



**Canadian Human
Rights Commission**

**Commission canadienne
des droits de la personne**

ALTERNATIVE DISPUTE
RESOLUTION (ADR) in
ABORIGINAL CONTEXTS: A
CRITICAL REVIEW

Prepared by Wenona Victor (Stó:lo Nation),
PhD Student
Prepared for Canadian Human Rights
Commission
April 2007

The opinions expressed in this report are those of the author and do not necessarily reflect the views of the Canadian Human Rights Commission. This document may be reproduced free of charge as long as acknowledgement is made of the source.

Aussi offert en français sous le titre *Règlement extrajudiciaire des différends (RED) dans les contextes Autochtones : Un examen critique*

“Balance is based on the understanding that all forms of life and all peoples are intrinsically complementary, and will flourish if the domain of each is perceived and respected”
(Marsden, as cited in Oman, 2004:83).

ABSTRACT

Until recently, the courts have been used as the main forum to resolve disputes. However, public dissatisfaction with an adversarial system, government recognition of experts other than judges, and an increased awareness of the impact of discretion on the administration of justice, especially how cultural differences affect the exercise of discretion, have all led to increased popularity and need for alternative dispute resolution processes (Bell, 2004:254).

In relation to disputes involving Aboriginal peoples, there appear to be three emerging modes of alternative resolution processes. One mode involves Western-based paradigms such as negotiation, conciliation, arbitration and mediation. A second mode involves Indigenous paradigms, which call for the rejuvenation and reclamation of ways in which disputes may be resolved according to the culture and custom of the Indigenous party involved. Due to the diversity and distinctiveness of Aboriginal peoples across the continent, Indigenous methods of dispute resolution are not easily summarized into categories. Rather, they are reflective of the Indigenous teachings from which they come and therefore may be different from one Aboriginal nation to another. A third mode is a combination of the two paradigms.

All three modes, however, share similar challenges. Whether using an Indigenous paradigm, a Western one or a combination of the two, issues of power, cultural differences, language barriers and the effects and impacts of colonialism need to be addressed. This paper examines several of these common challenges. It examines differing worldviews in relation to dispute settlement and conceptualizes the Indigenous paradigms and Western paradigms based upon these worldview differences. By so doing, this paper will not only add to the literature that distinguishes between Indigenous paradigms of dispute resolution and the “indigenization” of Western paradigms, it will also inform ADR theorists and practitioners. In particular, it will inform them of ways in which Indigenous and Western ADR paradigms may work cooperatively together while simultaneously protecting and respecting worldview and cultural differences.

TABLE OF CONTENTS

INTRODUCTION.....	5
CHALLENGES TO ADR PROCESSES IN ABORIGINAL CONTEXTS.....	8
Issues of Power.....	8
Language Barriers.....	11
Cultural Differences.....	16
Cultural Exploitation.....	19
Aboriginal Women’s Voices.....	20
DIFFERING WORLDVIEWS.....	23
Two Worlds Colliding.....	23
Worldview Differences.....	26
Aboriginal Wisdom and Western Scientific Knowledge.....	27
Relationship Building in “Indian” Time.....	29
The Idea of Universality at Work in ADR Processes.....	30
TWO ADR PARADIGMS.....	32
Conceptual Diagram.....	35
CONCLUSION.....	37
REFERENCES.....	40

INTRODUCTION

Within a variety of different Canadian contexts, alternative dispute resolution (ADR) processes are gaining momentum and popularity. While the United States is attributed with starting the ADR movement in the 1970s (Kahane, 2004:33; Pirie, 2004:335), over the past fifteen years in Canada there has been such an increased interest and use of ADR processes that some suggest it no longer be referred to as “alternative” (Bell, 2004:254). According to Bell (2004), this increase in popularity is due to public dissatisfaction with the adversarial court system, a shift by government to have expert individuals other than judges resolve disputes, and increased awareness of the impact of discretion on the administration of justice especially in terms of how cultural differences affect this exercise of discretion (254).

ADR mechanisms within the Western paradigm of conflict resolution are garnering much interest and include such means as negotiation, mediation, arbitration and conciliation. 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 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.

The purpose of this paper is to examine several common challenges applicable to both Aboriginal and non-Aboriginal ADR processes as they pertain to disputes involving Aboriginal peoples, to examine the differing worldviews in relation to conflict resolution, and finally to conceptualize the two different paradigms based upon these worldview differences. By so doing, this paper will not only add to the literature that distinguishes between Indigenous paradigms of dispute resolution and the “indigenization” of the Western paradigm, but it will also inform ADR theorists and practitioners, whether Aboriginal or non-Aboriginal, of ways in which Indigenous and Western ADR paradigms may work cooperatively together to ensure the full realization of ADR while simultaneously protecting and respecting worldview and cultural differences.

The major issues outlined in this paper are drawn mostly from the text *Intercultural Dispute Resolution in Aboriginal Contexts* edited by Catherine Bell and David Kahane (2004). To complement this text, other sources were drawn upon including *Continuing Poundmaker & Riel's Quest* compiled by Richard Gosse, James Youngblood Henderson and Roger Carter (1994), *Reclaiming Indigenous Voice and Vision* edited by Marie Battiste (2000) and *Justice as Healing Indigenous Ways: Writings on Community Peacemaking and Restorative Justice from the Native Law Centre* edited by Wanda D. McCaslin (2005). Together, these four texts provide a thorough analysis and critique of the main issues and concerns when dealing with disputes in Aboriginal contexts.

The text edited by Bell and Kahane (2004) provides an analysis and in some cases a critique of the Western forms of alternative dispute resolution processes in relation to Aboriginal disputes. Behrendt's chapter looks at ways in which certain values of importance to Euro-Canadian ADR mechanisms may in fact go against Indigenous

values. Bell (2004) also examines ways in which the Métis, for example, are using Western mechanisms such as mediation, but are doing so based upon Cree teachings and spirituality through the Healing Mediation Process being designed by the Métis Settlements Appeal Tribunal (MSAT). Bell (2004) provides a thorough overview of Indigenous methods used within non-Indigenous frameworks, and highlights key areas of concern and challenges in doing so. Her section on the MSAT along with Ghostkeeper's chapter on *Weche* teachings demonstrate ways in which Tribunals may be used to ensure respect of both worldviews (see also Te Whiti Love's chapter on the Waitangi Tribunal in New Zealand).

The text also examines the use of formal processes such as courts (e.g. Yazzie's chapter on the Navajo courts and Dewhurst's critique of the Tsuu T'ina Courts) along with insight into a few of the Indigenous methods currently available within Aboriginal communities. Yazzie's chapter on Hozhooji Naat'aanii (Navajo Peacekeepers), Ghostkeeper's chapter on the use of Aboriginal Wisdom, the development of The Mediation Healing Circle by the MSAT and Napoleon's chapter which explores several challenges faced by the Gitxsan in relation to dispute resolution, all touch on methods that are based upon Indigenous values and worldviews.

Overall, the text examines several issues regarding dispute resolution within Aboriginal contexts. By posing both theoretical and practical questions, the text is a means by which colonial relations may be deconstructed. This analysis is helpful in shedding light on several colonial assumptions that often feed, and in many instances impede, the proper resolution of disputes between two often diametrically opposed worldviews. Therefore, the text is like a metaphorical pit stop, a call to halt the ADR train

in order to examine more thoroughly the discourse, especially with respect to its ability to address conflicts and disputes involving Aboriginal people, communities and/or issues.

