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RESOLVING TROUBLING CULTURAL ISSUES

CONSIDERATION OF THE APPROACH TAKEN IN THE WELLINGTON BIOSOLIDS CASE IN RELATION TO THE ISSUE OF THE WEIGHT WHICH THE ENVIRONMENT COURT AND CONSENT AUTHORITIES SHOULD GIVE TO COMPETING MAORI EVIDENCE.

Maori issues have received increased attention from the Environment Court since the *Resource Management Act 1991* (RMA) came into force, due in part to the recognition given to Maori cultural and spiritual values in sections 6(e), 7(a), and 8 of the RMA. Increasingly, the court (and consent authorities) are required to weigh competing Maori evidence.

This article considers the approach taken to such issues in *Te Runanganui O Taranaki Whanui Ki Te Upoko O Te Ika A Maui Inc v Wellington Regional Council and Wellington City Council*, Environment Court, W48/98, 8 July 1998, Judge Kenderdine (the Wellington Biosolids case).

The full significance of the Wellington Biosolids case is not revealed by the simple terms of the record of determination. However, in her keynote address to the RMLA 1998 Conference, Judge Kenderdine stated that the evidence heard in the case showed that "Maori can competently resolve potentially deeply troubling cultural issues through grasping new technologies and adapting them to their own cultural ways". Before turning to the evidence heard in the case, the background to the appeal will be discussed briefly.

BACKGROUND

The Wellington Biosolids case arose from a joint decision by the Wellington Regional Council and the Wellington City Council to grant resource consents to the Living Earth Joint Venture Company Limited (LEJV), to enable the construction of a composting plant at the Wellington Southern Landfill to process dewatered sewage sludge (biosolids) with greenwaste to produce compost of high quality which will have a wide range of positive and beneficial uses in the Wellington region – the first proposal in New Zealand to convert biosolids and greenwaste into compost.

Initially, LEJV's applications were opposed by inter alia four submissions made by Ngati Toa, Te Runanganui O Taranaki Whanui Ki Te Upoko O Te Ika A Maui Inc (the Runanga), the Maori Trustee, and the Wellington Tenth Trust.

However, by the time of the court hearing, the Runanga's appeal remained the only objection to the proposal based on Maori cultural and spiritual values.

The Runanga's appeal was based on the claim that human blood, body parts, and tissues may be present in the sewage sludge which is to be used to make the compost products, and that the proposal was offensive to the cultural and spiritual values of all Maori.

EVIDENCE HEARD IN THE CASE

Would human blood, body parts, and tissues be present in the sewage sludge?

Dr Kenneth Thomson, a consultant pathologist, was called to give expert evidence by LEJV. The court noted his conclusion that "it is reasonable to conclude... that the compost produced from biosolid sludge will contain no significant human material at all".

Was the proposal offensive to Maori cultural and spiritual values?

LEJV submitted that the answer to this question was no. This submission was based on the decision of the Court of Appeal in *Watercare Services Ltd v Minhinnick* [1998] NZRMA 113.

In determining whether a proposed activity is offensive to Maori cultural and spiritual values, the Environment Court in *Minhinnick* followed the approach of Greig J in *Zdrahal v Wellington City Council* [1995] NZRMA 289. Greig J held in *Zdrahal* that "if reasonable ordinary persons would be offended or find it objectionable, then it does affect the environment of those people and of any other such people living in the vicinity who are likely to be affected".

Judge Sheppard concluded that the view of Maori "while entitled to careful consideration could not be regarded as determinative". He then held that "ordinary persons would be informed about the background and about the way in which the work was to be done" (emphasis added).

The Environment Court in *Minhinnick*, therefore, based its judgement on "the attitude of a person who was representative of the

community at large rather than a representative of a particular iwi or other section of the community".

The Court of Appeal in *Minhinnick* held that the Environment Court had "correctly directed itself in law when forming its opinion". Tipping J then went on to hold that:

"The Court must weigh all relevant competing considerations and ultimately make a value judgement on behalf of the community as a whole. Such Maori dimension as arises will be important but not... While the Maori dimension, whether arising under s6(e) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as representative of New Zealand society as a whole decides, whether the subject matter is offensive or objectionable... In the end a balanced judge has to be made."

