**IN THE SUPREME COURT OF NEW ZEALAND**
**I TE KŌTI MANA NUI O AOTEAROA**

**No: SC 2/2023**

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| **BETWEEN** | **TE RŪNANGA O NGĀTI AWA**<br><br>**Appellant** |
| **AND** | **BAY OF PLENTY REGIONAL COUNCIL**<br><br>**First Respondent** |
| **AND** | **CRESWELL NZ LIMITED**<br><br>**Second Respondent** |

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**SUBMISSIONS ON BEHALF OF BAY OF PLENTY REGIONAL COUNCIL**

8 September 2023

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Having made appropriate inquiries to ascertain whether these submissions contain any suppressed information, I certify that, to the best of my knowledge, these submissions are suitable for publication.

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## MAY IT PLEASE THE COURT

## Introduction

1. These submissions respond to the appeal by Te Rūnanga o Ngāti Awa (**Ngāti Awa**), which relates to the water take consent granted by Bay of Plenty Regional Council (**Regional Consent**). They address the issue of "end use" in the context of the Regional Consent, but also respond to the arguments raised by Sustainable Otakiri on this issue in the context of the land use consent granted by Whakatāne District Council (**District Consent**), to the extent relevant to the Regional Council's functions.

## Overview of Regional Council Case

### *End use – plastics and export*

2. Few would deny that unmitigated production of plastic bottles has the potential to cause harm to the environment, particularly where the recycling or disposal of the product is unregulated. It is a global issue requiring a concerted response, like many of the environmental challenges facing our planet.

3. Concerns around the commercialisation of water, a taonga for tangata whenua, are genuine and well founded. This issue also requires a considered policy response.

4. However, seeking to address these issues through ad hoc resource consents under a policy framework which does not currently seek to address them is not sound planning.

5. Straining or revisiting the established tests of nexus and remoteness in the manner proposed, to fill a policy gap, has potentially significant implications for the assessment of consent applications, placing an onerous burden on consent authorities and, in turn, the fulfilment of compliance and monitoring functions.

6. The Court of Appeal properly assessed the end use issue in the context of s104(1)(a) RMA, by applying the well-established tests of nexus and remoteness to the circumstances of this case. Such tests are not "inappropriate and unnecessary glosses" on the text of the RMA as submitted.[1] They provide a principled approach for a consent authority to assess the evidence of effects against the planning framework, and to address those effects through conditions which can reasonably and effectively be complied with by a consent holder and enforced by councils. Where appropriate, those effects also provide a basis for declining consent.

7. Disagreeing with the outcome of the application of those tests does not found a plea for this Court to revisit them, or to provide guidance on these issues during the transition to a new resource management regime as sought.[2] The new regime is not materially different in relation to the issues raised in this appeal.

***Part 2, RMA***

8. The parties appear to agree that, following the Court of Appeal's decision in *Davidson*,[3] the question of whether a consent authority should have direct regard to Part 2 of the RMA (the purpose and principles section) when assessing a resource consent application involves the exercise of a discretion which is specific to the particular circumstances.[4]

9. But Ngāti Awa argues that the circumstances of this case, which engage the "*multi-dimensional Māori provisions of the RMA,*"[5] require direct recourse to Part 2.

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[1] Synopsis of Submissions for Sustainable Otakiri Inc. dated 26 July 2023 (**Sustainable Otakiri Submissions**), paras 31 and 48.
[2] Synopsis of submissions for Te Rūnanga o Ngāti Awa, 28 July 2023 (**Ngāti Awa Submissions**), para 7.
[3] *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.
[4] Ngāti Awa Submissions, para 75.
[5] Sections 6(e), 7(a) and 8, RMA.

10. While this argument may have superficial appeal in cases concerning resources of importance to Māori, the Court of Appeal (and the two Courts before it) properly understood that "*nothing would be added*" to the Environment Court's assessment by "*having direct reference*" to Part 2. Ngāti Awa has repeatedly failed to explain how having direct reference to Part 2, as opposed to referring to the relevant planning provisions which seek to give effect to Part 2, would have resulted in a different outcome in this case.

11. The Court of Appeal (and the two Courts before it) all concluded that the Bay of Plenty Regional Natural Resources Plan (**RNRP**) comprehensively addresses matters of importance to Māori including specific provisions addressing the mauri and mana o te wai, kaitiakitanga, and Te Tiriti o Waitangi. This is not disputed by Ngāti Awa with reference to any specific provisions of the plan (or identification of the absence of provisions) which would otherwise be addressed by reference to the more general provisions of sections 6(e), 7(a) and 8. This ground of appeal is based on generic statements which are unsupported by necessary detail.

