The Incorporation of the Principles of the Treaty of Waitangi into the Resource Management Act 1991 – Section 8 and the Issue of Consultation

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In promoting the sustainable management of natural and physical resources, the Resource Management Act 1991 (RMA) recognises the importance of the Treaty of Waitangi. Section 8 of the RMA is the provision which incorporates the principles of the Treaty into the Act. The section has been the subject of extensive judicial consideration over the last four years. This article considers the approach of the courts to the interpretation of the section. In particular the question of whether a council officer is obliged to consult with tangata whenua in the resource consent process is considered. An analysis is undertaken of the various interpretations of the courts, and of the underlying issues which have manifested themselves.

I: INTRODUCTION

In promoting the sustainable management of natural and physical resources, the Resource Management Act 1991 ("RMA") recognises the importance of the Treaty of Waitangi. Section 8 of the RMA is the provision which incorporates the principles of the Treaty of Waitangi into the Act. The section is located in Part II of the Act and therefore operates as an important guide in the exercise of powers and functions in this area of law. The section is one of a number of mechanisms in the Act which aim to protect Maori interests.

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On the surface section 8 appears to be drafted in plain terms and is not difficult to understand. A closer scrutiny, however, reveals that the wording employed is subject to a degree of inherent and inevitable uncertainty. This has been revealed by the divergent judicial approaches which have appeared in the interpretation of the section. Section 8 has been the subject of extensive judicial consideration over the last four years. This article considers the approach of the courts to the interpretation of the section. In particular the question of whether a council officer is obliged to consult with tangata whenua in the resource consent process is considered. This is achieved by an analysis of the various approaches taken by the courts, and of the underlying issues which have manifested themselves in this uncertainty.

II: THE JUDICIAL APPROACH TO SECTION 8

Section 8 of the RMA states:

> **8. Treaty of Waitangi** – In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

1. The Gill Approach

In early 1993 Judge Kenderdine delivered three decisions on the meaning of section 8 in the resource consent procedure. In *Gill v Rotorua District Council*[1] the Tribunal considered an appeal against a decision by the Rotorua District Council to grant a resource consent allowing a residential

1 (1993) 2 NZRMA 604.

development in a rural zoning. The Tribunal was afforded an opportunity to consider the ambit of the section 8 duty as it applies in the resource consent process. Judge Kenderdine noted:[2]

> One of the nationally important requirements of the Act under the Part II considerations is that account be taken of principles of the Treaty of Waitangi 1840: Section 8 of the Act. One of these principles is that of consultation with the tangata whenua: see *New Zealand Maori Council v Attorney General* [1989] 2 NZLR 142 (CA) ... The council itself does not appear to have actively consulted with the tribe over the proposal.

After noting that the council had notified the tangata whenua of the application, Her Honour continued:[3]

> This is not what the legislation requires. The council's actions appear to have been merely passive. The test which the council has to meet under all provisions of s 7 is a high one.... The section imposes a duty to be on inquiry.

The comments made in *Gill* raise two distinct issues. The first is that section 8 imposes a duty of consultation on the council. The second is that consultation is necessary to ensure that particular regard is given to the matters specified in section 7 of the Act. This analysis will focus on the first of these two issues and consider whether section 8 imposes a consultative duty on the council.

The *Gill* decision was followed by that in *Haddon v Auckland Regional Council*.[4] This case involved an inquiry into a recommendation to the Minister of Conservation by the Auckland Regional Council, to allow the

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2 Ibid, 616.

3 Ibid, 616.

4 [1994] NZRMA 49.

extraction of sand off the coast of North Auckland. On the issue of section 8 Judge Kenderdine noted:[5]

> The Court of Appeal has established that consultation is a principle of the Treaty (see *New Zealand Maori Council v Attorney General* [1989] 2 NZLR 142).

Her Honour held that in this case the Treaty principle of consultation appeared not to have been complied with early enough in the application process, given the appellant's known interest in the area. It was noted that the tangata whenua was "brought in only at the seventh stage in a nine-stage process."[6] The Treaty principle of informed decision making was also noted and consultation was found to be necessary at an early stage to satisfy that principle.

The third case on this issue was *Wellington Rugby Football Union Incorporated v Wellington City Council.*[7] In that case Judge Kenderdine developed the *Gill* theme by stating:[8]

> It is only if the council officers carry out research or consultation and are seen to do so by virtue of the material that they put before the council, that it can avoid being in breach of the Treaty provision of the Act. The council itself in making its decision then has a duty to take into account any relevant principles ... in weighing its decision.

Thus the early stance taken by the Tribunal was that section 8 imposed a duty of consultation with tangata whenua on the local authority, where issues of importance to Maori are at stake. This was based on the reasoning that the Court of Appeal had found consultation to be a principle of the

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5 Ibid, 61.

6 Ibid, 61.

7 Planning Tribunal. 30 September 1993 W 84/93.

8 Ibid, 22-23.

Treaty, and that section 8 requires this principle to be accounted for. The position of the Tribunal at this point in time seemed relatively settled.

The *Gill* approach was subsequently endorsed by the High Court in *Quarantine Waste (NZ) Ltd v Waste Resources Ltd.*[9] This case involved an application for judicial review of a decision by the Manukau City Council permitting an application for land use consent to proceed on a non-notified basis. Blanchard J found that the applicant had consulted with the tangata whenua but went on to note:[10]

> In other circumstances I would have very real qualms about a second-hand consultation, with a local authority leaving it to an applicant to consult with local Maori interests. The potential for distortion by an applicant of their views is obvious. It should be emphasised that the statutory and Treaty obligation of consultation is that of the consent authority - as the local governmental agency - not that of the applicant. As the Planning Tribunal has noted in [*Gill*] ... s 8 requires that persons exercising functions under the Act must take into account the principles of the Treaty (including that of consultation) ...

This obiter statement clearly affirms the *Gill* approach to section 8. It is perhaps unfortunate that the High Court did not have the opportunity to consider the divergent approaches which have since emerged on this issue.

What is also of interest is that the actual decision in *Quarantine Waste* arguably undermines the principle enunciated in *Gill*. Blanchard J found that the failure to conduct direct consultation did not bring about a situation in which the council failed to take into account a relevant or material factor. This may not be consistent with the *Gill* approach which seems to frame consultation under section 8 as an end in itself.[11] In any case at this point in

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9 [1994] NZRMA 529 (HC).

