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WALKING TOGETHER - INDIGENOUS ADR IN LAND AND RESOURCE DISPUTES

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Contents

ABSTRACT

Disputes between Indigenous peoples and the Crown over lands and resources arise from deeper disagreements about the sources of law applicable to those disputes. Constitutionally recognized Aboriginal rights and their common law doctrines—such as the duty to consult—do not reflect the full scope of Indigenous legality and authority. This article explores the value of Alternative Dispute Resolution (ADR) in bridging this divide. It suggests that an appropriate process in this context is one that embraces the legal traditions, values and protocols of the Indigenous party involved. As a flexible and party-driven process outside the boundaries of the common law, Indigenous-led ADR responds to these deeper disagreements and manages conflict through negotiation rather than litigation. In doing so, it advances a broader project of legal and cultural pluralism grounded in respect for difference.

ABOUT THE AUTHOR

Don Couturier is a judicial law clerk at the Court of Appeal of Alberta and recently completed law school and a Master of Public Administration at Queen's University. In the fall, he will clerk for Justice Kasirer at the Supreme Court of Canada. During law and graduate school Don worked for Indigenous governments at a boutique law firm specializing in Aboriginal law. He previously served as a policy advisor for the Government of the Northwest Territories. Don was born and raised in Yellowknife, Northwest Territories, and draws on his experience working for and alongside Indigenous peoples in offering the comments contained in this article. The views expressed are his alone and were drafted before his work at the courts commenced.

WALKING TOGETHER: INDIGENOUS ADR IN LAND AND RESOURCE DISPUTES[1]

Conflict between Indigenous peoples, government and private industry arises often in the context of land and resource management. Whether the issue relates to Aboriginal title, consultation on a proposed project, or other activities implicating Indigenous interests, lands and resources lie at the centre. Historically, this has meant, and continues to mean, struggles to assert who owns the land and how it should be used. With the recognition of Aboriginal rights in the *Constitution Act, 1982*, the Supreme Court of Canada developed legal tests to determine whether such rights exist and have been upheld.[2] While these tests dictate the course of litigation, their underlying assumptions—for example, that Aboriginal title exists as a burden on the underlying radical title of the Crown,[3] or a particular treaty interpretation based on common law principles of contract[4]—do not necessarily reflect how Indigenous peoples view their inherent rights as sovereign peoples. When it comes to resolving conflict outside the courtroom, progress requires a more flexible, nuanced and complete understanding of Indigenous-Crown relations. Trials are time-consuming, costly, and choose winners and losers. Negotiation better serves.

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[1] Don Couturier, BA (Victoria), JD/MPA (Queen's); Judicial Law Clerk, Court of Appeal of Alberta (2020-2021); Judicial Law Clerk for Kasirer J, Supreme Court of Canada (2021-2022). Views expressed are mine alone and have not been influenced by my work at the courts. Commentary derives from my experiences working for and alongside Indigenous peoples both outside and inside government, as well as my experiences growing up in the Northwest Territories, a territory with strong Indigenous governance institutions. In 2018, an earlier version of this paper won the James L. Thistle award from the Canadian Bar Association in the category of Alternative Dispute Resolution.

[2] Among the most notable decisions include *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 285; *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289; *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648; *Delgamuukw v British Columbia*, [1997] 2 SCR 1010, 153 DLR (4th) 193; *R v Marshall*, [1999] 2 SCR 465, 177 DLR (4th) 513; *Haida Nation*, 2004 SCC 73; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44; and more recently, *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40; *Mikisew Cree First Nation v Canada (governor General in Council)*, 2018 SCC 40. See also Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation and Judicial Discretion" (Vancouver: *Centre for First Nations Governance* 2002) at 4. This essay was part of a series of research papers commissioned for the Delgamuukw/Gisday'wa National Process.

[3] *Tsilhqot'in Nation*, *supra* note 2 at paras 69-72.

[4] *R v Badger*, [1996] 1 SCR 771 at para 76, 133 DLR (4th) 324. For a different perspective on treaty relationships, see Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing, 2007).

Alternative Dispute Resolution (ADR) provides promising mechanisms for managing conflict in these areas, but only if designed appropriately. Due to the complex issues, histories and cultural differences defining Indigenous-Crown relations, boiler-plate approaches to ADR will fail. To this end, this paper serves as a primer on common misunderstandings that interrupt negotiations. It sketches several broad components of mutually respectful relationships through dispute resolution. The key themes are as follows. Indigenous-led ADR, as I will refer to it, must be shaped by the legal traditions, values, and processes of the Indigenous group involved. Indigenous-led ADR can advance reconciliation by fostering legal and cultural pluralism based on mutual respect and recognition. Acquiring a self-initiated appreciation for Indigenous cultures is perhaps the most important first step for non-Indigenous parties.[5] Like any dispute resolution process, understanding the perspectives in play shows respect and creates opportunities for collaboration. Armed with understanding, humility, and respect for difference, one better understands the common pitfalls and how to avoid them. I add that I claim no expertise in Indigenous cultures; rather, my comments are intended for non-Indigenous practitioners seeking a greater understanding of the dispute resolution and negotiation context.