***Negative tikanga effects[6]***

12. A careful analysis of the Environment Court's decision confirms that the fact finder did consider the "*negative tikanga*" effects of the end use of the water take, being the export of bottled water, having regard to the evidence before it. It follows that the High Court and Court of Appeal correctly assessed this as a factual issue not a legal one and therefore that finding is unable to be disturbed on appeal from a question of law.[7]

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[6] The Supreme Court's decision granting leave defines "negative tikanga effects" to mean "*negative effects on te mauri o te wai and the ability of Te Rūnanga o Ngāti Awa to exercise kaitiakitanga*". [2023] NZSC 35 at [3] CB [05.0021]. The RMA defines "*tikanga Māori*" to mean "*Māori customary values and practices*". The decisions of the lower Courts use the terms "tikanga" and "cultural" effects interchangeably, as do these submissions where referring to the decisions of the lower Courts.

[7] RMA s299, Appeal to High Court on Question of Law.

## Development of Argument

13. The Supreme Court granted leave on the general question of whether the Court of Appeal was correct to dismiss the appeals. It also granted leave to appeal the High Court decision[8] in relation to whether the High Court erred in upholding the Environment Court's decision[9] in relation to the negative tikanga effects.[10]

14. The submissions for Ngāti Awa address the third issue (negative tikanga effects) together with the issue relating to "end use effects" (together referred to as Ground One), and the issue relating to Part 2 of the RMA separately as Ground Two. These submissions address the three issues separately as follows:

    (i) Issue One: End Use effects;

    (ii) Issue Two: Part 2 RMA;

    (iii) Issue Three: Negative Tikanga Effects.

## Issue One – End Use Effects

15. It is relevant context to understand that the issue of the production or disposal of plastic bottles (the "plastics" issue now being raised by Sustainable Otakiri) was never squarely at issue before the Environment Court. Rather, it arose through the course of the hearing during questions from Commissioner Kernohan, who provided a minority decision focussing on the plastics issue. That issue became a focus of the subsequent appeals and remains a focus of these proceedings.

16. However, the focus of the "end use" issue in the Environment Court was on the "export" of water. As explained by counsel for Ngāti Awa, its case continues to reflect a simple proposition that the

[8] [2020] NZHC 3388 (**HC Decision**) CB [05.0080].
[9] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 (**EC Decision**) CB [05.0024].
[10] [2023] NZSC 35 (**Leave Decision**) CB [05.0019].

Regional Consent allows "*for too much water to be sold too far away*."[11]

17. For that reason, the Environment Court's analysis of the end use issue is largely framed in the context of the Regional Consent to take water under the RNRP and on a regional council's functions under s30 of the RMA,[12] which are focussed on the "environmental domains" of air, soil, and water; and natural hazards. The Environment Court correctly summarised the position as follows:

> [64] The end uses of the water, once taken, involve putting the water in plastic bottles, exporting the bottled water and consumption of it by people outside New Zealand. The end uses are ancillary activities which are not controlled under the regional plan. **There is no suggestion that control of such activities comes within the ambit of the functions of the regional council under s 30 RMA.** … [emphasis added]

18. The function of regulating the use and development of land rests with territorial authorities under s31 RMA.[13] The activity of managing plastic bottle production is a territorial authority land use function. In this case, the District Plan regulates certain production activities in the rural zone, and the water bottling plant requires consent as a rural processing activity.

19. It follows that the appellants' argument that the Court of Appeal was wrong to focus on the disposal of plastic bottles rather than their production is misconceived. The Court of Appeal properly focussed on disposal of bottles because that was the consequential effect or "end use" of the relevant activities for which consent is required, being a rural processing activity (water bottling operation) and the take of water for use for water bottling. The volume of water taken[14]

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[11] Ngāti Awa submissions, para 4.
[12] Supported by ss12-15 of the RMA, relating to the coastal marine area, lakes and rivers, water and contaminants.
[13] Supported by ss9-11 RMA, relating to "land".
[14] 2020 NZEnvC 089 (final decision on conditions), specifically the Regional Water Permit, Conditions 3.1-3.4, at p 16.

and the staging of the amount of bottles produced[15] are already regulated through conditions of consent granted by the Environment Court.

20. The appropriateness of those restrictions is not at issue. However, for context, in considering the appropriateness of those restrictions, the consent authorities considered the direct effects of production, for example, the noise generated by the bottling operation, the positive effects of employment generated by expanding production, and (in the case of the Regional Consent) the impact of the volume of water taken on the sustainability of the aquifer and on Māori cultural values / tikanga.

21. What the Court of Appeal (and the two Courts before it) did not consider, because the effects were considered too remote, was the consequential disposal of the plastic bottles once exported.

22. The RMA is not a code for managing environmental issues, particularly global ones. District and regional plans regulate the effects of activities on the immediate neighbourhood, catchment, or wider district or region. Where an issue is considered to be of national significance, it will be regulated through national policy instruments under the RMA, or by Parliament through other legislation.

