

# MEDIATING SUSTAINABILITY: THE PUBLIC INTEREST MEDIATOR IN THE NEW ZEALAND ENVIRONMENT COURT

BY  
STEPHEN HIGGS\*

*The New Zealand Environment Court is a unique institution unlike any in the United States. The court is the principle adjudicator of disputes arising under the Resource Management Act or RMA, the first legislation in the world designed to achieve sustainability. In addition to rendering decisions, the court maintains an innovative mediation service where its own technically-oriented commissioners, who also serve as adjudicators on the court, act as mediators in other cases at no extra cost to the parties. Commissioners offer parties their facilitation expertise, as well as knowledge of the subject matter of the dispute and the overarching legislation that frames their dispute. In doing so, they often occupy a hybrid role between a traditional mediator who promotes a constructive negotiation process and a judge who may focus on the substantive outcomes of the process.*

*This Article offers a tour of the Environment Court's mediation program and responds to skepticism about whether the public interest can be protected in a process that assists private parties to negotiate settlements to their disputes outside the limelight of a public trial. The first Part of the Article highlights key characteristics of the RMA, and the structure of the Environment Court and its mediation program. The Article then explores how commissioners are well-positioned to protect the public interest during mediations by a) utilizing various interventions to ensure mediated agreements are legal, and b) fostering an improved dispute-resolution climate to help parties explore and elect more sustainable agreements. Special attention is directed to the benefits of using a court-mediator who also serves as an adjudicator, as opposed to outsourcing mediation to private providers.*

I.	INTRODUCTION .....	62
II.	SUSTAINABILITY DECISIONS AND DISPUTE RESOLUTION UNDER THE RMA .....	66
	A. <i>The Resource Management Act</i> .....	67
	1. <i>Sustainable Management</i> .....	68
	2. <i>Integrated and Devolved Decision Making</i> .....	69
	3. <i>Resource Consents (Permitting)</i> .....	71
	B. <i>The Environment Court</i> .....	74

1. <i>Court Structure</i> .....	74
2. <i>Judicial Review</i> .....	75
C. <i>Court-Annexed Mediation</i> .....	77
III. THE COURT MEDIATOR AND THE PUBLIC INTEREST .....	81
A. <i>The Public Interest and the Limits of Mediation</i> .....	82
1. <i>Loss of Judicial Oversight</i> .....	82
2. <i>Self-Centered Negotiations</i> .....	84
3. <i>Commissioner Loyalties to the Parties and to the Public</i> .....	86
B. <i>The First Dimension of the Public Interest—Mediator As Guardian of Public Law</i> .....	88
1. <i>Pressing Parties on How an Agreement Satisfies Key Provisions of the RMA</i> .....	89
2. <i>Legal Advice and Robust Reality Testing</i> .....	91
3. <i>Engaging a Judge for a Mini-Hearing</i> .....	95
C. <i>The Second Dimension of the Public Interest—Mediator As Optimizer of Agreements</i> .....	97
1. <i>Building Better Agreements Through Shared Learning, Decision Making, and Ownership</i> .....	99
2. <i>Building Better Relationships and Problem Solvers</i> .....	101
IV. MEDIATING SUSTAINABILITY—BEYOND THE NEW ZEALAND EXPERIENCE ....	103

## I. INTRODUCTION

The concept of sustainable development—meeting the present needs of development and environmental protection without compromising the needs of the future<sup>1</sup>—finds near universal support. Managing resources sustainably, however, is a significant challenge and cause of pervasive and intractable disputes. Environmental and natural resource policies that afford real meaning to sustainability can infringe on vested interests and acquired freedoms.<sup>2</sup> Such policies require us to make difficult decisions, such as

---

\* Stephen Higgs holds an M.S./J.D. from the University of Michigan. This report was written in 2006 while pursuing a Fulbright Research Fellowship in New Zealand to study the Environment court's mediation program. During this time, the author maintained an adjunct research position with the Faculty of Law at the Victoria University of Wellington. The views and conclusions in this report are those of the author and other dispute resolution professionals who participated in this research as anonymous interviewees. These views and conclusions should not be interpreted as representing the opinions of Fulbright New Zealand, Victoria University, or the Environment Court. The author wishes to thank his project advisor, Ian Macduff, for his contributions and support. Information was also derived in consultation with Principal Environment Court Judge John Bollard. Remaining errors are solely attributable to the author.

<sup>1</sup> See WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE 8 (1987) (defining sustainable development as "meet[ing] the needs of the present without compromising the ability of future generations to meet their own needs").

<sup>2</sup> Pieter Glasbergen, *Environmental Dispute Resolution As a Management Issue: Towards New Forms of Decision Making*, in MANAGING ENVIRONMENTAL DISPUTES: NETWORK

eliminating entrenched industrial practices and restricting use of certain non-renewable resources.<sup>3</sup> These decisions are complicated by the need to consider the socioeconomic, transnational, intergenerational, and interspecies effects of our decisions.

In New Zealand, the Resource Management Act<sup>4</sup> (RMA) is the principal source of legislation under which sustainability decisions are made. The RMA, enacted in 1991, remains the largest piece of legislation ever passed in the country and the first in the world designed to achieve sustainability.<sup>5</sup> Today, over fifteen years later, we can see its transformative effect; the RMA is setting in place a chain of national and regional environmental policies and plans and requiring new approaches to resource management. Under its multi-tiered framework, difficult environmental and natural resource management decisions are made, and disagreed with, every day.

Many of the most significant disagreements are brought before a specialized tribunal known as the Environment Court—the principal adjudicator of sustainability under the RMA.<sup>6</sup> In addition to rendering decisions, the court maintains an innovative court-annexed mediation service where its own technically oriented commissioners, who also serve as adjudicators, act as mediators in other cases at no extra cost to the parties.<sup>7</sup> In mediation, commissioners help parties search for a mutually satisfying settlement to their dispute instead of awaiting a decision by a judge.<sup>8</sup>

The strength of the mediation model is that commissioners, skilled in mediation and adjudication, offer parties their facilitation expertise as well as

---

MANAGEMENT AS AN ALTERNATIVE 1, 6–7 (Pieter Glasbergen ed., 1995).

<sup>3</sup> *Id.* at 7.

<sup>4</sup> Resource Management Act 1991, 1991 S.N.Z. No. 69, available at [http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes) (select “Statutes” database, then expand menu for the letter “R,” and follow “Resource Management Act” hyperlink).

<sup>5</sup> MINISTRY FOR THE ENV’T, YOUR GUIDE TO RESOURCE MANAGEMENT: AN ESSENTIAL REFERENCE FOR PEOPLE AFFECTED BY OR INTERESTED IN THE RMA 5 (2006), available at <http://www.mfe.govt.nz/publications/rma/rma-guide-aug06/rma-guide-aug06.pdf>; Bret C. Birdsong, *Adjudicating Sustainability: New Zealand’s Environment Court*, 29 ECOLOGY L.Q. 1, 6 (2002). See generally Ministry for the Environment, Resource Management Act, <http://www.mfe.govt.nz/rma/> (last visited Jan. 28, 2007) (providing general information on the Act).

<sup>6</sup> The Environment Court was established by section 247 of the RMA with exclusive jurisdiction to hear claims arising under the Act. More information on the court is provided in this report and can also be found at the following sources: MINISTRY FOR THE ENV’T, YOUR GUIDE TO THE ENVIRONMENT COURT (2006), available at <http://www.mfe.govt.nz/publications/rma/everyday/court-guide-jun06/court-guide-jun06.pdf>; Ministry of Justice, Environment Court, <http://www.justice.govt.nz/environment/> (last visited Jan. 28, 2007); Birdsong, *supra* note 5 (noting that U.S. audiences have found the Environment Court to provide helpful lessons).

<sup>7</sup> Environment Court, Consolidated Practice Note § 3.2.9 (2006), available at <http://www.justice.govt.nz/environment/consolidated-practice-note/chapter-3.html> [hereinafter Practice Note].

<sup>8</sup> In mediation, disputants typically enter assisted negotiations voluntarily with the knowledge that discussions will be confidential, that parties will set the agenda for discussion, and that the mediator has no authoritative decision-making power. For more information on mediation, see CHRISTOPHER MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 3–81 (3d ed. 2003); LAURENCE BOULLE ET AL., *MEDIATION: PRINCIPLES, PROCESS, PRACTICE* 3 (N.Z. ed., 1998).

their knowledge of the subject matter of dispute and the overarching legislation that frames their dispute. In doing so, commissioners often occupy a hybrid role between a traditional mediator who promotes a constructive negotiation process and a judge who may focus on the substantive outcomes of the process.

This Article offers a tour of the Environment Court's mediation service and responds to skepticism about whether the public interest can be protected in a process that assists private parties to negotiate settlements to their disputes outside the limelight of a public trial. Discussion is organized into two parts.

Part II provides the context for the public interest analysis with an overview of the RMA, the Environment Court, and its court-annexed mediation program. This Part is particularly relevant to those interested in New Zealand's approach to sustainability-based decision making and the practice of adjudicating and mediating sustainability disputes in the court.

Part III addresses the public interest topic by first defining the "public interest" and then raising concerns over potential ways in which it can be compromised in mediation due, for example, to the loss of judicial oversight over settlement discussions and the potential for parties to forge agreements that meet their own interests while compromising the public interest. The bulk of analysis then explores how commissioners are well-positioned to protect the public interest during these mediations by a) utilizing various interventions to ensure mediated agreements are legal, and b) fostering an improved dispute-resolution climate to help parties explore and elect more sustainable agreements. Special attention is directed to the benefits of using a court mediator who also serves as an adjudicator as opposed to outsourcing mediation to private providers.

In closing, this Article highlights some of the overarching benefits of the Environment Court's mediation model that flow to the parties in dispute and to the public.

What can we learn from the New Zealand experience? Scholars in the United States have already drawn valuable lessons from the RMA and the Environment Court that polices the statute.<sup>9</sup> This Article provides an opportunity to learn from the court's mediation model—a less well-known but significant innovation in mediation. These lessons are of particular relevance to the environmental professionals in the United States who work with the many federal and state judicial<sup>10</sup> and administrative courts<sup>11</sup> and agencies<sup>12</sup>

---

<sup>9</sup> Examples of U.S. scholarship on the RMA include: Owen Furuseth & Chris Cocklin, *An Institutional Framework for Sustainable Resource Management: The New Zealand Model*, 35 NAT. RESOURCES J. 243, 243 (1995); Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 159 (2001). U.S. scholarship on the Environment Court includes: Birdsong, *supra* note 5, at 26.

<sup>10</sup> Almost every federal circuit court has a mediation program and all but two use staff mediators. court-annexed mediation programs are also common in the federal district courts and at least one of these courts has placed special emphasis on environmental mediation. Robert Rack, *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, 17 OHIO ST. J. ON DISP. RESOL. 609, 610–12 (2002); Lisa Kloppenberg, *Implementation of Court-Annexed Environmental Mediation: The District of Oregon Pilot Project*, 17 OHIO ST. J. ON DISP.

that use mediation to address environmental disputes. Collectively, these programs have made environmental mediation the most common form of public mediation in the United States;<sup>13</sup> concomitant with that status, there is an ongoing need to learn from the mediation practice of others, and New Zealand's Environment Court offers some important lessons.

The information in this Article is derived principally from twenty-five formal interviews of environmental dispute-resolution professionals in New Zealand (ten of judges and commissioners on the Environment Court and fifteen of professionals outside the court) who met with the author between May and July of 2006.<sup>14</sup> This Article makes extensive use of quotations

---

RESOL. 559, 564 (2002); *see also* Deborah Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 167 (2003) (noting that "many state courts require parties to attempt to resolve their cases through mediation before they can obtain a trial date").

<sup>11</sup> Environmental mediation is an important part of some administrative law courts whose role is most analogous to the Environment Court. For example, the Environmental Protection Agency's Office of Administrative Law Judges (OALJ), which is composed of five judges who conduct hearings and render decisions in permit and enforcement proceedings between the Environmental Protection Agency (EPA) and others, offers parties mediation in almost every case. Significantly, at EPA the judges are the ones who mediate, whereas in the Environment Court, mediation is conducted by specialized commissioners. EPA, Office of Administrative Law Judges, <http://www.epa.gov/aljhomep/index.htm> (last visited Jan. 28, 2007); EPA, Alternative Dispute Resolution in the Office of Administrative Law Judges, <http://www.epa.gov/aljhomep/about.htm#adr> (last visited Jan. 28, 2007); *see also* Department of Interior (DOI), Office of Hearings and Appeals Interior Board of Land Appeals ADR Pilot Program Materials, [http://mits.doi.gov/cadr/main/IBLA\\_ADRPilotProgram.cfm](http://mits.doi.gov/cadr/main/IBLA_ADRPilotProgram.cfm) (last visited Jan. 28, 2007) (highlighting the board's ADR program).

<sup>12</sup> Some federal and state agencies have well-developed programs in mediation and other forms of collaborative decision-making. *See, e.g.*, EPA, Conflict Prevention and Resolution Center, <http://www.epa.gov/adr/> (last visited Jan. 28, 2007); DOI, Collaborative Action and Dispute Resolution Center, <http://mits.doi.gov/cadr/main/main.cfm> (last visited Jan. 28, 2007); U.S. Inst. for Envtl. Conflict Resolution, About the Institute, <http://www.ecr.gov/about.htm> (last visited Jan. 28, 2007); Mont. Consensus Council, History and Executive Order, <http://mcc.mt.gov/ExecutiveOrder.asp> (last visited Jan. 28, 2007).

<sup>13</sup> Robert Zeinemann, *The Characterization of Public Sector Mediation*, 24 ENVIRONS ENVTL. L. & POL'Y J. 49, 50 (2001).

<sup>14</sup> To prepare for these interviews, the author consulted several environmental professionals who helped develop three sets of interview questions: 1) nine questions to judges concerning issues such as the pros and cons of court-annexed mediation and ways to manage mediation and adjudication as parallel processes in the court, 2) sixteen questions to commissioners concerning issues such as managing party power imbalances and protection of the public interest, and 3) eleven questions to dispute-resolution professionals outside the court (private mediators, members of government agencies, the for-profit community, and the nonprofit community) concerning the same questions posed to commissioners. In total, twenty-five formal interviews were performed and transcribed into approximately 175 pages of transcripts from which selected quotations are used in this Article. Interviews took place near the three court registries: Auckland, Wellington, and Christchurch. Out of court interviewees were identified with assistance from the environmental professionals the author met with prior to his formal interviews. Interviewees were selected based on their extensive experience in mediation, which allowed them to participate without divulging case-specific, confidential information. To reach interviewees on the court, the author sent an invitation to registry staff who forwarded the letter to judges and commissioners in their respective jurisdictions. All interviewees were promised anonymity and gave written authorization to use quotations from

because expressing lessons from interviewees in their own words has great value in reinforcing controversial points and assists in replicating conversations in short form. Information was also drawn from secondary sources on environmental mediation in New Zealand and the United States.<sup>15</sup> Readers should also note that the author wrote a compendium report that features most of the interview findings and other lessons learned from the Environment Court's mediation program.<sup>16</sup>

## II. SUSTAINABILITY DECISIONS AND DISPUTE RESOLUTION UNDER THE RMA

Sustainability disputes are multi-faceted and fuelled by a complex interplay of factors that overlap and reinforce one another.<sup>17</sup> Decisions about

---

their interview recordings.