To develop these themes, I first provide some historical and legal context on land and resource conflict between Indigenous peoples and the Crown. I then address why mainstream ADR inadequately accounts for this context and develop suggestions for approaching Indigenous-led ADR in a positive way. I conclude with a broader discussion of the importance of involving Indigenous institutions in the design and application of ADR, and offer a vision for the future.

Perhaps more provocatively, I will suggest that a relationship-centred approach solves a chicken-and-egg problem. Indigenous-led ADR not only manages existing conflict, it also prevents conflict to begin with. Much debate in this area concerns what "consultation" requires to satisfy the legal standard. From a dispute resolution practice perspective, this is the wrong question. Where a relationship-centred approach guides, the requirements for consultation take care of themselves. The more pressing question concerns what it takes to instill healthy and mutually respectful relationships. When I refer to Indigenous-led

[5] One of my favourite articles discussing the shortcomings of Canadian legal concepts and law school education in capturing, communicating and teaching Indigenous perspectives on law is Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847. I encourage readers to review this thoughtful scholarship, and especially to access its bibliography, which is a great place to start for those seeking to undertake self-initiated study.

ADR in the lands and resources context, then, consultation and dispute resolution are not mutually exclusive. Rather, consultation is a dispute resolution process itself. For the purposes of this paper, Indigenous-led ADR thus refers to both the resolving of a dispute once headed for litigation (retroactive) *and* the process of consultation itself, which I view as a feature of healthy treaty relationships that helps to avoid conflict in the first place (proactive).

CONTEXT: EUROPEAN COLONIZATION, INDIGENOUS LAW AND LAND AND RESOURCE CONFLICT

Contemporary struggles for lands and resources are rooted in land dispossession and colonization. This phenomenon is not just historical; conflict continues to simmer as a result of the ongoing preservation of this power structure through economic and cultural domination. Recent disputes over pipeline construction and lobster fisheries are just the latest installments in this centuries-old story.[6] A full analysis of these forces is beyond the scope of this paper, but acknowledging their sources and continued influence is fundamental to understanding both the promise and pitfalls of ADR in this context.

A brief, interdisciplinary narrative of Indigenous-Crown land and resource conflict

Concepts of Indigenous property and tenure usually exclude the right to sell land to outsiders, diminish lands and resources, or otherwise expropriate land for private gain without considering reciprocal obligations. Yet the written texts of many treaties claim an outright surrender of Aboriginal title to the Crown, a feature often disputed by Indigenous signatories to those treaties.[7] Until Aboriginal and treaty rights were affirmed under section 35 of the *Constitution Act, 1982*, the Crown had common law legal authority to extinguish Aboriginal title.[8] During this period, Indigenous peoples experienced a systematic carving out of their traditional territories through government policies and laws aimed

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[6] Chantelle Bellrichard and Jorge Barrera, "What you need to know about the Coastal GasLink Pipeline Conflict", *CBC News*, February 5, 2020, online: https://www.cbc.ca/news/indigenous/wet-suwet-en-coastal-gaslink-pipeline-1.5448363 [perma.cc/6SXY-CR69]; Angela D'Elia Decembrini, "The Marshall Decision and Mi'kmaq Commercial Fishing Rights: An Explainer". *First Peoples Law*, October 8, 2020, online: https://www.firstpeopleslaw.com/public-education/blog/the-marshall-decision-and-mikmaq-commercial-fishing-rights-an-explainer [perma.cc/E6TW-5BXS].
[7] Kent McNeil, *supra* note 2.
[8] *Ibid*.

at dispossession, expropriation and relocation. Indigenous laws were (many would argue are still) subordinated or outright ignored.

After 1982, Canadian courts acknowledged Aboriginal title and established the Crown's duty to consult on activities that engage section 35 rights.[9] But the crucial point is this: because Indigenous laws existed and applied prior to European contact, section 35 is viewed by some as a Eurocentric prescription of Aboriginal rights that fails to reflect the full scope and quality of Indigenous legality.[10] In other words, for many Indigenous peoples, such rights are not defined by the incomplete vision recognized under common law. Rather, Indigenous law gives meaning to these rights, and has since time immemorial, separate and distinct from western recognition.

For this reason, Indigenous peoples often feel that consultation on resource development is inadequate insofar as it relies on what section 35 consultation requires. According to Sarah Morales, this tension stems from a failure to recognize that Indigenous laws are the true source of Aboriginal rights and title, and the unequal bargaining power that results.[11] Instead, the concepts underpinning Free, Prior and Informed Consent (FPIC) better reflects meaningful consultation.[12] FPIC holds that Indigenous peoples have the right to be fully informed and to engage with, and grant or withhold consent to, development projects within their lands that impact their resources and/or ways of life.[13] FPIC is a central feature of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), an instrument of international law

