reveal a contrary intention, statutes are to be interpreted as "always speaking"; they must be interpreted and applied in the world as it exists today, and in the light of the legal system and norms currently in force. In law, … elsewhere, context is everything.

24. These findings of the Privy Council are to be applied with more emphasis in the context of Policy documents. The NZCPS is not a statute, nor is it a set of rules or standards that have strict direction in all circumstances. *King Salmon* confirms this is so given the nature of Part 2 RMA:[20]

> [30] As we have said, the RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality.

25. We agree that "increasing particularity" refers to the way the purpose and Part 2 RMA are given effect to as the policy and planning documents become applicable to a region or district context. This acknowledges a fundamental component of the RMA which is that the environment is not the same across the board, nor are the interests of Māori generically applied.

26. If we apply the EWL context where a number of iwi participated, the adverse effects claimed by Ngāti Whātua Orākei – specifically on the biodiversity in the coastal environment which they consider to be taonga – would have been given greater priority because on the Court of Appeal's reasoning, those effects would not have been able to be avoided because the Board would have been precluded from evaluating the effects within the context of the EWL project and the NZCPS as a

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19 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC), at [9].

20 *King Salmon* at, [30].

whole. Policy 11 would then trump Policy 2 which was positively engaged by the position of all other iwi who did not oppose the EWL project.

27. Further, if we apply the Court of Appeal decision within a context where the *Ngāti Maru Rūnanga v Ngāti Whātua Orākei Whai Maia Ltd* decision is also engaged (an assessment of relative iwi strengths of relationship to an area the subject of a resource consent is required),[21] it could be possible for the relative strengths exercise to be bypassed or rendered unnecessary, in favour of or because of the avoid policies in the NZCPS.

28. This is wrong at law and tikanga, especially so within the context of s 6(e) which envisages the recognition and provision of relationships. Relationships, by their very nature in Te Ao Māori are contextual.

Conclusion

29. The Board 's approach in EWL – that sought to evaluate, balance and reconcile conflicting policies and provisions – allowed for the varying views and considerations of the EWL project to be viewed in the context of the NZCPS and AUP and the positions of the parties as a whole.

30. The Board, with respect, adopted the correct approach to reconciling the tensions in that case and found that the narrow window that is available under the AUP and NZCPS could be passed. We agree with Waka Kotahi on this point.[22]

Certified as suitable for publication under clause
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[21] *Ngāti Maru Rūnanga v Ngāti Whātua Orākei Whai Maia Ltd* [2020] NZHC 2768, at [133].

[22] We reiterate the comments from the Waitangi Tribunal in *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) Vol 1 at pp 271-272, that describes the complex nature of RMA decision making, scheme and balancing of consideration.