

Western ADR Processes and Indigenous Dispute Resolution

Rebecca Ratcliffe and Catherine Bell

I. Introduction

First Nation, Inuit and Métis peoples have adopted a range of alternative dispute resolution processes (ADR) in various contexts to operate in conjunction with the Canadian justice system. ADR approaches can range from unstructured voluntary negotiations through to more structured methods of mediation, to arbitration and tribunal decisions that may result in binding decisions. While many contemporary western dispute resolution processes and Aboriginal processes seem similar, there may be “dramatic cultural and philosophical differences that underlie” them.¹ These differences may have impacts on how the processes are received or implemented in a community. However, where the objectives and methods compliment Indigenous legal traditions, western forms of ADR have been modified or adapted to facilitate resolution of conflicts within the community.

This paper provides an overview of the methods, mechanics, objectives, opportunities and limitations of ADR processes currently in operation in the administration of Canadian civil justice (non-criminal matters), such as family law, with a view to providing information to those interested in adopting or adapting them. It is not intended to advocate a particular model or approach but to add to a body of resource material being developed for First Nations by the Centre for Excellence in Matrimonial Property. Although some examples of how First Nations have used ADR are given in this paper, more detailed examples are provided in Sikka, Wong and Bell “Models of First Nation Conflict Resolution Processes in Canada.”²

¹ Diana Lowe & Jonathan H Davidson, "What's Old is New Again: Aboriginal Dispute Resolution and the Civil Justice System" in Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) [Bell & Kahane] 280 at 280 [Lowe & Davidson].

² Nisha Sikka, George Wong & Catherine Bell, "Indigenous Centred Conflict Resolution Processes in Canada" (2014), online: <> [Sikka, Wong & Bell].

II. Overview of Primary Western-Canadian Dispute Resolution Models

Numerous alternative dispute resolution models exist and are used in a variety of contexts. Among these are negotiation, mediation, arbitration, tribunals (experts decide instead of judges) and family group conferencing. Each has specific features, underlying principles, and limitations. In many cases, alternative refers to something other than litigation in court, where a judge or jury gives a verdict deciding the dispute before it. However, some say the “A” should stand for “appropriate” as the ADR movement seeks to find more appropriate ways to resolve dispute considering a range of factors such as the nature of the conflict and the parties to the dispute. For example, ADR processes are often private and confidential; parties to a dispute may not want to participate if they want the outcome or process to be public. They may also want to go to court, or another body that can make binding decisions, if one of the parties refuses to comply with his or her obligations, to get a short term enforceable remedy until the parties can decide on a long term solution, or to rally a group of people behind a specific cause.³ People may also choose to go to court if a legal precedent that can be relied on in the future is desired, a law is unclear and needs interpretation, or they are concerned an alternative process will not result in a fair outcome.⁴

Yet litigation before Canadian courts has many limits. It is adversarial, formal, expensive, takes a long time and is designed to implement Canadian state law and values. Lawyers make arguments and the judges impose decisions, with the parties having a very limited active role in determining solutions other than by giving evidence at trial. It creates adversity, severs relationships, and usually no one is happy with the outcome even if a “winner.” Litigation is also complicated - there are many rules of procedure and evidence along with customs and traditions for obtaining facts that are usually unfamiliar and alienating to those outside the legal profession. As a consequence, the process may

³ Jay Folberg, Dwight Golann, Thomas J Stipanowich & Lisa A Kloppenberg, *Resolving Disputes: Theory, Practice, and Law* (New York: Aspen Publishers, 2010) at 17 [Folberg et al].

⁴ Government of Canada, Aboriginal Affairs and Northern Development Canada, "Guide for the Management of Dispute Resolution Mechanisms in Modern Treaties", online: Aboriginal Affairs and Northern Development Canada < https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AL/STAGING/texte-text/fari_1343831241721_eng.pdf > at 12 [Government of Canada].

not be a preferred process for First Nation parties in general, and families in particular, to resolve a conflict.

In many provinces, engaging in some form of ADR is required before parties can have a judge decide non-criminal matters, particularly in family law contexts. In some provinces ADR is required only for certain disputes (e.g. child custody), while in others it is voluntary. Where it is mandatory, one of the goals is to reduce the number of court cases. Others are to create solutions that are enduring and maintain positive relationships. Processes that encourage parties to be more involved in developing their own solutions, such as negotiation and mediation, may also lower costs and delays in resolving a dispute, and improve access to justice by fostering more enduring, efficient and effective solutions⁵ in ways that may increase participant satisfaction. These types of processes work best where there are high personal or economic costs associated with litigation, time is of the essence, parties want to be involved in determining the outcome, privacy is preferred, there is a concern about maintaining relationships between participants and others who may be affected by the dispute, or where special expertise or experience is needed.⁶ However, unlike decisions made by a judge, decisions reached through negotiation and mediation processes are generally only enforceable by courts through the creation of a contract setting out the terms of agreement. Thus, the costs of an ADR process, such as mediation, may increase if the parties attempt an ADR process only to find it does not succeed or they are not genuinely committed to finding and respecting solutions.⁷ In addition, as we elaborate below, issues such as power, emotion and culture may pose challenges to the process running, or being perceived to be running, appropriately, efficiently or fairly.

⁵ Patricia A Monture-OKanee, "Alternative Dispute Resolution: A Bridge to Aboriginal Experience?" in Catherine Morris & Andrew Pirie, eds, *Qualifications for Dispute Resolution: Perspectives on the Debate* (Victoria: UVic Institute for Dispute Resolution, 1994) [Morris & Pirie] 131 at 132 [Monture-OKanee].

⁶ Folberg et al, *supra* note 3 at 17.

⁷ Jo-Ann EC Greene, *Towards Resolving the Division of On-Reserve Matrimonial Real Property Following Relationship Breakdown: A Review of Tribunal, Ombuds and Alternative Dispute Resolution Mechanisms* (Ottawa: Minister of Indian Affairs and Northern Development, 2003), online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/adr_1100100032666_eng.pdf> at 26 [Greene].

1. Negotiation

(a) Key Features

Negotiation stands opposite to trial litigation.⁸ Where trials are formal and public, negotiations are often private and relatively informal. Parties are given control over the proceedings and are "free to agree to whatever outcomes they wish, subject to limits of contract law and public policy in enforcing their agreement."⁹ In contrast, a judge controls trials, with the parties constrained by the rules of procedure and evidence.

Party control of the outcome is a key principle in negotiation.¹⁰ In negotiation, the parties bargain with one another to reach a conclusion. The process is likely familiar to most people as many of us engage in negotiations on a daily basis. We negotiate such things as who will do the housework, how much to pay for a car, or when we may take vacation off at work. Simply put, negotiations are conversations in which two or more persons try to reach an agreement or decide upon a course of action. In negotiation, there is shared decision-making and an assumption that the agreement reached will be acted upon as the parties agreed.¹¹

There are several approaches to negotiation that parties may use. For instance, the parties may take an interest-based approach to negotiation or a position-based approach. A position is what is decided upon and interests are what caused a person to make the decision to adopt a certain position (e.g. psychological, substantive, economic and procedural reasons).¹² In positional negotiating, parties focus on legal rights, sequentially set out their position and defend it.¹³ However, this style of negotiation can hinder efficient and amicable negotiation and damage relationships as people become "stuck" in their positions.¹⁴

⁸ Folberg et al, *supra* note 3 at 5.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Union of BC Municipalities & First Nations Summit, "A Review of Dispute Resolution Processes for First Nations & Local Governments" (6 August 2003), online: Union of British Columbia Municipalities <<http://www.ubcm.ca/assets/library/Policy~Topics/First~Nations~Relations/Relationship~Building~and~Dispute~Resolution~Resources/Review%20of%20Dispute%20Resolution%20Processes%20for%20FN%20and%20LG%20in%20BC%202003.pdf>> at 9 [Union of BC Municipalities & First Nations Summit].

¹² Roger Fisher & William Ury, *Getting to Yes*, 3d ed (New York: Penguin Books, 2011) at 43 [Fisher & Ury].

¹³ *Ibid* at 4.

¹⁴ *Ibid.*

More popular in matters of family law are interest-based approaches in which parties seek to discover and understand the underlying reasons why people take up certain positions. For example, in a matrimonial property dispute concerning possession of the home the parties seek to understand why they both want the house and find solutions to meet the needs of each other. Such an approach may open up a wider range of solutions since "for every interest there usually [exists] several possible positions that could satisfy it."¹⁵ For instance, if the reason why someone wants the house is he or she cannot afford to move, this economic interest can be addressed in a variety of ways including, but not limited to, retaining possession.

In negotiation and mediation, active listening is considered advantageous.¹⁶ Active listening is where the listener hears "not only the content, but also...the emotion or sentiment of the content" heard.¹⁷ The listener then confirms or clarifies what they heard from the speaker.¹⁸ Techniques for active listening vary and some are not appropriate in some cultural contexts. For example, a listener may clarify by paraphrasing and asking if their understanding is correct or by asking questions that encourage the speaker to elaborate. The active listener encourages sharing information through body language and words. Negotiations may be conducted directly by the parties, their lawyers, or there may be a third party to facilitate the negotiation. The difference between this process and a typical interest based mediation (discussed below) is lawyers may be more involved in the process and crafting solutions.

