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SUBMISSION OF NEW ZEALAND FISH AND GAME COUNCIL TO THE CONSTITUTIONAL ADVISORY PANEL

Introduction

1. The New Zealand Fish and Game Council ("the Council") was created in 1990, with the introduction of Part 5A of the Conservation Act 1987, as inserted by section 17 of the Conservation Law Reform Act 1990. Together with a network of regional Fish and Game Councils, it replaced the former Acclimatisation Societies, which had operated in New Zealand since the 1860's.
2. The structure adopted under Part 5A of the Conservation Act 1987 was designed to "separate and clearly define the responsibilities of the Crown and those of the anglers and hunters".¹ It thus was premised on the basis that the Council and the Government have different interests and responsibilities. Those differences are reflected in their different roles under Part 5A. "The [Part 5A] system separates the responsibility of the policy development for management and ensures clear lines of accountability to both the Crown and the user of the recreational resource."²
3. In legal terms the Council is a body corporate (section 26B(2) Conservation Act 1987). The fact that it is created by statute is significant only to the extent that it is a statute that defines the Council's purpose, function and legal powers. But that fact does not automatically make it part of the Government.
4. The Council has two legal purposes "to represent nationally the interests of anglers and hunters and provide co-ordination of the management, enhancement and maintenance of sports fish and game" (section 26B(1) Conservation Act 1987). The representation of its members' interests is thus central to the Council's reason for being. It is the key purpose that distinguishes the Council from the regional Fish and Game Councils, which are established solely for the "purposes of the management, maintenance and enhancement of sports fish and game" (section 26P Conservation Act 1987)

¹ Press Release, Office of the Associate Minister of Conservation 23 May 1988, cited in R M McDowall *Gamekeepers for the Nation* (Canterbury University Press, 1994), p 459.

² Hon. Philip Woollaston (Minister for Conservation), 505 New Zealand Parliamentary Debates 500 (8 March 1990).

Statutory managers of freshwater sports fish, game birds and their habitats

New Zealand Council

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5. The Council's purposes are expressed through the specific functions granted to it by the statute (section 26C Conservation Act 1987). Those functions provide the means by which the Council fulfils its purpose to "represent nationally the interests of anglers and hunters". They include:

“(1)(g)to advocate generally and in any statutory planning process the interests of the New Zealand Fish and Game Council and, with its agreement, of any Fish and Game Council in the management of sports fish and game, and habitats:”
6. In the exercise of its functions the Council expends substantial effort and resource on protecting the environment and habitat for sports fish and game. Water quality and river flows are a vital concern of the Council, as they are to a great many New Zealanders and the tourism industry. The Council advocates and litigates extensively in order to obtain Water Conservation Orders for rivers of particular importance to trout and salmon. In that connection the Council concentrates much attention on environmental law and the measures needed to promote and protect a high quality habitat. The Council is of the view that the framework for protecting and enhancing the quality of New Zealand's environment needs improvement and for that reason consideration needs to be given to the issue at a constitutional level. The natural environment is a defining feature of New Zealand's identity, the 'Kiwi' brand, our agricultural economy, and way of life of its citizens. It needs to be appreciated that the Council are the inheritors of a tradition going back 152 years. For a modest fee any citizen could obtain a licence to harvest designated natural resources on a sustainable basis and those natural resources remain part of the public estate. All people are entitled to access them and they cannot be part of any private estate, as they were from whence our forefathers came. This state of affairs is unique worldwide and fully justifies recognition in a New Zealand Constitution.