<sup>15</sup> Several authors have written about environmental mediation in New Zealand. These accounts originally drew heavily on mediation practice in the United States, but now a substantial body of local scholarship exists on this subject. *See generally* STEPHEN QUINN & ASHLEY CORNOR, MINISTRY FOR THE ENVIRONMENT, ALTERNATIVE DISPUTE RESOLUTION FOR RESOURCE MANAGEMENT DISPUTES (June 2004) (on file with author) (reporting the most recent study on the mediation program of the Environment Court and pointing to contemporary issues facing the program); Kate Mitcalfe, *Fronting up—Mediation Under the Resource Management Act 1991*, 5 N.Z. J. ENVTL. L. 195, 225 (2001) (providing an overview of the benefits and challenges of mediation in the court); Royden Somerville, *Additional Dispute Resolution*, in HANDBOOK OF ENVIRONMENTAL LAW 170, 170 (Rob Harris ed., 1st ed. 2004) (discussing different forms of alternative dispute resolution under the RMA with focus on mediation); R.J. Bollard & S.E. Wooler, *Court-Annexed Mediation and Other Related Environmental Dispute Resolution*, N.Z. L. REV. 707, 707 (1998) (discussing the impact of the unique legislative framework behind the RMA on mediation in the Environment Court); Vernon J.C. Rive, *Resolving Conflict by Consensus: Environmental Mediation Under the Resource Management Act 1991*, 1 N.Z. J. ENVTL. L. 201, 210–11, 213–20 (1997) (providing historical statistics of court mediations and addressing limits of mediation); CAROLYN BLACKFORD & HIRINI MATUNGA, MAORI PARTICIPATION IN ENVIRONMENTAL MEDIATION, INFORMATION PAPER No. 30, at ix–x (Centre for Resource Management, Lincoln Univ., 1991) (providing guidelines to government and others on how to engage indigenous parties in mediation). In the United States, a comparatively vast array of scholarship exists on environmental mediation, often subsumed under the general heading “environmental conflict resolution” (ECR), which includes, among others, court mediation, negotiated rule-making, public consultation, joint scientific inquiries, and policy and site-specific plan development. For a review of ECR research, see E. Franklin Dukes, *What We Know About Environmental Conflict Resolution: An Analysis Based on Research*, 22 CONFLICT RESOL. Q. 191, 193–97 (2004).

<sup>16</sup> *See* Stephen Higgs, *Conversations on Environmental Mediation in the New Zealand Environment Court* 9–11, 13–14, 22–27, 31–35 (Oct. 2006) (unpublished report, on file with author) (highlighting a range of responses from interviews on mediation issues such as the nature of environmental disputes, referring cases to mediation, regional variations in mediation uptake, and delving into benefits and challenges of mediating environmental disputes in a court setting such as, for example, the independence and dignity of working with a court-mediator, dealing with settlement pressure, managing resource disparities, maintaining neutrality, and ensuring growth of judge-made law).

<sup>17</sup> Well-developed scholarship exists on the nature of environmental disputes. *See* MOORE, *supra* note 8, at 64–65 (diagramming causes and interventions to conflict generally). *See generally* GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* 91–168 (1986) (analyzing challenges and opportunities in environmental mediation); PARLIAMENTARY COMM’R FOR THE ENV’T, *PUBLIC PARTICIPATION UNDER THE RESOURCE MANAGEMENT ACT 1991: THE MANAGEMENT OF CONFLICT* 7–9 (Linda Pears ed., 1996) (discussing sources of environmental

how to protect the environment and manage natural resources for sustainability have transboundary and intergenerational effects; consequently, many people are impacted and brought into these decisions and associated disputes. With a wide cross-section of parties, resource and power disparities are commonplace, which undermines trust and respect between people and their ability to resolve disputes amicably. Problems of trust and respect are exacerbated by the scientific and technical uncertainties inherent in environmental and natural resource decision making, so parties often act with imperfect and conflicting information about the environmental and socio-economic impacts of a decision. Environmental disputes also spotlight the competing values and worldviews we hold on our relationship to nature, and these differences pit people against one another in profound and personal ways. Another significant attribute of these disputes (including most environmental enforcement actions) is that government is often a central player and decision maker, which raises the public significance of these disputes and the approaches used to resolve them.

Having some background on the nature of decisions made under the RMA and its early dispute-resolution procedures helps to better understand the types of disputes filed in the Environment Court. This information is drawn on in Part III, which discusses how the public interest is protected in Environment Court mediations.

### *A. The Resource Management Act*

The RMA is considered one of the most advanced models of environmental legislation in the world.<sup>18</sup> When enacted in 1991, the RMA restated and reformed preexisting law relating to the use of land, air, and water and replaced over twenty major statutes and fifty laws that governed environmental management and resource development.<sup>19</sup> Prior to enactment of the RMA, past environmental regulation had proceeded in an ad hoc basis, where one aspect of the environment was managed in isolation of others.<sup>20</sup>

---

disputes under the RMA).

<sup>18</sup> ENVIRONMENTAL LAW FOR A SUSTAINABLE SOCIETY, at ix (Klaus Bosselmann & David Grinlinton eds., 2002); MINISTRY FOR THE ENV'T, *supra* note 5, at 5 (noting that "the RMA was groundbreaking legislation. At the time of its enactment, no other country had a mechanism for managing the quality of land, air and water under a single law.").

<sup>19</sup> MINISTRY FOR THE ENV'T, *supra* note 5, at 1. Despite the wide scope of the RMA, there are other significant pieces of legislation that relate to environmental and natural resources. For a brief summary of these acts, see *id.*, *supra* note 5, at 13–15 (including: land (Property Law Act (1952) and Maori Land Act (1993)), conservation (Conservation Act (1987) and National Parks Act (1980)), wildlife (Wildlife Act (1953), Marine Mammals Protection Act (1977), and Marine Reserves Act (1971)), minerals (Crown Minerals Act (1991)), local government (Local Government Act (2002)), public health (Health Act (1956)), buildings (Buildings Act (1991)), oceans (Marine Pollution Act (1974) and Maritime Transport Act (1994)), fisheries (Fisheries Act (1996) and Maori Fisheries Act (1989)), timber (Forests Act (1949)), and other matters (Ozone Layer Protection Act (1996), Antarctica Act (1994), New Zealand Nuclear Free Zone, Disarmament and Arms Control Act (1987), Hazardous Substances and New Organisms Act (1996), and the Historic Places Act (1993)).

<sup>20</sup> Kenneth Palmer, *Resource Management Act 1991*, in ENVIRONMENTAL & RESOURCE

The RMA was envisioned as a super-statute to achieve greater integrated management of environmental media (air, water, and land) and greater coordination across various resource management agencies and regions.<sup>21</sup> The Minister for the Environment oversees and monitors the implementation of the RMA and also has some direct areas of responsibility, including the authority to appoint people to carry out the duties of local agencies who fail to live up to their responsibilities under the RMA.<sup>22</sup>

For our purposes, three aspects of the Act are important to understand: its focus on sustainable management, its devolved yet integrated form of planning and decision-making, and its resource permitting and consent process. These and other provisions of the Act are discussed at length in legal treatises,<sup>23</sup> government-issued guidance from the Ministry for the Environment, and materials produced by professional affiliations in the resource management community.<sup>24</sup>

### *1. Sustainable Management*

The purpose of the RMA is to “promote the sustainable management of natural and physical resources.”<sup>25</sup> Sustainable management is defined under part II, section 5(2) of the RMA as:

[M]anaging the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety, while—(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.<sup>26</sup>

This key provision of the RMA evolved from the path-breaking work of the World Commission on Environment and Development in the book, *Our*

---

MANAGEMENT LAW 85, 88 (Derek Nolan ed., 3d ed. 2005).

<sup>21</sup> See MINISTRY FOR THE ENV'T, *supra* note 5, at 5 (stating that the RMA “set out to create a more streamlined” approach).

<sup>22</sup> *Id.* at 20, 69. Note that a smaller body of government known as the Office of the Parliamentary Commissioner for the Environment provides more independent oversight of the Act and has authority to investigate the performance of public bodies. Office of the Parliamentary Commissioner for the Environment, <http://www.pce.govt.nz> (last visited Jan. 28, 2007) (providing a basic oversight of the function of the office).

<sup>23</sup> See, e.g., Palmer, *supra* note 20, at 85–207.

<sup>24</sup> See Env'tl. Def. Soc'y, RMA Guide, [www.eds.org.nz/rma/index.cfm](http://www.eds.org.nz/rma/index.cfm) (last visited Jan. 28, 2007) (providing online information regarding community participation in processes under the RMA). The professional affiliations include, for example, the Resource Management Law Association of New Zealand, <http://www.rmla.org.nz> (last visited Jan. 28, 2007), the New Zealand Planning Institute, <http://nzplanning.co.nz/About-NZPI/Goals.asp> (last visited Jan. 28, 2007), and the New Zealand Law Society's Environmental Law Committee, <http://www.nz-lawsoc.org.nz/cteenviron.asp> (last visited Jan. 28, 2007).

<sup>25</sup> Resource Management Act of 1991, § 5(1), 1991 S.N.Z. No. 69.

<sup>26</sup> *Id.* § 5(2).



*Common Future*,<sup>27</sup> but the drafters of the RMA used the term “sustainable management” because the term “sustainable development” outlined in *Our Common Future* embraced matters such as social inequality and global redistribution of wealth, which were considered well beyond the scope of the RMA.<sup>28</sup>

Although “sustainable management” is the paramount goal of all decision making under the RMA, such decisions must also address matters of special significance outlined in more specific provisions of the RMA. These include national priorities for which decision-makers must “recognize and provide for” under section 6, including the preservation of the natural character of the coastal environment,<sup>29</sup> matters to which decision makers must “have particular regard to” under section 7, such as the benefits of renewable energy,<sup>30</sup> and the need to take into account the principles of the Treaty of Waitangi under section 8, a foundational governance agreement between central government and the indigenous Maori Peoples of New Zealand.<sup>31</sup> Collectively, sections 5, 6, 7, and 8 all fall under Part II of the RMA and are considered the RMA’s “engine room” because they “guide the application and interpretation of the entire legislation.”<sup>32</sup>

## 2. Integrated and Devolved Decision Making

Decision making under the RMA is governed by a hierarchical approach that includes central government, regional, and district councils. Central

---

<sup>27</sup> WORLD COMM’N ON ENV’T & DEV., *supra* note 1.

<sup>28</sup> Palmer, *supra* note 20, at 92–94.

<sup>29</sup> Resource Management Act § 6. Other matters of national importance under section 6 include, for example: the natural character of the coastal environment, wetlands, lakes and rivers; natural features and landscapes; significant indigenous vegetation and habitats; and maintenance of public access to the coastal marine area, lakes, and rivers. *Id.*

<sup>30</sup> *Id.* § 7. Other matters that decision makers must have particular regard to under Section 7 include, for example: the exercise of guardianship by indigenous peoples over their historic lands; the efficient use and development of natural and physical resources, the protection of trout and salmon habitat, the effect of climate change, and benefits from the use and development of renewable energy. *Id.*

<sup>31</sup> Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 134 n.70 (2000). Signed in 1840, the treaty is a pivotal document in the country which details an early agreement between the Queen of England and a large proportion of Tribal leaders representing the Maori of New Zealand. The treaty provided the Queen with some authority to govern the country while reserving governance rights held by Maori. Despite its foundational significance, the meaning of the treaty is subject to intense dispute as the English and Maori versions are inconsistent and conflict in several important respects. Some shared principles have been outlined including: a) the right of central government (the Crown) to govern and make laws, b) “the right of iwi (tribes) and hapu (family units) to self-management and control of their resources in accordance with their tribal preferences,” c) “the principle of partnership and a duty to act in good faith,” and d) “the duty on the Crown to actively protect Maori in the use of their resources” and treasures (“including the provision of redress for past injustices”). MINISTRY FOR THE ENV’T, *supra* note 5, at 10. For more information on the treaty, see State Services Commission, *The Treaty of Waitangi*, <http://www.treatyofwaitangi.govt.nz/> (last visited Jan. 28, 2007).

<sup>32</sup> N.Z. LAW SOC’Y, SEMINAR: RESOURCE MANAGEMENT ACT 1991 1 (1991).

government lays the governance framework in the form of national standards and policy statements for the regional and district councils to develop their own policies and plans for their respective jurisdictions that must be consistent with the national agenda.<sup>33</sup>

The purpose and content matter of the various national standards and policy statements cover a wide range of issues. National standards can be quantitative or qualitative (or other types of standards) that concern a range of subjects such as the control of discharges into air, land or water that apply nationwide.<sup>34</sup> Similarly, national policy statements concern matters of national significance and can guide subsequent decision making of regional and district councils.<sup>35</sup>

New Zealand's twelve regional councils, whose jurisdictions are broadly defined by watersheds, must formulate regional policy statements and may also craft regional plans. Regional policy statements "provide broad direction and a framework for resource management within [a] region."<sup>36</sup> Regional plans cover more specific functions of a regional council, including soil conservation, water quality and quantity, biodiversity management, and discharges of contaminants.<sup>37</sup>

The third management tier of the RMA is the district councils (some of which are known as "territorial authorities"). There are seventy of these councils that are primarily responsible for managing the impacts of land use and must prepare specific district plans to assist the councils in these duties. District plans cover a range of land use matters such as the effects of noise, the impacts of land use on natural hazards, and land subdivision.<sup>38</sup>

Through this hierarchy of national standards and policies and more local policies and plans, the drafters of the RMA sought to provide direction from

---

<sup>33</sup> Palmer, *supra* note 20, at 97–98; Env'tl. Def. Soc'y, RMA Guide: Approach to Environmental Management, <http://www.eds.org.nz/rma/introduction/approach.cfm> (last visited Jan. 28, 2007).

<sup>34</sup> Resource Management Act § 43 (national environmental standards); Env'tl. Def. Soc'y, RMA Guide: Planning Documents: National Environmental Standards, <http://www.eds.org.nz/rma/plandocs/envstds.cfm> (last visited Jan. 28, 2007).

<sup>35</sup> Resource Management Act §§ 45–55 (national policy statements); Env'tl. Def. Soc'y, RMA Guide: Planning Documents: National Policy Statements, <http://www.eds.org.nz/rma/plandocs/natpolicystmts.cfm> (last visited Jan. 28, 2007).

<sup>36</sup> Env'tl. Def. Soc'y, RMA Guide: Planning Documents: Regional Policy Statements, <http://www.eds.org.nz/rma/plandocs/regpolicystmts.cfm> (last visited Jan. 28, 2007); *see also* Resource Management Act §§ 30, 59–62 (outlining the functions of regional councils and the purposes and requirements of regional policy statements respectfully).

<sup>37</sup> Env'tl. Def. Soc'y, RMA Guide: Planning Documents: Regional Plans, <http://www.eds.org.nz/rma/plandocs/regionalplans.cfm> (last visited Jan. 22, 2007); *see also* Resource Management Act §§ 63–70 (outlining the purposes and requirements of regional plans).