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[9] *Ibid*. See e.g. *Delgamuukw*; *Tsilhqot'in*; *Haida Nation*; *Clyde River*, *supra* note 2.
[10] Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation Without Respect? Section 35 and Indigenous Legal Orders" in Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 77; Christine Zuni Cruz, "Law of the Land—Recognition and Resurgence in Indigenous Law and Justice Systems" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford, UK: Hart Publishing, 2009) 315; Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993;
Hannah Askew et al, "Between Law and Action: Assessing the State of Knowledge on Indigenous Law, UNDRIP and Free, Prior and Informed Consent with Reference to Fresh Water Resources" (Vancouver: Decolonizing Water Project 2017) at 16.
[11] Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in Jennifer Goyder, ed, *UNDRIP Implementation: Braiding International, Domestic, and Indigenous Laws – Special Report* (Waterloo: Centre for International Governance Innovation, 2017) at 65.
[12] James (Sa'ke'j) Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing 2008) at 86–87.
[13] Article 32, *United Nations Declaration on the Rights of Indigenous Peoples*.

ratified by countries across the world. Canada has explicitly endorsed UNDRIP, and recently stated that it intends to implement the agreement through mirror legislation that will reflect its principles.[14]

Mutually respectful relationships supply the foundation to FPIC. Since FPIC is premised on the idea that Indigenous peoples remain sovereign and self-determining, it obviously provides one way to approach dispute resolution in a manner sensitive to the historical and contemporary concerns of Indigenous peoples. It has potential to facilitate co-existence between Canadian law and Indigenous legal orders in ways that uphold a legitimate and defensible vision of reconciliation. As things stand, conflict over land and resource simmers somewhere in the gulf between the Canadian legal concept of consultation (section 35) and the expectations of Indigenous peoples located in the doctrine of FPIC.

Canada's legal landscape allows for dispute settlement grounded in Indigenous law

Although there are clear tensions between Canadian and Indigenous laws, Canada's legal landscape allows for ADR models that incorporate both Indigenous and western approaches to dispute resolution.[15] For example, the Supreme Court of Canada has confirmed that because the common law did not alter Indigenous law, Indigenous customs and conventions give meaning and content to Aboriginal legal rights.[16] To be sure, there are notable points of incommensurability across legal traditions that render harmonization within

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[14] Canada, "Implementing the United Nations Declaration on the Rights of Indigenous Peoples", Department of Justice Canada, 2020, online: https://www.justice.gc.ca/eng/declaration/un_declaration_EN1.pdf [perma.cc/424H-N5GK]; John Paul Tasker, "Liberal government backs bill that demands full implementation of UN Indigenous rights declaration", *CBC News* (November 21, 2017), online: http://www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037 [perma.cc/KW9X-F36R].

[15] See my "Judicial Reasoning Across Legal Orders: Lessons from Nunavut" (2020) 45:2 Queen's Law Journal 319, discussing the promises but also incommensurabilities between Canadian and Indigenous laws at 334-342.

[16] John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:1 McGill LJ 629 at 636, citing *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193; *Guerin v The Queen* [1984] 2 SCR 335, 13 DLR (4th) 321; *Calder et al v Attorney General of British Columbia* [1973] SCR 313, 34 DLR (3d) 145. Despite what the Supreme Court has pronounced, many Indigenous commentators would dispute that the common law's articulation of Aboriginal rights and title reflected this proclaimed vision. *Supra* note 10.

Canadian law difficult and perhaps at times undesirable.[17] But this adds to the appeal of Indigenous-led ADR, because as an alternative to court-driven processes, they are flexible and capable of custom design to reflect local realities. They are not constrained by the various principles and presumptions underlying the common law.

Nevertheless, Canadian courts recognize the existence of Indigenous laws. Canadian courts have acknowledged that Indigenous and non-Indigenous legal principles can co-exist without conflict.[18] As recognition of the inherent jurisdiction and authority of Indigenous laws and institutions increases, Indigenous-led ADR will be integral to navigating conflict between Indigenous and non-Indigenous parties. Of course—and I think I have been clear on this point—Indigenous peoples do not need institutional recognition to apply and enforce their laws. My point is that where such recognition comes from a place of sincerity and respect, it creates opportunities for dialogue and signals a societal disposition towards greater pluralism and coexistence. If designed appropriately to uphold and apply Indigenous customs and conventions, Indigenous-led ADR can become a useful and flexible mechanism for harmonizing Indigenous and non-Indigenous perspectives along the fault lines underlying Indigenous-Crown disputes.

Canada has a moral obligation to respect Indigenous law in dispute settlement

Canada also has a moral imperative to explore ADR models that capture the spirit of nation-to-nation partnership, mutual recognition and understanding, and the interaction of Indigenous and western legal traditions. This imperative arises from historical, yet evergreen treaty promises between the Crown and Indigenous peoples that pre-date confederation. A clear example is the Two Row Wampum, a 1613 treaty between the Haudenosaunee and Europeans often cited as an ideal framework for modern treaty-making.[19] The Two Row

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[17] See Alan Hanna, "Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape" (2017) 51:1 UBC L Rev 105 at 108.

[18] Borrows, *supra* note 16 at 638, citing *Canadian Pacific ltd. v Paul*, [1988] 2 SCR 654 at 673, 54 DLR (4th) 487 and *Delgamuukw v British Columbia (AG)* (1993), 104 DLR (4thh) 470, 30 BCAC 1 at 532. For an excellent article on the continuity of Indigenous laws within Canadian common law and constitutional law, see Mark D Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill LJ 711. But there may be limits: Couturier, *supra* note 15.