10 Ibid, 542.

11 Although in *Haddon* the obligation of consultation was framed as both an end in itself and a means to the end of informed decision making.

time the *Gill* approach as endorsed by the High Court was settled authority on the interpretation of section 8.[12]

2. Divergent Decisions

The subsequent approach of the Tribunal on this issue has been far from settled and consistent. The decisions which followed have often been in conflict with those in the *Gill* line of cases. In theory the obiter statement of the High Court in *Quarantine Waste* should have been followed in subsequent Tribunal decisions.[13] The two Tribunal decisions of *Ngatiwai Trust Board v Whangarei District Council*[14] and *Hanton v Auckland City Council*[15] were delivered after the *Gill* decisions but just prior to that in *Quarantine Waste*.[16] This effectively allowed the Tribunal room to depart from the *Gill* authority without the weight of the endorsement from the High Court. It was perhaps the timing of these decisions which was instrumental in facilitating what was to become a debate on the issue of

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12 Some of the commentary at the time indicates that the *Gill* case may have been seen as a settled statement on the position of the Tribunal. See Phillipson, M., "Judicial Decision Making under the Resource Management Act 1991: A Critical Assessment" (1994) 24 VUWLR 163, 169-170. Any reference to the *Gill* approach or the *Gill* line of cases should be taken as a reference to *Gill*, *Haddon, Wellington Rugby* and *Quarantine Waste.*

13 See the comments of Palmer, K., in "Consultation with the Tangata Whenua under the Resource Management Act" (1994) 1 BRMB 21, 23.

14 [1994] NZRMA 269.

15 [1994] NZRMA 289.

16 The three cases were heard within a fortnight, between 6 December 1993 and 20 December 1993. The decision in *Ngatiwai* was delivered on 11 February 1994, in *Hanton* on 1 March 1994, and in *Quarantine Waste* on 2 March 1994. For a discussion of these decisions see Palmer, supra, note 13.

consultation under section 8.

It is convenient at this point to divide the judicial approach which was to follow into two distinct issues. These both concern the finding in *Gill* that consultation by a council is obligatory under section 8 when Maori issues are relevant. The first concerns whether the consent authority in its quasi-judicial role is obliged to consult with tangata whenua. The second is whether the planning officers of the council are vested with that responsibility.

3. Consultation by the Consent Authority

A number of Tribunal decisions which followed the *Gill* cases were critical of the possibility that a consent authority should consult with one party prior to the consent hearing. This concern may have arisen as a result of the terminology used by Judge Kenderdine. In *Gill*, for example, Her Honour noted that: "The *council* itself does not appear to have actively consulted ...".[17] In *Ngatiwai* Judge Bollard considered the *Gill* and *Haddon* decisions and proceeded to limit them to situations where the council had failed to follow up a special background of Maori significance. The Judge went on to note:[18]

> We do not think that, by [*Gill* and *Haddon*], it was intended to be understood that, in all cases where Maori people are known to reside in the vicinity of a site the subject of a resource use consent application, or otherwise where local Maori community interests have registered some viewpoint or concern about the application, the council to whom the application is addressed must consult with those involved ... before proceeding to hear and determine the matter.... As bodies required to act judicially in hearing and determining the applications, ... , we do not see that [the consent authority] ... , was under a duty to consult with [the tangata whenua] before proceeding to hear the [applications].

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17 Supra, note 1, at 616 (emphasis added).

18 Supra, note 14, at 273-275.

This statement suggests a reluctance on the Judge's part to infringe on the principle of natural justice that one party should not be heard in the absence of the other prior to a hearing. In *Hanton* Principal Planning Judge Sheppard considered the *Gill, Haddon* and *Ngatiwai* decisions. In adopting the *Ngatiwai* approach the Judge noted:[19]

> [T]he consent authority's function is to act judicially, and consultation with one section of the community prior to a public hearing of those who choose to take part would be inconsistent with that character of its functions.

In *Rural Management Ltd v Banks Peninsular District Council*[20] Judge Treadwell strongly dismissed any assertion that a consent authority is under such a duty to consult:[21]

> If a reading of [*Gill* and *Haddon*] leads to the conclusion that a consent authority must consult unilaterally with a party to proceedings then quite simply we do not agree. Nevertheless we do not consider that those cases are intended to lead to that conclusion but rather must be read in the context of their own facts.

His Honour went on to approve the principle from *Ngatiwai* and *Hanton* that the consent authority must act judicially in hearing an application for resource consent. It was further noted: [22]

> Perhaps to put the issue in a constitutional perspective, the Crown as a signatory to the Treaty applied the laws of this country to all peoples within it but guaranteed to Maori certain rights and privileges. What the Treaty did not do was to set to one side a fundamental principle of our judicial system which is that no one party may be consulted or even spoken to without the other parties to proceedings

19 Supra, note 15, at 301.

20 [1994] NZRMA 412.

21 Ibid, 423.

22 Ibid, 424.

being present.

The Tribunal in *Ngatiwai*, *Hanton*, and *Rural Management* was clearly concerned that a consultative duty on the consent authority would infringe the principles of natural justice. The duty to act judicially would preclude any such consultation prior to the consent hearing. Whilst that is a legitimate concern, it is unlikely that Judge Kenderdine intended the imposition of such a duty on the consent authority. In *Gill*, the duty was framed as being that of "the council", however, no indication was given as to whether this meant the council in its quasi-judicial capacity or otherwise. In the *Wellington Rugby* case the Judge was more specific: "It is only if the council officers carry out research or consultation ..." and "The Council itself in making its decision then has a duty to take into account any relevant principles, ...".[23]

Subsequently in *Whakarewarewa Village Charitable Trust v Rotorua District Council*[24] Judge Kenderdine sought to clarify that the duty identified in *Gill* and *Haddon* was not vested in the consent authority but in the officers of the council:[25]

> [C]onfusion seems to have arisen in distinguishing the role of '*consent authorities*', '*local authorities*' and '*councils*' in this question of consultation. It has inadvertently arisen out of the Gill decision where the word '*council*' appears.... It is not anticipated that consultation should be undertaken by the council in its quasi-judicial capacity or on a footing that might compromise it in that capacity. If we had, we would have referred in the Gill decision to '*consent authority*' not the '*council*' (meaning council officers).

Thus the Tribunal appears to be in agreement that a consent authority

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23 Supra, note 7, at 22-23.

24 Planning Tribunal, 25 July 1994 (W 61/94).

25 Ibid, 23.

in its quasi-judicial capacity should not consult with tangata whenua, and hence this aspect of the consultation issue is arguably resolved. The only area of doubt which remains in this respect is the statement of the High Court in *Quarantine Waste* where Blanchard J noted:[26]

> [T]he statutory and Treaty obligation is that of the consent authority - as the local governmental agency - ...

The status of this obiter statement is cast in some doubt. The High Court decision affirms the *Gill* approach, however Judge Kenderdine's approach to consent authority consultation is not entirely clear from the wording in *Gill*. However, given that the *Quarantine Waste* decision was made in the context of notification, it is likely that Blanchard J was intending that the consultation be conducted by the council officer rather than the consent authority.

