PAUL TERRENCE BEVERLEY

CONSULTATION WITH THE TANGATA WHENUA AND THE ROLE OF THE LOCAL AUTHORITY UNDER THE RESOURCE MANAGEMENT ACT 1991

LLM RESEARCH PAPER
ADVANCED ENVIRONMENTAL LAW (LAWS 539)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

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ABSTRACT

This paper considers the contentious issue of consultation with the tangata whenua under the Resource Management Act 1991. More particularly, an analysis is conducted of the duties of the local authority in the resource consent procedure. Section 8 of the Act prescribes that all persons exercising functions and powers under the RMA, shall take into account the principles of the Treaty of Waitangi. This section has been interpreted in one line of cases as imposing an active duty of consultation on the local authority, or the officer of that authority. Conversely, the Planning Tribunal in another line of decisions has refused to accept that consultation is a Treaty principle which has unqualified application in the resource consent procedure. The overall position is one of confusion.

This paper will analyse the two conflicting lines of authority on this issue. Further, the reasoning behind an active duty of consultation is considered in order to establish that such a duty is not legitimate under section 8 of the RMA. The duty is then tested against the principles of natural justice, to determine the effects on impartial decision-making in this context. Finally, a solution is offered which would arguably resolve the conflict on this issue and remove the potential threats to natural justice.

This piece of work is dedicated to my mother Norah and my brother Michael.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 14850 words.

I INTRODUCTION

The Resource Management Act 1991 ("RMA") was enacted to restate and reform the law relating to the use of land, air, and water resources. That Act defines the "environment" widely to encompass, for example, cultural conditions affecting people and communities.[1] The Act regulates the use of these resources partially on the basis of the potential effects of a use on the environment.

This paper will consider one cultural aspect of the RMA. The Act expressly incorporates the principles of the Treaty of Waitangi, in recognition of Maori culture as a constituent part of the wider environment. Section 8 of the Act states that all persons exercising functions and powers under the RMA, must take into account the principles of the Treaty.

The starting point for this analysis will be a consideration of how the Planning Tribunal has interpreted section 8 of the Act. There are two broad lines of authority which are in a state of conflict. The basis of this conflict is whether section 8 requires the local authority to conduct consultation with the tangata whenua in the resource consent procedure, or requires something less than that.

The Planning Tribunal in *Gill* v *Rotorua District Council* [2] held that section 8 of the RMA imposes an active duty of consultation on the local

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[1] See the definition of "environment" in s2 of the RMA.

[2] (1993) 2 NZRMA 604. Note that both the expression "local authority" and the term "council" are used in this paper. They are both intended to refer to the local authority as defined in s2 of the RMA. The use of both is a reflection of a similar approach in the case law on this issue. The "consent authority" is also referred to occasionally, and this expression refers to the local authority in its decision-making capacity under the RMA, see the definition in s2.

authority. This approach has been subsequently endorsed by the tribunal and the High Court. There have, however, been a number of other decisions in which the tribunal has refused to affirm the principle expounded in *Gill.* Further to this both lines of authority display elements of internal inconsistency. The result of this is an overall lack of clarity and direction in the decisions on this issue.

This paper will consider the cases on consultation, in an attempt to define the law as it presently stands, and in order to trace the evolution of the consultation principle. An analysis of the reasoning used in decisions such as *Gill* will then be conducted in order to test the legitimacy of an active duty of consultation under section 8. This duty will also be tested against the standards of natural justice, to determine whether impartial decision-making under the RMA is jeopardised. Finally, an alternative approach to that taken in *Gill* will be offered, which the writer believes is a solution to the confusion apparent in this area of law and the natural justice concerns identified in the paper.

II THE WIDER ISSUE OF CONSULTATION

It is essential that the scope of this inquiry is carefully defined and limited. This will ensure that the analysis is more than a summary of a wide range of interrelated issues. The concept of consultation, even if limited to the RMA context, is very wide and raises a number of issues worthy of careful analysis. The writer therefore has chosen to concentrate on one specific aspect within the broader heading of consultation with the tangata whenua under the RMA. That aspect is the confusion which has arisen with respect to consultation by the local authority in the resource consent procedure. This confusion is a result of different approaches to the interpretation of section 8 of the Act.

In the interests of completeness however, it is necessary to at least identify some of the issues which are related to the subject matter of this paper. These wider issues will not be discussed in any depth in the paper, but it is recognised that there are a number of areas of conflict and dispute within them which are deserving of further research and discussion.

This paper therefore does not consider the following issues in relation to consultation with the tangata whenua:

(1) What is consultation? What should it involve? When and how should it occur and what is to be regarded as effective consultation?

(2) Who should be consulted? How can a local authority ensure that the appropriate iwi, hapu or wider Maori group are being consulted?

(3) How legitimate is consultation under the Treaty of Waitangi? What is the Maori view of this process? What alternatives are available?

(4) What is the nature of the consultation requirements in the other parts of the RMA, such as in the preparation of plans and policy statements? How does consultation fit in with the principle of sustainable management under the RMA?

There is a range of useful literature available on this wider subject, which would provide a good starting point for an investigation of the above issues.[3]

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[3] See for example R Boast and D Edmunds "The Treaty of Waitangi and Maori Resource Management Issues" in *Brooker's Resource Management* (Brooker's, Wellington, 1991); Parliamentary Commissioner for the Environment *Proposed Guidelines for Local Authority Consultation with Tangata Whenua* (Wellington, 1992); Ministry for the Environment, *Resource Management - Consultation with Tangata Whenua* (Wellington 1991); DC Kaua *Processes of Consultation Between Maori and Local Government Agencies* Research Paper for the Degree of Masters of Public Policy, Victoria University of Wellington, 1995. See also decisions such as that of the Court of Appeal in *Wellington International Airport Ltd* v *Air New Zealand* [1993] 1 NZLR 671; and the Planning Tribunal in *Ngati Kahu and Pacific International Investments Limited* v *Tauranga District Council* [1994] NZRMA 481.

III THE DUTY OF CONSULTATION UNDER THE RMA

The duty to consult with Maori in the resource consent procedure has been considered in a number of cases before the Planning Tribunal. The tribunal has, however, been unable to formulate a coherent principle of the requirements under the RMA and the law is presently in a state of confusion. There has also been one High Court decision on the issue which, unfortunately, does not clarify the position of the local authority. The confusion is due to differences in the interpretation of section 8 of the RMA:

> **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).

The cases on consultation will be analysed in chronological order to demonstrate the evolution of the law in this area.[4]

A Gill, Haddon, and Wellington Rugby

The issue of consultation under the RMA was first dealt with in the Planning Tribunal by Judge Kenderdine. Her Honour initially delivered three important decisions on consultation which formed the basis for the subsequent divisions in the tribunal on this issue.

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[4] This is not an exhaustive analysis of the decisions involving consultation under the RMA; see for example *Panekiri Tribal Trust* v *Wairoa District Council* Unreported, 25 July 1994, Planning Tribunal, W 62/94; *Campbell* v *Southland District Council* Unreported, Planning Tribunal, W 114/94; *Sea-Tow* v *Auckland Regional Council* [1994] NZRMA 204; *Marlborough District Council* v *New Zealand Rail Ltd* [1995] NZRMA 357.

1 *Gill*

The first decision to explore the issue of consultation under the RMA was that of Judge Kenderdine in *Gill* v *Rotorua District Council*.[5] That case involved an appeal against the granting of a resource consent for a housing development. The land in question was of special significance to the tangata whenua. The tribunal was concerned that the nationally important characteristics of the area had not been taken into account in the decision to grant the consent. The duty to consult was one of a number of issues dealt with by the tribunal. The comments made by Judge Kenderdine on this issue were brief but clearly identified the source of the duty to consult with tangata whenua in the resource consent procedure:[6]

> 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 tribunal went on to note that the council had not actively consulted with the relevant tribe over the proposal, but had merely notified the tribe of the situation. These actions were held to be passive and insufficient to satisfy the standard required by section 8 of the Act.[7] In the summary of findings Judge Kenderdine concluded: "The council did not actively consult with the Maori Trustees of Kariri Point Reserve in terms of s 8 of

[5] Above n 2.
[6] Above n 2, 616.
[7] Above n 2, 616.

the Act."[8] The tribunal allowed the appeal on the basis of a number of reasons including this lack of consultation.

2 *Haddon*

In *Haddon* v *Auckland Regional Council*[9] the tangata whenua applied for a review of a recommendation made by the Auckland Regional Council (ARC), to the Minister of Conservation ("The Minister"). That case involved an application by the Auckland City Council ("ACC") to extract sand off the shores of North Auckland. This activity was classed as a restricted coastal activity, and as such the role of the ARC was to make a recommendation to the Minister, who in turn acted as the consent authority.[10] The role of the Planning Tribunal was to perform an inquiry into the ARC recommendation, and then report to the Minister.

Judge Kenderdine noted that the ACC, ARC, Minister, and the tribunal itself, were all required to take into account the principles of the Treaty of Waitangi.[11] The tribunal stated:[12]

> [I]t is clear to us the parties had not taken into account the principles of being adequately informed, or of consulting sufficiently as to the full implications for the hapu of what exactly was proposed ... *early* enough in the decision-making process.

This source of this duty of consultation was then considered: "The Court of Appeal has established that consultation is a principle of the

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[8] Above n 2, 616.
[9] [1994] NZRMA 49.
[10] See ss 117, 118 119 of the RMA.
[11] As parties exercising functions and/or powers under the Act, see above n 9, 60.
[12] Above n 9, 61.

Treaty. (See *New Zealand Maori Council v Attorney General* [1989] 2 NZLR 142.)"[13]

Judge Kenderdine criticised the parties for not consulting the tangata whenua parties early enough in the process:[14]

> [The counsel for the Minister] drew our attention to the Treaty principle of the Crown making informed decisions ... all the parties under RMA ... must be informed where the interests of a Treaty partner is concerned and demonstrate ... that they have taken those interests into account. To be properly informed therefore the parties must consult at the initial stages in the process.

The tribunal concluded on this issue in the summary of findings by stating: "The Treaty principle of consultation in respect of the development and protection of the resource appears not to have complied with early enough in the application process, given the [tangata whenua's] known interest in the area."[15]

3 *Wellington Rugby*

In Wellington Rugby Football Union Incorporated v Wellington City Council [16] Judge Kenderdine considered an appeal in respect of a decision by the Wellington City Council to allow facilities to be upgraded at

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[13] Above n 9, 61.
[14] Above n 9, 61.
[15] Above n 9, 64.
[16] Unreported, 30 September 1993, Planning Tribunal, W 84/93.

Athletic Park. The tribunal held in respect of the interests of the tangata whenua:[17]

> 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].

There are two particular points of interest in this statement by Judge Kenderdine. First, the obligation under section 8 is held to be that of the council officers, rather the council in some broader capacity. This distinction was not made in *Gill* or *Haddon*. A number of subsequent tribunal cases were distracted by the possibility that Judge Kenderdine intended the duty to be that of the consent authority in its decision-making capacity. The *Wellington Rugby* decision suggests that this was not the intention in *Gill* or *Haddon*.

Secondly, the above statement in *Wellington Rugby* indicates that the section 8 duty can be discharged by the officer conducting research *or* consultation. This implies a discretion as to consultation which is not apparent in the earlier decisions of Judge Kenderdine.

