

# What happens when values are put to work?

## A reflection in one outcome from a Restorative Justice Conference in the criminal division of the District Court: Environment warranted judge jurisdiction

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### ***Canterbury Regional Council v Interflow (NZ) Ltd***

A mistake happened.

It caused a lot of damage to an ecologically and culturally significant stream.

It killed a lot of fish.

The company that caused the mistake held a core value of honesty.

They lived by that value and took full responsibility.

The company met with the community and Local Rūnanga and are making it right.

The stream is recovering and will be better than it was, the fish will return.

Two other streams not affected are being improved.

The company's example is a wero (challenge) to all citizens especially corporates.

Have values; live values.

*Canterbury Regional Council v Interflow (NZ) Ltd* [2015] NZDC 3323 (*Interflow*) illustrates what having values and living them can look like. What happened and how that was addressed by the company Interflow is an example of how good the landscape can look when and if those who make environmental mistakes go beyond the bare minimum required of them by the law. So much more on so many different levels can be accomplished. There can be an "insidious" and "cumulative" effect on ameliorating the environment (note that in this sense I use environment as defined by s 2 of the Resource Management Act 1991 to include people and communities). So often those words, in the context of offending where the environment is damaged, are used to lament the loss of and degradation to the environment. It is not always so, and this case provides an example where, despite the damage done, something really good was achieved through the application of the criminal legal process.

This case study recounts what happened in one specific situation in Canterbury. Reference is made to the larger impression that this jurisdiction is having on using existing legal frameworks to achieve innovative, creative outcomes for the environment and the people who are part of that environment.

### **What happened**

This situation happened in an urban catchment in Akaroa, a small coastal community in Banks Peninsula. Interflow is a company that specialises in relining culverts. They were contracted to reline two culverts running underneath Rue Noyer in Akaroa. They used a structural lining technique called Rotaloc to complete this work.

On 12 February 2014, as part of the process of relining the culverts, the Walnut stream had been diverted into the Eastern culvert to enable work on the Western culvert. Interflow staff began injecting grout and its admixtures. Some discoloured water was noticed, which appears to have come from contaminants filtering through the ground beneath the pipes. It was thought this was contained with the use of a substance called intercrete. It was not contained, as in fact the pipes were rusted and the subsoil beneath was porous resulting in the contaminants migrating beneath the stream downstream. The next day staff painted the end of the pipes with a UV paint called Sikalastic-488-AU. The paint was wet, and water was allowed to pass through the pipe and over the wet paint, which resulted in a cloudy discharge. Neither discharge was adequately contained to prevent chemicals discharging to water. (*Interflow* at [4]–[10].)

On 12 February complaints were received by Canterbury Regional Council (CRC) that fish were dying. On attendance on 13 February, CRC staff were met with a chemical or paint smell, numerous dead and dying fish, a dirty scum and sheen in still areas.

This small urban stream was home to eight native fish species. Four of those are listed as declining, longfin eel, kōaro, bluegill bully and inanga. Longfin eel, kōaro and inanga are regarded as culturally

significant as they are also mahinga kai (traditional food species). The existence of such species denotes that the stream was a healthy and abundant environment. The local Rūnanga gather watercress from the stream. Walnut stream is considered to have significant ecological and cultural value (*Interflow* at [16]–[18]).

This was a large, catastrophic “fish kill” and included 79 eels, 12 bullies and 51 inanga located on the day with a further 71 located three days after the event.

The local community and Rūnanga were affected in their use and enjoyment of the stream. The cultural harvesting of watercress had to stop.

### Why did it happen?

In this case the discharges into Walnut Stream happened because Interflow did not understand the characteristics of the site and failed to ensure the appropriate site investigations were completed and that the sediment control measures were appropriate for the site (*Interflow* at [23]).

Overall it can be said that what happened here was an unfortunate accident. The main office of Interflow was contacted, and once appraised of the situation, took immediate responsibility and did what they could to assist.

### A very quick lesson in the law

The Resource Management Act 1991 (RMA) is legislation enacted to promote the sustainable management of natural and physical resources (s 5(1)). Part 3 sets out the duties and restrictions in relation to resources. When there is a contravention of duties or restrictions, the RMA provides offence creating sections. The RMA also provides for specific statutory categories of liability, which include strict (s 340) and vicarious (s 341).