Negotiation empowers the parties by giving them a key role in determining the outcome. It assumes that the parties are able to work out their own solution and relies on shared decision-making.¹⁹ However, because decisions reached through negotiation are not binding like a decision from a court, parties reaching an agreement must trust each other to follow through on the agreement or rely on other means of enforcement, such as through contract law.

¹⁵ *Ibid* at 44.

¹⁶ *Ibid* at 36.

¹⁷ Folberg et al, *supra* note 3 at 110.

¹⁸ *Ibid*.

¹⁹ Union of BC Municipalities and First Nations Summit, *supra* note 11 at 9.

(b) Complicating Factors in Negotiation and Mediation

Trust, strength of relationship and a desire to maintain positive relations are important considerations in negotiation and mediation. Other factors such as emotions, culture, gender and power can impact how people interact or perceive one another. Though these factors are being discussed here in the context of a negotiation, it should be noted that they are important to consider in designing and selecting any form of dispute resolution process.

Emotions

Emotions influence how we perceive the world and how we interact with others. Depending on how they are manifested and dealt with, they can prevent efficient and effective problem solving.²⁰ For instance, positive moods, such as happiness, produce more cooperative behaviour and have been linked to parties getting better outcomes through solutions that address the needs of all parties.²¹ Negative moods, on the other hand, may cause the opposite effect.²² Negative emotions such as anger may reduce rapport building between parties²³ and strong negative emotions cause emotional tunnel vision and operate as a bar to successful resolution.²⁴ Managing such negative emotions is important yet denying them is detrimental. Emotional interests must be addressed to ensure agreements are perceived as fair and for them to endure. There is also evidence that some negative emotions are not a barrier to reaching enduring agreements and, if managed properly, may give rise to clearer thinking.²⁵ Therefore focusing on the people in the dispute, their emotions, and building positive respectful relationships is an important component in successful dispute resolution process that will involve active

²⁰ Edward J Lowler & Jeongkoo Yoon, "Structural Power and Emotional Processes in Negotiation: A Social Exchange Approach" in Roderick M Kramer & David M Messick, eds, *Negotiation as a Social Process* (Thousand Oaks: Sage Publications Ltd, 1995) 143 at 146.

²¹ Bruce Barry, Ingrid Smithey Fulmer & Nathan Goates, "Bargaining with Feeling: Emotionality In and Around Negotiation" in Leigh L Thompson, ed, *Negotiation Theory and Research* (New York: Psychology Press Taylor & Francis Group, 2006) 99 at 103-104 [Barry, Smithey & Goates].

²² *Ibid*, at 104.

²³ Roger Fisher & David Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (New York: Penguin Group, 2005) at 4 [Fisher & Shapiro].

²⁴ *Ibid* at 146.

²⁵ Joseph P Forgas, "Affect in Legal and Forensic Settings: The Cognitive Benefits of Not Being Too Happy" in BH Bornstein & RL Wiener, eds, *Emotion and the Law Psychological Perspectives* (New York: Springer Science+Business Media, 2010) 13 at 20.

participation by the parties. Having someone who is respected and skilled in addressing and managing emotions, such as an elder or social worker from the community, may be necessary and desirable for these and other reasons.

In addition to affecting how we think, emotions are contagious.²⁶ Strong emotions such as guilt and fear may also be used to influence the other party's actions.²⁷ For example, in the context of matrimonial property, one party could, during informal discussions or negotiations, attempt to get the other to give up trying to get possession of the matrimonial home by threatening to expose some embarrassing secret. Or one party may try to guilt the other into making a concession. Given that emotion affects how we think,²⁸ it is not surprising that suppressing emotion is physically and mentally demanding.²⁹ For all of these reasons, although emotions may seem to distract from resolving a problem, it is important to express and address them because of how they affect how we act, think, and perceive fairness.

Trust and Relationships

It has been suggested on the one hand that, "a working relationship where trust, understanding, respect and friendship are built up over time" makes for more efficient negotiations.³⁰ On the other hand, high trust and very close relationships may prevent someone from seeking the best solution for him or herself or lead to feeling "socially uncomfortable."³¹ Lack of trust in negotiations results in less information sharing and satisfaction of the parties with the solutions reached.³²

Trust plays a largely beneficial role in negotiations, or in any social interaction. But trust can be tricky. Trust relies heavily on what is perceived about the level of the other party's concern for others.³³ Thus, "trustworthiness is...in the eye of the beholder."³⁴

²⁶ Fisher and Shapiro, *supra* note 23 at 147.

²⁷ *Ibid* at 161.

²⁸ Barry, Fulmer & Goates, *supra* note 21 at 112.

²⁹ *Ibid* at 116.

³⁰ Fisher & Ury, *supra* note 12 at 21.

³¹ Kathleen L McGinn, "Relationships and Negotiations in Context" in Thompson, *supra* note 8, 129 at 132 [McGinn].

³² William W Maddux et al, "Cultural Differences in the Function and Meaning of Apologies" (2011) 16 *International Negotiation* 405 at 406.

³³ Maurice E Schwietzer, John C Hershey & Eric T Bradlow, "Promises and Lies: Restoring Violated Trust" (2006) 101 *Organizational Behaviour and Human Decision Processes* 1 at 2.

Deception, of any sort, damages trust if it is discovered. Where parties to a negotiation distrust each other, fostering trust is critical and if not possible, an independent decision maker, like an arbitrator or judge, may be required to impose a resolution.

Good relationships foster better results in terms of addressing all of the interests of affected parties.³⁵ They also affect how people perceive and interpret each other's behaviour.³⁶ For instance, stubborn behaviour may be perceived positively in a good relationship as commitment.³⁷ Relationships can also be shaped and changed through the process of the discussions.³⁸ If parties already have a very strained or difficult relationship a third party, such as a mediator, may be necessary to help navigate through the difficulties that arise from that relationship or depending on how difficult the relationship, it may not be possible to resolve the dispute through discussion and negotiation.

Culture, Gender and Power

Differences in culture, gender and power can also affect how we interact with other people and how we perceive the words and actions of others. Culture, for instance, can "color what we perceive."³⁹ Culture has been characterized as being about "the shared reality of individuals"⁴⁰ and the "symbolic dimension of life" where culture gives "messages about what is normal, appropriate and expected."⁴¹ Within a culture, there is a "substantial sharing of what is perceived to be typical behavior, values and characteristics" of the culture.⁴² These common understandings may become expectations of how people should behave. For instance, some cultural groups may tend to be more "collectivist" where the values of cooperation, respect for elders, group reputation and interdependence are more privileged than in a more "individualist" oriented group where

³⁴ Peter H Kim, Kurt T Dirks & Cecily D Cooper, "The Repair of Trust: A Dynamic Bilateral Perspective and Multilevel Conceptualization" (2009) 34 *Academy of Management Review* 401 at 403.

³⁵ Fisher & Ury, *supra* note 12 at 21.

³⁶ McGinn, *supra* note 31 at 132.

³⁷ *Ibid.*

³⁸ *Ibid* at 131.

³⁹ Folberg et al, *supra* note 3 at 182.

⁴⁰ Michele J Gelfand, Janetta Lun, Sarah Lyons & Gariy Shtenynberg, "Descriptive Norms as Carriers of Culture in Negotiation" (2011) 16 *International Negotiation* 361 at 368 [Gelfand et al].

⁴¹ Michelle LeBaron, "Culture and Conflict" (July 2003), online: Beyond Intractability <<http://www.beyondintractability.org/essay/culture-conflict>> [LeBaron 2003A].

⁴² Gelfand et al, *supra* note 40 at 364.

competition, independence, personal success and self-reliance are relatively more valued.⁴³ Cultural groups may also favour a type of communication style. For example, people from Western cultures communicate largely by speaking directly and through body language with less reliance on ceremony, ritual, physical space, and non-verbal processes of communication.⁴⁴

Culture can also shape how parties identify, frame and resolve a conflict as well as the perceived success of the process.⁴⁵ Thus Michelle LeBaron maintains

...understanding worldview differences are especially important when designing and implementing either Western or Indigenous dispute resolution processes. Differing concepts of time, individualism, epistemologies, modes of speaking and communicating will have a direct impact upon both real and perceived successes of the process.⁴⁶

For example, some worldviews may be more oriented towards community restoration than punishment of the individual for dealing with harms to the community.⁴⁷ The process to resolve the dispute needs to fit the ideology of the community it serves or it will not be used, if optional, or respected. This point is brought home by Reg Crowshoe, a Piikani (Peigan) elder & Sybille Manneschmidt in their study of delivery of health services to the Piikani.

