# Kluwer Mediation Blog

## Mediating Landscape and Memory

Ian Macduff (NZ Centre for ICT Law & School of Law, Auckland University) · Wednesday, February 26th, 2020

"For as long as our records go back, we have held these two things dear, landscape and memory. Each infuses us with a different kind of life. The one feeds us, figuratively and literally. The other protects us from lies and tyranny. To keep landscapes intact and the memory of them, our history in them, alive, seems as imperative a task in modern time as finding the extent to which individual expression can be accommodated before it threatens to destroy the fabric of society."

— *About This Life: Journeys on the Threshold of Memory* by Barry Lopez

In choosing the heading for this blog I borrow both from the Barry Lopez quotation above, and from Simon Schama's magnificent 1995 book, Landscape and Memory. Schama's objective in that book was to explore the impact of landscape on art, culture, imagination and politics. I draw too on Robert Macfarlane's talk on "Landscape and the Human Heart".

I begin with a brief apology for returning to a theme of local politics and history – the residues of colonial history in New Zealand/Aotearoa and the confiscation of land in the 19th century – which will be outside the experience and probably interest of many readers. My point here, however, is not to dwell on that history but rather to use it as vehicle for thinking about a contemporary role for mediation – and for mediators who are not the usual audience for these Kluwer blogs – in resolving the current consequences of historical events.

In taking this approach I also echo my mediation colleague Denise Evans' recent brief comment on the lessons for mediators in the case of competing land claims over a place called Ihum?tao.

First, an outline of the ongoing – but very nearly resolved – dispute over land at Ihum?tao: in 1863, an area of farmland near what is now Auckland Airport, was confiscated by colonial authorities, and the traditional M?ori owners of that land were driven off. This was, at least in part, as punishment for Ihum?tao owners' support of the Kingitanga movement during the Waikato wars. The confiscation was in breach of the partnership reached between M?ori and the Crown, signed in the Treaty of Waitangi in 1840, only a generation before these events.

The land was then sold by the colonial government to the Wallace family. who held it for many years before selling it in 2016 to one of the major construction companies in New Zealand. The objective of that construction company was to build a number of high-value homes in a low-density development. It was designated by 2014 legislation as a special housing area, thus lending further formal legitimacy to the project. This is, in legal terms, private land; it is thus not formally

subject to the ongoing process, since 1975, of restoring confiscated land in Crown ownership to the original M?ori owners. Lawyers might immediately ask whether that present legal title remains contaminated by the illegality of confiscation, though the confiscation was "legitimated" by colonial era legislation. Even the libertarian political philosopher, Robert Nozick, might have had his doubts about the "justice in acquisition" of the present title.

Against the question of legal title is the history and significance of the land: it is believed to be one of the first places M?ori settled in T?maki Makaurau (Auckland). Almost immediately after consents were granted, local M?ori, including those who claimed *mana whenua*, or traditional authority and jurisdiction, over the land, occupied the land and forced a stand-off between the building company and M?ori. That occupation continues at time of writing, though has been scaled back. The building company has agreed – at the request of the Prime Minister – not to proceed with any development until the issue is resolved, though the conversation continues along the parallel tracks of private property versus traditional title; legal title versus illegitimate acquisition; commercial development versus the spiritual value of this land.

At the heart of the protest and occupation is a group called Save our Unique Landscape – SOUL. They acknowledge their lineage back to the early ancestors and leaders who settled the land. Thus, the competing narratives of history and legitimacy, pitting legal title (albeit of questionable origin) against traditional title (and the protections guaranteed under the Treaty of Waitangi). If you like, this is a stand-off between legal and moral 'title' to the land; and it's a contest between the value of the land as commodity or land as *taonga* or 'treasure' the rights to the control of which were also guaranteed under the Treaty.

This dispute is, as an article in the Guardian in 2019 acknowledged, a dispute not just about "land" but about an element of New Zealand's soul. These are two quite different narratives, two very different ways of framing what is in dispute; and the language of *taonga*, of soul, of the contemporary power of traditional value of land has entered our political discourse in ways that seem to tip the balance at least equally if not slightly in favour of the symbolic rather than commercial narrative.