[19] John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press 2000) 155; see generally John Borrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University

Wampum promised mutual respect and non-interference between its Indigenous and European signatories, both in terms of way of life and ability to self-govern. But litigation in lands and resources disputes signals the Crown's unwillingness to negotiate and uphold these promises in modern disputes. Dispute resolution that embraces principles of legal and cultural pluralism, grounded in concepts such as FPIC, can effectively address the sources of these conflict directly, while also strengthening Indigenous institutions and facilitating cross-cultural understanding.[20] This is because modern negotiations and dispute resolution do not occur in a vacuum; they are necessarily informed by the history of treaty making and broken promises, whether or not this is acknowledged by the Crown.

In its current form, the duty to consult does not require agreement. Contested state activities may survive a legal challenge even where opposition continues, provided baseline consultation requirements are met or the justification test set out in *R v Sparrow* in satisfied.[21] This feature of the framework is particularly untenable to some.[22] Shin Imai puts it this way:

> The community feels powerless. It is difficult to trust a process of consultation when they know that no matter what happens, the final decision is not in their hands. It is through recognition of the necessity of consent that Indigenous communities will have power that can be a balance to the superior economic power of the mining company and the superior political power of government.[23]

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of Toronto Press 2006). For an attempt to theorize and provide practical guidance on how historical treaties can inform and overcome roadblocks in modern-day treaty-making, see my "Negotiating the Dehcho: Protecting Dene Ahthít'e Through Modern Treaty-Making (Toronto: Gordon Foundation, 2020), online: https://gordonfoundation.ca/wp-content/uploads/2020/04/Don_Couturier_JGNF_2018-2019.pdf [perma.cc/9WQ3-ZJV2].

[20] Borrows, *supra* note 16 at 655: "First Nations law has an important place in a broad intercultural context".

[21] See e.g., *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34. The FCA dismissed the appeal of the Cold Water First Nation, who sought to challenge the government's approval of the Trans Mountain Pipeline Expansion Project. Despite vigorous opposition from several Indigenous nations, the Court held that Canada had met its consultation obligations under the duty to consult. See paras 40, 41, 54. For an example of the application of the *Sparrow* justification test, see *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2018 BCSC 633.

[22] Shin Imai, "Consult, Consent and Veto: International Norms and Canadian Treaties" (2016) 12:5 Osgoode Hall Law School Legal Studies Research Paper Series, Research Paper No 23 at 17.

[23] *Ibid* at 13.

As the literature makes clear, authority over lands and resources was acquired illegitimately through dispossession and colonization, and this injustice is reinforced with every unilaterally designed and implemented project. Understanding where this sense of unfairness comes from is critical. Failure to acknowledge these historical power dynamics also results in litigation, as we saw in the Supreme Court of Canada's decision in *First Nation of Nacho Nyak Dun v Yukon*,[24] wherein the Court held that the Yukon government had breached the honour of the Crown when it disregarded the Na-Cho Nyak-Dun's contributions to the Peel Watershed Regional Land Use Plan.

Some quarters of private industry have begun to recognize that consent-based relationships save money and reduce conflict, even if it requires serious compromise. Industry has strong incentives to obtain the full consent of impacted communities before proceeding with a project.[25] The costs of conflict with Indigenous groups are significant, and can result in serious impacts to companies, including suspensions and project closures, not to mention legal fees. Failure to adequately consult may lead to injunctions and other litigation. In response to *Tsilhqot'in Nation v British Columbia*,[26] which recognized the Tsilhqot'in's Aboriginal title to possess and own titled lands and resources, several industry organizations developed engagement guidelines driven by principles of FPIC.[27] Industry is quickly moving toward a broader concept of consultation—it is not a far stretch to develop complementary ADR mechanisms alongside these procedures.

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[24] 2017 SCC 58.

[25] For a comprehensive collection of scholarship analyzing emerging trends in agreements between Indigenous peoples and private industry, see Ibironke T Odumosu-Ayanu and Dwight Newman, eds, *Indigenous-Industry Agreements, Natural Resources and the Law* (New York: Routledge, 2021). For perspective on the complex gender and social dynamics between extractive industries and Dene communities in the Northwest Territories, see Itoah Scott-Enns, Elexeta Edets'eeda: Strengthening Support for Tłı̨chǫ Mining Families (Toronto: Gordon Foundation, 2015), online: https://gordonfoundation.ca/wp-content/uploads/2017/03/JGNF_2015_Itoah_TlichoMiningFamilies_FINAL.pdf [perma.cc/B8H4-ZDGX].

[26] *Supra* note 2.

[27] Boreal Leadership Council, *Understanding Successful Approaches to Free, Prior and Informed Consent in Canada. Part I* (Victoria: The Firelight Group 2015). See also Ginger Gibson and Ciaran O'Faircheallaigh, *IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements* (Toronto: Gordon Foundation, 2015), online: https://gordonfoundation.ca/wp-content/uploads/2017/03/IBA_toolkit_web_Sept_2015_low_res_0.pdf [perma.cc/6BGV-TCY5].