The existing administrative structures for delivery of health services...was alien to and imposed on the community. Additionally, this administrative structure does not include grassroots community participation. Its hierarchical structure allows input by "health experts" only...Even though some of these individuals are Native and may still have a strong connection to their community they have to operate within a system that has extremely limited community input. Thus, the services developed out of this Western-based structure with its Western values are not connected to the traditional values of those they are trying to serve. Rather, the services may be misunderstood, misused, not respected and finally, not accessed.⁴⁸

⁴³ LeBaron 2003A, *supra* note 41.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Wenona Victor, "Alternative Dispute Resolution (ADR) in Aboriginal Contexts: a Critical Review" (April 2007), online: Canadian Human Rights Commission <http://www.chrc-ccdp.gc.ca/sites/default/files/adredd_en_1.pdf>, 29 [Victor].

⁴⁷ Monture-OKanee, *supra* note 5 at 132-133.

⁴⁸ Reg Crowshoe & Sybille Manneschmidt, *Akak'stiman: A Blackfoot Framework for Decision-Making and Mediation Processes* (Calgary: University of Calgary Press, 2002) at 47 [Crowshoe & Manneschmidt].

Culture, then, can play a key role in the success and design of a dispute resolution process.⁴⁹ And language is a part of culture. Thus where possible "the use of Aboriginal languages and concepts is key to the successful resolution of disputes involving Aboriginal people, as only within these languages and concepts will their worldviews be adequately represented and respected."⁵⁰

Cultures that tend toward more context-specific and non-verbal styles of communication may prefer an insider who is respected within the community to guide and assist in settling a dispute whereas those belonging to cultures that prefer more direct communication may prefer someone who is an outsider.⁵¹ Furthermore, different cultures have different tolerances for things like personal space, nonverbal communications, power differences between parties, risk taking, and gender roles.⁵² For example, eye contact may be viewed as disrespectful⁵³ in one culture and respectful and confident in another. How people arrange themselves around a table, may also impact the parties' perception and experience of the process. Americans, for instance, "tend to talk with people seated opposite them, or at an angle" whereas the Chinese tend to find those sorts of seating arrangements alienating and uncomfortable.⁵⁴

Culture can also play a role in how different people respond to risk or uncertainty.⁵⁵ In fact, it has been suggested that in situations where there is uncertainty, the cultural tendencies of people may become even more pronounced, as they rely on their cultural knowledge and experience as it is more familiar.⁵⁶ The use of items that are of cultural significance, such as language and symbols, that express cultural values and norms, may generate greater comfort with the process.⁵⁷ For this reason the location of the process, the visual representations at the location, and the use of familiar cultural symbols are important in dispute resolution design.

⁴⁹ Victor, *supra* note 46 at 19.

⁵⁰ *Ibid* at 14.

⁵¹ LeBaron 2003A, *supra* note 41.

⁵² Michelle LeBaron, "Culture-Based Negotiation Styles" (July 2003), online: Beyond Intractability <<http://www.beyondintractability.org/essay/culture-negotiation>> [LeBaron 2003B].

⁵³ *Ibid*.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*.

⁵⁶ Gelfand et al, *supra* note 40 at 371.

⁵⁷ *Ibid*.

But culture is not static. It is given to change and is "elastic."⁵⁸ Cultural elasticity refers to the idea that even where a group's norms are known, that does not mean that every person in that group will absolutely follow those norms.⁵⁹ Even where a cultural group may be very similar, some people may show different levels of personal identification to the shared culture.⁶⁰ Many people also carry within them a mix of cultural values and tendencies, including individual rights and collective decision making orientation, do to cultural interaction. Designing successful community oriented dispute resolution systems requires being attune to this reality for it to be respected and used.

Gender and power also shape people's perceptions and experiences. Gender can have wide reaching impacts on social interactions, as one author noted:

...even when we don't have a strong visceral reaction, gender colors our experience. Any negotiation is caught in a web of influence, social values, and informal codes of conduct. Social norms or standards that seem at first blush to have nothing to do with gender might generate troubling expectations about what we should and can do as women.⁶¹

Culture can inform what types of characteristics are expected of different genders. Where in one culture a particular attribute may be seen as masculine, in another it may be feminine.⁶² In some cultures the values of "assertiveness, task-orientation, and achievement," may be considered masculine and preferred to values of "cooperation, nurturing, and relationship" building.⁶³ Differences in gender expectations may also arise from socialization, how people view themselves, and moral values.⁶⁴ For example, women may be socialized within a particular culture to see "morality through a care-based perspective" as contrasted to a "justice-based morality" which seeks to resolve disputes by looking to what is right and wrong. Yet in some cultures care and justice are not contrasted but integral to each other and do not divide on gender lines.

⁵⁸ LeBaron 2003A, *supra* note 41.

⁵⁹ *Ibid.*

⁶⁰ Anne Marie Bulow & Rajesh Kumar, "Culture and Negotiation" (2011) 16 *International Negotiation* 349 at 351.

⁶¹ Folberg et al, *supra* note 3 at 177 citing Deborah M Kolb & Judith Williams, *The Shadow Negotiation: How Women Can Master the Hidden Agendas That Determine Bargaining Success* (Toronto: Simon & Schuster, 2000).

⁶² LeBaron 2003B, *supra* note 52.

⁶³ *Ibid.*

⁶⁴ Laura J Kray & Leight Thompson, "Gender Stereotypes and Negotiation Performance: An Examination of Theory and Research" (2005) 26 *Research in Organizational Behavior* 103 at 138 [Kray & Thompson].

People have "multiple social identities," including gender, and those different identities may become more or less prominent in a particular situation depending on the group involved.⁶⁵ However, ideas about gender are "very pervasive and powerful in influencing how negotiators perform, what is expected of negotiators, and how the bargaining table is experienced differently from men and women."⁶⁶ The ways in which the negotiator's role 'fits' with the gender role may impact the negotiation performance of that person. For instance, one author noted that when women were negotiating for another person, as opposed to themselves, their performance was better.⁶⁷

Power can also impact the dispute resolution experience. Power is basically the ability to influence another party. It may be defined as "the capacity to influence others' behavior, to get others to do what the challengers want, rather than what the initial parties themselves want"⁶⁸ and has an impact how people behave and think.⁶⁹ Negotiation power may be seen simply as the ability of a person to influence another party.⁷⁰

Negotiation theory considers three types of power: coercive, exchange and collaborative power.⁷¹ Coercive power is "based on superior strength" and is "often accomplished without the actual infliction of force" as merely threatening someone is often sufficient.⁷² Examples of coercive power include the use of physical force and the use of emotions, such as when one party aims to embarrass another.⁷³ Exchange power is similar to using some sort of reward to get someone to do something. It is a "gentler type of power" than coercive and arises from the parties trading something.⁷⁴ Lastly, collaborative power is akin to a 'hug', where the ability to get what is desired is achieved through things like "loyalty and legitimacy, or simply a conviction that teamwork is a

⁶⁵ Deborah M Kolb, "Too bad for the Women or Does it Have to Be? Gender and Negotiation Research over the Past Twenty-Five Years" (2009) 25 Negotiation Journal 515 at 519 [Kolb].

⁶⁶ Kray & Thompson, *supra* note 64 at 104.

⁶⁷ Kolb, *supra* note 65 at 520.

⁶⁸ Marie A Dugan, "Power" (2003), online: Beyond Intractability: <<http://www.beyondintractability.org/essay/power>> (updated August 2012 by Heidi Burgess) [Dugan].

⁶⁹ Alain PCI Hong & Per J van der Wijst, "Women in Negotiation: Effects of Gender and Power on Negotiation Behavior" (2013) 6 Negotiation and Conflict Management Research 273 at 274.

⁷⁰ *Ibid.*

⁷¹ Dugan, *supra* note 68.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

more productive approach than hierarchy."⁷⁵ This last type of power may also rely on persuasion where both parties' values are taken under consideration.⁷⁶

How could emotions, trust and relationship, gender, culture and power influence a party's selection of a dispute resolution process in addition to those we have already described? Cultural differences between parties may present challenges for creating trust and rapport."⁷⁷ Negotiation, with its frequent emphasis on individuals and the parties in fashioning solutions, may be at odds with values that prefer to incorporate the larger community in finding a solution.⁷⁸ These factors also play a role in whose "values are seen as legitimate, whose values are accommodated and how."⁷⁹ For instance,

a process designed to focus on "the facts" may reflect a cultural bias against the expression of emotions. For members of highly expressive cultures, participating in a process where emotions are contained and viewed with suspicion is difficult and inhibiting. Similarly, a process designed with the values of cost savings and efficiency in mind may screen out what some participants see as critical-building steps.⁸⁰

A common message in studies on dispute resolution processes is that to be effective and respected, the process must be "anchored in the values of the community they are intended to serve."⁸¹ The process should be fitted to the parties who will engage with it. Furthermore, western models of ADR and Indigenous processes such as mediation and circle processes are not interchangeable, even if they share some characteristics. The values, focuses and intentions of the processes may be varied. For instance, Wenona Victor of the Sto:lo Nation in a review of ADR processes for the Canadian Human Rights Commission commented:

In addition to the plethora of "alternative" modes of resolution are the Indigenous paradigms, which call for the rejuvenation and use of Indigenous methods of resolving disputes. Although both paradigms are currently used to address similar disputes, they are often fundamentally different from one another. They are grounded within very different worldviews and often ask

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Folberg et al, *supra* note 3 at 182.