23. There is nothing to preclude Parliament phasing out plastic bottles through legislation such as the Waste Minimisation Act 2008 or regulations made under it (such as the recent Plastic and Related Products Regulations[16]). If that occurred, the resource consents (which are merely enabling) would not provide a legal right to produce plastic bottles which would override that legislation. There is also the potential for central government to directly regulate the production and / or disposal of plastic bottles through National Environmental Standards (NES) under the RMA. Such standards

[15] 2020 NZEnvC 089 (final decision on conditions), specifically the Land Use Consent, Conditions 1 and 3, at p 29.
[16] Waste Minimisation (Plastic and Related Products) Regulations 2022.

could potentially require review of current resource consents to ensure consistency with the new policy and regulations.

24. It is not correct to suggest that implementation of these consents will inevitably lead to plastic bottles eventually finding their way into the environment as micro-plastics, as argued by Sustainable Otakiri. There is nothing in the consent conditions which require the consent holder to produce a certain capacity, or to use plastics rather than glass or some other form of material.

25. The short point is that the plastics issue requires a considered policy approach and regulation. Seeking to address the issue through ad hoc resource consents under a policy and planning regime which does not currently seek to address this issue is bad planning practice.

26. Straining the existing tests of nexus and remoteness to fill a perceived policy gap will have potentially significant implications for the future assessment of consent applications, placing an onerous burden on consents planners and, in turn, on compliance staff.

27. These tests are also important for councils who have a duty to monitor and enforce compliance with consent conditions. Conditions must be certain and reasonably capable of being complied with. Where an effect is too remote, such as where it occurs overseas, the effect is unlikely to be capable of being managed through a lawful condition. The Court of Appeal properly understood this point.[17]

28. In summary, the key legal issues raised by the appellants in relation to the Court of Appeal's application of s104(1)(a) are that the Court:

    (a) Analysed the issue from the wrong starting point (it should have focused on the production of bottles not their disposal).

[17] [2022] NZCA 598 (**Court of Appeal Decision**) at [34] CB [05.0170].

This proposition is misconceived as explained above, and is not addressed further;

(b) Failed to place significance on the word "allowing";

(c) Placed undue weight on the Supreme Court's decision in *Buller Coal;*[18]

(d) Took the wrong approach to the concept of "tangibility";

(e) Should not have taken judicial notice of overall effects of plastic on a global scale but should have sought further evidence;

(f) Placed undue emphasis on the legality of the ultimate disposal / ignored inevitability that all plastic will ultimately be disposed of as waste;

(g) Should have applied a simple "but for" test;

(h) Applied a strained interpretation of s104(1)(a), which considered positive effects of employment, but discounted export and bottling as too remote.

29. None of the above arguments withstand close scrutiny. In summary:

(a) **Failed to place significance on the word "allowing":** This argument is not borne out by the Court of Appeal's analysis. At [63] the Court emphasises the "allowing" consideration as follows: "*But to be relevant, the effect must still be an effect of allowing the activity*". The issue is not that the Court did not understand this aspect of s104(1)(a). Rather, the appellants simply disagree with the Court's conclusion that the effects they seek to prevent are too remote to be

[18] *West Coast ENT v Buller Coal Ltd* [2013] NZSC 87, [2013] 1NZLR 32.

regulated by the consent granted for the activity which has been allowed;

(b) **Placed undue weight on *Buller Coal***:[19] It is argued this decision should have been distinguished on the facts. This submission misunderstands the purpose of the Court of Appeal's analysis and reliance on *Buller Coal*. It is the leading decision from our highest Court on the "end use" issue in a consenting context. The Court of Appeal was clear that it was relying on the "approach" taken in *Buller Coal*. It did not seek to rely on the facts of that case.[20] The Court also considered other decisions[21] and ultimately undertook its own analysis, identifying five conceptual difficulties on the facts of this case;[22]

(c) **Wrong approach to the concept of "tangibility**": Ngāti Awa argues that "*the Court of Appeal was wrong to find that for plastics to be considered they would need to produce a "deleterious effect" to be tangible*."[23] This is not what the Court found. It said: "*Here, it would need to be said that the plastic bottles produced by the proposed activities that are discarded in the environment would produce a deleterious effect* ***in combination with the discarding of plastic that already occurs*** *in New Zealand and elsewhere arising from other activities* [emphasis added]. The Court was considering the concept of cumulative effects. It observed that the RMA requires effects to be considered even though small in scale, but can still be relevant if, when considered in combination with other effects, they have an adverse (deleterious) impact. This was the very issue considered in *Buller Coal.* "*By parity of reasoning*" with that decision (not

[19] *West Coast ENT v Buller Coal Ltd* [2013] NZSC 87, [2013] 1NZLR 32.
[20] Court of Appeal Decision at [50] CB [05.0174].
[21] *Taranaki Energy Watch Inc v Taranaki Regional Council* ENVC Auckland W039/03, 16 June 2003 and *Beadle v Minister of Corrections* EnvC Wellington A074/02, 8 April 2002.
[22] Court of Appeal Decision at [55]-[65] CB [05.0176].
[23] Ngāti Awa submissions at para 48, citing Court of Appeal Decision at [63] CB [05.0178].