Her Honour went on to note that the consent authority is also bound by section 8, and that it must take into account any relevant principles of the Treaty in making its decision.[18]

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[17] Above n 16, 22.
[18] Above n 16, 22-23.

Thus Judge Kenderdine in these three decisions had expounded a relatively clear statement of principle on behalf of the tribunal. The duty of consultation in the resource consent procedure is that of the council. This flowed from section 8 of the Act and the fact that the Court of Appeal had identified consultation as a principle of the Treaty in the *New Zealand Maori Council* case.

B The High Court in Quarantine Waste

The next decision on this issue was that of the High Court in *Quarantine Waste (NZ) Ltd* v *Waste Resources Ltd.*[19] In that case Quarantine Waste was seeking judicial review of a decision by the Manukau City Council to proceed on a non-notified basis in respect of a land use consent application. The applicants for resource consent, Waste Resources, were trade competitors of Quarantine Waste.

The issue of consultation was dealt with by the court despite the fact that the tangata whenua were not party to the proceedings. In support of its application for judicial review, Quarantine Waste asserted that the council had not discharged its obligation under the RMA to consult with the tangata whenua. It was noted that the council had instead relied on the ongoing consultation conducted by the applicant.[20]

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[19] [1994] NZRMA 529.
[20] Above n 19, 542.

After discussing the consultation by the applicant, Blanchard J stated:[21]

> 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* v *Rotorua District Council* ... s 8 requires that persons exercising functions under the Act must take into account the principles of the Treaty (including that of consultation) and s 7 requires that particular regard be paid to the 'Maori Issues' listed in that section. As the Tribunal has said, s 7 imposes a duty to be on inquiry.

The court stated however that even upon the assumption that consultation was necessary, the lack of it in this case did not result in the council failing to consider or take into account a relevant factor. For this reason relief was not granted.

This decision therefore endorsed the approach taken by the tribunal in earlier cases such as *Gill* and *Haddon*.[22] Blanchard J in the High Court expressly adopted the reasoning of Judge Kenderdine in *Gill* in terms of a Treaty based duty of consultation on the local authority.[23] *Quarantine*

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[21] Above n 19, 542.

[22] While the court relied upon the decision in *Gill,* the decisions in *Wellington Rugby* and *Haddon* were also cited; see above n 19, 537. The *Gill* approach is affirmed at least in terms of the scope of the duty under section 8. However, see the discussion at below n 23.

[23] Although the result in *Quarantine Waste* indicates that the duty of consultation is not actually mandatory, rather it exists only as a means to ensure that decision-making in conducted in an

Waste remains the leading decision on the question of consultation and in theory should have settled the principle at the Planning Tribunal level.[24]

It is submitted that the approach in the High Court may have been different if Blanchard J had been able to consider the jurisprudence that has developed on consultation since the early cases such as *Gill* and *Haddon*. His Honour relied upon the approach taken in these cases, which may have been seen as a coherent statement of principle from the Planning Tribunal. As the subsequent decisions have revealed, that is not the case.

C *Ngatiwai, Hanton and Rural Management*

It is submitted that the timing of the subsequent tribunal decisions in relation to that of the High Court in *Quarantine Waste* was pivotal in the development of the consultation issue. The decisions in *Ngatiwai Trust Board* v *Whangarei District Council* [25] and *Hanton* v *Auckland City Council* [26] were both delivered prior to that in *Quarantine Waste*.[27] The tribunal in these two decisions was therefore free to depart from the approach taken in *Gill* and *Quarantine Waste*. The tribunal was able to express divergent views on the issue without being bound by the High Court decision. This allowed for the development of a different school of thought in the tribunal on the issue of consultation.

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informed environment. Thus the result in that case is not entirely compatible with the unqualified duty of consultation identified in *Gill*.

[24] A number of the subsequent decisions of the tribunal, however, appear to effectively ignore the High Court decision. See the discussion at below n 102.

[25] [1994] NZRMA 269.

[26] [1994] NZRMA 289.

[27] All three cases were heard within the same fortnight, between 7 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.

1 *Ngatiwai Trust Board*

In *Ngatiwai Trust Board* v *Whangarei District Council* [28] the tribunal was faced with an argument that the local authority had failed to discharge a duty of consultation with the tangata whenua. That case involved an appeal against a decision to grant a consent for the subdivision of land to establish a camping ground, and for the taking and discharge of water. The tangata whenua argued that they had not been consulted by the local authority, and relied on *Gill* and *Haddon* as authority for this obligation. In response to this argument Judge Bollard stated that the decisions in *Gill* and *Haddon* were not of general application, but were focused on the failure of the local authority to "follow up the special background of Maori significance present in each instance - both cases being intimately related to apparently long-standing cultural issues of which the councils concerned could not have been unaware."[29]

The tribunal concluded:[30]

> As bodies required to act judicially in hearing and determining the applications in the light of the evidence forthcoming from the applicants and others electing to participate, we do not see that [the local authority] having regard to its relevant functions and powers, was under a duty to consult with the [tangata whenua] before proceeding to hear [the application] ...

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[28] Above n 25.
[29] Above n 25, 274.
[30] Above n 25, 275.

The tribunal did emphasise that a council should be careful in scrutinising the supporting information provided by an applicant. Further a council officer may be under a duty in some circumstances to consult with the tangata whenua prior to a hearing, to ensure that the council is adequately informed of Maori concerns.[31]

2 *Hanton*

In *Hanton* v *Auckland City Council* [32] Principal Planning Judge Sheppard indicated in very strong terms that there is no duty on the local authority to consult with the tangata whenua in the resource consent procedure. That case involved an appeal against a decision by Auckland City Council to grant a land use consent for the construction of a service station. The tribunal analysed the issue of consultation in detail.[33] The decision included passages from *Gill*, *Haddon*, and *Ngatiwai*. Judge Sheppard discussed the duty created by section 8 of the RMA, and considered the extent to which consultation was a principle of the Treaty. The tribunal focused on the importance of section 8 due to its place in Part II of the Act, but went on to note: "...we would not be entitled to give it effect beyond the scope of the words used."[34]

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[31] Above n 25, 274-275.
[32] Above n 26.
[33] The decisions in *Ngatiwai* and *Hanton* are in fact the first to carefully analyse the basis for imposing such a duty on the local authority. In *Hanton* Judge Sheppard considered the principles of the Treaty of Waitangi and the incorporation of those principles into the RMA. Compare decisions such as *Gill* and *Quarantine Waste* which proceed on the assumption that consultation is a Treaty principle which has an unqualified application in the RMA context.
[34] Above n 26, 301.

The tribunal emphasised the wording of the section by stating:[35]

> Although section 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.

The decision in *Haddon* was then distinguished on the basis that in any case where the consent authority is a Minister of the Crown, any decision made should be subject to the Crown's obligations under the Treaty. The tribunal went on to state that the RMA context is distinct from that dealt with in the Court of Appeal decisions where consultation was held to be a principle of the Treaty.[36]

Judge Sheppard considered whether the *New Zealand Maori Council* case[37] referred to in *Gill,* could be taken as authority for a duty of consultation in the RMA context. His Honour relied on three grounds to distinguish the resource consent procedure from the context of the State Owned Enterprises Act ("SOE Act"). First, under the RMA the council is not disposing of Crown assets in a manner which would render them unavailable for the compensation of Treaty grievances. Rather, the council is making decisions in terms of appropriate use consistent with the principle of sustainable management. Secondly, the RMA involves a detailed procedure which does not overlook the position of the tangata whenua, but which omits any express duty of consultation. Thirdly, the

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[35] Above n 26, 301.
[36] These decisions were made in the context of the State Owned Enterprises Act 1986; see for example *New Zealand Maori Council* v *Attorney General* [1987] 1 NZLR 641; *New Zealand Maori Council* v *Attorney General* [1989] 2 NZLR 142.
[37] [1989] 2 NZLR 142.

requirement that a consent authority act judicially is not consistent with a duty on that authority to consult with one sector of the community.[38]

In conclusion the tribunal noted:[39]

> We would adopt, with respect, the discussion in the *Ngatiwai* decision of the [*Gill* and *Haddon*] decisions, and would follow the conclusion that a consent authority is not obliged to consult with the tangata whenua on a resource consent application. We hold that no such duty is to be inferred from section 8 or the *Maori Council* case;...

It is worth noting that unlike *Gill* and *Haddon*, the circumstances in *Hanton* did not involve matters of special significance to the tangata whenua. It was held that there was no evidence that the site in question was of any special value to Maori.[40] The tribunal then took a similar approach to that in the *Ngatiwai* decision by conceding that in circumstances where the resources in question are the subject of a special relationship with Maori: "...an adviser preparing a report on the application for a consent authority should investigate and report on the extent to which the proposal would affect that relationship."[41] This action was not required on the facts in *Hanton* due to the lack of any such special relationship.

Thus the tribunal in *Ngatiwai* and *Hanton* refused to accept that section 8 of the RMA imported into the resource consent procedure an unqualified

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[38] Above n 26, 301.
[39] Above n 26, 301-302.
[40] Above n 26, 306.
[41] Above n 26, 302. In *Ngatiwai* this was framed as a duty which *may* fall on the council officers in certain circumstances, above n 25, 274.

duty of consultation. This is clearly inconsistent with decisions such as *Gill* and *Quarantine Waste.*

3 *Rural Management*

The decision in *Rural Management Ltd v Banks Peninsular District Council* [42] is crucial in an analysis of the evolution of the duty to consult on the local authority. The reason for this is that the tribunal was presented with a choice between the High Court authority in *Quarantine Waste*, and the dissenting views of the tribunal in *Ngatiwai* and *Hanton.* The High Court decision was not even cited by the tribunal which preferred to follow the *Ngatiwai* and *Hanton* approach.[43]

This case concerned an appeal relating to the disposal of sewerage from a subdivision. The tribunal was again faced with a submission that there had been inadequate consultation with the tangata whenua. It was noted that the applicant had made "considerable efforts"[44] to consult, but that the representative of the tangata whenua was uncooperative. The tribunal held that consultation is a two-way process, and if one party chooses to withdraw from discussions without giving reasons for doing so, that party "...cannot, in our opinion, be later heard to complain that the principles of the Treaty have been infringed."[45]

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[42] [1994] NZRMA 412.
[43] This was despite the fact that the *Quarantine Waste* decision was delivered three months before the decision in *Rural Management.*
[44] Above n 42, 422.
[45] Above n 42, 423.