⁷⁸ Larissa Behrendt., *Aboriginal Dispute Resolution A Step Towards Self-Determination and Community Autonomy* (Sydney: The Federation Press, 1995) at 58 [Behrendt].

⁷⁹ Michelle LeBaron, "Learning New Dances: Finding Effective Ways to Address Intercultural Disputes" in Bell & Kahane, *supra* note 1 11 at 14 [LeBaron 2004].

⁸⁰ *Ibid* at 14-15.

⁸¹ Catherine Bell, "Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada" in Bell & Kahane, *supra* note 1 241 at 245 [Bell].

very different types of questions. This does not mean that one paradigm may not at times draw from the other or that they do not share similar challenges. It does, however, require respect for differing worldviews and an acknowledgement of the ways in which colonialism impacts the development, implementation and interaction both within and between the two paradigms.⁸²

(c) *First Nation Contexts*

Negotiation Training Programs

Though it is no longer in operation,⁸³ Ridgewood Foundation for Community-Based Conflict Resolution (Int'l) (Ridgewood) is an example of a dispute resolution service that also offered negotiation training to First Nation communities and individual members within communities.⁸⁴ The organization focused on community-based conflict resolution, which aims to resolve conflict by "creating an environment of dignity and respect, which welcomes interaction and settlements that foster trust and honour."⁸⁵ To do so, the process looks to resolve conflict by creating a solution that draws on the "sum" of the community, which includes all the varied values and identities present in the community such as "age, gender, ability, race, culture, and power."⁸⁶

In addition to offering training, one of the services the organization provided was to act as a "third-party neutral to community groups such as First Nations, government, police, youth, community developers and professionals."⁸⁷ Prior to the actual dispute resolution process taking place, the organization offered training to participants that focused on a "principled approach to conflict resolution and intervention by providing what to expect in the negotiation experience and the skills needed to own the process and be able to address the issues that caused the conflict."⁸⁸

Similar programs designed to improve interest based negotiating skills and power within a First Nation context continue to be offered by other institutions, such as the

⁸² Victor, *supra* note 46 at 5.

⁸³ "Ridgewood Foundation", online: Ridgewood Foundation for Community Based-Conflict Resolution <<http://rpbirt.com/ridgewood/ridgewoodtrust/index.htm>> [Ridgewood Foundation].

⁸⁴ Greene, *supra* note 7 at 24.

⁸⁵ Ridgewood Foundation Community-Based Conflict Resolution, "CBCR", online: Ridgewood Foundation Community-Based Conflict Resolution <http://rpbirt.com/ridgewood/ridgewoodtrust/2_cbc.html> [Ridgewood CBCR].

⁸⁶ *Ibid.*

⁸⁷ Greene, *supra* note 7 at 24.

⁸⁸ *Ibid.*

Banff Centre for Management Indigenous Leadership and Management Program.⁸⁹ These models operate on the premise that power and negotiation of fair enduring agreements depends in part on negotiations skills. In both programs training is tailored to the conflict context most relevant to participants, such as land claim negotiations, or internal community disputes. Unlike the Banff program which, unless custom-designed for a particular Aboriginal community, is based on preparation for and participation in a hypothetical dispute, participants in the Ridgewood program were asked to "do their own background preparation to take part in their community negotiation session," so that the training process was tailored to the community and conflict context most relevant to them.⁹⁰ The training was designed to help "address identity or cultural conflicts" by using a process that promoted "self-assessment and the surfacing of the deep-rooted issues for consideration and resolution in the process."⁹¹ Critiques of the Ridgewood program noted that the training and process was costly and relied on the parties to cooperate but also gave the "skills for an equitable negotiation session", considered culture and identity, engaged "principled negotiation," and encouraged "full participation by the parties."⁹²

Jo- Ann Greene has suggested negotiation training might be adaptable to assist parties negotiate their matrimonial real property disputes.⁹³ This may be particularly helpful in First Nation processes that anticipate parties attempt to negotiate interspousal contracts before proceeding to third party assisted dispute resolution processes.

Applicable aspects of the Ridgewood model include:

- It provides training in the process and skills for an equitable negotiation session;
- It is principled negotiation with emphasis on reaching an amicable agreement;
- It allows attention to cultural/identity issues, even those that may be deep-rooted, to be explored during negotiation; and
- It encourages full participation by the parties by paying attention to the environment in which the negotiation process occurs.⁹⁴

⁸⁹ The Banff Centre, "Indigenous Leadership and Management", online: The Banff Centre <<http://www.banffcentre.ca/programs/program.aspx?id=103>>.

⁹⁰ Greene, *supra* note 7 at 24.

⁹¹ *Ibid* at 25.

⁹² *Ibid*.

⁹³ *Ibid*.

⁹⁴ *Ibid*. For further discussion, see Sikka, Wong & Bell, *supra* note 2.

Collaborative Negotiation Under the Nisga'a Treaty

Various processes for resolving disputes among the parties to the Nisga'a treaty illustrate how negotiation and other forms of ADR may draw on and facilitate Indigenous values of dispute resolution. The rationales for the processes and the requirement to go through collaborative negotiation and a facilitated process, such as mediation or an advisory panel, before appearing before a court or tribunal that can make binding decisions "[reinforces] the importance of respect, acknowledgement, harmony and reconciliation in the Nisga'a justice tradition."⁹⁵ The rationales for the three-stage process are:

1. to co-operate with each other to develop harmonious working relationships
2. to prevent, or alternatively, minimize disagreements
3. to identify disagreements quickly and resolve them in the most expeditious and cost effective manner possible
4. to resolve disagreement in a non-adversarial, collaborative and informal atmosphere⁹⁶

If agreement cannot be reached through informal discussions, subject to a few limited exceptions, parties must enter into interest based (also called collaborative) negotiation. The collaborative negotiation model draws on both western models of negotiation and the traditional values of the Nisga'a. The whole process is split into three phases: "collaborative negotiations, facilitated processes, and adjudication (or arbitration)."⁹⁷ Typically, parties may not jump straight to phase three; the parties must, with some exceptions, proceed through the stages in order.⁹⁸ The focus of the first stage, collaborative negotiations, is to look at how the parties interpreted the treaty language and to gain consensus.⁹⁹ The agreement sets out the process for stage one and that "parties not directly affected by the disagreement can participate."¹⁰⁰ Rules on confidentiality and recording, which aim to foster open discussion, are stipulated.¹⁰¹ The negotiation is "closed to the public, transcripts and electronic recordings are prohibited

⁹⁵ Bell, *supra* note 81 at 257.

⁹⁶ *Ibid.*

⁹⁷ *Ibid* at 257-258.

⁹⁸ *Ibid* at 258.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

and parties must keep confidential the information disclosed in the negotiations."¹⁰² Furthermore, information that comes to light during this process, either orally or written, can't be used as evidence in subsequent proceedings, regardless if that proceeding has to do with the topic of the negotiation.¹⁰³ The process, as set out in the agreement, acknowledges the values of "restoration of harmony"¹⁰⁴ between the parties by adopting an "interest-based negotiation model."¹⁰⁵ The adoption of that type of model is evident in section 9 of Appendix M-1 of the agreement that states:

The parties will make a serious attempt to resolve the disagreement by:

- a. identifying underlying interests;
- b. isolating points of agreement and disagreement;
- c. exploring alternative solutions;
- d. considering compromises or accommodations; and
- e. taking any other measures that will assist in resolution of the disagreement.¹⁰⁶

2. Mediation

(a) Key Features

Mediation is a process in which a third party neutral to the dispute helps the parties come to an agreement.¹⁰⁷ A common form is interest based mediation in which the mediator is a process facilitator - a neutral party who helps parties communicate, identify the interests at the root of the conflict, and generate options for their mutual gain that meet their common and diverse needs. "[T]he facilitative mediator assumes that his principal mission is to enhance and clarify communications between the parties" and does not tend to offer personal opinion because it may "impair the appearance of impartiality and thereby interfere with the mediator's ability to function."¹⁰⁸ Facilitative mediators may also not "know enough - about the details of the case or the relevant law, practices or technology - to give an informed opinion."¹⁰⁹

¹⁰² *Ibid.*

¹⁰³ *Ibid* citing *Nisga'a Final Agreement*, Appendix M-1, ss 13(c) and (d).

¹⁰⁴ *Ibid* at 258.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Nisga'a Final Agreement Act SBC 1999*, Chapter 2, Appendix M-1 Collaborative Negotiations at s 9.

¹⁰⁷ Folberg et al, *supra* note 3 at 249.

¹⁰⁸ *Ibid* at 276.