While the text focuses primarily upon intercultural disputes, the themes and challenges discussed in this paper highlight issues that may be equally relevant to intracultural disputes.¹ The reasons for this become apparent when looking at issues of “internal colonialism” and the adopting and importing of certain Western ideologies and structures by Aboriginal communities.²

CHALLENGES TO ADR PROCESSES IN ABORIGINAL CONTEXTS

Throughout the Bell and Kahane text, several concepts such as power imbalances, cultural differences and language barriers along with theoretical concerns such as goodness of fit were critically analyzed vis-à-vis disputes involving Aboriginal people/parties. From this analysis several key questions and concerns are posed, most of which are relevant to all ADR processes whether Aboriginal or Western.

Issues of Power

The majority of chapters within the text make reference to the notion of power and its effect on dispute resolution. The text acknowledges that many power imbalances inherent to disputes involving Aboriginal people are firmly rooted in most Western ideologies and institutions. Power imbalances affect all levels of social interaction, from government and institutional relations to individual interactions. What varies however, is the visibility of the power differential. Understanding Western history with respect to

¹ The term “intracultural disputes” is used in this paper to refer to a dispute within an Aboriginal community and/or nation. However, if the dispute is between two different Aboriginal nations then it would be an intercultural dispute, not an intracultural dispute, as there are distinct and important cultural differences between the Aboriginal peoples across Canada. As well the term intercultural is also used when speaking of disputes between Aboriginal and non-Aboriginal parties.

² This is an interesting and in many ways deleterious effect of oppression and colonialism. For further discussion, see Henderson (2000) and Laenui (2000).

issues of power and its development is just as informative as coming to understand how collective societies respect equally the autonomy of every individual member, regardless of, or rather, especially because of age, gender and certain abilities.³

Kahane illustrates this power imbalance by critiquing the Western system, which actively excluded Aboriginals: “from Locke to Kant to Tocqueville, liberals have defined Aboriginal peoples as beyond the scope of liberal justice – too savage, insufficiently settled, unreasonable” (30). Behrendt makes a similar point in the Australian context whereby she contends that Australian law, while protecting non-Aboriginal Australians and their rights, has and is failing to protect the rights of Aboriginals. Behrendt acknowledges that this failure to protect is also due to “historic colonial legacy” (121).

Turner (2004) critiques the abuse of political power in the Canadian context by providing a construct for it, which he refers to as “Kymlicka’s constraint” (60). Kymlicka’s constraint refers to the process whereby Aboriginal people are forced to have their rights and voices heard within Canadian legal systems and in so doing must explain Aboriginal ways using Western political and legal discourse. He further contends that, “as long as this imperative characterizes the Aboriginal-newcomer legal and political dialogues, then Aboriginal peoples’ ways of understanding the world remain of little or no importance” (57).

He acknowledges that one need not look too far to see that the differences in political power and Kymlicka’s constraint are a “brutal reality check for Aboriginal

³ The importance of individuality and how it is perceived by collective societies is often a difficult concept to explain to Western, liberal legal societies which tend to frame the argument as individual versus the collective. This framework may fit liberal ideology; however, from within collective Indigenous societies it is better conceptualized as the individual and the collective as the two are impossible to separate. The individual, however, does not become lost within the collectivity, quite the opposite (for further discussion on the individual within Indigenous collectivities see Little Bear (2000); Zion (2005:80-81).

peoples” (60). As long as Canada unilaterally imposes its power over Aboriginal people, survival will demand that Aboriginal people engage in Western discourses and use the “language of the oppressor,” whether in courtrooms or sitting at roundtable treaty negotiation tables (Turner, 2004:60). This constraint is difficult enough when Aboriginal people are aware of it; however, it is especially deleterious when awareness eludes either or both the Aboriginal and non-Aboriginal party to a dispute.

Another facet of power which plays an important role in conflict resolution is the degree to which Indigenous forums retain dependency upon the laws, systems and resources outside of, and often in contradiction to, the Aboriginal culture, community, traditions and laws. Many Aboriginal concepts of dispute resolution may operate outside of Western ADR values and mechanisms. As noted by several authors, as long as Aboriginal forums are restrained by laws not of their own, or are given jurisdiction by an authority other than their own, or are seen as being delegated by or “alternative” to, then these forums are simply another way of maintaining Aboriginal dependence and power imbalances firmly rooted in colonial legacy (see for examples chapters by Bell, Behrendt, Dewhurst, Kahane, and Yazzie). Thus, when operationalized, these issues of dependency raise questions of process, specifically who controls this process and who becomes its gatekeeper.

In such situations there may be a discord between the conceptual framework of conflict resolution within Aboriginal ideology and how conflict resolution is operationalized. Those Aboriginal methods of dispute resolution that are dependent upon government funding and/or non-Aboriginal agencies for jurisdiction have an additional challenge of meeting two often diametrically opposed sets of standards and requirements.

The government funding and reporting requirements can be rigid and bureaucratic based upon quantifiable measurements while many Aboriginal methods of dispute resolution are characterized by their flexible processes, people-orientation, use of cyclical time, and more qualitative measurements in assessing the success of the conflict resolution process.

Aboriginal communities may be forced to change their circle in order to fit it into square bureaucratic requirements. The “strings” attached to government funding often force Aboriginal communities to do one of two things: either mirror and/or model Western forums and institutions, or administer justice (as a Western goal) through the use of Indigenous cultures (Lee 2005). This latter response may, when done carefully, be empowering and a means by which Aboriginal peoples express their self-determination. However, care must be expressed to avoid exploitation in order to meet government goals. As noted by Lee (2005:310), “the administration of justice through culture is an appropriation of culture that exploits Indigenous knowledge and spirituality in order to meet the government’s bureaucratic policy and goals.” In terms of power differentials, either response is another way of maintaining Aboriginal dependence and furthering assimilative objectives.

Language Barriers

There are key differences between the English language and many Indigenous languages, which have a direct impact on how disputes are perceived, defined and resolved. The Aboriginal worldview(s) and culture(s) is best understood from within its own language; the challenge is that as a result of colonial policy, many Aboriginal people do not speak any language other than English. As there are two very different worldviews at play within dispute resolution processes, but often only one language (English) to

describe these worldviews, the challenges become evident but not insurmountable. Later in this paper several worldview differences are expanded upon, but for now it is important to note that due to these differing worldviews, miscommunication and misunderstanding whether using one language or two is an ongoing challenge to ADR processes within Aboriginal contexts.

Within the text are several examples whereby the same term may mean different things to Aboriginal and non-Aboriginal people. The term “culture” and concepts of “land” can have entirely different meanings and this difference may apply equally to intracultural disputes as it does to intercultural disputes. As well there are many English concepts that may not exist within some Aboriginal languages, for example words for “lying” “punish” “blame” and to describe possessiveness such as “mine,” “yours,” “his,” “hers” and even certain gender differences. Thus, assumptions cannot be made that everyone has the same understanding of any given concept when engaged in disputes, including intracultural disputes. Ensuring understanding of important concepts between parties to a dispute is integral to the dispute resolution process.

Language may also result in an increased power imbalance. There are several English terms and phrases which when used during ADR processes may affect its validity. Use of many common English writing styles and terms are inherently biased against Aboriginal people. A simple and common example would be the use of a lowercase “i” for Indigenous or “a” for Aboriginal, but use of capitalized European and Canadian. Seeing the words Aboriginal and Indigenous written with the lowercase while Canadian and European with the uppercase suggests that Aboriginal is not equal or

deserving of the same respect. This may indirectly taint the dispute resolution process as the parties may not be viewed or treated as equals.

Other examples include the use of “mainstream,” and “dominant society” in reference to Canadian society and the use of “alternative” in reference to Indigenous systems when Aboriginal people do not consider their own systems as alternative. These are all common examples of how language can be used to further entrench colonial relations. The terms “dominant” and “power” can mean very different things in Aboriginal cultures than in Western cultures. Many Aboriginal people may not think of a non-Aboriginal society or culture as “dominant” in comparison to their own. These English terms are strongly bound to the Western worldview where hierarchies and “power,” as usually defined by materialistic standards, are the norm.