The Constitutional Issue

7. The Terms of Reference for the Panel make it clear that the issue of a written constitution for New Zealand must be considered by the Panel and reported on. In this regard as the Panel's September 2012 document points out "New Zealand is one of only three countries in the world without a formal written document known as a *Constitution*."³ The Council believes there is a case for New Zealand ceasing to be a constitutional outlier and for a written constitution to be drawn up and adopted that includes constitutional protection for the environment.
8. Such a development would bring New Zealand into line with the constitutional position in many other countries, as outlined later in the submission. There are important human rights issues bound up in environmental protection. The future of New Zealand will be inextricably

³ New Zealand Government, Constitutional Advisory Panel, *New Zealand's constitution-the Conversation so far* (September 2012),

bound up with the global environmental problems that threaten to overwhelm the planet. The challenges these problems pose of the development of public policy in New Zealand are formidable. Climate change is one of the issues, but it is not the only one-water quality, the health of the oceans and acidification, the disposal of waste, loss of top soil, air quality, chemical pollution are others. In such circumstances it is only prudent to set out some constitutional markers to ensure that New Zealand's relatively high standards of environmental protection are maintained and enhanced.

9. The consequences of such a step will be important. Restraints will be placed on the capacity of policy makers to breach the constitutional guarantees. The public will know what the bottom lines are. Ministers and MPs will be bound by the Constitution and so will the Judges. In other words, such constitutional rights to be meaningful must be enforceable. Rather than go into a detailed legal analysis on the effects of such constitutional guarantee, this submission will place in front of the Panel some examples of what other countries have done and the range of environmental matters that could be covered in a written Constitution.
10. One of the leading examples comes from the relatively new Constitution of the Republic of South Africa. It provides in Article 24:
"Everyone has the right-
 - a. to an environment that is not harmful to their health or well-being; and
 - b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - i. prevent pollution and ecological degradation;
 - ii. promote conservation; and
 - iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."
11. France has made an important change to its constitutional arrangements. The French National Assembly adopted the Charter for the Environment and integrated it with the Constitution of the Fifth Republic in 2005. This means that government regulations that are inconsistent with the Charter can be quashed and that has occurred in regard to a genetic modification law. Most commentators who have examined the effect of this change reach the conclusion that it has had profound and beneficial consequences for the France's environment. The contents of the Charter are set out in Appendix I.
12. In May 1994 an international group of experts on human rights and environmental protection convened at the United Nations in Geneva and drafted the first declaration of principles on human rights and

the environment.⁴ Part I of that document contains a succinct statement of the principles:

1. Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.
 2. All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural economic, political and social rights, are universal, interdependent and indivisible.
 3. All persons shall be free from any form of discrimination in regard to actions and decisions that affect the environment.
 4. All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.
13. The rapidity with which constitutional protection for preservation of the environment and its life sustaining qualities has spread around the world is noteworthy. It began with the Stockholm Declaration in 1972 following the global eco-summit held that year.⁵

“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”

Scholarship on Constitutional Environmental Protection

14. A recent and leading work of scholarship has appeared documenting the issues from around the world- David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (University of British Columbia Press, Vancouver, 2012). This book has a detailed account and analysis of all the constitutional environmental provisions around the world.
15. Dr Boyd summarises his conclusion on the right to environmental protection in the following way:

“As of 2012 177 of the world’s 193 UN member nations recognize this right through their constitution, environmental legislation, court decisions, or ratification of any international agreement. The only remaining holdouts are the United States, Canada, Japan, Australia, New Zealand, China, Oman, Afghanistan, Kuwait, Brunei, Darussalam, Lebanon, Laos, Myanmar, North Korea, Malaysia, and Cambodia. Even among these

⁴ Economic and Social Council, Commission on Human Rights, E/CN.4/Sub.2/1994/9, Annex I, Draft Principles on Human Rights and the Environment

⁵ Stockholm Declaration of the United Nations Conference on the Human Environment. Adopted by the UN Conference on the Human Environment at Stockholm , 16 June 1972 reprinted in 11 ILM 1416(1972)

laggards, some substantial governments recognize the right to a healthy environment, including six American states, five Canadian provinces or territories, and a growing number of cities.”

