IN THE HIGH COURT OF NEW ZEALAND **CIV-2017-470-03**
TAURANGA REGISTRY

UNDER	the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal against a decision of the Environment Court under s299 RMA
BETWEEN	**ATTORNEY-GENERAL**
	Appellant
AND	**THE TRUSTEES OF THE MOTITI ROHE MOANA TRUST**
	First Respondent
AND	**BAY OF PLENTY REGIONAL COUNCIL**
	Second Respondent

Submissions for New Zealand Māori Council / Te Kaunihera Māori o Aotearoa (NZMC)

Dated: 21 May 2017

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MAY IT PLEASE THE COURT

INTRODUCTION

1 This appeal turns on the relationship between the Fisheries Act 1996 and the Resource Management Act 1991 (**RMA**), and the extent to which s30(2) RMA limits mandatory functions of regional councils. A mandatory consideration, and guiding principle for interpretation, are the principles of Te Tiriti o Waitangi.

2 The appeal by the Attorney General (**Crown**) raises matters of national importance to Māori, explaining the involvement of the New Zealand Māori Council.[1] These include:

- S6(e) RMA: relationship of Māori and their culture and traditions with indigenous biodiversity in ancestral waters;[2]
- S7(a) RMA: exercise of kaitiakitanga by tangata whenua over taonga species and habitat in the coastal marine area;
- S8 RMA: active protection of taonga species and habitat in the coastal marine area as recognised Treaty principle;
- S8 RMA: restoration of mauri in coastal marine area, also part of the duty of active protection of taonga;
- These are "strong directions" per *McGuire*.[3]

3 Principles of the Treaty are mandatory considerations, and apply at two levels:

- S8 RMA expressly requires decision-makers, in exercising functions, to have regard to Treaty principles. This relevantly applies to regional councils exercising functions under s30 RMA

[1] The New Zealand Māori Council / Te Kaunihera Māori o Aotearoa is empowered under the Māori Community Development Act 1962 to (*inter alia*) represent matters of national concern to Māori.
[2] Recognising that "coastal marine area" is the correct descriptor under the RMA.
[3] Lord Cooke in *McGuire v Hastings District Council* [2002] 2 NZLR 577, 594 paragraph [21]: "These are strong directions, to be borne in mind at every stage of the planning process. The Treaty of Waitangi … and the other statutory provisions quoted do mean that special regard to Maori interests and values is required in such policy decisions as determining the routes of roads.."

when setting objectives, policies and methods for proposed coastal plans;

- The constitutional or macro-level principle that, when interpreting legislative provisions for exercise of public law powers, the Court should prefer the interpretation that best reflects Treaty principles, unless precluded by express wording.[4]

4 The Environment Court correctly found that it is lawful for regional coastal plans to include rules that control fishing techniques and methods.[5] Lawful purposes include maintenance of indigenous biodiversity; and recognition of cultural and spiritual relationships between tangata whenua and taonga species or habitat in the coastal marine area. Unlawful purposes involve control of fisheries and fishery resources for human utilisation now or in the future, [6] the latter being Fisheries Act purposes.

5 The RMA is familiar with overlapping functions and purposes: both intra-Council[7] and inter-Council.[8] It is also familiar with functional overlap as between different statutory frameworks.[9] Parliament has turned its mind to, and particularised, unlawful functions in s30(2). It could have adopted a blanket prohibition in s30(2) but instead focused on functions stated in s30(1)(d)(i)(ii)(vii). Regional council functions not referred to in s30(2) are not captured. This reflects the statutory premise that words are taken to mean what they say: s 5 *Interpretation Act 1999*.[10]

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[4] NZMC reserves its position as to whether the law has evolved to give greater recognition to Treaty principles in circumstances where these conflict with express wording, such as the HC decision in *Glenharrow Holdings Ltd* [2003] 1 NZLR 236 (HC); affirmed on different grounds by the CA in *Glenharrow Holdings Ltd v A-G* [2003] 2 NZLR 328. The point does not arise on this appeal.
[5] [2016] NZEnvC240: Common Bundle (**CB**) at tab one
[6] *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438.
[7] Such as s30(1)(c) and s30(1)(ga) RMA
[8] Such as overlapping functions between district and regional councils for maintenance of land-based indigenous biodiversity, reflected in planning instruments which may have rules covering the same activities. See for example *Canterbury RC v Banks Peninsula DC* [1995] 3 NZLR 189 (CA).
[9] Environment Court at [39], CB13. Refer examples in Forest & Bird submissions at [46]
[10] Discussed in *Federated Farmers of New Zealand v Manawatu Wanganui Regional Council* [2011] NZEnvC 403 at [4]; affirmed on appeal in *Property*