Hierarchies within Indigenous communities are commonly based upon levels of respect as opposed to the ability to oppress and control. To yield power, within many Indigenous worldviews can mean either internal personal power and/or can be tied to personal and collective spiritual power, which in turn respects the autonomy of others and contributes to the collectivity. Power and hierarchies, therefore, are often very different concepts within Aboriginal communities (see for example Alfred, 1999). They are based upon relations with others, a holistic view that respects difference in each individual’s ability to contribute to the whole. For example, with respect to the power of men and women, Marie Wilson of the the Gitskan Wet’suwet’en Tribal Councils explains:

...compare[s] the relationship between women and men to the eagle. An eagle soars to unbelievable heights and has tremendous power on two equal wings – one female, one male-carrying the body of life between them. Women and men are balanced parts of the whole, yet they are very different from each other and are not “equal” if equality is defined as being the same (as cited in Monture, 1995:224).

It is important that ADR practitioners are aware of these differences in concepts of power and hierarchies. The challenge lies in ensuring that the values and norms of the Aboriginal community be respected, especially when they may remain invisible to an “outsider.”

LeBaron (2004) provides a description of power and leadership in the Euro-Canadian culture where leadership is characterized as: “zealously guard your status and reputation; constantly analyze resources and the opportunity structure; make others aware of their dependence upon you; create a web of relationships to support your power” (23). This is in contrast to characteristics of Aboriginal leadership described as the ability to “draw on your own personal resources as sources of power; value productivity, generosity, and non-materialistic resources; set an example; take the greatest risk needed for the good of the community; be modest and funny; minimize personality conflict and use humor to deflect anger; be aware of role models; take responsibility for educating others” (Alfred (Mohawk) as cited in LeBaron, 2004:23). Within an ADR process it cannot be assumed that an Indigenous leader will adhere to the latter definition; it may be the case that some Indian-Act-Chiefs have accepted and adopted the Western definition of power and leadership. Many Aboriginal leaders may possess both; and/or it may be that a Western dispute resolution process will highlight and draw upon qualities from the former list while Indigenous paradigms will draw from the qualities of the latter.

Lastly and most importantly, 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. Learning what these concepts mean in English and ensuring accuracy within this

translation could in fact be part of the “cross-cultural” training required. Both Ghostkeeper (2004) and Yazzie (2004) share examples by which their respective Aboriginal languages are not only used, but are considered integral to the dispute resolution process. For example, the Métis have taken the Cree concept *Wechewehtowin*, which means “partnershiping,” and adapted it to describe a way in which “partnerships” (*Weche*) can be developed between Métis and non-Métis. This “partnership” is respectful of the differing epistemologies between Aboriginal wisdom and Western scientific knowledge (explained in further detail later).

The Cree term *Wechewehtowin* provides an example of an Aboriginal concept that does not necessarily exist in the Western world. According to Ghostkeeper, *Wechewehtowin* translates into English as “partnershiping” and this translation may relate to the differing worldviews. The English language is very noun focused whereas many Indigenous languages are verb driven, more “process-oriented” and descriptive (Little Bear, 2000:78). This difference in focus between the languages also reflects the differing notions of time and space (see for examples Little Bear,2000; Deloria, 2003). With many Indigenous worldviews, their languages reflect their concept of time as always being in motion, as opposed to linear time with a clear beginning and endpoint.

The term “partnershiping” implies a relationship and a “process” that is on-going and descriptive of something we are “doing.” While the English term “partnership” describes a relationship, it specifically describes something we “are” as opposed to something we “do.” While a subtle difference, it is worthy of note as many Aboriginal cultures put emphasis on the “process” as opposed to a static state.

The Navajo process, for instance, relies heavily on the use and understanding of key Navajo concepts to resolve disputes according to a Navajo worldview (see Yazzie, 2005). Yazzie (2005) acknowledges the difficulty in translating important Navajo concepts into the English language. For instance the Navajo concept of *nalyeeh* is an action verb which translates into English as “a demand to be made whole” and “a demand to enter into a respectful discussion of the hurt” (Yazzie, 2005:128). However, articles on Indigenous traditional law often use the translation of “restitution” or “reparation” which are nouns. *K’e* is another important Navajo concept to the dispute resolution process, and is difficult to translate into English. *K’e* is about the importance of relationships and describes the deeply embedded feeling that the Navajo have of their responsibilities to others and their duty to live in good relations (Yazzie, 2005:130).

Cultural Differences

While it is increasingly recognized and acknowledged that cultural differences are largely responsible for many of the shortcomings of formal dispute resolution processes within Aboriginal contexts, it is still largely undefined and unclear as to how exactly ADR processes, whether Aboriginal or Western, will overcome these cultural challenges. Several chapters in the Bell and Kahane’s text are extremely insightful and unabashed in asking pertinent and challenging questions (see for examples, Bell, Behrendt, Kahane, Napoleon and Yazzie). By so doing, the text lays important foundational work by providing mindful areas as well as shedding light on lessons learned from previous cultural interactions which resulted in further misunderstanding and cultural divide.

As mentioned several times throughout the text, Aboriginal paradigms are subject to similar cultural challenges due to the colonial impacts upon these cultures. There are

language barriers that are further complicated because many Aboriginal communities do not “understand their traditional philosophies in their own languages” (Turner, 2004:65). This may impact adherence to their Aboriginal customs and laws on which they would base process design and implementation. However, this would now be by choice and not legal imposition. That is, Aboriginal communities are now able to revitalize and practice their Indigenous forms of dispute resolution, if they so choose.

There are impediments to this revitalization process referred to as “internal colonialism.” The result of which is that Aboriginal communities may view their own traditional legal systems as inferior to those of the colonial powers (Bell, 2004:242) or, when finding that Indigenous systems are in contradiction to colonial ideology and policy, they may decide to abide by the latter or create divisions within the Aboriginal community (Napoleon, 2004:189) and adopt only those “aspects of [I]ndigenous knowledge, values, and processes that do not conflict with Western values and laws” (Bell, 2004:243). Should this be the case, it would naturally follow that the dispute resolution process in design and practice would also be subject to the same cultural challenges faced by formal Western and ADR processes.

There may be a rather large understanding of what “culture” means to Aboriginal people within Aboriginal interactions and contexts. However, this understanding may be quickly diluted or challenged in the context of “cross-cultural” interactions or intercultural disputes. Ghostkeeper, for example, states he has spent many years trying to interpret what is meant by the English word “culture” and has found that it is often equated with “cultivation,” which means to disconnect and distance oneself from the land. Cultivation is something that is done separate from and outside of the self. In this

sense “culture” is interpreted to mean that those most cultivated are those living the farthest from the land, something that directly contradicts his Métis teachings and worldview of close relations with the land. According to Ghostkeeper (Métis):

[S]ome of the Elders I work with do not use the word “culture” because they say it is not properly applied to Aboriginal people. We do not believe that we are separate from nature. Consequently, I even question if it is an appropriate concept to use in describing communications between Aboriginal and non-Aboriginal people or in trying to describe our worldview (173).

Similarly Ghostkeeper has stopped using the term “cross-cultural” as he does not know what this means. As an anthropologist, Ghostkeeper studied culture for many years and concludes that culture is something cultivated from nature and should not be applied to people, ideas and experiences (174). Cultivate denotes a separation which is in direct conflict with his teachings of being related to and be one with the land and the natural environment.

