A shifting tide:

The implications of *King Salmon* on resource consent decision-making under the Resource Management Act 1991.

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"Very often the value structure in a statute is complex, and potentially internally inconsistent. On the face of it the Resource Management Act 1991 is a candidate for classification as a statute with multiple personality disorder. ... The truth is that there is an inherent conflict between conservation and development which no words can resolve."

JG Forgarty "Giving Effect to Values Used in Statutes" in Jeremy Finn and Stephen Todd (eds) Law, Liberty and Legislation: Essays in Honour of John Burrows QC, (LexisNexis, New Zealand, 2008) 1 at 20.

I. *Introduction*

This dissertation examines the consequences of different approaches to decision-making under the Resource Management Act 1991 ('the RMA' or 'the Act'). The outcome of RMA decision-making affects everyone. It is important what approach is taken to decision-making because the statutory criteria, type and extent of information available, and sequence of assessing information will determine the outcome of applications made under the Act. The approach to decision-making under the RMA has been contested by parties with different interests since the enactment of the Act and is still contested.

The RMA as a whole is also contested. Numerous amendments have been made to the RMA since its enactment[1] but, after some initial uncertainty, the approach to decision-making was settled for over 20 years.[2] Decision makers considered statutory factors and then, in the final analysis, applied the 'overall broad judgment approach' to determine whether sustainable management would be promoted.

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[1] The RMA has so far been subject to 18 Amendment Acts since its enactment. They are (in order of most recent to least recent) the Resource Legislation Amendment Act 2017, Resource Management Amendment Act 2013, Resource Management (Simplifying and Streamlining) Amendment Act 2009, Resource Management Amendment Act 2007, Resource Management Amendment Act 2005, Resource Management (Waitaki Catchment) Amendment Act 2004, Resource Management (Foreshore and Seabed) Amendment Act 2004, Resource Management (Energy and Climate Change) Amendment Act 2004, Resource Management (Aquaculture Moratorium Extension) Amendment Act 2004, Resource Management Amendment Act 2004 (No 2), Resource Management Amendment Act 2004, Resource Management Amendment Act 2003, Resource Management (Aquaculture Moratorium) Amendment Act 2002, Resource Management Amendment Act 1997, Resource Management Amendment Act 1996, Resource Management Amendment Act 1994 (No 2), Resource Management Amendment Act 1994, and Resource Management Amendment Act 1993. Further detail of these amendments can be found at Ministry for the Environment "List of all RMA or amendment acts" (20 April 2017) <www.mfe.govt.nz>.

[2] Ceri Warnock "Reconceptualising the Role of the New Zealand Environment Court" (2014) 26 JEL 507 at 507; IH Williams "The Resource Management Act 1991: Well Meant But Hardly Done" (2000) 9(4) OLR 673 at 674-675; and Sian Elias "Righting Environmental Justice" (2014) 10 RMTP 47 at 59: "Competing visions of environmental justice are inevitable. Inevitable too is the fact that community priorities in environmental matters will move around as social priorities and experiences change … So regular review of our environmental legislation is to be expected and welcomed."

However, in 2014 the decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*[3] ('*King Salmon*') overturned the legal approach for plan change decision-making. The implications of *King Salmon* are still being evaluated and debated. *King Salmon* has been applied to circumstances beyond its facts, making the decision revolutionary for resource management in New Zealand. In 2017 the High Court applied the *King Salmon* ratio to resource consents.[4] However, in August 2018 the Court of Appeal held that the *King Salmon* ratio did not apply to resource consents.[5]

The purpose of this dissertation is to undertake two conceptual exercises examining the implications of applying or rejecting the *King Salmon* test. The effects of each exercise on other applications made under the RMA and the impact to the wider scheme of the RMA will be analysed. The Court of Appeal decision in *Davidson* was released whilst writing this disseration. Although an appeal to the Supreme Court from *Davidson* is unlikely, this case has left unresolved issues and causes us to reconsider how the RMA works in practice. This dissertation explores the 'questions' that *King Salmon* and *Davidson* have highlighted about the working of the RMA.

The first chapter provides an overview of how and why the overall broad judgment approach to decision-making emerged.

The second chapter analyses *King Salmon* and subsequent plan change cases showing the new approach to decision-making, as well as the lower court decisions in *Davidson* and later resource consent cases. The Court of Appeal decision in *Davidson* is discussed showing the current state of the law.

The third chapter will be a conceptual exercise to discuss the implications of applying the *King Salmon* ratio to resource consents, including: a greater need for public participation when making and amending plans; the need for, and pressure on, planners in writing plans that will be subject to close scrutiny; the question as to whether resource consents – that are exceptions to activities permitted by plans – still

[3] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.
[4] *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.
[5] *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

serve a purpose under the RMA if they must be assessed only within plan provisions; and the potential for increased litigation to clarify the application of a new legal test.

The final chapter will also be a conceptual exercise to assess the implications of rejecting the *King Salmon* approach in determining resource consents, including: having two different legal tests for applications that are meant to be equal alternatives; the possibility for the public to choose the application with the perceived easier legal test; the impact on the RMA more generally; the widening of discretion for decision makers and the Environment Court; and the potential for the importance of plans to be undermined.

This dissertation concludes that *King Salmon* and *Davidson* and the debate surrounding these cases force us to re-consider the wider scheme and coherence of the RMA.

II. *Determining the appropriate decision-making approach*

A. The Resource Management Act 1991

In New Zealand, environmental law is primarily sourced from legislation.[6] The RMA is the primary piece of legislation in New Zealand managing natural and physical resources.[7] The RMA arose from a significant reform project that began in 1988 following which many isolated and incohesive environmental acts were combined into one comprehensive statute.[8] The RMA governs planning and development of resources on private and public land with sustainable management as the overarching purpose.[9] In doing so, the RMA divides responsibility for setting policy and planning between central government, regional councils and territorial authorities.[10]

The Act controls the use and development of resources. Those wishing to use the environment in this way must obtain legal permission to do so. A number of mechanisms in the Act enable development including plan rules, resource consents, designations and heritage orders. Decision makers including local authorities, central government, the Environment Court and Boards of Inquiry, determine applications. All decision makers must promote the purpose of the Act in determining those applications.

The decision-making approach will determine whether an application is granted. As a result the decision-making approach under the RMA has been contested through differing interpretations of sustainable management.

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[6] Kenneth Palmer "The Sources and Institutions of Environmental Law" in Derek Nolan (ed) *Environmental and Resource Management Law* (6th ed, LexisNexis, Wellington, 2018) 33 at [2.8]; Klaus Bosselmann "New Zealand" in Louis J Kotze and Alexander R Paterson (eds) *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (Kluwer Law International BV, The Netherlands, 2009) 355 at 357.

[7] Palmer, above n 6, at [2.8].

[8] Geoffrey Palmer *Environment - The International Challenge: Essays* (VUP, Wellington, 1995), at 145; Bosselmann, above n 6, at 357. The RMA replaced 12 acts and amended 53 others.

[9] Bosselmann, above n 6, at 358.

[10] At 360.

B. Sustainable management

The purpose of the RMA is to promote sustainable management of natural and physical resources.[11] Sustainable management is defined as:[12]

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, 'sustainable management' means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety –
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Further explanation of sustainable management is provided in Part 2 by ss 6-8 that include matters of national importance,[13] other matters[14] and the Treaty of Waitangi.[15] The Act requires all decision makers to take Part 2 into account in various ways. For example, the purpose of national policy statements,[16] the New Zealand coastal policy statement,[17] national planning standards[18] and regional policy statements[19] is to

[11] Resource Management Act 1991, s 5(1). For discussion of the World Commission on Environment and Development's Brundtland Report and the difference between sustainable development and sustainable management see David Grinlinton "Integrating Sustainability into Environmental Law and Policy in New Zealand" in Klaus Bosselmann, David Grinlinton and Prue Taylor (eds) *Environmental Law for a Sustainable Society* (2nd ed, New Zealand Centre for Environmental Law, New Zealand, 2013) 21 at 28.

[12] Resource Management Act 1991, s 5(2).

[13] Section 6.

[14] Section 7.

[15] Section 8.

[16] Section 45.

[17] Section 56.

[18] Section 58B.

"achieve the purpose of the Act". Further, local authorities are required to prepare and change regional policy statements,[20] regional plans,[21] and district plans[22] "in accordance with Part 2". A board of inquiry making a report must also consider matters in Part 2.[23] Finally, applications for resource consents,[24] designations[25] and heritage orders[26] are assessed "subject to Part 2". Therefore all RMA decision-making mechanisms link back to s 5 or Part 2.

Section 5 incorporates a number of different values that can conflict in particular fact situations.[27] It is often not possible to achieve all values to the greatest extent at one time.[28] Thus it is not surprising that s 5, and Part 2, has been litigated and debated.[29] Initially, courts had to consider how Part 2 would be interpreted.[30] There have been two approaches to decision-making under the RMA since. These are the so-called 'environmental bottom line approach' and the 'overall broad judgment approach'. Whilst the environmental bottom line approach was initially favoured,[31] the overall broad judgment approach has been dominant since *NZ Rail Ltd v Marlborough District Council*.[32] This chapter will outline the development of the environmental bottom line approach before looking at the development of the overall broad judgment approach.

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[19] Section 59.
[20] Section 61(1)(b).
[21] Section 66(1)(b).
[22] Section 74(1)(b).
[23] Section 51(1)(a).
[24] Section 104(1).
[25] Sections 168A(3) and 171(1).
[26] Section 191(1).
[27] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3, at [150]; Eleanor Milne "Fishing for Answers: The Implications of Environmental Defence Society v. King Salmon" (2015) 46 VUWLR 213 at 217.
[28] JG Fogarty "Giving Effect to Values Used in Statutes" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty and Legislation: Essays in Honour of John Burrows QC* (LexisNexis, New Zealand, 2008) 1 at 20.
[29] Ali Memon "Reinstating the Purpose of Planning within New Zealand's Resource Management Act" (2002) 20(3) Urban Policy and Research 299 at 303.
[30] Warnock, above n 2, at 511.
[31] *Shell Oil New Zealand Limited v Auckland City Council* PT Auckland W8/94, 2 February 1994; *Foxley Engineering Ltd v Wellington City Council* PT Wellington W12/94, 16 March 1994; *Plastic and Leathergoods Company Limited v The Horowhenua District Council* PT Levin W26/94, 9 April 1994; and *Campbell v Southland District Council* PT Invercargill W114/94, 14 December 1994.
[32] *NZ Rail Limited v Malborough District Council* [1994] NZRMA 70 (HC).

C. The environmental bottom line approach

The environmental bottom line approach was the first approach to decision making. Under this approach, when decision makers considered promoting sustainable management s 5(2)(a), (b) and (c) were held to be cumulative safeguards.[33] Resources were managed in a way that promotes the wellbeing of the community whilst ensuring sustainable management is achieved.[34] Therefore if the effects of an application could not ensure s 5(2)(a)-(c) were met then sustainable management was not promoted.[35] This approach enabled environmental wellbeing to take precedence over other possible benefits from development such as economic wealth.

The environmental bottom line approach developed through cases and was favoured by local authorities and environmental adjudicators. The environmental bottom line approach appears consistent with the explanation given by the Minister for the Environment at the third reading of the Resource Management Bill. Hon Simon Upton[36] stated "the Bill provides us with a framework to establish objectives with a biophysical bottom line that must not be compromised."[37] If an application did not avoid, remedy or mitigate adverse effects of the proposed activity then sustainable management was not promoted and the application could not be granted. This

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[33] *Shell Oil New Zealand Limited v Auckland City Council*, above n 31, at 10; *Foxley Engineering Ltd v Wellington City Council*, above n 31, at 40-41.

[34] *Shell Oil New Zealand Limited v Auckland City Council*, above n 31, at 10.

[35] *Foxley Engineering Ltd v Wellington City Council*, above n 31, at 41; *Plastic and Leathergoods Company Limited v The Horowhenua District Council*, above n 31, at 8; and *Shell Oil New Zealand Limited v Auckland City Council*, above n 31, at 10.

[36] The Minister for the Environment when the Resource Management Act 1991 was enacted.

[37] Hon Simon Upton (4 July 1991) 516 NZPD 3018 at 3019-3020. At the third reading of the Resource Management Bill it was explained by Upton that: "Clause 4 enables people and communities to provide for their social, economic, and cultural well-being. Significantly, it is not for those exercising powers under the Bill to promote, to control, or to direct. … The Bill provides us with a framework to establish objectives with a biophysical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair. As such, the Bill provides a more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards and society will set those standards. Clause 4 sets out the biophysical bottom line. Clauses 5 and 6 set out further specific matters that expand on the issues. The Bill has a clear and rigorous procedure for the setting of environmental standards - and the debate will be concentrating on just where we set those standards."; Simon Upton, Minister for the Environment, Minister of Research, Science and Technology, and Minister for Crown Research Institutes "Purpose and Principle in the Resource Management Act" (1995) 3 Wai L Rev 17 at 26, 36, 37 and 39.

approach hinged on s 5(2)(a)-(c) being interpreted as cumulative safeguards to protect the environment. However, the High Court decision in *New Zealand Rail Limited v Marlborough District Council*[38] departed from this approach.

D. The emergence of the overall broad judgment approach

The approach to be taken to Part 2 was discussed in *New Zealand Rail Limited v Marlborough District Council.*[39] The Tribunal held that the decisions in *Batchelor v Tauranga District Council (No 2)*[40] and *Kennett v Dunedin City Council*[41] confirmed the law.[42] All three cases assessed resource consent applications on the original version of s 104 RMA. At the time s 104(4)(g) required a decision maker to "have regard to" Part 2 and other factors. The placement of Part 2 within this subsection influenced its role. Part 2 did not have a primary role in decision-making because it was only one factor to be considered in s 104(4).