4. Consultation by the Council Officer

In *Whakarewarewa* Judge Kenderdine clarified that it is the council officer who is vested with a consultative obligation under section 8 of the RMA. The duty of the council officer has partially escaped the attention of the many Tribunal decisions which came after the *Gill* cases. It is possible that the issue of consultation by the consent authority has dominated the Tribunal's attention, and this focus has obscured this second and arguably central issue. A decision which is the subject of challenge from Maori, may be criticised in part on the basis of a lack of consultation. This may be a failure of the applicant, the council officer, or both. The extent of the obligation on the council officer under section 8 has generally been dealt with in passing, and whilst different Judges may have commented on that obligation, there has been no extensive analysis of this issue.

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26 Supra, note 9, at 542.

In *Ngatiwai* Judge Bollard went some way towards endorsing the *Gill* principle:[27]

> We pause here to emphasise that nothing we are about to say should be construed as suggesting that a council planning officer, in preparing a report for pre-hearing distribution among the parties and for the council's assistance at the hearing, may not be under a duty (depending on the circumstances) to inquire into the views of tangata whenua by consulting with their representatives, so as to ensure that the report is suitably comprehensive as to relevant issues upon which the council needs to be informed. If this point was, in effect, conveyed in [*Gill* and *Haddon*], we likewise endorse it.

This approach is arguably consistent with that of Judge Kenderdine. What is questionable is the timing of the *Ngatiwai* form of consultation. In *Haddon* it was stated that consultation needed to be conducted early in the process. The *Ngatiwai* form would occur during the processing of a completed application and just prior to the hearing. Judge Bollard also noted that a council (presumably meaning the consent authority), whilst not obliged to consult, "must nevertheless be careful to consider what supporting information it ought to require be furnished by an applicant in the particular circumstances".[28] This may be a suggestion that applicant consultation should be considered along with that conducted by the council officer.

In *Hanton* Judge Sheppard, after dismissing the possibility that the consent authority should consult, noted:[29]

> [W]here it is known that natural or physical resources the subject of a resource consent application are the object of a valued relationship by Maori people, an adviser preparing a report on the application for a consent authority *should*

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27 Supra, note 14, at 274.

28 Ibid, 275.

29 Supra, note 15, at 302 (emphasis added).

> *investigate and report* on the extent to which the proposal would affect that relationship.

This decision provides an early illustration of the Tribunal's reluctance to endorse the *Gill* approach in an unqualified manner. Whilst Judge Sheppard agrees that some form of responsibility rests on the council officer, the words "should investigate and report" fall short of an actual duty of consultation.

At this point in time the authority on this issue was interesting. The Tribunal in subsequent cases would have to deal with two diverging lines of authority. On the one hand was the *Gill* approach which identified a positive duty of consultation on the council officer. This had been adopted by the High Court in *Quarantine Waste* and in theory subsequent Tribunal decisions should have followed the obiter statement in that case. The analysis which follows will illustrate that this has not been the case. On the other hand the *Hanton* decision indicated the imposition of something less than a consultative obligation.

In *Rural Management* Judge Treadwell did not consider *Quarantine Waste* but preferred to follow *Ngatiwai* and *Hanton*: [30]

> *If there is to be any consultative process*, it can be undertaken by officers of the consent authority who can report back to the consent authority and whose report is open to all parties to accept or contest as the case may be. Those officers cannot however consult on behalf of the consent authority, they can merely consult as officers for the purpose of obtaining information which can be relayed back to the consent authority for its consideration along with other evidence.

As was the case in *Ngatiwai* and *Hanton*, in this case the Tribunal's focus was on the duty of the consent authority under section 8. The question as to the duty of the council officer was dealt with as a secondary consideration.

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30 Supra, note 20, at 424 (emphasis added).

In stating "If there is to be any consultative process ..." the Tribunal is clearly removed from the obligation of consultation identified in *Gill*.

Judge Kenderdine was given the opportunity of revisiting this issue in *Whakarewarewa Village Charitable Trust*. As noted Her Honour clarified that the obligation under section 8 was that of the council officer rather than the consent authority. In doing so, however, the Judge confirmed that a council officer is under a positive duty to consult. In the context of that case it was held that the holding of a pre-hearing meeting with tangata whenua satisfied the obligation of consultation under the section.[31]

Judge Kenderdine also considered this issue in *Aqua King Ltd and Fleetwood Farms Ltd v Marlborough District Council*.[32] In that case Her Honour was required to consider the relationship between consultation conducted by the applicant for resource consent, and that of the council officer:[33]

> We accept that there are two stages of consultation under the Act that are required where there are issues of moment to Maori. They are the applicant's consultation or otherwise under the Fourth Schedule, and the council officers' consultation under Part II of the Act which arises from the principles of the Treaty of Waitangi 1840. That consultation is an obligation which pertains only to councils ... and in our view the council's obligation arises independently of anything applicants may do.

Thus Judge Kenderdine continued to interpret section 8 as imposing a duty of consultation on the council officer.

It has been noted that decisions such as *Ngatiwai*, *Hanton* and *Rural Management*, whilst not completely inconsistent with *Gill*, did represent a

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31 In this respect a comparison may be drawn with *Haddon* where Judge Kenderdine noted that consultation needed to be conducted early in the resource consent process.

32 [1995] NZRMA 314.

33 Ibid, 320.

reduced form of duty on the council officer. In *Greensill v Waikato Regional Council*,[34] however, Judge Treadwell made the most explicit and significant inroad into the *Gill* principle to date:[35]

> As we read cases to date concerning [consultation] there has been an assumption that consultation should take place but ... although desirable, there is *no compulsion* on an applicant for a resource consent *or on the officers of the consent authority* to embark unilaterally upon consultation.

The Tribunal at this point in time was clearly in a position of conflict. The *Greensill* decision was unequivocal in its rejection of the obligation identified in *Gill*. It would seem that this conflict still exists. Whilst at the time of writing a number of decisions had subsequently been delivered on this issue, none of those had been delivered by Judge Kenderdine.

There is one other High Court decision which is worthy of mention in this analysis. In *Worldwide Leisure Ltd v Symphony Group Ltd*[36] the court considered an argument that consultation with tangata whenua is necessary prior to a council officer deciding whether to notify an application under section 94 of the Act. Cartwright J noted that as the tangata whenua had not been consulted, the council had failed to take into account relevant considerations and therefore the decision was unreasonable, unlawful, and invalid. The court noted:[37]

> [Section] 8 has been held to place an obligation to consult ...

In this respect reference was made to *Gill, Haddon,* and *New Zealand Maori*

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34 Planning Tribunal. 6 March 1995 W 17/95.

35 Ibid, 8 (emphasis added).

36 [1995] NZAR 177 (HC).