Judge Treadwell went on to consider the decisions in *Gill* and *Haddon*, and stated:[46]

> If a reading of those cases 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 noted the decisions in *Ngatiwai* and *Hanton* and observed that those cases established that a consent authority must act judicially in hearing applications and is not under a duty to consult with any party prior to the proceedings. The tribunal held that such a duty would breach a fundamental principle in the justice system that one party should not be heard without the other being present.[47] It was concluded that the officers of the consent authority may consult for the purposes of obtaining information which may be considered by the hearings committee along with the other evidence presented.[48]

D Whakarewarewa

In *Whakarewarewa Village Charitable Trust* v *Rotorua District Council* [49] Judge Kenderdine was afforded an opportunity to revisit the

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[46] Above n 42, 423.
[47] Above n 42 424.
[48] Above n 42, 424.
[49] Unreported, 25 July 1994, Planning Tribunal, W 61/94.

issue of consultation, following the division which had appeared in the Planning Tribunal. This case involved an appeal against a decision by the Rotorua District Council to decline an application to allow living, manufacturing, processing, and retailing of Maori arts and crafts in the Whakarewarewa village. There was a submission before the tribunal that there had not been adequate consultation with the tangata whenua. Judge Kenderdine referred to the dicta in *Quarantine Waste*, and noted that it was relevant to the case before the tribunal in two respects. First, the council officers had held a pre-hearing meeting with the tangata whenua to ensure that adequate information was available. This was held to discharge the council's obligation under the principles of consultation implicit in the Treaty.[50] Secondly, the tribunal held that the duty of consultation was not that of the applicant, for the reasons identified in *Quarantine Waste*.[51] Judge Kenderdine then impliedly acknowledged the differing opinions on the issue of consultation by stating:[52]

> [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 ...

Her Honour went on to comment:[53]

> 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. ... To avoid confusion in the future

[50] Above n 49, 23.
[51] Above n 49, 23.
[52] Above n 49, 23.
[53] Above n 49, 23-24.

> we propose to use the term *'consent authority'* in respect of the council sitting in its quasi-judicial capacity, and *'council officers'* in respect of questions of consultation.

Judge Kenderdine concluded that this approach was commensurate with that of the High Court in *Quarantine Waste*.[54]

It has been noted that the tribunal was divided on this issue, and it is respectfully submitted that Judge Kenderdine in this case attempted to reconcile the conflicting approaches which had arisen. The resistance to the imposition of this duty on the local authority in *Hanton* and *Rural Management* was based partially on the principles of natural justice. The tribunal in those cases was unable to accept that a consent authority as the decision-maker, should consult with one party unilaterally prior to making a decision.

The focus of the *Whakarewarewa* decision was therefore to reconcile the conflict between the section 8 duty of consultation on the council, and the role of the consent authority as an impartial decision-maker. Judge Kenderdine stated that consultation was the responsibility of the officers of the council rather than the consent authority. This approach does deal with the natural justice problem inherent in any consultation by the consent authority.[55] It is submitted, however, that this does not address the fundamental conflict relating to the scope of the section 8 duty.[56]

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[54] Above n 49, 24.

[55] The argument will be made subsequently in this paper that an issue of natural justice is still apparent in the situation where a council officer consults on behalf of the consent authority. See below n 144.

[56] See the discussion at below n 99.

E The Reaction in the Tribunal

The tribunal at this point in time was faced with a choice of precedent on the issue of consultation. Judge Kenderdine had revisited the issue in *Whakarewarewa*, and had qualified the *Gill* principle in order to avoid the natural justice problems identified in cases such as *Hanton.* The High Court decision in *Quarantine Waste,* while ignored in *Ngatiwai*, *Hanton* and *Rural Management,* was still in theory the leading case on consultation. Those later tribunal decisions expounded a fresh principle which redefined the duty under section 8 of the RMA and denied the existence of an unqualified duty to consult. The reaction to this quandary is interesting not only from the evolutionary perspective of the consultation issue, but also in terms of the present status of the law on consultation.

1 Greensill

In *Greensill* v *Waikato Regional Council* [57] the tribunal gave a summary of the law of consultation with tangata whenua.[58] The focus was predominantly on the issue of consultation by the applicant, however Judge Treadwell noted:[59]

> It appears generally accepted law that in these circumstances the consent authority itself shall not consult unilaterally with any party but that its officers, in the course of investigating the matter, *may*

[57] Unreported, 6 March 1995, Planning Tribunal, W 17/95.
[58] Judge Treadwell considered the place of consultation in the preparation of plans and policy statements, in the decision as to whether an application should be notified or non-notified (The High Court decision in *Worldwide Leisure* v *Taupo District Council* was cited in this respect) and in the resource consent procedure.
[59] Above n 57, 7 (emphasis added).

> consult and such consultation would of course include tangata whenua.

The judge then made the most significant inroad into the *Gill* principle to date by stating:[60]

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

The tribunal therefore denied that section 8 imposed *any* duty of consultation on the officers of the consent authority. It is arguable that this statement does not accord with any of the previous tribunal decisions, all of which identified at least some form of consultative duty on the council officers in special circumstances. His Honour did not provide any reasoning to support this proposition, but rather cited it as representative of the "cases to date".[61]

2 *Paul, Tawa, Aqua King, Banks* and *Paihia*

The tribunal has subsequently delivered five decisions on this issue which reveal not only the current views on consultation, but also demonstrate how that forum has reacted to the conflicting opinions in earlier decisions. The decision in *Greensill* arguably heightened the tension

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[60] Above n 57, 8 (emphasis added).

[61] Above n 57, 8. Judge Treadwell also presided in *Rural Management,* his reading of the "cases to date" is clearly a view of only one side of the debate in the tribunal.

between the approach of Judge Kenderdine and the remainder of the tribunal. Further, it is submitted that there were apparent inconsistencies not only between the two "sides" of the tribunal, but also between decisions such as *Ngatiwai*, *Hanton*, *Rural Management*, and *Greensill*.[62]

Paul v *Whakatane District Council* [63] involved an appeal against a decision by the Whakatane District Council to grant a land use consent for a bowling club. The appellant claimed that although consultation had taken place with a Trust Board, that his particular rights as the tangata whenua of the area had been ignored. Counsel for the appellant submitted that the council should have consulted with the appellant as the tangata whenua.

Judge Sheppard noted the ruling in *Hanton*, that the consent authority is obliged to take into account the principles of the Treaty, but is not obliged to consult with tangata whenua.[64] The tribunal seemed to accept the interpretation from *Hanton*, but did not directly deal with the argument that the council should have consulted with the tangata whenua. Judge Sheppard concluded that the council was entitled to rely on the responses from the local Trust Board as indicative of Maori views on the proposal, and that this action constituted recognition of the tangata whenua and the principles of the Treaty. While the decision is not focused on the consultation duties of the council, the lack of such consultation did not deter the judge in finding that the requirements of Part II of the RMA had been fulfilled.[65]

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[62] The scope of the duty on the council officers is an example of the internal inconsistencies within the *"Ngatiwai"* line of cases. See the discussion at below n 100.
[63] Unreported, 13 March 1995, Planning Tribunal, A 12/95.
[64] Above n 63, 6.
[65] Above n 63, 8.

In *Tawa and Ngatai* v *Bay of Plenty Regional Council* [66] the tribunal noted that the hearings committee of the consent authority was "required to act in a judicial way, and be even-handed between the applicant and the submitters opposing the application."[67] The tribunal further held: "It would not have been right for the Regional Council or the members of its hearings committee to have themselves consulted unilaterally with any of the parties."[68] Judge Sheppard went on to note that the reporting officer of the council behaved appropriately in consulting with iwi representatives to ensure that the hearings committee was adequately informed.

The tribunal endorsed the decision in *Greensill*, and the use of the term "appropriate"[69] indicates that the council officer may have a *discretion* as to consultation, rather than an active duty to consult. The focus in this decision seems to be the need for the hearings committee to be adequately informed of Maori interests. The tribunal noted: "This having been done, we do not consider that the primary hearing was deficient by lacking information about those issues."[70]

It is submitted that the decision in *Tawa* lacks clarity on the issue of whether the council officer has a duty of consultation. While the focus of the decision is arguably away from a positive duty, Judge Sheppard concluded by stating: " Nor do we accept that the applicant or the Regional council *failed to consult* with [the tangata whenua]."[71] It is clear, however, that the *Greensill* decision was accepted by the same judge who had previously delivered decisions in *Ngatiwai* and *Paul.*

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[66] Unreported, 24 March 1995, Planning Tribunal, A 18/95.
[67] Above n 66, 7.
[68] Above n 66, 7.
[69] Above n 66, 7.
[70] Above n 66, 8.
[71] Above n 66, 8 (emphasis added).

In *Aqua King Ltd and Fleetwing Farms Ltd* v *Marlborough District Council* [72] Judge Kenderdine considered the council's procedure in handling two competing applications for a resource consent over the same coastal marine area. In that case the tribunal afforded recognition to consultation by the applicant which was not apparent in earlier decisions such as *Gill* and *Quarantine Waste*. The tribunal noted that the applicant's consultation operates in conjunction with that required by the council officers under section 8 of the Act:[73]

> 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.

The tribunal noted that the duty on the council officer to consult arises independently of anything the applicant may do.[74] This decision reaffirms Judge Kenderdine's resolve on this issue, and indicates that the tribunal is in an unequivocal and ongoing state of conflict.

In *Banks and Gregory* v *Waikato Regional Council* [75] Judge Sheppard held that the applicants for resource consent had consulted adequately with the tangata whenua. In terms of the obligation on the council the tribunal

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[72] [1995] NZRMA 314.
[73] Above n 72, 320.
[74] Above n 72, 320.
[75] Unreported, 22 March 1995, Planning Tribunal, A 31/95.

referred to the decision in *Tawa* and to the principle that a council should not unilaterally consult with one party, although a council officer may consult where appropriate. The tribunal continued:[76]

> In this case, it is clear that the official preparing the staff report for the [council's] hearings committee on this application made sufficient enquiries to enable him to report to the hearings committee on the relevant aspects of the proposal, and on how those aspects should be addressed ...

In the most recent case on consultation, *Paihia and District Citizens Association Incorporated* v *Northland Regional Council* [77] the tribunal considered an appeal against a decision to grant a coastal permit. Judge Sheppard noted:[78]

> [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 consents engage in consultation with the tangata whenua where their proposals may affect the matters referred to in section 6(e) or section 7(a), and that those reporting to consent authorities on such applications inform themselves and advise on those matters.

In that case the applicant had consulted, and the council had

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[76] Above n 75, 9.
[77] Unreported, 10 August 1995, Planning Tribunal, A 77/95.
[78] Above n 77, 20. The judge cited as authority a number of decisions which included, interestingly, those of Judge Kenderdine in *Whakarewarewa* and *Aqua King*.

notified the tangata whenua of the application. The tribunal noted: "This is not a case where the applicants or the regional council's reporting officer had been careless of the tangata whenua or unwilling to consult those known to them to have that status."[79]

The tribunal in *Banks* and *Paihia* appears to focus on the need for the council officer to be adequately informed of the interests of the tangata whenua, and that this information is conveyed to the hearings committee. This may be achieved through means such as applicant consultation, notification, or "enquiries"[80] on the part of the council officer. The active duty of consultation identified originally in *Gill*, has not survived the process of evolution which has resulted in the reasoning in later decisions such as *Banks* and *Paihia*.

F The High Court in Worldwide Leisure

There is one other High Court decision which should be mentioned in this analysis. In *Worldwide Leisure Ltd v Symphony Group Ltd* [81] the High Court heard an application for judicial review of a decision by the Taupo District Council, to proceed on a non-notified basis in respect of an application for resource consent.[82] The tangata whenua were party to the application for review, and claimed that as a party likely to be adversely affected by the application their written approval should have been

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[79] Above n 77, 23. This reliance on notification rather than consultation was precisely what Judge Kenderdine referred to as "passive" in *Gill,* and in that case it was held to be a breach of the active duty to consult under s8, above n 2, 616, 620.

[80] See *Banks* at above n 75, 9. These enquiries may arguably include consultation, but may also be satisfied by, for example, investigating the results of applicant consultation.