Accordingly, Part 2 matters were not to be given primacy in the way that they are expressed in Part 2.[43] This is because s 104(4) (as it then was) required a decision maker to "have regard to" Part 2 rather than "recognise and provide for"; or "have particular regard to"; or "take into account" Part 2.[44] There was no justification for preferring one matter in s 104 over another.[45] Instead, all matters need to be

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[38] *New Zealand Rail Limited v Marlborough District Council* (1993) 2 NZRMA 449 (PT) (Interim Decision).
[39] At 1.
[40] *Batchelor v Tauranga District Council (No 2)* [1993] 2 NZLR 84, (1992) 1A ELRNZ 221, (1992) 2 NZRMA 137 (HC).
[41] *Kennett v Dunedin City Council* (1992) 1A ELRNZ 168, (1992) 2 NZRMA 22 (PT)
[42] *New Zealand Rail Limited v Marlborough District Council*, above n 38, at 152.
[43] *Kennett v Dunedin City Council*, above n 41, at 16.
[44] At 16.
[45] *Batchelor v Tauranga District Council (No 2)*, above n 40, at 9-10; *Kennett v Dunedin City Council*, above n 41, at 16.

considered and given the weight appropriate in the circumstances of the case.[46] Without the qualifying words "subject to" Part 2 was not a primary consideration.[47]

This interim decision paved the way for the so-called 'overall broad judgment approach' to develop. Part 2 factors were weighed against each other to determine whether sustainable management would be promoted. No value in Part 2, including s 5, had greater weight over others and s 5 was not interpreted as containing an environmental bottom line.[48]

NZ Rail v Marlborough District Council is often cited as the beginning of the overall broad judgment approach. In the High Court, Greig J had to decide whether Part 2 had primacy in assessing resource consent applications.[49] As the RMA was drafted at the time, Greig J agreed that Part 2 was just one matter for consideration and did not have any particular primacy.[50] If "subject to" had been used in s 104 *NZ Rail* might have been decided differently and Part 2 may have had primacy.

In contrast, in *Environmental Defence Society v Mangonui County Council*,[51] decided under the Town and Country Planning Act 1977 ('TCPA'),[52] ss 3 (matters of national importance) and 4 (general purposes of planning) of the TCPA were primary considerations because the provisions used strong statutory language.[53] However, the

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[46] *Kennett v Dunedin City Council*, above n 41, at 16; *Batchelor v Tauranga District Council (No 2)*, above n 40, at 9-10.

[47] *New Zealand Rail Limited v Marlborough District Council*, above n 38, at 152-153. At the time of this decision the phrase "subject to" did not appear in any provisions of the RMA dealing with resource consents.

[48] Derek Nolan and James Gardner-Hopkins "EDS v New Zealand King Salmon - the implications" (November 2014) RMJ 1; Bret C. Birdsong "Adjudicating Sustainability: New Zealand's Environment Court" (2002) 29(1) Ecology L.Q. 1 at 45.

[49] *NZ Rail Limited v Malborough District Council*, above n 32, at 14.

[50] At 29; *Batchelor v Tauranga District Council (No 2)*, above n 40, at 10.

[51] *Environmental Defence Society v Mangonui County Council* [1989] 3 NZLR 257 (CA).

[52] *NZ Rail Limited v Malborough District Council*, above n 32, at 15.

[53] *Environmental Defence Society v Mangonui County Council*, above n 52, at 6-7 per Casey J, at 7 per Bisson J, at 3-4 per Somers J, at 24 per McMullin J; Town and Country Planning Act 1977, ss 3 and 4. Section 3 stated "In the preparation, implementation, and administration of regional, district, and maritime schemes, and in administering the provisions of Part II of this Act, the following matters which are declared to be of national importance shall in particular be recognised and provided for." Section 4 stated, "Subject to section 4 of this Act, regional, district, and regional planning and the administration of the provisions of Part II of this Act, shall have for their general purposes … ." Further

RMA is a "significantly different regime" from the TCPA so a new approach was necessary.[54]

Greig J held that an ordinary reading of the Act showed Part 2 is not the primary consideration.[55] Further, the manner in which Part 2 and s 5 were drafted meant that it was not possible to subject them to strict statutory interpretation as Grieg J explained:[56]

> This part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way.

The overall broad judgment approach is widely cited as originating from Greig J's interpretation of s 5. The RMA was one of the first statutes in New Zealand to incorporate a purpose section.[57] However, s 5 was not used as a traditional purpose section. According to Harris the role of purpose sections tends to vary.[58] A purpose section can inform the decision maker of Parliament's intent when interpreting a statute.[59] If the meaning of statutory words is uncertain, a purpose section can help determine the appropriate interpretation. However, purpose sections in environmental

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in s 4(2), "the general objectives of regional, district, and maritime schemes shall be to achieve the purposes specified in (1) of this section." In s 4(3) " … regard shall be had to the principles and objectives of the Soil Conservation and Rivers Control Act 1941 and the Water and Soil Conservation Act 1967." See AP Randerson "The Exercise of Discretionary Powers Under the Resource Management Act 1991" [1991] NZ Recent Law Review 444 for discussion of the TCPA provisions and their differences to the RMA.

[54] *Batchelor v Tauranga District Council (No 2)*, above n 40, at 3.

[55] *NZ Rail Limited v Malborough District Council*, above n 32, at 16.

[56] At 19.

[57] Warnock, above n 2, at 511.

[58] BV Harris "Sustainable Management as an Express Purpose of Environmental Legislation: The New Zealand Attempt" (1993) 8(1) Otago LR 51 at 57.

[59] At 57.

legislation may fail to "clearly articulate the policy trade-offs necessary to apply the legislation in practice."[60]

Section 5 describes the purpose, identifies the end goal, and makes sustainable management a principle.[61] It also provides criteria for decision-making.[62] However, it does not make it clear how competing considerations inherent in 'sustainable management' should be reconciled.[63] Upton argues that the purpose section label is misleading.[64] Rather than being a traditional purpose section, s 5 is a value-laden principle outlining the ultimate focus of the RMA.[65]

NZ Rail interpreted s 5 as a guiding principle in line with Upton's intention but the approach taken did not recognise environmental bottom lines. Rt Hon Sir Geoffrey Palmer QC is critical of the overall broad judgment approach as being a contradiction to clear parliamentary intent for environmental bottom lines.[66] Nonetheless *NZ Rail* shifted the interpretation of s 5 by emphasising the generality of language used. *NZ Rail* represents the start of the overall broad judgment approach to Part 2 that has dominated RMA decision-making.

E. A revert back to the environmental bottom lines approach

Despite *NZ Rail*, in *Campbell v Southland District Council* the Planning Tribunal reverted back to the environmental bottom lines approach. Although the decision was made following the Resource Management Amendment Act 1993 the Tribunal was

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[60] Edward Willis "The Interpretation of Environmental Legislation in New Zealand" (2010) 14 NZJEL 135 at 149.

[61] Upton, above n 37, at 19-20. Upton considers this to be an example of 'continental' approach to drafting as described by Nigel Jamieson "The New Look Legislation" (1991) 4(1) NZLJ 24 at 26-27: Therefore the RMA is "simple rather than complex, general rather than particular, abstract rather than concrete, academic rather than experiential, principled rather than elemental, conceptual rather than textual, substantive rather than procedural, politically motivated rather than legally addressed."

[62] Harris, above n 58, at 57.

[63] Willis, above n 60, at 151.

[64] Upton, above n 37, at 22.

[65] At 22.

[66] Geoffrey Palmer "Ruminations on the problems with the Resource Management Act 1991 (Part 1)" (February 2016) NZLJ 2 at 5.

required to assess the application according to the original wording in the RMA.[67] Rather than following *NZ Rail* the Tribunal held that s 5 is not about achieving a balance between the benefits and adverse effects of a particular activity.[68] Section 5(2)(a)-(c) are cumulative safeguards that must be met for sustainable management.

F. The Resource Management Amendment Act 1993

The decisions discussed above were decided against the original text of s 104 RMA. The original text of s 104(4) RMA stated:

> **104 Matters to be considered**
>
> …
>
> (4) Without limiting subsection (1), when considering an application for a resource consent, the consent authority shall have regard to—
>
> (a) Any relevant rules of a plan or proposed plan; and
>
> (b) Any relevant policies or objectives of a plan or proposed plan; and
>
> (c) Any national policy statement, New Zealand coastal policy statement, and regional policy statement; and
>
> (d) Where the application is made—
>
> (i) In accordance with a regional plan, any relevant district plan; and
>
> (ii) In accordance with any district plan, any relevant regional plan; and
>
> (e) Any relevant water conservation order; and
>
> (f) Any relevant draft water conservation order included in the report of a special tribunal under section 208 or the report of the Planning Tribunal under section 213; and
>
> (g) Part 2; and
>
> (h) Any relevant regulations.

[67] *Campbell v Southland District Council*, above n 31, at 22.
[68] At 66.

As explained, the placement of Part 2 within this list determined the approach that decision makers took to the role of Part 2.[69] In decision-making, Part 2 was just one factor to consider. However, the Resource Management Amendment Act came into force on 7 July 1993 and amended s 104:

> **104 Matters to be considered**
>
> (1) Subject to Part 2, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to—
>
> …

The amendment responded to the cases discussed above and moved Part 2 to a (seemingly) primary position.[70] As the Planning Tribunal in *Reith v Ashburton District Council*[71] stated:[72]

> [P]rior to the Amendment Act, the correct way to consider an application for land use consent was to have regard to all relevant matters without giving any of them primacy, including those in Part II. It was also permissible to have regard to and in an appropriate case give weight to the likely effects on the coherence of a district plan and on its consistent administration, if consent was to be either granted or refused. … It appears from the Amendment Act that Parliament was not satisfied that this was the appropriate way to proceed. … Three important points emerge from the new s 104. The first is that the matters in Part II are now, so it seems, to be given a measure of primacy.

The phrase "subject to" has been held to be a "standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict."[73]

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[69] Martin Williams "Part 2 of the RMA - "engine room" or backseat driver?" (April 2017) RMJ 25 at 28; Gordon Smith "The Resource Management Act 1991 "A Biophysical Bottom Line" Vs "A More Liberal Regime"; A Dichotomy" (1997) 6 Canta LR 499 at 505.

[70] Birdsong, above n 48, at 41; Williams, above n 69, at 28; and Smith, above n 69, at 506. At the first reading of the Resource Management Amendment Bill 1993 the Minister for the Environment at the time, Hon Rob Storey, said "Part II of the Resource Management Acts sets out its purpose and the key principles of the Act. It is fundamental, and applies to all persons whenever exercising any powers and functions under the Act. The current references in the Act in Part II are being interpreted as downgrading the status of Part II. Amendments in this Bill restore the purpose and principles to their proper overarching position." (15 December 1992) 532 NZPD 13179.

[71] *Reith v Ashburton District Council* [1994] NZRMA 241 (PT).

[72] At 250-251.

The other matters in s 104 can be employed and there is no need to assess Part 2 unless there is a conflict; then Part 2 can be used to resolve conflict in a final analysis.[74] A few early cases interpreted the wording to mean the opposite but according to Harris the new position of Part 2 in s 104 meant it was "intended to play a dominant and pervasive role."[75] Williams agrees and argues the 1993 amendments were introduced so that Part 2 had an overarching position in decision-making.[76] Case law developed to reflect this view and Part 2 was given a primary role in decision-making.[77]

G. Acceptance of the overall broad judgment approach

In *Trio Holdings v Marlborough District Council*[78] the Tribunal had regard to the relevant policies and plans and found that some policies, aimed at preserving the environment,[79] militated against the proposed development but the proposal did not appear offensive to the relevant plans, taken in their entirety.[80] The Tribunal turned to consider Part 2 to resolve the conflict. In assessing Part 2 matters ss 6(a), 6(b), 7(c), 7(d) and 7(g) RMA weighed against the proposal. However, the significant health and economic benefits of the proposal met s 5(2) in terms of social and economic

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[73] *Environmental Defence Society v Mangonui County Council*, above n 51, at 6 per Cooke P; *Minister of Conservation v Kapiti Coast District Council* (1994) 1B ELRNZ 234, [1994] NZRMA 385 (PT) at [8]; and *Re Skydive Queenstown Ltd* [2014] NZEnvC 108 at [19].

[74] Ceri Warnock and Maree Baker-Galloway *Focus on Resource Management Law* (LexisNexis, Wellington, 2015) at 214-215.

[75] Harris, above n 58, at 57.

[76] Williams, above n 69, at 25.

[77] For example, in *Auckland City Council v John Woolley Trust* (2008) 14 ELRNZ 106, [2008] NZRMA 260 (HC) at [47] the High Court stated: "Given the primacy of Part 2 in setting out the purpose and principles of the RMA, I do not accept … that the words "subject to Part 2" in s 104 mean that Part 2 matters only become engaged when there is a conflict between any of the matters in Part 2 and the matters in s 104. Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the Act."

[78] *Trio Holdings v Marlborough District Council* (1996) 2 ELRNZ 353, [1997] NZRMA 97 (PT).

[79] Policies 1.1.4, 3.1.1, 8, 10, and 11 NZCPS; Objective 5.3.10, 7.2.7, and 8.1.2, and Policies 5.3.10, 7.2.8, 8.1.3, 8.1.5 and 8.1.6 MRPS. Limited weight was given to the provisions of the MSPRMP because they were subject to change.

[80] Marlborough United Council Regional Planning Scheme, the New Zealand Coastal Policy Statement (NZCPS), Marlborough Regional Policy Statement (MRPS), and the Marlborough Sounds Proposed Resource Management Plan (MSPRMP).

wellbeing.[81] It was noted that nationally significant proposals could outweigh preservation of the local environment.[82]

In a final evaluative exercise the Tribunal stated:[83]

> The natural character of the coastal environment of the Marlborough Sound is not to be protected at all costs – but to be protected in terms of its sustainable management. We have concluded that the national (and international) significance of the development of the sponge and algal species in the proposal, if successful, is such that we should ensure that the adverse effects we identified in the decision, if not avoided altogether, could be mitigated sufficiently to still enable the promotion of the concept of sustainable management of the sites' natural resources to occur. The idea of "mitigation" is to lessen the rigour or the severity of effects. We have concluded that the inclusion of the word in s 5(2)(c) of the Act, contemplates that some adverse effects from developments such as those we have now ascertained may be considered acceptable, no matter what attributes the site may have. To what extent the adverse effects are acceptable, is, however, a question of fact and degree.

The Tribunal granted consent and justified its decision by giving more weight to economic and health benefits of the proposal than negative environmental effects. A similar evaluative approach was also taken in *Te Runanga O Taumarere v Northland Regional Council and Far North District Council*[84] and *McIntyre v Christchurch City Council and BellSouth.*[85]

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[81] *Trio Holdings v Marlborough District Council*, above n 78, at 35.