due to the application of similar facts) the Court of Appeal in this case concluded that there would need to be a "tangible impact" of any attempt to control plastic through an individual application for resource consent due to the widespread and worldwide use of plastic (at [64]). That was an entirely reasonable conclusion to reach. Importantly, this discussion of tangibility was used by the Court to test its conclusions as to remoteness and was found to "support" those conclusions.[24] The tangibility assessment was not of itself material to the ultimate conclusion;

(d) **Judicial notice and evidence:**

(i) Ngāti Awa argues "*not only did the Court of Appeal not have the evidence before it to consider the overall effects of plastic on a global scale, the impact of billions of plastic bottles cannot reasonably be said to be de minimis*".[25] This misses the point the Court of Appeal was making. It did not find or observe that the impact of billions of plastic bottles would be de minimis. Rather, it was considering the issue of control and tangibility, not seeking to quantify the impact. The Court found (at [63]-[64]) that the impact of discarding the bottles produced by this application, when considered in combination with the widespread and worldwide use of plastic, would not have a tangible impact. The Court was reasonably entitled to take judicial notice (at a general level, for the purposes of its tangibility assessment) of the impact of this application on the worldwide use of plastic. Further, as explained above, the Court's tangibility analysis was used to test its conclusions on remoteness. It was not material to those conclusions;

[24] Court of Appeal Decision at [62] CB [05.0178].
[25] Ngāti Awa Submissions at para 48.

(ii) Both appellants pursue their previous argument that the Environment Court should have sought further evidence on this issue. The evidence issue was a separate ground of appeal before the Court of Appeal and is separately addressed in its decision. The Court was alert to the context of how the plastics issue was raised in these proceedings. It was not an issue raised in the appeals before the Environment Court. Rather, it arose from questions from Commissioner Kernohan and has taken on a life of its own since. In that context, the Court of Appeal's finding (at [78]) that the Environment Court's "*primary duty … is to consider the issues raised by the parties and the evidence they have called, and apply the relevant statutory provisions in the RMA*" is sound and reasonable;

(e) **Undue emphasis on legality of ultimate disposal / ignored inevitability that all plastic will ultimately be waste:** This argument does not accurately reflect the Court of Appeal's analysis. Several of the Court's propositions in support of its conclusions on remoteness address both disposal scenarios, i.e. "whether lawful or unlawful".[26] Nor did the Court ignore the inevitably that all plastic will ultimately be disposed of as waste (which presumably the appellants consider the Court was entitled to take judicial notice of). The point is that the Court considered that even the effect of the disposal of bottles in recycling facilities was too remote (particularly from a tangibility perspective), and therefore presumably the ultimate effect of micro-plastics entering the environment even more remote;

(f) **"But for" test is enough:** Ngāti Awa appear to argue there is sufficient *nexus* to consider end use and that the inquiry

[26] Court of Appeal Decision at [59] and [60] CB [05.0178].

should stop there. Under the heading "*Sufficient nexus in this case to consider end uses*", their submissions frame the question in this way:

> Consider: could Creswell deliver the product (plastic bottles of water) without the water take? The answer must be no. Would Creswell commit to such a quantity of take without the ability to export? The answer must also be no.[27]

This oversimplifies and conflates the established legal tests, which require an assessment of both nexus and remoteness. Even where a simple "but for" test of causation is established between consequential effect and the activity, that is not the end of the inquiry. A question remains as to whether the nexus is sufficiently strong, and the remoteness assessment (including considerations of tangibility) is equally if not more important. It is that analysis which addresses the efficacy and reasonableness of endeavouring to hold a consent holder responsible for managing the remote effect, and ultimately the consent authority for enforcing compliance with the condition. These are important "real world" considerations from the Regional Council's perspective, and are only given superficial attention by the appellants. If the answer lay in a simple but for test, then the export, packaging and disposal of all primary products would require regulation through consent conditions on the primary activity. This troubled the Court of Appeal[28] and cannot be correct;

(g) **Strained interpretation of s104(1)(a):** Ngāti Awa argues that the Environment Court's consideration of positive effects (employment) but discounting of adverse effects (plastics) is a strained interpretation of s104(1)(a). This argument is misconceived. Positive effects are required to be considered

[27] Ngāti Awa Submissions at para 50.
[28] Court of Appeal Decision at [56] CB [05.0176].

under the RMA.[29] So are adverse effects. Whether either of those effects (positive or adverse) are too remote is a separate issue.

