INDIGENOUS RIGHTS – TREATY OF WAITANGI

RESORT TO MEDIATION IN MAORI-TO-MAORI DISPUTE RESOLUTION: IS IT THE ELIXIR TO CURE ALL ILLS?

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I COMMENTARY: INDIGENOUS PEOPLE – TREATY OF WAITANGI

Treaty of Waitangi discourse is trailblazing indeed, having morphed in a reactionary, *ad hoc* fashion from an initial nullity to unquestionably now, the foundational document of this country. This ranking seemingly asserts a New Zealand identity in which Maori rights are recognised, nestled in harmonious co-habitation with the rights of others who have since settled here. Yet this is merely a pretence that belies a volatile concoction of unresolved issues of relationship and rights manifest in the courtroom and on the marae, on the street, and most vociferously, in the media. We are nearing the end of our second century of nationhood founded on the Treaty, and the exact nature of linkages between the rights and responsibilities contained within the Treaty and the conceptual legal frameworks that operate independently of this Treaty, remain ill-defined and unreconciled.

Sir Ivor Richardson's contribution to the law has been immense, to Treaty jurisprudence, monumental. His indelible mark can be traced through the cases of the late 1980s, and through his time at the helm of the Court of Appeal, heralding a decisive shift in the structure of the legal debate. Treaty scholarship is the fortunate recipient of his sharp intellect and keen legal mind, as are so many other areas of the law to which this publication is devoted. We have much to be grateful for.

Kei a koe e te matua, e Tā Ivor Richardson, nei rā te mihi mō te whānui o tāu mahi kia whaiwāhi motuhake ai te Tiriti o Waitangi ki tēnei ao hurihuri. Kua roa koe e whakapau ana i tōu kaha ki tēnei mea te ture. Tēnā koe mō ngā hua e puta tonu mai ana.

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In April of this year, in fitting tribute to Sir Ivor Richardson, the assembled masses were 'treated' to three very stimulating and intellectually robust presentations on the Treaty, each speaker an expert in their own right and delivering on an aspect of the Treaty of their own selection. As presentations on the Treaty go, the levels of interconnection between papers, given the vast and multi-dimensional subject area, were surprisingly frequent, culminating in an exciting, piquant, and useful contribution to discourse on the Treaty. I accept responsibility, as timekeeper at the time, for cutting each speaker off midstream, and acknowledge that the audience was left with little more than a tantalising morsel. Fortunately, their papers are available in full in this publication.

The three speakers comprehensively traversed the Treaty story, ranging from the very broad and conceptual, to the more narrow and localised. The joining of theory with practice is profitable indeed, and the papers have complimented each other perfectly, in this way. Together the commentaries confirm yet again the complexity of issues arising out the Treaty. The nature of the rights and responsibilities remain inchoate, ill-understood, and arguable, open to manipulation by all. As we seek to achieve reconciliation of grievance and address the needs of Maori and Pakeha in this country, it seems that despite almost two centuries of co-existence, we have only just begun to define what our relationship is.

For my part, in this paper, following a brief overview of the commentaries, I reflect on a very specific dimension of this Treaty discourse: Maori-to-Maori disputes in the context of Treaty claim settlement, and consider mediation as a mechanism to resolve struggles between and within Maori groups. The provocation to take this journey has been the common thread through the three papers of relationship building and rebuilding. My analysis centres on two examples: the dispute resolution mechanisms of the Treaty of Waitangi Fisheries Commission, and the mediation in 2000 between Ngati Tama and Ngati Maniapoto. I conclude by sounding a tocsin that care should be taken against the indiscriminate use of mediation in the resolution of Maori disputes lest we believe, as if by some miracle, that it is the cure-all for all such ills.