6 It is *intra vires* s30 RMA to recognise spiritual relationships between tangata whenua and kaitiaki species identified by tikanga and oral tradition (such as hapuku) by use of a rule in a regional coastal plan that prevents net or rod fishing during breeding season. It is *intra vires* to maintain endangered and endemic soft corals by controlling or preventing dredging in areas of high biodiversity. In contrast, it is *ultra vires* s30 RMA for a rule in a regional coastal plan to control net or long-line fishing to replenish depleted snapper stocks to enhance fishing potential. The latter is controlled by management methods available under the Fisheries Act.

7 These submissions adopt matters raised in the submissions of the first respondent (**Trust**) and Forest & Bird.[11] As noted by the Crown, interpretation of purpose and function in s30 RMA is contextual.[12] Part of this context is the relationship between Māori and indigenous biodiversity, as expression of tikanga and matauranga Māori; it also speaks to s6(e), s7(a) and s8 RMA purposes that express ancestral relationships with coastal waters and taonga. These are not "for the purpose of managing fish or fishing resources". NZMC has therefore focused on the 1st and 3rd preconditions identified by the Environment Court. It is submitted that Waitangi Tribunal reports can assist in interpretation of this context, and are referred to where relevant below.

8 Issues discussed are:

- RMA and Fisheries Act to be read in light of Treaty principles
- Environment Court decision
- Indigenous biodiversity
- Treaty principles include recognition of exercise of kaitiakitanga and active protection of taonga species and habitat in the coastal marine area.
- Context: MV Rena, coastal waters of Motiti, kaitiakitanga, rāhui
- Non-derogation: general and specific
- Relief

Rights of New Zealand Inc v Manawatu-Wanganui Regional Council [2012] NZHC 1272

[11] Royal Forest & Bird Protection Society of New Zealand Inc

[12] Crown submissions at [42], [43].

RELEVANCE OF TREATY TO INTERPRETATION

9 The Treaty is "part of the fabric of New Zealand society".[13] Treaty and related rights and interests should be protected and promoted by public bodies, including Courts and Tribunals, absent clear legislation to the contrary.[14] Statutes are to be interpreted in light of common law fundamentals like Treaty principles. This default-rule approach was confirmed in *Barton-Prescott*, where a Full Court stated that "..*since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and..whether or not there is a reference to the treaty in the statute*".[15]

10 As Whata J emphasised in *Holland*, "*the development of New Zealand common law must employ locally recognisable and acceptable norms and concepts to be relevant and persuasive*".[16] The Court of Appeal's decision to treat the Treaty of Waitangi as determinative authority in *Takamore* arguably reflected this substantive domestic fit.[17]

11 Section 8 confirms that the exercise of regional council functions in s30 RMA are subject to consideration of Treaty principles as mandatory consideration. The Supreme Court in *King Salmon* confirmed the substantive and procedural importance of s8 RMA.[18]

12 Relevant provisions in the Fisheries Act are identified in the Trust's submissions.[19] There is no direct equivalent to s8 RMA. Part 9 refers to

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[13] *Huakina Development Trust* [1987] 2 NZLR 188 (HC) at p210
[14] e.g. *Ngati Apa* [2003] 3 NZLR 643 (CA); *Auckland Casino* HC Auckland M81/94, 13 July 1994 at p35 per Robertson J).
[15] In consequence, "Acts dealing with the status, future and control of children, are to be interpreted as coloured by the principles of the Treaty": [1997] 3 NZLR 179 (Gallen, Goddard JJ) (at p184).
[16] *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 at [21]
[17] [2011] NZCA 587, [2012] 1 NZLR 573; noting differing approaches adopted in the Supreme Court: [2012] NZSC 116, [2013] 2 NZLR 733 (SC).
[18] EDS v New Zealand King Salmon Company Ltd [2014] NZSC 38, [2014] 1 NZLR 593 at [88]: "..Moreover, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind, including when giving effect to the NZCPS…"
[19] "[30] Part 9 provides for Taiapure-local fisheries and customary fishing. Its object is to make better provision for rangatiratanga and Article II Titiri [te Tiriti] O Waitangi in respect of estuarine or littoral coastal waters of special significance to iwi or hapu as a source of food or for spiritual or cultural reasons.

rangatiratanga and Article II but uses the words "making better provision" which is non-exclusive in wording.[20] It does not preclude recognition of Treaty principles not addressed by methods stated in Part 9.