***Two further arguments***

30. Ngāti Awa raises two further arguments relevant to issue one (end use) which require brief attention.

31. The Court of Appeal found that a condition which attempts to control the disposal of plastic overseas could not be justified as fairly and reasonably related to a consent to take water.[30]

32. Ngāti Awa alleges this was an error of law.[31] That does not follow. The Court of Appeal was not seeking to promulgate a new legal test for "end use". Rather, the Court found it "*helpful*" to consider this as a form of cross-check, having applied the considerations arising from *Buller Coal* and *Beadle.*[32] This was entirely appropriate. The statutory tests for the lawfulness of a resource consent condition include a causative requirement to establish that the condition is "*directly connected*" to an adverse effect of the activity on the environment.[33] It was therefore a useful way for the Court of Appeal to test its findings as to nexus and remoteness.

33. Ngāti Awa also argue that guidance from this Court is required during the transition to the new resource management regime, which could take up to 10 years.[34] It is unclear why such guidance is required, given resource consents will continue to be processed under the RMA until the new Natural and Built Environment Plans

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[29] *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433 (HC) and s104(1)(ab) RMA.
[30] Court of Appeal Decision at [60] CB [05.0178].
[31] Submissions for Ngāti Awa in Support of Application for Leave dated 21 February 2023, Ground One para 14.
[32] Court of Appeal Decision at [54] CB [05.0176].
[33] Section 108AA(1)(b) RMA. This statutory test codifies (and provides a "*slight strengthening*") of the previous "*logical connection*" test used by the Supreme Court *in Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 (See *Ngāti Whātua Ōrākei Whaia Mai Ltd v Auckland Council* [2019] NZEnvC 184, (2019) 21 ELRNZ 447 at [44] and [45].
[34] The Natural and Built Environment Act (which will replace the RMA over time) was passed into law on 23 August 2023.

(**NBEPs**) are prepared,[35] which is expected to take several years.[36] Moreover, with two important amendments, the new equivalent of s104(1)(a) carries over the same wording from the RMA relevant to this case, specifically, the requirement that "*The consent authority must … have regard to any actual and potential effects on the environment of allowing the activity*."

34. There are two relevant amendments to the s104(1)(a) equivalent, which are intended to codify the *King Salmon* and *Davidson* jurisprudence[37] by removing the reference to "subject to Part 2" (or its equivalent)[38] to avoid consent authorities reverting to Part 2 in order to undertake an "*overall broad judgment*" of the type eschewed by the Supreme Court in *King Salmon*. There is also a new restriction on the ability of the consent authority to have regard to the purpose of the Act, which may only occur "*if, and to the extent that, it is necessary*" to resolve conflicts, ambiguity or gaps in the planning framework (effectively a codification of the *King Salmon* tests).[39]

35. This new statutory approach is also entirely consistent with the Court of Appeal's approach in this case (discussed below), which is to avoid reverting to Part 2 where that is unnecessary.

**Issue Two - Part 2 RMA**

36. The essence of Ngāti Awa's argument that the Court of Appeal was wrong not to consider Part 2 of the RMA directly appears to be based on the following two themes:

[35] Natural and Built Environment Act (**NBEA**), Schedule 1, clauses 6, 17 and 19.
[36] NBEA, *supra.* s2(6). The NBEP provisions do not come into effect until an Order in Council is made in relation to each region. A region by region approach is anticipated (ss2(7) and (8)).
[37] Report of the Resource Management Review Panel (2020), p281, footnote 318.
[38] NBEA Part 1, Subpart 1, relating to the "purpose and other matters".
[39] NBEA, s286(12)(b).

(a) The planning framework is "incomplete" because it does not contemplate the effects of water bottling and particularly does not address "end-use" effects;[40] and

(b) The "*multi-dimensional Maori provisions*" (ss6, 7(a) and 8) and the decision of *RJ Davidson*[41] applying *McGuire*[42] require direct reference to Part 2 in this case.

37. The question put to and answered by the Court of Appeal on this issue was:

> [80] The third question is:
>
> > Did the High Court err in finding that the Environment Court did not need to have recourse to pt 2 of the [RMA] and, in particular (i) that the relevant planning instruments provided adequate coverage of the provisions of pt 2, and (ii) that an assessment of sustainability by itself was sufficient to address relevant cultural effects, so that no further reference to pt 2 was needed in that context[?]

38. The second aspect of the question relating to sustainability is addressed in Ngāti Awa's submissions in relation to the "*negative tikanga effects*" ground of appeal, which relates to the appeal against the High Court's decision. These submissions respond to it in that context (Issue Three below). It will be explained that the High Court did not make a finding that an assessment of sustainability by itself was sufficient to address relevant cultural / tikanga effects. Accordingly that did not form the basis of either the High Court or Court of Appeal's conclusions that it was unnecessary to have direct regard to Part 2. The Court of Appeal concluded it was unnecessary to have direct regard to Part 2 because the relevant planning documents "*refer extensively to both the*

[40] Ngāti Awa Submissions, at paras 76 and 83.
[41] *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.
[42] *McGuire v Hastings District Council* [2001] NZRMA 557.