¹⁰⁹ *Ibid.*

Another form of mediation is evaluative mediation. The difference is mediator orientation and involvement. An evaluative mediator not only has expertise in facilitating communication, but also the subject matter in dispute. These mediators are more interventionist and may participate in generating options for resolving the dispute. Evaluative mediators are chosen when "the participants want and need the mediator to provide some directions as to the approximate grounds for settlement."¹¹⁰ They are "qualified to give such direction by virtue of ... experience, training, and objectivity."¹¹¹ Critics of evaluative methods argue they can result in "positioning and polarization" of the parties or detract from "the focus on party responsibility for critical evaluation, re-evaluation and creative problem solving."¹¹² On the other hand, evaluative methods encourage "litigants to question and re-evaluate their own judgements and "bottom lines"" and can help to satisfy the party that wants "their day in court."¹¹³

Mediators are typically chosen by the parties, but in mandatory processes may be assigned by the court. Mediation processes are usually informal, private and confidential. Mediation assumes that consensus can be reached and that the parties are willing to solve their own dispute.¹¹⁴ It is not successful if parties do not want to resolve the dispute through consensus and cooperation. The process is flexible and shaped by the goals of the parties and the choice of mediator.¹¹⁵ Agreements reached are not binding (but may be enforced through contract) and the process does not require participants to reach an agreement.

Neutrality, confidentiality, preserving relationships, participation, and cooperation are key principles in mediation. Neutrality means the mediator is not biased with regards to the parties or the dispute. For example, the Child Protection Mediation program administered by ADR-LINK in Ontario "connects Children's Aid Societies with ADR practitioners in the South West Region of Ontario."¹¹⁶ In Ontario, the *Child and Family*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid* at 333 citing Lela P Love, "The Top Ten Reasons Why Mediators Should Not Evaluate" (1997) 24 Fla St. U L Rev 937.

¹¹³ *Ibid* at 335 citing Marjorie Corman Aaron, "Merits Barriers: Evaluation and Decision Analysis" in D Golann, *Mediating Legal Disputes* (2009) 145.

¹¹⁴ Behrendt, *supra* note 78 at 60.

¹¹⁵ Folberg et al., *supra* note 3 at 274.

¹¹⁶ "ADR-LINK", online: Centre for Children & Families in the Justice System <<http://www.lfcc.on.ca/adr-link/index.html>> [ADR-LINK].

Services Act mandates that "Children's Aid Societies must consider Alternative Dispute Resolution (ADR) when appropriate for child protection cases."¹¹⁷ Child protection mediation is one of the programs that is prescribed and is available to families when "a court intervention is being considered, is pending or is in process."¹¹⁸ In that program, the mediators are trained "independent" professionals who have "no power to make decisions about the case."¹¹⁹ Neutrality also means mediators are very careful about sharing their personal feeling about a dispute. For instance, one author advises mediators:

...never say how you *personally* would decide the case, but rather should frame your opinion as a *prediction* of the attitude of an *outside decision maker*. Expressing one's personal opinion about what is "right" or "fair" in a dispute is almost always a bad idea, because it is likely to leave a listener feeling that the mediator has taken sides against him."¹²⁰

Part of the process of mediation is creating a place where parties can be heard. Mediation seeks to minimize adversarial emphases on blame, fault or "moral vindication."¹²¹ For this reason the mediator

...models good conflict-management behaviours, trying to create an environment where the parties in conflict will begin to listen to each other with clear heads. For many disputants, this may be the first time they have had an opportunity to fully present their story. During this process, the parties may hear things that they have not heard before, things that broaden their understanding of how the other party perceives the problem.¹²²

Mediation may assist parties in overcoming obstacles that prevent direct negotiation.¹²³ Elements such as power, emotion, trust, culture and relationships are important considerations in mediation, much like in negotiation. Mediation, for instance, can help navigate some of the challenges of power imbalances¹²⁴ or cultural differences.¹²⁵

¹¹⁷ *Ibid.*

¹¹⁸ ADR Link, "Child Protection Mediation" (2008), online: Centre for Children & Families in the Justice System < http://www.fcc.on.ca/adr-link/ADR_LINK_ChildProtection_Mediation.pdf > at 4.

¹¹⁹ *Ibid* at 3.

¹²⁰ Folberg et al, *supra* note 3 at 285.

¹²¹ *Ibid* at 466 citing Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 1000 Yale LJ 1545.

¹²² Folberg et al, *ibid* at 303.

¹²³ *Ibid* at 354.

¹²⁴ Behrendt, *supra* note 78 at 60.

¹²⁵ Gelfand et al, *supra* note 40 at 375-376.

While emotions or cultural differences may not preclude the method from being used, it is important to consider how they align with the assumptions in mediation. For example, awareness of different cultural styles of participation and communication is important in selecting an appropriate method or modifying it. The assumption that the best and most enduring agreements are fashioned by the parties to a dispute and the principle of mediator neutrality may "undermine the role of elders and traditional cultural values."¹²⁶ Mediators also come to the process with their "own selected conscious and unconscious cultural stereotypes" that will impact how the mediator will receive the parties' stories.¹²⁷

(b) First Nation Contexts

Calgary Rockyview Child and Family Services (CRCFS) Native Services Traditional Mediation Circle

The mediation circle process offered by CRCFS incorporates some features of western mediation such as collaborative problem solving by the participants, but also draws on Indigenous dispute resolution "values."¹²⁸ The program began in 1999, when the Calgary Rockyview Child and Family Services Native Office collaborated with an elder from the Peigan tribe, Reginald Crowshoe, a Piikani Blackfoot elder and keeper of the Small Thunder Medicine Bundle Pipe who has "[knowledge] in traditional mediation processes."¹²⁹ The model used is based on the Blackfoot Circle Structure model and is a "process based on traditional Blackfoot ceremonies."¹³⁰ The process is conducted within a teepee circle arrangement in which participants and those with the rights and responsibilities as ceremonial bundle holders have a seating position in accordance with Blackfoot legal traditions.¹³¹ The circle process follows ceremonial protocols that have "a specific beginning and ending" and define "the appropriate position and duties of each

¹²⁶ Brian A Crane, QC, Robert Mainville & Martin W Mason., *First Nations Governance Law* (Markham: LexisNexis Canada Inc, 2006) at 240 [Crane et al].

¹²⁷ Folberg et al, *supra* note 3 at 463 citing Sina Bahadoran, "A Red Flag: Mediator Cultural Bias in Divorce Mediation" (2000) 18 Mass Fam LJ 69.

¹²⁸ "Native MST", online: Calgary and Area Family and Child Services <<http://www.calgaryandareacfsa.gov.ab.ca/home/579.cfm>>.

¹²⁹ Calgary Rockyview Child and Family Services, "Native Services Traditional Mediation Circle", online <http://www.calgaryandareacfsa.gov.ab.ca/home/documents/ProgramsServices/mediation_circle.pdf> at 4.

¹³⁰ Crowshoe & Manneschmidt, *supra* note 48 at 35.

¹³¹ *Ibid* at 36.

individual participating in the ceremony, as well as the role of the cultural materials involved, namely, the bundle itself, the pipe, and the smudge."¹³²

In the process, the bundle represents the goal of the process, and the ceremonialists guide the process. The bundle keepers are the hosts/hostesses of the process and stewards of the bundle/goal that is presented. The supporters who sit on the south and north side contribute to the process with their specific capabilities.¹³³

The inner positions of the floor plan are also connected to the goal in particular ways.¹³⁴ The people who sit on the right side of the circle are those who "contribute materially and financially to achieving the goal" while those on the left are those who "contribute the human resources."¹³⁵ For instance, in the case of the child protection program, the Child Welfare Act may represent the bundle, as it is the topic of the gathering and the "guiding principle for the mediation."¹³⁶ The mediator fills the ceremonialist position on the right side of the circle and the "parent or guardian applying for the child's permanent guardianship" fills the position of the host.¹³⁷ The "person who carries the mandate for the agency and who has to uphold the law" takes up the ceremonialist position on the left.¹³⁸ The co-host, who sits to the right of the ceremonialist on the left, is the social worker.¹³⁹ Family and friends may sit on the right, in support of the person seeking guardianship, while on the left sit any professionals who may be supporting the social worker.¹⁴⁰ Advisors, or in this case people who were previous guardians or foster parents or experienced child protection workers, sit at the circle's entrance, adopting the role of the "former ceremonialist or elder ceremonialist in the traditional" model.¹⁴¹ Different agencies involved in the case may be represented

¹³² *Ibid.*

¹³³ *Ibid* at 37.

¹³⁴ *Ibid* at 37-38.

¹³⁵ *Ibid* at 37.

¹³⁶ *Ibid* at 49.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

within the circle, along with a person from the Child and Family Services agency.¹⁴² The secretary of the mediation or note taker also sits within the circle.¹⁴³

The mediation circle process "gives all participants non-exclusive access to the process and ensures that they all contribute to the same goal."¹⁴⁴ Thus, "all participants have to be clear about their roles in that process"¹⁴⁵ and be willing to "learn and take on the responsibilities that come with a specific position in the circle."¹⁴⁶ The model "is based on a worldview that is not structured in a hierarchy and combines a balance of abstract and physical components that needs to be carefully maintained."¹⁴⁷ Furthermore, "the model is based on community participation because it allows for each individual's voice" and is not based on favouring "experts" or "outsiders to the community."¹⁴⁸

Inherent in the process are four components of decision making that are common to many Indigenous traditions: "Venue, Action, Language and Song" (VALS).¹⁴⁹ Venue refers to the gathering place or sitting order, action the protocols for movement, and language and song to the ceremonial oral traditions that accompany the process. This circle process and VALS components are common to many First Nation legal traditions and have been adapted and applied in a variety of other contexts to facilitate discussion and decision making. For example, a similar model was adopted to facilitate discussion at national gatherings on Indigenous Knowledge and decision making by the Aboriginal Advisory Group to the Department of Canadian Heritage organizing these events. The goal of the gatherings was to "work collaboratively with First Nations, Inuit and Métis peoples in continuing to develop practical and inclusive strategies that recognize, respect, protect and celebrate the diversity of Indigenous knowledge in Canada."¹⁵⁰ Elders, hosts

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid* at 38.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid* at 39.