LEJV submitted that this was the correct approach which the Court should follow when

determining whether the proposal was *offensive to* Maori cultural and spiritual values. In the course of the Wellington Biosolids case, the Court was set to hear evidence from Maori on both sides of this issue. Those for

the Runanga had described in evidence circulated before the hearing, what was seen as the "traditional view" of Maori tikanga. Evidence from LEJV described what has become known as the "pragmatic (or informed) view" of matters in a modern society.

THE "PRAGMATIC VIEW" OF MAORI TIKANGA

Evidence of the "pragmatic view" of Maori tikanga was given by Morris Te Whiti Love, director of the Waitangi Tribunal and trustee of the Wellington Tenth Trust; and by Sir Tipene O'Regan.

Love stated in evidence that:

"... I would first point out that we are dealing with modern day issues not contemplated by our tupuna. Therefore what we are talking of is a derived tikanga or an extension of ancient beliefs to deal with the modern day situation..."

"The proposal to compost the untreated sewage sludge follows the tikanga to render the

tapu sludge into something noa and therefore usable. To complete the process to whakanoa association of the compost with earth is required so that the material would fall into a cycle of fallowing to become earth or papatūānuku..."

"This composting proposal is a close approximation to the natural process and produces a product which with appropriate handling is no longer culturally offensive..."

More importantly, Sir Tipene O'Regan stated:

"Whilst I agree with the conclusions of Morris Te Whiti Love I take the view that he does not go far enough in articulating the dynamic and evolving character of traditional Maori values. In my view it is the capacity for dynamic adaptation which is the particular genius of Maori culture and its associated values. I believe that this is powerfully demonstrated in Maori traditional history as well as in our more recent historical experience. I take the view that we should follow the historical precept of our tupuna and permit our values to flourish in

“ MAORI CAN COMPETENTLY RESOLVE POTENTIALLY DEEPLY TROUBLING CULTURAL ISSUES THROUGH GRASPING NEW TECHNOLOGIES AND ADAPTING THEM TO THEIR OWN CULTURAL WAYS ”

accordance with the changing environment and the expansion of human knowledge and capacity. Seen from this perspective the proposal may be viewed more as consistent with tikanga than a form of compromise with it.

"I accept that the Runanga may regard its position as a traditional Maori view. I differ from that view of our tradition and take the position that a truly traditional Maori view is one that grasps the possibilities of new technologies and understanding and manages them in a pragmatic manner as consistently as possible with the core traditional concepts of tapu and noa and the balance between them. I believe that such an approach is appropriate in this case."

DETERMINATION OF APPEAL

After hearing submissions from counsel and evidence from eight witnesses on behalf of LEJV, including Drs Thomson and Palmer, Sir Tipene

O'Regan and Morris Te Whiti Love, the Runanga agreed to arrangements by which the issues in the appeal could be resolved. It was, however, important to the Runanga that the conclusions in the medical evidence given by Dr Thomson be recorded by the Court as part of its determination of the appeal in the form of a finding upon the evidence. This was acknowledged in the record of determination.


CONCLUSION

The significance of the Wellington Biosolids case lies in the evidence of Sir Tipene O'Regan in relation to the evolving nature of traditional Maori values and "the capacity for dynamic adaptation which is the particular genius of Maori culture and its associated values". This demonstrates that when determining whether a proposal is offensive to the cultural and spiritual values of Maori,

whilst both the "traditional" and "pragmatic view" of Maori tikanga are entitled to careful consideration – the informed "pragmatic view" which "grasps the possibilities of new technologies and understanding"

can be regarded as determinative of the matters in issue, in appropriate circumstances.

This approach to Maori cultural and spiritual values enables modern-day resource management issues to be resolved "in a pragmatic manner as consistently as possible with the core traditional concepts of tapu and noa and the balance between them".

Accordingly, the Wellington Biosolids case shows that "potentially deeply troubling cultural issues" can be resolved where the circumstances in question suggest that the "pragmatic view" of Maori tikanga should be preferred. 

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FOOTNOTE

1. Trevor Gould and Trevor Daya-Winterbottom acted as counsel for LEJV in the Wellington Biosolids case.