A Professor Mason Durie "Universal Provision, Indigeneity and the Treaty of Waitangi"

It was purely coincidental, but entirely appropriate, that the first person to present was Professor Mason Durie, Professor of Maori Studies at Massey University and pre-eminent academic on the Treaty and matters Maori. The Treaty session happened to immediately follow the opening session of the conference on Human Rights, forming the perfect backdrop to Professor Durie's erudite paper exploring universality and the rights of indigenous peoples. His paper challenges the State and policy makers to address the inherent tension between rights of citizenship (such as equality and democracy) and indigeneity, the bundle of rights that Maori as indigenous peoples in Aotearoa might reasonably seek to assert. Add to the mix the Treaty relationship between Maori and the Crown, a composite of the theoretical legal arguments he argues, and you get a uniquely New Zealand melting pot that has yet to be fully scrutinised, tested

and implemented in New Zealand statute, policy, programmes, and processes in a way that is consistent with Maori values, and addresses needs within the Treaty relationship.

B Professor Benedict Kingsbury "Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law"

Benedict Kingsbury spoke to his paper published in March 2002,[1] in the Toronto Law Journal, which examined tensions in the legal discourse as to how to deal with Maori issues. He gave a masterful analysis by presenting numerous examples of the different logics behind five structures of argument: human rights, minority rights, self-determination, historical sovereignty, and indigenous peoples; each one of which can and is being applied to Maori. In effect, we are presented with five theoretical hooks on which to hang all manner of Maori issues. Whilst there are overlaps and conflicts between these legal bases, all these he argues, are interwoven with the threads of the Treaty, a unifying bond of sorts. Each conceptual framework variously establishes its own legitimacy under one or all of the articles of the Treaty, but at the same time exists, independently of it.

So is there a hierarchy within the approaches, with one concept favoured over another or does the perpetual competition between them illustrate that they are incapable of rigid categorisation? Benedict's work exposes these competing logics as a basis for analysis of what has been, till now, an *ad hoc* and reactive development of law and legal policy on Maori issues without clear demarcation and reconciliation between the Treaty, the Treaty relationships, and the conceptual legal frameworks at play.

C Judge Carrie Wainwright "Maori Representation Issues and the Courts"

Judge Wainwright speaks of Maori representational issues with a perspicacity borne of experience. While this area may be considered 'bread and butter' for Judges of the Maori Land Court, many of us have little knowledge of the intricacies of Maori-to-Maori disputing, familiar only to the extent that the media portrays it or from the trail of litigation that has beset every settlement that Maori and the Crown have ever sought to effect. The reasons underlying conflict of this scale are complex and Judge Wainwright adeptly illustrates the fundamental element of relationship, the impact of cultural, social and political loss, and the degradation of cultural norms and practices by way of the context of Maori representation disputes. The call for Maori interaction with the Crown and numerous other organisations, where previously there was very little, has forced groups to develop representational frameworks, which quite often bear little resemblance to the once strong indigenous internal political structures. Instead, Maori are required to measure up to the requirements of those with whom they are transacting. The stream of issues is interminable. Who do these representative bodies speak for? How do they conclude

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1 Benedict Kingsbury "Competing Conceptual Approaches to Indigenous Group Issues in New Zealand law" (2002) 52 U Tor LJ 101-134.

the shape and composition of their representative structure? For that matter, why should they be expected to entrust the resolution of 150+year old grievances into the hands of a fledgling Maori organisation, with little or no track record of representation. Judge Wainwright's paper is a candid and constructive dissection of the issues. Ongoing, mismanaged conflict at the fundamental level of representation threatens to derail Treaty settlements at every turn. She concludes, with reference to the expanded section 30 supervisory jurisdiction, on representation issues of the Maori Land Court,[2] that there is a need for commitment to developing mechanisms that facilitate the meaningful resolution of debilitating relationship disputes.

II RESORT TO MEDIATION IN MAORI-TO-MAORI DISPUTE RESOLUTION

These commentaries helpfully draw our attention to the nature of the Treaty relationship. I continue that theme, with a more narrowly focused exploration of inter- and intra-Maori disputing, and the enormous challenges it presents for dispute resolution mechanisms. This paper considers an alternative to the courtroom in the form of mediation, and whether therein, lies the prospect of identifying a panacea to all ills?

Until recent times, resort to the courts and the formal, adversarial nature of the courtroom has been the principal port of call for all manner of Maori dissatisfaction. While the authoritative independence of the judicial process and its accompanying safeguards of equality before the law are key tenets of the legal system in New Zealand, strict jurisdictional boundaries delimit justiciability, and the potential costs are great both financially and in terms of long term relationship between the parties. The legal paradigm is founded on a straightforward and clearly defined contest of rights. The rapid resolution of narrowly defined claims that fit the confines of the law is the primary marker of success and for disputants, selection as the 'winner' is the indicator of right.