13 Section 5 Fisheries Act requires consistency with the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.[21] As a starting point, the purposes referenced in the Settlement Act are unrelated to the purposes identified in s6(e) and s7(a), and have no contextual connection to the substantive role of s8 RMA. The statutory context is quite different, relating to settlement of commercial and non-commercial rights held by Māori in relation to fishing. In contrast, s6(e) and s7(a) RMA is relational and "relationship" focused.[22] Crown argument conflates different "purposes" arising in different statutory contexts.

14 Perhaps more relevantly, settlements reached are "subject to" Treaty principles. Preamble to the Settlement Act confirms that Treaty principles continue to govern the relationship of Crown to Māori in relation to matters covered by the settlement. The preamble is given

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It does this by providing for identification of Taiapure-local fishery areas, which are managed by a committee, and which can be subject to specific regulations. Regulations relate to customary food gathering and the special relationship between tangata whenua and places of importance for customary food gathering. Part 9 also provide for temporary closure of a fishery or restriction on fishing methods to recognise and make provision for the use and management practices of tangata whenua in the exercise of non-commercial fishing rights. Provision for rangatiratanga and Article II of the Treaty is not equivalent to the duty to have regard to Treaty principles under s8 RMA; and s8 is not limited to rangatiratanga." [Footnotes omitted]

[20] **174 Object**
The object of sections 175 to 185 is to make, in relation to areas of New Zealand fisheries waters (being estuarine or littoral coastal waters) that have customarily been of special significance to any iwi or hapu either—
(a) as a source of food; or
(b)for spiritual or cultural reasons,—
better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi.

[21] **5 Application of international obligations and Treaty of Waitangi (Fisheries Claims) Settlement Act 1992**
This Act shall be interpreted, and all persons exercising or performing functions, duties, or powers conferred or imposed by or under it shall act, in a manner consistent with—
(a) New Zealand's international obligations relating to fishing; and
(b) the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992."

[22] "Rights" and "relationships" may overlap but are conceptually distinct.

legal status by s3 of the Settlement Act:

> …(viii) the implementation of the deed through legislation and the continuing relationship between the Crown and Maori would constitute a full and final settlement of all Maori claims to commercial fishing rights and would change the status of non-commercial fishing rights so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect but would continue to be subject to the principles of the Treaty of Waitangi and give rise to Treaty obligations on the Crown.
>
> **3. Interpretation of Act generally**
> It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the agreements expressed in the Deed of Settlement referred to in the Preamble.

15 The Fisheries Act is therefore:

(a) intended to be subject to Treaty principles;

(b) alternatively, it should be read in light of Treaty principles;

(c) provisions such as Part 9 and the Settlement Act do not exclude Treaty principles. [23]

16 This answers the Crown's argument that fishery management under other statutes, including the RMA, has potential to undermine agreements recorded in the Settlement Act, or non-commercial management methods such as mataitai.[24] This is conflation of unrelated purposes or considerations.

17 While a merits point, Dr Roger Grace's evidence confirms that, absent intervention through rules in a coastal plan, there may be no direct relationship between tangata whenua and taonga species, when species are fished out of existence in a particular area.[25]

18 If the Crown is correct, and there is direct or indirect impact on quota allocated to Māori as a result of rules that control fishing techniques and methods in regional coastal plans, then this is a consequentialist argument and does not go to jurisdiction. It is not reason to fail to recognise matters of national importance and mandatory

[23] Environment Court at [15]
[24] Crown submissions at [70]-[76]
[25] Referencing kina barrens, threatened absence of hapuku: refer generally CB at tab 13.

considerations in s6(e), s7(a) and s8 RMA.[26] Failure to maintain indigenous biodiversity has caused adverse effects to mauri, and ancestral relationships of Māori to coastal waters and taonga species and habitat.

19 Either the default approach applies, or the Fisheries Act is "subject to" Treaty principles. On either view, the RMA and Fisheries Act should be read having regard to Treaty principles.