¹⁴⁷ *Ibid* at 38.

¹⁴⁸ *Ibid* at 39.

¹⁴⁹ Canadian Heritage, Traditions National Gathering on Indigenous Knowledge, Participants Kit [2009] p. 24. (Canadian Heritage, Traditions: National Gathering on Indigenous Knowledge - Final Report (Ottawa: Canadian Heritage 2008) at 6, 46). See also Brian in consultation with Reg Crowshoe and in discussion with the Knut-sum-atak Society, "Poomaksin, Skinnipikani-Nitsiitapii Law, Transfers and Making Relatives: Practices and Principles for Cultural Protection, Repatriation, Redress, and Heritage Law Making in Canada, in Catherine Bell and Val Napoleon, eds., *First Nations Cultural Heritage and Law: Case Studies Voices and Perspectives* (Vancouver: UBC Press, 2008) 258 at 270-272.

¹⁵⁰ *Ibid* at 17.

from Canadian Heritage and hosts from the community all had defined roles in the circle including opening and closing, explaining the process, monitoring the process, making vows to the bundle (discussion topic), and summarizing discussion items. The process was modified as required to reflect different circle protocols, structures, and philosophies of Métis, Inuit and First Nation communities.¹⁵¹

3. Arbitration and Tribunals

(a) Key Features of Arbitration

Arbitration is an adjudicative style dispute resolution process in which a third party delivers a judgement on the dispute after a hearing, much like a judge in court.¹⁵² However, arbitration awards (decisions) are more ironclad than court judgments, since appeal is very limited and courts will generally give deference to arbitration decisions. Other features of arbitration include privacy and expert knowledge of the arbiter on the subject in dispute.¹⁵³

The decision of the arbiter can be binding or advisory. Advisory arbitration is "where an arbitration panel is employed to render a non-binding advisory award prior to trial of a case."¹⁵⁴ In binding arbitration, the award is final and binding on the parties involved. Arbitration is relatively informal in comparison to court proceedings as "arbitrations frequently take place in an attorney's conference room or other suitable meeting place."¹⁵⁵ There is typically flexibility in "the rules of evidence and procedure" as the parties might be able to "submit certain kinds of evidence that would not be considered in court."¹⁵⁶ The process for presenting evidence and arguments varies depending on the arbitrators or the agreed upon rules for the process.¹⁵⁷

Parties may choose their arbitrators and can select arbitrators with particular areas of expertise if desired. By doing so, the process can be more efficient and more relevant to the parties based on the idea that a knowledgeable arbitrator with specialized knowledge "reduces the amount of time that will be required to explain issues in dispute"

¹⁵¹ *Ibid* at 25.

¹⁵² Folberg et al., *supra* note 3 at 537.

¹⁵³ *Ibid* at 543.

¹⁵⁴ *Ibid* at 537.

¹⁵⁵ *Ibid* at 542.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid*.

and increase the chances that the result is "keeping with pertinent business, legal or technical standards."¹⁵⁸ For example, if the parties have a dispute related to mining or oil and gas, they may not have to spend as much time describing the industry's unique technical standards or practices to a knowledgeable arbitrator, saving everyone time and effort. Multiple arbitrators may be involved, such as when each party picks one and then the two picked arbitrators jointly pick a third.¹⁵⁹ Arbitration relies on the principles of fairness and open-mindedness to support due process during the process.¹⁶⁰

Arbitration is selected when parties seek an "informed decision based on the facts, rather than the emotions that may be involved in an issue"¹⁶¹ or seek certainty through a final decision. While "this finality may be one of the greatest advantages of arbitration for many ... who want to get a dispute behind them," it may disadvantage those who are "displeased with a ruling or believe that the integrity of the process was compromised, or where a dispute presents important or novel legal issues."¹⁶² As in litigation before the courts, the parties have no control in the decision-making.

Again, cultural factors may come to play in determining the suitability of this process to resolve a dispute. Larissa Behrendt, an Australian Indigenous legal scholar, suggests that the "adversarial and judicial nature" of arbitration is "in direct conflict with the Aboriginal cultural values of consensus. Arbitration reflects the notion of the individual, which is contrary to the Aboriginal value of community."¹⁶³ "[D]ecision-making in the arbitration process is also quite inflexible and rigid"¹⁶⁴ as it "does not allow for the informality and flexibility valued in traditional Aboriginal dispute resolution. Even the venue for these processes is alienating and court-like."¹⁶⁵ The process also "fails to eliminate the power imbalance" particularly in disputes between Aboriginal and non-Aboriginal litigants.¹⁶⁶

¹⁵⁸ *Ibid* at 577.

¹⁵⁹ *Ibid* at 583.

¹⁶⁰ *Ibid* at 577.

¹⁶¹ Union of BC Municipalities and First Nations Summit, *supra* note 11 at 10.

¹⁶² Folberg et al, *supra* note 3 at 543.

¹⁶³ Behrendt, *supra* note 78 at 55.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid* at 56.

¹⁶⁷ Greene, *supra* note 7 at 32.

Behrendt's commentary draws attention to the need to "fit" the process to these values of the parties as well as the nature of the dispute. Also, although arbitration may be flexible in comparison to litigation, it is still more rule-bound and formal than many other forms of dispute resolution. Behrendt draws attention to elements such as power and culture, which may be influential in the success of a dispute resolution process. Though parties are to be treated equally before the arbitrators,¹⁶⁷ there may still be power differences based on any number of factors including resources to prepare for the hearing, experience appearing in such a process, or in knowledge.

(b) Key Features of Tribunals

As in arbitration, tribunal members are experts in a particular area of law, like landlord and tenant law that render a decision on disputes brought before them. Tribunals can

provide specialized and technical resolutions in different situations, ensure greater innovation, flexibility and efficiency in the delivery of governmental programs and strategies, and provide an informal and rapid forum for public hearings, thereby minimizing time and costs related to litigation before ordinary courts.¹⁶⁸

They are more flexible in procedure and rules of evidence than court proceedings though still more formal and rule-bound than other forms of ADR. Because of their expertise, rights to appeal and review of their decisions are limited, lengthy and expensive.¹⁶⁹

Tribunals are typically established by statute and the matters they can decide on are defined by their enabling legislation.¹⁷⁰ They are also established under modern treaty and land claim agreements. For example, the Métis Settlements Appeal Tribunal in Alberta was established by the *Métis Settlements Act [Act]*.¹⁷¹ Part 7 of the *Act* addresses

¹⁶⁷ Greene, *supra* note 7 at 32.

¹⁶⁸ Chief Justice Beverley McLachlin, "Administrative Tribunals and the Courts: An Evolutionary Relationship" (Speech delivered at the 6th Annual Conference of the Council of Canadian Administrative Tribunals, 27 May 2013), online: Supreme Court of Canada <<http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>> at 3 citing Guy Régimbald, *Canadian Administrative Law* (Markham: LexisNexis Canada, 2008) [McLachlin].

¹⁶⁹ Crane et al, *supra* note 126 at 240.

¹⁷⁰ Greene, *supra* note 7 at 1.

¹⁷¹ *Métis Settlements Act*, RSA 2000, Chapter M-14, s 180(1) [*Métis Settlements Act*].

the establishment and powers of the tribunal. The statute sets out who makes up the tribunal¹⁷² and the powers and responsibilities of the appeal tribunal.¹⁷³ The tribunal has a number of panels which can hear appeals on several types of matters including membership appeals, land appeals, surface access, other disputes such as business property or mineral projects, or anytime all the parties agree the tribunal can decide the matter.¹⁷⁴ Furthermore, the *Act* allows the tribunal to set up "any means of dispute resolution process that it considers appropriate, including mediation, conciliation and arbitration processes."¹⁷⁵ Thus, the tribunal is created by the *Act*, but it is also constrained by the *Act* in what sort of matters it can hear, who can be on the tribunal, and what sort of powers and responsibilities it has.

Tribunals are governed by principles of procedural fairness, due process, lack of bias,¹⁷⁶ natural justice, and independence from outside influences or government.¹⁷⁷

Procedural fairness requires that

the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.¹⁷⁸

The "content of the duty of fairness will vary according to the circumstances of the case, but usually includes the right to be heard and, in appropriate circumstances, the right to cross-examine witnesses."¹⁷⁹ Outside this context, what "matters is fundamental fairness, and that what is fundamentally fair depends profoundly on the particular mandate and context of the tribunal in question."¹⁸⁰ Natural justice has two key features: (1) that the "person affected by the decision has a right to be heard" and (2) to have an unbiased decision maker.¹⁸¹

¹⁷² *Ibid* at s 180(2)

¹⁷³ *Ibid* at Division 3.