[82] *New Zealand Rail Limited v Marlborough District Council*, above n 38, at 465-466: "It is our judgement that s 6(a) of the Act should be applied in such a way that the preservation of the natural character of the coastal environment is only to give way to suitable or fitting subdivision, use and development. Here of course we only have to consider development. But this does not mean to say that any suitable or fitting development will qualify. Although the threshold, as Mr Camp put it, may be passed earlier when considering appropriateness as distinct from need, it has to be remembered that it is appropriateness in a national context that is being considered. … Consequently any development being considered for the purposes of s 6(a) of the Act would have to be nationally suitable or fitting before preservation of the natural character of the coastal environment could justifiably be set aside."

[83] *Trio Holdings v Marlborough District Council*, above n 78, at 36-37.

[84] *Te Runanga O Taumarere v Northland Regional Council and Far North District Council* (1995) 2 ELRNZ 41 (PT).

[85] *McIntyre v Christchurch City Council and BellSouth* [1996] NZRMA 289 (PT).

The overall broad judgment approach was also clearly preferred in *North Shore City Council v Auckland Regional Council*.[86] The Environment Court considered the relevant plans[87] and found policies requiring environmental protection.[88] Nevertheless, in determining whether the proposal was necessary to promote sustainable management, the Court was of the view that:[89]

> Where (as in this case) there are a number of issues to be considered in deciding whether a proposal would promote the sustainable management of natural and physical resources as defined, it is our understanding that the duty entrusted to those making decisions under the Act cannot be performed by simply deciding that on a single issue one or more of the goals in paragraphs (a), (b) and (c) is not attained.

The Court noted that adopting an environmental bottom line approach would severely restrict the way a community could provide for their wellbeing;[90] failing to meet one part of s 5 should not determine the outcome of the case.[91] Instead:[92]

> The method of applying section 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose. Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.

The above statement was the first explicit description of the overall broad judgment showing close statutory interpretation of s 5 is incorrect.[93] Instead an overall broad

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[86] *North Shore City Council v Auckland Regional* (1996) 2 ELRNZ 305, [1997] NZRMA 59 (EnvC) at 44.

[87] New Zealand Coastal Policy Statement, proposed Auckland Regional Policy Statement (ARPS), proposed Auckland Regional Plan: Coastal (ARPC),

[88] Policies 3.3.1, 5.1.1(a) NZCPS; Policies 8.4.1, 8.4.21, map 2, sheet 2, map 3, sheet 2, map 5, sheet 1, map 5, sheet 3 ARPS; Objectives 5.3.3, Policies 3.4.2, 5.4.2, 5.4.3, map 1, sheet 34 ARPC

[89] *North Shore City Council v Auckland Regional*, above n 86, at 44.

[90] At 44.

[91] At 44.

[92] At 46.

[93] At 45.

judgment approach should be applied to weigh up the significance of conflicting considerations.[94] *Trio Holdings* and *North Shore City Council* were later accepted as correct in other cases and academic commentary.[95] Thus in the final determination of any proposal the Court turned to Part 2 to undertake an overall broad judgment approach.[96] Sustainable management was promoted by giving different weight to the criteria in s 5 and Part 2 in accordance with their scale, degree, significance and proportion on the facts of the case.[97]

To summarise, the Court assessed applications against relevant statutory criteria including policy and plan provisions. Decision makers then returned to Part 2 to undertake an overall broad judgment approach as a final exercise. Applying Part 2 in the final analysis seemed to be a direct statutory requirement on decision makers. The requirement to consider Part 2 is included in plan change, resource consent, designation and heritage order provisions.[98] Therefore Part 2 was given the ultimate decision-making role.[99]

The way decision makers use Part 2 is the difference between the environmental bottom line cases and the overall broad judgment cases. The environmental bottom line cases prevented use and development of the environment if the cumulative safeguards in s 5(2) were not met. However, the jurisprudence determined that no environmental bottom lines exist within the RMA.[100] In contrast, the overall broad judgment approach, weighed up competing considerations giving equal importance to the environmental and developmental values in s 5.[101] Applications were granted

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[94] At 46. *North Shore City Council* was appealed to the High Court but the appeal did not need to decide the correctness of the overall broad judgment approach: *Aquamarine Ltd v Southland Regional Council* EC Christchurch C126/97, 15 December 1997; Peter Skelton and Ali Memon "Adopting sustainability as an overarching environmental policy: A review of section 5 of the RMA" (2002) 10 RMJ 1 at 9.

[95] *Aquamarine Ltd v Southland Regional Council*, above n 94, at 140-141.

[96] At 140.

[97] At 141.

[98] Resource Management Act 1991, ss 45, 56, 58B, 59, 61(1)(b), 66(1)(b), 74(1)(b), 51(1)(a), 104(1), 168A(3), 171(1), 191(1).

[99] Warnock, above n 2, at 512.

[100] At 512.

[101] *Kiwi Property Management v Hamilton City Council* (2003) 9 ELRNZ 249 (EnvC) at [24].

when the benefits of the proposal outweighed the effects on the environment in the particular circumstances.[102]

H. Implications

Commentators argue Upton's statement that "clause 4 sets out the biophysical bottom line", in the third reading of the Resource Management Bill, was untenable.[103] It was a misconception to think that s 5 set biophysical bottom lines.[104] Section 5(2)(a) in particular emphasises anthropocentric values.[105] Further, there was no clear indication that environmental values took priority.[106] The courts agreed and accepted the overall broad judgment approach for decision-making.[107] Including "subject to Part 2" in provisions like s 104 enabled the overall broad judgment approach to be applied in determining specific applications.[108] Plan changes must also be made "in accordance with Part 2". Accordingly, the overall broad judgment approach was considered the appropriate way to evaluate Part 2 in all contexts.[109]

The overall broad judgment approach is not a balancing of competing elements of s 5(2).[110] Neither is it a balancing of the statutory considerations within the relevant section being assessed. Instead, a weighing exercise of the various elements of sustainable management occurs.[111] Birdsong views the overall broad judgment approach as enabling decision makers to weigh competing social, economic and environmental concerns much like branches of government do.[112] Further, Saili describes the overall broad judgment approach as asking for a "holistic normative

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[102] Warnock and Baker-Galloway, above n 74, at [3.9].
[103] Memon, above n 29, at 307; Harris, above n 58, at 59; and Smith, above n 69, at 537.
[104] Memon, above n 29, at 307; Kerry Grundy "In search of a logic: s 5 of the Resource Management Act" (February 1995) NZLJ 40 at 41.
[105] Memon, above n 29, at 307.
[106] Willis, above n 60, at 151.
[107] Warnock, above n 2, at 512.
[108] The section for designations, s 171 Resource Management Act 1991, was amended at the same time with the same wording of "subject to Part 2".
[109] Warnock, above n 2, at 512.
[110] Skelton and Memon, above n 94, at 8.
[111] At 8.
[112] Birdsong, above n 48, at 47.

judgement to be exercised: a principles value judgement that is just in the circumstances of a particular case and gives effect to the purpose of the Act."[113]

The decision maker determines what promotes sustainable management on an overall broad judgment approach.[114] Further, the decision maker has significant discretion as to what, in the circumstances, needs greater weight afforded to it.[115] Significant discretion is possible because of the wide scope of sustainable management in s 5. Therefore sustainable management has been achieved in many different ways.[116] Fogarty J (writing extra-judicially) has described this approach as a decision maker preferring one value over another.[117] Often the discretion of decision makers tends to favour economic benefits over environmental wellbeing.[118] This is because in practice (and litigation) it is easier to quantify economic benefits than adverse environmental wellbeing.[119] Thus economic benefits tend to assume greater dominance in the overall evaluation. The overall broad judgment approach was accepted for over 20 years without being considered at a higher level of appellate court, until the decision in *King Salmon*.

[113] Tigilau Saili ""Planning vs. Markets" Under the RMA 1991: Are we asking the right question?" (August 2006) RMJ 10 at 16.

[114] Warnock and Baker-Galloway, above n 74, at [6.33].

[115] *J F Investments Limited v Queenstown Lakes District Council* EC Christchurch C48/06, 27 April 2006 at [23]: this was described as a "choice or compromise...between limiting the economic and social conditions of people by avoiding the adverse effects of their activities or enabling an individual's well-being by allowing some adverse environmental effects to occur, duly remedied or mitigated to the appropriate extent."; Tania Lowe "An Uncertain Purpose: The Position of Economic Well-Being in Section 5 of the Resource Management Act 1991" (LLB (Hons) Dissertation, University of Otago, 2010) at 11.

[116] *Unison Networks Limited v Hastings District Council* EC Wellington W011/09, 23 February 2009 at [130].

[117] Fogarty, above n 28, at 20-21; Warnock, above n 2, at 511.

[118] Nicola Wheen "An updated history of New Zealand environmental law" in Eric Pawson and Tom Brooking (eds) *Making a new land: Environmental histories of New Zealand* (Otago University Press, Dunedin, New Zealand, 2013) 277 at 290-292.

[119] Lowe, above n 115, at 11.

III. King Salmon and its Successors

The previous chapter discussed the emergence of the overall broad judgment approach as the way to interpret Part 2 in decision-making. The overall broad judgment approach was settled for over 20 years and had not been considered in a higher New Zealand court until *King Salmon*. This chapter will outline *King Salmon* and the plan change cases that have followed it. It will then discuss the extension of *King Salmon* to resource consent through the Environment Court and High Court *Davidson* decisions. The Court of Appeal in *Davidson* will also be discussed.

A. King Salmon

On the facts of *King Salmon* an application was made for a change to the Marlborough Sounds Resource Management Plan to make salmon farming a discretionary activity at eight sites.[120] Resource consents to farm salmon were also applied for.[121] The proposed activities involved matters of national significance and were referred to a board of inquiry ('the Board').[122] The Board granted plan changes in respect of four of the eight sites and also granted resource consents for these sites.[123] The Environmental Defence Society and Sustain Our Sounds Inc appealed the Board's decision to the High Court but the appeal was dismissed.[124] Another appeal was brought under s 149V RMA and leave was granted to the Supreme Court.[125]

In accordance with s 67(3) RMA, the Board was required to "give effect to" the New Zealand Coastal Policy Statement[126] (NZCPS) in order to determine the application.[127] On the facts the Board found that: the area had outstanding natural

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[120] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3, at [1].
[121] At [1].
[122] At [2].
[123] At [2].
[124] At [3].
[125] At [3].
[126] Department of Conservation New Zealand Coastal Policy Statement 2010 (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010).
[127] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3, at [5].

character and was an outstanding natural landscape;[128] a salmon farm would have significant adverse effects on the landscape;[129] and that granting the proposal could not comply with policies 13(1)(a) and 15(a) of the NZCPS.[130] However, the Board did not take these policies to be determinative, and it reverted to considering Part 2 of the RMA in the final analysis and an overall broad judgment approach was applied.[131] As a result the application was granted.[132] The Environmental Defence Society argued the decision to return to Part 2 was wrong in law.[133]

In considering Part 2 of the RMA, in particular s 5, the majority of the Supreme Court noted the definition of sustainable management is broad, general and flexible.[134] Therefore s 5 is a guiding principle for decision makers under the RMA rather than an aid to interpretation.[135] This view of s 5 is consistent with Greig J in *NZ Rail*.[136] The Court also settled the meaning of "while" within s 5, which has been subject to debate.[137] The difference between interpreting "while" as a coordinating conjunction or a subordinating conjunction determines whether an environmental bottom line exists within s 5. [138] The Supreme Court confirmed that s 5 is to be read as an

[128] At [5].
[129] At [5].
[130] At [5]. The Board and the High Court considered that the language of the policies at issue weighed heavily against granting the plan change application: at [128].
[131] At [5].
[132] At [5].
[133] At [5].
[134] At [24(a)] and [150].
[135] At [24(a)].
[136] *NZ Rail Limited v Malborough District Council*, above n 32, at 19.
[137] BV Harris "The law-making power of the judiciary" in Philip A. Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 264 at 269; Kenneth Palmer "Resource Management in New Zealand - Decision-making for Sustainability" (paper presented to International Conference on Global Built Environment: Towards an Integrated Approach for Sustainability, Lancashire, September 2006) 144 at 146; John Milligan "The Resource Management Act - 9 months on" (October 1992) NZLJ 351; and Nicola Wheen "The Resource Management Act 1991 - A "Greener" Law for Water?" (1997) 1(1) NZJEL 165 at 183: Wheen explains that the debate began in DE Fisher "The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives" in *Resource Management* (Brooker and Friend, Wellington, 1991) and was continued by John Milligan "Pondering the 'While'" (May 1992) 16 Terra Nova.
[138] Harris, above n 137, at 269.

integrated whole and so "while" must mean "at the same time as".[139] Therefore s 5(2)(a)-(c) does not set an environmental bottom line.[140]

However, the Court did find that plans could set environmental bottom lines.[141] Plans are issued following extensive processes including consultation and public participation; therefore the values in the plan are the result of community choices.[142] Environmental bottom lines are a valid choice for communities to make. Further, preservation of the environment is consistent with sustainable management because:[143]

> … [Section] 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management.

This was reiterated when discussing the definition of sustainable management:[144]

> What is clear about the definition, however, is that environmental protection by way of avoiding the adverse effects of use or development falls within the concept of sustainable management and is a response legitimately available to those performing functions under the RMA in terms of pt 2.

Decision makers must note when plans promote environmental protection rather than assuming sustainable management only encompasses use and development. This

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[139] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3, at [24(c)].
[140] Kenneth Palmer "The Resource Management Act 1991" in Derek Nolan (ed) *Environmental and Resource Management Law*, (6th ed, LexisNexis, Wellington, 2018) 101 at 129.
[141] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3, at [107].
[142] At [90].
[143] At [24(d)].
[144] At [150].

recognises the extensive process that plans go through and gives meaning to the choices within plans.