Identity-based conflict sits at the heart of Maori disputing. The legal issues fashioned to fit the rights-based model of litigation are often a subterfuge for more basal, value-based concerns. I am a fifth generation descendant of grievance in Taranaki. The language I speak, the songs I sing, the cultural values I practice, all derive from a history of grievance. I am acutely aware that the core issues for resolution have much less to do with material restitution, in the form of land and resources, and are instead, inextricably linked to what is necessary to restore to my kin and myself, the legitimacy of my identity that up until this point has been denied. The loss is of identity. In my case, I call it the loss of *Taranakitanga*, the right to express myself fully as a member of Taranaki iwi. The resolution is therefore, in part, recognition of my mana (status, prestige, rights).

In representation terms, mana is the obligation to act for the betterment of your kin against all others, as necessary, preserving boundaries and assets, cultural capital and identity, and basically

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2 Under Te Ture Whenua Maori Amendment Act 2002.

making the 'right' decisions. In the context of massive cultural and material loss, many Maori bear the scars of generations forced to cultivate identities disconnected from their own. Values of mana and whanaungatanga (rights and responsibilities through kinship ties) are some of the key imperatives for Maori action even where groups of Maori are otherwise culturally weak. Though the people's understanding of the values may be elementary, its significance as fundamental to their cultural framework is not lost in a broader cultural sense. With this in mind, entrusting the grievance into the hands of a few representatives, with little if any experience, and where the vision for and expectations of the organisation are ill informed is just too dangerous. There is far too much at stake. The settlement and its benefits must endure well beyond the settlers' time on this earth. It is very easy, therefore, for positions, on representation or any number of other Treaty issues, to become intractable and for Maori to appear chary in giving their support. Put simply, they do not trust the process and they do not trust the people asserting a right to lead such an important task.

Enter mediation, and it seems we have a strong contender to fill the Maori conflict resolution void. Drawing on the expanded mediative jurisdiction of this year's amended section 30 as a recent example, mediation is arguably the vogue process of choice in the context of Maori-to-Maori disputes. Mediation is a process whereby disputing parties meet with an independent mediator in an informal and confidential setting to develop an enhanced understanding of the elements of the dispute through dialogue. The parties have the opportunity to design a process as to how these matters may be resolved, and may (though not always) arrive at an agreed resolution.

But what constitutes 'success' in mediation? In instances where parties do not agree to an outcome, the entire procedure is commonly described as a 'failure'. But notions of success vary between people and between processes, and what motivates and satisfies one may not compare in any way with the needs and satisfaction of another. The primary objective of the mediation may, in fact, simply be agreement as to what the dispute is and a process by which that may be worked through. A series of mediations or other dispute resolution forums may follow. It may be that success is found purely in the fact of an enhanced understanding of the other in contrast with the concrete and detailed determinations we expect from litigated disputes.

A Dispute Resolution in Allocation of Commercial Fisheries Settlement

Te Ohu Kaimoana, the Treaty of Waitangi Fisheries Commission (the "Commission") has, since early 1995, promoted dispute resolution in relation to interim arrangements for iwi participation in the commercial fisheries settlement, as an alternative to litigation in the Courts of ordinary jurisdiction. This was especially directed at the, at times, bitter wrangling within Maoridom over the Commission's model for allocation which led to the Commission and protagonists undertaking incessant litigation before the Courts in New Zealand including the High Court, the Court of Appeal, and the Privy Council. That litigation is still extant. New litigation is threatened.

Mediation mechanisms have now found their way into the August 2002 *Ahu Whakamua – Report for Agreement*, which sets out the latest model for allocation. The Commission has proposed a three-stage dispute resolution procedure requiring parties to a dispute to first endeavour to resolve it by agreement. If this is unsuccessful, then a *mandatory* attempt to resolve the dispute through formal mediation is required, and as a final measure there is a choice between a binding alternative dispute resolution mechanism or reference of the "matter" to the Maori Land Court for binding decision. In the original design, the dispute resolution mechanisms did not succumb to a mandatory hierarchy as is now proposed by the Commission.