¹⁷⁴ Métis Settlement Appeal Tribunal, "Appeals", online: Métis Settlements Appeal Tribunal <<http://www.msat.gov.ab.ca/appeals/>>.

¹⁷⁵ *Métis Settlements Act*, *supra* note 171 at s 188.

¹⁷⁶ Crane et al, *supra* note 126 at 205.

¹⁷⁷ Greene, *supra* note 7 at 2.

¹⁷⁸ *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at para 28.

¹⁷⁹ Crane et al, *supra* note 126 at 240.

¹⁸⁰ McLachlin, *supra* note 168.

¹⁸¹ J.M Law, F.A Laux & M Lewans, *Administrative Law: Cases and Materials*, Coursepack, (Faculty of Law, University of Alberta, 2013/2014) at 194.

(c) First Nation Contexts

Treaty Four Tribunal

The Treaty Four Administrative Tribunal is designed to "adjudicate disputes involving the application of First Nation law within the Treaty Four territory" and " is intended to assist Treaty Four citizens to resolve disputes that cannot be resolved at the community level."¹⁸² The Tribunal is granted jurisdiction when a First Nation law states that the tribunal can be utilized.¹⁸³ The Institute keeps a "roster of professional panel members to adjudicate disputes involving the application of First Nation community-based law."¹⁸⁴

To help ensure a sense of fairness and absence of bias, the roster "includes professionals from throughout the Treaty Four territory" so that "the panel members have no direct connection to the community that they are helping."¹⁸⁵ The model is "based on rules of Natural Justice and Fairness, and incorporates traditional and contemporary dispute resolution approaches."¹⁸⁶ Specific ceremonies may be incorporated if participants ask for it and Elders will talk to participants so that they are aware of the method, process, and the "Laws of Kinship that govern the community."¹⁸⁷

In the first step of the process, the tribunal determines if it has jurisdiction to hear the matter followed by the "pre-hearing stage" where the tribunal works with "both sides of the dispute to determine if mediation is possible."¹⁸⁸ Next is the actual hearing, followed by the tribunal writing up a decision which includes the "issue/dispute, decision, hearing particulars and reasons" and is recorded and shared with the participants.¹⁸⁹

¹⁸² Canadian Human Rights Commission, *A Toolkit for Developing Community-Based Dispute Resolution Processes in First Nations Communities*, online: National Aboriginal Initiative <http://www.doyouknowyourrights.ca/sites/nai-ina/files/pdf/toolkit_trousse-eng.pdf> at 64 [Canadian Human Rights Commission].

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid* at 65.

¹⁸⁹ *Ibid.*

Lastly, "the Tribunal may make non-binding recommendations to the parties on possible ways to resolve the conflict or dispute" if it seems appropriate.¹⁹⁰

4. Family Group Conferencing and Family Mediation

(a) Key Features

Family group conferencing is a "circle process grounded in traditional Aboriginal culture that aims to restore balance and harmony for families and children in crisis."¹⁹¹ The traditional practice was to engage in a sharing circle where the family and community could speak, listen, be respected and treated equally.¹⁹² All together, a consensus would be made as to the best plan, drawing on "traditional values and beliefs," for the child and family while also considering the community's welfare as a whole.¹⁹³ A primary goal of the process is to "[rebuild] positive family relationships around the child."¹⁹⁴

A facilitator is involved in the process to help organize the conference, identify which services may be approached to help support the family, such as Elders or other figures, and ensure that the child's voice is heard.¹⁹⁵ There may be several stages such as a pre-meeting or planning phase, the meeting, and the finalization of the developed plan.¹⁹⁶ The process is "family-driven"¹⁹⁷ and typically governed by the following principles:

- The child and family have the right to participate in decisions that affect them.
- Families have strengths and resources that they can draw on.
- Child safety and well-being are enhanced by strengthening families and their networks of support and through shared responsibility for child welfare.
- Through collaborative problem solving, families can resolve issues and develop plans that keep their children safe and well cared for.

¹⁹⁰ *Ibid.*

¹⁹¹ Native Counselling Services of Alberta, "A Sacred Circle: Family Group Conferencing Discussion Guide" , online: Bearpaw Legal Education and Resource Centre <<http://www.bearpaweducation.ca/sites/default/files/FGC%20Discussion%20Guide.pdf>> at 1.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid* at 4.

¹⁹⁵ *Ibid.*

¹⁹⁶ Della Knoke, "Family Group Conferencing in Child Welfare", online: Canadian Child Welfare Research Portal < <http://cwrp.ca/sites/default/files/publications/en/FGC77E.pdf>> at 2 (CECW Information Sheet #77) [Knoke].

¹⁹⁷ *Ibid* at 1.

- Solutions developed by the family are more likely than those imposed by professionals to respect and preserve children’s bonds to their families, communities and cultures.
- Families are more likely to respect and adhere to plans that they develop than those imposed on them by professionals.
- To encourage trust and open dialogue, discussions that occur during FGC are confidential, except where disclosure is required by law (e.g., necessary for the child’s safety).¹⁹⁸

The process is very family focused, with the plan arising from family members, as contrasted to other processes in which parents work with welfare workers to develop a plan.¹⁹⁹ Only family members, or those who are identified as being like family to the child, play a role in designing the plan.²⁰⁰ For this reason it is often used by families that do not feel as comfortable working directly with service groups. Although this may exclude welfare experts from giving direct input into the plan developed, plans are often approved and deemed to “adequately address child welfare issues and concerns.”²⁰¹ While some participants are generally pleased with the experience and outcome citing its positive effects on family bonds, communication and a sense of ownership of the process,²⁰² other families may find the process stressful, aggressive, or inhibiting.²⁰³ Key in selecting this process is determining the role of outside support workers, such as welfare providers, in developing the family plan.

(b) First Nation Context

Meenoostahtan Minisiwin Family Justice

This family mediation process, which serves families in the jurisdiction of the Awasis Agency in Northern Manitoba, has been providing mediation services since 1999²⁰⁴ and works to bring

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid* at 3.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ Awasis Agency of Northern Manitoba, *Awasis Agency of Northern Manitoba 2012/2013 Child and Family Services - Final Report*, online: Awasis Agency of Northern Manitoba <http://www.awasisagency.ca/docs/2012-2013_Annual_Report.pdf> at 101 [Awasis Agency]

together family, extended family, community members, Elders, social workers and community service providers in the resolution of child protection concerns through the use of properly trained Okweskimowewak (family mediators). The Okweskimowewak's role involves assisting participants to articulate their personal 'truth' (dabwe) and to hear and respect the dabwe of others; to create a safe and nurturing context by addressing inherent power imbalances; to explore the root causes of family conflict in order to address the long term best interests of children; and to facilitate innovative and collaborative planning outcomes for families.²⁰⁵

The program is "designed as an alternative approach for addressing child and family matters outside of the regular Child and Family Services and court systems."²⁰⁶ The Okweskimowewak "utilizes a combination of traditional peacemaking and family mediation skills that are anchored in the language of each First Nation that is engaged."²⁰⁷ They deliver "culturally specific mediation or peacemaking" and may "utilize elders and traditional practices to promote healthy ways of healing."²⁰⁸ Working towards the "care and healthy development of children," the program also looks to facilitate "health, harmony and balance within the family unit."²⁰⁹

During the process, "each participant is given the opportunity to voice their views and their perspectives on the issues" and focuses on a "discussion led by the Okweskimowew [assisting] to determining the underlying problems, and ways to resolve them."²¹⁰ The "intent is to create the possibility for a new way of relating - one that offers the possibility to contain ambivalence or even agreeing to disagree, but not from a conflicted place, but rather from an honouring or a valuing of differentnesses."²¹¹ The mediator helps the parties identify "common needs" so that a "mutual consensus" on what is to be put into the agreement can be reached as a result of "give and take" between the parents and the Agency with the goal of the child being returned to the care of the parents.²¹²

²⁰⁵ Joe Pintarics & Karen Sveinunggaard, "Meenoostahtan Minisiwin: First Nations Family Justice "Pathways to Peace"" (2005) *The First Peoples Child & Family Review* 2 67 at 67 [Pintarics & Sveinunggaard].

²⁰⁶ Awasis Agency, *supra* note 204 at 101.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid* at 109.

²⁰⁹ *Ibid* at 101.

²¹⁰ Pintarics and Sveinunggaard, *supra* note 205 at 77.

²¹¹ *Ibid.*

²¹² Awasis Agency, *supra* note 204 at 103.

The Okweskimowew may play many roles. The Okweskimowew does make clear that they are a "middle" person between the Agency and the parents.²¹³ But while they do act in the role of mediator or negotiator,²¹⁴ they can also "coordinate with local resources (health/mental health workers) to ensure assessments and plans are in place for families and/or individuals."²¹⁵ They may also support education initiatives to promote the program.