LeBaron (2004) notes that:

In much conflict resolution training, culture is treated as a distinct module or topic, without being fully integrated into all aspects of skill acquisition, process design, and implementation. It is conceptualized as something external that divides us, without recognition that culture is everywhere, including within us; it is a set of lenses through which we see all human interaction and information. When communication and process design skills are taught without reference to the cultural assumptions underlying them, processes are more likely to mirror bureaucratic, legal culture than the culture of any particular ethnocultural group. Non-dominant culture values may be pushed to the sidelines in the interests of efficiency, cost savings, and even the laudable goal of fairness (16).

According to Leroy Little Bear (Kainai):

Culture comprises a society’s philosophy about the nature of reality, the values that flow from this philosophy, and the social customs that embody these values. Any individual within a culture is going to have his or her own personal interpretation of the collective cultural code; however, the

individual's worldview has its roots in the culture- that is, in the society's shared philosophy, values, and customs (2000:77).

Thus, the word "culture" may mean different things to different people. If the term is given its literal interpretation we may find it is not even applicable, as noted by Ghostkeeper. Or, if the term is used strictly within a Western worldview, it may be harshly undermined and misused, its importance clearly misunderstood and limited as in the example provided by LeBaron.

Lastly, Napoleon cautions against equating symptoms of powerlessness with Indigenous cultures: "culture cannot be confused with symptoms of poverty or dysfunction created by loss of power" (185). Additionally, the fact that Aboriginal cultures have been adversely impacted by colonial legislation needs to be considered and examined when developing ADR processes.

Of equal importance to the ADR and Indigenous dispute resolution process is "how" culture is included and perceived by the parties to the dispute. As noted by LeBaron, treating culture as a separate module or as one segment of the process is simply not enough. Whether an intercultural or an intracultural dispute, the culture(s) of the Indigenous party(s) needs to be fully integrated and in fact guide the entire process.

Cultural Exploitation

Cultural appropriation occurs when non-Indigenous processes incorporate Aboriginal elements such as Elders, spirituality, drumming, singing, sitting in circle and use of ceremony without the proper consultation and consent from the Aboriginal people from which these cultural teachings belong. Cultural exploitation, which may follow, is a

challenge to both Indigenous and non-Indigenous people and occurs when culture is used for personal, economic, social or political gain.⁴

Napoleon addresses the fear of cultural exploitation when she refers to “public drama and ceremony,” whereby government officials participate in Aboriginal ceremonies but after which do very little, if anything, to change systemic issues of discrimination and oppression. Moreover, Government officials participating in public ceremonies, and social workers making use of an Elders’ Panel that is continually trumped by provincial legislation, has done very little to address the over-representation of Aboriginal children in the care of the ministry.⁵

Aboriginal Women’s Voices

Indian people must wake up! They are asleep...Part of this waking up means replacing women to their rightful place in society. It’s been less than one hundred years that men lost touch with reality. There’s no power or medicine that has all force unless it’s balanced. The woman must be there also, but she has been left out! When we still had our culture, we had the balance. The women made ceremonies, and she was recognized as being united with the moon, the earth and all the forces on it. Men have taken over. Most feel threatened by holy women. They must stop and remember, remember the loving power of their grandmothers and mothers (Rose Auger, Cree Elder as cited in Voyageur, 2000:81).

A final challenge that applies equally to Aboriginal and Western forms of ADR processes within Aboriginal contexts (whether inter- or intra- cultural) is to find the space and the place for the voices of Aboriginal women. Only two chapters in *Intercultural*

⁴ Laenui (2000:152) describes the first of five phases of decolonization as “rediscovery and recovery” whereby Aboriginal people make deliberate and conscious effort to remember and abide by their cultural teachings; however, he explains how if not careful this phase may be mistaken for the final colonizing step of “transformation/exploitation” whereby those remnants of Aboriginal culture that have survived the colonizing process are then exploited and used for personal/social/political/economic gain without understanding of the teachings attached to the exploited culture. In other words, practicing culture by simply going through the motions but not understanding why – “form without substance.”

⁵ In B.C. up to 42% of the children in care are Aboriginal. A reconciliation ceremony under these circumstances may be perceived as acceptance for unacceptable circumstances especially if the ceremony is not used as one step of many in improving relations.

Dispute Resolution in Aboriginal Contexts make specific reference to the dispute resolution process in relation to Aboriginal women (LeBaron, 2004:20; Yazzie, 2004:108). This under-representation of Indigenous women's voices to such a crucial topic is problematic for many reasons considering that the overarching objective of ADR, whether Indigenous or non-Indigenous, is to increase effectiveness and participation. However, it is especially problematic for the deconstruction of colonial relations.

Prior to colonial legislation, women played powerful roles within Indigenous communities (See Absolon et. al, 1996; LaRocque, 1996; Monture, 1995; Sayers & MacDonald, 2001; Voyaguer, 2000). These roles were clearly established and recognized by all as being important to the well being of the community. As the advisors to men, teachers of children, cultural property owners, the givers of life, and the ones to decide who would lead their communities, Indigenous women held valued, empowering and important roles (Sayers & MacDonald, 2001:10). Today, Indigenous women still play powerful roles within their communities; however, these roles are not always recognized and often are not valued or are under-valued by community members.

Eurocentric and patriarchal legislation has adversely impacted the roles and responsibilities of Aboriginal women. Ensuring that Indigenous women's voices are given space and place is crucial to any alternate or formal dispute resolution process involving Aboriginal people. This is no easy task as the powerful voices and roles of Indigenous women have been harshly impacted by colonial ideology and legislation, which downplays, disregards, or entirely ignores the role and power of woman. This is further complicated by a colonial habit whereby Aboriginal people begin to internalize

eurocentric and patriarchal beliefs while conveniently forgetting or feigning ignorance of traditional teachings that directly contradict eurocentric and patriarchal beliefs.

While within ceremony, Aboriginal men may in fact treat women in the manner in which tradition dictates, which for most Indigenous nations is of respect and power as women are the givers of life which is one of, if not the most, sacred role.⁶ Yet, these same men may quickly forget these teachings while sitting in boardrooms, conferences or otherwise engaged in processes outside of their communities. Napoleon alludes to something very similar and refers to this divide as “cultural cognitive dissonance” which may lead to a “cultural paralysis” (188).

There is no doubt that the eurocentric and patriarchal values imposed upon Indigenous communities through legislation such as the *Indian Act* has had the most profound effect upon the identities, roles and responsibilities, and relationships of Aboriginal women. Any dispute resolution process that either directly or indirectly impacts Indigenous women must deconstruct, decentre and challenge these colonial ideologies.

In order to ensure respect and representation for Aboriginal women and their children, any ADR process, whether operating from within a Western or Indigenous paradigm, must take active steps to include the traditional⁷ roles and responsibilities of the Aboriginal women. By seeking their active participation, women will have the opportunity to play leading roles in consultation, implementation and design of ADR

⁶ It should also be noted that even while in ceremony there is anecdotal evidence that Indigenous women have been disrespected and their roles misunderstood. One example would be the public humiliation of an Aboriginal woman in ceremony while she is her most powerful. Rather than explaining how this powerful time in a woman’s cycle can disrupt and even overpower the balance of the whole, women may be made to feel shame, alienation and exclusion due to what is a very sacred part of womanhood.

⁷ The term “traditional” is used here to mean “the ways of our ancestors,” which is especially relevant to contemporary relationship building.

systems. How Aboriginal women do this may look different in each community, but it is important that they themselves dictate the rules of participation.

DIFFERING WORLDVIEWS

Aboriginal cultures have been developing on Turtle Island⁸ for thousands of years. Thus, it is only natural that Aboriginal worldviews have something to offer, both to Aboriginal people and all people in Canada. The challenge to overcome is the manner in which Canadian history has been written, taught and understood. Until recently, much of this history has oppressed and devalued Indigenous worldviews. Nevertheless, there are Aboriginal ways of doing things that are extremely relevant today, especially because they are rooted in ancient relations to the world.