37 Ibid, 187.

Council v Attorney-General.[38] Unfortunately, there was no consideration given to the wider debate on this issue in the Planning Tribunal. While this is an affirmation of the *Gill* approach, there was no more than a passing reference to those cases. Further, as a result of the subsequent Court of Appeal decision in this case, the status of the High Court statement regarding consultation is not entirely clear.[39]

It is interesting to consider the subsequent decisions on this issue to determine the Tribunal's reaction to the conflict which had arisen. In *Tawa v Bay of Plenty Regional Council*[40] and *Banks v Waikato District Council*[41] Judge Sheppard continued to frame the duty on the council officer as something less than a duty to consult. In *Tawa* Judge Sheppard cited with approval the decision in *Greensill.* His Honour went on to note that "it was ... appropriate that a reporting officer had consulted with [tangata whenua]".[42] In *Banks* the Tribunal endorsed the *Tawa* decision and was satisfied that the council officer "made sufficient enquires"[43] to ensure the hearings committee was adequately informed. Judge Sheppard cited with approval the *Rural Management* and *Greensill* decisions, which are probably further from the *Gill* approach than any other.

Tawa and *Banks* illustrate that there may be a duty on the council officer, but that it may not extend as far as one of consultation. In *Paihia and District Citizens Association Incorporated v Northland Regional Council*[44] Judge Sheppard summarised the recent approach to this issue by

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38 [1989] 2 NZLR 142 (CA).

39 See the discussion of the Court of Appeal decision in this case by Latimore, B., Cowper, I., and Caunter, J., "To Notify or not to Notify" (1995) 1 BRMB 170.

40 Planning Tribunal. 24 March 1995 A 18/95.

41 Planning Tribunal. 20 April 1995 A 31/95.

42 Supra, note 40, at p 7.

43 Supra, note 41, at p 9.

44 Planning Tribunal. 10 August 1995 A 77/95.

stating:[45]

> [T]he Act does not make any specific requirement of consultation by applicants for resource consent, or by local authorities when acting in their functions as consent authorities ... It is *recognised good practice* that applicants for resource consent engage in consultation with the tangata whenua where their proposals may affect the matters referred to in section 6(e) and section 7(a), and that those reporting to consent authorities on such applications *inform themselves and advise* on those matters.

The words used by Judge Sheppard are indicative of a weaker form of obligation than has been identified by Judge Kenderdine. The reference to consultation being a "good practice" is repeated by Judge Bollard in *Isobel Berkett v Minister of Local Government*[46] and evidences a judicial desire to encourage consultation without going as far as identifying the firm obligation from the *Gill* cases. In *Mangakahia Maori Komiti v Northland Regional Council*[47] Judge Bollard noted that the consent authority behaved appropriately in leaving it to the council officer to consult, and that the council officer "could do little more, in our view, than listen, as he did, to the concerns conveyed to him by representatives of the komiti, and having done so, record those concerns in his report to the council".[48] The Tribunal refused to accept that a council officer, in consulting with tangata whenua, should undertake an active involvement by exploring how concerns may be responded to and accommodated in the context of realistic planning options. What remains unclear from the judgment is whether the council officer is under any duty to consult. The focus on the "appropriate behaviour" of the consent authority in delegating such a task, gives little

45 Ibid, 20 (emphasis added).

46 Planning Tribunal. 10 November 1995 A 103/95, at 5.

47 [1996] NZRMA 193.

48 Ibid, 206.

indication as to the duty of the council officer. By way of contrast Judge Treadwell in *Greensill* clearly indicated that there is no consultative obligation on the council officer.

5. A Shift in Focus

The more recent decisions on this issue suggest a shift away from a section 8 focus on consultation. This shift has been evidenced by a wider focus which deals with consultation as one means to the end of informed decision making. Further, there has been an increasing focus on other principles of the Treaty of Waitangi, and the other mechanisms for protection of Maori interests under the RMA.

In *Te Runanga o Taumarere v Northland Regional Council*[49] Judge Sheppard dealt with dual submissions that consultation with tangata whenua was inadequate, and that the Treaty principle of active protection of Maori interests had not been complied with. On the first of those issues the Tribunal noted that the applicant (in that case the Far North District Council) "recognised the principle of consultation and went to considerable lengths in consulting with the tangata whenua about its proposals and modifying them in response to the attitudes expressed."[50] This raises the interesting issue of the relationship between consultation conducted by the applicant and the council respectively.[51] In this case there was no discussion of consultation by the officers of the Northland Regional Council.[52] The Tribunal went on to note that while the consultation principle had been satisfied by the applicant, the proposal failed to honour the Treaty principle of active protection. It was also held that the proposal did not provide for

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49 [1996] NZRMA 77.

50 Ibid, 94.

51 See the discussion infra, note 96.

52 In this case the Northland Regional Council was the consent authority.

the relationship of Maori with their culture and traditions as was required by section 6(e) of the RMA.

A similar approach was taken by the Environment Court in *CDL Land New Zealand Limited v Whangarei District Council.*[53] In that case Judge Sheppard considered submissions by Maori that consultation had been inadequate, and that the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga had not been accounted for under section 6(e) of the Act. The court overturned the council decision that consultation had been inadequate, on the basis that the tangata whenua had been given the opportunity to respond but had chosen not to do so.[54] The court did find that the application should be declined, however, on the basis that it would fail to account for the matters specified in section 6(e).

In *Ngai Tahu Maori Trust Board v Director-General of Conservation*[55] the Court of Appeal noted that consultation can be an "empty obligation" which by itself may be "hollow" and insufficient to demonstrate a full account of the principles of the Treaty.[56] In that case the court again focused on the Treaty principle of active protection.

These later cases illustrate that consultation is only one of the aspects of the Treaty which may be relevant under section 8. In addition to section 8, there are other forms of protection for Maori interests in, for example, section 6(e) of the Act. Compliance with a consultative duty will not

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53 Environment Court. 25 November 1996 A99/96.

54 It is interesting that the Court held that consultation had been inadequate with two iwi which did not make submissions on the application, but who appeared at the council hearing. The court, however, held that consultation was adequate with a different iwi which was originally identified as tangata whenua by the council. See ibid, 6.

55 [1995] 3 NZLR 553 (CA).

56 Ibid, 560 per Cooke P (as he then was).

necessarily ensure compliance with the Maori provisions of the RMA, and the *Ngai Tahu* decision clearly indicates that consultation in itself may be insufficient to demonstrate a full account of the Treaty principles.

III: THE UNDERLYING ISSUES

The preceding analysis revealed a variety of approaches to the duty which is imposed by section 8 of the RMA. Judge Kenderdine has interpreted the section to impose a duty of consultation on the planning officers of the local authority. Other decisions have indicated that the section may impose something less that this duty. It is worthwhile considering the issues which form the basis of this uncertainty over the issue of consultation under section 8.