At first glance, the compelling desirability of accessing mediation appears to suffer as a result of insisting that it be undertaken. There is an inherent danger of imposing process on people. Mediation is wholly unsuitable for some situations (domestic violence for example), and in all instances, one must investigate the needs of the context, and the parties, to determine what is appropriate. It is as important as the mediation itself. Yet this dispute resolution structure is consistent with emerging practice based on the Dispute Systems Design Process,[3] which permits the mandatory use of dispute resolution mechanisms, such as negotiation and mediation. The approach has two key elements. First the entire dispute resolution process commences with low cost (financial and relational), mandatory options, such as mediation, which must not derogate from the participants' rights in the dispute. This is geared towards generating dialogue. The second essential component is to ensure stakeholder buy-in. A mediative process that does not bring people along with it is just not going to achieve what it sets out to. It may look like a good idea to ensure that mediation forms part of the hierarchy of options but participants need to be persuaded there is value in being there, otherwise there is little incentive to cooperate, make concessions, or share openly within the mediation, when parties can hold out for the binding determination further down the process. Some groups have little idea of what mediation entails, let alone what it is, and is not, capable of achieving. When mediation is framed as mandatory, in the absence of stakeholder buy-in prior to mediation commencing, this compounds the already challenging and potentially difficult job of the mediator to wrench parties away from the competitive mindset of litigation or posturing preliminary to such litigation. This is also in direct opposition with the touchstone of mediation, that parties arrive at mutually agreed decisions on process, on objectives, on future dealings, and possibly even more substantive dimensions of the dispute, free of elements of coercion and other diktats.

The final option in the Commission's dispute resolution procedure, of referring the matter to the Maori Land Court for binding decision is new, and indeed an interesting proposal that would require amending legislation to implement. It does accord with the view that the Maori Land Court should now assume a more constructive role in respect of post-Treaty settlement asset

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3 See William L Ury, Jeanne M Brett, and Stephen B Goldberg *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Jossey-Bass, San Francisco, 1988).

protections, consistent with its revised role in section 30 mediations. The expansion of the Maori Land Court to a Treaty Court, with specialist jurisdiction, would provide a valuable contemporary and future jurisdiction for the Maori Land Court.

B Ngati Maniapoto, Ngati Tama and the Crown Mediation (2000)

The mediation between Ngati Maniapoto, Ngati Tama, and the Crown in 2000, referred to in Judge Wainwright's paper, is the first of only two mediations to have been conducted between Maori disputants in the context of Treaty claim settlement. By way of summary, Ngati Maniapoto placed a claim with the Waitangi Tribunal (the "Tribunal") objecting to the offer of redress to their southern neighbour, Ngati Tama, in the settlement of Ngati Tama's Treaty claim. Essentially, it was a question of overlapping boundaries and associated mana interests, with Ngati Maniapoto asserting the dominant claim of manawhenua to the area, in direct opposition to the negotiated redress package between the Crown and Ngati Tama. Chief Judge Williams of the Maori Land Court instituted mediation as the process to follow, and the parties confirmed their acquiescence following the second judicial conference presided over by the Chief Judge, in tandem with the two mediators, who would later conduct the mediation. The terms of reference specified the purpose of the mediation to be the development of a mechanism whereby Ngati Maniapoto would have their interests protected, while allowing Ngati Tama to proceed to settlement. The Tribunal made it clear that it was not to decide either parties' Treaty claims or to establish tribal boundaries. The two mediators were agreed and subsequently appointed: a Maori, steeped in reo and tikanga, and a Pakeha, expert in the field of conflict resolution. Their own account of the mediation has since been published.[4]

After several months of mediation, consisting of five or six meetings and many separate caucus sessions, a stalemate ensued and the parties retreated to entrenched positions. In the end, the tribes turned to the Tribunal for a default determination. The Tribunal in its report acknowledged the Crown's revision of the settlement offer to account for issues raised during the mediation such as the implementation of *non*-exclusive redress for sites within the most heavily contested area, and ultimately found in favour of the Crown's process and that the settlement with Ngati Tama should proceed. Many called the mediation a failure. By the usual non-mediative, adversarial standard of assessment, Ngati Maniapoto came out as the less favoured.