<sup>38</sup> Env'tl. Def. Soc'y, RMA Guide: Planning Documents: District Plans, <http://www.eds.org.nz/rma/plandocs/districtplans.cfm> (last visited Jan. 28, 2007); *see also* Resource Management Act §§ 31, 72–77 (outlining the functions of territorial authorities and the purposes and requirements of district plans respectively). *See generally* MINISTRY FOR THE ENV'T, THE RESOURCE MANAGEMENT ACT: KEY FACTS ABOUT LOCAL AUTHORITIES & RESOURCE CONSENTS (2004), *available at* <http://www.mfe.govt.nz/publications/rma/annual-survey/2003-04/summary/rma-survey-summary-2003-04.pdf> (noting general facts about local authorities and resource consents).

the top and more integrated resource management of environmental media as decisions are made down the chain of command.<sup>39</sup> The broad right of appeal of all plans and policies to the Environment Court provides a judicial check on the content of these documents. Significantly, *any* person can challenge a council's decision in the court on a proposed plan or policy provided that the individual had previously filed a submission on the same matter during the council's earlier planning or policy-making process.<sup>40</sup>

### 3. Resource Consents (Permitting)

The environmental effects of resource development activities are managed under the RMA through a resource consent decision-making process, as well as through standard conditions imposed in regional and district plans. A holder of a resource consent is permitted to carry out an activity so long as it complies with conditions attached to the consent and is deemed by the relevant authority to represent "sustainable management."<sup>41</sup> Just as policy statements and plans are designed to enable integrated decision-making across national, regional, and district authorities, where an activity requires resource consent from different authorities, the decision to grant or deny the consent is often coordinated between authorities in joint hearings.<sup>42</sup>

There are several types of resource consents, including a land use consent, subdivision consent, coastal permit, water permit, and discharge permit.<sup>43</sup> Depending on the size and impact of a proposed activity, some applicants must obtain more than one consent from both regional and district councils,<sup>44</sup> where multiple consents are required, applicants are encouraged to apply for all consents at the same time so that the potential effects of an activity can be looked at in their entirety.<sup>45</sup>

Applicants for resource consents must provide, among other things, a description of their proposed activity and an Assessment of Effects on the Environment (AEE), which must correspond in detail to the scale and

---

<sup>39</sup> See Env'tl. Def. Soc'y, RMA Guide: Planning Documents, <http://www.eds.org.nz/rma/planning.cfm> (last visited Jan. 28, 2007) (providing an overview of the interlinked nature of national policy statements and council policies and plans).

<sup>40</sup> Resource Management Act Schedule 1 § 14; Env'tl. Def. Soc'y, RMA Guide: Court Proceedings: Lodging a Plan Appeal, <http://www.eds.org.nz/rma/court/lodgingreference.cfm> (last visited Jan. 28, 2007).

<sup>41</sup> See Resource Management Act § 5 (stating that the purpose of the RMA is sustainable management of natural and physical resources); *id.* § 104 (requiring the consent authority to consider national environmental policy when determining resource consents).

<sup>42</sup> MINISTRY FOR THE ENV'T, *supra* note 5, at 41; see Env'tl. Def. Soc'y, *supra* note 33 ("[D]ecisions about the management of the coastal marine area are shared between the national and regional levels.").

<sup>43</sup> See Resource Management Act § 87 (listing the types of resource consents); see also Env'tl. Def. Soc'y, Resource Management Act, <http://www.eds.org.nz/rma/resourceconsents/typesofresourceconsents.cfm> (last visited Jan. 28, 2007) (explaining the different types of resource consents).

<sup>44</sup> See Env'tl. Def. Soc'y, *supra* note 33 ("[D]ecisions about the management of the coastal marine area are shared between the national and regional levels").

<sup>45</sup> MINISTRY FOR THE ENV'T, *supra* note 5, at 41.

significance of the effects envisioned.<sup>46</sup> This “effects-based” approach means that activities themselves are not regulated per se; rather, it is the “effects” of those activities that come under scrutiny.<sup>47</sup> In their AEE, applicants must also identify those persons interested in or affected by a proposal, the consultation they have undertaken with such parties, and any response to the views of those consulted.<sup>48</sup>

Aside from an appeal to the Environment Court, a regional or district council member is the final decision maker on applications for resource consents. As agents of the RMA, these officials must ensure their decision meets the “sustainable management” requirements of part II (sections 5, 6, 7, and 8) of the RMA. Councils are not restricted to considering only matters and evidence provided by an applicant; they may also request further information and commission reports to ensure all necessary information is available prior to rendering a decision.<sup>49</sup> Where a proposed project will have significant environmental effects, the council may seek additional input (written submissions) from the public at large through a process called “notification.”<sup>50</sup> According to one survey, only five percent of consent applications are notified,<sup>51</sup> which is an important finding because, in general, only those parties

---

<sup>46</sup> Resource Management Act § 88.

<sup>47</sup> The Ministry for the Environment provided the following illustration of effects-based management:

A company wishes to establish a furniture-making factory in a small New Zealand town. The proposal will create 100 jobs, use locally sourced exotic timber and be of great economic and social benefit to the local community, which suffers from relatively high unemployment. It is not necessary for the company to show how the jobs created will outweigh any negative impact on a competing furniture manufacturer in a nearby town. Neither does the company need to demonstrate how the benefits of the proposal outweigh any adverse environmental effects, such as the effects of noise on neighbouring residential properties or the effects of the discharge of dirty water from the factory into a nearby stream. While the social and economic benefits of the proposal will be considered and are important, the RMA requires the company to demonstrate how it will tackle those adverse environmental effects and take measures to prevent or minimise their impact.

MINISTRY FOR THE ENV'T, *supra* note 5, at 8.

<sup>48</sup> See Resource Management Act § 88 (making an application); Resource Management Act Schedule 4, §1(h) (assessment of effects on environment); Env'tl. Def. Soc'y, RMA Guide: Resource Consents, <http://www.eds.org.nz/rma/resourceconsents.cfm> (last visited Jan. 28, 2007).

<sup>49</sup> PARLIAMENTARY COMM'R FOR THE ENV'T, *supra* note 17, at 9.

<sup>50</sup> So-called “limited notification” is also used where people who are known to be directly affected by a proposal are given a chance to make submissions. Resource consent applications need not be notified where a proposal will only have minor adverse effects and where the applicant has obtained written consent of all parties potentially impacted by a proposal. Resource Management Act § 96(1) (any person can make a submission to a consent authority on a notified application); Resource Management Act §§ 93–94D (notification of applications); Env'tl. Def. Soc'y, RMA Guide: Notification of Resource Consent Application, <http://www.eds.org.nz/rma/resourceconsents/notification.cfm> (last visited Jan. 28, 2007); Env'tl. Def. Soc'y, RMA Guide: Applying for a Resource Consent, <http://www.eds.org.nz/rma/resourceconsents/apply.cfm> (last visited Jan. 28, 2007).

<sup>51</sup> MINISTRY FOR THE ENV'T, *supra* note 5, at 39.

who make a submission on a notified consent application have standing to appeal a council's decision to the Environment Court.<sup>52</sup>

In addition to receiving submissions from the public on the merits of an application, councils may also hold a contested hearing to assist in their decision on an application.<sup>53</sup> Hearings are costly and time consuming, however, so authorities may arrange a "pre-hearing" meeting to allow resource consent applicants and parties who have made a submission on an application to meet to clarify issues or attempt to negotiate or mediate the resolution of a dispute.<sup>54</sup> In practice, the use of the pre-hearing meeting for the purpose of dispute resolution has been rare,<sup>55</sup> but recent reforms to the RMA may increase the frequency of such meetings.<sup>56</sup>

---

<sup>52</sup> Where an application for resource consent is not notified, the public cannot make submissions on the application and therefore cannot appeal decisions to the court. Thus, the decision to "notify" serves an important gate-keeping function and restrains access to the court to applicants and notified parties. There is, however, a safety valve that permits access to the court for so-called section 274 parties that fail to make a submission to a council, but who represent an interest greater than the public generally. Resource Management Act § 120 (right to appeal); *id.* § 121 (procedure for appeal); *id.* § 274 (special interest parties); *see also*, Env'tl. Def. Soc'y, RMA Guide: Resource Consents Notification, <http://www.eds.org.nz/rma/resourceconsents/notification.cfm> (last visited Jan. 28, 2007) (discussing resource consent notices); Env'tl. Def. Soc'y, RMA Guide: Applying for a Resource Consent, <http://www.eds.org.nz/rma/resourceconsents/apply.cfm> (last visited Jan. 28, 2007) (discussing application procedure for resource consent).

<sup>53</sup> Resource Management Act § 100 (obligation to hold a hearing).

<sup>54</sup> *Id.* § 99–99A (pre-hearing meetings and mediation). Where a pre-hearing meeting is structured as a mediation, it appears that the process mirrors that of Environment Court mediations. *See* MINISTRY FOR THE ENV'T, PRE-HEARING MEETINGS: A PRACTICAL GUIDE FOR COUNCILS 23–33 (1999), *available at* <http://www.mfe.govt.nz/publications/rma/pre-hearing-guide-mar99.pdf>.

<sup>55</sup> In 2003 and 2004, pre-hearing meetings were used in only about 2.4% of applications for resource consents. *See* MINISTRY FOR THE ENV'T, *supra* note 5, at 39–40 (noting that pre-hearing meetings are held in about half of notified applications and that in 2003 and 2004 local authorities reported that about 4.8% of consent applications were notified); *see also* Roy Montgomery & Jonathan Kidd, *An Appraisal of Environmental Conflict Management Provisions in New Zealand's Resource Management Act 1991*, 45 ASIA PAC. VIEWPOINT 105, 106 (2004) (noting that very little emphasis has been placed upon early use of environmental dispute resolution in forums such as pre-hearing meetings due to low levels of awareness and inadequate training).

<sup>56</sup> As part of a package of reforms to the RMA in 2005, amendments were made to bolster the use of pre-hearing meetings for the purposes of early dispute resolution in the planning and resource consent process. For example, section 99 now permits councils to invite submitters who challenge or oppose an application for resource consent to attend a pre-hearing meeting or, if the applicant for resource consent agrees, require attendance. MINISTRY FOR THE ENV'T, RESOURCE MANAGEMENT AMENDMENT ACT 2005—IMPROVING DECISION MAKING 2 (2005), *available at* <http://www.mfe.govt.nz/publications/rma/rmaa2005-factsheets-aug05/improving-decision-making/improving-decision-making.pdf>. Mediation is also specifically provided for in pre-hearing meetings in the new section 99A, however, attendance in mediation is not compulsory. *Id.* In the plan development context, a new clause 8AA of the First Schedule of the act provides for the use of pre-hearing meetings to address planning disputes and empowers local authorities to refer parties to independent mediation, but participation in these processes is not mandatory. MINISTRY FOR THE ENV'T, RESOURCE MANAGEMENT AMENDMENT ACT 2005—IMPROVING LOCAL POLICY AND PLAN MAKING 2 (2005), *available at* <http://www.mfe.govt.nz/publications/rma/rmaa2005-factsheets-aug05/improving-local-policy-and-plan-making/improving-local-policy-and->

The effect of all these pre-court provisions is that applicants and potential adversaries are encouraged to consult with one another and to address the concerns of relevant parties when pursuing resource development projects. Depending on the manner in which such consultation is pursued, the involvement of affected persons at an early stage in the decision-making process reduces the likelihood and intensity of objection, and “promotes an early form of dispute resolution.”<sup>57</sup> Ultimately, some disputes are irreconcilable by the parties alone, and it is in these circumstances that the role of the Environment Court becomes central.

### *B. The Environment Court*

The breadth of decisions made under the RMA is vast, ranging from whether someone can build an addition to a home to how the country can meet its commitments under the Kyoto Protocol to reduce production of greenhouse gases. When people disagree with decisions made under the act, the Environment Court provides an important judicial check on whether those decisions are legal and in the public interest.

While environmental disputes are commonplace, of the 54,658 applications for resource consent processed in 2003 and 2004, only 1.2% (651) of decisions on those applications were appealed to the court,<sup>58</sup> indicating that recourse to litigation is an infrequently used option. Those cases that are litigated, however, are true survivors as parties have already funnelled these disputes through a complex array of dispute-resolution avenues and the decision to litigate is often the last and least desirable path.<sup>59</sup> Thus, disputes filed in the Environment Court, though comparatively few, are often very serious. As the final adjudicator of sustainability under the RMA, the court speaks with a powerful and timeless voice, so its decision in one case can play a major role in guiding the prospective actions of individuals, groups, and government actors.

#### *1. Court Structure*

One of seven specialized judges, who hold life tenure and who maintain jurisdiction over disputes in assigned territories, manages court proceedings.<sup>60</sup> One of these judges, the Principal Judge, is charged with the

---

plan-making.pdf.

<sup>57</sup> Peter Spiller & Stephen Hooper, *Dispute Resolution in a Statutory Context*, in *DISPUTE RESOLUTION IN NEW ZEALAND* 179, 181 (Peter Spiller ed., 1999).

<sup>58</sup> MINISTRY FOR THE ENV'T, *supra* note 38.

<sup>59</sup> The most common dispute management approach is to live with or avoid the dispute, recognizing that not every dispute can be resolved. Another common response is direct negotiation with decision makers or adversaries to modify an environmental decision. “Of the relatively few disputes which are brought to lawyers,” only some of those actually result in legal proceedings and most of these proceedings will result in a settlement between the parties before ever being heard by a judge or a mediator. BOULLE ET AL., *supra* note 8, at 31; *see* MOORE, *supra* note 8, at 8 (discussing mediation).

<sup>60</sup> *See* Resource Management Act §§ 249–50, 278 (providing for judge eligibility, judge

“orderly and expeditious discharge of the business of the Environment Court.”<sup>61</sup> Fourteen technical commissioners work alongside these judges and also preside over hearings and assist in writing judicial decisions.<sup>62</sup> These commissioners serve five-year terms and are appointed to ensure the court “possesses a mix of knowledge and experience” in matters coming before it.<sup>63</sup> Training and qualification in the law is not a requirement for commissioners; rather, skills that are considered particularly valuable include expertise in business, economics, local government affairs, planning and resource management, environmental science, architecture and engineering, Maori affairs, or techniques in alternative dispute resolution (ADR).<sup>64</sup>

A quorum for the court is one judge and one commissioner, but hearings can also be held with one judge and two commissioners or, more rarely, a judge or commissioner sitting alone.<sup>65</sup> These hearings are generally open to the public<sup>66</sup> and are comparatively informal, as the court is not bound by the rules of evidence.<sup>67</sup> There are three Court Registries (court houses) where hearings take place, situated in the country’s three largest cities: Auckland, Wellington, and Christchurch.<sup>68</sup> As a circuit court, it also holds hearings near the locality of the subject matter in dispute.<sup>69</sup>

## 2. Judicial Review

There are two types of disputes typically filed in the court. The first and most common case is where an applicant or an opponent of a resource consent appeals the decision of a regional or district council to grant or deny the consent.<sup>70</sup> A second type of case arises when a party challenges a plan or policy put forth by a regional or district council.<sup>71</sup> In both cases, parties

---

appointment, and Environment Court powers); Ministry of Justice, Environment Court, Judges & Commissioners of the Environment Court, [http://www.justice.govt.nz/environment/environment\\_court\\_judges.html](http://www.justice.govt.nz/environment/environment_court_judges.html) (last visited Jan. 28, 2007) (listing the seven judges currently sitting on the bench).

<sup>61</sup> Resource Management Act § 251.

<sup>62</sup> Ministry of Justice, *supra* note 60.

<sup>63</sup> Resource Management Act § 253.

<sup>64</sup> *Id.*; see Ministry of Justice, *supra* note 60 (listing the composition of the court).

<sup>65</sup> See Resource Management Act § 265 (defining a quorum of the Environmental Court); § 279 (outlining powers of judge sitting alone); *id.* § 280 (outlining powers of a commissioner sitting alone).

<sup>66</sup> See *id.* § 277 (mandating that hearings be public subject to Environment Court order).

<sup>67</sup> Ministry of Justice, *supra* note 6.

<sup>68</sup> *Id.*

<sup>69</sup> ENV’T COURT, E. 49: REPORT OF THE REGISTRAR OF THE ENVIRONMENT COURT FOR THE 12 MONTHS ENDED 30 JUNE 2005, at 6 (2005).

<sup>70</sup> See Resource Management Act § 314 (outlining court’s power to issue enforcement orders).