ENVIRONMENT COURT DECISION

20 At [8] the Court set out the "*core issue"*: "*the interface between the Fisheries Act 1996 and the Resource Management Act 1991, and particular the application of s30(2) of the Resource Management Act…"*

21 At [10] the Court identified that the regimes of the 2 Acts are "*intended to work in tandem*" and "*are aware of, and attentive to, the other*". The relationship between the 2 Acts is not one "*where one statute could be said to impliedly repeal the other, or that there is intended to be a lacuna between the two Acts*". The Fisheries Act is "*not to be regarded as a code*": at [14] (relying on *Reay v Minister of Conservation*[27]). Criticism as error that the Court "*did not analyse the purpose, content or structure of the Fisheries Act in any detail.."* [28] is overstated. The Court adopted by reference the "*detailed background information*" provided by the Crown, leading to its view that the two Acts work in tandem.

22 Overlap in control must be considered by decision makers under each Act: at [16]. s6 Fisheries Act does not affect jurisdiction to include controls of the nature listed (going to allocation and occupation); instead enforceability: at [22]. s30(2) RMA creates a jurisdictional bar: at [23]. At [24ff] the Court identified the relevant parts of s30 RMA. Functions in s30(1)(d) are not the only functions relevant to the CMA. At [29] the provisions in s30(1) are "*subject to the constraint in s30(2)".*

[26] NZMC expressly reserves its position on whether this gives rise to actionable claims under Treaty principles. It arises from the wording chosen by Parliament in s30(2) RMA and duty to actively protect taonga.
[27] [2014] NZHC 1844 at [46]
[28] Fishing Industry submission at [20]

23 At [31], [61] the Court agreed with the Crown that "*all preconditions contained within that clause [s30(2)] would need to apply before it would limit jurisdiction of a regional council under the RMA*". These are the three preconditions identified in Trust and Forest & Bird submissions.

24 At [33] it considered that the word "purpose" in s30(2) is not a reference to the purpose in s8 but to "*method and measures by which the Fisheries Act achieves its purpose*". The purpose that legislators were "*seeking to prevent was a parallel control of fishing and fisheries resources equivalent to under the Fisheries Act*".

25 At [34ff] the Court set out its analysis of the 3 preconditions in s30(2). In summary:

a. At [38]-[41], the s30(1)(ga) function is not assimilated by s30(1)(d) functions, citing *Property Rights in New Zealand Inc v Manawatu-Wanganui Regional Council*[29]. It concluded at [42] and [61b] that rules for the purpose of maintaining indigenous biodiversity do not breach the 1st precondition of s30(2) and so are lawful.

b. At [42], the Court stated its view that rules relating to relationship of Māori with taonga arise under s30(1)(d). This aspect of the Court's reasoning, arguably *obiter*, is too limiting. Maintenance of indigenous biodiversity restores mauri and protects taonga species and habitat. It forms part of the kaitiaki role for reasons discussed below. It therefore forms part of the s30(1)(ga) function.

c. At [42]-[47] the Court discussed the 2nd precondition: meaning of "*taking, allocation or enhancement of fisheries*". Although the Court did not state definitions of terms, it analysed how these concepts apply to all or some fishers and to methods and techniques. It identified control of activities that fall outside definitions e.g. anchoring distances: at [46].

[29] *EDS v NZ King Salmon Co Ltd* at [24c].

d. At [48]-[56] the Court discussed the 3rd precondition: *"for the purpose of managing fish or fishing resources*". At [51] it acknowledged that it is possible that a provision could be stated as being for "*one purpose, but actually have as its real purpose the managing of fisheries or fisheries resources controlled under the Fisheries Act*". In contrast, if controls are for s30(1)(ga) or s6(e) purposes, they are not for the purpose of managing fisheries. At [56] it stated that a "*control would need to demonstrate a clear purpose under the RMA*".

e. Declarations are stated at [66]. These state the "objective" rationale for controls on fishing techniques and methods. These are purposes and not "motives".[30] They include recognition of purposes in s6(e), s7(a) and substantive Treaty principles under s8 RMA.

INDIGENOUS BIODIVERSITY

26 The Māori worldview on indigenous biodiversity is identified in the WAI262 Report of the Waitangi Tribunal: **Ko Aoteroa Tēnei**. The Tribunal separates (on the one hand) relational and intrinsic values placed by Māori on biodiversity as expression of relationship or kinship (whanaungatanga). On the other hand, there is an anthropocentric perspective, with Māori as consumers of the environment, which of course includes harvesting of fish and shellfish for consumption:

> 3.2.1 **Te Ao Māori and the environment**
>
> We have already explained, in chapter 1, how the first settlers from Hawaiki shaped, and in turn were shaped by their environment. The world view of those settlers was infused by the concept of whanaungatanga. Often translated as 'kinship', whanaungatanga does not refer only to family ties between living people, but rather to a much broader web of relationships between people (living and dead), land, water, flora and fauna, and the spiritual world of atua (gods) – all bound together through whakapapa. In this system of thought, a person's mauri or inner life force is intimately linked to the mauri of all others (human and non-human) to whom he or she is related. This explains why iwi refer to mountains, rivers, and lakes in the same

[30] Contrast Crown submission at [10]

> way as they refer to other humans, and why elders feel comfortable speaking directly to them.
>
> We also explained in chapter 2 that kaitiakitanga does not mean that the Māori world view requires humans to treat the environment as pristine and untouchable. All human communities survive by exploiting the resources around them and Māori were no exception. Whanaungatanga relationships with the environment of Aotearoa evolved over many generations. As we explain in more detail below, Māori in the first few hundred years after settlement did significant damage to the environment of Aotearoa. Then, over time, kaitiakitanga relationships reached a kind of environmental equilibrium, which appears to have remained relatively stable for several hundred years before the arrival of European settlers with their new approach to environmental management. 'Kaitiakitanga' in a modern resource management context can be seen as Māori environmental law, policy, and practice. Its exercise has relied on tikanga and mātauranga being transmitted from generation to generation for many hundreds of years, both prior to and since European settlement.

27 This is reflected in kaumatua evidence before the Environment Court, that identified the role of rāhui to protect indigenous species and habitat for intrinsic and spiritual reasons, separate to management for future use or consumption:

> "[7] Rahui is a spiritual dome placed over an area which relates to death by drowning and where resources have been contaminated, require restoration, or taonga require protection. Rahui is one form of closure, there are also other cultural methods used...Rahui is part of the body of knowledge known as matauranga Maori. Rahui ca be used to protect taonga and is exercised by the kaitiaki of an area (rohe). Reference to matauranga Maori in the coastal marine environment would commonly be understood as including use of rahui in accordance with tikanga…" [31]
>
> "[8] Rāhui is a planning and resource management tool, used from ancient times to the present. Rāhui is part of our role as kaitiaki. It maintains our relationship with the biodiversity of Tangaroa, our native flora and fauna, and our taonga areas and species. I tautoko (support and adopt) the affidavit evidence of Nepia Ranapia dated 19 August 2016 on these matters. We seek to rely on the tool of law (te rakau ture), through the Resource Management Act 1991, to protect our relationships with our moana and taonga. We see this as part of the duty for active protection under the principles of te Tiriti o Waitangi."[32]

[31] Affidavit of Nepia Ranapia, CB107 at [7]
[32] Affidavit of Umuhuri Matehaere, CB168 at [8]

28 The WAI262 report, **Ko Aotearoa Tēnei**, noted interlinkage between protection of the environment, exercise of kaitiakitanga, and protection of Māori culture itself. None are "for the purpose of managing fishing or fisheries resources..":

> The environment, therefore, cannot be viewed in isolation. There is an old saying : 'Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tūpuna' (beneath the herbs and plants are the writings of the ancestors). Mātauranga Māori is present in the environment : in the names imprinted on it ; and in the ancestors and events those names invoke. The mauri in land, water, and other resources, and the whakapapa of species, are the building blocks of an entire world view and of Māori identity itself. The protection of the environment, the exercise of kaitiakitanga, and the preservation of mātauranga in relation to the environment are all inseparable from the protection of Māori culture itself. (vol 1, p270)

29 The Environment Court's declarations focused on the intangible relationship of Māori with animate and inanimate elements of ancestral coastal waters. Declarations do not refer to gathering and consumption of fish by Māori from traditional coastal waters or rohe.

RELEVANT TREATY PRINCIPLES

30 Principles that relate to obligations on the Crown under the Treaty derive principally from Court of Appeal decisions in relation to cases brought under s 9 State-Owned Enterprises Act 1986. Relevant Treaty principles were identified in the *Lands* case, and continue to evolve:

(a) The two parties to the Treaty must act reasonably towards each other and in utmost good faith;

(b) The Crown must make informed decisions (which will often require consultation, but not invariably so);

(c) The Crown must not unreasonably impede its capacity to provide redress for proven grievances; and

(d) The Crown must actively protect Maori interests, related to principles of reciprocity and partnership.[33].