The RMA provides for the creation of plans within a hierarchy.[145] Plans are required to give effect to Part 2, among other things, when being created and amended.[146] The Supreme Court determined that it was unnecessary for the Board to return to Part 2 to an overall broad judgment approach in the final analysis because the NZCPS already gave effect to Part 2 through s 56.[147] Section 56 of the RMA provides that the purpose of the NZCPS is to "state objectives and policies in order to achieve the purpose of this Act". The Board should have "given effect to" the NZCPS. The directive language of policies 13 and 15 formed a protection and preservation scheme; therefore an environmental bottom line existed in the NZCPS.[148] The policies had to be implemented as they were drafted. Decision makers could not use their discretion to only implement some parts of the NZCPS.[149]

Policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS used the term "avoid". The policies required decision makers to avoid adverse effects in particular areas. In the context of the NZCPS, and s 5(2)(c), "avoid" means "not allow" or "prevent the occurrence of".[150] Whether an environmental bottom line approach or an overall broad judgment approach was adopted would dictate the effect that "avoid" would have.[151] An overall broad judgment approach would keep the requirement to "avoid" adverse effects as just one of a list of factors.[152] However, an environmental bottom line approach makes the direction much stronger.[153]

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[145] At [30]. See Warnock and Baker-Galloway, above n 74, at 145-166 for an explanation of the planning document hierarchy.
[146] See for example: ss 61(1)(b), 66(1)(b), and 74(1)(b).
[147] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3, at [85].
[148] At [90], [132] and [146]. See [92]-[105] for discussion on the meaning of "avoid" and "inappropriate" in the context of the NZCPS.
[149] At [90].
[150] At [96].
[151] At [97].
[152] At [97].
[153] At [97].

The NZCPS was intended to determine an application for a plan change rather than Part 2.[154] This is because plans exist within a carefully constructed hierarchical scheme.[155] Plans also go through extensive processes to be issued.[156] Further, the language used in planning documents is not always open and general like s 5 – it can be very specific. These features must be recognised.[157] The language of the NZCPS created a binding effect on local authorities and there was no reason to read it down by looking to Part 2.[158] Therefore Part 2 cannot effectively trump the NZCPS when it is likely Parliament intended for the NZCPS to give effect to Part 2.[159] Part 2 is not the operative provision for decision makers.[160]

Ultimately the Board was wrong to go back to Part 2 and carry out an overall broad judgment approach.[161] The Board should have just dealt with the NZCPS policies.[162] The NZCPS was not "given effect to" because the strong directives in the policies were not followed, so the plan change application should not have been granted.[163]

The Court's approach to plan changes meant higher order policy and plans would provide the basis for decision-making in plan change applications instead of s 5.[164] A decision maker must identify relevant policies and pay close attention to the language used.[165] Directive terms in policies are to be given greater weight than less directive terms.[166] Sometimes a decision maker will have no choice but to implement a very directive policy.[167] If a policy is directive then an overall broad judgment approach is not necessary. The Court provided some exceptions to their approach. Recourse to Part 2 and the overall broad judgment approach can be used when the exceptions

[154] At [86(a)].
[155] At [142].
[156] At [86(a)], [90] and [142].
[157] At [142].
[158] At [146].
[159] At [86(a)-(b)].
[160] At [130] and [151].
[161] At [153].
[162] At [153].
[163] At [153]-[154].
[164] At [151].
[165] At [129].
[166] At [129].
[167] At [129].

arise. The three exceptions are when the lawfulness of a planning document is challenged; or when the planning document does not cover the application at issue; or when the policies of the planning documents have uncertain meanings.[168]

Although *King Salmon* was determined in the context of the NZCPS the Court expressed general concerns about the overall broad judgment approach.[169] The significance of specific language in planning documents may be diminished by an overall assessment.[170] The decision maker may conclude too quickly that an overall assessment is necessary, when a perceived conflict exists between policies, rather than making a real attempt to implement the policies.[171] The overall broad judgment approach seems to be inconsistent with the extensive process that plans go through.[172] This extensive process indicates that plans should be more than just "one relevant factor".[173] Further, the overall broad judgment approach is uncertain and difficult to understand and apply.[174] The overall broad judgment approach also has the potential for spot zoning and to allow adverse effects on particular landscapes on a case-by-case basis without looking to the overall effect on the region.[175]

B. Implications of King Salmon

It was possible that *King Salmon* would be confined to the context of the NZCPS. However, it has had implications for all plans in the context of plan change applications because the statutory language is very similar across plan provisions and lower order plans must "give effect to" higher order plans. The purpose of national policy statements,[176] the New Zealand coastal policy statement,[177] national planning standards[178] and regional policy statements[179] is to "achieve the purpose of the Act".

[168] At [88].
[169] At [127], [131], [136], [137], [139], and [140].
[170] At [127].
[171] At [131].
[172] At [136].
[173] At [136].
[174] At [137].
[175] At [139]-[140].
[176] Resource Management Act 1991, s 45.
[177] Section 56.
[178] Section 58B.

Local authorities are required to prepare and change regional policy statements,[180] regional plans,[181] and district plans[182] "in accordance with Part 2". When plans contain directive policies these will determine the outcome of a plan change application. A decision maker cannot revert back to Part 2 and use the overall broad judgment approach unless the outlined exceptions apply. Plans are presumed to give effect to Part 2 when they are made according to statutory requirements. When reviewing policies the decision maker must subject the words to close scrutiny akin to statutory interpretation. Therefore plans have been elevated to the primary decision making tool whilst s 5 is a guiding principle for the Act generally.

C. Cases following King Salmon

Lower courts attempted to grapple with the new approach to plan change decision-making. The change in approach was legally disruptive and has taken time for the implications to be worked through. There has been uncertainty and at times inconsistency between approaches.

King Salmon has been applied to proposed changes to regional policy statements,[183] district plans,[184] proposed plans[185] and to existing plans[186] to confirm that plans guide the decision of a plan change.[187] Highly directive and mandatory objectives and

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[179] Section 59.
[180] Section 61(1)(b).
[181] Section 74(1)(b).
[182] Section 51(1)(a).
[183] *Tramlease v Auckland Council* [2015] NZEnvC 133, [2015] NZRMA 343 at [26]; *Man O'War Station Limited & Ors v Auckland Council* [2014] NZEnvC 167. All subsequent appeals were dismissed See *Man O'War Station Ltd v Auckland Council* [2015] NZHC 767, (2015) 18 ELRNZ 591, [2015] NZRMA 329; *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, (2017) 19 ELRNZ 662, [2017] NZRMA 121; and *Man O'War Station Ltd v Auckland Council* [2017] NZEnvC 76.
[184] *South Epsom Planning Group Inc & Three Kings United Group & Anor v Auckland Council* [2016] NZEnvC 140.
[185] *Royal Forest and Bird Protection Society of New Zealand Incorporated* [2017] NZHC 3080.
[186] *Self Family Trust v Auckland Council* [2018] NZEnvC 49 at [67].
[187] *Motiti Rohe Moana Trust & Others v Bay of Plenty Regional Council* [2018] NZEnvC 67 at [162]; *Self Family Trust v Auckland Council*, above n 186, at [475] and [536].

policies in plans can be binding.[188] The purpose of the RMA is contained in these objectives and policies.[189] Therefore further recourse to Part 2 is only relevant when a plan is invalid, incomplete or uncertain.[190] However, Part 2 has not been overridden. *King Salmon* just shows that the NZCPS gives effect to Part 2 in greater detail.[191] Therefore the task of the Environment Court has been described as checking whether the objectives of the proposed plan change depart from higher order documents.[192] Further, the Court is wary of attempts to avoid *King Salmon*. For example taking a "proportionate response" has been rejected as another name for the overall broad judgment approach and therefore inconsistent with *King Salmon*. [193]

There has been some conflict in applying *King Salmon* as courts attempted to apply the new approach.[194] In *Appealing Wanaka v Queenstown Lakes District Council* the Court viewed *King Salmon* as meaning there is no need to refer to higher documents if a lower plan is sufficiently certain, complete and valid.[195] This is because lower plans give effect to higher plans in the planning hierarchy.[196] However, Wylie J had reservations about this approach in *Royal Forest and Bird.* His Honour was of the view that *Appealing Wanaka* did not accurately convey *King Salmon*.[197] Further, Wylie J believed there was a risk that the effect of higher plans can be lost further

[188] *South Epsom Planning Group Inc & Three Kings United Group & Anor v Auckland Council*, above n 184, at [29]-[30]; *Tramlease v Auckland Council*, above n 183, at [25].
[189] *Federated Farmers of of New Zealand (Inc) MacKenzie Branch v MacKenzie District Council* [2017] NZEnvC 53 at [169].
[190] *Self Family Trust v Auckland Council*, above n 186, at [475] and [536]; *Friends of Nelson Haven and Tasman Bay Incorporated & Others v Tasman District Council* [2018] NZEnvC 46 at [34]; and *Federated Farmers of of New Zealand (Inc) MacKenzie Branch v MacKenzie District Council*, above n 189, at [156]. *Federated Farmers* concerned powers under s 293. Section 293 provides that the Environment Court may order change to proposed policy statements and plans. This provision was prior to the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No. 31) enacted 1 October 2009.
[191] *Motiti Rohe Moana Trust & Others v Bay of Plenty Regional Council*, above n 187, at [166].
[192] *Federated Farmers of of New Zealand (Inc) MacKenzie Branch v MacKenzie District Council*, above n 189, at [169].
[193] *Royal Forest and Bird Protection Society of New Zealand Incorporated*, above n 185, at [64], [103] and [106].
[194] *Self Family Trust v Auckland Council*, above n 186, at [469]-[477].
[195] *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139 at [43].
[196] At [43].
[197] *Royal Forest and Bird Protection Society of New Zealand Incorporated*, above n 185, at [88].

down the planning hierarchy.[198] *King Salmon* creates a firm obligation on decision makers to give effect to higher documents like the NZCPS.[199]

The conflict between these cases was noted in *Self Family Trust.*[200] The Environment Court followed *Royal Forest and Bird* because it was High Court authority.[201] The conflict was left for superior courts to resolve.[202]

The plan change cases have mostly applied *King Salmon*. Therefore when a decision maker is considering a plan change application there is no need to refer back to Part 2 in a final analysis. This is because higher order plans are presumed to give effect to Part 2. Absent the *King Salmon* exceptions plans will determine an application. This new approach to decision-making is very different to the overall broad judgment approach. At the date of writing there has not been any cases where the *King Salmon* exceptions have been successfully argued.

Decision makers look to principles, objectives and policies in the plans they are assessing. The Supreme Court held some plans are so prescriptive that decision makers must implement them. However, this is not true for every plan. Prior to *King Salmon* these objectives and policies were written in the knowledge that Part 2 would be assessed through an overall broad judgment approach. Therefore many objectives and policies are unlikely to be as prescriptive as the NZCPS.

It was unclear whether the *King Salmon* rationale applied to resource consents.[203] The statutory language is different between plan change and resource consent provisions. Plan changes must "give effect to" a number of documents including Part 2. However, when assessing resource consent applications the decision maker must, "subject to Part 2", "have regard to" a list of factors. One early case, *KPF Investments Limited v Marlborough District Council*, rejected *King Salmon* for resource consents.[204]

[198] At [88].
[199] At [89].
[200] *Self Family Trust v Auckland Council*, above n 186, at [471]-[475].
[201] At [475].
[202] At [475].
[203] Greg Severinson "Consenting to a bottom line in the RMA" (2014) 10 BRMB 192.
[204] *KPF Investments Limited v Marlborough District Council* [2014] NZEnvC 152 at [194]-[202].

However, the Environment Court and High Court decisions in *Davidson* held *King Salmon* applied.

D. R J Davidson Family Trust v Marlborough District Council (NZEnvC)

The case concerned a resource consent application to establish a marine farm in Beatrix Bay to cultivate crops such as green shell mussels.[205] The NZCPS was confirmed as the top planning instrument in the hierarchy.[206] However, the NZCPS had not yet been incorporated into the Sounds Plan.[207] The application was non-complying and needed to pass one of two gateways in s 104D before the Court could consider s 104.[208] The application passed the second gateway test because it was not contrary to the Sounds Plan as a whole.[209]

In considering Part 2, the Environment Court found that *KPF Investments* was erroneous in light of more recent cases.[210] Plans can be relied on to give effect to Part 2.[211] But if a "deficiency in the plan" exists then regard must be had to the purposes and principles of the RMA.[212] *Appealing Wanaka*[213] was held to be consistent with *Thumb Point* in that a "deficiency in the plan" is reference to the *King Salmon* exceptions.[214] Judge Jackson did not express the same concerns about *Appealing Wanaka* as Wylie J did in *Royal Forest and Bird.*[215] Nonetheless, plans are presumed to give effect to Part 2 for resource consent applications. Part 2 would not be assessed unless the *King Salmon* exceptions applied.

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[205] *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [1].
[206] At [155].
[207] At [155].
[208] At [246].
[209] At [249].
[210] At [254].
[211] *Thumb Point Station Ltd v Auckland City Council* [2015] NZHC 1035 at [31].
[212] At [31].
[213] *Appealing Wanaka Inc v Queenstown Lakes District Council*, above n 195.
[214] At [44]-[45]; *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3, at [90].
[215] *Royal Forest and Bird Protection Society of New Zealand Incorporated*, above n 185, at [88].

The correctness of *New Zealand Transport Authority v Architectural Centre Inc & Ors*[216] and *Auckland City Council v The John Woolley Trust*[217] were questioned. These decisions gave Part 2 a primary role as the "engine room" of the RMA.[218] In contrast *Davidson* likened Part 2 to a bridge, or the operations room, on a flagship because it is not the operative decision making provision.[219] Part 2 does not have a primary role and is not the pivotal provision for decision makers on specific applications.

The meaning of "subject to Part 2" in s 104 had to be determined in light of *King Salmon*. "Subject to" is a standard drafting method of making clear what provisions prevail in a conflict.[220] *King Salmon* slightly modified this approach to suggest mere conflict is insufficient.[221] Absent the *King Salmon* exceptions Part 2 is not an additional consideration.[222] Therefore "subject to Part 2" means the other factors in s 104 take priority unless a plan is invalid, incomplete or uncertain in meaning. Thus the *King Salmon* ratio was applied to resource consents so that Part 2 was not assessed as a final exercise unless plans are invalid, incomplete or uncertain. Part 2 was relegated beneath planning documents as the ultimate decision making tool.

The Environment Court claimed that the Supreme Court clearly saw *King Salmon* applying to resource consents.[223] However, the paragraphs cited merely show general unease with the overall broad judgment approach.[224] It is not obvious that this unease

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[216] *New Zealand Transport Authority v Architectural Centre Inc & Ors* [2015] NZHC 1991, (2015) 19 ELRNZ 163, [2015] NZRMA 375.