In discussing worldviews, it is first important to recognize and acknowledge the differences and, secondly, to understand and accept them.⁹ According to Chartrand (2004:vii), while acknowledging that conflict between competing interests is inevitable, we need to ask “how are such competing interests to be reconciled and disputes resolved? Who decides and how” (vii)? He suggests that concerns such as these represent a shift from the idea of “colonial systems doing things *to* Aboriginal peoples, to doing things *for* Aboriginal peoples, and finally, to the imperative of doing things *with* Aboriginal peoples” (vii). By understanding and respecting worldview differences, the barrier between doing things *to* and doing things *with* Aboriginal peoples can be overcome.

“Two Worlds Colliding”?

No matter how dominant a worldview is, there are always other ways of interpreting the world. Different ways of interpreting the world are manifest

⁸ Turtle Island refers to the Western hemisphere, or the Americas.

⁹ Some argue that part of colonial history was to create the “strategy of differences” whereby certain European norms were ascribed positive traits while Indigenous norms were ascribed negative traits resulting in increased xenophobia (Youngblood Henderson, 2000).

through different cultures, which are often in opposition to one another. One of the problems with colonialism is that it tries to maintain a singular social order by means of force and law, suppressing the diversity of human worldviews. The underlying differences between Aboriginal and Eurocentric worldviews make this a tenuous proposition at best. Typically, this proposition creates oppression and discrimination (Leroy Little Bear (Kainai) 2000:77).

Perhaps one of the most deleterious effects of colonization is the manner in which Indigenous cultures and worldviews have been misunderstood and oppressed. As noted by Special Rapporteur Martinez: Indigenous societies were studied according to “one-dimensional Euro-centric approximations which held consumer societies, the market economy and the “alleged intrinsic goodness of “modern” (Western) social organization” as superior (1992:7). Therefore, any culture not in line with the Western Judeo-Christian paradigm was deemed to be “backward,” “obsolete,” inferior and “if at all, of negligible value” (1992:7).

While xenophobia, racism and intolerance are still evident in today’s world (Martinez, 1992:7), there is some movement in addressing these issues. Martinez suggests that in order to examine and understand the “motivations, constructions and aspirations of indigenous peoples with respect to juridical manifestations...must be done in the light of what has been termed as ‘contemporary epistemological awareness’ which favors a decentred view on culture, society, law and history” (1992:7). The ability to decentre the Western worldview in order to understand Aboriginal ones is important to the ADR movement and the proper resolution of inter- or intra- cultural conflict.

There is also a growing proliferation of literature, including *Intercultural Disputes in Aboriginal Contexts* in support of a “contemporary epistemological awareness”(Martinez, 1992) and a need to “decolonize methodologies” (Smith, 1999).

All disciplines, especially those that rely on multidisciplinary-generated data, theories and knowledge such as ADR, benefit from an analysis that at the very least decenters the Western worldview. This would allow for a proper reflection and understanding of other equally important ways in which Aboriginal people have come to understand and make sense of the world in which we live.

Such discourse may call into question the cultural transferability of Western-derived epistemologies and values. Many Western values are often held to be universal but find no resonance in Indigenous cultures. Their imposition may instead generate ethnocentric biases within Aboriginal communities (Martinez, 1992:9; see also Henderson, 2000:63). Thus, it is important to recognize different epistemologies allowing for alternative dispute resolution processes to be a part of the solution as opposed to furthering “the project of colonization” (Bell, 2004:242).

These issues are especially important in relation to Aboriginal disputes and the ADR movement. There is still direct and indirect resistance to Aboriginal people taking full responsibility for their own lives and according to their own unique ways of being in this world. This resistance is often grounded in eurocentric notions of the world. As noted by former National Chief George Erasmus:

All across North America today First Nations share a common perception of what was then agreed: we would allow Europeans to stay among us and use a certain amount of our land, while in our own lands we would continue to exercise our own laws and maintain our own institutions and systems of government. We all believe that this vision is still very possible today, that as First Nations we should have our own governments with jurisdiction over our own lands and people (as cited in Turner, 2004:61).

This Aboriginal understanding of the world is often in stark contrast to that of newcomers. Dispute resolution is enhanced when the parties to the dispute can agree to

some common understanding of the world. Martinez provides two worldview commonalities that can ground the forthcoming analysis of differing discourses between Indigenous Peoples and Western societies. The two universals are (1) that all societies have a system of law (whatever it consists of) and (2) that all societies are rational (however this rationality is defined) (1992:13). With these two universals in mind an analysis of the differences in relation to Aboriginal worldviews and Western worldviews in relation to ADR processes may be grounded.

Worldview Differences

Martinez's identifies seven important dimensions upon which Indigenous and Western state-based societies differ. These dimensions are repeatedly reflected throughout Bell and Kahane. They include (1) the concept of individuality; (2) life as an indivisible whole; (3) concept of time; (4) modes of societal organization, especially in relation to kinship ties; (5) concept of land guardianship/ownership; (6) leadership; and (7) principle of reciprocity¹⁰ (Martinez, 1992). Each of these dimensions will have a direct influence on ADR processes in Aboriginal contexts.

Many of these differences are apparent in the chapter written by Elmer Ghostkeeper (Métis) titled "*Weche* Teachings: Aboriginal Wisdom and Dispute Resolution." Ghostkeeper speaks of "Aboriginal wisdom" as an epistemology to be respected and viewed at the very least, in equal stature and necessity as Western knowledge: "Aboriginal wisdom must be accepted in partnership, fellowship, and equity with other knowledge systems. In particular, it must be treated with respect and be given equally serious consideration as Western scientific knowledge" (2004:163). According to

¹⁰ According to Thurnwald, "reciprocity is an essential principle of law" (as cited in Martinez, 1992:15).

Ghostkeeper, Aboriginal wisdom encapsulates the Aboriginal worldview and reifies many of its philosophical beliefs.

“Aboriginal Wisdom” and Western Scientific Knowledge

Ghostkeeper outlines notions of “relationships,” “time,” “epistemologies,” “reality,” “concepts of land and culture” and “spirit” between Aboriginal wisdom and Western scientific knowledge bases. Aboriginal wisdom incorporates oral history and story telling as important forms of Aboriginal epistemology and is inherently holistic and cyclical; whereas Western knowledge is fragmented, pragmatic, and grounded in scientific evidence that can be quantified and empirically studied (see Figure 10.3 in text, pg 166). While both ways of understanding the world have very different foundations for truth and ways in which to ascertain this truth, both are equally valid (Ghostkeeper, 2004:165). The problem is in purporting one epistemology as being the *only* epistemology:

Science is fragmented because it represses emotion and spirit...People grounded in this knowledge system sometimes have difficulty understanding the relevance of what we need to communicate as Aboriginal people about our relationship to the land. They listen to a story and try to discern a scientific fact, rather than personal, spiritual or emotional connection, or they ask us to reduce our teachings to what we can prove by Western scientific methods. There is little room at many negotiation tables for spirituality, emotion, or experience that is not also supported by scientific fact (165-66).

Understanding these differences goes a long way in ensuring the development and use of equally beneficial ADR processes in Aboriginal contexts. Ghostkeeper explains what Martinez described as “life as an indivisible whole:”

Everything is one as created by the Great Spirit. Consequently, every living thing on earth has the same four aspects of self that we do. This understanding of ourselves and our connection to nature is what we call a holistic worldview. Everything, even objects Western culture may view as

inanimate, has a soul; in our worldview, this means all life is sacred (2004:163).