<sup>71</sup> See *id.* § 310(a) (outlining court’s power to issue declarations). Members of the court also have power to issue enforcement or abatement orders and the broad power to make declarations regarding the existence or extent of any function, power, right, or duty under the Act such as, for example, the appropriate division of authority between regional and district councils. § 309.

appeal a council's decision and the court's inquiry often concerns an assessment of the actual or potential environmental effects of the decision.<sup>72</sup> Significantly, where a council has publicly "notified" a decision, which is always the case in the planning context and sometimes the case in the consents process, parties can only appeal the council's decision on matters raised in their first submission to the council during its initial decision-making process, and potential remedies are constrained by the scope of their submission.<sup>73</sup> In a hearing, a judge may "dismiss, allow or partly allow" an appeal.<sup>74</sup> In rendering judgment, a judge "can confirm, cancel or amend" a council's decision.<sup>75</sup> Judges may also consider alternative proposals and adjourn proceedings to allow mediation to occur or reoccur.<sup>76</sup>

In its review, the court looks at issues *de novo*, which means that they may fully rehear matters that were before the council, and, while they must consider the council's decision, they are not bound to afford it any deference.<sup>77</sup> This power of *de novo* review over agency decision-making is one primary traits that separates the Environment Court from federal appellate courts in the United States; the power vests the court with final authority to make findings of fact and law and to determine what "sustainable management" means in a case.<sup>78</sup> Decisions of the court are final<sup>79</sup> and appeals to the High Court are limited to questions of law.<sup>80</sup>

---

<sup>72</sup> Bollard & Wooler, *supra* note 15, at 709.

<sup>73</sup> MINISTRY FOR THE ENV'T, HOW TO LODGE AN APPEAL TO THE ENVIRONMENT COURT (1999).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See Bollard & Wooler, *supra* note 15, at 709.

<sup>77</sup> See MINISTRY FOR THE ENV'T, *supra* note 73 (discussing *de novo* review). In the 2005 reforms to the RMA, section 290A was added to require a judge to "have regard to the decision being appealed." In that provision, the court is also "given explicit powers to accept evidence that was submitted at the consent authority hearing and to direct how evidence is to be given to the Court, [which] enables the Court to take evidence as read." The Ministry for the Environment stipulates that taking "regard to the primary decision and taking evidence as read should help the Court focus on the issues of contention and shorten hearing times, rather than the Court having to fully rehear every application. It also places increased emphasis on more comprehensive and robust decisions at the council hearing." MINISTRY FOR THE ENV'T, *supra* note 56, at 4.

<sup>78</sup> According to one U.S. scholar, the court's power of *de novo* review "elevates the Environment Court's role above that of mere adjudicator and vests it with the authority to set and implement environmental policy in New Zealand. The power of *de novo* review places the court in the position to perform the fundamental tasks of environmental management." The scholar states that, "In doing so, 'the Court hears the evidence itself and decides what the facts are, based on that evidence, before coming to its own conclusion as to the proper way in which the statutory discretions should be exercised.'" He further explains that "the Court is free to exercise this discretion in the way that it sees fit within the overall framework of the RMA, even when there are potentially inconsistent decisions by local authorities on similar facts." Birdsong, *supra* note 5, at 34-35.

<sup>79</sup> See Resource Management Act, § 295 (1991) (explaining that the Environment Court's decisions are final subject to potential rehearing under section 294 and appeal under section 299).

<sup>80</sup> See *id.* § 299 (explaining High Court appeals on questions of law). New Zealand is a constitutional monarchy with a democratic parliamentary government. There are four courts of general jurisdiction that interpret acts of Parliament: District Courts (criminal and civil cases),



### *C. Court-Annexed Mediation*

In addition to rendering decisions, the Environment Court has the authority to encourage the settlement of appeals through two avenues: judicial settlement conferences<sup>81</sup> and “alternative dispute resolution” (ADR). ADR includes: “mediation, conciliation or other procedures designed to facilitate the resolution of any matter before or at any time during the course of a hearing.”<sup>82</sup> The provision for ADR in the statute stemmed from an acknowledgment among lawmakers that the adversarial approach that dominated in the court “was often inappropriate and not conducive to an efficient or just method” of resolving environmental disputes.<sup>83</sup> Today, among the various ADR options available to the court, mediation is generally the only alternative employed.<sup>84</sup> It is important to stress that in the Environment Court, as in other settings, adjudication and mediation processes are not mutually exclusive and are often enhanced by their relationship to one another.<sup>85</sup>

Support of and interest in mediation was slow to begin. In the early days of the RMA, mediation was almost never used<sup>86</sup> and was largely restricted to small matters between two parties.<sup>87</sup> Today, however, hundreds

---

High Court (more serious cases), Court of Appeal (appeals from the High Court), and Supreme Court (final arbitrator of disputes). See MINISTRY OF JUSTICE, THE NEW ZEALAND LEGAL SYSTEM (2001), available at [http://www.justice.govt.nz/pubs/other/pamphlets/2001/legal\\_system.pdf](http://www.justice.govt.nz/pubs/other/pamphlets/2001/legal_system.pdf) (providing information on New Zealand’s constitution, government, and legislature).

<sup>81</sup> Resource Management Act § 267; Bollard & Wooler, *supra* note 15, at 711 (noting that judicial settlement conferences are a key mechanism to help identify and define issues, clarify the views, and explore ways for the parties to reach resolution).

<sup>82</sup> Resource Management Act § 268.

<sup>83</sup> Rive, *supra* note 15, at 206.

<sup>84</sup> Bollard & Wooler, *supra* note 15, at 711 (noting that a commissioner is rarely asked to arbitrate).

<sup>85</sup> To many, the threat of judicial hearings are a means to goad the other side into negotiation; without that threat, voluntary agreements made in mediation where parties change established uses of natural resources or forfeit resource development opportunities would rarely occur. Similarly, one of the strengths of mediation is that where cases fail to settle, mediation often narrows and clarifies issues for trial, evidence to be drawn on, and the relief sought. Equally significant, where parties fail to reach settlement in mediation, there is often real value knowing that a case is ripe for adjudication. See Peter Spiller, *Litigation, in* DISPUTE RESOLUTION IN NEW ZEALAND 131, 137–38 (Peter Spiller ed., 1999) (discussing relationship between alternative dispute resolution and litigation); Bonnie G. Colby & Tamra Pearson d’Estrée, *Evaluating Market Transactions, Litigation, and Regulation As Tools for Implementing Environmental Restoration*, 42 ARIZ. L. REV. 381, 393 (2000) (discussing threat of litigation on voluntary agreements to change established uses); Dorothy Wright Nelson, *ADR in the Federal Courts—One Judge’s Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*, 17 OHIO ST. J. ON DISP. RESOL. 1, 4 (2001) (noting effect of alternative dispute resolution on trial preparation); Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 107–08 (2002) (discussing value of ADR programs in determining whether adjudication is desirable).

<sup>86</sup> See Rive, *supra* note 15, at 211 (documenting that in 1993, the first year mediation statistics were available, only six commissioner-facilitated mediations were recorded).

<sup>87</sup> N.Z. LAW SOC’Y, SEMINAR: APPLICATIONS UNDER THE RESOURCE MANAGEMENT ACT 1991, at 103 (1993).

of cases are mediated each year,<sup>88</sup> often with multiple parties involving significant environmental effects.<sup>89</sup> Members of the court believe in the program,<sup>90</sup> many commissioners mediate, and some predict mediation will become an elected option in up to ninety percent of cases in particular areas.<sup>91</sup> Perhaps nobody could have foreseen the popularity of the mediation program, so it is not surprising that the legislature provided little guidance in the statute on how mediation and other ADR options should proceed, short of legislating that these processes be voluntary.<sup>92</sup> For its part, the court has stressed that mediation works best when it is voluntary and driven by the settlement interests of the parties and not those of the court.<sup>93</sup>

Environment Court Commissioners mediate disputes at no extra cost to the parties because settlements arrived at through mediation can save the court the time and expense of empanelling judges and commissioners for a full hearing.<sup>94</sup> The primary factor in appointing a commissioner to mediate is time availability, but they are also selected for their expertise in the subject matter of the dispute in question, such as environmental planning or indigenous party affairs.<sup>95</sup> Parties cannot elect a preferred commissioner to mediate due to the need to prioritize their availability for hearings and because there is an interest to ensure all commissioners develop skills as mediators.<sup>96</sup> The parties can use a private mediator,<sup>97</sup> however, private

---

<sup>88</sup> Out of 1,368 cases disposed by the court between June 2004 and June 2005, parties elected court-annexed mediation in some 350 cases (26% of total cases disposed) and often these cases required multiple mediations to progress issues and topics within the appeals. These figures are approximations and the court intends to have better data made available through a new case management database that came into use in 2006. ENV'T COURT, *supra* note 69, at 8.

<sup>89</sup> See Bollard & Wooler, *supra* note 15, at 713 (discussing possibility of "appointment of a commissioner with particular skill and experience"); Rive, *supra* note 15, at 212 (providing examples of the types of disputes mediated).

<sup>90</sup> Practice Note, *supra* note 7, §§ 3.1.4, 3.1.5 (stating that mediation is often well suited to the resolution of environmental disputes and that such voluntary processes offer "flexibility, an interests-based approach, ownership of resolution of the dispute, and are often more conducive to the preservation of inter-party relationships as distinct from litigation").

<sup>91</sup> QUINN & CORNOR, *supra* note 15, at 20.

<sup>92</sup> Resource Management Act of 1991, § 268(1), 1991 S.N.Z. No. 69; QUINN & CORNOR, *supra* note 15, at 7 (noting that the court has discretion to invite parties to mediate, but there is limited statutory guidance on how to use that discretion).

<sup>93</sup> Practice Note, *supra* note 7, § 3.1.5.

<sup>94</sup> Bollard & Wooler, *supra* note 15, at 718.

<sup>95</sup> Resource Management Act § 253 (discussing eligibility requirements for appointment as Environment Commission Commissioner or Deputy Environment Commissioner).

<sup>96</sup> According to Environment Court Judge Bollard, the necessary skills for the task of mediation include: "expertise or competence in the subject matter, impartiality, confidentiality, investigative ability (getting to the heart of the matter), creativity and tactfulness." Bollard & Wooler, *supra* note 15, at 708.

<sup>97</sup> Resource Management Act § 268(1) (use of external mediator). Note that the two largest networks of private mediators in New Zealand are: 1) Leading Experts in Alternative Dispute Resolution (LEADR), and 2) Arbitrators and Mediators Institute of New Zealand (AMINZ). For more information, see their respective websites: [http://www.leadr.co.nz/db/index.php?option=com\\_content&task=view&id=17&Itemid=31](http://www.leadr.co.nz/db/index.php?option=com_content&task=view&id=17&Itemid=31) (last visited Jan. 28, 2007), and <http://www.aminz.org.nz/about.html> (last visited Jan. 28, 2007).

mediators are rarely employed because commissioners are free and often viewed as fully neutral and more expert in the RMA.<sup>98</sup>

The paths by which cases come to mediation are similar across the country. In practice, once an appeal is lodged in the court, a judge considers the file through ordinary case management procedures<sup>99</sup> and determines whether the matter is appropriate for mediation.<sup>100</sup> If mediation is deemed suitable, a mediation case manager will contact the parties to discuss the mediation option.<sup>101</sup> The parties may also request a commissioner as mediator on their own or a judge may later recommend mediation during a judicial settlement conference.<sup>102</sup> The court also charges parties with an ongoing responsibility to consider whether the use of ADR is appropriate to resolving their matter.<sup>103</sup>

In proposing the mediation option to the parties, a judge or member of the registry will describe mediation or provide information about the process. If all parties agree to mediate, the first (and perhaps only) mediation meeting will be arranged by registry staff, typically within the first two months following an appeal and according to a commissioner's time availability. While awaiting mediation, the parties can place their case on hold or can continue to prepare for a hearing, either by choice or by direction of a judge.<sup>104</sup> Mediations can occur in the hearing rooms of the three court registries or in other locations.<sup>105</sup> A *Court Practice Note* offers detailed information on the process, as does a guide written by the Ministry for the Environment.<sup>106</sup>

As described in the *Practice Note*, a mediation protocol applies when a commissioner serves as mediator.<sup>107</sup> Parties are bound by this protocol, but it is flexible, as mediators can conduct mediation in any manner deemed appropriate having regard to the circumstances of the dispute and the wishes of the parties and presiding judge.<sup>108</sup> Parties are expected to

---

<sup>98</sup> These three factors were among the most significant advantages interviewees raised when discussing the reasons for maintaining a court annexed service as opposed to outsourcing mediation to private providers.

<sup>99</sup> There are three case management tracks: 1) standard—which include most appeals on resource consents and where the court will typically issue standard directions to the parties with an emphasis on avoiding unnecessary court appearances and a hearing within six months of commencement, 2) complex—which include most statutory plan appeals and where the presiding judge will manage the case on an individual basis, and 3) parties' hold—where parties are not actively seeking a hearing in order to, for example, negotiate or mediate. Practice Note, *supra* note 7, § 2.2, available at <http://www.justice.govt.nz/environment/consolidated-practice-note/chapter-2.html>.

<sup>100</sup> Bollard & Wooler, *supra* note 15, at 711.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Practice Note, *supra* note 7, § 3.1.7.

<sup>104</sup> *Id.* § 3.1.10.

<sup>105</sup> Bollard & Wooler, *supra* note 15, at 709.

<sup>106</sup> Practice Note, *supra* note 7, § 3.2; MINISTRY FOR THE ENV'T, YOU, MEDIATION, AND THE ENVIRONMENT COURT 15–21 (June 2006), available at <http://www.mfe.govt.nz/publications/rma/everyday/court-mediation-jun06/court-mediation-jun06.pdf>.

<sup>107</sup> Practice Note, *supra* note 7, § 3.2.1.2

<sup>108</sup> *Id.* § 3.2.6.1.

cooperate in “good faith” with the mediator and with each other to attempt to settle their dispute and to provide access to documents, information, and other assistance requested by the mediator.<sup>109</sup> Because these services are free, the commissioner will manage the mediation on a tight timetable with the aim to conclude the mediation in one session or, barring exceptional circumstances, no more than three sessions.<sup>110</sup> Significantly, commissioners will generally not assess matters in dispute (whether legal, factual, of expert opinion, or possible outcomes); however, the parties and the mediator can agree to depart from this aspect of the protocol.<sup>111</sup>

One of the more unique and important characteristics of the court’s mediation model is the process by which parties document their agreement and render it legally enforceable. Recall that in most cases filed in the court, private parties have appealed the decision of a council on a plan or policy or a decision to grant or deny an application for resource consent. Once a council’s decision has been appealed, the court is the only authority who can modify or annul that decision. Thus, any agreement the parties (including the council) make in mediation to modify a council’s first decision must be submitted to the judge as a *draft* consent order for *final* approval.<sup>112</sup> In rendering a final decision, the judge’s task is to ensure the agreement falls within the scope of the original appeal and is legal.<sup>113</sup> This is the principal way judges ensure mediated settlements serve the purpose of the RMA in “sustainable management.”<sup>114</sup> Where an agreement has significant public law elements, a judge can publish a declaration to compliment the final order to describe how the parties resolved their case and why the decision is significant.<sup>115</sup>

The procedures of the Environment Court discussed above play an important role in protecting the public interest under the RMA. In interviews

---

<sup>109</sup> *Id.* § 3.2.6.3.

<sup>110</sup> *Id.* § 3.2.3.3.

<sup>111</sup> *Id.* § 3.2.6.8.

<sup>112</sup> Bollard & Wooler, *supra* note 15, at 713–14.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (noting that when approving a consent order, the judge “requires to be satisfied that it is within its jurisdiction and in keeping with the Act’s purpose”); *see also* Rive, *supra* note 15, at 216 (quoting D. Sheppard, Principal Environment Court Judge, stating, “settlements of the outcome of mediation frequently need to be put to the Court for endorsement and in considering disposition of cases, the Court will be alert to particular aspects of the public interest that may transcend the interests of the parties to the mediation process”).