31 The principles are "the underlying mutual obligations and

[33] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA); Crown's responsibility to provide active protection analogous to fiduciary duties: per Cooke P at 665.

responsibilities which the Treaty places on the parties."[34] Duties that apply to the Crown may apply in devolved form to consent authorities under the RMA, but this depends on context. The duty of active protection of taonga applies to the regional council in promulgating its proposed coastal plan.[35] This has been accepted as a relevant principle applicable to consent authorities at Environment Court level.[36] How the duty applies is a factual and merits question.

32 Waitangi Tribunal reports can assist in delimiting the scope of Treaty principles in context of s8 RMA. Reports may be persuasive but not binding. They assist with context in relation to the meaning of Treaty principles. [37] The interim report of the Waitangi Tribunal into the **MV Rena and Motiti Island Claims** identified that Otaiti is a taonga, triggering the duty of active protection by the Crown; this duty equally applied to the Regional Council as consent authority.[38]

33 The Waitangi Tribunal in its **Final Report on the MV Rena and Motiti Island Claims** referred to evolution of duty for active protection:[39]

> "Courts and other Tribunals have emphasised that partnership is at the heart of the Treaty exchange and the relationship that it established between the Crown and Māori. This relationship gives

[34] *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa ki Kawerau* [2003] 2 NZLR 349; (2003) 9 ELRNZ 182 (HC), citing *NZ Maori Council v A-G* [1994] 1 NZLR 513 (PC), 517, per Lord Woolf.
[35] No party appearing before the Environment Court disputed that the duty of active protection of taonga and restoration of mauri applies to the regional council in promulgating its proposed coastal plan.
[36] For example, the duty of active protection applied to a proposed designation for wastewater treatment plant in *Sustainable Matata v Bay of Plenty RC* [2015] NZEnvC 90 and the recent MV Rena decision in *Ngāi Te Hapū Inc v Bay of Plenty RC* [2017] NZEnvC 073 at [106]-[107]. Other examples are: *Sea-Tow Ltd v Auckland RC* (1993) 1B ELRNZ 66; [1994] NZRMA 204 (PT); *Aqua King Ltd (Anakoha Bay) v Marlborough DC* EnvC W071/97; *Mason-Riseborough v Matamata-Piako DC* (1997) 4 ELRNZ 31 (EnvC). The duty to actively protect under s8 RMA was identified but not discussed in *Takamore Trustees v Kapiti DC* [2003] 3 NZLR 496 (HC) and *Waikanae Christian Holiday Park v Kapiti Coast DC* 27/10/04, Mackenzie J, HC Wellington CIV-2003-485-1764.
[37] Courtney J in *Freda Pene* accepted that the Environment Court could consider Waitangi Tribunal reports in relation to Treaty principles; but this was a question of weight for the decision-maker: *Freda Pena v Auckland Regional Council* CIV 2005 404 356 (9 Dec 2005) at [85]-[88].
[38] Confirmed by the Environment Court in its recent (and interim) decision on resource consent applications relating to the MV Rena: [2017] NZEnvC 073 at [106]-[107]
[39] Trustees of the MRMT Trust are claimants under WAI2391.

> rise to the principle of partnership and mutual benefit and also creates a duty for the parties to act reasonably, honourably, and in good faith towards each other…
>
> The principle of active protection is derived from the principle of partnership and mutual benefit. The Tribunal's 2008 report on the central North Island (CNI) claims, He Maunga Rongo, articulated the two-fold duty that emanates from the principle of active protection: a duty to protect physical resources (lands, estates, and taonga) and a duty to protect rangatiratanga. The fundamental relationship created by the Treaty means that the Crown has a duty to protect the environment itself, as it affects the lands, estates, and taonga of Māori, and to protect Māori in their exercise of rangatiratanga over taonga." (p12)

34 Taonga includes biotic and abiotic elements (such as reefs). Relationship with taonga arises in spiritual and physical terms. According to the Tribunal's **Manukau Harbour** Report (WAI8):