As many Aboriginal cultures share this concept of “life as an indivisible whole,” relationships and their preservation is often one of the main guiding principles to dispute resolution. Since all life is connected and inter-related, ensuring “balance” and “harmony” is paramount. Ghostkeeper notes that these relationships include not only human relations, but also relations with the land and all other aspects of the natural environment. Ghostkeeper speaks for many Aboriginal people when he says: “We must be true to these beliefs in all our communications about our lands and our life on those lands to remain balanced as individuals and as a people” (165).

In relation to the concept of land guardianship/ownership, Ghostkeeper explains that this sacred relationship can only be described within his own language, that there are no adequate words in English to describe this relationship and connection to the earth: “So when we discussed land, we always spoke in Cree. It was in this language we were best able to express our relationship to the land and its importance to us as the people” (2004:167). Many Indigenous cultures share this sacred tie and relation to the land. The fact that there are no words to describe this relationship adequately in present-day English simply speaks to the differences in worldviews on this matter. Given there is no common language and such tremendous difference in how land is perceived by each party, how should disputes involving land be resolved?

Ghostkeeper suggests that the answer for the Métis was through *Weche* teachings. *Weche* is a word that comes from the Woodland Cree expression *Wechewehtowin*, which means “partnership” (161). *Weche* teachings describe a “partnership” that was developed and used in relation to the Métis land settlement legislation in Alberta.

Through *Weche* teachings both Aboriginal wisdom and Western knowledge bases were upheld and respected.

Ghostkeeper explains that he tried to ensure fundamental principles, which he calls “Métism” were kept in place during the land settlement legislation development (169). Métism is the “Métis way of doing things” and “Métis Wisdom.” According to Ghostkeeper:

This concept of land, our relationship to it, and its relationship to our spiritual and physical health was difficult for the government people to understand. To this day I am not sure that they understand completely, but they did come to understand that land was integral to our mental, physical, spiritual, and emotional well-being as a people and as individuals (168).

Relationship Building in “Indian” Time

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. For example, within many Aboriginal communities “work” takes a back seat to the “relationship-building” portion of any interaction. Many meetings and interactions begin with an extended period of time devoted to the informalities of simply sitting together, talking and laughing about everything but the issue at hand. To many, this segment of the get-together may appear frustrating, especially if the meeting ends with “let’s get together again tomorrow to pick up where we have left off” when in fact, the meeting had not even yet started.

The end result may very well be that four days spent “relationship-building” means the dispute itself is finally settled within an hour and all are happy with the

outcome. This approach is compared to two days of intensive, stressful negotiation with little or no time spent on relationship-building, which may result in misunderstanding and stalemate.

The former process also makes use of the concept of “Indian time.” Indian time is often a misunderstood concept and has fallen prey to the eurocentric notion that it means one is always late. On the contrary, Indian time means “the right time” and is hardly ever linear. It is cyclical and understands life to be always in motion and in constant flux (Little Bear, 2000:78).

The Idea of Universality at Work in ADR Processes

Berhendt’s chapter demonstrates how the idea of universality can work against ADR processes. The importance of “neutral third parties” and “impartiality” are upheld as universal ‘must-haves’ in relation to dispute settlement in Western models; however, within Aboriginal worldviews these traits contradict several important traditional teachings. As noted by Kahane: “Avruch reminds us of the cultural presuppositions involved in the belief (dominant in Western contexts) that the best mediator will be an outsider, impartial and unbiased. He suggests that ‘the ethnographic record in general does not support the existence of the uninvolved third party as either the norm or the ideal’” (2004:47). This, coupled with a neutral third party, “presupposes an authoritative system of law and rule under which parties to dispute are jointly situated” (31); it calls into question the validity and suitability for such “alternative” processes.

In this aspect and others, Behrendt suggests that mediation, which is meant to be an “alternative” response to court deficiencies and biases is actually a repetition of these same deficiencies. She provides suggestions and concerns, stating that while training

Aboriginal people as mediators is a better option and takes care of the problem of trying to teach non-Aboriginal people important cultural teachings and perspectives, there are still flaws (125). Brehrendt suggests that simply training Aboriginal people as mediators may not be sufficient to counter the problems of “cultural bias” and the problem of “neutral and impartial” third parties as there are many distinct differences between Aboriginal groups and communities.

A trained Aboriginal mediator who is knowledgeable in Aboriginal culture would probably fare better than a non-Aboriginal mediator in the ability to use the “elicitive” approach. An “elicitive” approach requires the mediator to take the lead from the parties involved and recognize the process as both a functional and political one (Kahane, 2004:47). It does not impose a formula or process upon the disputing parties; rather it takes the lead from them in terms of timing, place, communication styles, and who is to be involved in the resolution process (LeBaron, 2004:20). An Aboriginal mediator knowledgeable in Aboriginal culture would also be better suited to ensure that such qualities as creativity, authenticity, empathy, respect for one another and leadership (LeBaron, 2004:17-19) are present throughout the dispute resolution process.

Distinguishing between Western mediator “must-haves” such as “neutrality,” “impartiality” and “objectivity” and Indigenous ones of “personal involvement,” “first hand knowledge,” “tied to community and culture” are important for two reasons. First, simply imposing Western values upon an Aboriginal dispute will bias both process and outcome. Second, claiming Western norms and values as universal undermines the potential and realization of other equally important ways of understanding the world. Traits important to an Indigenous process reflect important tenets of their worldview such

as life as an indivisible whole and the importance of oral tradition (just as there are rules for written histories, there are also rules for oral histories and traditions). Both issues would be resolved in large measure if the mediator, or mediators, came directly from the community, which is engaged in a dispute. This is also in keeping with oral tradition within Indigenous communities that often dictates who can and cannot speak on a subject. Those who are considered impartial and neutral are also disconnected and lack personal involvement; they are therefore not authorized to speak (see Brehrendt, 125).

Yazzie's chapter on *Hozhooji Naat'aanii* (Navajo Peacemaking) demonstrates ways in which Aboriginal culture, traditions and "must haves" are being met and are experiencing a great deal of success precisely because of its grounding in traditional Navajo thinking. The *naat'aanii* (Peacekeepers) are leaders from the Navajo community who command respect during disputes because of their reputation for wisdom and knowledge of traditional teachings (108). The process is successful precisely because of its foundation in traditional Navajo concepts of "solidarity, mutuality, and reciprocal obligations" (108). In many different ways, the Navajo are assisting other Aboriginal communities who increasingly insist upon doing "justice" according to their own Aboriginal customs and legal traditions. As Yazzie succinctly states, "we are reviving our traditional law to survive" (107).

TWO ADR PARADIGMS?

Our traditional laws are not dead. They are bruised and battered but are alive within the hearts and minds of the [I]ndigenous peoples across their lands. Our elders hold these laws within their hearts for us. We have only to reach out and live the laws. They do not need the sanction of the non-[I]ndigenous world to implement our laws. These laws are given to us by the Creator to use. We are going to begin by using them as they were intended. It is our obligation to the children yet unborn (Venne, as cited in RCAP 1994:122).

By the mid-1980s the field of conflict resolution began to recognize the importance of cultural issues. One of the major findings of the Multiculturalism and Dispute Resolution Project at the University of Victoria was that the majority of disputes involving people outside of the Euro-Canadian culture remained largely unaddressed (LeBaron, 2004:14). This coupled with the over-representation of Aboriginal people within the criminal justice system (whether from arrest to incarceration), the under-representation of Aboriginal people in positions of authority within this system, and the under-utilization of either formal or ADR processes by Aboriginal people to resolve disputes all indicate that something needed to be done to increase Aboriginal peoples involvement in resolving disputes.