[217] *Auckland City Council v The John Woolley Trust* (2008) 14 ELRNZ 106, [2008] NZRMA 260 (HC).

[218] At [47].

[219] *R J Davidson Family Trust v Marlborough District Council*, above n 205, at [257]; *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3, at [24(a)] and [151].

[220] *Minister of Conservation v Kapiti Coast District Council*, above n 73, at [8]; *Re Skydive Queenstown Ltd*, above n 73, at [18]-[19]; *KPF Investments Limited v Marlborough District Council*, above n 204, at [15]; *Environmental Defence Society v Mangonui County Council*, above n 51, at 6 per Cooke P and 7 per Casey J; and *Harding v Coburn* [1976] 2 NZLR 577 (CA) at 582.

[221] *R J Davidson Family Trust v Marlborough District Council*, above n 205, at [259].

[222] At [259].

[223] At [260].

[224] See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3, at [137]-[138].

meant the Supreme Court intended for *King Salmon* to apply to resource consents.[225] Further, as Williams argues, whether this approach applied to resource consents was not before the Supreme Court anyway.[226] Nonetheless the Environment Court employed the ratio of *King Salmon* to assess the resource consent application.[227] The Court doubted whether the decision making process could employ an overall broad judgment approach anymore.[228] Ultimately consent was refused after assessing the Sounds Plan and directive policies in the NZCPS.[229]

E. R J Davidson Family Trust v Marlborough District Council (NZHC)

The Environment Court's decision in *Davidson* decision was appealed and cross-appealed to the High Court.[230] One ground of appeal was whether the Environment Court erred in failing to apply Part 2 of the RMA in considering the resource consent application under s 104.[231] The Environment Court decision and *King Salmon* were reviewed.[232] Cull J held *King Salmon* applied to resource consents because plans give effect to Part 2 unless they are invalid, incomplete or uncertain.[233] Therefore the Environment Court was correct to apply *King Salmon* to s 104.[234] The Environment Court made no errors in law on all grounds of appeal.[235]

F. Cases following NZEnvC and NZHC Davidson

The legal disruption, uncertainty and inconsistency in the plan change cases, by applying *King Salmon*, were also apparent in the resource consent context.

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[225] Williams, above n 69, at 27.
[226] At 27.
[227] *R J Davidson Family Trust v Marlborough District Council*, above n 205, at [262].
[228] At [263].
[229] At [297].
[230] *R J Davidson Family Trust v Marlborough District Council*, above n 4.
[231] At [61].
[232] At [61]-[75].
[233] At [76].
[234] At [77].
[235] At [162].

In other cases, the Environment Court's decision in *Davidson* was followed although initially not expressly.[236] Instead *King Salmon* was referred to in accepting that plans would provide the basis for resource consent decision-making,[237] and also other decisions about resource consents such as s 116 determinations.[238] Plans are presumed to give effect to Part 2, therefore recourse to Part 2 is unnecessary.[239] Further, in the event of conflict or uncertainty, planning instruments between Part 2 and a district or regional plan in the hierarchy should be considered first, leaving Part 2 to be assessed as a last resort.[240] The overall broad judgment approach in *North Shore City Council* was rejected.[241] Soon after the Environment Court and High Court decisions were cited in other cases for resource consents.[242]

However, the cases following the High Court decision in *Davidson* have been inconsistent. *Envirofume v Bay of Plenty Regional Council* held: Part 2 is still relevant for resource consents as a check that Part 2 is being covered; to focus the decision

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[236] *Southland Fish & Game New Zealand v Southland Regional Council and Southland District Council* [2016] NZEnvC 220.

[237] *The Remarkables Residences Limited v Queenstown District Council* [2017] NZEnvC 13; *Southland Fish & Game New Zealand v Southland Regional Council and Southland District Council*, above n 236, at [20].

[238] Resource Management Act 1991, s 116. This section is about when resource consent commences. *The Remarkables Residences Limited v Queenstown District Council*, above n 237, at [8]; *Cossens v Queenstown Lakes District Council* [2018] NZEnvC 71 at [9].

[239] *Southland Fish & Game New Zealand v Southland Regional Council and Southland District Council*, above n 236, at [280].

[240] *Infinity Investment Group Holdings Limited v Canterbury Regional Council* [2017] NZEnvC 36 at [35]-[36]. In this case the Allocation Plan was at issue. The Allocation Plan was held to be incomplete and ambiguous so the issues with it had to be resolved by looking at the intermediate instruments of the planning hierarchy. The intermediate instruments between the Allocation Plan and Part 2 were the National Policy Statement Freshwater Management 2014, the Christchurch Regional Policy Statement and the Canterbury Land and Water Regional Plan. Part 2 could only be considered if the intermediate instruments could not assist the decision maker.

[241] *Southland Fish & Game New Zealand v Southland Regional Council and Southland District Council*, above n 236, at [21].

[242] *P & E Limited v Canterbury Regional Council* [2016] NZEnvC 252; *Blueskin Energy Ltd v Dunedin City Council* [2017] NZEnvC 150; *Southland Fish & Game New Zealand v Southland Regional Council and Southland District Council*, above n 236; *Infinity Investment Group Holdings Limited v Canterbury Regional Council*, above n 240; and *Okura Holdings Limited & Others v Auckland Council* [2018] NZEnvC 87.

maker on the purpose of the application; and to check that plans give effect to the RMA.[243]

Further, *Davidson* was only partially followed in *Blueskin Energy Ltd v Dunedin City Council* and *Yaldhurst Quarries Joint Action Group v Christchurch City Council.*[244] The decision in *Blueskin Energy* varied from *Davidson* by giving Part 2 a role in decision-making.[245] Part 2 could be referred to in considering the application and submissions under s 104(1);[246] but Part 2 is not to be assessed as a separate evaluative exercise.[247] The drafting of "must, subject to Part 2, have regard to" was to be interpreted in a more nuanced way in light of *Davidson*.[248] Weight can be given to the relevant consideration in the plan except where *King Salmon* exceptions apply, and then Part 2 may provide guidance on the weight to be given.[249]

Lower courts left these inconsistencies to be resolved by the Court of Appeal in *Davidson.*[250] In some instances, courts were using both the *King Salmon* approach *and* the overall broad judgment approach in their decisions and deciding, on the facts, either approach reached the same conclusion.[251] However, on different facts the two approaches could conclude differently.

G. R J Davidson Family Trust v Marlborough District Council (NZCA)

On 21 August 2018 the Court of Appeal released their decision. The first question of law was:

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[243] *Envirofume Ltd v Bay of Plenty Regional Council* [2017] NZEnvC 12 at [143].

[244] *Blueskin Energy Ltd v Dunedin City Council*, above n 242, at [3]; *Yaldhurst Quarries Joint Action Group v Christchurch City Council* [2017] NZEnvC 165.

[245] *Blueskin Energy Ltd v Dunedin City Council*, above n 242, at [26]; Bronwyn Carruthers and Aidan Cameron "Blueskin Energy Ltd v Dunedin City Council [2017] NZEnvC 150" (November 2017) RMJ 31 at 31.

[246] *Blueskin Energy Ltd v Dunedin City Council*, above n 242, at [29].

[247] At [29].

[248] At [34].

[249] At [34].

[250] *SKP Incorporated & Anor v Auckland Council* [2018] NZEnvC 81 at [285]-[286].

[251] *Pierau v Auckland Council* [2017] NZEnvC 90, at [256]; *SKP Incorporated & Anor v Auckland Council*, above n 250, at [52] and [286].

> Whether the High Court erred in holding that the Environment Court was not able or required to consider Part 2 RMA directly and was bound by its expression in the relevant documents.

The Court answered this in the affirmative but said the error of law was of no consequence in determining the actual outcome of the case. The High Court did not have to remit the case back to the Environment Court. The appeal was unanimously dismissed and resource consent was declined.

In reaching its decision the Court of Appeal found Parliament's intent for consent authorities to have regard to Part 2, when appropriate, was apparent in the Resource Management Amendment Act 1993.[252] Part 2 was put at the beginning of s 104 showing its fundamental role in decision-making.[253]

Part 2 directly influences the content of plans because plan provisions incorporate phrases that link back to Part 2, such as "in order to achieve the purpose of the Act" in s 63(1).[254] Thus the *King Salmon* ratio is correct for plan change decision-making. However, the RMA does not envisage resource consents reflecting Part 2 because resource consents are not the result of planning processes.[255] Therefore recourse to Part 2 should be available for resource consent decision-making.

Further, the instruction in Part 2 of "[in] achieving the purpose of this Act …" gives s 5 a particular role.[256] This instruction must be complied with regardless of whether "subject to Part 2" is in s 104.[257] The Supreme Court was correct that s 5 does not

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[252] *R J Davidson Family Trust v Marlborough District Council*, above n 5, at [47].
[253] At [47].
[254] At [50]. The Court used the example of s 63(1) RMA where the Act states that the purpose of the preparation, implementation, and administration of regional plans is to assist a regional Council carry out any of its functions in order to achieve the purpose of the Act. The Court considered that this was a direct link to s 5 where the purpose of the RMA is outlined.
[255] At [51].
[256] At [52]. The full instruction contained at the beginning of ss 6, 7 and 8 is "[i]n 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 …".
[257] At [52].

determine decision making in plan change applications.[258] However, the reference to Part 2 in s 104 means it must be considered for resource consents when appropriate.[259] Plans should not determine resource consent applications when Part 2 is clearly referred to.[260] Further, the *King Salmon* exceptions do not limit consideration of Part 2.[261]

The Court of Appeal stated three reasons why *King Salmon* did not apply to resource consents. First, the Supreme Court did not mention resource consents and they would have been explicit if their decision applied to resource consents.[262] The overall broad judgment approach has been used consistently and, in the absence of explicit direction to suggest otherwise, is still appropriate.[263] Secondly, and related to the first point, the Supreme Court's uncertainty about the overall broad judgment approach was not generally applicable.[264] Thirdly, the statutory language of "subject to Part 2" requires Part 2 to be considered.[265]

The Court of Appeal suggested that *King Salmon* could be applied when a decision maker had to consider the NZCPS under s 104(1)(b)(iv).[266] For example, when a proposal clearly breaches the NZCPS there may be no benefit in turning to Part 2 as part of the evaluative exercise because some NZCPS policies are very directive; and directive policies must be followed.[267] However, Part 2 can assist if the NZCPS is unclear on whether an application should be granted.[268] The *King Salmon* ratio could also apply to other plans, including regional and district plans.[269]

The Court then set out their approach. Relevant plans should be considered as per s 104(1)(b). However, the decision maker cannot consider the plan "for the purpose of

[258] At [52].
[259] At [52].
[260] At [51].
[261] At [53].
[262] At [67].
[263] At [67].
[264] At [68].
[265] At [70].
[266] At [71].
[267] At [71].
[268] At [72].
[269] At [73].

putting it to one side."[270] A "fair appraisal of the objectives and policies read as a whole"[271] is needed.[272] A decision maker must implement environmental bottom lines in the policies and objectives of a plan that clearly gives effect to Part 2.[273] An assessment of Part 2 cannot reach a conclusion that is inconsistent with the plan.[274] However, Part 2 can be given emphasis if a plan does not clearly give effect to Part 2.[275] Overall the Court said:[276]

> [75] If a plan that has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.

Although Part 2 can be considered when the *King Salmon* exceptions apply in plan change decisions, the exceptions do not provide the flexibility needed to determine resource consent applications;[277] more opportunities are needed to refer back to Part 2 for the variety of issues that arise. Thus the Supreme Court's rejection of a Part 2 analysis through an overall broad judgment approach was not applicable to resource consents.[278]

Ultimately, the Court of Appeal held the High Court was wrong to hold *King Salmon* prevented recourse to Part 2 in determining resource consents.[279] However, the error was not significant and the overall conclusion to refuse consent was in accordance with the NZCPS and the Sounds Plan.[280]

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[270] At [73].
[271] *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at [25] per Tipping J.
[272] *R J Davidson Family Trust v Marlborough District Council*, above n 5, at [73].
[273] At [74].
[274] At [74].
[275] At [74].
[276] At [75].
[277] At [76].
[278] At [66].
[279] At [77].
[280] At [78]-[82].

H. Conclusion on the current law

Currently, plan changes and resource consents have different legal tests. Plan changes are assessed according to *King Salmon*. Higher order policy and plans determine the outcome of lower order plan change applications and must be given effect to unless the plans are invalid, incomplete or uncertain in meaning; then Part 2 can be assessed.[281] However, while the decision maker for resource consents must "have regard to" plans (and there may be no need to resort to Part 2 if they are clear) recourse to Part 2 may assist the decision maker in cases where necessary. Accordingly, there is greater ability to resort to Part 2 in resource consent decision-making than plan changes. Nonetheless, the Court of Appeal and the Supreme Court agree Part 2 cannot be used to defeat a plan provision in a wholly inconsistent way.

The decision maker's ability to resort to Part 2 makes *King Salmon* and *Davidson* different. A decision maker, such as the Environment Court, assessing plan changes must prove the *King Salmon* exceptions exist in a plan to be able to resort to Part 2; this assessment could be appealed as an error of law. However, decision makers assessing resource consents have the discretion to resort to Part 2 and would not have to justify their decision to resort to Part 2 to the same extent. Therefore decision makers assessing resource consents have greater flexibility to resort to Part 2 and their decision to do so may not be an error of law.

The Court of Appeal did not consider wider policy implications for their approach to decision-making. The next two chapters aim to provide insight into the implications of applying or rejecting *King Salmon* for resource consents. No view is expressed on the correct approach. However, the cases have highlighted a number of significant challenges to a coherent resource management system.

[281] Milne, above n 27, at 230; Nolan and Gardner-Hopkins, above n 48, at 2. It was suggested in *Skyline Enterprises Ltd v Queenstown Lakes District Council* [2017] NZEnvC 124 at [18] that it may be appropriate to go back to Part 2 where there is a proposed plan that has not been fully tested by Part 2.

IV. Implications of applying King Salmon

The previous chapters outlined the emergence of the overall broad judgment approach in the early years of the RMA and explained how that approach has changed since *King Salmon*.

The decision-making test would have changed if *King Salmon* had been applied to resource consents. Although the Environment Court and High Court applied *King Salmon* to resource consents the Court of Appeal has now rejected its application. Nonetheless, this chapter conducts a conceptual exercise to assess the implications of applying *King Salmon* to resource consents because the cases show, in sharp relief, difficulties in resource management decision-making and cast doubt on the coherence of the scheme as a whole.