1. The Lack of Express Provision

The differing approaches to consultation by the council officer may be a result of the lack of express provision on this issue. The RMA does not explicitly require a council officer to consult with tangata whenua in the resource consent procedure. The consultative duty identified in the *Gill* cases was implied into that procedure by virtue of Part II of the Act. This is interesting in that the RMA is not silent on local authority duties of consultation. The Act expressly provides for local authority consultation with tangata whenua during the preparation and change of regional policy statements, regional plans, regional coastal plans and district plans.[57]

This raises the interesting question of whether it is appropriate to imply a consultative duty into one part of the Act in the absence of express

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57 These instruments must be prepared in accordance with the First Schedule of the RMA; in particular see clause 3(1)(d) of that schedule.

provision to that effect. This is especially so where Parliament has recognised an express duty in another part of the Act. This question may be approached in one of two ways. On the one hand it could be argued that Parliament has exhaustively defined the situations in which local authority consultation is required under the RMA, and would not have intended an express duty to apply in one part of the Act and an implied duty in another. This would be consistent with the argument that consultation as a Treaty principle is applicable only in respect of truly major issues, and that Parliament has chosen to define these in the RMA context.[58] Moreover, the principles which are to be implied into the rest of the Act from section 8, must be qualified by what is expressly provided for already. Where a Treaty principle is dealt with specifically in the Act, that should take precedence over the more general implied provisions from Part II.

An alternative approach would be to argue that an implied duty of consultation arises by virtue of Part II of the Act, and that in addition Parliament has chosen to supplement this by creating express duties in certain important areas such as the preparation and change of plans and policy statements. These express duties could be argued to be a set of minimum consultative standards rather than an exclusive definition of the situations in which a duty will arise. This approach would recognise that the resource consent procedure is subject to Part II of the Act, and that the purpose and principles sections should not be subjected to restrictive or narrow interpretations.

A plain reading of Part VI of the Act would suggest that a planning officer is under no duty to consult with tangata whenua. Judge Sheppard alluded to this by stating:[59]

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58 See the discussion infra, at note 70.

59 Supra, note 15, at 301. See also the comments of Judge Sheppard in *Paihia and District Citizens Association Incorporated v Northland Regional Council* supra, note 44, at 20.

> [In dealing with resource consents] the consent authority is following quite a detailed code of procedure which does not overlook the place of tangata whenua, but which omits any express duty of consultation.

The lack of express provision is complicated by the issue of applicant consultation during the preparation of an assessment of the effects on the environment.[60] A council officer could take this requirement to indicate that it is the applicant who is responsible for consultation in the resource consent procedure. It could be argued that the express provision for consultation by the council in respect of plans and policy statements is replicated in the resource consent procedure with an express duty on the applicant.[61] A number of cases have also revealed that the council officer believed that notification of the application fulfilled the requirements of section 8.

In *Smith v Auckland City Council*[62] the High Court dealt with the argument that consultation with tangata whenua was necessary prior to a decision to prosecute under the RMA. Fisher J rejected this argument and noted:[63]

> Examples [of the situations where Part II considerations are relevant] are the preparation and change of regional policy statements and plans ... , the preparation and change of district plans, and the consideration of applications for resource consent. ... In the process of preparing or changing a policy statement or plan, regional councils and territorial authorities *must go further and actively seek out Maori. They must consult with the local tangata whenua* through iwi authorities and tribal runanga ...

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60 See the discussion infra, at note 96.

61 This argument would be based on a comparison between the express duty relating to plans and policy statements in clause 3(1)(d) of the First Schedule, and the express duty relating to resource consents in clause 1(h) of the Fourth Schedule.

62 [1996] NZRMA 27 (HC).

63 Ibid, 31 (emphasis added).

On appeal the Court of Appeal affirmed the High Court decision and noted:[64]

> [O]ne would expect any requirement for consultation or consent to be in plain terms ...

There was no discussion on the question of consultation in the resource consent procedure. The statements made by the High Court and Court of Appeal, while not directly relevant to this discussion, certainly lend some weight to the former of the two approaches to the question of express provision. The High Court statement implies that in the resource consent procedure, the Act does *not* require a council to go further and actively seek out Maori by consulting with tangata whenua. This is endorsed by the statement of the Court of Appeal that one would expect any requirement of consultation to be in plain terms. This may suggest that an implied duty of consultation in this context is inappropriate. It will be interesting to observe whether these statements are argued in context of resource consent consultation and whether the Environment Court will distinguish them on the basis of context. It would have been useful to see a Court of Appeal pronouncement on whether the *Gill* approach is a reasonable interpretation of section 8.

Thus the lack of express provision has been a catalyst for the issue of consultation in the resource consent procedure. The absence of a clear directive has allowed the courts room to explore the application of section 8 in a specific context of the RMA.

2. The Principles of the Treaty of Waitangi

The basis of the *Gill* approach is the reasoning that as consultation is

64 *Smith v Auckland City Council* [1996] NZRMA 276, 278 (CA) per Eichelbaum CJ.

a Treaty principle, it must be conducted to fulfil the requirements of section 8. The cornerstone of this reasoning is that consultation is actually a principle of the Treaty in the context of the RMA. There are two assumptions in the *Gill* approach which must be tested. The first is that consultation is a principle of the Treaty. The second is that in order to "take into account" this principle, consultation must in fact be conducted.[65]

In *Gill*, Judge Kenderdine relied on the 1989 Court of Appeal decision in *New Zealand Maori Council v Attorney General* ("the Forests case").[66] This decision was used as authority for the proposition that consultation is a principle of the Treaty of Waitangi. It is arguable that the Forests case does not in fact stand for an unqualified Treaty principle of consultation. The comments made by the Court of Appeal in the Forests case should be viewed in the context of those made in the earlier Lands case.[67] In the Lands case the Court of Appeal refused to accept that there existed a general Treaty principle of consultation: "A duty 'to consult' was also propounded. In any detailed or unqualified sense this is elusive and unworkable"[68] and "... an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty".[69] Subsequently in the Forests case the Court of Appeal qualified its earlier statements:[70]

> In the judgments in 1987 this Court stressed the concept of partnership. We think

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65 This second assumption will be discussed in the subsequent part of this paper. See infra, note 80.

66 Supra, note 38.

67 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

68 Ibid, 665 per Cooke P (as he then was).

69 Ibid, 683 per Richardson J.

70 *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA), at 152 per Cooke P (as he then was) (emphasis added).

> it right to say that the good faith [owed] to each other by the parties to the Treaty must extend to consultation on *truly major issues*.

Therefore a statement that the Forests case is authority for a broad Treaty principle of consultation should be treated with some caution. In that case the court seemed to be qualifying its earlier refusal to recognise such a principle. If the Forests case is to be used as the basis of a consultative duty in the resource management field, the ambit of the expression "truly major issues" must be clarified. That expression arose in terms of the disposition of Crown assets under the State Owned Enterprises Act. The scope of truly major issues in the RMA context is unclear. It has been suggested that this phrase may extend to "National policy statements and the Minister's exercise of the call-in powers, but not necessarily to all or even most resource consent applications."[71] In *Rural Management* Judge Treadwell noted that consultation on truly major issues would apply "in particular in such situations as preparation of a district or regional plan or in a situation where a district or regional council is itself proposing to commence an activity which could impinge upon Maori".[72]

The issue of context is extremely important. The development of a Treaty jurisprudence under the RMA will require some refining of principles identified elsewhere. Principles which are relevant under the State Owned Enterprises Act may not be so under the RMA. Moreover, there may be dangers in extrapolating principles from the former directly into the latter. This was argued in *Haddon*, and although Judge Kenderdine accepted this submission, a Treaty principle of consultation was identified in that case. In *Hanton* Judge Sheppard noted that a distinction could be drawn as under the State Owned Enterprises Act assets are being disposed of in a manner

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71 Ministry for the Environment *Case Law on Consultation - Working Paper 3* (Wellington, 1995) at 5.