In response to these issues there has been rejuvenation and increased acknowledgement, by Aboriginal and non-Aboriginal people, of traditional Indigenous methods of resolving disputes. Like Western forms of ADR, Indigenous forms may also operate either within or as an annex to the formal court system. Examples include community mediation circles, Elders sentence advisory panels, community sentencing committees, family group conferencing and sentencing circles (see for example Green, 1998). These types of ADR processes, however, are often strongly criticized as simply “indigenization” of the current Canadian system (Lee, 2005; Tauri, 2005). While they may to a small degree increase the participation of Aboriginal people within the dispute resolution process, they do very little to substantially address systemic and societal issues of racism, discrimination, oppression and eurocentrism. Many argue that simply “accommodating” Aboriginal identity and culture is not enough (see Poundmaker text for example).

There is presently a movement of Indigenous forms of ADR that operate entirely separate from the formal Canadian system and from within an entirely Indigenous paradigm. A conceptual framework may be helpful in understanding the difference between Indigenous paradigms of dispute resolution and the “indigenization” of western ADR models. Two frameworks are particularly useful. The first, Rupert Ross’ (1994) notion of “dueling paradigms,” operates much like a straight line or continuum. Ross (1994) places Western forms of criminal justice at one end of the continuum and Aboriginal justice at the other end. All programs can thereby be placed anywhere along the continuum depending on whether they operate from within a Western paradigm (focused mostly upon punishment and crime control) or an Aboriginal one (focus upon traditional teachings and healing).

For the current analysis, Western ADR processes would be placed at one end of the continuum and Indigenous forums at the other, with the understanding that any ADR process may operate anywhere along the continuum. For example, Aboriginal courts and tribunals would operate closer to the western end of the continuum and the Navajo Peacekeepers would operate closer to the Aboriginal end of the continuum with most processes such as the Métis Mediation Healing circles operating in the middle. It would also be possible for ADR processes that use flexible approaches to slide along the continuum during the dispute resolution process.

Conceptual Diagram

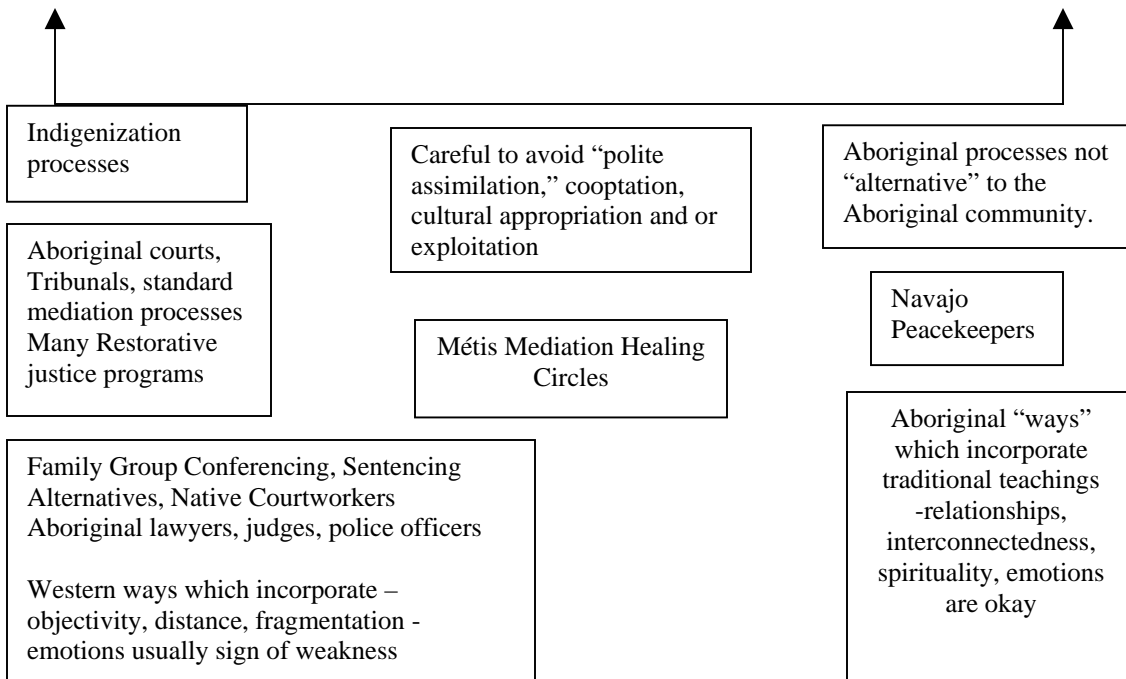
WESTERN ADR PROCESSES

“Liberalism”
 “Individualism”
 “Experts & Professionals”
 “HEAD TALK”

“Shared Horizons” &
 “Weche Teachings”

ABORIGINAL PROCESSES

“Aboriginal Wisdom” &
 “Navajo thinking”
 “HEART TALK”



* This diagram is a compilation of the ideas expressed in Bell and Kahane’s book, *Intercultural Dispute Resolution in Aboriginal Contexts*, as applied to Ross’s (1994) “dueling paradigms” model.

The second conceptual framework is provided by Mary Ellen Turpel (1994). She suggests that Aboriginal systems of justice would run parallel to the Western criminal justice system but at several points, there would be points of convergence in which the two systems meet and work together. Macfarlane also discusses “convergence” but not in relation to parallel systems (2004:99). Rather the concept provided by Macfarlane is convergence that results when different cultures of conflict resolution collide; she is not referring to anything “new,” transformative or integrative resulting from this collision,

rather she uses the term to describe cross fertilization and mutual influence. Macfarlane acknowledges that this type of convergence may not be desirable and may in fact be seen as a “polite form of assimilation” (99). And given issues of power imbalances, cultural differences and language barriers, assimilation may be a result of this type of convergence.

On the other hand, the framework provided by Turpel, and to some degree by Dewhurst, discusses points of convergence for parallel systems. With two equally present systems, issues of cooptation, cultural appropriation and/or exploitation and assimilation are less of a threat. Points of convergence could also operate either way, with Aboriginal systems at times “borrowing” from the Western systems and vice versa. To provide an example, the most obvious is best (keeping in mind that while the most obvious example may not necessarily be the most common example). In those rare situations whereby someone is causing harm to the people and/or community and is refusing or unwilling to stop, Aboriginal communities could banish this person from the community. However, this response may then put relatives (and strangers for that matter) from a nearby community in danger. Therefore, this may be a rare occasion where -- provided the situation does not require mental illness assistance -- incarceration is the only thing that can ensure the safety of valuable and often vulnerable members of the community (especially women and children). This could be a point of convergence whereby the Indigenous system uses a resource already available within the Western system.

The interesting caveat of this conceptual framework is that either paradigm has the option of borrowing from the other. There are a whole host of questions and concerns that come along with this, one for instance being that “convergence” if not done carefully

could simply amount to nothing more than “a polite form of assimilation” (Macfarlane, 2004:99). For the present purpose of this paper, an important point is that Indigenous paradigms of justice and ADR have the most to offer their own people, but they also have something to offer non-Indigenous people when done respectfully and steps are taken to avoid cooptation and/or cultural exploitation.

CONCLUSION

Until recently, the courts have been used as the primary mechanism to resolve disputes. However, public dissatisfaction with an adversarial system, government recognition of a range of expert decision makers, and increased awareness of the importance of acknowledging cultural differences among disputing parties are among the factors that have encouraged the rise of alternative dispute resolution processes (Bell, 2004:254).

Within the context of Canadian Aboriginal communities, Indigenous methods for resolving disputes have also been revived and applied. Within these communities, there are three distinct modes of alternative resolution processes. One approach involves Western-based paradigms such as negotiation, conciliation, arbitration and mediation. A second approach applies Indigenous paradigms to resolve disputes according to the culture and custom of the Indigenous parties involved. Due to the diversity and distinctiveness of Aboriginal peoples across the continent, these methods of dispute resolution are multifaceted; they reflect the Indigenous teachings from which they come and subsequently differ across Aboriginal nations. A third approach focuses on combining the two paradigms, so that aspects of Western-based paradigms are synthesized with traditional Indigenous paradigms.