<sup>115</sup> In speaking of a judge’s power under RMA section 310(a) to make declarations on mediated agreements, one judge interviewee stressed,

[t]here are sometimes occasions . . . in which a result will be produced from a particularly important dispute that has significant public law elements in it, where I won’t just sign a consent order that is disseminated to the parties and no further, but will actually go to the lengths . . . [to] record that the result that is attached as an annex was produced from negotiation/mediation, but that it provides some answers on an environmental dispute that are of some importance, and so it will then be issued under seal as effectively as a decision of the Court approving the settlement, and will reach Brokers and the other legal publishers and go to the media.

*See supra* note 14..

with dispute-resolution professionals, numerous comments were made about the need to protect the public interest in confidential mediations and the unique capacity of the commissioner to do so. These comments are explored in greater detail in the following public interest analysis.

### III. THE COURT MEDIATOR & THE PUBLIC INTEREST

The preceding information provided an overview of New Zealand's approach to environmental decision making and dispute resolution. In New Zealand, like anywhere else in the world, environmental decisions and the disputes that follow are of huge public significance, so it is important to look closely at how the public is protected by various dispute-resolution options.

We can assume that open hearings before a publicly accountable judge are likely to protect or advance the public interest in fair, effective, and legal decision-making. But, do confidential agreements made by self-interested parties in mediation also protect or advance the public interest? This and related questions have been of long-term concern in environmental mediation scholarship<sup>116</sup> and were also of interest to several interviewees. Under the Environment Court's mediation model, the answer is *yes*.

The following analysis discusses how the commissioner protects and advances the public interest during Environment Court mediations. Discussion is divided into three sections: section A defines the public interest and raises concerns over the limits of mediation to protect it; section B evaluates three interventions that commissioners use in mediation to protect public law; and section C discusses the role commissioners can play to optimize the social, economic, and environmental effects of mediated agreements. It is important to emphasize that this analysis concerns the public interest in the *substantive* outcomes of mediated agreements; there are numerous *process* benefits common to court-annexed mediation programs that are also of public importance (e.g., perceived neutrality of the mediator),<sup>117</sup> but those benefits are not considered here.

---

<sup>116</sup> See, e.g., Rive, *supra* note 15, at 215–16 (citing J. Chart, *Resource Management Disputes: Part B Mediation* 16 (Ministry for the Environment RMLR Working Paper No. 22, 1988)) (containing an early discussion of public interest concerns in mediation with a focus on the fact that unrepresented interests are cut out of the negotiating process); BLACKFORD, *supra* note 5 (noting soon after the enactment of the RMA that research was required on whether the mediator should be required to represent the interests of third parties). For a historical debate in the United States on the role of the mediator in protecting the public interest, see Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 47 (1981) (arguing that mediators have an obligation beyond that of neutral third party and should be accountable to the community at large); Joseph Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 86 (1981) (rebutting professor Susskind's argument as "conceptually and pragmatically incompatible with the goals and purpose of mediation").

<sup>117</sup> See, e.g., Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 747–49 (1999) (providing a review of the five common ways to structure a court-connected mediation program and analysis of the many benefits that arise where publicly-funded court staff serve as mediators such as the perceived neutrality of the court-mediator and the dignity of the court

*A. The Public Interest and the Limits of Mediation*

To understand how the commissioner protects and advances the public interest during mediation, it is critical to first understand what is meant by the vague and elusive term “the public interest.” Under the RMA, the public interest lies in any decision or agreement that serves the purpose of the act—sustainable management—which, at a minimum, is one of several options a judge would determine is legal. However, there is also a second dimension to a public interest agreement made under the RMA, which serves the utilitarian purpose of maximizing social, economic, and environmental benefits for present and future generations—the end goal of sustainability.<sup>118</sup>

The Environment Court is a lightning rod for public interest disputes. The court is the final authority for determining whether the environmental decisions of national, regional, and district authorities constitute “sustainable management,” which is perhaps the most pressing and contentious issue of our time. Each day, the court renders decisions to advance the public interest that range from how to meet the nation’s rising energy demand to how to meet historical commitments to indigenous populations. Increasingly, mediation is being used to resolve these types of significant disputes, as well as in smaller cases with environmental effects that are significant in the aggregate. There are, therefore, many decisions of public importance that are made in Environment Court mediations.

There is a considerable amount of scepticism about whether the public interest can be protected during environmental mediations that occur in the Environment Court or elsewhere.<sup>119</sup> These concerns would take another article to fully canvass, but at base, the concerns fall into two camps: some stem from the loss of judicial oversight over the process, while others relate to the self-centered lens through which parties often view settlement decisions.

*1. Loss of Judicial Oversight*

On the issue of judicial oversight, one pressing concern is that, unlike a judge-led hearing, mediations are private, and the conversations and decisions made in them are shielded from public view and scrutiny.<sup>120</sup> Environment Court mediations are not required by law to be private, but they are in

---

setting); Rack, *supra* note 10, at 610–12 (providing an analysis of benefits of a court mediation program with a focus on mediator quality through training, supervision, and evaluation).

<sup>118</sup> As murky as this two-part definition is, the definitional quagmire thickens when we recognize that the public interest is nothing more than an abstraction of what we, as individuals, believe is right or wrong in any one situation. The public interest is therefore indefinable and a matter of ongoing debate driven by the complex and impossible challenge of pinning down how individuals, groups, or larger communities in our society perceive and experience the benefits and consequences of an environmental decision today, tomorrow, and in five hundred years. Given the complex and interwoven tradeoffs made in any significant environmental agreement or decision, it is more sensible to view the public interest decision or agreement as one of a range of possible outcomes that serves the public better than the others.

<sup>119</sup> See, e.g., Zeinemann, *supra* note 13, at 52 (listing several criticisms of mediation).

<sup>120</sup> *Id.* (noting that one criticism of mediation is that it is a forum where private parties can hide from public view disputes that have public implications).

practice, and such confidentiality is very significant for some parties.<sup>121</sup> But when parties broker their own deal in private, a judge no longer plays a central role to ensure that the decision advances the public interest.<sup>122</sup> In some instances, a private settlement will also deprive a judge of ruling on important matters that would benefit from a judicial precedent,<sup>123</sup> particularly those instances where judicial leadership is needed to stimulate administrative reform,<sup>124</sup> or where law is comparatively young and evolving, which is the case with the RMA.<sup>125</sup>

In the Environment Court, concerns over the loss of judicial oversight over mediated decisions are tempered in part by the fact that a large number of mediated decisions need to be submitted to a judge for final approval. But a judge, who has a duty to look out for third parties and the public interest when finalizing a mediated consent order, cannot easily do that when the judge has not heard the dispute and relevant evidence.<sup>126</sup>

When discussing a judge's role in finalizing mediated agreements, one judge stressed they are not to be regarded as "rubber stamps for results," and another pointed to instances where judges had rejected consent orders on public interest grounds. Nonetheless, they also noted that their ability to scrutinize these agreements was constrained, so they relied on the parties and on commissioners to put forward legally palatable agreements.<sup>127</sup> Some out-of-

<sup>121</sup> Bollard & Wooler, *supra* note 15, at 713.

<sup>122</sup> Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (taking issue with the virtues of settling legal disputes).

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. . . . [A Judge's] job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts.

*Id.*; see also BOULLE ET AL., *supra* note 8, at 59 (noting a court "balances competing values and authoritatively resolves important issues of policy . . . [and] acts as a standard for future community behaviour and a precedent for the resolution of subsequent disputes of a similar nature").

<sup>123</sup> BOULLE ET AL., *supra* note 8, at 59–60.

<sup>124</sup> Zeinemann, *supra* note 13, at 52 (noting that mediation may deter large-scale structural changes in political and societal institutions that can only be corrected through a judicial decision).

<sup>125</sup> Although the RMA is a comparatively young statute, the fact that mediated agreements may deprive a judge from contributing to evolving case law or setting precedents on matters of public interest was not a vital concern of any judge interviewee. One judge stressed, "there are always going to be that hard core body of disputes that are going to go to hearing and that are going to be the subject of decisions issued by panels of the court or divisions of the court. Jurisprudence isn't going to die." See *supra* note 14. Another judge pointed to a recent resource management treatise with a girth that suggested judge made law was alive and thriving. *Id.*

<sup>126</sup> Mitcalfe, *supra* note 15, at 217 (citing comments by Peter Skelton, retired Environment Court judge).

<sup>127</sup> In discussing the difficulty of determining whether mediated agreements comport with law without having heard the case, one judge noted, "one of the advantages of the court-annexed mediation system is that one would expect that the mediator would be able to give a steer if you like . . . as to what would be reasonable to put forward to a judge for approval in the context of a consent order as conforming to the [act]." See *supra* note 14. Another judge also professed reliance on the commissioners when reviewing draft consent orders and noted, "we

court interviewees believed that a judge's review of consent orders was particularly shallow,<sup>128</sup> and some authors believe review is limited to a determination of whether the proposed order relates to matters raised on appeal and not whether it meets the purpose of the RMA.<sup>129</sup>

A related issue is that some mediated agreements are never presented to an Environment Court judge for consideration because the nature of the agreement (whether it be for the payment of money or otherwise) is a "side deal" that falls outside the power of the court to put into a consent order. Very often these deals play a pivotal role to allow parties to find common ground, but there is some distress over the fact that the court has no ability to police these deals for their environmental effects.<sup>130</sup>

## 2. *Self-Centered Negotiations*

A second group of concerns over whether the public interest is protected in environmental mediations is that outcomes in mediation are

---

can gain that greater degree of confidence knowing that the process has been facilitated by these [commissioners] who are steeped in resource management knowledge." *Id.*

<sup>128</sup> When discussing the self-empowering feeling of mediating in court, one out-of-court interviewee noted, "[y]ou get to make your own result and I know it's all supposed to be subject to Part II [of the Act] and I know that, yes, it has to go past an Environment Court Judge to sign off, but they always do unless there is some glaring [error]." *Id.* Another out-of-court interviewee took a similar view:

[i]n terms of matters that do have an amendment to consent and require a consent order, the Court generally doesn't interfere with the outcome. And they do that on the basis of saying if that is what the parties have agreed and that is what resolves the appeal in the entirety, then we are not going to second guess that, we'll sign off on that basis rather than looking at it and trying to [be] involved or second guess as to how they came to that or trying to determine the case without having heard any evidence. Bearing in mind that the Court at that stage has pretty limited information before it about the matter and so if it starts to interfere too much in consent orders, it really needs to start to hear evidence and to open it up again.

*Id.*

<sup>129</sup> QUINN & CORNOR, *supra* note 15, at 12.

<sup>130</sup> Some interviewees raised significant concerns about compromises put to the environment in mediated agreements, most likely referring largely to side deals made in mediation. For example, one interviewee stressed, "I've seen agreements and know of agreements that if you had gone to court you would have never got that in a zillion years because they are *ultra vires* or you are not getting good environmental outcomes." See *supra* note 14. Another interviewee raised a similar point about the loss of judicial oversight over these deals,

[o]ne of the challenges [with mediation], parties by their nature will always look at what's in it for them. . . . The moment you try to do a deal that relates to an amendment to a design or a deal that relates to someone doing something for someone else or paying money or whatever, it might be the deal for the purposes of getting rid of the case is not the best environmental outcome. You kind of know the deal has been struck, and it suits the parties, and it makes the appeal go away, but if the Court had looked at it and dealt with it, the outcome would have been very different because they would have been looking at it from a broader sense, with the public interest versus private interest.

*Id.*; see also Bollard & Wooler, *supra* note 15, at 714 (discussing the purpose and legitimacy of side deals in Environment Court mediations).



driven by the positions and interests of the parties in dispute, rather than the interests of the broader public. In mediation, there may be a tendency for disputants to “externalise” the cost of their decision so as to not affect them but other voices or third parties not present in the mediation, including other species and future generations.<sup>131</sup> Sometimes it is this ability to externalize the costs of a decision that enables parties to reach a compromise.<sup>132</sup> Similarly, some take the view that mediation tends to be pro-development,<sup>133</sup> and may exacerbate intergenerational inequalities, as the parties develop a solution on the basis of their immediate situation having regard only “to their own interests and not those of the future.”<sup>134</sup> Even when a compromise does not externalize costs, some argue mediation may undermine the interests of weaker parties,<sup>135</sup> particularly where the process or the outcome is erroneously promoted as being better than what could be achieved in court.<sup>136</sup>

---

<sup>131</sup> Zeinemann, *supra* note 13, at 57 (“An externality occurs when an agent making a decision does not bear all of the consequences of his or her action. . . . [or] whenever the welfare of some person depends directly on not only his or her activities, but also on activities under the control of some other person.”). “Externalities are common when natural resources are used.” *Id.* at 58. In a public hearing, most of these third parties (save future generations and other species) might participate as amicus parties, but in mediation, amicus proceedings are unheard of and inconsistent with a process that empowers parties to resolve the dispute between them and not the concerns of others.

<sup>132</sup> Zeinemann, *supra* note 13, at 58. Zeinemann argues that

[t]his shift may be the way the disputants resolved their differences—they created a win-win for each other by making losers of persons not represented in the negotiations for various reasons, such as lack of organization, awareness, physical proximity, money, time, and information. . . . Clearly, this shifting strategy is more effective when the third party is unaware of their extra burdens, or is powerless to prevent them. . . . [D]ecisions may be made that shift costs to the future.

*Id.*

<sup>133</sup> Mitcalfe, *supra* note 15, at 213–14.

Environmental mediation contains an inherent bias in favour of development as the dispute is portrayed as a clash between different, but equally valid, interests. Compromise between the two becomes the logical solution to the problem. . . . A compromise between the parties is closer to filling the goals of the developer than the goals of the submitter.

*Id.*

<sup>134</sup> *Id.* at 216.

<sup>135</sup> Zeinemann, *supra* note 13, at 52–53. Cooption of weak groups by the powerful

might occur when mediation is used by powerful groups to give weaker groups a false sense of participation in decisions. Groups can do this by skillfully limiting the perceived range of choices to those most beneficial for the powerful group. The problem is that the powerful group can legitimize the decisions made in mediation even though the powerful group could have made a unilateral decision without the weaker group.

*Id.*

<sup>136</sup> Hensler, *supra* note 10, at 195 (raising concerns that courts may push ADR too hard and that “judges and mediators are telling claimants that legal norms are antithetical to their interests, that vindicating their legal rights is antithetical to social harmony, that juries are capricious, that judges cannot be relied upon to apply the law properly, and that it is better to seek inner peace than social change”).

In Environment Court mediations, concerns over the ability of parties to externalize the costs of their mediated decision are moderated in part by the fact that certain parties are allowed to intervene in litigation and participate in mediation when they represent an interest greater than the public generally.<sup>137</sup> However, these parties cannot speak for the public interest, and even if they could, they lack the resources to intervene in every public interest case. Even representatives of regional or district councils, who are always a party in these mediations and who have a responsibility to ensure mediated agreements comport with law, may find their ability to do so compromised for various reasons.<sup>138</sup> Indeed, implicit in the court's authority to review council decisions is an assumption by the legislature that councils will not always act in accordance with the law, whether intentionally or unintentionally.

The loss of judicial oversight over mediated processes and the potential for parties to externalize the effects of their decisions are significant and complex concerns, but there are also valuable counter-points that alleviate these concerns. Exploring these concerns and responses in more detail is well beyond the scope of this Article and perhaps more germane to a larger debate about the relative merits of mediation versus adjudication to resolve environmental disputes.

This Article is written with the assumption that mediation will continue to increase in prominence in court settings, including the Environment Court. It therefore focuses attention on the benefits of using a public agent like the commissioner (with facilitation skills, experience in adjudication, and subject-matter expertise) to serve as mediator and to protect the public interest during the process. Readers will come to see how the court's mediation model mitigates many of the concerns raised above.

### *3. Commissioner Loyalties to the Parties and to the Public*

The contemporary view in New Zealand is that Environment Court Commissioners play a central role in protecting the public interest during

---

<sup>137</sup> Resource Management Act 1991, § 274, 1991 S.N.Z. No. 69 (special interest parties).

