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What would you do with . . . a river at the table?

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Forty-five years ago, Professor Christopher Stone published a paper entitled "Should Trees have Standing? Towards Legal Rights for Natural Objects". [45 *Southern California Law Review* 450–501.] Two years later, that paper had morphed into a book of the same title, with the subtitle, "Law, morality and the Environment" (1974; 3rd ed, 2010; OUP). Stone's objective in the paper and book was to place the discussion of prospective rights for trees and other environmental features in context of our broadening vision of those worthy of our moral concern and obligations, leading to the serious proposition that we grant legal rights and moral status to the environment (a question in Western jurisprudence that might cause wonder amongst those other peoples for whom it's patently clear that this should be, and already is, so).

Stone placed his discussion in the context of the parallel conversations in ethics on the rights and claims of non-human entities – not merely animals but also places, traditions, languages. This discussion takes the 'interests' of non-human species and entities well beyond either utilitarian or instrumental valuation (and certainly beyond William Baxter's "optimal pollution" model: "Penguins are important because people enjoy seeing them").

The discussion of the question has continued over the 4 decades, most recently appearing in a symposium on the dual challenge of standing in law in general and status of those entities or beings that might be seen to have legal rights and moral status in their own right. See here.

The relevance of this issue to mediation relates to the persistent question about how to "lay the table", how to ensure that all those whose interests and rights are at stake are present or represented, and that those without a direct interest in the outcome are not at the table. At the heart of this stage of preparation are the questions of credible representation, establishing preliminary and constructive connections with the parties, ensuring parties have clear connections with and mandate from constituents, and the assessment of the potential for agreement. This, however, becomes interesting and potentially tricky when, as Stone and his colleagues suggest, non-human and rights-bearing entities are on the invitation list and, indeed, must be there.

In similar vein, a series of articles appeared in the *Negotiation Journal* entitled "What would you do . . . ?" offering practical challenges to mediators in odd but not unlikely circumstances. I added to this conversation with a two-part question: "What would you do with a Taniwha at the Table?" [*Negotiation Journal*, 19(3) 195 (2003); and *Negotiation Journal*, 19(4) 291 (2003)]. My question arose from an impasse between a road development planned to cut through a swamp in order to straighten part of the highway, and the local Maori "iwi" or tribe whose objection to the

development was based on the belief that the swamp was the home of, and protected by, a "taniwha". The taniwha of Maori legend is primarily a spirit and guardian of water, but can be seen more widely as the spirit of places.

The question for negotiators and mediators was as to how to address this apparent stand-off, and to balance the transportation imperatives of highway safety with the cultural imperatives of the protection of valued spaces.

The immediate implication is that, beyond the conventional image of negotiation agency and of the interests-bearing, utility-maximising, mutually-disinterested, game player, there are interests at the table that may represent cultural, spiritual or other seemingly non-tangible values. A normative implication too is that, in relation to ongoing conversations in environmental ethics, there are diverse ways of representing environmental value and values.

In the mediation world, we now have wide experience in recognising language of identity and cultural value; this too is given some institutional force in the criteria for intercultural competence in mediation. But of course there is always the challenge of knowing that cultural value is represented or conveyed by parties who will also have tangible interests at the table and, as we're dealing with a malleable array of meanings, there will be competing interpretations and priorities [see for example Benedict Anderson, *Imagined Communities*; or Terence Ranger & Eric Hobsbawm's *The Invention of Tradition*].

There is also a risk, at least in the public and media representation of competing claims, that we're merely seeing a clash between culture and science, between belief and evidence (e.g. in the Mauna Kea case in Hawaii – as though science did not represent values, and culture did not incorporate tangible knowledge and wisdom).

Now – finally getting to the point of my title – a new approach has been adopted in New Zealand, in granting full legal personality to a river: going beyond human utility and preference, the Whanganui River now is vested with full legal personality, as an indivisible and a living whole, through the Te Awa Tupua (Whanganui River Claims Settlement) Bill – now granted Royal Assent as an Act.

"The Whanganui River is New Zealand's longest navigable river, stretching from the slopes of Mount Tongariro to the Tasman Sea. The Whanganui River is central to the existence of Whanganui Iwi and their health and well-being. The River has provided both physical and spiritual sustenance to Whanganui Iwi and the hap? of Whanganui Iwi from time immemorial.

"Other iwi and hap? also have interests in parts of the River and its tributaries. Through this settlement, the Crown acknowledges that Te Awa Tupua is an indivisible and living whole comprising the Whanganui River from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical elements."

As the Treaty of Waitangi Negotiations Minister Christopher Finlayson said: "The approach of granting legal personality to a river is unique . . . It responds to the view of the iwi of the Whanganui River which has long recognised Te Awa Tupua through its traditions, customs and practice."

In practical terms, of course, the river is not going to turn up at the mediation, so the legislation lays down the structure of representation: "Te Pou Tupua, consisting of 2 persons, one appointed

by the Crown and the other by iwi with interests in the Whanganui River, to a guardianship role to act on behalf of Te Awa Tupua."

Here we have concrete and legislative steps towards answering Stone's question and the predominantly affirmative discussion of that question in environmental jurisprudence; and it's a way of answering the question for mediators or those charged in future with protecting tribal and others interests in relation to the river, as to the nature of representation. The introduction of a clear guardianship model, both reflecting the 'partnership' model of governance, involving Crown and Maori, and moving beyond what might be regarded as merely stewardship views of human agency in relation to environmental concerns.

So, I return to my question: what would you do with a river at the table? One answer is provided in this legislative and guardianship model which is both interest-based (in that the guardians are those with traditional interests in the river) and rights-based (in the granting of autonomous personality to the river). For the mediators, there's a promising and challenging extra dimension to ensuring the protection of those rights where one of the parties is, in fact, a river.

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