As this paper shows, these three approaches share similar challenges. Whether using an Indigenous paradigm, a Western paradigm, or some combination of the two approaches, issues of power, cultural differences, language barriers and the effects and impacts of colonialism need to be addressed. While these challenges may be perceived as overwhelming, the following story, which comes from Dewhurst's chapter on "Parallel Justice Systems," tells the story of The Tale of Two Spiders. In keeping with the Aboriginal epistemology of storytelling, this story illustrates that these challenges are not insurmountable and there are lessons to be learned from 'thinking outside of the box'.

Dewhurst tells the story like this:

Once upon a time there were two spiders in a lodge, sitting on the roof, discussing the web of justice. After a very long time they both agreed there was injustice in the world that needed to be fixed. And, because spinning webs is what spiders do, they both agreed that they had to spin a better web. But, sadly, they could not agree on how the new web should be spun. So, each spider decided to try to solve the problem in the best way she could.

The first spider continued to sit on the roof thinking about how to build the complete and perfect web. She sat and she sat without moving, without spinning, thinking about all the things that could go wrong. If she moved too fast she might make a misstep, destroy the web, or fall to her death far below. If the creatures that sometime lived in the lodge with her didn't like her web, or if it got in their way, she would be frustrated and hurt by building her web only to have it smashed. The more she thought, the more problems she discovered. To try and head off these disasters, she thought about the best place to start her web. While many places seemed beneficial, none seemed perfect. So, she thought about where her web should end. Again, there were too many possibilities. She couldn't sort through them all. So then she thought about the exact design of her web. There were just too many things beyond her control that might affect the web's shape, like the wind and the movements of the other creatures. She finally decided that she could not predict exactly how her web should turn out. When the other creatures saw her sitting there and offered to give her a helping hand, she refused for fear that the hand might crush her or be snatched away, leaving her to fall. So there she sat, without a web to sustain her, and there she died.

The second spider crawled across the roof of the lodge looking for a place to spin her web. In a little while she found an opening where no webs had been built. Although she wasn't sure exactly how her web would turn out, she felt that it had

to begin with the first strand. So, anchoring the first strand of her web securely to the framework of the lodge around her, she dropped into the empty space. There she hung, suspended in midair. She wasn't sure where the wind or the other passing creatures would take her but she placed her faith in the forces of nature to take her to a spot where she should tie off her first strand. The wind blew her back and forth. Finally, it blew her to a place where she could tie off her first strand and she quickly did so. Then she started the whole process over again. On and on she worked, and her web took shape: sometimes through her own efforts, sometimes redirected or assisted by those around her, sometimes guided by the forces of nature. As she spun, some of the old strands were cut or broken, and she replaced them or resecured them. She never knew in advance what the final shape of her web would be. As her web developed she took time to appreciate what she had done and a pattern began to emerge. In the end, after long effort, she had spun something unique and beautiful. Her web was firm and flexible, it filled the openings that she had found, and it was able to sustain her in a way that nothing had before (Dewhurst, 2004:214).

References

- Absolon, Kathy, Herbert, Elaine, MacDonald, Kelly. (1996). "Aboriginal Women & Treaties Project" Report prepared for Ministry of Women's Equality.
- Alfred, Taiaiake. (1999). *Peace Power Righteousness: An Indigenous Manifesto*. Oxford: University Press.
- Battiste, Marie (2000). (editor). *Reclaiming Indigenous Voice and Vision*. Vancouver: UBC Press.
- Bell, Chatherine and Kahane, David (2004). (editors). *Intercultural Dispute Resolution in Aboriginal Contexts*. Vancouver: UBC Press
- Calliou, Brian. (2005). "The Culture of Leadership: North American Indigenous Leadership in a Changing Economy" in Duane Champagne, Karen Jo Torjesen and Susan Steiner (editors) *Indigenous Peoples and the Modern State*. Toronto: Altamira Press. pp 47-68
- Deloria, JR. Vine. (2003). *God is Red: A Native View of Religion*. Colorado: Fulcrum Publishing.
- Goss, Richard, Henderson Youngblood, James, & Carter, Roger. (1994). (editors). *Continuing Poundmaker & Riel's Quest: Presentations made at a conference on Aboriginal Peoples and Justice*. Saskatchewan: Purich Publishing.
- Green, Ross. (1998). *Justice in Aboriginal Communities: Sentencing Alternatives*. Saskatoon, Saskatchewan: Purich Publishing.
- LaRocque, Emma. (1996). "The Colonization of a Native Woman Scholar" in Christine Miller and Patricia Chuchryk (editors), *Women of the First Nations: Power, Wisdom, and Strength*. Winnipeg: University of Manitoba Press. pp 11-18/
- Lee, Gloria (2005). "The Newest Old Gem: Family Group Conferencing" In Wanda D. McCaslin (editor) *Justice as Healing Indigenous Ways: Writings on Community Peacemaking and Restorative Justice from the Native Law Centre*. Minnesota: Living Justice Press pp 308-312.
- Little Bear, Leroy (2000). "Jagged Worldviews Colliding" In Marie Battiste (Ed.). *Reclaiming Indigenous Voice and Vision*. Vancouver: UBC Press, pp. 77- 85
- Martinez, Miguel Alfonso (1992). Study on Treaties, Agreements and Other Constructive Arrangements. (First Progress Report). (E/CN.4/Sub.2/1992/32; 25 August 1992) Available online at <http://www.cwis.org/fwdp/International/untrtstd.txt>.

- McCaslin, Wanda D. (2005). (editor). *Justice as Healing Indigenous Ways: Writings on community peacemaking and restorative justice from the Native Law Centre*. Minnesota: Living Justice Press.
- Monture, Patricia. (1995). *Thunder In My Soul: A Mohawk Woman Speaks*. Halifax: Fernwood Publishing.
- Ross, Rupert. (1994). Duelling Paradigms? Western Criminal Justice Versus Aboriginal Community Healing. In R. Gosse, J.Y. Henderson and R. Carter (eds.) *Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*. Saskatoon: Purich Publishing, pp. 241-268.
- Sayers, Judith F. & MacDonald, Kelly A. (2001). *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports*. Status of Women Canada Policy Research Fund.
- Smith, Linda Tuhiwai (1999). *Decolonizing Methodologies: Research and Indigenous Peoples*. New Zealand: Univeristy of Otago Press.
- Tauri, Juan Marcellus (2005). "Family Group Conferencing: The Myth of Indigenous Empowerment in New Zealand". In Wanda D. McCaslin (editor) *Justice as Healing Indigenous Ways: Writings on Community Peacemaking and Restorative Justice from the Native Law Centre*. Minnesota: Living Justice Press pp 313- 323.
- Turpel, M. E. (1994). Reflections on Thinking Concretely about Criminal Justice Reform. In R. Gosse, J.Y. Henderson and R. Carter (eds.) *Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*. Saskatoon: Purich Publishing, pp. 206-221.
- Voyageur, Cora (2000). "Contemporary Aboriginal Women in Canada" in David Long & Olive Patricia Dickason (editors) *Visions of the Heart: Canadian Aboriginal Issues*. (2nd edition). Toronto: Harcourt Canada. pp 81-106
- Youngblood Henderson, James (Sákéj). (2000). "Postcolonial Ghost Dancing: Diagnosing European Colonialism." In Marie Battiste (Ed.). *Reclaiming Indigenous Voice and Vision*. Vancouver: UBC Press, pp. 57-76