72 Supra, note 20, at 423.

which would place them beyond reach for the redress of grievances under the Treaty.[73]

It is arguable that the *Gill* approach may stretch the Court of Appeal comments in the Forests case too far. An unqualified statement that consultation is a principle of the Treaty may be overstating the case. The essential qualification of "truly major issues" has been omitted from that approach. It should be noted, however, that Judge Kenderdine's approach has been endorsed by the High Court on two occasions. In *Quarantine Waste* Blanchard J adopted the *Gill* reasoning that the Forests case is authority for a principle of consultation in the RMA. In *Worldwide Leisure* Cartwright J similarly adopted this approach on the basis of the Forests case.[74]

It is important to emphasise that decisions such as those of the Court of Appeal are not the only source for the identification of Treaty principles. Another important source is the reports of the Waitangi Tribunal. The Court of Appeal has noted that in determining these principles, the court "should give much weight to the opinions of the Waitangi Tribunal"[75] and that "the Crown, as a Treaty partner, could not act in conformity with the Treaty or its principles without taking into account any relevant recommendations by the Waitangi Tribunal."[76] The Waitangi Tribunal has in fact identified that consultation is necessary in the RMA context. In the Ngai Tahu Report

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73 Supra, note 15, at 301. Interestingly Judge Sheppard has more recently stated that consultation is a principle of the Treaty in the RMA context and in doing so relied on the Forests case as authority. See *Te Runanga o Taumarere v Northland Regional Council* supra, note 49, at 94.

74 Note the effect of the Court of Appeal decision in this case, see Latimore, B., Cowper, I., and Caunter, J., supra, note 39.

75 Supra, note 67, at 661.

76 *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129, 135 (CA) per Cooke P (as he then was).

the Tribunal noted:[77]

> In the contemporary context, resource and other forms of planning, insofar as they may impinge on Maori interests, will often give rise to the need for consultation.

This is interesting as it obviates the need for an analysis of "truly major issues". A consultative duty in the resource management has been identified by the Waitangi Tribunal, and arguably that is the end of the matter. Whether this can be reconciled with the truly major issues qualification in the Forests case is unclear. This adoption of the Waitangi Tribunal's comments could have been used by Judge Kenderdine to achieve the same end in *Gill.*

This is an area which requires clarification. It is for the courts to clarify which Treaty principles are applicable in the RMA context, and the extent to which each applies.[78] An obvious starting point is the principles as identified in other contexts, and the opinions of the Waitangi Tribunal. There are also a number of very useful publications which discuss the application of Treaty principles under the RMA.[79]

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77 Waitangi Tribunal *Ngai Tahu Report - Wai 27* (Brooker & Friend, Wellington, 1991) 245.

78 For an analysis of the appropriateness of delegating important policy decisions to the Courts in this context see Williams, D.A.R., "The Resource Management Act and the Problem of Legislative Indeterminacy" (1995) 1 BRMB 165.

79 See for example Kenderdine, S.E., "The Treaty Jurisprudence" in *Applications under the Resource Management Act 1991,* (New Zealand Law Society Seminar Paper, October 1993); Ministry for the Environment, *Resource Management - Consultation with Tangata Whenua* (Wellington, 1991); Office of the Parliamentary Commissioner for the Environment, *Proposed Guidelines for Local Authority Consultation with Tangata Whenua* (Wellington, 1992); Crengle, *Taking into Account the Principles*

3. Incorporation of the Principles of the Treaty into the RMA

Section 8 of the RMA requires that Treaty principles must be "taken into account". It should be emphasised this requirement is not an end in itself, rather it is a means to the overriding objective of achieving sustainable management of natural and physical resources under section 5 of the Act. In this respect any uncertainty which surrounds the operation of section 5 must flow on to other parts of the Act such as section 8.[80] The form of statutory incorporation used in the RMA should be carefully considered when interpretations of the section are formulated. The use of this form of incorporation is relatively unique and this may be one reason for the conflicting approaches in the Planning Tribunal.[81] Moreover, the persons and bodies which are subject to the obligations under the RMA, are further removed from the Crown than is the case in other legislation which incorporates references to the Treaty. If it were assumed that consultation is a Treaty principle in the resource consent context, it is unclear what is required for this principle to be taken into account.

McHugh has commented that the manner in which Treaty principles are incorporated into a statute is as important as the fact of incorporation

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of the Treaty of Waitangi (Ministry for the Environment, Wellington, 1993); Ministry for the Environment, *Case Law on Consultation - Working Paper 3* (Wellington, 1995).

80 For a recent summary of the debate over s 5 of the RMA see Randerson, "Resource Management Act 1991" in Williams, D.A.R., (ed), *Environmental & Resource Management Law* (2nd ed 1997) esp at 73-77.

81 For a comparison between the form of incorporation used in the RMA and in other statutes see Fisher, D.E., "The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives" in Brookers *Resource Management* (1991) 15-16.

itself.[82] There are a variety of methods for the incorporation of the principles of the Treaty of Waitangi into domestic legislation. In the environmental context alone comparisons may be made between the RMA, the Conservation Act 1987[83] and the Environment Act 1986.[84] The Review Group on the Resource Management Bill considered the stronger form of incorporation as exists in the State Owned Enterprises Act 1986. Under section 9 of that Act the form of incorporation is stronger than exists in the RMA, in that it prohibits the Crown from acting in a manner which is inconsistent with the principles of the Treaty. The Review Group considered that this form would be inappropriate for the RMA, partly due to the fact that not all persons acting under the Act are Treaty partners.[85]

There has been a variety of opinions on the incorporation of Treaty principles into legislation and specifically into the RMA. The Waitangi Tribunal has criticised the lack of priority given to the Treaty in the RMA. In the Ngawha Geothermal Resource Report the Tribunal stated:[86]

> It is difficult to escape the conclusion that the Crown in promoting [the RMA] has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect the legislation is fatally flawed.

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82 McHugh, P, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991) 268.

83 Section 4 of the Conservation Act 1987 states: "This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi."

84 The Long Title of the Environment Act 1986 states that one of the purposes of the Act is to: "Ensure that, in the management of natural and physical resources, full and balanced account is taken of ... The principles of the Treaty of Waitangi."