THE WAY BACKWARDS: WHY MAINSTREAM ADR APPROACHES ARE INSUFFICIENT

Can traditional, mainstream approaches to ADR operate effectively in this context? Empirical studies suggest that mainstream models of dispute resolution, particularly facilitative and determinative approaches, may alienate Indigenous parties.[28] According to this research, in an intercultural context, mainstream models may favour more economically powerful participants and inadvertently favour dominant cultural perspectives.[29] Mediators often represent the dominant culture, styles of mediation are considered formalistic, and the process remains firmly embedded in the western legal system, all of which can have an alienating effect.[30] Some dispute resolution scholars, such as Bernhardt and Kelly, have proposed an "Indigenized" western ADR model that incorporates culturally appropriate methods of resolving disputes.[31]

Caution is needed here. ADR can be designed in ways that honour Indigenous institutions and knowledge, but efforts will fail if they offer only token acceptance of Indigenous systems, but the overall process remains unchanged. A distinction between "Indigenized" ADR and Indigenous-led ADR should be drawn. Rather than introducing Indigenous cultural elements to the mainstream process, a more fundamentally different and context-specific model is needed that embeds both Indigenous and non-Indigenous dispute resolution mechanisms into the process itself.[32] This is a difficult task. As Bell observes on the subject, "it remains unclear how best to avoid co-optation of the processes…how these would interact with existing legal mechanisms, and how to operate this system within the limits of Canadian law as it currently exists".[33]

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[28] Sarah Ciftci and Deirdre Howard-Wagner, "Integrating Indigenous Justice into Alternative Dispute Resolution Practices: A Case Study of the Aboriginal Care Circle Program in Nowra" (2012) 16:2 AILR 81 at 83.
[29] *Ibid*.
[30] *Ibid*.
[31] *Ibid*.
[32] I recognize it is much easier to discuss these concepts in the abstract than to find workable and clear solutions applicable in practice. For an example of how "co-governance" models and other institutional shifts might take into account Indigenous laws and governance in a real-world lands and resource management context, see my analysis on the Dehcho process in the Northwest Territories in *Negotiating the Dehcho*, *supra* note 19.
[33] David Kahane and Catherine Bell, "Introduction" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 2.

A one-size-fits all template will not work; the process must be driven by the unique history and concerns of the parties. Nevertheless, some common misunderstandings can complicate the process. As someone without expertise in Indigenous cultures, I cannot, nor should I, suggest specific protocols. The remainder of this paper will instead provide some foundational guidance by outlining some of the most common pitfalls. Most of these misunderstandings can be avoided through an approach grounded in humility, listening, and respect for difference.

The cultural and political element

Intercultural competence is critical but often overlooked.[34] Mediators may be trained to approach disputes from the perspective of the dominant culture, using off-the-rack methods designed to encourage efficiency of process, but which "work to embed cultural values in the process that do not fit well to the [Indigenous] context".[35] Michelle LeBaron observes that dominant cultural leadership is marked by jealously guarding your reputation and status, analyzing resources and opportunities, making others aware of their dependence on you, and creating a web of relationships to support power.[36] But leadership qualities valued by Indigenous communities may be different. LeBaron cites the ability to draw on your own personal resources as a source of power, an emphasis on generosity and non-materialistic resources, taking risks needed for the good of the community, being modest and funny, and using humour to deflect anger.[37]

Beyond the interpersonal, deeper cultural differences can interfere. Dominant western approaches follow a general template that involves each side making its case before a neutral third party, who, in the case of evaluative mediation or arbitration, will objectively suggest or decide a just settlement.[38] In mediation, this involves a back-and-forth compromise facilitated by a neutral third party who manages the process towards a negotiated settlement. According to David

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[34] Michelle LeBaron, "Learning New Dances: Finding Effective Ways to Address Intercultural Disputes" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 16.
[35] *Ibid*. See also Jeanne M Brett, "Culture and Negotiation", in *Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions Across Cultural Boundaries* (San Francisco: John Wiley & Sons, 2007) at 25, 30.
[36] *Ibid* at 24.
[37] *Ibid*.
[38] David Kahane, "What is Culture? Generalizing about Aboriginal and Newcomer Perspectives" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 29.

Kahane, these methods have "deep roots in western cultural, legal and philosophical traditions…[and are]…closely tied to political legitimacy".[39] ADR processes become an expression of political legitimacy in themselves, and so must properly account for historical grievances in play.

As Kahane notes, from the point of view of Indigenous struggles for survival, equality and self-determination, "this dominant western account of justice seems deeply corrupt".[40] Kahane critiques what he calls the liberal narrative of justice, stating that "accounts of justice brought by European arrival often explicitly excluded Aboriginal peoples from full membership in the political community within which justice was to prevail; liberals have deemed Indigenous peoples beyond the scope of liberal justice: too savage, insufficiently settled, unreasonable".[41] Culturally driven concepts of justice may further entrench conflict by ignoring how Indigenous perspectives understand justice in the context of land dispossession and colonization.