16. Dr Boyd found that since the mid-1970s, 92 countries have included the right to a healthy environment in their constitutions. His book also deals with the arguments against such a constitutional development. He summarises evidence concerning the arguments that constitutional environmental rights are:
 - . Too vague to be useful
 - . Redundant because of existing human rights and environmental laws
 - . A threat to democracy because they shift power from elected legislators to judges
 - . Not enforceable
 - . Likely to cause a flood of litigation
 - . Likely to be ineffective
17. Dr Boyd’s research found that none of the above charges were established. He found that in 78 of the 92 nations environmental laws were strengthened. In some nations the constitutional right became a unifying principle, Argentina being the leading example. This led to new laws governing access to environmental information, laws setting minimum standards on such matters as industrial waste and clean water. Such constitutional provisions encouraged the advance screening of laws and regulations to see that they complied with the constitutional provisions. Further, the constitutional provisions gave greater prominence to environmental issues, France being a leading example. There the Charter is influencing legislation government policy, court decisions and the French education system. The constitutional provisions have led to closing gaps in environmental law in many countries. They also seem to have prevented weakening in environmental laws and policies. In addition, such provisions have functioned as a spur to enforcement. The constitutional provisions have also increased substantially the public’s role in environmental governance. The substantive rights have led to procedural rights in order to make them effective. The provisions have led to open and participatory democracy. Dr Boyd also finds that corporate and government accountability have been increased by the existence of constitutional provisions. His research also found that the majority of lawsuits based on the constitutional right in Latin America, Europe and India are successful.
18. The research also finds that court decisions defending the right to a healthy environment have been made in at least 44 of the 92 nations that have such a constitutional provision protecting the environment. He finds the majority of cases

brought are successful. Courts have ruled that the right imposes three duties upon government: first, to respect the right by not infringing it by state action; second, to prevent infringement by third parties; third, to take actions to fulfill the right by providing such services as clean water, sanitation and waste management.

19. The conclusion of Dr Boyd's research is "These constitutional provisions are making a substantial contribution to improving people's lives and well-being."

Conclusion

20. The Panel will recall that the New Zealand Bill of Rights in section 8 provides "No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice." It is conceivable that some extreme environmental conditions, if they persisted, could give rise to the breach of that provision. The provision is oblique. The Council considers that section 8 plainly fails to provide adequate environmental protection, if any. Neither could the provision meet the Council's prime concern for water quality and other matters related to habitat.
21. In conclusion the Council submits to the Panel that constitutional recognition for the natural environment in New Zealand is both appropriate and required.



W B JOHNSON
Chief Executive

Attachment: *French Charter for the Environment*

The Charter of the Environment

The French people,

Considering,

That resources and the balance of nature have conditioned the emergence of humanity;

That the future and the very existence of humanity are inseparable from its natural environment;

That the environment is the common heritage of humanity;

That man exercises a growing influence over the conditions of life and over his own evolution;

That biological diversity, the fulfilment of the person and the progress of human society are affected by certain means of consumption or of production and by the excessive exploitation of natural resources;

That the preservation of the environment must be sought at the same level as the other fundamental interests of the Nation;

That in order to ensure sustainable development, the choices designed to respond to the needs of the present must not compromise the capacity of future generations and other people to satisfy their own needs;

Proclaim :

Article 1

Everyone has the right to live in a stable environment which respects health.

Article 2

All persons have a duty to take part in the preservation and the improvement of the environment.

Article 3

All persons must, under the conditions defined by law, forewarn of adverse factors that they are likely to carry into the environment or, failing that, to limit their consequences.

Article 4

All persons must contribute to repair the damage that they cause to the environment, under the conditions defined by law.

Article 5

As soon as realisation of damage could affect the environment in a serious and irreversible manner, even though [its recognition] might be uncertain in the current state of the scientific knowledge, public authorities should monitor, by the application of the precautionary principle in their relevant domains, the implementation of risk assessment procedures and the adoption of proportionate, provisional measures in order to prevent the realisation of the damage.

Article 6

Public policies should promote sustainable development. To this effect, they should reconcile the protection and enrichment of the environment, with economic development and social progress.

Article 7

All persons have the right, under the conditions and limits defined by law, to have access to information relating to the environment held by public authorities and to participate in the elaboration of public decisions having an impact on the environment.

Article 8

Education and training about the environment should contribute to the exercise of the rights and duties defined by the present Charter.

Article 9

Research and innovation should participate in the preservation and the enrichment of the environment.

Article 10

The present Charter inspires France throughout her European - and her international action.»