A. A change to the legal decision-making test

As a consequence of applying the *King Salmon* rationale, the legal test for decision-making would change so that policy documents must be closely scrutinised akin to statutory interpretation.

King Salmon requires a decision maker to consider relevant statutory requirements including plans, which contain the community values prioritised. The decision maker must implement any environmental bottom lines in the objectives and policies of plans. Therefore highly prescriptive plans would determine resource consent applications absent invalidity, incompleteness or uncertainty.

The RMA does not contain substantive environmental standards, but rather requires plans to contain this detail.[282] Applying the *King Salmon* rationale elevates policy

[282] Eloise Scotford and Jonathan Robinson "UK Environmental Legislation and Its Administration in 2013 - Achievements, Challenges and Prospects" 25(3) JEL 383 at 389 sate that environmental law in the UK context there is “extensive reliance on secondary legislation and guidance to establish legal requirements” and at 399 explain that “policy now has a significant role in environmental

documents to the primary decision-making tool. Given the importance in determining disputes, the wording of policy documents will be closely scrutinised akin to statutory interpretation. Ordinarily, statutory interpretation is reserved for legislation. It is difficult to apply statutory interpretation to policy documents, especially those written before *King Salmon*.

The following examples, taken from the Regional Coastal Plan for Southland,[283] show the directional and guiding nature of policies in a plan:

> Policy 5.3.6: Limit activities and structures in the coastal marine area to those that:
>
> a. have a functional need for that location; or
> b. contribute to the amenities of that area;
> c. are a necessary and functional part of activities also undertaken on adjoining land.
>
> Policy 5.3.7: Where practicable, enhance the amenity of the coastal marine area as opportunities arise.
>
> Policy 11.2.17: Encourage structures and activities, including reclamations, to be located, finished, and be of a form, profile, extent and alignment that is not incompatible with the visual amenity, natural character and physical landscape of the area in which it is located.

These and other policies in the Regional Coastal Plan for Southland were written before *King Salmon* and contain legally ambiguous terms. Therefore the objectives and policies in the Regional Coastal Plan for Southland were likely intended to provide direction and guidance for decision makers. Plan makers would have

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administration, being vital to the operation and construction of legislative regimes. Policy can bring up-to-date technical expertise into decision-making; it allows flexibility; and it often structures decision-making so as to prevent it from being arbitrary."

[283] The Regional Coastal Plan for Southland, except Chapter 15 (Marine Farming), became operative on 12 April 2007. The provisions in Chapter 15 (Marine Farming) were approved by Council on 10 September 2008, with Minister of Conservation providing approval on 14 February 2013. This version of the Coastal Plan became fully operative on 16 March 2013.

expected a final assessment of Part 2 to take place rather than close scrutiny of the objectives and policies.

Greig J in *NZ Rail* found that statutory interpretation could not apply to s 5 because the statutory language was general;[284] the Supreme Court in *King Salmon* agreed.[285] However, the same could apply to plans, which contain objectives, policies and rules. When assessing applications, rules cannot be subject to statutory interpretation because the activity does not comply with the standards for permitted activities. Therefore, the decision maker would find the applicable rules and then assess objectives and policies. Plans drafted before *King Salmon* will likely contain objectives and policies that are broad, flexible, and have different aims. The conflict between environment and development is likely to be apparent in these objectives and policies.

William Young J highlighted the difficulty of applying statutory interpretation to policy in his Honour's dissent in *King Salmon*.[286] Statutory interpretation is difficult to apply to policy because it is not a legislative instrument.[287] William Young J considered that there should be flexibility to interpret policy statements. There were three reasons for this. First, the requirement to "give effect to" the NZCPS is general and not aimed at specific policies.[288] Secondly, the language of policies was for the avoidance of particular effects rather than the prohibition of them.[289] Finally, if policy 8 in the NZCPS, which recognises the contribution of aquaculture to the social, economic and cultural wellbeing of people and communities, were considered alone the salmon farm would have been allowed.[290] Therefore close scrutiny of the NZCPS policies is wrong.[291] Statutory interpretation is not easily applicable to environmental

[284] *NZ Rail Limited v Malborough District Council*, above n 32, at 19.
[285] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3, at [24]-[25].
[286] At [186]-[198].
[287] At [198].
[288] At [198].
[289] At [198].
[290] At [198].
[291] At [198].

statutes that contain guiding principles or policy and may be an unsatisfactory way to resolve disputes.[292]

William Young J did not express a view on whether the overall broad judgment approach is correct. But his Honour accepted the Board should have taken into account and balanced conflicting considerations to form a broad judgment.[293]

William Young J suggested the majority's approach would create adverse consequences.[294] Assuming that s 3 (meaning of effect) applies to the NZCPS, the majority's test means regional councils must make rules that prohibit activities with adverse effects on areas of outstanding natural character.[295] His Honour was of the view that this would significantly restrict owners of private land in these areas.[296] Further, regardless of any benefits arising from an activity, the possible adverse effects would take a disproportionate role in decision-making.[297] William Young J believed it was important to recognise that, in accordance with s 6, policies should only protect land from *inappropriate* use or development.[298] Therefore the majority approach would place undue weight on the effects of activities that are, in William Young J's view, minimal and would wrongly preclude an application from being granted.[299]

In summary, *King Salmon* raises questions about statutory interpretation of policy documents. Further, as the cases in Chapter 3 have shown, more than 20 years of RMA decision-making jurisprudence has become obsolete, causing legal disruptions, uncertainty and inconsistency.

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[292] Kenneth Palmer "Introduction to Environmental Law" in Derek Nolan (ed) *Environmental and Resource Management Law* (6th ed, LexisNexis, Wellington, 2018) 1 at [1.7]; Willis, above n 60, at 135-136.
[293] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3, at [204].
[294] At [199]-[203].
[295] At [200]-[201].
[296] At [201].
[297] At [201].
[298] At [203(b)].
[299] At [199]-[203].

B. Public participation

The majority's justification for plans being the primary decision-making tool relied on the participation involved in creating them. As a consequence, participation in plan making is important and necessary to ensure applications are assessed according to community values. However, getting adequate participation is challenging.

Public participation is a core feature of environmental law because environmental law decisions affect many different interests.[300] A RMA plan dictates the way our communities form.[301] Therefore public participation, transparency and accountability are necessary to justify controlling activities and their effects.[302] Public participation in RMA plan making enables local authorities to make better decisions and develop plans according to community values.[303] Richardson and Razzaque argue more public participation leads to less litigation, fewer delays and better decision-making.[304] Decisions are more likely to be accepted when there has been adequate participation and consideration of different views.[305]

The Supreme Court has previously noted the importance of public participation within the RMA. In *Westfield (New Zealand) Ltd v North Shore City Council* the Court said:[306]

> The Resource Management and its predecessors have long recognised that members of the general public may be able to participate in a planning process

[300] Benjamin J. Richardson and Jona Razzaque "Public Participation in Environmental Decision Making" in Benjamin J. Richardson and Stepan Wood (eds) *Environmental Law for Sustainability* (Hart Publishing, Oxford, 2006) 165 at 165.

[301] Elias, above n 2, at 53; Charlotte Aspin "There is No Plan B: The Necessity of Public Participation in the Plan Making Process" (LLB (Hons) Dissertation, University of Otago, 2017) at 5.

[302] Richardson and Razzaque, above n 300, at 165. Public participation can take many forms. Richardson and Razzaque provide examples of public participation as being "through education, information dissemination, advisory or review boards, public advocacy, public hearings and submissions, and even litigation."

[303] Warnock and Baker-Galloway, above n 74, at [5.4].

[304] Richardson and Razzaque, above n 300, at 166.

[305] Thomas Dietz and Paul Stern *Public Participation and Environmental Assessment* (National Academics Press, Washington, 2008) at 50.

[306] *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17 at [45]-[46].

> in certain circumstances. … The purposes of [the Part 6] public participatory processes are twofold – first, to recognise and protect as appropriate the particular rights and interests of those affected and more general public interests and, second, to enhance the quality of the decision making.

Prior to the Resource Management Amendment Act 2009 public participation was much better. So far the RMA has been amended for efficiency at the cost of public participation.[307] The changes made by the 2009 Amendment Act include: restrictions on who could make further submissions; allowing a local authority to release group decisions on plan submissions; and removing the ability for an appeal to seek withdrawal of a whole proposed plan.[308] Further, the statutory presumption in favour of notifying resource consent applications was removed.[309] The 2013 Amendment Act revised the timeframes for processing notified and limited notified resource consent applications, including a 20 working day timeframe to receive submissions.[310]

The decision in *King Salmon* was made at a time when the opportunity for public participation was decreasing. In *King Salmon* public participation was emphasised as a core process within the RMA.[311] The majority noted the process of creating the NZCPS must include ample opportunity for public submissions.[312] Therefore an elaborate public consultation process showed Parliament's intent for the NZCPS to

[307] Palmer, above n 66, at 5; Ministry for the Environment "Resource Management Amendment Act 2009: Fact Sheet 5: Improving Plan Development and Plan Change Processes" (Ministry for the Environment, October 2009) at 1. The amendment acts were the Resource Management Amendment (Simplifying and Streamlining) Act 2009, the Resource Management Amendment Act 2013 and the Resource Legislation Amendment Act 2017.

[308] Ministry for the Environment, above n 307, at 3.

[309] Ministry for the Environment "Resource Management Amendment Act 2009: Fact Sheet 3: Improving Resource Consent Processes" (Ministry for the Environment, October 2009) at 1.

[310] Ministry for the Environment "Resource Management Amendment Act 2013: Fact Sheet 3: Six-month Processing of Notified Consent Applications" (Ministry for the Environment, August 2013) at 1.

[311] Nolan and Gardner-Hopkins, above n 48, at 2; *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3, at [15]: The RMA "requires that the various planning documents be prepared through structured processes that provide considerable opportunities for public consultation. Open processes and opportunities for public input were obviously seen as important values by the RMA's framers."

[312] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3, at [32], [76] and [153].

determine applications rather than Part 2; otherwise extensive public participation becomes redundant.[313]

However, public participation continues to be reduced. The Resource Legislation Amendment Act 2017 introduced an optional streamlined planning process.[314] Councils can request the Minister for the Environment (or Minister of Conservation for coastal marine areas) to use the streamlined process for a proposed policy statement, plan, plan change or variation.[315] The Council requesting this process must show, among other factors, urgency and significant community need.[316] The streamlined process avoids the lengthy standard plan process and public participation. If the Minister approves the document the operative date is publicly notified.[317] There is no right of appeal but judicial review in the High Court is available.[318]

Reducing the ability for public participation makes it difficult for plans to reflect community values. The *King Salmon* rationale of prioritising plans only works if the plans actually reflect community values. However, substantial participation is difficult to get for many reasons.[319] For some there is a disenchantment with local government and its processes, a lack of awareness that participation is being called for or a lack of interest because proposals do not immediately affect an individual.[320] Further, individuals may not have sufficient resources to participate effectively.[321] Where these and other situations arise plans do not reflect community values and will lack the diverse views needed for good decision-making.

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[313] At [86(a)] and [136].

[314] Minstry for the Environment "Resource Legislation Amendments 2017: Fact Sheet 5: A new optional streamlined planning process" (Ministry for the Environment, April 2017) at 1.

[315] At 1.

[316] At 1-2.

[317] At 4.

[318] At 5.

[319] David Grinlinton "Access to Environmental Justice in New Zealand" (1999) Acta Jur 80 at 83-84.

[320] Parliamentary Commissioner for the Environment 'Public Participation Under the Resource Management Act 1991 –The Management of Conflict' (Office of the Parliamentary Commissioner for the Environment, Wellington, 1996) at A22-A37; Aspin, above n 301, at 24-25.

[321] Stephen Kós "Public Participation in Environmental Adjudication: Some Further Reflections" (paper presented to the Environmental Adjudication Symposium, Auckland, 11 April 2017) at [10]-[12].

Marks and Thomas note that in their experience, prior to *King Salmon*, concessions were made in plans without sufficient public participation for flexibility, in the expectation that Part 2 would be assessed.[322] Flexible plans are now more likely to be litigated on the basis of the *King Salmon* exceptions. However, public participation ought to occur in plan making and amending, rather than just on individual applications, to ensure applications are assessed on community values.

Moreover, non-notified resource consents prevent public participation altogether.[323] Only around 5 per cent of resource consents are notified.[324] Further, the RMA is very strict about who can be heard by the Environment Court and will usually only hear those who submit on notified resource consents.[325] Without public participation in plans, decisions on non-notified applications would be made without public involvement.[326] Even when an application is notified a person usually must submit to be able to be heard.[327] Therefore the public is effectively locked out of the RMA process if they do not participate in plans or submissions on notified resource consents.

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[322] Hannah Marks and Georgina Thomas "King Salmon reigns … for now" (April 2017) RMJ 20 at 22-23.

[323] Williams, above n 2, at 690.

[324] Stephen Higgs "Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court" (2007) 37 Environmental Law 61, at 72-73; Palmer, above n 137, at 147.

[325] To be heard by the Environment Court a person must have initially submitted on the application unless they have a greater interest in the proceedings than the general public under s 274 Resource Management Act 1991. This ability to be heard without making a submission is limited by ss 308C and 308CA Resource Management Act 1991 where the person cannot be heard if the subject matter relates to trade competition or the effects of trade competition. In *Westfield (New Zealand) Ltd v North Shore City Council*, above n 306, at [21] Elias CJ said: "A decision not to notify has significant consequences. It deprives others of the right to participate in the determination of the resource consent application. It also precludes any person other than the applicant from appealing or participating in the hearing of an appeal to the Environment Court from the grant or refusal of resource consent. The Environment Court is a specialist tribunal which on appeal conducts a full rehearing of the application and is able to substitute its judgment for that of the consent authority. Non-notification precludes the opportunity for anyone other than the applicant to seek such reassessment and from further appeal on a point of law to the High Court."

[326] However, the decision not to notify can be challenged by judicial review in the High Court. The Environment Court does not have the jurisdiction to hear a judicial review proceeding as per s 309 Resource Management Act 1991.

[327] Unless s 274 Resource Management Act 1991 applies.