There are a number of interesting aspects to the conduct of the mediation that warrant special mention. Lawyers were consulted throughout the course of the mediation and participated actively in the process. On several occasions, parties sought early agreement on substantive and specific issues, but to no avail. Most significantly, the Crown, was a 'party' to the mediation, not merely the two disputing iwi, and thereby was present at all sessions. As with the two iwi, the mediators

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4 Colin McKenzie and Amster Reedy "A Treaty of Waitangi, Overlapping Claim Mediation: A Prospective Hindsight" (2001) 9 Resource Management 1.

met separately with representatives of the Crown prior to the commencement of the mediation 'proper', and then from time-to-time, as the mediation progressed.

The mediation 'key' does not fit every 'door'. One of the major criticisms of mediation per se is that it assumes that parties are entering on a level playing field and that the power dynamic is evenly placed. In most situations, but especially those with a cross-cultural element, this is just not the case. Where an imbalance exists, be it through lack of knowledge, the silencing of cultural voice, or limited access to resources, inequality disrupts those very things that mediation is lauded for. Put simply, where parties do not feel secure, where they do not trust the process, or where they feel uncertain as to what the consequences of their actions will be, they are encouraged to adopt 'safe', and more than likely uncompromising positions, often leading to a more entrenched separation than before.

By the time mediation commenced in March 2000, Ngati Tama had been in ongoing informal and formal dialogue with the Crown for more than five years. Furthermore, this cross claim was the only major stumbling block to the package being signed off and the fanfare of settlement signings commencing. Ngati Tama were well-versed, expert perhaps, in the language and intricacies of Treaty settlement, including the complex redress mechanisms which form part of a settlement package. In stark contrast, Ngati Maniapoto had not yet embarked on their research for their own Tribunal claim; the scope and legitimacy of their claim as yet unknown and in embryonic form. They had had little, if any exposure, to the technical and specialist language of process and redress in Treaty settlements. Effectively, Ngati Tama were, with the weight of their intimate relationship with the Crown, extensive experience of their own claim, and the pressure to keep the process moving, emissaries of the Government's Treaty settlements process.

Consistent with the knowledge gap was the character of the arguments doggedly adhered to by the parties. Ngati Maniapoto concentrated on an approach founded in tikanga (customary practices), in manawhenua, the broad bundle of rights to land arising out of the conquest of Ngati Tama. Ngati Maniapoto never really asserted interests in specific sites, a likely consequence of ill informed understandings of the detail of their claim, understandable given their limited involvement in the process thus far. In contrast, Ngati Tama based their claim on rights to particular sites, conforming in approach to the negotiated terms of the settlement redress and the directions of the Waitangi Tribunal. Ngati Tama made no calls on rights based on the concept of manawhenua, not surprising given the arguments of historical subordination from Ngati Maniapoto. Throughout the mediation, the parties presented their perspectives on two different levels from which there was little movement. This resulted, it appears, in a continuous sense of alienation, one to the other, and precluded meaningful engagement whereby a mutually acceptable dialogue, let alone a way-forward, could be achieved. In an effort to rectify the disparity in knowledge of the claims, the Office of Treaty Settlements commissioned David Young to produce an independent report on Ngati Maniapoto and Ngati Tama interests in the contested sites, centring on cultural redress items of the Ngati Tama package. It made little difference. Filling

gaps in the knowledge, and to that extent allaying fears, did little to address the crux of the matter: the age and stage in the settlement process.

The dominant narrative of the mediation was the rapid conclusion of Treaty claims. This particular mediation was but a tiny juncture in the Treaty settlement process, a significant, but small cog in the lumbering machinery that is settlement. The landscape for Ngati Tama was very different when they embarked on the process of settling their claim in the latter half of 1990s (following the completion of the Waitangi Tribunal phase in the form of the Taranaki Report), from what it is now. For Ngati Maniapoto, this was their first experience of the process but they in fact joined at the conclusion of someone else's. Did Ngati Maniapoto have a justifiable claim? Who knows. The research on their claim is yet to be completed and Tribunal hearings for them are years away. Nevertheless, whilst they lacked what was necessary to refute the claims of Ngati Tama, the mere existence of a threat to their own, and to their mana was enough. Regardless of the merits of their respective claims, the fundamental and neglected issue throughout the mediation was that both iwi were at completely different stages in the gigantic, amorphous machine that is Treaty settlements. Mediation was somehow thought to be able to fix the problem but instead, was hamstrung from the starter gun by the lack of cognisance and attention to what the real problem actually was.