III. Community Based Dispute Resolution

The Canadian Human Rights Commission's *A Toolkit for Developing Community-based Dispute Resolution Processes in First Nations Communities* provides useful information on developing community based dispute resolution processes and adopting others to meet community needs. While the focus is on processes to decide human rights issues within a First Nation community, the information is relevant to the development of processes to deal with other types of disputes, such as matrimonial real property. The toolkit identifies a number of key principles that facilitate community support and respect that also reflect principles of fundamental justice in Canadian law. These include: "make the process accessible," "obtain community input about the process," "ensure the process is acceptable to everyone involved in the dispute," "ensure impartiality and independence," "allow people to bring a representative," "give people the opportunity to be heard," "encourage people in a dispute to share information," "keep information confidential," "give reasons for decisions," and "help ensure no retaliation."²¹⁶

The toolkit also suggests imagining how the process will look and function. In addition to considering the main components of the process, thought needs to be given to how to communicate about the process, the "parameters of the process," how people will make complaints and submit them into the process, who the decision makers will be and what roles they may have,²¹⁷ who will be responsible for and willing to assist in the

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ *Ibid* at 104.

²¹⁶ Canadian Human Rights Commission, *supra* note 182 at 4.

²¹⁷ *Ibid* at 12.

development of the process,²¹⁸ and the skills of the participants including the need for extra guidance or expertise.²¹⁹ Community input into these and other decisions are key as “people who feel they are involved in developing a community-based dispute resolution process are more likely to trust it and want to use it.”²²⁰ Where structures for dispute resolution processes are imposed, there may be misunderstandings about the process, disrespect towards it, or non-use.²²¹

The development of a dispute resolution process should also consider what sort of timelines would apply to resolution of the dispute²²² and any processes for appealing outcomes.²²³ It is important for the “appeal process to also have an end, or people involved might feel like the dispute has not concluded. This could cause the dispute to stay ‘alive’ within the community.”²²⁴

IV. Court Processes and ADR

In some jurisdictions, there can be requirements that parties engage in a type of dispute resolution process before attempting civil litigation. For example, in Alberta, there are mandatory Rules of Court that state the parties must attempt to resolve the dispute by means of a dispute resolution process that is approved by the court before a trial date for a civil dispute will be approved.

In Alberta, under rule 8.4(3)(a), the parties must show proof of their participation in an approved type of dispute resolution process or proof that the ADR requirement was waived before a trial can be scheduled.²²⁵ Rule 4.16 sets out the requirements for the ADR processes that would fulfill the ADR requirement.²²⁶ The rule states:

4.16(1) The responsibility of the parties to manage their dispute includes good faith participation in one or more of the following dispute resolution processes with respect to all or any part of the action:

²¹⁸ *Ibid* at 20.

²¹⁹ *Ibid* at 21.

²²⁰ *Ibid* at 26.

²²¹ Crowshoe & Mannes Schmidt, *supra* note 48 at 47.

²²² Canadian Human Rights Commission, *supra* note 182 at 48.

²²³ *Ibid* at 55.

²²⁴ *Ibid*.

²²⁵ *Alberta Rules of Court*, Alta Reg 124/2010 s 8.4(3)(a).

²²⁶ *Ibid*, s 4.16.

- (a) a dispute resolution process in the private or government sectors involving an impartial third person;
- (b) a Court annexed dispute resolution process;
- (c) a judicial dispute resolution process described in rules 4.17 to 4.21 [Judicial Dispute Resolution];
- (d) any program or process designated by the Court for the purpose of this rule.²²⁷

The rules provide exemptions from the mandatory ADR process but only in specific circumstances where "before the action started the parties engaged in a dispute resolution process and the parties and the Court believe that a further dispute resolution process would not be beneficial," "the nature of the claim is not one, in all the circumstances, that will or is likely to result in an agreement between the parties," "there is a compelling reason why a dispute resolution process should not be attempted by the parties," "the Court is satisfied that engaging in a dispute resolution process would be futile," or "the claim is of such a nature that a decision by the Court is necessary or desirable."²²⁸

There are several ways that existing Indigenous ADR systems can meet court-mandated requirements. For example, in October 2012, the Chief Justice of the Federal Court issued a letter about a pilot project for "judicial review applications dealing with First Nations governance disputes" with hopes "to facilitate more expeditious, cost effective and satisfactory resolution of such disputes."²²⁹ One of the options for an alternative dispute resolution process includes "utilization of acceptable First Nations dispute resolution processes."²³⁰ Another example is under the *Child and Family Services Act* of Ontario, where "Children's Aid Societies must consider Alternative Dispute Resolution (ADR) when appropriate for child protection cases."²³¹ Here, a piece of law requires that parties attempt ADR. The Ontario ADR-Link states that the processes that would satisfy this requirement are "Child Protection Mediation"; "Family Group

²²⁷ *Ibid.*, s 4.16(1).

²²⁸ *Ibid.*, s 4.16(2).

²²⁹ Chief Justice of the Federal Court, "Pilot Project: Judicial Review of First Nations Governance Disputes" (16 October 2012), online: Federal Court of Canada <[http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/pdf/Notice%20-%20First%20Nations%20Governance%20Pilot%20Project%20\(ENG\)%20FINAL.pdf](http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/pdf/Notice%20-%20First%20Nations%20Governance%20Pilot%20Project%20(ENG)%20FINAL.pdf)> at 1.

²³⁰ *Ibid.*

²³¹ ADR-LINK, *supra* note 116.

Conferencing"; or, "for First Nations families, an ADR approach established by their band or community or other approach deemed appropriate by them."²³²

There are numerous other processes that may work alongside the court system or integrate into the system. For instance, consider the Nishnawbe-Aski Talking Together process. The process is a "restorative approach for dealing with child welfare issues" and is based on traditional circles.²³³ During the circle,

participants look at who has been affected and how they have been affected by the problems that the family is experiencing. Secondly, in the Circle, participants are asked: what can be done? If an agreement is reached, it is used as the basis for the Plan of Care, and filed with the Court. The ultimate goal of Talking Together is to bring families together - to work out the issues breaking up the family unit so that this unit becomes a healthy, stronger unit.²³⁴

The organization established agreements with other services such as the police and family services so that a more collaborative process would result for the participants.²³⁵ Part of the agreement with the Ontario Police and with the Nishnawbe-Aske Police involves pre- and post- charge diversion to restorative or alternative dispute resolution processes.²³⁶ Thus, a collaborative and restorative approach is established that also models traditional circle processes. Other examples are given in the companion paper to this: "Indigenous Centered Conflict Resolution Processes in Canada."²³⁷

V. Conclusion

Numerous ADR processes exist and are used or adapted to many circumstances. First Nation, Inuit and Métis peoples have adapted or adopted many types of ADR processes to fit a range of disputes. Included within that is the adoption of processes that can fit alongside the Canadian justice system. Some of the types of ADR that have been adapted include mediation, negotiation, arbitration, tribunals and family group

²³² *Ibid.*

²³³ Nishnawbe-Aski Legal Services, "Talking Together", online: Nishnawbe-Aski Legal Services <<http://www.nanlegal.on.ca/article/talking-together-126.asp>>.

²³⁴ *Ibid.*

²³⁵ Nishnawbe-Aski Legal Services, "Protocols", online: Nishnawbe-Aski Legal Services <<http://www.nanlegal.on.ca/article/protocols-141.asp>>.

²³⁶ *Ibid.*

²³⁷ Sikka, Wong & Bell, *supra* note 2.

conferencing. In many cases, there is a blending of western and traditional Aboriginal practices and values. Each process has particular strengths and weaknesses that make it more or less suitable for some individuals, groups, communities or disputes.

The successful implementation or adaptation of process may rely on many factors including the nature of the dispute and the desires of and relationships between the parties involved. Furthermore, elements such as culture, gender, power, trust and emotion can pose challenges to the success of ADR models. These factors should be considered in choosing or adapting an ADR process.

Some concerns in adopting any ADR system that is intended to be community based are the multi-layers of identities, beliefs and traditions of individuals who may participate in the process. Though generalizations about culture, for instance, may be able to give some indications as to how an individual will perceive or react to something, it is not always so simple. For one thing, culture is capable of growing, changing and adapting. For example,

Despite the tenacity of core indigenous values and processes, such as the law of agreement, identifying community values for a contemporary indigenous justice system is a complicated task that requires more than looking to values that were dominant prior to colonization. Culturally specific values now include a blend of Western and indigenous ideas of law and conflict."²³⁸

Individuals cannot necessarily be placed into one box nor can generalizations always be accurate for everyone. In developing or adapting an ADR process for a community or group, such considerations may be valuable. Furthermore, the adoption of one system or process may not need to exclude another. As Indigenous legal scholar John Borrows notes

The point I wish to stress is that being an indigenous person (with a political identity, legal entitlements, and normative responsibilities) does not prevent one from possessing other formal identities, entitlements and responsibilities. Indigenous peoples do not have to relinquish their participation in wider national and internal communities just because they have separate dispute resolution systems. Indigenous peoples are traditional, modern, and postmodern.²³⁹

²³⁸ Bell, *supra* note 81 at 246.

²³⁹ John Borrows, "A Separate Peace: Strengthening Shared Justice" in Bell & Kahane, *supra* note 1 343 at 348.