> With regard to other claims and submissions on the meaning and application of the Treaty of Waitangi we conclude as follows
>
> 1. The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them. The possessory guarantees of the second article must be read in conjunction with the Preamble (where the Crown is "anxious to protect" the tribes against the envisaged exigencies of emigration) and the Third Article where a "royal protection" is conferred. It follows that the omission to provide that protection is as much a breach of the Treaty as a positive act that removes those rights. It is the omission of the Crown to provide that protection that has been the main cause of complaint in this claim.
>
> 2. The protection of fisheries must accord with the Maori perception of those fisheries. **It must be recognised that those disruptions of fisheries that offend cultural or spiritual values, as for example the discharge of animal wastes to the waters of the fishery, is as offensive as a physical disruption that reduces the quantity or quality of the catch.** The guarantee of undisturbed possession or of rangatiratanga means that there must be a regard for the cultural values of the possessor. We accept in this respect the arguments of Counsel for the Commission for the Environment.
>
> 3. 'Taonga' means more than objects of tangible value. A river may be a taonga as a valuable resource. Its 'mauri' or 'life-force' is another taonga. We accept the contention of Counsel for the claimants that the mauri of the Waikato River is a taonga of the Waikato tribes. **The mauri of the Manukau Harbour is another taonga.**

> 4. The guarantee of possession entails a guarantee of the authority to control that is to say, of rangatiratanga and mana.
>
> 5. Both 'fisheries' and **'taonga' inherently denote not simply the marine biota but the associated marine habitat, the waters, reefs and beds. [Emphasis added]**

35 The Privy Council has confirmed that the level of protection is higher where a taonga is in a vulnerable state.[40] The relevant test for taonga is identified by the Waitangi Tribunal in the WAI262 report. Taonga are not limited to property and possessions and can be both tangible and intangible.[41] The Tribunal has accepted coastal reefs and the mauri of a river as taonga:[42]

> Taonga have mātauranga Māori relating to them, and whakapapa that can be recited by tohunga. Certain iwi or hapū will say that they are kaitiaki. Their tohunga will be able to say what events in the history of the community led them to that kaitiaki status and what obligations this creates for them. In sum, a taonga will have korero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested (**Ko Aoteroa Tēnei**, vol 1, p269)

36 Similar Treaty principles apply to regional councils exercising functions in relation to regional coastal plans. These principles are relevant to control of fishing techniques and methods to protect taonga and restore mauri, by way of objectives, policies and methods in a regional coastal plan.[43]

CONTEXT

37 Relevant background is stated in affidavit evidence of kaumatua and Dr

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[40] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517

[41] WAI262 **Ko Aotearoa Tēnei**, vol 1, p188

[42] Waitangi Tribunal, **Report on the Motunui-Waitara Claim**, p50; Waitangi Tribunal, **Manukau Report**, p67.

[43] The Waitangi Tribunal Report (**Tauranga Moana**) adopts the finding of the **Ngawha Geothermal Report** (1993) that "the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of natural resources in terms which do not require such authorities or bodies to afford the same level of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled." Report on **Tauranga Moana**, Vol 1, p22, citing **Ngawha Geothermal Resource Report** (1993) at pp100-102.

Roger Grace. The hapu management plan prepared by Nepia Ranapia is at CB114. It is poorly reproduced but identifies waahi tapu in the coastal marine area including Te Tau o Taiti / Astrolabe reef.[44] Merits of zoning changes sought by the Trust are not at issue but provide context to declarations sought. The NZ crisis in indigenous biodiversity is also subject of comment by Kos J in the *Property Rights* decision. [45]

38 The **MV Rena** Final Report confirms that Te Tau o Taiti [46]/ Astrolabe reef is a taonga, with its mauri significantly damaged by the presence of the Rena wreck. As noted by the Tribunal:

> "In addition, the presence of the Rena wreck on Otaiti has had more intangible effects, both for the reef and for Māori. The Tribunal has previously considered the wider harm that can result from environmental damage, including damage to mauri. In the **Report on the Muriwhenua Fishing Claim**, the Tribunal explained how damage to the natural environment can affect Māori: [47]
>
> > "The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or 'belonging', but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a 'hurt' to the environment or to the fisheries may be felt personally by a Maori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions, and the mana.

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[44] Relief sought by the Trust did not relate to the MV Rena itself, recognising that parallel resource consent processes were underway to address the MV Rena wreck.

[45] S30(1)(ga) responded to the crisis in biodiversity in New Zealand, both terrestrial and coastal:
"[7] In February 2000 the government issued the New Zealand Biodiversity Strategy. It was issued in part-fulfilment of New Zealand's international obligations under the 1992 Rio Convention on Biological Diversity. The Strategy document had the goal of establishing a framework to arrest the decline in indigenous biodiversity that had followed settlement and subsequent human exploitation of the country's natural resources. The Strategy records that New Zealand, one of the last places to be settled by humanity, has gone on to achieve one of the worst records of indigenous biodiversity loss on the planet. There was the loss of our larger bird species following initial human habitation. By the start of the seventeenth century about a third of the country's original forests had been replaced by grasslands. From the mid-nineteenth century expanding European settlement "started a new wave of forest destruction". A further third or so of our original forestation has been converted to farmlands. Extensive modification of wetlands, dunelands, river and lake systems, and coastal areas has also occurred." [Footnotes omitted]