<sup>138</sup> Some interviewees questioned a council's ability to zealously advocate for the public interest, and at least one raised concerns that a council may deliberately attempt to thwart the law. *See supra* note 14. The ability of council representatives to advocate for the public interest may be compromised for at least three reasons: 1) it may face a multi-party appeal of its decision (particularly in the planning context) and may wish to accept one party's settlement proposal to eliminate one of several appeals taxing council resources, even where such a settlement may not necessarily be in the public interest; 2) some council decision makers are elected by the public, so they can speak for majority interests of today, but those interests can be in conflict with minority interests or the interests of future generations; and 3) some council members may place undue trust in the information provided by an applicant for resource consent because they lack the resources to procure the information from an independent source. On this later point, one out-of-court interviewee noted, "[t]o a large extent they rely on the information put before them by the party, they have their own advisors, but some councils are really poorly resourced. Some districts can't afford things like dog licenses. How can we expect them to implement some of the more far reaching aspects of the RMA?" *Id.*

mediations.<sup>139</sup> These commissioners have two loyalties: one to the parties to help them attempt a resolution of their dispute, and one to the public to do their best to ensure that mediated settlements comport with public law and interest.<sup>140</sup> Any self-respecting private mediator would attest to the same loyalties, but for the commissioner, the public loyalty is statutorily derived, so their interest in looking out for the public takes on an aura of great significance that may not be found in private practice.<sup>141</sup>

One commissioner distinguished the public loyalty of commissioners from that of private mediators as follows:

[A]t the end of the day, they don't actually care, an external mediator, they have no reason to care apart from . . . fairness and justice . . . . [W]hether or not the solution that the parties might come up with, whether or not it gives effect to what is called Section 5 of the Act, which is what I call our Grandmother. I think the difference is with the . . . Court commissioners, Granny is not for sale! We actually, at the end of the day, do have a responsibility to direct or to ensure that the parties have turned their minds to whether or not their solution is in accordance with Part II and in particular Section 5 of the Act.<sup>142</sup>

Granny, of course, represents the public interest, something that commissioners apparently hold near and dear. Recall that section 5 (Granny) is the lynchpin of the entire act and is to be read with other provisions of part II (including sections 6, 7, and 8). Collectively, these provisions constitute the legislature's criteria to be considered in reaching a decision that protects the public interest in "sustainable management."

Now, recall the two-part definition of the public interest<sup>143</sup>—the legal agreement under the RMA and the utilitarian agreement that optimises social, economic, and environmental effects. The following two sections describe how the commissioner's work contributes to both dimensions of the public interest by a) ensuring that parties will honour public law in their mediated decisions, and b) helping parties to reach more optimal decisions through mediation.

---

<sup>139</sup> This view was supported by several interviewees and is also professed in the literature. See, e.g., BOULLE ET AL., *supra* note 8, at 236 (noting that some commentators believe that "mediators [operating under the RMA] have a responsibility towards the public interest and future users of the planet's resources. These responsibilities undermine the process/content distinction and the notion of mediator neutrality."); Mitcalfe, *supra* note 15, at 198 (noting "the [environmental] mediator should question agreements that are not in the interests of the public or unrepresented parties").

<sup>140</sup> Mitcalfe, *supra* note 15, at 219 ("Where an Environment Court Commissioner conducts a mediation, there are two sets of obligations, one to the Court and the other to the parties. It is the Commissioner's role to ensure that the RMA is satisfied, while allowing the parties to develop the best outcome to meet their interests.").

<sup>141</sup> *Id.* at 198.

<sup>142</sup> See *supra* note 14.

<sup>143</sup> See *supra* note 118 and accompanying text.

*B. The First Dimension of the Public Interest—Mediator As Guardian of Public Law*

There are at least three reasons why commissioners are well positioned to help parties conform mediated agreements to public law. First, commissioners are knowledgeable about the law because they have experience applying the law as adjudicators for the court.<sup>144</sup> Second, by facilitating negotiations, commissioners are made more aware of relevant issues that have a bearing on the legality of an agreement, including: the history of the dispute, potential settlement options, tradeoffs made, and some concerns of third parties. Third, many parties expect commissioners to use their knowledge to play a more active role to provide guidance as to whether certain claims would have force in the court or whether an agreement is legal.<sup>145</sup> Some disputants may elect a commissioner to mediate over a private mediator precisely because they trust the commissioner would intervene to protect the parties and the law.<sup>146</sup>

In interviews with dispute-resolution professionals, people raised three general forms of interventions or strategies that commissioners can and do use to ensure mediated agreements satisfy the law. These include: 1) pressing parties on how their agreements comply with key provisions in the RMA, 2) sharing limited legal advice and offering robust reality testing on what one should expect to achieve in the court, and 3) arranging a pre-

---

<sup>144</sup> This contention was supported by many interviewees and also in the literature. *See, e.g.,* Mitcalfe, *supra* note 15, at 218 (“Commissioners also have significant experience and skill where a member of the Court conducts the mediation . . . the risk that the outcome will be contrary to the RMA is reduced.”).

<sup>145</sup> QUINN & CORNOR, *supra* note 15, at 14.

[M]ediation (especially statutory mediation) will be conducted “in the shadow of the law.” The parties will naturally look to the mediator, in his or her capacity as an Environment Commissioner, to provide some insight in this regard. This is particularly so where the matters in dispute turn upon the respective rights of parties under the RMA. In such circumstances, it is arguably unrealistic to expect interest-based mediation to proceed in a law free vacuum.

*Id.*

<sup>146</sup> On this note, one interviewee argued, “The mediator is the guardian of the environment . . . . The mediator should always test [an agreement] back against what is the purpose of the Act that we are carrying out this mediation under and does the resolution we are heading towards actually conform with the goals of that legislation.” *See supra* note 14; *see also* Brazil, *supra* note 117, at 765–66.

Because I suspect that most people feel that the courts should be responsible for assuring the fairness of what happens in judicial proceedings, I believe that parties are more likely to expect a neutral who is a court employee (than a neutral who works primarily in the private sector) to be sure that every party has all the information it needs and that the information the parties have at least about the law is accurate; to assure that a stronger party does not take unfair advantage of a weaker party; and not to permit the parties to execute an agreement that is unenforceable, unlawful, or substantially out of line with the real settlement value of the case.

*Id.*

hearing meeting with the presiding judge to resolve a legal question and to help parties overcome a negotiating impasse.

The following commentary describes these interventions in more detail and the strengths and limitations of each one. The discussion also highlights the benefits of using a court mediator such as the commissioner (experienced in facilitation, adjudication and the subject matter in dispute) to employ these interventions to protect public law, instead of relying on private mediators.

### *1. Pressing Parties on How an Agreement Satisfies Key Provisions of the RMA*

The commissioners' first and most common public law intervention is to press the parties as to whether their mediated agreement satisfies overarching provisions of the RMA and to lend force to that charge by pointing to the presiding judge's ultimate review of their agreement. This intervention may be used at any point in discussion and might sound something like this:

As mediator, I cannot tell you what sustainable management means in this case. What I can say is that you must develop an agreement that achieves that goal by turning your mind to the part of the statute and related case law that concerns this area of dispute and, more broadly, Part II of the Act. The presiding judge, who retains final authority to approve, deny, or modify your draft agreement, will review your agreement against the same legal provisions just raised.<sup>147</sup>

This form of public law intervention is relatively safe for a mediator to employ because he or she does not direct a particular outcome or unduly constrain the range of outcomes parties may consider. Rather, the mediator simply asks parties in an open-ended way to think seriously about whether their agreement aligns with the statute, a practice that raises no legal or ethical objections. In the Environment Court, this intervention may even become standard practice for all commissioners to follow in mediation because the court may soon require parties to certify their agreement complies with law (specifically part II of the act) before a judge will consider it for final approval.<sup>148</sup>

Unfortunately, there is one practical difficulty with this intervention, as it can be very difficult for parties to determine whether an agreement satisfies the law. This is a significant issue in the Environment Court because part II of the act—the key legal provision parties must consider—is vague and conflicting, requiring parties, particularly lay parties, to consider this legislation and to certify that their agreement complies with it is no small task.<sup>149</sup>

---

<sup>147</sup> See *supra* note 14.

<sup>148</sup> See QUINN & CORNOR, *supra* note 15, at 11–12 (discussing the shortcomings of the Environment Court mediations, particularly that there is no requirement that consent orders be given, a requirement that ensures compliance with part II of the RMA).

<sup>149</sup> One out-of-court interviewee stressed, “[r]esource management law is some of the most

A significant challenge for parties is that section 5 of part II—which describes “sustainable management”—does not stand alone, but must be interpreted in relation to other key provisions in part II (sections 6, 7, and 8). Collectively, these provisions require balancing numerous, and sometimes conflicting, criteria to arrive at a “sustainable management” decision, such as protecting indigenous vegetation,<sup>150</sup> ensuring the efficient use and development of natural resources,<sup>151</sup> and meeting commitments to indigenous people.<sup>152</sup> One out-of-court interviewee argued that balancing these factors is a very difficult task for parties with a self-interested lens,<sup>153</sup> and implicit in this point is that this task is perhaps best left to a judge to exercise a normative decision. Complicating the matter, at least one judge interviewee stressed that balancing these factors is impossible because they point to different and conflicting values that cannot easily be weighed against one other.<sup>154</sup>

Nonetheless, in my view, when the commissioner intervenes and presses the parties to consider whether their agreement satisfies part II of the act, the public interest is served, at least partially. For many, the intervention compels parties to step out of their self-interest skin and to think more deliberately about the public interest implications of their agreement. This is particularly so when the charge to consider the public law is coming from a commissioner, an officer of the court, whom the parties recognize has clear responsibilities to protect the public interest. One commissioner interviewee stressed:

---

inaccessible law ever promulgated by Parliament and the courts of this country. Lay participants are at a significant disadvantage to identify substantive issues and advance relevant arguments. The challenges with interpreting section 5 and relating evidence to it are significant.” Higgs, *supra* note 14.

<sup>150</sup> Resource Management Act of 1991, § 6(c), 1991 S.N.Z. No. 69.

<sup>151</sup> *Id.* § 7(b).

<sup>152</sup> *Id.* § 8.

<sup>153</sup> See *supra* note 14. One out-of-court interviewee remarked on the potential requirement for parties to certify their agreement comports with part II of the Act and stated:

[t]hat in itself poses some real logistical, real difficulties, because as legal council, you are advocating a position on behalf of your client, and the section under Part 2 is a balancing act of a whole lot of considerations that the Act has set up. [It's a] kind of pretty difficult or unreasonable expectation that the lawyers are saying we certify this is consistent with Part II.

*Id.*

<sup>154</sup> This judge noted:

[A] lot of [judicial] decisions talk about balancing and I've gotten away from that because you can't weigh a Maori cultural issue against a rare bird or against a view. They are not comparable values, they are different values; nevertheless, they have to be integrated into a decision. . . . If you look at Court decisions, you will see there are different empathies on different values; some are seen as more important by one person or another. The reality is that represents no more than human experience, but they have to be integrated into a decision that says: “yes” or “no.”

*Id.*

[W]e are not free-wheeling, independent, unbridled mediators. We are constrained and we have particular responsibilities which external mediators cannot have . . . I think [that] makes a significant difference to how we prepare and I believe [it] makes a difference to the positions that the parties are in by the time they come to us.<sup>155</sup>

The position or mindset of parties coming before a commissioner in mediation is very often one of sincerity and seriousness akin to presenting oneself in court, which one may not always find with a mediator outside the court.

## *2. Legal Advice and Robust Reality Testing*

A second public interest intervention is one where the mediator actively assists the parties, sometimes through advice, to determine the legality or strength of a party's position or agreement. This intervention is less common than the first, and may encompass a range of statements depending on the legal issue at hand, but may sound something like this benign example: "As mediator, I am not a legal advisor and I have no decision-making authority. What I can tell you is that in other cases that have considered the duty to protect wetlands of significance, such wetlands have been determined to be over five hectares in area."<sup>156</sup> The mediator, in progressing this intervention, may also offer other forms of advice or opinion such as: 1) whether provisions in the parties agreement are within the jurisdiction of the court to consider and enforce,<sup>157</sup> 2) whether there is extensive case law on a matter or whether case law is limited,<sup>158</sup> and 3) whether a party's arguments would have any force in court.<sup>159</sup>

Parties are very often hungry for the advice-based public law interventions. In many instances, they come to mediation not only to settle a dispute, but to gain a steer or "reality test" for what to expect in the court. The chance to play out arguments, to test the resolve of opponents, and to explore the legality of solutions—all in front of a commissioner who also acts as an adjudicator—is very attractive. Commissioner interviewees remarked that they were frequently barraged with attempts from parties to press them on

---

<sup>155</sup> *Id.*

<sup>156</sup> This hypothetical example was based on a comment from one out-of-court interviewee who gave the following illustration of what a commissioner might say in mediation to resolve a legal uncertainty: "Oh, I was with Judge Blah last week, I know they are possibly not allowed to do this, but we did do a case the other day . . . where wetlands over five hectares were regarded as significant natural resources. . . . That sometimes does and sometimes doesn't happen." *Id.*

<sup>157</sup> This intervention could be simply pointing out that certain decisions made in mediation were not germane to concerns raised in the initial appeal and should be the subject of a side agreement instead of a draft consent order to the court.

<sup>158</sup> This intervention could take several forms including a subtle comment from the commissioner stating that a judge would be interested in hearing a matter.

<sup>159</sup> On this point, one out-of-court interviewee noted that a commissioner will sometimes take parties into a private session and say, "[L]ook, this is absolute rubbish. No chance. You are really pushing things up hill here. If you take this to the court, you'll get laughed at. How about you go back in and start focusing on the points that really matter?" *Id.*

legal points, to explore how the court would rule in a matter,<sup>160</sup> and many out-of-court interviewees felt that the best commissioners play an active advice-giving role.<sup>161</sup>

These forms of intervention may help parties conform their agreement to the law, but they are controversial because, in general, mediators do not offer any legal advice to parties beyond the mediator mantra, “Have you consulted a lawyer?”<sup>162</sup> Parties who receive uninvited and negative views from a mediator on the validity of their claim or how it should be resolved, particularly if that view is shared in open session, will find their position undercut. Worse, the mediator’s opinion may be wrong. This may occur where the commissioner is inexperienced, where a matter in question is novel, or where the opinion is based on practice in another jurisdiction.<sup>163</sup> In the Environment Court, commissioner opinions carry a greater weight than a private mediator, so an erroneous opinion may cut the heart out of a party’s claim and expose them as prey in a process that is supposed to be empowering.

Another significant concern is that commissioners who feel free to offer legal advice on one matter may find themselves on the proverbial slippery slope—offering one opinion after another on a range of matters best left to the parties. Some of these opinions may cross the line from simply pointing to relevant case law on a matter to professing a general opinion as to what the “public interest” or “sustainable management” is in any one case. There is no single “public interest” or “sustainable management” agreement,<sup>164</sup> so mediators who are overly directive in that regard will supplant their personal view for the parties’ views and the parties’ views may well be legitimate. Moreover, given the diverse make-up of commissioners and their vast geographic distribution, personal views on complex topics like the “public interest” and “sustainable management” will differ considerably,<sup>165</sup> so parties subjected to these views will experience unequal pressures from different

---

<sup>160</sup> One commissioner stressed, “[b]ecause you are an Environment Court commissioner, I am always having people say to me: ‘Well what do you think?’ And I have to turn it back to them all the time. Because they are getting us they think they are getting just a bit more than an ordinary mediator, and you can understand that can’t you?” *Id.* Another commissioner raised a similar point, “I have to say: ‘well I’m only facilitating,’ because [the parties] still think you are making a decision. You have to say all the time: ‘I’m not making a decision.’” *Id.*

<sup>161</sup> One out-of-court interviewee remarked, “I do like the quite hands-on mediators. I know there’s all that stuff about ‘Oh, it’s you who makes the decision, and I’m not going to intervene,’ and all that. But the best ones do, the best ones do.” *Id.*

<sup>162</sup> It is standard mediation practice that mediators do not offer parties legal advice. For a mediator ethics opinion on this subject, see, for example, Fla. Mediator Ethics Advisory Comm., *Improper for a Mediator to Provide Legal Advice Even If Framed As a Question*, available at <http://www.mediate.com/articles/floridaopinions3.cfm>.