When a prosecution is initiated under the RMA, the RMA requires that proceedings are presided over by an Environment Warranted Judge (s 309(3)). All other Acts apply, the Criminal Procedure Act 2011 to process, and the Sentencing Act 2002 (particularly ss 7 and 8) sets out the purposes and principles of sentencing.

The RMA does not specify matters to be taken into account in sentencing. The courts look to developed case law to expand the sentencing principles in the Sentencing Act in relation to sentencing environmental offenders. The principles set out

in *Machinery Movers Limited v Auckland Regional Council* [1994] 1 NZLR 492 (HC) [*Machinery Movers*] continue to apply, alongside the provisions of the Sentencing Act 2002, when determining the severity of the offending and hence sentence levels. Those principles are (*Machinery Movers* at 503):

- A. the nature of the environment affected;
- B. the extent of the damage inflicted;
- C. the deliberateness of the offence; and
- D. the attitude of the accused.

In December 2014, s 24A was inserted into the Sentencing Act 2002 to ensure that all *appropriate* sentencing cases were considered and referred to restorative justice processes. This amendment ensures that those affected by offending are given an opportunity to meet with the offender and to engage in this process, which is reported back to the Court. Sentencing principle 8(j) (s 8(j) of the Sentencing Act) requires the sentencing Judge to take “into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case” when sentencing an offender.

### What happened next – Court and the Restorative Justice Conference

Once the case entered the Court process Interflow requested referral to a restorative justice process. (Note as a point of interest Canterbury Regional Council implemented an Alternative Environmental Justice Scheme, which operates as a hybrid between diversion and restorative justice. This scheme won the inaugural IPANZ award in 2013 for Regulatory Excellence. This offending did not qualify for entry to the Scheme so after pleas were entered the restorative justice route was taken.) They had already commissioned an ecological report on the stream.

The local provider of restorative justice services organised a Conference. Members of the community were invited to attend or to write a letter that would be read. Representatives of the local Rūnanga from Ōnuku Marae were invited and attended. It is not usual for the prosecutor to be invited to a Restorative Justice Conference as they are not really a “victim” of the offending. However in the environmental arena the Council, and in this case CRC, usually hold expert evidence around what happened and have the expertise to understand

whether any offer made at the Conference is capable of implementation. It was helpful to have that information and personnel available to the Conference.

While the actual discussions within the Conference are confidential, a report was produced for the Court containing the outcomes. That was filed in Court (*Interflow* at [19]).

In this case, something extraordinary happened. *Interflow* tabled the ecological report and, after listening and hearing the voices of those attending, offered the sum of \$80,000 towards the betterment of not only Walnut stream but the true right and left bank of the nearby Grehan stream. A plan was proposed in the ecological report to create inanga spawning habitats which would improve all three streams. (*Interflow* at [43].)

I describe this as extraordinary as the offer was made in light of direct knowledge that the prosecutor was seeking a fine lower than \$80,000. In fact *Interflow* knew that the end point fine would be substantially lower than \$80,000. Despite knowing that position, they apologised, described how they had learned from what happened and changed their processes to ensure it would never happen again. They wished to make amends by implementation of the ecological plan.

### **What happened after that – The judgment**

Back in Court for sentencing, with submissions filed by CRC, *Interflow*, and the Restorative Justice Report, there was an agreed submission. The submission was that the final outcome should be a conviction and discharge on the payment of an \$80,000 donation to implement the plan in the ecological report. The case was adjourned to enable an appropriate neutral agency to be located to implement the plan. The Banks Peninsula Conservation Trust, already well established in the area, stepped in. Christchurch City Council also leaned in with an agreement to lend the Trust their consent which would allow them to do the work without seeking and incurring the costs of the consenting process. In layman's terms the \$80,000 would go a lot further. (*Interflow* at [46].)

On return to Court, the Court as it is required to do, went through the exercise of sentencing, which is a well set out process. After addressing the purposes and principles of sentencing, the *Machinery Movers* factors were addressed and an outcome reached. In considering the outcomes of the Conference and the

fact that the commissioning of the ecological report was valuable as well as the \$80,000 donation, the final decision was to convict and discharge *Interflow* with no further penalty.

### **What about the stream now?**

Banks Peninsula Conservation Trust has advised that work towards forming the inanga spawning habitats is well on its way. The Trust is working with the Christchurch City Council staff in relation to their Consent and all expectations are that the work will commence shortly. They are hopeful work will be completed before the end of the year. Things are looking good.