*biophysical <u>and metaphysical</u> dimensions of activities relating to water*." They were not limited to issues of physical sustainability.[43]

39. In reaching this conclusion (in response to the first part of Question 3 posed by the Court above), the Court of Appeal assessed the relevant aspects of the Environment Court's decision directly, observing that the Court had "*concluded that issues relating to the taking of water were comprehensively addressed in the RNRP, and it had heard no argument that the RNRP had been prepared other than competently on that aspect*."[44]

40. The Court of Appeal observed that the Environment Court had relied on the joint statement of planning witnesses (which included the planner engaged by Ngāti Awa) in which all planners were agreed that "*the regional plans provided adequate coverage of ss 6(e), 7(a) and 8 of the RMA*".[45]

41. Ngāti Awa is critical of the Environment Court's reliance on the joint witness statement, and also argues that the High Court placed undue emphasis on the agreed position that the RNRP contained "*comprehensive provisions relating to kaitiakitanga*".[46]

42. In fact, the High Court was not prepared to simply rely on the agreed planning statement, observing that:

> [169] In this context, however, **the evidence is not determinative**. The evidence of the planners was addressing the comprehensiveness of the Regional planning framework, which is not so much a question of fact but a question of construction; that is, a question of law. The majority's conclusions in that regard are not factual findings. **It is therefore necessary to consider the majority's conclusions against the planning framework**,

[43] Court of Appeal Decision at [109] CB [05.0194]. Emphasis added.
[44] Court of Appeal Decision at [87] CB [5.0184] citing the Environment Court majority at [167] CB [05.0052].
[45] Court of Appeal at [88] CB [05.0184] citing EC majority at [168] CB [05.0052].
[46] Ngāti Awa Submissions at para 72.

> beginning with key references to cultural values in the planning documents. [emphasis added]

43. The High Court undertook its own analysis of the relevant planning provisions directly, including the provisions in the "higher order" documents, specifically the National Policy Statement for Freshwater Management (**NPSFM**), and the Regional Policy Statement (**RPS**) - particularly the section on Iwi Resource Management, which the Court observed refers to Te Tiriti o Waitangi / Treaty of Waitangi principles, recognition of te tino rangatiratanga, and degradation of mauri.[47]

44. These provisions were also directly considered by the Court of Appeal in its decision,[48] leading to the conclusion that:

> [109] … **We observe that they reflect an apparently comprehensive set of provisions dealing with issues relevant to the relationship of Māori with water, te mana o te wai and relevant Te Tiriti o Waitangi/Treaty of Waitangi principles**. The latter include provisions recognising tino rangatiratanga and the degradation of mauri. The planning documents refer extensively to both the biophysical and metaphysical dimensions of activities relating to water. The appellants assert an error as a result of the Courts not referring in addition to pt 2, **but we are left unclear as to what that might have added to the analysis carried out by reference to the planning documents**. This was a case in which, in accordance with what was said in *RJ Davidson*, the Environment Court could properly conclude that nothing would be added by direct reference to pt 2. And in this respect, it is not a significant point to say that the planning framework might later change if what remained and was referred to dealt comprehensively with the issues affecting the wai from both a biophysical and a metaphysical perspective. [emphasis added]

45. The Court of Appeal made it clear that it was not articulating a principle of general application, but rather that the circumstances of this case lead to the conclusion that reverting directly to part 2 would add nothing further in this case.

46. Importantly, the Court of Appeal correctly observed that "*No party identified any relevant consideration addressed in the submissions*

[47] High Court Decision at [170]-[175] CB 05.0117.
[48] Court of Appeal Decision at [89]-[95] CB [05.0185].

*or evidence that did not come within the RNRP, but would come within pt 2*.[49]

47. Ngāti Awa has failed to squarely address this point in their submissions to this Court. It is clear from a direct analysis of the relevant NPSFM, RPS (Iwi Resource Management)[50] and RNRP provisions (Kaitiakitanga chapter)[51] that the issues raised in the "*multi-dimensional Maori provisions*" of the RMA (relating to Ngāti Awa's relationship with wai, its role as kaitiaki and the principles of Te Tiriti o Waitangi) are matters which are directly and comprehensively raised in those provisions and were considered by all three Courts in this case. All three Courts also directly addressed the Mataatua declaration which was accepted by all parties to be relevant.[52]

48. The perceived "gap" or "incomplete" nature of the planning instruments, which Ngāti Awa appears to rely on as a basis for its argument that directly referring to Part 2 is necessary, is therefore not entirely clear. At footnote 16 of Ngāti Awa's submissions it is observed that the High Court accepted that the planning framework is "incomplete". This statement relates to the operative RNRP not giving full effect to the NPSFM. That remains the current position across the country, because Regional Councils have until December 2024 to implement the NPSFM through a freshwater plan change.[53] In any event, a consent authority is required to have direct regard to the NPSFM when assessing a consent application under s104(1)(b)(iii). This perceived incompleteness is part of the usual planning process and the three Courts which considered the issue in this case were correct to find that it did not provide a reason for reverting directly to Part 2.