[81] [1995] NZAR 177 (HC).

[82] A council may decide not to notify an application for resource consent if it is satisfied that the effect of the activity will be minor, and every person who is likely to be adversely affected has given written approval of the application, see s94.

required. Cartwright J held that as the tangata whenua had not been consulted, the council had failed to take relevant considerations into account, and the decision not to notify the application was therefore "unreasonable unlawful and invalid."[83] The court stated: "Moreover, s 8 has been held to place an obligation to consult ..." and referred to *Gill*, *Haddon* and *New Zealand Maori Council* v *Attorney General* [84] as authority.

It is submitted that this case does not add significantly to this analysis of consultation. While it is a High Court decision, there was no more than a passing reference to the approach in *Gill* and *Haddon*. Further, no consideration was given to the wider debate on this issue in the Planning Tribunal.[85] Therefore while this case does confirm that consultation may be necessary in the decision as to whether an application should be notified, it does not arguably affect the status of the debate on this issue. It is submitted that while it could be cited as an affirmation of the *Gill* approach, its value in that regard is limited.

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[83] Above n 81, 179.

[84] [1989] 2 NZLR 142. Above n 81, 187. Interestingly the court referred to *Quarantine Waste* in relation to another issue, but not in considering the consultation aspect of the case, see above n 81, 185.

[85] In terms of the chronological analysis, the decision was delivered after *Ngatiwai*, *Hanton*, *Rural Management*, and *Whakarewarewa*, but before *Greensill*.

IV THE PRESENT STATE OF THE LAW ON CONSULTATION

The foregoing analysis served to highlight two aspects of the issue of consultation under the RMA. First, it emphasised the state of confusion and conflict apparent in this area of law. Secondly, it traced the evolution of the consultation principle, so that any given case can be considered in the context of a progression of tribunal decisions. This section of the paper will summarise the various aspects of the consultation issue, in an attempt to distil the law as it presently stands.

A A State of Confusion

The law relating to consultation with tangata whenua under the RMA is in a confused state. There has been one line of Planning Tribunal decisions asserting that a positive duty to consult is a necessary implication of section 8 and the principles of the Treaty as interpreted by the Court of Appeal.[86] Conversely, a number of other decisions have denied that such a positive duty exists as a result of section 8.[87] There is also a High Court decision which has not been given recognition in the majority of subsequent tribunal decisions.[88]

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[86] For the sake of brevity these will be referred to as "the *Gill*" line of cases, which includes *Gill*, *Wellington Rugby*, *Haddon*, *Quarantine Waste*, *Whakarewarewa*, and *Aqua King*.

[87] These will be referred to as "the *Ngatiwai*" line of cases, which includes cases such as *Ngatiwai*, *Hanton*, *Rural Management*, *Greensill*, *Paul*, *Tawa*, *Banks* and *Paihia*.

[88] *Quarantine Waste,* above n 19. Interestingly one Planning Tribunal Judge has stated in relation to section 8 that a number of recent cases have contributed to "a clearer understanding of the section's import and effect." In doing so His Honour referred to inter alia *Gill*, *Haddon*, *Quarantine Waste*, *Ngatiwai*, *Hanton.* See Judge RJ Bollard "Some Thoughts on the Planning Tribunal's role in Resource Management" [1995] *NZLJ* 38, 39.

It could be argued that the overall approach of the tribunal is not actually confused or in conflict, and that the two broad lines of authority are substantially compatible. This argument would be based on the proposition that most of the decisions identify a broad duty on the council officer to consult with the tangata whenua, at least in situations where there are Maori interests which are likely to be affected.[89]

It is submitted that this proposition fails for two essential reasons. First, the fundamental conflict between the approach of Judge Kenderdine and that of the other tribunal judges, arises in respect of the obligation under section 8 of the RMA. Judge Kenderdine asserts that the section imposes a positive and active duty to consult, while the other judges take a more expansive view of the obligations imposed. Therefore, while the above proposition may suggest a tolerable compromise, it does not account for a fundamental difference in opinion as to the obligation imposed by section 8 of the Act.

Secondly, the recent decisions such as *Tawa*, *Banks*, and *Paihia* demonstrate that the tribunal is not critical of a lack of consultation even in circumstances where Maori interests are evident. These decisions involved a wider approach to section 8 which focuses on the adequacy of information rather than a duty to consult. This simply cannot be reconciled with the approach taken by Judge Kenderdine.

It is submitted that this judicial divergence could be attributed to a lack of clarity within the Act itself. The Act expressly states that consultation is necessary in certain circumstances such as the preparation of plans and

[89] There was no distinction made between the consent authority and the council officer in *Gill*, *Haddon*, or *Quarantine Waste*. However, Judge Kenderdine did make this distinction in *Wellington Rugby,* and arguably the distinction was similarly intended in those other cases.

policy statements, but is silent on the requirements in the resource consent procedure.[90] This disparity did not discourage Judge Kenderdine from identifying a duty to consult on the council on the basis of section 8, and this approach has drawn support from commentators in the field.[91] It could be argued however that the RMA is clear in its directive that no consultation is necessary in the consent procedure. The *Gill* approach could be argued to be in conflict with a clear legislative intention that consultation not be required on the part of the council. The argument will be made subsequently in this paper that it may be inappropriate to imply this requirement into the procedure by virtue of section 8 of the Act.

Bennion noted in response to the *Hanton* decision:[92]

> Several decisions have now been made by the Planning Tribunal concerning consultation with Maori under the Resource Management Act 1991. They suggest the Act is not as clear on this subject as it might be.

It is submitted that the RMA is ambiguous on this issue. The differences in judicial opinion are clear evidence of this. Judge Treadwell touched on this when describing Part II of the RMA as "[A] welter of legislative directives, many of which are simply imprecise verbiage."[93] The Parliamentary Commissioner for the Environment stated in relation to consultation on resource consents: "[The council should] ask tangata

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[90] See the discussion at below n 108.
[91] R Boast and D Edmunds "The Treaty of Waitangi and Maori Resource Management Issues" in *Brooker's Resource Management* (Brooker's, Wellington, 1991), TW-52.
[92] T Bennion "Consultation and Resource Management" (March 1994) The Maori Law Review, 1.
[93] Judge W J M Treadwell, address to the New Zealand Planning Institute Annual Conference, May 1994, reported in *Planning Quarterly*, June 1994. See the discussion by A Dormer *The Resource Management Act 1991 - The Transition and Business* (New Zealand Business Roundtable, August 1994).

whenua whether the [applicant] has adequately consulted with them and whether their concerns have been accommodated in the consent application."[94] In comparison the Ministry for the Environment observed in relation to local authority consultation requirements in the resource consent process: "When hearings are due it does not hurt to invite all parties together on [the] marae to discuss the issues."[95] These statements clearly do not accord with the *Gill* approach to consultation. Further they were included in guides for local authorities specifically on this issue. They indicate that the lack of clarity in the Act has been problematic for more than just the Planning Tribunal Judges.

Parliament may have considered that the resource consent procedure does not generally involve "truly major issues"[96] and hence a duty of consultation would not be justified. The omission of an express duty to consult may reflect this intention. Alternatively, in line with the *Gill* approach it may have been intended that an implied duty of consultation would have been obvious from the wording of section 8.

B The Consent Authority shall not Consult

The tribunal is united in the opinion that the consent authority in its quasi-judicial capacity is not to conduct consultation with any party prior to the proceedings. The adverse reaction to *Gill* and *Haddon* was a result of this potential breach of the principles of natural justice. Judge

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[94] Parliamentary Commissioner for the Environment *Proposed Guidelines for Local Authority Consultation with Tangata Whenua* (Wellington, 1992) 28.
[95] Ministry for the Environment *Resource Management - Consultation with Tangata Whenua* (Wellington, 1991) 10.
[96] The Court of Appeal in *New Zealand Maori Council* v *Attorney General* [1989] 2 NZLR 142, held that consultation may be required on "truly major issues". For a discussion of this element see below at 119.

Kenderdine confirmed in *Whakarewarewa* that the duty was directed at the council officers rather than the consent authority as the decision-maker.

The *Ngatiwai* line of decisions[97] have emphatically denied that a duty of consultation is placed on the consent authority in its decision-making capacity. It is submitted that this emphasis has obscured the central issue of whether the council officers have an active duty to consult under section 8 of the Act. The decisions have concentrated on the first of these issues, and the second has been dealt with generally as an afterthought. It is submitted that the *Gill* cases did not seriously contend that the consent authority should consult in its quasi-judicial capacity.[98] The contention was that the council should consult in its administrative role on the basis of section 8. It is the question of whether a council officer must consult which, unfortunately, has been the subject of only a secondary focus in the tribunal.

C The Duty Under Section 8 ?

A fundamental conflict does exist within the tribunal on the question of the source of the duty to consult. The decisions by Judge Kenderdine identify a positive duty of consultation flowing from section 8, and the principles of the Treaty as identified in the *New Zealand Maori Council* case. Conversely the tribunal in the *Ngatiwai* line of cases refuses to accept that an unqualified duty exists on these grounds. In *Ngatiwai* for example, the focus is on the wider duty to take account of Treaty principles, rather than the narrower duty of consultation. In *Hanton* the tribunal delivered an

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[97] See above n 87 for the cases in this line of authority.
[98] See the comments in relation to *Wellington Rugby* at above n 89.

express and detailed account of why the Crown's duty of consultation did not apply to the council under the RMA. These cases clearly held that section 8 did not impose a duty of consultation on the council.

This recent tribunal decisions tend to adopt the *Ngatiwai* approach to section 8. The focus in decisions such as *Tawa* and *Banks* is the wider principle of informed decision-making rather than the narrower one of consultation. The recent decision by Judge Kenderdine in *Aqua King,* however, affirms that this fundamental conflict is yet to be resolved in the tribunal.

Another issue for consideration is the relationship between section 7 and section 8 of the RMA in terms of a duty to consult. Interestingly, in *Gill* Judge Kenderdine seems to blend the requirements under section 7 of the Act with those under section 8:[99]

> [Notification of the application] is not what [section 8] 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. It is required to have *particular regard to* the issues listed. ... The section imposes a duty to be on inquiry.

It is submitted that there is some danger in fusing the two sections in this manner. Judge Kenderdine appears to have justified the imposition of the duty under section 8, by reference to the high standard required under section 7. While section 7 does prescribe that particular regard be given to certain matters including matters of significance to Maori, it does not define the manner in which the relevant information should be obtained.

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[99] Above n 2, 616. This was endorsed by Blanchard J in *Quarantine Waste,* see above n 21.

Consultation would clearly be one of a number of means to achieve this end, however it is submitted that this does not justify a positive duty of consultation on the words of section 8.

A failure to comply with the requirements under section 7 may provide grounds for a decision to be challenged, on the basis that the decision-maker did not pay particular regard to the matters listed in that section. Criticism may be directed at the hearings committee for failing to pay particular regard to those matters, or at the council officers for failing to ensure that sufficient information was available to the committee and the parties involved. This criticism may include, at times, a reference to a failure to investigate and/or consult sufficiently to obtain the level of information required. It is submitted however that the duty under section 8 is a distinct matter, which operates independently of the duty under section 7. The fact that consultation may be required at times to satisfy the standard under section 7, does not justify section 8 being interpreted to impose an unqualified duty of consultation. The duty under section 8 is that the principles of the Treaty be taken into account in any exercise of a function or power under the Act. While section 7 may impose a duty to be on inquiry, it does not specify what form that inquiry should take, nor does it create a necessary implication that a positive duty be read into section 8.