85 Report of the Review Group on the Resource Management Bill (11 February 1991) at 15-16.

86 Waitangi Tribunal, *Ngawha Geothermal Resource Report - Wai 304* (Brooker & Friend, Wellington, 1993) 145.

Sir Kenneth Keith has commented that there are three variables which are relevant where legislation requires or permits decision-makers to have regard to the Treaty of Waitangi.[87] These are the status of the provision in terms of priority in the legislation, the strength of the verb used in the incorporation, and whether the Treaty is referred to in a general manner or more specifically. The author continues:[88]

> It is not only the choice made under each variable which affects the scope of power of the decision-makers ... It is also the combination of the particular choices: thus if the Treaty interest is just one of several, if the verb is relatively weak, and if the matter is broad, the power will be relatively unconstrained.

In terms of priority in the RMA, the principles of the Treaty are located in Part II of the Act. In this sense there is a clear priority attributed to these principles. Section 8 is not, however, the sole consideration in Part II and is of course itself subject to the overriding purpose of the Act as identified in section 5. Therefore while the Treaty principles do have priority in the resource consent context, there are other Part II matters which are relevant. Secondly the verb used in the RMA is not as strong as is found in some other statutes. Of the five examples identified by Sir Kenneth, "shall take into account" is ranked at number four in terms of strength of verb.[89] Finally the Treaty matter referred to in the RMA is the principles of the Treaty. This, in terms of the analysis of Sir Kenneth, is a general statement of the relevant matter. In this regard a comparison may be drawn with the more specific wording of section 6(e) of the Act.[90]

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87 Sir Kenneth Keith, "The Treaty of Waitangi in the Courts" (1990) 14 NZULR 37, 56.

88 Ibid, 58.

89 Ibid, 57.

90 That section requires recognition and provision for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and

Professor Fisher considered the issue of incorporation and after discussing the form used in other statutes noted:[91]

> It is however the form of the obligation in s 8 RMA91 that sets it apart from the previous legislation. The obligation is to 'take into account' the principles of the Treaty. The obligation is thus no more than procedural and deliberative.... It nevertheless is not a meaningless obligation in the sense that it is a matter for judicial determination whether or not and to what extent the principles of the Treaty have been taken into account in the exercise of any particular function.

In the *Wellington Rugby* case Judge Kenderdine responded to these comments:[92]

> With respect to [Professor Fisher], the obligation of the Treaty principles cannot be dismissed so lightly. Firstly, it is mandatory. It is only if the council officers carry out research or consultation and are seen to do so by virtue of the material that they put before the council, that it can avoid being in breach of the Treaty provision of the [RMA].

The Judge in this case indicates that consultation must be conducted for the principles of the Treaty to be taken into account. By way of contrast Judge Sheppard in *Hanton* considered the terms of incorporation and commented:[93]

> Although s 8 requires consent authorities to take into account the principles of the Treaty, we do not find in its language any imposition on consent authorities of the obligations of the Crown under the Treaty or its principles ... Rather the consent

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other taonga. See the discussion of the similar provision in s 3 of the Town and Country Planning Act 1977 by Sir Kenneth Keith, ibid, 57.

91 Fisher, D.E., supra, note 81, at 16.

92 Supra, note 7, at p 22.

93 Supra, note 15, at 301.

authority is to take those principles into account in reaching its decision.

The distinction between the obligations of the Crown and those of the consent authority in *Hanton* has been criticised by Professor Brookfield as being "constitutionally questionable": [94]

> The kawanatanga ceded in the Maori version of article 1 of the Treaty (whether or not expanded into the sovereignty of the English version) is exercised not only by the Crown and its Ministers and officers but by all authorities, officers and other persons exercising statutory powers or functions that depend ultimately on what was ceded or taken in 1840. If the powers of kawanatanga are qualified by obligations, *even if faintly through the concept of Treaty 'principles' to be 'taken into account'*, there is (with respect) no basis for the distinction suggested by the Tribunal in [Hanton] between Ministers of the Crown and other consent authorities.

This last statement is interesting in that it suggests that the form of incorporation used in the RMA is of little importance, and that the obligations of the Crown under the Treaty extend to the consent authority and council officers despite the statutory manner of extending such obligations. Judge Sheppard in *Hanton* was clearly attempting to attribute some meaning to the form of incorporation used in section 8, which is certainly the correct approach to interpreting the section. The comments made by Professor Brookfield are in line with those of the Waitangi Tribunal in the *Ngawha Geothermal* report, in that they are perhaps a criticism of the enactment of the RMA rather than the interpretation of it. This raises an important issue which is beyond the scope of this discussion. That is whether the Crown can divest itself of its Treaty obligations by delegating responsibilities in statutes such as the RMA.

In *Haddon* Judge Kenderdine conducted an analysis of section 8 and

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94 Brookfield, F.M., "Constitutional Law" [1994] NZRLR 376, 379 (emphasis added).

noted:[95]

> It would appear that the duty 'to take into account' indicates that a decision-maker must weigh the matter with the other matters being considered and, in making a decision, effect a balance between the matter at issue and be able to show that he or she has done so.

This appears to be a useful test for the decision-making stage of the resource consent process. There is some uncertainty which surrounds the application of this concept to the procedural stage of the process, especially in relation to the question of consultation by the council officer. It is unclear whether a council officer is obliged to conduct consultation, for such a principle to be taken into account.

4. Consultation by an Applicant for Resource Consent

This issue of council officer consultation has been complicated by the fact that the applicant for resource consent may conduct consultation with tangata whenua. As noted, it could be argued that the express duty of consultation on the council in the preparation and change of policy statements and plans, has been mirrored in the resource consent procedure by placing a consultative responsibility on the applicant. In this situation it is unclear whether a council officer is obliged to conduct consultation in addition to that carried out by the applicant. The statements in *Gill*, *Quarantine Waste* and *Aqua King* are unequivocal in that the obligation of the council officer is independent of anything the applicant may do. The council is not permitted to rely on the "second hand" consultation of the applicant.

There have been other decisions which have addressed the totality of consultation rather than the source of it. In *Rural Management* and *Greensill*,

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95 Supra, note 4, at 61, citing the decision of Somers J in *R v CD* [1976] 1 NZLR 436.

Judge Treadwell focused on the fact that there was consultation by the applicant which was not reciprocated. Judge Sheppard also took into account applicant consultation in decisions such as *Tawa*, *Banks*, *Paihia*, and in *Tautari v Northland Regional Council*.[96]

There are a number of questions which surround the issue of applicant consultation. First, it should be considered whether a council officer is able to satisfy section 8 by ensuring that the applicant has consulted with tangata whenua. The obligation to take into account the Treaty principles requires that tangata whenua issues are placed before the hearings committee of the consent authority, and are taken into account throughout the resource consent process. If applicant consultation has been conducted, and the officer is able to verify that the views have been adequately relayed, then is consultation by that officer necessary? Judge Bollard alluded to this in *Isobel Berkett v Minister of Local Government*:[97]

> [T]he Tribunal has indicated in a number of cases now that it is good practice (bearing in mind that s 8 of the Act should not be narrowly interpreted) for a planner preparing a report for a hearing body ... to consult with Maori in a case involving matters of Maori concern to which s 6(e), 7(a) and 8 bear reference. *That practice should be followed where the applicant's assessment of effects under s 88(6) does not show that they have been consulted.*

This statement implies that where an applicant has conducted consultation, there is no requirement for the council officer to consult further.