[49] Court of Appeal Decision at [110] CB [05.0194].
[50] CB [302.0311].
[51] CB [302.0431].
[52] EC Decision at [152] CB [05.0050], HC Decision at [173] CB [05.0119], Court of Appeal Decision at [109] CB [05.0194].
[53] Refer RMA, s80A(4).

49. The other "gap" asserted by Ngāti Awa is that the relevant planning provisions do not address the activity of water bottling or the associated "end-use" (plastic bottling) effects.[54] This submission is misconceived. As explained in relation to Issue One, the activity of producing plastic bottles is not an activity which is regulated through a regional plan addressing the management of freshwater. As explained by the Environment Court:[55]

> [64] The end uses of the water, once taken, involve putting the water in plastic bottles, exporting the bottled water and consumption of it by people outside New Zealand. **The end uses are ancillary activities which are not controlled under the regional plan.** There is no suggestion that control of such activities comes within the ambit of the functions of the regional council under s 30 RMA. … [emphasis added]

50. It follows that the effects of exporting water in plastic bottles are also not activities which can be regulated under the RNRP. This is not a "planning gap" issue. Rather, the issue is whether the consequential effects can be considered under s104(1)(a) (the effects of allowing the water take activity) which is addressed above. Even if this Court finds that those effects ought to have been considered (overturning the Court of Appeal), it does not follow that direct reference to Part 2 is required to address this issue. It would be a matter for the Environment Court to consider (upon referral back) whether direct reference to Part 2 would add anything to the evaluative exercise. This would require consideration of whether the tikanga aspects of those consequential effects (to the extent they are different to the tikanga effects already considered by the Court) are adequately addressed by the NPSFM, the RPS, and the RNRP.

51. For the same reasons the three lower Courts concluded that having direct regard to the general provisions of ss6(a), 7(a) and 8 is unlikely to add anything to the evaluative exercise in relation to the tikanga effects of *exporting water*, it appears unlikely that a different conclusion would be reached in relation to the tikanga effects of

[54] Ngāti Awa Submissions at paras 5(b) and 76.
[55] EC Decision at [64] CB [05.0037].

*plastic bottles*. The regional planning framework comprehensively addresses the relationships of Māori with resources and other taonga, including but not limited to water, the exercise of kaitiakitanga, and the principles of Te Tiriti o Waitangi.

**Third Ground – Tikanga-based effects of end-use**

52. Ngāti Awa seeks to frame this issue as a legal one based on the "approach" taken by the Environment Court to consideration of the tikanga effects of the water take. It maintains that it does not seek to challenge the factual findings of the Environment Court.[56]

53. Ngāti Awa's challenge to the Environment Court's approach is two-fold:

    (a) It asserts that the Environment Court *could not* have considered the tikanga-based effects of the "end use" of the water take (being the export of bottled water) because doing so would "*frustrate the majority's own jurisdictional conclusion*" that it could not consider such effects;[57] but also that

    (b) The Environment Court *did not* consider the negative tikanga effects of the export of bottled water (or indeed any end use effects).[58]

54. Counsel agrees with the submission for Ngāti Awa that "*The specific factual findings cited by the High Court therefore require careful analysis*."[59] The issue is not whether the Environment Court considered itself to be jurisdictionally constrained, but whether or not it went on to address the issue and made factual findings. If it did, then those factual findings cannot be disturbed on appeal.

[56] Ngāti Awa Submissions, at para 23.
[57] Ngāti Awa Submissions para 8(a)(i).
[58] Ngāti Awa Submissions footnote 14 and para 8(a)(i).
[59] Ngāti Awa submissions, para 57.

55. The High Court directly addressed the Environment Court's approach and concluded that:

(a) Despite the Environment Court majority's conclusion that it had no jurisdiction to consider the effects of exporting water as an "end use", it went on to consider evidence on the physical sustainability and metaphysical effects of export and made factual findings on that evidence; and

(b) Those factual findings made the Environment Court's jurisdictional findings immaterial:

> [119] Having considered the cultural effects and made the factual findings referred to, the legal conclusion in the Jurisdictional Overview that the effects of export were beyond scope was not material to the decision.[60]

56. That conclusion is sound and can be tested against the factual findings of Environment Court relied on by the High Court. The submissions for Ngāti Awa only address part of the High Court's assessment of this issue. They cite findings at [112], [113] and [114] of the High Court's decision in support of their argument that, when read in context, the Environment Court's assessment of tikanga effects was limited to the water take itself and not to the end use effects raised by Ngāti Awa, being the export of bottled water.[61]

57. However, they overlook that the High Court went on to directly address this issue in the passages that follow those cited by Ngāti Awa. At [115] – [117] the High Court concluded that the Environment Court had addressed both the sustainability of the water take and the "*metaphysical effects, such as effects on mauri of the aquifer*" and it cited a passage from the Environment Court referring to the evidence of Ngāti Awa witnesses which "*focussed*

[60] High Court Decision at [119] CB [05.0108].
[61] The issue of plastic bottles was not part of Ngāti Awa's appeal to the Environment Court, and only emerged as an issue during the hearing in response to questions from Commissioner Kernohan, HC Decision at [88] CB [05.0103].