D The Duty on the Council Officers ?

While the tribunal is in conflict over this issue generally, the majority of decisions have identified that some form of consultation either should or may be undertaken by the officers of the council. The *Gill* cases state that this is obligatory as a result of section 8, and that the council officers must

consult to discharge their duty under that section.[100] The other cases in the tribunal attribute this responsibility to the council officer in a variety of ways. In *Ngatiwai* the tribunal noted that a council officer *may* be under a duty in certain circumstances to consult with the tangata whenua when that officer is preparing a pre-hearing report. The purpose of this consultation is to ensure that the report is accurate and comprehensive as to Maori interests. In *Hanton* it was held that where it is known that Maori interests are involved, then an adviser preparing a report *should* investigate and report on how those interests are likely to be affected.[101] In *Rural Management* Judge Treadwell noted that *if any consultation is to take place*, then it should be conducted by the council officers and the information collated could be placed in front of the committee along with the other evidence presented.

This requirement on the council officers to consult seemed to move from an obligation in certain circumstances towards a discretion as the tribunal decisions progressed. In *Greensill* Judge Treadwell took the further step of asserting that while it may be desirable, there is *no compulsion* on the council officers to embark unilaterally upon consultation. In *Tawa* and *Banks* Judge Sheppard noted that a council officer is able to satisfy the obligations under section 8, by conducting investigations prior to the hearing for the purposes of preparing a report for the hearings committee. These investigations may include consultation with tangata whenua, however this consultation was not framed as a duty but as a means of ensuring that hearings committee is adequately informed. In *Paihia* the tribunal accepted that notifying the tangata whenua of the

[100] Although the distinction between the council officer and the consent authority was not actually noted in *Gill*, *Haddon*, or *Quarantine Waste*. See the discussion at above n 89.
[101] The term "investigate" was used by the judge rather than the term "consult".

application, and ensuring that the applicant's consultation was sufficient, discharged the council's responsibility under section 8.

The duty on a council officer as defined by the Planning Tribunal is therefore relatively unclear. One line of decisions suggest that there exists an unqualified duty to consult in all circumstances where Maori interests are evident. Other decisions indicate that consultation may be required in the preparation of a pre-hearing report to ensure the adequacy of information before the hearings committee. In *Greensill* the tribunal held that the officer was not under a duty to consult in any circumstances. In *Paihia* the tribunal did not criticise the officer for relying on notification rather than consultation.

E *The Quarantine Waste Decision*

The position of the High Court decision in *Quarantine Waste* is left in doubt following the later tribunal cases. This decision, although in theory the leading case on consultation, was not referred to in *Rural Management*, *Greensill*, *Paul*, *Tawa*, *Banks*, or *Paihia*. Further to this, the dicta in that case has been effectively ignored in all cases apart from the decision of Judge Kenderdine in *Aqua King*.

Following *Hanton* , Palmer commented: "The [*Quarantine Waste*] decision was delivered one day after *Hanton*, and the dicta should be applied by consent authorities and the Planning Tribunal whenever appropriate."[102] This clearly has not been the case.

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[102] K Palmer " Consultation with the Tangata Whenua under the Resource Management Act" (1994) 1 BRMB 21.

It is difficult to define exactly what can be taken from *Quarantine Waste*. The obiter statement by Blanchard J indicates that the consent authority rather than the applicant is vested with the duty to consult. The meaning of the words: "as the local government agency"[103] is not so clear. Presumably this is a reference to the consent authority as the local agent of central government. It is not clear how the distinctions made in subsequent cases between the consent authority in its quasi-judicial role, and the officers of the council upon whom the duty is asserted to fall, relate to this statement by Blanchard J.[104]

The actual decision in *Quarantine Waste* is interesting in that it potentially undermines the positive duty to consult. The court found that in the circumstances, the failure to consult did not bring about a failure on the part of the council: "... to consider or take into account a material and relevant factor."[105] The focus of the court therefore, was the absence of evidence that the council was inadequately informed as to matters affecting the tangata whenua. The judgment states that there is a positive duty of consultation, yet a failure to discharge this obligation will be irrelevant if all material matters are taken into account. It is submitted therefore, that while *Quarantine Waste* affirms the *Gill* principle, the High Court decision is in fact closer to the *Ngatiwai* focus on the adequacy of information. This analysis is important in that it relates to the argument, made subsequently in this paper, that a council is able to discharge its obligations under section 8 without actually undertaking consultation.

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[103] Above n 19, 542.

[104] His Honour referred to both the local authority and the consent authority as being responsible for consultation, see above n 21. The *Wellington Rugby* decision was cited in *Quarantine Waste* however, therefore Blanchard J was aware of the council officer/consent authority distinction. Unfortunately, the terms used in the decision are not consistent.

[105] Above n 19, 542.

F The Timing of Consultation

For consultation to be effective it is generally understood to be necessary at the initial stages in the process.[106] In *Haddon* Judge Kenderdine held that consultation should have taken place during the formulation of the application and prior to notification. In *Whakarewarewa,* however, the same judge accepted that the consultation duty had been discharged by the council officer organising a pre-hearing meeting.[107] The decisions such as *Ngatiwai*, *Hanton*, *Rural Management*, *Tawa* and *Paul* all envisage that any consultation conducted would occur only at the pre-hearing stage. This is another aspect of this issue which the Planning Tribunal has not been able to resolve in a consistent manner.

G The Effect of Notification and Applicant Consultation

In the earlier cases such as *Gill* and *Quarantine Waste,* the tribunal and High Court held that the council is not entitled to rely on the fact that the tangata whenua have been notified of the application, or that the applicant has conducted consultation. In the subsequent tribunal decisions these other factors have been held to discharge the section 8 requirements. As noted in *Paihia* the notifying of the application to the tangata whenua was

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[106] See the Court of Appeal in *Wellington International Airport Limited* v *Air New Zealand* [1993] 1 NZLR 671, 675, citing with approval the statement by McGechan J in the High Court decision in the same case. See also the Parliamentary Commissioner for the Environment *Proposed Guidelines for Local Authority Consultation with Tangata Whenua* (Wellington, 1992) 26 where it is emphasised that consultation should be conducted early in the process. The Waitangi Tribunal has also referred to "the courtesy of early consultation", see Parliamentary Commissioner for the Environment *Environmental Management and the Principles of the Treaty of Waitangi - Report on Crown Response to the Recommendations of the Waitangi Tribunal 1983-1988* (Wellington 1988) 109.

[107] The pre-hearing meeting would normally occur well after the application had been formulated and notified.

held to be sufficient. In *Rural Management* the tribunal focused on the fact that the applicant had made genuine efforts at consultation which were not reciprocated. These efforts by the applicant were held to discharge the consultative requirements under the Act. The tribunal in *Tawa* and *Banks* similarly viewed the consultation by the applicant and the council as complementary and the duty was discharged by the actions of the two parties working together. In *Aqua King* Judge Kenderdine recognised that the two forms of consultation worked together, although Her Honour was clear that the council's obligation arose independently of anything the applicant may do. It seems that there has been a steady retreat in the tribunal from the position taken in *Gill,* that notification and applicant consultation will not discharge the section 8 duty.

V THE BASIS OF THE DUTY TO CONSULT

The Planning Tribunal and High Court have clearly struggled to formulate a coherent principle in relation to the implied duty of consultation under section 8 of the RMA. A fundamental conflict arises when one considers whether a positive duty to consult exists, or whether consultation is a discretionary means of achieving the wider end of informed decision-making.

It is necessary to examine the basis upon which the Planning Tribunal and High Court have, in some cases, imposed a consultative duty on the local authority. The duty is not explicit in the RMA, and has been implied into the resource consent procedure by virtue of section 8 of the RMA. It is submitted that there are a number of compelling arguments against the reasoning used in cases such as *Gill* and *Quarantine Waste*. Further, it is submitted with respect that the focus of the Planning Tribunal and High Court should have been on the wider principle of informed decision-making rather than the narrower one of consultation.

A The Absence of an Express Duty in the RMA

There is no express duty of consultation on the local authority in the resource consent procedure under the RMA.[108] That duty is identified by implication in the *Gill* line of cases. However, the RMA is not silent on the issue of consultation. The local authority is directed to consult with iwi during the preparation of a proposed policy statement or plan, under clause 3(1)(d) of the First Schedule of the Act. Further, under section 64(1) and

[108] Part VI of the Act pertains to the resource consent procedure.

clause 2(2) of the First Schedule, the preparation of a regional coastal plan must be conducted by the regional council in consultation with the iwi authorities of the region.

This raises the issue of whether it is appropriate to imply a consultative duty into the resource consent part of the Act in the absence of an express provision to that effect. This is especially questionable when there is an express duty of consultation in another part of the Act. There are two conflicting arguments which can be forwarded in this respect.

On the one hand it could be argued that as Parliament has not expressly required consultation by the local authority in the resource consent procedure, then no such duty should arise. As stated the basis for this argument would be that Parliament has exhaustively defined in the RMA those procedures which are to be subject to such a duty. Further, as noted in *Hanton,* the resource consent part of the Act involves a detailed procedure which does not overlook the position of the tangata whenua, but which omits any express duty of consultation.[109]

Allied to this argument is the issue of consultation by the applicant. It could be argued that the consultation requirements on the council in the preparation of policy statements and plans, are "mirrored" in the resource consent procedure in the Fourth Schedule of the Act. That schedule outlines the requirements on an applicant in the preparation of an assessment of the effects on the environment. That assessment must be included in an application for resource consent.[110]

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[109] Above n 26, 301.
[110] S 88 of the Act.

Clause 1 of the Fourth Schedule specifies the matters which should be included in the assessment, and these include:

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

It is clear that Parliament intended the council to consult with the tangata whenua in the preparation of plans and policy statements, and this intention is expressed in the First Schedule to the Act. It is arguable that a similar intention is expressed in the Fourth Schedule, and that Parliament intended that the applicant be responsible for consultation in the resource consent procedure. However, it has been noted by the tribunal that this consultation by the applicant is not mandatory.[111]

Conversely, it could be argued that the duties under Part II are overriding and apply irrespective of the content of individual parts of the Act. The tribunal in the *Gill* cases relied on the primacy of Part II and the fact that the resource consent procedure is subject to it. The duty of consultation was implied into the procedure and the lack of express provision was not in fact dealt with by the tribunal. This approach has some validity in that duties are implied into all parts of the Act through the operation of Part II. On this basis the express duty in relation to the preparation of plans and policy statements, could be argued to exist in addition to the broader duty under section 8.

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[111] The use of the term "should" in cl 1 of the Fourth Schedule indicates that applicant consultation is not mandatory. See *Greensill* at above n 57, 8. Note however that the council could delay the processing of the application until satisfactory consultation has been conducted, see *Aqua King* at above n 72, 318-319, and the discussion at below n 155.