<sup>163</sup> Many commissioners mediate in jurisdictions other than their own, and court decisions in one jurisdiction are not binding in others. Hence, a commissioner may understand the law in his or her region, but the law in another area may be different. In practice, this is an unlikely event because the judges endeavor to ensure opinions are consistent with one another.

<sup>164</sup> See *supra* notes 116–17 and accompanying text.

<sup>165</sup> One commissioner interviewee noted, “the commissioners of the Court, as you no doubt know by now, are a very diverse group. There is a very diverse range of backgrounds, experience, and personalities. And probably some of them are more and some are less well suited to particular mediation cases.” See *supra* note 14.



mediators in different regions. The problem may be exacerbated for those commissioners who are also experts in the subject matter in dispute as subject experts are at a particularly high risk for supplanting their views for those of the parties.<sup>166</sup>

Despite these concerns, this second form of intervention to protect public law may well be the most valuable intervention a mediator can use, provided it is exercised with restraint. In the case of commissioners, even though they are not hired as legal experts, they adjudicate RMA appeals for the court (some have for many years), so they are more knowledgeable about the law and trends in the law than the many parties that come to the court without lawyers, as well as some private attorneys and representatives from regional and district councils. Thus, the commissioner will often have a more educated view about whether a proposed agreement is legal than anyone else at the table.<sup>167</sup> Perhaps more significantly, commissioners are experts in certain environmental fields such as planning or engineering, and this expertise is sometimes a principle reason why they are asked to mediate. With their specialty background in the matter in dispute and the law, it is inevitable parties will look to the commissioner for an expert and legal opinion, and trust in that view because, as one interviewee remarked, “their pay doesn’t depend on an outcome,” so they lack incentives to force results or steer people wrong.<sup>168</sup>

From a judge’s perspective, the fact that commissioners can offer some limited advice to parties in mediation is considered highly valuable. As discussed earlier,<sup>169</sup> judges cannot fully review the legality of draft consent orders submitted for final approval because they have not heard evidence on the matter. Consequently, they take greater comfort when approving such orders knowing they were negotiated with the assistance of a commissioner because they trust commissioners to intervene or raise yellow flags when confronted with a legally questionable agreement.<sup>170</sup> One judge noted such

---

<sup>166</sup> BOULLE ET AL., *supra* note 8, at 87 (citing C. Nupen, *Mediation, in* DISPUTE RESOLUTION 39, 41 (P. Pretorius ed., 1993)).

<sup>167</sup> One commissioner commented when describing the court’s mediation model, “I think it’s wonderful! I think it’s the best [model] because we sit on cases so we are up to date with where the court is measuring the act . . . where New Zealand as a whole is going in environmental terms.” See *supra* note 14. One out-of-court interviewee provided a similar remark:

You’ve got a relatively small pool of expert mediators who mediate in a particular area, are very familiar with the legislation they are mediating under, and although its mediation and not strictly a legal process, you have to do it within the framework of the legislation to get good results. You have to be familiar with where that legislation is driving, and the commissioners are because they sit on hearings.

*Id.*

<sup>168</sup> *Id.*

<sup>169</sup> See *supra* note 20 and accompanying text.

<sup>170</sup> One judge interviewee stressed:

[M]y real worry and my only concern about [court annexed mediation] is the ongoing one: Does the environment suffer as a result of people making [private] agreements? And I guess you have to have a leap of faith in the system and trust that [because] the mediators that you know are very experienced and well-trained, [they] know the

interventions are likely to be done well due to commissioners' experiences on the court.<sup>171</sup>

In some mediations, the advice-based interventions are clearly of value, such as where unrepresented parties are struggling to find legally palatable options<sup>172</sup> or have erroneously relied on advice from an opponent's lawyer which in fact is contrary to law.<sup>173</sup> The commissioner, with an internal view of RMA jurisprudence, can keep the parties focused on generating legal

---

boundaries beyond which they won't take anything.

*See supra* note 14.

<sup>171</sup> One judge interviewee stressed:

I suggest these [mediators] of ours are a bit less likely to give a wrong steer during reality testing than a practitioner-mediator who is not steeped in court and in mediation. Having said that, the reality testing has to be done in a reasonably careful way because mediators have to keep faith[ful] to their promise not to impose a solution. But nevertheless, I'm sure there comes a time in mediations, as I've found in the limited number of judicial settlement conferences I've done, where the reality testing can sensibly become reasonably robust, reasonably direct, and the benefit of our knowledge of the area and what is attainable in the case can be made available to the parties.

*Id.* That same interviewee also stressed commissioners "bring their knowledge and skills to the task to achieve not only a settlement but also [to ensure that] the purpose of the act is served." *Id.*; *see also* Bollard & Wooler, *supra* note 15, at 714.

[T]he Court requires . . . that [a mediated agreement] is within its jurisdiction and in keeping with the Act's purpose. Instances where a proposed order is referred back to the parties for further consideration and perhaps resumption of mediation are nonetheless infrequent. With a Commissioner assisting as mediator, and with counsel frequently being involved (at least for the public authority), this hardly seems surprising.

*Id.*

<sup>172</sup> One judge interviewee stressed:

Often you get people that are looking very practically at trying to see what the options are for a sustainable outcome, and where you've got people who are unrepresented they find it of great assistance for a commissioner, someone who they trust from the court, just giving them a steer as to those options. . . . I suppose the skill that a commissioner has to develop is understanding how far they should go in a particular case in terms of indicating how the options stack up and what is realistic in terms of what the court might do were the thing to go to court.

*See supra* note 14. An out-of-court interviewee took a similar view:

[I]n my experience, the court-mediators, because they don't sit subsequently on the case if it doesn't settle at mediation . . . can give parties, particularly parties who don't have access to good legal advice or good expert advice, . . . a pretty strong steer about whether they've got a strong case, whether the issues they are raising are going to get them anywhere, [and] whether there in fact [is] jurisdiction [over] them.

*Id.*

<sup>173</sup> One out-of-court interviewee noted:

Quite often people don't have lawyers there or have lawyers that don't have an RMA practice. . . . If . . . [a] more authoritative lawyer . . . in terms of representing a bigger and more powerful party, wearing a suit, talks very knowingly about the law, it's really important that people are able to check that. I think that's the mediator's role.

*Id.*

settlement options, while also exercising that robust reality testing that so many parties desire. One commissioner likened these interventions to a “judgment call,” similar to what one would exercise in court, and noted:

[A] lot of our work is judgment, and obviously you’re guided in making your judgment by the act, but you are also guided by the values and mores of the society we live in. . . . In a mediation . . . you are sitting there and you’re monitoring the options that are being moved around the table . . . and looking for anything that might be considered, in your own judgment, to potentially compromise the purpose of the act.<sup>174</sup>

While unconventional, the advice-based public law interventions also appear to be permissible under the RMA. Nothing in the act defines mediation as purely facilitative or precludes a commissioner from giving legal advice in mediation, such as pointing the parties to pertinent case law. The statute simply refers to the practice of mediation as being one of several forms of “alternative dispute resolution” procedures, which presumably include procedures like early neutral evaluation and non-binding arbitration that position the neutral in a legal advice-giving role.<sup>175</sup> Under the RMA, commissioners are also allowed to apply legal expertise by serving as sole adjudicators or arbitrators,<sup>176</sup> so presumably they have sufficient authority to blend legal advice into the mediation process, provided parties are put on notice that this may occur. There are, of course, clear boundaries that need to be set on commissioners’ ability to offer advice on the law—boundaries that might include pointing parties to pertinent case law, but preclude telling parties how the presiding judge would see a matter. The advantage of a court-annexed service like that of the Environment Court (as opposed to outsourcing mediation to private providers) is that court administrators can build on their collective expertise to decide where to allow these interventions and can enforce those boundaries through training, evaluation, and employment.

### *3. Engaging a Judge for a Mini-Hearing*

The third public law intervention used by commissioners is a shared intervention, where the commissioner, with support from the parties, arranges a pre-hearing meeting with the presiding judge to resolve a legal question. The intervention may sound something like this:

As mediator, I have seen you reach an impasse over the correct interpretation of a point of law. I cannot interpret that provision for you, but the presiding

---

<sup>174</sup> *Id.*

<sup>175</sup> See Resource Management Act of 1991, § 268, 1991 S.N.Z. No. 69. Note that these processes are not used in the Court, but they can be helpful to parties. Brazil, *supra* note 85, at 116–17 (pointing to benefits of non-binding arbitration, particularly for parties who have an emotional need for something like their “day in court,” but who would benefit from telling their story to a neutral party who can provide an opinion that lacks finality).

<sup>176</sup> See Resource Management Act §§ 280, 356.

judge may be willing to offer a view to help break the impasse and enable continued negotiations. If you want, I can arrange a pre-hearing meeting with the judge to offer a binding opinion on the matter.<sup>177</sup>

Compared to the advice-based interventions, this intervention is relatively easy and non-controversial because it does not require a commissioner to give any inkling of legal advice about a point of law or the strength of a claim. Some commissioners take the view that they have no authority to give such advice in mediation,<sup>178</sup> so this intervention may be of particular value where parties solicit advice but the commissioner is reluctant to accede. Even if there is some allowance for commissioners to provide legal advice (which there most likely is), this third form of intervention is valuable in those instances where advice would be inappropriate, such as where there is limited jurisprudence on a matter or where the commissioner is inexperienced on the court. For the judges' part, these determinations are not normally lengthy and, as one judge interviewee stated, "you can usually fit it around the edges [of] your normal judging day."<sup>179</sup>

One difficulty with this intervention is logistical: parties who reach a legal stumbling block in mediation will often want to overcome it in a short period of time, but a judge may not always be immediately available to assist. Moreover, sometimes parties mediate in different regions than where a judge sits, rendering use of the mini-hearing impractical.

Nonetheless, where possible, this intervention is a valid tool to ensure that public law is upheld in court-mediated processes. In essence, it is a hybrid form of the first and second interventions. Like the first, the mediator offers no advice or opinion on a point of law or the legality of an agreement. Like the second, an opinion is made, but it is an opinion of a judge and not a commissioner. This intervention is also easier for commissioners to employ when compared to a private mediator because commissioners have close working relationships with judges and registry staff and can more easily engage a judge in the process and manage the logistics of mini-hearings.

In conclusion, commissioners employ the three interventions described above to ensure mediated agreements meet the first definition of the public interest—that they be legal. The ability of commissioners to use these interventions to protect public law helps to mitigate some of the concerns over the loss of judicial oversight over mediated processes and the potential for parties to forge agreements that meet their own interests while externalizing the negative effects experienced by others.

On a related point, the court's mediation model also helps to address a more basic tension or question underlying any court-annexed mediation service, which is: Should courts even be in the business of helping parties settle their disputes?<sup>180</sup> This question reflects deeper issues over who

---

<sup>177</sup> See *supra* note 14.

<sup>178</sup> *Id.* (noting that, for commissioners, giving advice "is not our place").

<sup>179</sup> *Id.*

<sup>180</sup> See Simon Roberts, *Alternative Dispute Resolution and Civil Justice: An Unresolved*

actually owns a dispute once it is filed in court. Do parties retain an overriding ownership interest and therefore should they be encouraged to settle a case by their own choices? Or, does the public take an ownership interest, and therefore should the dispute be put to a judge to ensure law is properly applied and to develop public norms in the process? Most likely, the court's mediation approach diffuses some of the tension in these questions. In these mediations, commissioners help parties retain ownership over the final disposition of their disputes, but, by virtue of their experience on the court, commissioners also provide important oversight over settlement discussions to ensure public law is protected.

The next section of the public interest analysis concerns the second and more elusive definition of the public interest agreement—an agreement that serves the utilitarian purpose to maximize social, economic, and environmental benefits for present and future generations. The argument follows that the commissioner plays a pivotal role in enabling such agreements.

### *C. The Second Dimension of the Public Interest—Mediator As Optimizer of Agreements*

Standing alone or in the aggregate, many decisions on how to resolve a sustainability dispute have significant effects that are interlinked and that can be irreversible.<sup>181</sup> Consequently, there is a pressing need to optimize the social, economic, and environmental effects of environmental and natural resource management decisions.

Unfortunately, private parties left to their own negotiations will often not reach a decision that serves their interests or those of the public. Instead, many settlement decisions simply reflect one side or another giving up its causes or concerns, or trading them for some compensation that may not fully satisfy or vindicate its interests.<sup>182</sup>

---

*Relationship*, 56 MOD. L. REV. 452, 462 (1993) (taking issue with court-sponsored settlements and noting, "It must be doubted whether uncoerced negotiations are possible at all under the supervision of court personnel").

<sup>181</sup> For example, during the author's time in New Zealand, the court was considering whether to authorize a massive wind farm outside his home. If approved, the decision would permanently impact the landscape and ecology, the nation's energy supply and demand, population growth, future investments in infrastructure and business, and global effects on greenhouse gases and demand for renewable energy technology.

<sup>182</sup> LAWRENCE SUSSKIND ET AL., NEGOTIATING ENVIRONMENTAL AGREEMENTS: HOW TO AVOID ESCALATING CONFRONTATION, NEEDLESS COSTS, AND UNNECESSARY LITIGATION 1 (2000). In environmental negotiations,

The agreements reached often fall short . . . of addressing the underlying concerns that brought the parties together in the first place. Most represent little more than one side or the other "giving up," at least temporarily. Thus, even when regulatory, legal, and policy disputes are settled, it is possible that better agreements could have been crafted—that more could have been done to protect public health, ensure the careful management of scarce resources, or guarantee that the public's long-term interests are not sacrificed for short-term economic gain. The effectiveness of settlement agreements depends on how well the parties involved are able to deal with their differences through negotiation.

In an appeal before the Environment Court, the law usually allows for a range of decisions when dealing with a malleable concept like “sustainable management.” Some of those decisions, however, will be more optimal than others and it is in everyone’s interests to reach the best ones. We know commissioners are not neutral to the legality of these decisions, but what about whether a decision is optimal or more sustainable? Pursuing such decisions is, of course, the ultimate purpose of the RMA, and the commissioner plays some role to help parties achieve this purpose.

As others have argued, mediators should endeavour to push the decision-making frontier and to create value for the public from the substantive decisions made in mediation.<sup>183</sup> This role is not based on a legal obligation,<sup>184</sup> but rather derives from or complements the mediator’s primary task to help parties reach an agreement that meets their interests and comports with law.

In the Environment Court, commissioners assist parties to optimize the social, economic, and environmental effects of mediated agreements in two ways. First, they foster a climate in mediation where shared learning and understanding can take place, which are important elements to discovering and electing more optimal or sustainable agreements. Second, they help parties resolve disputes in ways that often protect and strengthen relationships and improve parties’ problem-solving skills, two factors that also contribute to more sustainable decision making.

---

Unfortunately, they are often not able to do it very well.

*Id.*

<sup>183</sup> See, e.g., Peter Adler, President, Keystone Ctr., Address at the First Australasian Natural Resources Law & Policy Conference: Water, Science, and the Search for Common Ground (Mar. 27, 2000) (transcript available at <http://mediate.com/articles/adler.cfm>) (discussing the evolving nature of environmental mediation from a focus on process outcomes to substantive outcomes, particularly in water law).