For Kahane, fairness—and its role in intercultural dispute resolution—is rooted in particular cultural traditions, rather than a transcultural definition of reason, interests and rights.[42] Cultures exist in relation to one another, in contexts shaped by power,[43] which, in the context of Indigenous-Crown relations, implicates the colonial power to coerce, dispossess, rule, and define the scope and content of Aboriginal rights within this framework. In other words, "treating Aboriginal claims as properly resolved within the supposedly neutral procedures of an existing nation state already reiterates historical injustices that ought themselves to be in question".[44] To successfully counter these dynamics, then, ADR strategies can benefit where Indigenous laws and methods of dispute resolution operate alongside and in equal measure to western traditions.

The spiritual and philosophical element

Land disputes may be rooted in fundamental divergences between Indigenous and non-Indigenous relationships with the environment. Failure to recognize and navigate these differences may lie at the core of parties' inability to resolve conflict. For example, rich and varied stories, laws and customs often express

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[39] *Ibid*.
[40] *Ibid* at 30.
[41] *Ibid*.
[42] *Ibid* at 31.
[43] *Ibid*.
[44] *Ibid*.

the centrality of land, water and animals to Indigenous peoples.[45] This contrasts with government desire to harness and develop natural resources for economic gain, and of course, the desire of private industry to engage in extractive activities for profit.[46]

Between these visions exists the tension between environmental protection and resource development, or as it is sometimes referred to, "sustainable development". Indigenous and non-Indigenous peoples may have different views about whether sustainable development is attainable, and if so, how environmental protection ought to be balanced against development. Discussing this balance from an Indigenous perspective, Thom Alcoze offers this insight:

> The way in which native traditions have always dealt with this problem is to consider seven generations into the future…native traditions have always maintained an integrated relationship with the land. An intimate relationship with nature's resources, with nature, with the earth.[47]

A different balance emerges within western viewpoints, which may instead place the environment in opposition to humans; something commodifiable for profit,[48] a benefit that can coexist alongside ecological preservation. These competing visions can bedevil negotiations where jurisdiction, authority and resource stewardship are at issue. I am quick to point out that this dichotomy does not necessarily exist in every dispute or negotiation between Indigenous and non-Indigenous groups. Overlaps may surprise negotiators; Indigenous communities may wish to develop their resources provided they have sufficient decision-making autonomy and a share in profits;[49] and non-Indigenous groups

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[45] See the description of the sources of Indigenous law in Chapter 2 of John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press 2010).
[46] Randy Kapashesit and Murray Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1991) 36 McGill LJ 925 at 570. See also David Lertzman & Harry Vredenburg, "Indigenous Peoples, Resource Extraction and Sustainable Development: An Ethical Approach" (2005) 56 Journal of Business Ethics 239.
[47] Thom Alcoze, "Our Common Future: Native Land Use and Sustainable Development" in The Guelph Seminars on Sustainable Development (Guelph: University of Guelph 1990), reproduced in E.L. Hughes, ed, *Environmental Law and Policy* (Toronto: Emond Montgomery, 1993) at 568.
[48] Leroy Little Bear, "Jagged Worldviews Colliding" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press 2000) at 77.
[49] For example, see the discussion in Ginger Gibson, John B Zoe & Terre Satterfield, "Reciprocity in the Canadian Dene Diamond Mining Economy" in Emma Gilberthorpe & Gavin Hilson, eds, *Natural Resource Extraction and Indigenous Livelihoods: Development*

may also seek a balance that favours ecological protection. We must be careful not to essentialize these viewpoints, which can slide along a spectrum. The key point is that this asymmetry may exist to different degrees, and so an ADR process should be alive to this possibility and designed to facilitate dialogue to establish common ground.

In terms of demonstrating respect for different philosophical viewpoints, an effective ADR model should empower, not minimize, Indigenous epistemologies in its discussion framework. Otherwise, a sense of unfairness or subordination may arise; as Elmer Ghostkeeper writes, "capitalism is the main economic paradigm within which we are forced to negotiate and talk with non-Aboriginal people about our land".[50] When this paradigm collides with fundamentally different beliefs about sustainable development, miscommunication and frustration can result, and discussions may break down. Indigenous peoples have long been forced to articulate their perspectives to Europeans and justify their place amongst western intellectual traditions.[51] Mainstream ADR processes are no different. By prioritizing Indigenous philosophies in ADR, Indigenous knowledge becomes justified on its face as an integral component of the process, rather than acting as a hindrance to a successful outcome that favours western goals and values. In part this why, at the outset of this discussion paper, I suggested that self-initiated efforts to read about and understand Indigenous perspectives are perhaps the most crucial step towards such dialogue, as it relieves Indigenous peoples of the burden to explain and justify their viewpoints.

THE WAY FORWARD: REIMAGINING INDIGENOUS-LED ADR

What are the foundations for success?

As an aspirational model, Indigenous-led ADR can reduce litigation, introduce FPIC into the consultation process, and move us towards nation-to-nation partnership. As Catherine Bell observes, "it is only when Aboriginal jurisdiction and dispute resolution systems are equal in authority and legitimacy to, rather

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Challenges in an Era of Globalization (London: Taylor & Francis Group, 2014) (suggesting that the Tłı̨chǫ expect reciprocity from mining companies, which reinforces and sustains their own values and identity).

[50] Elmer Ghostkeeper, "*Weche* Teachings: Aboriginal Wisdom and Dispute Resolution" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 162.