It is submitted that the better view is that Parliament has defined in the Act, the instances in which a specific and express duty of consultation is placed on the local authority. There is no such intention expressed in Part VI and therefore no broad duty of consultation should exist in the resource consent procedure. This argument does not deny that a duty exists on the local authority to take into account the principles of the Treaty under Part II, and that at times consultation may be required to discharge that duty. It does, however, deny an unqualified duty of consultation in the absence of express provision to that effect.

B Consultation - A Principle of the Treaty?

The overriding purpose of this paper is to test the validity of decisions such as *Gill* and *Quarantine Waste*. It is therefore essential to critique the underlying reasoning in those cases. That reasoning may be summarised in three broad steps. First, under section 8 the principles of the Treaty must be taken into account by those exercising functions and powers under the Act, such as the local authority. Secondly, consultation is a principle of the Treaty. Thirdly therefore, the local authority is obliged by section 8 to consult with tangata whenua in the resource consent procedure. The cornerstone of this approach therefore is the assertion that consultation is a principle of the Treaty.

Judge Kenderdine in *Gill* relied on the Court of Appeal decision in *New Zealand Maori Council* v *Attorney General* [112] as authority for the proposition that consultation is a principle of the Treaty. It is submitted that there is some danger in relying on the *New Zealand Maori Council* case, ("the 1989 case") as authority for a unqualified duty to consult in the RMA context. That decision of the Court of Appeal should be viewed in the context of the earlier decision of the court in *New Zealand Maori Council* v *Attorney General* [113] ("the 1987 case"). In that earlier case the court rejected the submission that there was a general Treaty principle of consultation: "A duty 'to consult' was also propounded. In any detailed or unqualified sense this is elusive and unworkable."[114] In the same case Richardson J noted: "an absolute open-ended and formless duty to consult is incapable of practical fulfilment, and cannot be regarded as implicit in the Treaty."[115]

The Court of Appeal subsequently in the 1989 case stated:[116]

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

An unqualified statement that consultation is a principle of the Treaty on the basis of the statements made in the 1989 decision is flawed. The

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[112] Above n 37.
[113] [1987] 1 NZLR 641.
[114] Above n 113, 665 per Cooke P.
[115] Above n 113, 683.
[116] Above n 37, 152 (emphasis added).

nature of the statements in the 1989 case should be viewed in the context of those made in the 1987 case. The later are a qualification of the earlier. The court in the 1989 case was clearly not reversing the position taken in the 1987 case. Rather it was clarifying the position, and suggesting that while consultation had been rejected as an unqualified principle of the Treaty, it nevertheless is necessary on truly major issues. It is submitted that the later statements were cautionary in nature, and do not constitute a sound basis for the proposition that consultation is a principle of the Treaty.

Judge Kenderdine clearly adopted the 1989 case as authority for such a duty in the *Gill* line of cases. Her Honour has commented elsewhere on the attitude of the Court of Appeal on this issue: "However there was a shift away from [the 1987 stance] in a case which followed: [the 1989 case]."[117] It is respectfully submitted that the 1989 case saw the court clarifying rather than shifting stance on the consultation issue. Boast and Edmunds have commented that the 1989 statement was delivered: "perhaps in order to correct possible misunderstanding."[118]

2 *"Truly major issues"*

The 1989 decision identified that a duty of consultation may arise "on truly major issues."[119] This is arguably a clear signpost from the court that consultation is not to be considered an unqualified Treaty principle. Rather, the court provided a threshold to be satisfied before consultation is

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[117] Judge Kenderdine "The Treaty Jurisprudence " in *Applications under the Resource Management Act 1991,* (New Zealand Law Society Seminar Paper, October - November 1993) 17.
[118] Above n 91, TW-45.
[119] Above n 37, 152.

necessary. It could be argued that consultation was intended by the court to be a means to an end rather than a principle itself. That end may be the upholding of the concept of partnership, and more particularly, the principle of informed decision-making.

The "truly major issues" qualification has not been given effect by Judge Kenderdine in the RMA context. The *Gill* line of cases have relied on consultation as a Treaty principle, citing the 1989 case as authority for this proposition. Those cases have however failed to consider what is clearly a vital qualification to the statements made by the Court of Appeal.

The 1987 and 1989 cases were concerned with the State Owned Enterprises Act ("the SOE Act") and the disposition of Crown assets which were potentially the subject of Maori claims. It is not entirely clear what would constitute a truly major issue in the RMA context. It has been suggested that the phrase may extend to: "[N]ational policy statements and the Minister's exercise of the call-in powers, but not necessarily to all or even most resource consent applications."[120]

It is submitted that this qualifying phrase further undermines the validity of relying on the 1989 case as the basis for a broad duty to consult. It is doubtful that a consent application on the scale of those in the *Gill* line of cases would constitute a truly major issue in the view of the Court of Appeal. This issue evidences the wider problem of extrapolating principles from one statutory context into another. In *Haddon*, the argument was forwarded that the SOE Act created a significantly different context to that of the RMA, and that there were dangers in extrapolating interpretations

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

from the former into the latter.[121] Further, it was argued that the principles which apply under the RMA may be different to those in the SOE context, "although those identified by the Court of Appeal may prove a useful guide in a case like this."[122] Judge Kenderdine accepted these submissions as correct, but effectively ignored them by stating: "The Court of Appeal has established that consultation is a principle of the Treaty."[123]

There are some important contextual distinctions between the SOE Act and the RMA. The former allows for assets to be removed from the Crown's estate and hence those assets are no longer able to provide a basis for the redress of claims under the Treaty. In comparison the RMA prescribes the law relating to the use of land, air, and water. It could be argued that "truly major issues" are more likely to arise in the former rather than the latter context, and therefore a "principle" of consultation is more applicable in the SOE context than under the RMA.

Another important distinction between the two Acts is the manner in which the Treaty obligations are incorporated. Section 9 of the SOE Act states that nothing in that Act shall permit the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi. In contrast section 8 of the RMA requires that the principles of the Treaty be taken into account by persons exercising functions and powers under the Act. The former Act therefore accords a priority to the principles of the Treaty which is not apparent in the RMA.[124] Thus the two statutory contexts are distinct in this respect, and this affirms the need for caution in transposing

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[121] Above n 9, 60.
[122] Above n 9, 60.
[123] Above n 9, 61.
[124] See the Legislation Advisory Committee, Report No 6, *Legislative Change: Guidelines on Process and Content* (Revised edition, 1991) Appendix D, cited in M Chen and G Palmer *Public Law in New Zealand* (Oxford University Press, Auckland, 1993) 417.

case authority from one into the other. The implications of the words "shall take into account" will be considered subsequently in this paper.

It is therefore submitted that it is not legitimate to rely on the *New Zealand Maori Council* cases as authority for an unqualified Treaty principle of consultation. This is especially so given that those cases were decided in a distinct statutory context, and that the 1989 case extended a consultation obligation only in respect of truly major issues.

3 *Other sources of Treaty principles*

The foregoing analysis was focused on the legitimacy of relying on the 1989 *New Zealand Maori Council* case as authority for an unqualified principle of consultation under the RMA. As stated this paper is concerned with the validity of decisions such as *Gill* and *Quarantine Waste,* which rely on the 1989 decision as authority for a consultative duty on the local authority. There is another aspect of this issue which is worthy of mention.

The courts are not the only source of statements on Treaty principles. Boast and Edmunds note that there are three possible sources of material on the principles of the Treaty. These are decisions of the ordinary courts, reports of the Waitangi Tribunal, and government pronouncements on the Crown's obligations under the Treaty.[125] Therefore while it is sufficient for the purposes of this paper to consider the principles as defined by the Court of Appeal in the 1987 and 1989 cases, it is important to acknowledge the other potential sources of Treaty principles.

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[125] Above n 91, TW-43.

The Court of Appeal in the 1987 decision noted that in determining the meaning of the expression "the principles of the Treaty of Waitangi", the court "should give much weight to the opinions of the Waitangi Tribunal", although its reports are " not of course binding on Courts in proceedings concerned with other Acts".[126] It is submitted that a potential conflict arises in the situation where the Waitangi Tribunal's view of a Treaty principle is inconsistent with that of the Court of Appeal. This has arguably occurred in the context of consultation. Crengle has noted :[127]

> In seeking to implement the [1987] decision, the Waitangi Tribunal identified the following areas where consultation will be 'highly desirable if not essential if legitimate Treaty interests of Maori are to be protected' ...
>
> The matters identified included ... resource and other forms of planning, insofar as they may impinge on Maori interests ...

The Waitangi Tribunal has therefore identified a Treaty based principle of consultation in the resource management context. It could be argued that this does not accord with the Court of Appeal's pronouncements in the *New Zealand Maori Council* cases.[128] In this type of conflict the Planning Tribunal would be bound by the Court of Appeal decision, but not by the opinions of the Waitangi Tribunal. The difficulty in this regard is that the exact scope of the Court of Appeal defined consultation principle is not clear.

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[126] Above n 113, 661.
[127] D Crengle *Taking Into Account the Principles of the Treaty of Waitangi* (Ministry for the Environment, Wellington, 1993) 15 citing the Waitangi Tribunal *Ngai Tahu Report - Wai 27* (Brooker & Friend, Wellington, 1991).
[128] See discussion at above n 118.

It is interesting that Judge Kenderdine did not draw support from the Waitangi Tribunal Reports for the Treaty based principle of consultation relied upon in *Gill.* That Waitangi Tribunal has identified such a principle in the context of resource management, and the Court of Appeal has indicated that weight must be given to the opinions of that tribunal. It is submitted that this would have been a more justifiable approach than relying on the statements in the 1989 case. In any case the issue of whether consultation is a Treaty principle may not be settled, and the *Gill* approach could at some point become retrospectively legitimate. The writer believes however, that is not presently the case.

C Taking into Account the Principles of the Treaty

Section 8 of the RMA states that all persons exercising functions and powers under the Act are obliged to take into account the principles of the Treaty. It is necessary to examine the manner in which the Treaty principles are incorporated into the RMA. The decisions such as *Gill* and *Quarantine Waste* rely on the premise that section 8 imports a positive duty of consultation. The issue of whether consultation can be actually regarded as a Treaty principle in an unqualified sense has already been discussed. Even on the assumption that there was a Treaty principle of consultation, the effect of the expression "shall take into account" in section 8 must be considered. It is submitted that the *Gill* reasoning effectively ignores the legislative choice in terms of the incorporation of Treaty principles into the RMA.

In the *Haddon* decision, Judge Kenderdine in discussing the meaning of the words "take into account", referred to the decision of Somers J in

R v *CD*[129]. His Honour in that case considered the phrase "shall have regard to" and distinguished it from "shall take into account" by stating: "If the appropriate matters had to be taken into account, they must necessarily in my view affect the discretion [of the decision- maker.]"[130]

Judge Kenderdine in *Haddon* noted:[131]

> [T]he duty to 'take into account' indicates that a decision-maker must weigh the matter with others being considered and, in making a decision, effect a balance between the matter at issue and be able to show he or she has done so.

This approach would equally apply to any other person exercising a function or power under the Act.

McHugh has commented: "The *way in which* the Treaty is expressly incorporated into a statutory scheme is *as important as* the simple fact of express incorporation."[132] That writer noted that in some cases such as the SOE Act, the Treaty principles are given an overriding status, whereas other enactments list the principles as one of a number of factors to be considered.[133]

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[129] [1976] 1 NZLR 436 (CA). See also *New Zealand Cooperative Dairy Company Limited* v *Commerce Commission* [1992] 1 NZLR 601.
[130] Above n 129, 437.
[131] Above n 9, 61.
[132] P McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 268 (emphasis added).
[133] Above n 92, 268. The RMA clearly falls into the latter class.