One conception of *King Salmon* is that the Supreme Court pushed back against reductions in public participation by prioritising plans. As public participation is a core feature of environmental decision-making the Supreme Court ensured that plans made with community input determine applications. Having plans determine applications respects public participation; the public has their say on how future applications will be decided. If the Court of Appeal had applied *King Salmon* to resource consents then decisions would be made within the frame of community values.[328]

C. Planners writing like legislators

Applying *King Salmon* would mean plans are closely scrutinised, akin to statutory interpretation, rather than merely setting a direction or providing guidance. Planners will be under pressure to draft plans as if they were legislation.

There are difficulties in relying on planners to write as legislators. Compared to legislators and drafters, planners are not trained in legal drafting. This can be positive because it allows for fresh perspectives and a range of views to be incorporated into plans. However, *King Salmon* places significance on and scrutinises every word, much like statutory interpretation. Therefore there is pressure on planners not only to bring their perspectives and abilities but to also bring skills of an entirely different profession to plan making. Planners must be able to identify inherent ambiguity in language that legislators and lawyers have been trained to identify, understand and analyse. Objectives and policies must be written clearly so there is no doubt what meanings were intended.[329]

King Salmon establishes that plans can set environmental bottom lines. This approach could be considered a positive for the environment where it has otherwise been outweighed by economic benefits. However, the knowledge that plans will be subject to close statutory interpretation may cause planners to write in a way that does not

[328] Marks and Thomas, above n 322, at 22.
[329] Nolan and Gardner-Hopkins, above n 48, at 4.

create environmental bottom lines.[330] Instead, plans may be written broadly so as to invoke the *King Salmon* exceptions, maximise flexibility and do justice on the facts of different cases. Further, higher order plans prioritising economic values must be followed by lower plans, constraining the ability of planners to set environmental bottom lines. In contrast, a higher order plan, such as a regional policy statement,[331] prioritising environmental protection must be followed by lower plans.

Nonetheless planners will be under pressure to be very careful with the language and words used in plans when they are subject to such close scrutiny.

D. If Part 2 was amended

The application of *King Salmon* raises a further question of what happens when Part 2 is amended.[332] If Part 2 is amended the *King Salmon* exceptions may be invoked.

An amendment would mean that no current plan has been made in accordance with the new Part 2. It is uncertain whether this would make any legal difference to the validity of a plan. Although a plan has been made prior to an amendment it may still give effect to Part 2 as a whole and validity may not be an issue. However, it does leave a question of whether an amendment to Part 2 falls within the *King Salmon* exceptions. Part 2 has been amended as recently as 2017.[333]

An overall broad judgment approach could account for amendments to Part 2. The decision maker, after considering statutory requirements, would undertake a final analysis incorporating the new Part 2 provision. However, the only way to assess Part 2 under *King Salmon* is if an amendment to Part 2 made a plan invalid, incomplete or uncertain. Therefore the ability to incorporate a new addition to Part 2 would rely on a party arguing that the plan fell into the three exceptions. It is unclear whether an

[330] Milne, above n 27, at 223.

[331] In Chapter 4 the inability of a regional policy statement to be amended through a private plan change will be discussed.

[332] Severinson, above n 203.

[333] In s 6 (matters of national importance) paragraph (h) was inserted, as from 19 April 2017, by s 6 Resource Legislation Amendment Act 2017 (2017 No 15): "the management of significant risks from natural hazards."

amendment would cause a plan to be invalid, incomplete or uncertain as to its meaning. If this meant the *King Salmon* exceptions applied there would likely be an increase in litigation to successfully argue this point.

E. Increased litigation for King Salmon exceptions

Litigation for the *King Salmon* exceptions is likely to increase so that Part 2 can be assessed through an overall broad judgment approach. It is argued the plans written before *King Salmon* are likely to be the target of litigation. Applicants would want an assessment of Part 2 so that benefits from development such as economic wealth could be taken into account.

Prior to *King Salmon* plans were made and amended on the basis that a final Part 2 analysis would taken.[334] Therefore plans were not written in a way that envisaged a change to the legal test. Nolan and Gardner-Hopkins argue the majority judgment in *King Salmon* ignores the fact the NZCPS was drafted assuming a Part 2 analysis would take place.[335] The *King Salmon* exceptions are the appropriate time for Part 2 to be considered.[336] Plans made before *King Salmon* are likely to be the target of litigation.

However, prescriptive plans setting environmental bottom lines make it difficult for a plan change or resource consent application to succeed. Most applications are not consistent with enhancing the environment. As Nolan and Gardner-Hopkins note "it is difficult, however, to conceive of activities, other than perhaps of conservation and reserve-type uses, that might *enhance* natural character (or landscape, for that matter)."[337] There may be activities that are consistent with protecting existing landscapes.[338] However, applicants with significant proposals are unlikely to enhance the environment. For example in *King Salmon* the proposed plan change for salmon farming would not have enhanced the environment.

[334] Marks and Thomas, above n 328, at 23.
[335] Nolan and Gardner-Hopkins, above n 48, at 2.
[336] Marks and Thomas, above n 328, at 23.
[337] Nolan and Gardner-Hopkins, above n 48, at 3.
[338] At 3.

Therefore applicants would want their application assessed against Part 2 so that the economic benefits, among others, could be weighed. Applicants would have to argue that the *King Salmon* exceptions apply. Thus there may be significant amounts of litigation arguing for the exceptions on older plans.[339] This litigation would argue that a plan made prior to *King Salmon* is invalid, incomplete or uncertain in meaning so an overall broad judgment approach should apply. To avoid litigation, plans could be amended to avoid ambiguity and ensure that the different approach to decision making is accounted for.[340] However, this would be a significant task. If plans are not amended to take account of *King Salmon* then litigation can be expected arguing that the exceptions apply on particular applications.

The 2017 RMA amendments[341] may reduce the scope for litigation of the *King Salmon* exceptions. The amendments introduced planning standards to improve national consistency in plan and policy structure, format and content.[342] Therefore parts of plans and policy statements may be standardised at a district, regional or national level.[343] Local authorities must amend their plans, without going through the Schedule 1 process, to comply with mandatory directions in planning standards.[344] They may also choose to implement their plans, through the Schedule 1 process, to comply with discretionary directions.[345] The first draft set of standards was notified in June 2018. Planning standards, if they are drafted clearly and prescriptively, may increase certainty in regional and district plans. This could decrease the ability to litigate the *King Salmon* exceptions depending on how prescriptive the planning standards are.

[339] Marks and Thomas, above n 328, at 23.
[340] Nolan and Gardner-Hopkins, above n 48, at 4.
[341] Resource Management Act 1991, ss 58B-58K.
[342] Section 58B; Ministry for the Environment "About the National Planning Standards" (6 June 2018) <http://www.mfe.govt.nz/rma/legislative-tools/national-planning-standards/about-standards>.
[343] Section 58C; Ministry for the Environment, above n 342.
[344] Section 58I; Ministry for the Environment "Implementing the first set of National Planning Standards" (22 August 2018) <http://www.mfe.govt.nz/rma/legislative-tools/national-planning-standards/implementing-first-set-of-standards>.
[345] Ministry for the Environment, above n 344.

F. Purpose of resource consents

A consequence of applying the *King Salmon* rationale is that resource consents, and particularly the status of 'non-complying' activities, may not serve an obvious purpose under the RMA.

Resource consents enable activities with effects that would otherwise contravene the RMA to be undertaken.[346] Resource consents are required for any activity classified as 'controlled', 'discretionary', 'restricted discretionary' and 'non-complying' in the plan.[347] Only a plan change can be obtained for 'prohibited activities'.[348] The processes for obtaining resource consents enable decision makers to assess the effects of a proposal.[349] Previously, the decision maker would consider relevant plans under s 104 and then undertake a separate analysis of Part 2. The overall broad judgment approach assessed whether sustainable management was promoted overall. The overall broad judgment approach recognised the purpose of resource consents as an exception to what is permitted under the RMA and plan rules.[350]

If *King Salmon* applied to resource consents then applications would be assessed for consistency with the objectives and policies of plans. The distinct purpose of resource consent could be unclear under this approach. Resource consents would be unnecessary for an activity consistent with environmental protection because the activity would likely be permitted. It seems unlikely that a resource consent application would be consistent with objectives and policies that even slightly promote environmental bottom lines. Therefore ensuring consistency with objectives and policies of plans undermines the reason resource consents are available. Resource consents are best suited for discrete, usually one off, activities not permitted by the RMA or plans.

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[346] Section 87; Birdsong, above n 48, at 19 and 22; and Laura Fraser "Property Rights in Environmental Management: The Nature of Resource Consents in the Resource Managment Act of 1991" (2008) 12 NZJEL 145 at 163.
[347] Section 87A(2)-(5).
[348] Section 87A(6).
[349] Birdsong, above n 48, at 22.
[350] Williams, above n 69, at 29.

The application of *King Salmon* to resource consents would also throw into doubt the continuing relevance of the 'non-complying' activity status. 'Non-complying' activities must pass an additional gateway to obtain resource consent. The first threshold is achieved if the effects of the activity are minor.[351] Alternatively, if the effects are more than minor then the application must be considered in light of the objectives and policies of the relevant plan.[352] It is unclear which objectives and policies a decision maker would assess, especially if there is conflict within the plan. Nonetheless, the RMA requires resource consent for a 'non-complying activity' to be consistent with the objectives and policies of a plan.

A 'non-complying activity' has the least desirable effects that an applicant can still obtain resource consent for hence the additional statutory hurdle. If *King Salmon* applied to resource consents *all* types of resource consents would be assessed for compliance with the objectives and policies of the plan. The second gateway in s 104D would become meaningless.

G. A revert back to the Town and Country Planning Act?

The application of *King Salmon* could also lead RMA plans to resemble TCPA plans. This is an issue because the RMA was meant to be significantly different from previous legislation such as the TCPA.[353]

The TCPA was designed to meet its objectives by regulating particular activities and uses.[354] Local authorities administered land use plans comprised of prescriptive zoning in order to control land use.[355] The prescriptive approach taken to plans meant they began to look the same across New Zealand and were produced in a "formulaic"

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[351] Resource Management Act 1991, s 104D(1)(a).

[352] Section 104D(1)(b).

[353] *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360, [1997] NZRMA 539 (HC) at 5; BJ Gleeson and KJ Grundy "New Zealand's Planning Revolution Five Years On: A Preliminary Assessment" (1997) 40(3) Journal of Environmental Planning and Management 293 at 293; and Elias, above n 2, at 57-58.

[354] Birdsong, above n 48, at 14.

[355] Gleeson and Grundy, above n 353, at 295-296. New Zealand inherited the TCPA system from Britain.

way.[356] The TCPA was a "command and control model"[357] whereas the RMA moved to a liberal, flexible and effects-focused regime.[358] The RMA was intended to allow nearly any activity so long as the effects of the activity were consistent with sustainable management.[359] Therefore the RMA focuses on effects of activities instead of activities themselves.[360]

The settled decision-making approach enabled a decision maker to return to Part 2 to undertake an overall broad judgment approach. The decision maker had flexibility and could consider all factors of a proposal and give appropriate weight as required by the circumstances. Despite claims that an environmental bottom lines approach was intended, the overall broad judgment approach may be more appropriate for the RMA. However, applying *King Salmon* to plan changes and resource consents would reduce flexibility in decision-making and make it more prescriptive.

Close scrutiny of direct and prescriptive plans may mean RMA plans begin to resemble the TCPA land use plans. Therefore *King Salmon* would not be consistent with part of the reason for enacting the RMA, which was to incorporate flexibility. A consequence of applying the *King Salmon* rationale may be that we returned to a TCPA-like regime. Plans may start to look the same as the interpretation of words and phrases are litigated. If this happens then the RMA will have formulaic plan making. As a result plans could become rigid, voluminous and difficult for the public to navigate.

H. Conclusion

This chapter has shown some implications that will arise if the *King Salmon* ratio was applied to resource consents. These implications are that: there is a greater need for public participation in plan making; the pressure on planners to write like legislators;

[356] Lindsay Gow "The Resource Management Act: Origins, context and intentions" (November 2014) RMJ 27 at 31.
[357] Memon, above n 29, at 299.
[358] Gleeson and Grundy, above n 353, at 299.
[359] Birdsong, above n 48, at 14-15.
[360] Gleeson and Grundy, above n 353, at 299; Warnock and Baker-Galloway, above n 74, at [5.45].

a question is raised whether resource consents still serve a purpose under the RMA and the potential for litigation arguing for the *King Salmon* exceptions. These implications affect the general public, applicants, lawyers and decision makers (including local authorities, planners, and courts).

V. *Implications of rejecting King Salmon*

The previous chapter conducted a conceptual exercise of assessing the implications of accepting *King Salmon* for resource consents. This exercise highlighted difficulties for the coherence of the RMA as a whole. This chapter will also conduct a conceptual exercise to highlight the difficulties of rejecting *King Salmon* for resource consents. The Court of Appeal has rejected the application of *King Salmon* to resource consents, which means plan changes and resource consents have different tests.

A. Two different tests

The rejection of the *King Salmon* ratio to resource consents means there are two different legal tests for plan changes and resource consents. This is problematic, as this part will explain.

Regional and district plan rules allocate activities into six primary categories.[361] The RMA provides avenues to approve activities where they would otherwise breach the Act and plans. The RMA does not explicitly specify when an applicant should apply for plan change or resource consent. Instead, the applicant decides which process to take (often in consultation with their local authority).[362] Therefore private plan changes and resource consents could be considered equal alternatives because applicants may choose either process to achieve their aims. Prior to *King* Salmon, all RMA applications assessed Part 2 and took an overall broad judgment approach. Following the Court of Appeal's rejection of *King Salmon* for resource consents, plan changes and resource consents have different legal tests. This is an issue if plan changes and resource consents are left as equal alternatives.

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[361] Permitted activities, controlled activities, restricted discretionary activities, discretionary activities, non-complying activities and prohibited activities.

[362] The RMA Quality Planning Resource "When to Use a Private Plan Change" <http://www.qualityplanning.org.nz/index.php/plan-steps/privateplanchange/when-to-use-a-private-plan-change>.