Most of us are 'green' to mediation, not just Maori. Like most, we could be forgiven for confusing it with any other dispute resolution mechanisms we have experience of, most likely the courtroom setting presided over by a Judge. That the views of the mediator are non-determinative, and ultimately, that it is for the parties to the dispute to choose how the mediation will conclude is foreign and many, in my experience, approach mediation initially as a trial by a different name, with the mediator viewed as an arbitrator with a few less teeth. Ensuring clarity as to reasonable expectations from the process is in all cases an ongoing challenge for any mediator. The mediation between Ngati Tama and Ngati Maniapoto began with a formal judicial conference with the presiding Chief Judge of the Maori Land Court stating there that, in the event of no agreement the Tribunal would make a decision, not dissimilar in design from the reframed dispute resolution mechanisms of the Treaty of Waitangi Fisheries Commission. Commencing with formal proceedings and a determinative default mechanism looming, would have made it extremely difficult to extirpate the misconception that agreement on the core issues was not the primary objective. Persuading the mediator to agree with your point of view to influence the inevitable final determination would seem to be a central element in your strategy. The resort to legal counsel during and outside of the mediation exemplifies the lack of trust, and power inequalities, particularly in relation to knowledge and misunderstanding as to how the mediation was different from court action.

The mediators acknowledge[5] that a pre-conference gathering would have been more suitable following an initial phase of separate meetings with the individual parties to discuss expectations, concerns, to explain the process of mediation and the mediator's role. I agree. This would be consistent with the point made earlier to the need for buy-in at the earliest possible point. Uncontaminated by the views and assessments of other parties, including in this case the Crown, they are able to establish clearly what the mediation can and cannot achieve and a better sense of the mediator's function to mediate. The joint pre-mediation conference that follows then, is the opportunity to build relationships, to agree the process and objectives, to clarify the roles of all participants, and to reality check the expectations of the mediation. This, it appears, did not occur. Follow up individual caucusing is also valuable, although I accept that in its own way it has the potential to disrupt momentum and encouragement retrenchment, but it is the mediator's role to guide the process on the basis of agreed guidelines as to when caucusing is to occur and for what purposes.

Efforts by parties to the mediation to arrive at early determinations on substantive issues before, during, and after the process of dialogue are further indicators of misunderstanding in the Ngati Maniapoto and Ngati Tama mediation. Expectations of the process were raised far above what was ever likely to be achieved. The mediators acknowledged[6] that values, mana, and identity were central to the mediation and were addressed too late in the process to be properly incorporated. I suggest that it is unlikely that these were ever resolvable by this mediation. Such great hopes. Mediation and mediators are ill-equipped to deal with fundamental non-negotiables in a context where parties are at different stages in the settlements process, where the mediators lack a combination of cultural competencies to navigate complex cultural issues and where the mediation of itself is difficult. Iwi were disinclined to share because talking was not the outcome the broader Treaty process was demanding, nor in their best interests due to a perceived consequential vulnerability given what they felt the process was aimed at. The expectation that this mediation would produce 'win-win' outcomes of the sort that many promoted were totally unrealistic. Dialogue? Sure. Conclusion? Forget it.

The two mediators, as a team, were expert, respectively, in tikanga Maori and mediation, necessary prerequisites, one might expect. Each possessing a combined set of skills would have been preferable and without which, the risk is that what emerges might. be construed as tokenism, a mihi (greeting) here, a karakia (prayer) there. Their commendable endeavours were plagued by decisions in the process that, in retrospect, emanated from gaps in their respective competencies and ultimately exacerbated the polarisation between the parties. Maori are not one homogenous group with a single set of ideas. Consideration of the conflict in terms of the cultural, tribal, and historically influenced worldviews of the Maori parties is absolutely crucial lest we fall into the

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5 McKenzie and Reedy, above, 2.