*on the irrevocable loss of mauri from the water* ***resulting from its bottling and export overseas***."[62] [emphasis added]

58. The High Court went on to conclude that:

> … the majority squarely considered the cultural effects of taking water **and sending it overseas** on the mauri of the wai.[63] [emphasis added]

59. Importantly, the High Court, like the Environment Court, correctly recognised that "*the cultural effects of export*" being the "*metaphysical cultural effect* ***on the iwi appellants***" are felt "*in New Zealand*".[64]

60. This conclusion is sound having regard to the findings of the Environment Court majority, which clearly examine the cultural effects of the export of bottled water, based on the evidence which included the evidence of Ngāti Awa witnesses. Under the heading "*Evaluation of Evidence of Cultural Effects*" the Environment Court majority considered (for example) the following evidence given by Ngati Awa's witnesses:

> [96] Dr Mason and Mr Merito have expressed their honestly held belief that taking too much water **for bottling and export overseas** would result in the un-restorable loss of the mauri of that water. … In answer to questions, Dr Mason said that the main concern was about **sending the water away to people** whose tikanga are different.
>
> …
>
> [100] … we have no evidence of a widely held belief within Ngati Awa regarding the adverse metaphysical effects of taking water **for bottling and export**.

[62] High Court Decision at [115]-[116] CB [05.0107] quoting the EC Decision at [134] CB [05.0048].
[63] High Court Decision at [117] CB [05.0107].
[64] High Court Decision at [118] CB [05.0108].

[emphasis added]

61. The Environment Court also considered (and ultimately preferred) the cultural / tikanga evidence called on behalf of Creswell and the majority[65] concluded:

> [156] In assessing the evidence on the primary issue of the adverse metaphysical effects resulting from the asserted loss of mauri from the water **that is bottled and exported**, we have accepted Mr Eruera's evidence that there is no loss of mauri from the water as the water remains within the broad global concept of the water cycle and is returned to Papatuanuku irrespective of where it is used.[66] [emphasis added]

62. While Ngāti Awa may disagree with the Environment Court's assessment of this evidence, it is clear that the cultural / negative tikanga effects of exporting bottled water were considered. It follows that the High Court's conclusion that these effects were considered by the Environment Court despite its jurisdictional assessment is sound, and no error of law arises. The Court of Appeal was correct to decline leave on the basis that the issue arising, properly construed, is a challenge to the correctness of the preferred evidence relating to the tikanga effects of the proposal.[67]

**Conclusion**

63. If the appeal is allowed, Ngāti Awa seeks referral back to the Environment Court for reconsideration. It submits that application of a proper approach should lead to consent being declined.[68]

64. It is useful to understand that, in its interim decision,[69] the Environment Court upheld the grant of consent on an interim basis, to enable the parties to engage on conditions. Following

[65] The cultural / tikanga effects of the water take receive no mention in the Minority decision.
[66] EC decision at [156] CB [05.0050].
[67] Court of Appeal Decision at [4] CB [05.0160]
[68] Ngāti Awa Submissions, at para 86.
[69] EC Decision, *ibid*. n9.

engagement by the parties, the final decision[70] included conditions largely agreed on by the parties to better address tangata whenua concerns, despite this not being required by the interim decision.

65. It is acknowledged that the appellants engaged on conditions without prejudice to their appeal rights. However, declining consent (the ultimate remedy sought) is not the only means for addressing the cultural / tikanga effects of a proposal. In this case, the conditions provide for active involvement of kaitiaki in monitoring the effects of the water take using a tikanga framework to assess effects on mauri, and a remedy (review of the conditions) if required to address cultural / tikanga effects arising. These conditions apply for the duration of the consent (25 years).

66. While Ngāti Awa also seek to exercise their kaitiaki responsibilities in relation to disposal of plastic (and are managing their own activities to address this), all of us have a responsibility to take care in our use and disposal of plastics. Ngāti Awa and others (including Creswell or its successor) are not precluded by the conditions of these consents from taking responsible action. Nor do the consents preclude or constrain government regulation which separately addresses obligations to manage plastics. But it is not the role of the consent authority to prevent the primary activity where, as in this case, it is otherwise sustainable and addresses the direct effects of the activity (including in this case cultural / tikanga effects) though appropriate and enforceable conditions.

**Costs**

67. The Regional Council seeks costs in the event the appeal is dismissed.

[70] EC Decision CB [05.0024].

**Dated** 8 September 2023

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**M H Hill**
**Counsel for Bay of Plenty Regional Council**