The difference in drafting between "in accordance with Part 2" in plan change sections and "subject to Part 2" in s 104 may justify a different approach. Further, plan changes and resource consents have different functions. Plan changes alter the plan for the general public whereas resource consents approve an activity for a single applicant. The Court of Appeal in *Davidson* held the difference in drafting and nature of resource consents compared to plan changes justified different legal tests.[363] Parliament could have used the same statutory language if the same legal test applied. The RMA has been amended many times so Parliament has had opportunities to align the provisions. At the same time the RMA does not regulate when plan changes or resource consents are appropriate, apart from the 'prohibited activity' classification, and it does not explicitly specify that different tests are required. This may suggest plan changes and resource consents are meant to be equally available and assessed the same way.

For over 20 years decision makers assessed Part 2 using the overall broad judgment approach across RMA decision-making. Having two different tests for avenues that are equal alternatives is problematic for reasons that will be detailed below. One test for all decisions under the RMA gave applicants certainty on how decisions are made; it also meant all applications were equally difficult as each other.

B. Increased applications of one kind for the most favourable test

It is problematic if plan changes and resource consents are left as equal alternatives with different legal tests. This part argues that one test may be perceived to be easier than the other and so an increase in resource consent applications may occur.

If plans adopt environmental bottom lines, the legal test for plan changes could be perceived as more difficult for applicants to surmount than resource consents. *King Salmon* reduces pre-existing discretion within plan change decision-making. Therefore prescriptive plans will make it difficult for plan change applications to succeed because the decision maker cannot resort to Part 2. Accordingly, resource consents may be perceived as easier to obtain because the decision maker has

[363] *R J Davidson Family Trust v Marlborough District Council*, above n 5, at [47] and [70].

discretion to return to Part 2 to undertake an overall broad judgment approach. The case law shows quantifiable economic benefits will often outweigh unquantifiable effects on the environment.[364]

If the legal test for resource consents is easier to surmount, then applicants may choose this route over plan changes. Generally resource consents are quicker, cheaper and require less public consultation than private plan changes.[365] However, resource consents are not always advantageous because they can have a shorter duration than plans.[366] Further, resource consents are site specific whereas plan changes can be site specific and district wide.[367] Therefore an influx of resource consents may occur whilst plan change applications could dramatically decrease. Despite some disadvantages of resource consents, applicants are likely to pursue the application with the greatest chance of success. However, a significant increase in resource consent applications is likely to have a negative impact on the environment.

C. Iterative destruction of the environment through resource consents

If resource consent applications begin to increase because the legal test is perceived to be easier to surmount then the potential for environmental degradation is concerning.

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[364] Wheen, above n 118, at 290-292.

[365] The RMA Quality Planning Resource, above n 362. Resource Management Act 1991, Schedule 1 Part 1 sets out the process for preparing and changing policy statements and plans by local authorities. Clauses 2, 3, 3A, 3B, 3C set out consultation requirements. In Schedule 1, Part 2, Clause 23 an applicant may be required to provide further information about any consultation undertaken or to be undertaken.

[366] Resource Management Act 1991, s 123: "Except as provided in section 123A or 125,— (a) the period for which a coastal permit for a reclamation, or a land use consent in respect of a reclamation that would otherwise contravene section 13, is granted is unlimited, unless otherwise specified in the consent: (b) subject to paragraph (c), the period for which any other land use consent, or a subdivision consent, is granted is unlimited, unless otherwise specified in the consent: (c) the period for which any other coastal permit, or any other land use consent to do something that would otherwise contravene section 13, is granted is such period, not exceeding 35 years, as is specified in the consent and if no such period is specified, is 5 years from the date of commencement of the consent under section 116: (d) the period for which any other resource consent is granted is the period (not exceeding 35 years from the date of granting) specified in the consent and, if no such period is specified, is 5 years from the date of commencement of the consent under section 116." Whereas a private plan change will last for the lifetime of the relevant plan.

[367] The RMA Quality Planning Resource, above n 362.

It is argued that without robust cumulative effects policies in plans, environmental degradation may continue to occur through resource consents.

Resource consents provide site-specific permission to undertake activities contrary to the plan or the RMA. The effects of resource consents on the environment can be negative. If resource consents are easier to achieve then each application may chip away at environmental preservation. The majority in *King Salmon* was concerned that the overall broad judgment approach could create spot zoning which would undermine the strategic approach that planners are required to undertake.[368] A "whole region perspective" is preferable,[369] but:[370]

> As applied, the "overall judgment" approach allows the possibility that developments having adverse effects on outstanding coastal landscapes will be permitted on a piecemeal basis, without a full assessment of the overall effect of the various developments on the outstanding areas within the region as a whole. At its most extreme, such an approach could result in there being few outstanding areas of the coastal environment left, at least in some regions.

Although the above statement was said in a plan change context it is equally true for resource consents because if resource consents are not assessed on a wider scale then environmental degradation can occur.[371] To remedy this, very prescriptive and robust cumulative effect policies are necessary to ensure effects do not exceed precise limits. A significant influx of resource consent applications, and no limits on cumulative effects, will allow further environment degradation.

Negative consequences may arise from the legal test for resource consent being easier to achieve, quicker and cheaper. If a wider perspective is not taken then environmental degradation will increase as each application is granted. Each resource consent granted by recourse to Part 2 will chip away at the environment until there is

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[368] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3, at [139].
[369] At [139].
[370] At [140].
[371] For discussion of environmental creep and the permitted baseline issue in the resource consents context see Warnock and Baker-Galloway, above n 74, at 222-223; Bronwyn Carruthers and Brigid Kelly "Unimplemented resource consents as part of the permitted baseline" (November 2014) RMJ 15.

nothing left. Therefore rejecting *King Salmon* does nothing to remedy the very real issue of environmental degradation through the RMA.

If planners are willing to set environmental bottom lines in a regional policy statement, regional plans and district plans must give effect to those. A regional policy statement cannot be altered by a private plan change.[372] Therefore a protective regional policy statement would make granting resource consents harder. Thus environmental bottom lines in higher order plans may reduce the number of resource consents with effects that will degrade the environment further.

Using the 'prohibited activity' classification in plans to force applicants to undertake a plan change to achieve their aims may also prevent environmental degradation. In *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development*[373] the Court of Appeal held a local authority could classify an activity as 'prohibited' to force applicants to go through the plan change process rather than allowing resource consents.[374] An activity does not have to be forbidden for it to be classified as 'prohibited'.[375] Local authorities needing more information on a proposed activity may use the 'prohibited activity' classification until they receive more information through a plan change.[376] A plan change requires a local authority to undertake an evaluation, including a 'precautionary approach' in s 32(2)(c).[377] Therefore local authorities may be able to prevent environmental degradation by forcing applicants to undertake plan changes.

D. Less respect for public participation

In Chapter 3 public participation was shown to be central to the RMA. Currently, plan changes require public participation to decide applications in line with community

[372] Resource Management Act 1991, Schedule 1, Clause 21.
[373] *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development* [2007] NZCA 473, [2008] 1 NZLR 562.
[374] At [16].
[375] At [41].
[376] At [9] and [45]. However, it is not acceptable for a local authority with sufficient information about a proposal to use the 'prohibited activity' classification to defer undertaking a s 32 evaluation.
[377] At [26]-[30].

values. However, if *King Salmon* is rejected for resource consents then public participation in plans is not respected.

Environmental decision-making ought to be made in accordance with as many views as possible. Recent amendments to the RMA have reduced the ability for public participation in resource consent decisions. Public participation in plans is not respected if Part 2 is assessed and an overall broad judgment approach is taken. Decisions would not necessarily be made in accordance with plans because an element of discretion still exists.

The Court of Appeal in *Davidson* held that a Part 2 analysis must not be wholly inconsistent with the relevant plans.[378] However, the decision maker's discretion could still have considerable force over the success of an application. The discretion to consider Part 2 does not respect participation in plan making. If good decisions come from having significant public input then that ought to be consistently promoted across all decision-making mechanisms. Therefore discretion may undermine the importance of plans by not respecting public participation that is supposed to be central to the RMA.

This approach may also leave resource consent processes vulnerable to future amendments to the RMA, which have previously decreased scope for public participation. If *King Salmon* was a push for public participation then rejecting this approach detracts from this push. Less emphasis on public participation will mean plans do not have the benefit of community input. Further, applicants will choose resource consent where discretion is available.

E. Purpose of resource consents

Chapter 3 discussed whether the purpose of resource consents, as an exception to the RMA, would exist by applying *King Salmon*.[379] This part argues that the purpose of

[378] *R J Davidson Family Trust v Marlborough District Council*, above n 5, at [74].
[379] Resource Management Act 1991, s 87.

resource consents would be served by assessing Part 2 through an overall broad judgment approach.

If *King Salmon* is rejected for resource consents then decision makers will assess Part 2 using an overall broad judgment approach. This is arguably consistent with the nature and purpose of resource consents. If resource consents are an exception from what the RMA and plans permit then the *King Salmon* rationale departs from how resource consents ought to be decided. The nature of resource consents means applications should not normally be assessed for consistency with the very plan that precludes the proposed activity. Therefore keeping analysis of Part 2 through an overall broad judgment recognises the purpose of resource consents. Discretionary decision-making could be beneficial to ensure that resource consents still have a purpose within the RMA.

Resource consents are in the RMA to provide an exception to the RMA and plans. To assess resource consent applications for consistency with plans undermines their purpose. Therefore a wholly discretionary approach to decision making may suit the nature of resource consents better. Then resource consents are kept as an exception to the plans and the RMA. Currently, 'non-complying' applications are required to show that they are not contrary to the plan. These activities have the least desirable effects that resource consents are still available for. It may make sense to ensure that these activities are not contrary to plans because the effects of these activities need to be limited. Thus 'non-complying' activities should not be wholly inconsistent with the plans. However, decision makers should have discretion in deciding applications for other activity classifications because their effects are not as damaging on the environment compared to 'non-complying' activities.

F. Effect on RMA as a whole

This part discusses the effect that *King Salmon* has on the wider decision-making mechanisms under the RMA. There is uncertainty for decision makers and the community on how future decisions will be made.

In the early years of the RMA there was a debate about how decisions should be made but since *NZ Rail* the approach has been consistent. Although it could be argued the decision maker's discretion to consider Part 2 made decisions inconsistent, there was clarity and consistency as to the decision-making approach taken; whether it was plan changes, resource consents, designations or heritage orders.[380] The lower court decisions in *Davidson* made plan changes and resource consents consistent by applying *King Salmon*. The approaches are now inconsistent following the Court of Appeal decision.

The approach to take to designations and heritage orders is also uncertain. Designation and heritage order provisions use the phrase "subject to Part 2".[381] Prior to the release of Court of Appeal *Davidson* designation decisions discussed *King Salmon*.[382] The 'Basin Bridge decision'[383] rejected *King Salmon*. The phrase "subject to Part 2" in s 171 was not at issue.[384] Therefore the role of Part 2 in designation decisions is not limited in the same way as plan changes.[385] Further, Judge Newhook undertook a Part 2 analysis noting that the debate as to whether *King Salmon* approach applied to designations was academic.[386] Finally, in *Minister of Corrections v Otorohanga District Council*[387] the appeal of *Davidson* was noted and disregarded:

> [26] *R J Davidson* has been appealed to the Court of Appeal but regardless of the outcome we distinguish it on the basis that it is a resource consent appeal and we consider we are bound by the *Basin Reserve* decision which is a designation proceeding.

Therefore there is High Court authority for an assessment of Part 2 through an overall broad judgment approach to remain for designations. However, it is equally possible

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[380] Warnock, above n 2, at 512.

[381] Resource Management Act 1991, ss 168A(3), 171(1) and 191(1).

[382] *New Zealand Transport Agency v Architectural Centre Inc & Ors* [2015] NZHC 1991, (2015) 19 ELRNZ 163, [2015] NZRMA 375 [Basin Bridge]; *City Rail Link Limited v KiwiRail Holdings Limited* [2017] NZEnvC 204; and *Minister of Corrections v Otorohanga District Council* [2017] NZEnvC 213.

[383] *New Zealand Transport Agency v Architectural Centre Inc & Ors*, above n 382.

[384] At [112]-[113].

[385] At [363]-[364].

[386] *City Rail Link Limited v KiwiRail Holdings Limited*, above n 382, at [98]-107].

[387] *Minister of Corrections v Otorohanga District Council*, above n 382.

that an appeal to a higher appellate court would change this or maintain the status quo in this area.

Nonetheless rejecting *King Salmon* for resource consents, and possibly designations and heritage orders, means RMA decision-making is in a state of uncertainty. The test for decision-making is becoming inconsistent across plan change, resource consent, designation and heritage order provisions. Perhaps this was always intended because of the difference in wording between plan change provisions and the rest of decision-making in the Act. However, applicants are now uncertain of how decision-making will be undertaken and whether that assessment is correct.

G. Conclusion

This Chapter has sought to show implications for rejecting *King Salmon* such as: having different legal tests; increased applications of one type; the concern of environmental degradation through resource consents; less emphasis on public participation; the true purpose of resource consents being promoted; the effect on the RMA as a whole and to other decision-making mechanisms; the availability of discretion and the potential for plans to be undermined. The implications contained in this Chapter exist in light of the Court of Appeal decision in *Davidson*.

VI. Conclusion

This dissertation has sought to show how decision-making has changed since the enactment of the RMA and the impact *King Salmon* and *Davidson* has had on the entire Act. The focus here has been on what happens to resource consents; but as the RMA is amended yet again, and as consequences are realised, more questions will arise. Resource management decision-making has reached a turning point. The sweeping changes in *King Salmon* could be accepted across all decision-making mechanisms or be limited to plan changes; at this time the Court of Appeal has limited it. However, this will not be the end of the debate and there will be litigation to determine the limits of the law. No matter what the final outcome is it will be legally disruptive and there will be a period of uncertainty as courts, local authorities, planners, lawyers and the public come to terms with a different resource management regime.

This dissertation has shown that concluding on the correct approach to decision-making requires many consequences to be comprehensively thought out. The Supreme Court (both the majority and dissent) in *King Salmon* took the opportunity to consider the wider ramifications of their decision. Wider policy implications of extending *King Salmon* to other decision-making mechanisms need to be considered. Resource management law affects everyone so certainty is fundamental; inconsistent and uncertain approaches are undesirable. Courts have done their best but perhaps it is time for Parliament to have the final say. This may involve an overhaul of the RMA to set the decision-making approach; but some action is required to alleviate this state of uncertainty.

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