[51] See generally Dale Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press 2006).

than alternative or delegated from, non-Indigenous governments and processes that true Aboriginal justice can be obtained".[52]

But significant shifts must occur first. For example, the process must come to terms with its broader colonial interaction in its design and implementation.[53] As a start, this may require apology and acknowledgement of the historical alienation of Indigenous peoples from concepts of justice and ownership.[54] As Jeremy Webber points out, to secure Indigenous participation, "the very structure of dispute settlement may have to be re-negotiated".[55] This might begin with the selection of the mediator. Indigenous communities may have different views about the ideal qualities of a mediator. Personal stature may be less important than wisdom and experience.[56] The terms of the process itself will need to be negotiated, including who participates, how they participate, and how decisions will be made. Ideally, community protocols should be observed. Community involvement is another important feature identified in the literature. A community-based forum for dispute resolution may be quite foreign to those accustomed to traditional ADR processes. Such an approach is entirely different from conflict between two individuals, which speaks to the fundamental distinction between Indigenous deliberative processes and western approaches to dispute resolution. Webber analogizes this process of collective deliberation to a typical community meeting or legislative assembly.[57] Disputes related to lands and resource stewardship implicate the community as a whole, including future generations. A community may not have consensus within itself, and so there must be a mechanism to resolve internal conflict. Without such a mechanism, any agreement reached may not generate lasting consensus that will be accepted by the community in the long-term.

Perhaps most fundamentally, mainstream ADR models may operate under different concepts of time and consensus. In a mainstream process, parties develop discrete and clear agenda items, and work to resolve them as soon as possible. Where an Indigenous-led process is in use, things may progress more

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[52] Catherine Bell, "Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 244.
[53] Jeremy Webber, "Commentary: Indigenous Dispute Settlement, Self-Governance, and the Second Generation of Indigenous Rights" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 150.
[54] *Ibid*.
[55] *Ibid*.
[56] *Ibid*.
[57] *Ibid* at 150–51.

slowly. There may be a need to establish a relationship of trust at the outset. This might involve spending time in the community or on the land with community leaders to learn about their way of life, history and culture. Substantive topics may not be directly discussed at this early stage. For those accustomed to mainstream methods and looking to resolve the dispute quickly, this may be a source of frustration. But corners cannot be cut when establishing and fostering a relationship-centred approach; trust and understanding are central. Moreover, the concept of consensus may be fluid, requiring revisitation.[58] This is also unusual for mainstream approaches, which would typically record an agreement and commit the parties to those terms going forward. Although the parties will similarly be expected to commit to and honour promises made, ongoing demonstrations of good faith may be needed to maintain trust.

Finally, the process should be alive to the specific concerns of the community or communities in question, not just perceived Indigenous values in general.[59] Each community, communities or nation may have its own traditions, including unique and varied legal orders, stories, customs, and more, as well as site-specific attachments to certain land formations or bodies of water. Each may have its own set of complex political considerations related to the accepted authority of their hereditary chief versus Band Chief and Council elected under the *Indian Act*. Some view the Chief and Council as the primary decision-makers, some view the hereditary leadership in this way, and a community may disagree about this within its membership. Non-Indigenous parties cannot resolve these internal disagreements, of course, but it is important to be aware of them and recognize how they may influence the discussions taking place.

Suggestions for developing an appropriate framework have included identification of community values and processes, a balance of traditional values with those of modern contemporary ways of life,[60] and adopting an "elicitive approach that is participant led and recognizes process design as a political and functional issue".[61] As I have also suggested, grounding such a process in the principles espoused by UNDRIP, and specifically FPIC in the lands context, is an appropriate structural guideline that will fulfill Canada's political commitments and further the broader project of reconciliation. In New

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[58] Mark Dockstator, UVic Institute for Dispute Resolution, *Making Peace and Sharing Power: A National Gathering on Aboriginal Peoples and Dispute Resolution* (Victoria: University of Victoria, 2007) at 170.
[59] *Ibid*.
[60] Bell, *supra* note 51.
[61] Kahane, *supra* note 38 at 47.

Zealand, the Waitangi Tribunal's role in the dispute resolution of Maori treaty claims is an interesting example to consider.

To briefly illustrate, the Waitangi Tribunal was established to manage the claims of the Maori against the Crown arising from the historical Treaty of Waitangi. Claims received are classified as either historical (past government action), contemporary (current government action) or conceptual (related to "ownership" of natural resources).[62] Dispute resolution is built into the claims process through bicultural and bilingual mediation. Typically, co-mediation is used, where one mediator with general skills is paired with a *kaumatua* (elder) skilled in *tikanga* (traditional Maori practices).[63] There is preference for consensual or interest-based processes rather than positional bargaining.[64] This is a new and evolving area for the Tribunal, and as it develops, scholars are emphasizing that Maori protocol should be observed where possible.[65] Canada has nothing comparable for the moment, but the utility of co-mediation in an intercultural setting is evident, and offers helpful lessons for how an Indigenous-led ADR process might be approached.