Fisher has noted in relation to the incorporation of Treaty principles into the RMA:[134]

> It is however the form of the obligation in s8 RMA 91 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.

This approach was criticised by Judge Kenderdine in the *Wellington Rugby* case: [135]

> 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 [section 8].

The essential question in this respect is what does it mean to "take into account" a principle of consultation? Does it mean that consultation must actually be conducted? In this regard it is submitted with respect that the *Gill* reasoning is subject to a logical inconsistency. It is arguably the wider principles of partnership and informed decision-making conducted in good faith which should be taken into account under section 8. Consultation may be one means of ensuring that these wider principles are considered in any exercise of power, however, it is not consultation in itself which should be taken into account.

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[134] D E Fisher "The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives" in *Brooker's Resource Management* (Brooker's, Wellington, 1991) 16.
[135] Above n 16, 22.

The Waitangi Tribunal has criticised the lack of priority which is given to the principles of the Treaty in Part II of the RMA. In the *Ngawha Geothermal Resource Report* [136] the Tribunal stated:[137]

> 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.

The tribunal recommended that a provision be included in the RMA requiring all persons exercising powers and functions under it to act in a manner consistent with the principles of the Treaty.[138]

The Waitangi Tribunal therefore recognised that the duty on a local authority is less than would be expected of the Crown itself. It is submitted that even if there is a duty of consultation on the Crown, the comments of the Waitangi Tribunal demonstrate why this duty should not be transposed to the local authority under the RMA. Section 8 confers an obligation to take into account the actual obligations of the Crown. Recognition must be given to the fact that Parliament has chosen a weaker form of Treaty incorporation in section 8.[139] It is difficult to accept that the phrase used in

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[136] Wai-304 (Brooker and Friend, Wellington, 1993).
[137] Above n 136, 145.
[138] Above n 136, 145. See also the comments by AL Mikaere "Maori Issues" [1993] NZ Recent Law Review (Legal Research Foundation, Auckland, 1993) 308, 318-319.
[139] Parliament could have chosen a stronger form such as "Persons exercising functions and powers under this Act shall not act in a manner inconsistent with the principles of the Treaty of Waitangi." The Review Group on the Resource Management Bill considered this form of incorporation, but considered it inappropriate on the basis that not all persons exercising powers under the RMA are parties to the Treaty; Report of the Review Group on the Resource Management Bill (11 February 1991) 16.

that section was intended to confer on the local authority, obligations commensurate with those of the Crown.

In the *Hanton* decision, Judge Sheppard approached section 8 by stating:[140]

> Although s8 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.

The issue of whether the Crown can delegate its responsibilities under the Treaty, or in fact refuse to do so is a difficult one. In response to the decision of the Planning Tribunal in *Hanton* Palmer observed:[141]

> [T]he *Hanton* decision is of legal interest in drawing attention to a possible distinction between the Crown and local authority obligations under the Treaty. The Planning Tribunal view [in *Hanton*] contrasts with the Waitangi Tribunal report, *Manukau Harbour* ... which states 'The Crown cannot divest itself of its Treaty obligations, or confer an inconsistent jurisdiction on others.'

The question of whether the Crown is in breach of its Treaty responsibilities by conferring an inconsistent jurisdiction on the local authority under the RMA, is beyond the scope of this paper. It is arguable however that the Crown's Treaty obligations may not been transferred to

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[140] Above n 26, 301. See the criticism of *Hanton* by FM Brookfield "Constitutional Law" [1994] NZ Recent Law Review (Legal Research Foundation, Auckland, 1994) 376, 379. That writer argues that the distinction between the Crown and the consent authority in that case is invalid in terms of the Treaty obligations.

[141] Above n 102, 23.

the local authority under section 8. It is submitted that this diminished form of responsibility under section 8 has not been recognised in the reasoning of decisions such as *Gill* and *Quarantine Waste*.

Crengle has argued:[142]

> In terms of section 8, the use of 'take into account' indicates that in every case the principles of the Treaty must be considered and weighed against other factors in making a decision. Decision-makers need to be able to demonstrate how they have achieved the balance between the matters in coming to their decision. ... Without evidence of ... consultation, local authorities may find it difficult to demonstrate their compliance with the duty set out in section 8.

The purpose of this paper is to demonstrate how the section 8 duty may be discharged without the need for the courts to identify a duty of consultation. The final section of the paper is an attempt to outline how this may be achieved. The argument is that the local authority will be able to demonstrate that a balance with the Treaty principles has been achieved, without a need for active consultation by the council officer.

This paper thus far has questioned the reasoning in decisions such as *Gill* and *Quarantine Waste* in two ways. First, the proposition that the 1989 *New Zealand Maori Council* case identifies a Treaty based duty of consultation was considered. Arguments were forwarded that such a unqualified duty is unjustified on the basis of that decision. Secondly, the wording of section 8 of the RMA was analysed to decipher exactly what is required of the local authority under the Act. It was argued that even if a

[142] Above n 127, 21.

duty of consultation was imposed on the Crown as a result of the *Maori Council* case, that duty could not simply be transposed to the local authority on the basis of section 8.

VI THE PRINCIPLES OF NATURAL JUSTICE

A number of cases on consultation in the Planning Tribunal have focused on the importance of natural justice in the resource consent procedure. This approach was summarised by Judge Treadwell in *Rural Management*:[143]

> 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 aside 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 being present.

In the *Ngatiwai* line of cases the tribunal refused to accept that the consent authority as decision-maker was required to consult unilaterally with one party prior to proceedings. It has been noted that although *Gill* and *Haddon* do not specify the duty to be that of the council officer, this was arguably Judge Kenderdine's intention. The judge did make such a distinction in the *Wellington Rugby* case, which was decided shortly after *Gill* and *Haddon*, but was not cited in any subsequent tribunal decisions. In *Whakarewarewa* Judge Kenderdine clarified the *Gill* principle and noted that the council officers were responsible for consultation under section 8.

The tribunal is therefore unanimous on this aspect of the consultation debate. While the actual extent of the duty on the council officer is not entirely clear, the tribunal appears to have settled the issue of natural

[143] Above n 42, 424.

justice in concluding that the consent authority shall not consult. It could be argued however that the "solution" advanced in *Whakarewarewa* does not fully resolve the natural justice issue. The concern in the tribunal was that the decision-maker must remain impartial, and that a duty of consultation threatened to disturb this balance. The duty was thus placed on the council officer, and this approach purported to satisfy section 8 of the Act while ensuring that natural justice was preserved.

It is submitted that even consultation by a council officer may impinge on the principles of natural justice. The reason for this assertion is to be found in council practice. In the resource consent procedure the council officer processes an application and complies with the statutory duties such as deciding whether to notify the application, and informing the various parties of the hearing. That officer normally prepares a report for the hearings committee which is distributed among the parties prior to the hearing. This report covers a range of issues including any conditions which may be necessary, and a recommendation as to the appropriate decision.[144]

The separation of roles between the council officer and the consent authority may therefore be questionable. It could be argued that the council officer is in fact an extension of the consent authority, and that any consultation conducted by that officer may be imputed to the authority. The recommendation in the officer's report arguably demonstrates that it is difficult to completely sever the roles of officer and decision-maker. The desired result of an impartial decision may be threatened by the decision-maker's representative consulting with one party prior to the proceedings.

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[144] The writer has observed from appearances in this forum that this recommendation, and the report generally, can be highly influential to the hearings committee.

Judge Treadwell recognised this potential conflict in Rural Management:[145]

> Those officers cannot ... 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.

It is submitted that the results of consultation contained in the pre-hearing reports may constitute impartiality or bias in the form of "prior involvement" by the decision-maker. Flick has observed:[146]

> ...disqualification of a decision-maker may ... be sought on the basis of his prior involvement with the facts of the case he is later called upon to decide. This prior involvement may be caused by the frequent combination in the administrative process of the adjudicative function with, *inter alia*, the tasks of ... investigation.

It could further be argued that this procedure breaches the audi alterum partem rule[147] in that the reports are distributed to the parties sometimes as late as a few days prior to the hearing. This may leave insufficient time for the applicant to effectively respond to the results of consultation by the council officer, which may have occurred over a number of months. Hay has commented in this respect: "Disclosure of relevant information must also be made in adequate time to prepare a defence or comments."[148]

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[145] Above n 42, 424.
[146] G Flick *Natural Justice* (2 ed, Butterworths, Sydney, 1984) 164.
[147] The right to a fair hearing.
[148] JC Hay *Section 27 of the New Zealand Bill of Rights Act 1990 - The Right to Justice: Something Old, Something New* LLM Research Paper, Victoria University of Wellington, 1991, 19. See also GDS

The right to natural justice is incorporated in the New Zealand Bill of Rights Act 1990 ("BORA"):

> **27. Right to Justice -** (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

This paper does not afford the scope for a detailed analysis of whether the principles of natural justice are infringed in this consultation scenario.[149] If consultation and the subsequent reporting by a council officer could be shown to be a breach of the principles of natural justice, then section 27 of the BORA may be applicable.[150] It could then be argued that if an alternative interpretation to section 8 of the RMA is available which removes the infringement of the BORA, that interpretation should be preferred.

Taylor "Administrative Law" [1993] NZ Recent Law Review (Legal Research Foundation, Auckland, 1993) 369, 383.

[149] There is scope for an analysis of whether a report to the hearings committee of this type is in breach of standards such as bias, pre-determination, and impartiality under the wider heading of natural justice. This council officer's report has generally become accepted in practice, however it is arguably in need of scrutiny to ensure constitutional standards are not being compromised.

[150] As to the individual elements of s27 see JC Hay, above n 148, 8-15; and Parliamentary Commissioner for the Environment *Environmental Information and the Adequacy of Treaty Settlement Procedures* (Wellington, 1994) 18-20.

Section 6 of the BORA states:

> **6. Interpretation consistent with Bill of Rights to be preferred-**
> Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

It is submitted that an alternative interpretation to the RMA is available, which would be consistent with the principles of natural justice. This alternative is that section 8 does not require consultation by the council officer. Rather, it requires that the hearings committee has sufficient information to make a decision which is informed and in good faith, in accordance with the principles of the Treaty of Waitangi. The following section of this paper suggests an alternative approach to the section 8 responsibility, which removes this potential infringement of the principles of natural justice.

VII AN ALTERNATIVE APPROACH

It has been argued that the *Gill* approach to the issue of consultation is inappropriate for a number of reasons. These include the issue of whether consultation is an unqualified principle of the Treaty, and whether section 8 limits the Treaty responsibilities of local authorities. It has also been argued that a duty of consultation on the council officer is potentially in conflict with the principles of natural justice.

It is therefore appropriate that an alternative approach is suggested which arguably fulfils the section 8 requirements, while avoiding any potential natural justice problems. It is submitted that this alternative approach would not only provide certainty for local authorities seeking to comply with the RMA, but would assist the tribunal in finding a "tolerable middle-ground." This approach is of course unable to reconcile the fundamental conflict in principle which has divided the tribunal.[151]

A The Focus under Section 8

Section 8 of the RMA requires that persons exercising functions and powers under the Act take into account the principles of the Treaty of Waitangi. It is respectfully submitted that Judge Kenderdine has resorted too quickly to the concept of consultation as necessary to achieve the purpose of section 8.