Excellence in conflict resolution for water cases will derive from the way we meet the challenge of achieving powerful “substantive” solutions to tough problems. Good process and improved relationships—the traditional measures of good mediation in other arenas, are necessary but insufficient for greater use of this method in water cases. Conventional mediation models are heavily weighted on communication skills (i.e., active listening, reframing, self-disclosing) and negotiation strategies (i.e., in-team organizing, shadow bargaining, single-text negotiating). Indeed, standard mediation theology holds that the parties retain control over the substance of the dispute while mediators exert strong management over process and interpersonal working relations. Not surprisingly, improved “relationships” and better “process” are often reported as the major achievements and outcomes of many consensus processes. In water cases, we must do better. We must be able to show outcomes that are Pareto-optimal, better than what can be achieved in litigation, better than expectations, or better than some other party-established baseline.

*Id.* (internal citations omitted).

<sup>184</sup> It is the author’s view that mediators should not have legal obligations to optimize the effects of mediated agreements because such a duty would throw them into a hole of conflicting obligations to the parties and to the public and may lead them to co-opt the process with their own view of what an “optimal” agreement looks like.

The following analysis explores these themes in more detail. Unlike the preceding public interest section, which emphasized the comparative skill and advantage of a commissioner over a private mediator to intervene to protect public law, both commissioners and private mediators appear well positioned to help parties discover and reach more optimal agreements. Their ability to do so is, of course, limited by the time they can bring to the process<sup>185</sup> and the parties' resolve to explore and agree to more optimal settlements.

*1. Building Better Agreements Through Shared Learning, Decision Making, and Ownership*

The concept of sustainability and "sustainable management" entails more than a decision; it also encompasses the learning undertaken to make a decision. One of the principal strengths of mediation is the ability of parties to learn from one another. Particularly in the multi-party disputes common in the Environment Court, elements such as a neutral forum, confidentiality, and sharing tea and cookies allow people to communicate and to develop a mutual understanding of their concerns, the state of the environment, the effects of certain activities on the environment, and tradeoffs that are made when weighing one decision against another. Where issues in dispute are engulfed in technical or scientific uncertainty, the mediation environment often enables experts (whether hired or from within the parties themselves) to work together to develop a shared understanding of the challenge and a mutually acceptable approach to address that challenge;<sup>186</sup> this is especially valuable where experts have had a history of partisanship, which is sometimes the case in the Environment Court.<sup>187</sup>

In addition to shared learning, in mediation people have a chance to identify and debate different dispute-resolution options and decide on a course of action. One commissioner referred to this aspect of mediation as

---

<sup>185</sup> On this point, it should be noted that a private mediator can offer as much time as the parties will allow to deliberate and to reach a more optimal solution, but the commissioner's time is limited by competing public values to resolve disputes promptly and to prevent parties from free-riding on the backs of tax payers by demanding more time from the commissioner than warranted. This limitation, however, is mitigated in part by the fact that commissioners provide their services for free, which encourages people to try mediation when they may not otherwise have done so if they had to pay.

<sup>186</sup> For a useful discussion of skills and approaches mediators use to manage scientific and technical disputes, see PETER ADLER ET AL., MANAGING SCIENTIFIC AND TECHNICAL INFORMATION IN ENVIRONMENTAL CASES: PRINCIPLES AND PRACTICES FOR MEDIATORS AND FACILITATORS 33–64, available at [www.resolv.org/pubs/envir\\_wjc.pdf](http://www.resolv.org/pubs/envir_wjc.pdf).

<sup>187</sup> Notwithstanding a recent practice note that charges experts with an overriding duty to assist the court impartially, at least one out-of-court interviewee stressed that experts are "quite partisan." See *supra* note 14. This finding is not surprising given the reality of employing experts in an adversarial system; such experts (whether consciously or subconsciously) may reconcile technical or scientific uncertainties in a way that favors their client's interests, whereas, had they encountered the uncertainty in a totally neutral forum, their views may have been different. Practice Note, *supra* note 7, at ch. 5, available at <http://www.justice.govt.nz/environment/consolidated-practice-note/chapter-5.html>.

the “art of the possible.”<sup>188</sup> The mediator, having sat with the parties and heard the dispute, often develops a good idea of what is a possible or acceptable agreement and can, as one commissioner remarked, “float balloons” or ideas that serve as a catalyst for parties to raise their own ideas in the search for common ground.<sup>189</sup> Through these discussions, more optimal or sustainable options may emerge, which makes it all the more likely that one of these options will be chosen and implemented. For the commissioner’s part, any ideas or “balloons” they propose are likely to be legally palatable under the RMA, and may also be among the more sustainable options because commissioners can look at the parties’ situation free from the blinders of a private interest lens. The commissioner as mediator is therefore a convenor of people and ideas, and a robust set of ideas is what is needed to meet the challenge of sustainability.

On a related point, by learning and generating options together, parties often develop greater ownership over an agreement made in mediation and may be more likely to live up to or even exceed the terms of their agreement. One out-of-court interviewee stressed the importance of such ownership or buy-in to an agreement, particularly in the complex plan-based disputes mediated in the Environment Court:

If you don’t get buy-in, people get so bloody minded that they say: “I’m just going to [breach the plan] anyway.” . . . [W]ell often the council will turn a blind eye. Even where the council takes some action, it tends to be low level action. . . . People can do a cost benefit analysis and say: “I’m just going to do it.” Where in mediation, it’s an educational exercise where you get parties’ buy-in, so you get greater compliance with the outcome.<sup>190</sup>

Other interviewees took a similar view, one noting that ownership over an agreement often equates with a more “sustainable outcome,” while another stressed that such ownership yields a “better chance of successful implementation.”<sup>191</sup> Judges are perhaps in the best position to know if people live up to or exceed agreements made in mediation, and at least one judge believed they were: “we all know that they buy in to a solution . . . . [The agreement is] likely to have long term benefits, be more easily

---

<sup>188</sup> See *supra* note 14.

<sup>189</sup> See MOORE, *supra* note 8, at 288.

In spite of the best option-generation processes, developed by the parties or the mediator, disputants can still get stuck and be unable to develop mutually acceptable settlement options. In this event, a mediator may want to try out some of his or her own ideas, become catalysis, and help parties expand their thinking about what is possible. Mediators who have been listening to parties discussing their issues and interests often develop significant insights regarding what might constitute or go into an acceptable agreement. Mediator suggestions are often helpful to parties, especially late in the option-generation process.

*Id.*

<sup>190</sup> See *supra* note 14.

<sup>191</sup> *Id.*



enforceable, and lead to improved or at least not degraded relationships between parties.”<sup>192</sup>

## *2. Building Better Relationships and Problem Solvers*

If sustainability decisions are viewed as a learning process, it is easy to appreciate that it is a long-term process marked by continued evaluation and change. The decision labelled “sustainable management” under the RMA should never be viewed as an isolated, one-time event because decisions that concern environmental impacts or the allocation of resources (even between neighbors) have enduring effects and need to be revisited and sometimes modified. The ultimate success or sustainability of these decisions, therefore, depends largely on the downstream actions of the people involved in the decision and the future stakeholders who will inherit its effects. In the author’s view, we can best ensure these downstream actions unfold as planned when we prioritize the maintenance of relationships or networks between people.

Many interviewees remarked on the value of the mediation process in maintaining or strengthening relationships. One out-of-court interviewee noted, “Mediation often leads to a much more favorable relationship for the future than the court adversarial system. [In] . . . probably eighty percent of environment cases, there is an ongoing situation.”<sup>193</sup> Another remarked that sometimes these relationships are so important that deals are made in mediation in order to preserve them; “keeping those relationships intact is pretty helpful and it’s probably a reason why some settlements have been effected . . . . By comparison, I can think of matters that have gone to court [that have] caused some deep-seated resentment.”<sup>194</sup> Relationships are therefore valuable in the moment and prospectively as a way to manage disputes between people who will square off against one another repeatedly in the environmental context.

Commissioners not only help parties preserve important relationships, they also build parties’ problem-solving skills. In the Environment Court, numerous appeals are filed each year that could have been resolved elsewhere, a fact that is reflected by recent amendments to the RMA to promote a more robust alternative dispute-resolution culture in the upstream decision making of regional and district councils.<sup>195</sup> This culture, however, will never emerge in isolation, but will draw from existing practice in environmental mediation, which has largely been the domain of the Environment Court.

---

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Recent amendments to the RMA underscore the legislature’s resolve to promote greater consensus-based decision making at the local level by enacting new requirements for the use of mediation in pre-hearing meetings to resolve disputes in resource consent and planning processes. Resource Management Act of 1991, § 99, 1991 S.N.Z. No. 69; *see supra* notes 50–52 and accompanying text (discussing the RMA notification requirements).

Commissioners play a pivotal role contributing to this evolving culture. Collectively, they work with a huge cross-section of individuals around the country to help them overcome the psychological dimensions that impede negotiation.<sup>196</sup> In doing so, commissioners, whether deliberately or inadvertently, often help parties develop more collaborative problem-solving skills with positive spillover effects for the next dispute.

Similarly, commissioners have also been called upon, and will continue to be called upon, to lend advice to mediators working in other environmental contexts. Increasing areas of interest include, for example, the upstream decision-making of regional and district councils on plans and resource consents or matters outside the jurisdiction of the RMA. One prominent author has raised a call for more sharing of information on how mediators manage intense emotional multiparty conflicts, imbalances of power, and communication problems—all of which are regular challenges in Environment Court mediations for which commissioners have developed responses.<sup>197</sup>

The preceding analysis highlighted the role commissioners can play to optimize the social, economic, and environmental effects from mediated decisions. The mediation process will often culminate in a decision that is legal and satisfies the parties' interests, such as approval and mitigation for a resource development activity. There are, however, important but less tangible effects beyond the decision, including the shared learning reflected in the decision, strengthened relationships between parties, and improvements in their problem-solving skills. All of these benefits have an enduring impact on how a decision is implemented and how people approach the resolution of disputes over time.

The need to optimize the effects from mediated processes goes to the heart of the court's purpose. As a branch of the judiciary, the court is to resolve disputes in a prompt, impartial, and consistent manner that engenders public trust and confidence in the judicial system. As a creature of statute, the court is to resolve disputes in a way that effectuates the purpose of the RMA to "promote the sustainable management of natural and physical resources."<sup>198</sup> Adjudication is the primary vehicle by which the court carries out these functions, but the judiciary and the legislature have recognized that many environmental disputes are not properly resolved through judicial hearing and that mediation offers some important benefits. In mediation, commissioners help parties promptly resolve disputes, but they also provide a forum which often improves the conditions in which people make decisions, and, at least in some cases, may also improve the quality of the decisions that are made—the ultimate purpose of the RMA.

---

<sup>196</sup> See MOORE, *supra* note 8, at 166 (pointing to five psychological dynamics that impede negotiations including: 1) strong emotions, 2) misperceptions or stereotypes held by one or more parties of each other or about issues in dispute, 3) legitimacy problems, 4) lack of trust, and 5) poor communication).

<sup>197</sup> *Id.* at 467.

<sup>198</sup> Resource Management Act of 1991, § 5(1), 1991 S.N.Z. No. 69.

## IV. MEDIATING SUSTAINABILITY—BEYOND THE NEW ZEALAND EXPERIENCE

Sustainability disputes present some of the most difficult challenges of our time. Their roots are complex and involve historical grievances, competition for resources, and conflicting worldviews on our place in nature. These disputes are made more complex by questions of intra- and inter-generational equity, such as whether to reallocate resources to today's generations and how to address the needs of the future. As one out-of-court interviewee remarked, "human judgment is not particularly well [suited] to deal with those sorts of problems."<sup>199</sup> But we must make sustainability decisions, and we must address the disputes that arise from them. Mediation provides one forum in which to address some of these disputes and the Environment Court's mediation model offers several lessons in that regard. What have we learned from the court's mediation experience?

The first lessons concern benefits to the parties. The Environment Court has developed a relatively unique mediation model where its own technically-oriented commissioners, who also serve as adjudicators, act as mediators in other cases at no extra cost to the parties. The model offers parties access to facilitators who bring expertise in both the subject matter of dispute and the overarching legislation that governs their dispute. In addition to providing the core benefits of mediation—promoting dialogue, understanding, and a search for common ground—the commissioner as mediator offers an experienced view of what court proceedings will be like and can help parties better evaluate the pros and cons of appealing to the Environment Court.

In addition to benefits to parties, a more important question to ask of a publicly-funded process is "what is in it for the public?" Parties can always negotiate privately or hire a mediator to assist, but engaging someone like a commissioner to serve as a mediator may make it more likely that the public interest will be protected when settlement discussions ensue.

The commissioner, skilled in adjudication and mediation, can readily intervene in mediations to ensure that public law is considered, discussed, and honored. They bring an air of public import to these discussions, they command greater respect from the parties as officers of the court, and they often know the law better than the parties by virtue of their experience on the court. While a judge could also mediate and employ the same interventions to protect public law, commissioners are much less judge-like, and so they can foster a more relaxed and secure problem-solving environment that is a hallmark of a good mediation process. Moreover, when a commissioner raises questions as to how the law is served by an agreement, they may be less likely than a judge to be overly directive or evaluative and to cut off the parties' creative but legitimate options. Commissioners lack the specter of a more authoritative decision maker like a judge who, as some people argue, may simply tell people what to do.<sup>200</sup>

---

<sup>199</sup> See *supra* note 14.

<sup>200</sup> Teresa Carey, *Attorneys in Mediation: For Better or Worse?*, THE MARIN LAW., Nov. 2004, at 4, available at [http://www.marinbar.org/members/news\\_archive/0411.pdf](http://www.marinbar.org/members/news_archive/0411.pdf).

The commissioner, like other environmental mediators, also plays a role in optimizing the social, economic, and environmental effects of mediated agreements. This finding is important because we should not only be interested in the quantity of settlements, but also their quality. The commissioner works to build shared learning of the issues in dispute and an understanding of each party's situation. This shared learning, coupled with the commissioner's own observations as an intermediary, may allow the parties and the commissioner to raise and explore more optimal solutions that better serve private and public interests. Shared learning may also make it more likely that parties will live up to, if not exceed, the terms of their agreement, which is particularly important when enforcement is limited or toothless. On a related note, the mediation process often helps people retain positive relationships that can be pummelled by litigation, and these relationships are important to the long-term implementation of these agreements and the ability of parties to develop and employ a more collaborative approach to address sustainability disputes in the future without the need to litigate.

The general tenor from the twenty-five dispute-resolution professionals was that people take pride in the Environment Court's mediation service and feel that it is working in its own small way to help the country address its sustainability challenge. Environmental mediation will continue to grow in significance in New Zealand and around the world.<sup>201</sup> In light of this trend, there is still much to be learned about the promises and pitfalls of mediation to address environmental disputes, especially around the issue of how to protect the public interest in these private processes. With several years of practice mediating under the world's first example of sustainability-based legislation, the experience of commissioners is of clear significance to a world community looking for new models of consensus-based decision making, particularly for those who believe such decision-making is a cornerstone of sustainability.<sup>202</sup>

---

<sup>201</sup> See MOORE, *supra* note 8, at 471 (noting environmental mediation is one of seven major areas where growth will occur, particularly in the realm of major problems such as transboundary air pollution, global warming, and limited water resources).

<sup>202</sup> See Pieter Glasbergen & Jan Van der Veen, *From Adversarial to Collaborative Interaction: Environmental Problem Solving in the Zealand Flanders Canal Region*, in MANAGING ENVIRONMENTAL DISPUTES: NETWORK MANAGEMENT AS AN ALTERNATIVE 53, 55-56 (Pieter Glasbergen ed., 1995) (describing the factors of adversarial decision making which have resulted in a failure to address environmental problems and the need for a collaborative approach).