Of course, the Waitangi process arose from lengthy historical negotiations and has the benefit of institutional heft and resources. Not all Indigenous-led ADR processes in Canada will meet this standard. Dispute resolution may occur in the context of ongoing, historical treaty obligations, but it may also occur on an ad-hoc basis to navigate proposals between communities and private industry. The features I have identified above, however, seek to identify some commonalities that would be relevant to all of these contexts. Chief among them are commitments to consensus-based decision making and relationship building. Consensus and relationships are the key guideposts to a successful and mutually beneficial resolution process.

The role of storytelling in Indigenous-led ADR

Indigenous laws, principles, values and histories are often communicated orally. These stories may not have a textual foundation; instead, they may exist through living memory and teachings across generations. I have emphasized that grounding ADR processes in Indigenous laws and customs can help

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[62] Morris Te Whiti Love, "The Waitangi Tribunal's Role in the Dispute Resolution of Indigenous Treaty Claims" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 136.
[63] *Ibid* at 142.
[64] *Ibid* at 143.
[65] *Ibid* at 146.

resolve the dispute at hand and strengthen Indigenous institutions. Storytelling is an important aspect of mainstream ADR as well, though of course these stories do not contain principles of law. Often, parties in traditional mediations are as interested in telling their story and being heard as they are in reaching a settlement. Although intercultural dialogue is a distinctive feature here, the concept of storytelling is not entirely foreign to the western model.

Creating space for Indigenous storytelling into the ADR process—to the extent that the Indigenous party would like to do so—achieves the complementary goals of preserving the integrity of Indigenous intellectual traditions, drawing out Indigenous law and legal principles, and serving the basic function of communicating the interests and position of each party. Storytelling therefore offers a powerful way to manage some of the divides arising in an intercultural dispute resolution context. While there are commonalities in this regard, the function and significance of storytelling within Indigenous communities is unique to them, and so to the extent that non-Indigenous parties use storytelling to communicate their position, this cannot be equated with oral histories that weave concepts of identity, law and relationship to the natural world. The overlap rather relates to the design of ADR processes; they exist to facilitate a degree of storytelling, and so this characteristic should be recognized for the opportunities it presents.

CONCLUSION

I have suggested that in order for dispute resolution to effectively resolve conflict and be seen as legitimate by Indigenous peoples, its processes must be grounded in Indigenous laws and ways of knowing. Since the process is itself a political endeavour, Indigenous-led ADR can serve as a vehicle for reconciliation and legal, philosophical and cultural pluralism. Where such a model is premised on nation-to-nation partnership, it benefits all participants. Non-Indigenous parties can expand their respect for Indigenous cultures and reach mutually beneficial resolutions on equitable terms. For Indigenous peoples, their leadership in designing the process presents an opportunity to assert sovereignty and revitalize and develop governance institutions.

Primarily, an Indigenous-led dispute resolution process can respond more flexibly to conflicting legal perspectives on Indigenous rights and sovereignty. In so doing it can avoid the dissatisfying duty to consult process and the box of judicially recognized section 35 rights, which, as we have seen, is often criticized for failing to capture the substance of Indigenous rights. Efforts in some corners of private industry are already yielding positive results,

demonstrating the utility of a forward-thinking approach to consultation. Recognizing the deficiencies of the duty to consult in relation to their own goals and liabilities, private industry is developing ways of going above and beyond the legal requirements to obtain community consent and participation in projects.[66]

Indigenous-led ADR moves parties closer to a model premised on free, prior and informed consent. Consultation and consent is a free-flowing concept in the dispute resolution process: it is sought prior to a dispute arising, but the sincerity with which it was sought informs and sets the tone for the dispute resolution process itself. A community's willingness to resolve a dispute may hinge on its perception of whether or not the opposing party has made good faith efforts to engage and consult from the very beginning. Indigenous-led ADR therefore requires us to think of dispute resolution as a continuum beginning well before parties are headed for court.

Removed from the traditional court process, Indigenous-led ADR provides the necessary flexibility to weave together Indigenous and non-Indigenous approaches to ADR. This reinforces Indigenous institutions and avoids the difficulty of courts attempting to reconcile common law doctrines that may be at times inconsistent with Indigenous legal principles. The central question then becomes how best to model such a process. I have suggested that, to answer this question, we must be aware of the shortcomings of mainstream ADR models in such contexts and prioritize the role of the community itself in negotiating and setting the terms of any such process.

Indigenous governance has a crucial role to play in intercultural disputes and can help us navigate the paradox of sustainable development. We can learn a great deal about caring for the land from Indigenous knowledge. Unfortunately, critics are often concerned that if we allow Indigenous peoples to set the terms of consultation and dispute resolution, economic productivity will grind to a halt.[67] But it is a false dichotomy to assume that all Indigenous peoples, in all cases, are concerned only with vitiating economic development in their territories. Rather, they are concerned with respect for their sovereignty and jurisdictional authority. Once we learn to walk together on this path, new possibilities will emerge for a shared future.

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[66] Imai, *supra* note 22.

[67] Lorraine Land, "Who's afraid of the big, bad FPIC? The evolving integration of the *United Nations Declaration on the Rights of Indigenous Peoples* into Canadian law and policy", *Northern Public Affairs* (May 2016).