Against the backdrop of thinking about how we mediate and negotiate history, I want to touch on two issues for contemporary mediation: first, the challenge of competing, even non-commensurable, perceptions of what it is that is under discussion; and second, the recognition of the wider body of those who are – and long have been – mediators in traditional and indigenous worlds.

When dealing with examples such as contemporary land claims which arise from historical events, it's clear that this is a renegotiation of the consequences of history. As the rewriting of the colonial histories shows, there is also a necessary reappraisal of the history itself. This is not, I hasten to add, an exercise in revisionist history which seeks to gloss over the inequities and iniquities of the past (see, for example, Shashi Tharoor's trenchant dismissals, in his *Inglorious Empire*, of Niall Ferguson's defence of Imperial rule in India). But, as we become more conscious of how and by whom histories have been written, there's a reinterpretation and renaming of those histories – thus, the colonial period confiscation of lands, which form the basis for this blog, were (when I was at school) referred to as part of the "Maori Wars"; later renamed as the "Land Wars"; and now usually referred to as the "New Zealand Wars".

In case this seems all too remote from the working lives of those of you readers who work in the

worlds of commerce, finance, employment relations and so on, just think for a moment about the ways in which parties, or their counsel, tell the stories about what brings them to the table. Our job, as mediators, involves honing in on those narratives in order to find a shared narrative.

Hence the source of the first of my two "lessons" in this dispute, that "land" in such cases is rarely merely land, or a resource, or property. [Nor, as I recall from a mediation I was engaged in some years ago, is a company merely a company when it is also the creation and 'treasure' of an individual.] Where indigenous and traditional claims are involved, we cannot ignore the parallel stories about the relationship between people and the land. Australia, Canada, and New Zealand now have several decades of experience of judicial, political and cultural reinterpretations of the meaning of landscape and history, of ownership and title, through long and often difficult processes of negotiation and litigation. At stake have been not only the legalities of ownership and title but also the contemporary relevance and power of a spiritual relationship to land not encompassed by conventions of modern title. The ways in which such traditions and perceptions now shape our conversations about who – or indeed what – can be party to the negotiations is reflected in the legal recognition of landforms, rivers, mountains, which I discussed in an earlier blog and which writer and academic Robert Macfarlane discussed in an article on the prospects of rights for trees and landscapes. This too appears, for example, in the work of the Société pour la Protection des Paysages et de l'Esthétique de la France (SPPEF) established in 1936 to protect the environmental and aesthetic values – though not necessarily indigenous values – of landscape.

On the second point – the role of mediators – it needs only to be noted that the conversations which are close to resolution have been led by Kingitanga mediators. It will be recalled that the original eviction from the land was in part precipitated by colonial authorities' objection to the owners' support for the emerging Kingitanga movement; and yet here we have mediators drawn from that same source. Unlike the modern conventions of neutrality and disclosure of any personal relationships, here are mediators – acceptable in practice to both the M?ori and commercial parties – leading the dialogue. At the very least, it's a reminder of the lessons from indigenous practice discussed by Rosemary Howell in an earlier blog.

Resolution is close but not quite there yet; it had been hoped that a resolution could be announced on the day marking the anniversary of the signing of the Treaty of Waitangi, February 6th but, while the M?ori King has lowered his flag at Ihum?tao, it seems that the dialogue still needs more time. The prospect of resolution marks a recognition by government and the commercial owners of the land that there can be a solution that acknowledges both formal legal rights and traditional rights. For that reason, the parties remain optimistic and, once settled, my guess is that this dispute will mark a significant step in both the blending of legal and traditional rights and the importance of those elders whose work, we should recall, served as part of the inspiration for the modern mediation 'movement'

"Any harm that might be done by people who cared nothing for the land, to whom it was not innately worthy but only something ultimately for sale, I thought, would one day have to meet this kind of integrity, people with the same dignity and transcendence as the land they occupied."

— *About This Life: Journeys on the Threshold of Memory* by Barry Lopez

**Postscript** (27th February)

Last night, Heritage New Zealand announced that it was bestowing the highest level of heritage

recognition on Ihum?tao by extending the boundaries of the already-recognised ?tuataua Stonefields to include the contested land. This is a largely symbolic act and will not bring the controversy to an end, nor does it grant further formal legal protections, which remain in the hands of the local government authority. It is, however, a significant affirmation of the historic and heritage value of the land.

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