6 McKenzie and Reedy, above, 4.

trap of incarcerating the parties within the confines of the dominant narrative. As such, Maori disputes are not immediately amenable to orthodox 'problem-solving' techniques. Pure, unadulterated mediation skills are inadequate. There is no template for Maori-to-Maori disputing. Nor is a rudimentary knowledge only of the background, history, or cultural context acceptable on the part of the mediators. The capacity demands on mediators in intra/inter-iwi mediations are significantly greater. Making use of an elicitive approach whereby participants develop a model according to their own traditional approaches to dispute resolution, making use of metaphor, symbols, and stories, rather than prescribing how things are done, demands that mediators have a full complement of competencies necessary to facilitate this sort of discussion. This articulation of conflict is unintelligible to those with little, if any Maori cultural framework. The presence of a Maori is not going to equip the other with the skills with which to make decisions on the spot based on the direction the mediation is taking. Working out how to shift parties from oppositional approaches requires exceptional mediative skills.

The mediator's job is to work with the participants to produce consensus, but in situations of inequality, it invariably ends up reflecting the 'dominant narrative', the Treaty Settlements narrative. Ngati Maniapoto's claim was a hiccup in that process and Ngati Tama were quite understandably uptight to only now be subjected to such scrutiny, and at the 'eleventh hour'. The issues on the table, the external pressures, and the uncertainty of what this mediative process was going to achieve, left both parties, but especially the weaker party, feeling coerced and under pressure to comply. In this situation, parties do not trust or care for the process, nor therefore, do they trust the mediators. The assertions of neutrality were not persuasive.

If we are to get it right and achieve equitable and durable outcomes for the settling tribes, for the Crown and for tribes with cross-claims, then the Treaty settlements process needs revision. There are likely to be many more overlapping claims, disputes over current and concluded settlements, and conflicts where disparity of resources and stage in the process are relevant. In instances where we seek to remedy failings of 'process past', then the reality of 'process present' as it impacts on the mediation forum must be confronted. Mediation will be nothing but perfunctory, an artificial hand-holding exercise to satisfy critics that something should be done to quieten the voice of dissenters. If not properly designed, reality checked, and mediated by those with the requisite set of skills to do so, mediation is at best an opportunity for parties to communicate where once they would not; at worst, further abrasion of a relationship already intensely polarised.

This is not a judgment on the relative merits of the Ngati Maniapoto/Ngati Tama claims. Rather, I wish to point out the collision of processes and disparities within the greater context of Treaty settlement. There was never any possibility of slowing things down, of establishing a dialogue aimed at working constructively and respectfully through the issues of mana and rights. The bottom line was that it was just too late. How can one address cross claims when over five years have been invested in negotiations run on a different playing field. It was unfair to both parties, whichever way you turn. The proper place for these matters to be addressed was early in

the process. This did not happen. Now it seems, in a reactive fashion, we turn to mediation as the less confrontational way of massaging out the knots of intransigence and opposition gushing forth from a hastily constructed settlement process. There are dangers at every turn.

III CONCLUSION

Mediation is not a cure-all. It is one way of establishing constructive dialogue between parties where otherwise they would not have engaged. With the benefit of hindsight, it seems easy to pick the flaws and I commend the mediators in the Ngati Tama/Ngati Maniapoto mediation for their frank and honest review of what occurred. This exercise is absolutely crucial, in the absence of any substantive research in the area, so that we may build on our limited experience and avoid repeat performances and perceived failure. I raise this cautionary note to guard against mediation becoming nothing more than a sham, a useless, showy object, appended randomly to the Treaty and other intra-Maori dispute resolution processes to rectify deficiencies in the greater Treaty machinery. Just as important in this analysis is the reminder that it is not good for the process of mediation either.

All this takes place within the broader context of the Treaty, and how we define the relationship of Maori and Pakeha in a contemporary setting. The question remains whether the door is open for conversations between institutions, experts, and law-makers about how to define and reconcile rights and responsibilities under the Treaty of Waitangi, and do so in a way that does not rip people apart. Each of the papers has given us an immensely valuable insight into the complexity of these matters. The challenge for every one of us is how we respond.