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[151] That being whether s8 imports an active duty of consultation on the council officer. The *Gill* cases have relied on this proposition, and the *Ngatiwai* cases have refused to accept it.

It is submitted that the focus under section 8 of the RMA should be on the broader principle of partnership and the need for decisions to be made in good faith and on an informed basis. In this way consultation may be necessary as a means to this end, rather than an end in itself.

A number of tribunal decisions have adopted this wider approach to section 8 of the Act. While decisions such as *Ngatiwai* focused on the need for impartial decision-making, there was a broader approach to section 8 than was found in *Gill* and *Haddon*. The High Court in *Quarantine Waste* while endorsing the narrower view of the section as was expounded in *Gill*, delivered a decision commensurate with a wider approach to the principles of the Treaty. This wider focus allows the council to satisfy the section 8 requirements without necessarily undertaking consultation in the resource consent procedure.

B Consultation by the Applicant

It is submitted that the council officer should adopt a supervisory role in terms of consultation with the tangata whenua. Upon receiving an application for resource consent that officer should inform the applicant that the interests of Maori must be considered. The applicant will be instructed to consult with the appropriate tangata whenua before an application in final form can be accepted.[152] The difficulty in this respect is that consultation by the applicant is not mandatory under clause 1(h) of the

[152] The identification of the tangata whenua will be the responsibility of the council officer. This will require, inter alia, thorough consultation at the plan/policy statement preparation stage, as is required by the RMA; see the discussion at above n 108. In the resource consent procedure the officer may have to conduct ongoing consultation to determine which iwi or hapu holds mana whenua over the area and hence has the status of tangata whenua. This is a different form of consultation to that in relation to the effects of an individual application.

Fourth Schedule of the Act.[153] Judge Kenderdine in *Aqua King*, however, indicated that an applicant could be made to conduct meaningful consultation by virtue of section 92 of the Act. Section 92(2) states:

> (2) Where the consent authority is of the opinion that any significant adverse effect on the environment may result from an activity to which an application for a resource consent relates, the consent authority may-
>
> (a) Require an explanation of -
>
> ...
>
> (ii) The consultation undertaken by the applicant;

The council could therefore request an explanation of the consultation undertaken which "would allow the council to assess whether the consultation was adequate on an objective basis."[154] Judge Kenderdine went on in *Aqua King* to note that if the consultation was not adequate, further information could be required from the applicant in terms of section 92 of the Act. Section 92 states:[155]

> **92. Further information may be required** - (1) A consent authority may, at any reasonable time before the hearing of an application, ... , require the applicant to provide further information relating to the application.

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[153] See above n 110; cl 1 of the Fourth Schedule lists matters which *should* be included in an assessment of the effects on the environment. The consultation identified is not therefore mandatory. See the discussion in *Greensill*, above n 57, 9.

[154] Above n 72, 319. In terms of s92(2) note the wide definition of "environment" in s2 of the RMA. In *Aqua King* Judge Kenderdine held that this definition would encompass iwi concerns about coastal waters, above n 72, 319.

[155] See also s92(4) which states that further information may be required under the section only if the information is necessary to enable the consent authority to better understand the nature of the activity in respect of which the application for resource consent is made, the effect it will have on the environment, or the ways in which any adverse effects may be mitigated.

Judge Kenderdine held that the further information requested under this section could include a request for further consultation.[156]

This analysis demonstrates that there is a statutory procedure for ensuring that consultation by the applicant is adequate. Where the council believes that an application may have a significant effect on the tangata whenua of an area, an explanation of the consultation undertaken may be required under section 92(2). If this explanation reveals that the standard of consultation was not sufficient, the applicant could be made to conduct further consultation under section 92(4). Judge Kenderdine in *Aqua King* noted that inadequate consultation by an applicant may result in delays in the processing of the application.[157] The council officer is therefore able to take into account the principles of the Treaty by ensuring that the views of the tangata whenua are sought at an early stage in the process. These views when placed before the hearings committee, would ensure that decisions are made in an informed environment.

C The Pre-Hearing Meeting

The council officer would also need to ensure that the views of the tangata whenua were accurately relayed by the applicant. Blanchard J in *Quarantine Waste* noted the potential for distortion if the council relied upon applicant consultation.[158]

This reliability could be achieved in two ways. First, the officer could liaise with the tangata whenua, to ensure that their views were being

[156] Above n 72, 319.
[157] Above n 72, 320. See also the discussion in *Greensill* at above n 57, 7-8.
[158] See above n 21.

accurately conveyed by the applicant. Secondly, the officer could convene a pre-hearing meeting under section 99 of the Act, allowing the applicant and the tangata whenua to discuss their views with each other and with the council officer. This would ensure that the views of the tangata whenua were not distorted. Section 99(3) states:

> (3) The outcome of the meeting may be reported to the consent authority, and that report -
>
> (a) Shall be circulated to all parties before the hearing; and
>
> (b) Shall be part of the information which the consent authority shall have regard to in its consideration of the application.

Thus the officer could circulate a report of the meeting to the consent authority and the parties to the proceedings. This would avoid the natural justice concerns inherent in the council officer reporting to the consent authority the results of consultation with one party, and informing the other parties of these results shortly before the hearing.[159]

D The "Tolerable Middle Ground."

It is submitted that this approach would find favour on both "sides" of the Planning Tribunal debate on this issue. Judge Kenderdine accepted in *Whakarewarewa* that the convening of a pre-hearing meeting was sufficient to actually discharge the council officers duty under section 8 of the Act. In cases such as *Rural Management*, *Tawa*, and *Banks*, extensive consultation by the applicant was held to discharge the requirements of Part II of the Act. The tests in *Ngatiwai* and *Hanton*, that in some

[159] See the discussion of these concerns at above n 148.

circumstances a council officer may be under a duty to investigate or consult, would also be satisfied by this approach. It should also be noted that in any case where Maori interests are relevant, the tangata whenua should also be notified of an application. This would allow submissions to be made both on the application and at the hearing if necessary.

E Summary

It could be argued that this alternative approach has effectively imposed a duty of consultation on the council officer in any case. That may be so, depending on the definition of "consultation" being considered. The central argument in this paper has been that a council officer is able to discharge the section 8 duty, without conducting consultation in the form identified in *Gill* and *Quarantine Waste*. The wider focus on the adequacy of information under section 8, may at times involve conduct by the council officer commensurate with a concept of consultation. It is submitted however, that there is a subtle but important distinction between this definition of the section 8 duty, and that which originated in *Gill*.

VII CONCLUSION

The decision in *Gill* v *Rotorua District Council* has been described as "an excellent decision in that several sections of the planning and development community now have a better understanding of their obligations under the [RMA] as a result of Judge Kenderdine's pronouncements."[160] The cases which have emerged since *Gill* will have sent that community's understanding of this issue into a state of turmoil. The law on consultation with the tangata whenua under the RMA lacks both clarity and direction. A detailed analysis of these cases has outlined the evolution of this issue through the various decisions. Further, this analysis has allowed a consideration of the law as it presently stands.

The *Gill* decision identified that the local authority has a duty to consult with the tangata whenua in the resource consent procedure. This principle was based on section 8 of the RMA and the 1989 *New Zealand Maori Council* case. This paper has endeavoured to establish three things. First, the 1989 case is not sound authority for a Treaty principle of consultation. Further, the expression "shall take into account" reduces the impact of the Treaty principles on persons exercising functions and powers under the Act. Secondly, the principles of natural justice may be infringed by a duty of consultation on the council officer. This suggests that alternatives should be considered. Finally, the RMA facilitates an alternative approach to that originally taken in *Gill*. This focuses on the wider Treaty principle of informed decision making, and the role of the council officer as the guardian of this principle.

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[160] M Phillipson "Judicial Decision Making under the Resource Management Act 1991: A Critical Assessment" (1994) 24 *VUWLR* 163, 170. The writer did, however recognise that the tribunal may be about to diverge from *Gill*. See footnote 24 at p 170.

This paper was written at an immensely interesting time in terms of the consultation debate. This issue is in dire need of an authoritative statement from a superior forum, which has considered the entirety of relevant decisions and arguments on consultation. It is hoped that this paper helps to identify that material.

SELECTED BIBLIOGRAPHY

Bennion T "Consultation and Resource Management" (March 1994) The Maori Law Review.

Boast R and Edmunds D "The Treaty of Waitangi and Maori Resource Management Issues" in *Brookers Resource Management* (Brooker's, Wellington, 1991).

Judge RJ Bollard "Some Thoughts on the Planning Tribunal's role in Resource Management" [1995] *NZLJ* 38.

Brookfield FM "Constitutional Law" [1994] NZ Recent Law Review (Legal Research Foundation, Auckland, 1994) 376.

Chen M and Palmer G *Public Law in New Zealand* (Oxford University Press, Auckland, 1993).

Crengle D *Taking Into Account the Principles of the Treaty of Waitangi* (Ministry for the Environment, Wellington, 1993).

Dormer A *The Resource Management Act 1991 - The Transition and Business* (New Zealand Business Roundtable, August 1994).

Fisher DE "The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives" in *Brooker's Resource Management* (Brooker's, Wellington, 1991).

Flick G *Natural Justice* (2 ed, Butterworths, Sydney, 1984).

Hay JC *Section 27 of the New Zealand Bill of Rights Act 1990 - The Right to Justice: Something Old, Something New* LLM Research Paper, Victoria University of Wellington, 1991.

Kaua DC *Processes of Consultation Between Maori and Local Government Agencies,* Research Paper for the Degree of Masters of Public Policy, Victoria University of Wellington, 1995.

Judge Kenderdine "The Treaty Jurisprudence " in *Applications under the Resource Management Act 1991,* (New Zealand Law Society Seminar Paper, October - November 1991).

McHugh P *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991).

Mikaere AL "Maori Issues" [1993] NZ Recent Law Review (Legal Research Foundation, Auckland, 1993) 308.

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

Ministry for the Environment, *Resource Management - Consultation with Tangata Whenua* (Wellington, 1991).

Ministry for the Environment *The Resource Management Act - Kia Matiratira - A guide for Maori*, (Wellington, 1992).

Palmer K "Consultation with the Tangata Whenua under the Resource Management Act" (1994) 1 BRMB 21.

Parliamentary Commissioner for the Environment *Environmental Information and the Adequacy of Treaty Settlement Procedures* (Wellington, 1994)

Parliamentary Commissioner for the Environment, *Environmental Management and the Principles of the Treaty of Waitangi - Report on Crown Response to the Recommendations of the Waitangi Tribunal 1983-1988* (Wellington 1988) .

Parliamentary Commissioner for the Environment *Proposed Guidelines for Local Authority Consultation with Tangata Whenua* (Wellington, 1992).

Phillipson M "Judicial Decision Making under the Resource Management Act 1991: A Critical Assessment" (1994) 24 *VUWLR* 163.

Report of the Review Group on the Resource Management Bill (11 February 1991).

GDS Taylor "Administrative Law" [1993] NZ Recent Law Review (Legal Research Foundation, Auckland, 1993) 369.

Beverley, Paul Terrence
Consultation with the tangata whenua and the role of the local authority under