[46] Also identified as Otaiti; refer [2017] NZEnvC 073 at [33]-[34]

[47] **Final Report on MV Rena and Motiti Island Claims** at p15

> The fisheries taonga, like other taonga, is a manifestation of a complex Maori physico-spiritual conception of life and life's forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength."(p180)

39 Declarations granted by the Environment Court were directed at purposes that recognise Māori relationships with indigenous biodiversity and are not for the purpose of managing fishing or fisheries resources. Restoration of mauri may be for spiritual and intrinsic purposes.

NON DEROGATION

40 The principle of *generalia specialibus non derogant* is not relevant to interpretation of s30(2) RMA.[48] Reasons include:

41 Specific provisions in the Fisheries Act are not abrogated. The Fisheries Act does not control purposes related to intrinsic values of indigenous biodiversity and relationship of Māori with ancestral waters and taonga. The "environment" includes "social, economic, aesthetic and cultural conditions" that affect ecosystems and natural and physical resources (s2 RMA).

42 Parliament turned its mind to overlap between RMA and Fisheries Act through words deliberately chosen in s30(2). The non-derogation principle does not assist. Express statutory direction in s30(1)(ga) RMA in relation to fishing techniques and methods is not required.

43 S30(1)(ga) is specific. It includes fish species. "Biological diversity" is broadly defined in s2 RMA[49] and includes, without need for amendment, indigenous flora and fauna in coastal waters (such as fish and plant/coral species):

> "**biological diversity** means the variability among living organisms, and the ecological complexes of which they are a part, including diversity within species, between species, and of ecosystems"

44 Absence of express reference to "biological diversity" in sections 6-8

[48] Fishing Industry submissions at [2.1]-[2.5].
[49] In light of which, query correctness of Fishing Industry submission at [35] that: "[35] The Fisheries Act is the only one of the two acts that defines biodiversity."

RMA does not mean the concept is excluded from consideration as matter of national importance. The environmental bottom line in s5(2)(b) ("life-supporting capacity of..water..and ecosystems") includes marine biodiversity as ecosystem. "Natural character" in s6(a) includes biotic elements, as with "natural features and landscapes" in s6(b).[50] Relationship of Māori with taonga includes indigenous flora and fauna. Kaitiakitanga is necessarily exercised over kaitiaki species such as fish. "Intrinsic values of ecosystems" in s7(d) uses an overlapping term ("ecosystems") that forms part of the definition of biological diversity. As noted, Treaty principles include the relationship of Māori with biodiversity and the active duty to protect same.

RELIEF

45 This appeal is unusual in that the Crown's argument on jurisdiction has changed between Environment and High Court.[51] Despite the change in argument, and additional party input, the Environment Court decision was correct. Environment Court reasoning was adequate, and reflected the large measure of agreement as between parties on key points. Absence of reasoning on agreed issues is not a basis for valid criticism. The Crown accepts not all controls that might impact fishing or fisheries resources are precluded by s30(2) RMA[52], but fails to state an alternative wording for declarations. There was no material error. The appeal should be declined.

Dated this 21st day of May 2017

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Te Kaunihera Māori o Aotearoa

[50] Natural character is not defined in the RMA but cf Policies 2, 13 and 15 NZCPS that refer to biotic and abiotic, and cultural landscapes
[51] "..the argument advanced by the Crown has evolved.." Crown submissions at [17]
[52] Crown submissions at [11]

LIST OF KEY AUTHORITIES CITED

- *Barton-Prescott* v Director General of Social Welfare [1997] 3 NZLR 179
- EDS v New Zealand King Salmon Company Ltd [2014] NZSC 38, [2014] 1 NZLR 593
- *Federated Farmers of New Zealand v Manawatu Wanganui Regional Council* [2011] NZEnvC 403
- *Huakina Development Trust* [1987] 2 NZLR 188 (HC) at p210
- *McGuire v Hastings District Council* [2002] 2 NZLR 577
- *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641
- *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517
- *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438.
- *Property Rights of New Zealand Inc v Manawatu-Wanganui Regional Council* [2012] NZHC 1272
- *Reay v Minister of Conservation* [2014] NZHC 1844