### **Mirror, Mirror**

Mirror, mirror on the wall, what reflection do I see looking back at me.

The environment is not a faceless victim. The RMA definition of environment (s 2) is more encompassing than the particular environment affected, for example in this case the stream. "Environment" is extended to include people and its communities.

As we look into the environment we see all our faces reflecting back. Environmental damage or pollution affects a myriad of people, organisations and institutions. The effects of damage and pollution are often not localised and can be ongoing. Often the courts refer to effects as "cumulative" and "insidious" as they may not be apparent on the day or indeed for some time. Those affected by environmental damage range immensely from neighbours bordering damage, in the case of water-downstream neighbours, those who fish and hike and enjoy the outdoors, to local Rūnanga, who may not be able to gather mahinga kai.

There are many categories of offenders. They range from individuals to small and large corporations. They include those who pollute on purpose for private economic gain to those who make small mistakes resulting in great environmental harm. Ultimately it is the community who shoulder the lasting effects of environmental harm and pollution.

We are all part of this; we are all connected to the problem and the solution. When it comes to the earth, air and water, there is no end point. The environment continues to exist and to be subject to the protections and consequences offered by the law. In this case *Interflow* went beyond the minimum levels required by the law. It sought out an ecological

report on the affected Walnut Stream that not only looked at remediation of that stream but others. It chose to go with the option to remediate three in stream habitats. So much more was achieved for the stream itself and the Akaroa community than would have been achieved by leaving their involvement at paying a monetary fine and walking away from the damage done.

Interflow as a company held a value, were genuinely remorseful and they made it right. They also set a platform where others could lend a hand – and they did.

### Conclusion

The Environment Warranted Judge jurisdiction of the District Court, in sentencing those who breach

their responsibilities under the RMA and damage the environment, is moving quickly and with agility to consider restorative and creative contributions to dealing with those who appear before it. The *Machinery Movers* factors provide the framework to put the environment at the forefront of sentencing. Restorative justice processes are adding a platform for the voice and views of the community to be heard. This is also a platform that an offender can use to apologise and offer amends to that community directly.

Each case is unique and very fact-specific but there are numerous examples where the court is reaching for unique solutions, providing tailored sentences to achieve the best overall outcome. All this is done within the current legal framework. This is just one case but there are many more.

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## Enabling an iwi allocation of freshwater: Is it a radical change?

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### Introduction

The allocation of freshwater in New Zealand has always been a highly contentious issue. Within that, the issue of an iwi allocation of freshwater has long been discussed and has recently become more prominent, both legally and politically. This raises the question of whether, and if so how, an iwi allocation of freshwater could be provided for under the current framework of the Resource Management Act 1991 (RMA)?

This article will not consider the merits of whether there should or should not be an iwi allocation, but instead whether such an allocation could be achieved under the current statutory framework, or whether further changes are needed.

### Basis for an iwi allocation

This article assumes that the Crown decides to give effect to a Treaty obligation and/or provide redress for a Treaty breach by providing for an iwi allocation of freshwater.

It is likely the decision would stem from the WAI 2358 National Freshwater and Geothermal Resources

Inquiry. In *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012), the Waitangi Tribunal found that Māori had rights and interests in water akin to the English notion of ownership rights, and these rights were guaranteed and protected by the Treaty of Waitangi (at 2.8.3). The extent of the proprietary right was the exclusive right to control access to, and use of, the water while it was in their rohe.

The second stage of the Inquiry will consider how those property rights sit within the laws and policies managing the use of water (including the RMA). However, following the WAI 2358 Interim Report, the costs, benefits, and incentives of an iwi allocation regime were considered in two reports prepared for the Iwi Advisors Group by the Sapere Research Group (Kieran Murray, Marcus Sin and Sally Wyatt *The costs and benefits of an allocation of freshwater to iwi* (report prepared for the Iwi Advisors Group, Sapere Research Group, 2014); Kieran Murray and Sally Wyatt *The incentives to accept or reject a rights regime for fresh water* (report prepared for the Iwi Advisors Group, Sapere Research Group, 2015)). In summary, the 2014 Sapere report (Sapere Report) found strong economic advantages from an iwi allocation, though the allocation was based on a new regime which created