One problem with the officer relying upon applicant consultation is the fact that consultation by an applicant is not mandatory under the RMA. The Fourth Schedule to the Act sets out, inter alia, matters that should be

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96 Planning Tribunal. 24 June 1996 A 55/96.

97 Supra, note 46, at 5 (emphasis added). See also the subsequent decision of the Environment Court in *Isobel Berkett v Minister of Local Government* Environment Court. 23 January 1997 A 6/97.

included in an assessment of effects on the environment. In clause 1(h) of that schedule it is stated that an assessment *should* include:

> An identification of those persons interested in or affected by the proposal, the consultation undertaken, and any response to the views of those consulted.

This consultation by an applicant for resource consent appears to be discretionary rather than mandatory. The RMA does, however, state that the assessment shall be in such detail as corresponds with the scale and significance of the actual or potential effects on the environment.[98] This indicates that the more complex the application, the more likely it is that an applicant should conduct consultation. Moreover, under section 92 a consent authority may require an explanation of consultation undertaken by an applicant where the authority is of the opinion that a significant adverse effect may result from the proposed activity. In *Aqua King* Judge Kenderdine noted that the consent authority could in fact require an applicant to carry out further consultation if it was not satisfied with that which had occurred.[99] In *Greensill* Judge Treadwell noted that the consent authority could also commission a report on any matters raised in relation to the application.[100] These matters could include consultation which has been or which should have been conducted under the Fourth Schedule. Judge Treadwell went on to affirm that while there is no obligation on an applicant to consult with tangata whenua, that person would be "most unwise" not to do so.[101]

Thus a council officer does have a range of means of ensuring that consultation with tangata whenua is conducted by the applicant. An applicant who fails in this regard runs the risk of having the notification or

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98 Resource Management Act 1991, s 88(6)(a).

99 Supra, note 32, at 319.

100 Supra, note 34, at p 8.

101 Ibid.

determination of the application delayed until the requisite standard is achieved. Judge Kenderdine in *Aqua King* and Judge Treadwell in *Rural Management* have both made statements to this effect.[102] The question which remains is whether an officer who ensures effective applicant consultation is then required to conduct independent consultation as an end in itself. It is on this point that the Tribunal and Environment Court seem to be divided.

There is one other issue of interest in relation to applicant consultation. Professor Fisher in his analysis of the RMA commented:[103]

> The expression 'power and function' is apt to include not only the institutions of government exercising executive and administrative power under the [RMA] but also *entrepreneurs and conservationists seeking to obtain consent or object* to the grant of consent under the various processes in the legislation.... [T]he obligation in s 8 to take into account the principles of the Treaty of Waitangi is *cast upon an applicant for consent* just as much as it is an obligation imposed upon the Crown as the party to the Treaty itself.

If this proposition were to be accepted by the Environment Court, then the *Gill* approach would suggest that the consultative duty under section 8 would apply equally to an applicant for resource consent. In fact Professor Fisher argues that a person making a submission on the resource consent application would also be subject to the obligation under section 8, on the basis that they are "any person" performing "a function" under the Act.

This raises the interesting issue of the obligations under section 8 which arise when a number of persons or bodies are involved in one procedure. In this scenario, the applicant, council officer, persons making submissions, and the consent authority may all be subject to section 8 responsibilities. It has been noted that the responsibility in question will

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102 Supra, note 32, at 319-320; and *Rural Management* supra, note 20, at 424.

103 Fisher, supra, note 81, at 14 (emphasis added).

vary depending upon the person or body concerned. The consent authority, although clearly obliged to take into account the principles of the Treaty, is not permitted to consult with tangata whenua prior to a hearing. The question which remains is whether the *Gill* proposition is correct, and that an officer of the council is obliged to consult regardless of the actions taken by the applicant for resource consent.

5. Notification and the Making of Submissions

There are two other matters which may affect the extent of the duty on a council officer. The first is the notification of the application to the tangata whenua. In *Gill* Judge Kenderdine held that notification of an application is insufficient to satisfy section 8. This is consistent with the approach in *Wellington International Airport Ltd v Air New Zealand* where it was held that consultation involves more than the dissemination of information.[104] There will often be situations where the notification of an application is accompanied by applicant consultation. The question again arises as to whether independent consultation by the council officer is necessary in this scenario. In the *Paihia* case Judge Sheppard seemed satisfied that the council had notified iwi of the application, and that this combined with consultation by the applicant was held to comply with the principles of the Treaty.

The second matter which may affect the extent of the duty on the council officer is the situation where tangata whenua make a submission on an application. In this case does an active involvement by Maori affect the obligations of the officer under section 8? In *Tautari* Judge Sheppard

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104 [1993] 1 NZLR 671, 675 (CA), citing with approval the decision of McGechan J in *Air New Zealand Ltd v Wellington International Airport Ltd* High Court, Wellington. 6 January 1992 CP 403/91.

noted:[105]

> [T]he Regional Council properly left it to its officials to consult with the [tangata whenua] and to record in the report to the Council ... the concerns conveyed to them by iwi. If that did not adequately express those concerns, the [tangata whenua] ... *had opportunity to state their case directly to the Council hearings committee*; ...

The question in this respect is whether a council officer should consult with tangata whenua if that party is making a submission on an application. There may be an issue of natural justice which arises in this scenario, especially if the submission is in opposition to the application.[106]

IV: CONCLUDING REMARKS

The Treaty section of the RMA should not be subjected to narrow or restrictive interpretations. There is a need for the courts to accord the section an interpretation which is purposive and which ensures that the Act promotes sustainable management which is culturally appropriate. At the same time section 8 must be the subject of a sensible approach which accounts for the wording chosen by Parliament, and the other matters specified in Part II of the Act. It should be remembered that the principles of the Treaty of Waitangi are to be taken into account in achieving the promotion of sustainable management of our natural and physical resources. In the interpretation of section 8 the courts have been consistent in some respects, yet in other ways divergent approaches have been evident. The scope of the duty of consultation with tangata whenua on the council officer has been particularly

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105 Supra, note 96, at pp 6-7 (emphasis added).

106 See the comments of Judge Bollard in *Mangakahia Maori Komiti* supra, note 47, at 206.

troublesome. This should not, however, necessarily be seen as a negative result. The development of a Treaty jurisprudence under the RMA will require time and debate, and some divergence of opinion may be a means to the greater end of an effective and workable Act. The only difficulty in this respect is the uncertainty which is created for those persons attempting to work under the legislation. In terms of the synthesis between Maori and environmental law this is a dynamic and fascinating period.