

Introduction

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The past two decades have seen a burgeoning of theoretical and popular interest in alternative dispute resolution (ADR). Given perceived deficiencies in adversarial, court-centred responses to conflict, there has been a search for forms of dispute resolution less costly in both social and economic terms. ADR denotes modes of problem solving, negotiation, conciliation, mediation, and arbitration less formalistic than conventional legal approaches to conflict, more attentive to underlying interests, and less likely to create winners and losers.

However, notwithstanding their growing appeal, alternative forms of dispute resolution raise serious questions of justice: Does a move away from formal legal processes threaten the impartiality of outcomes? Do the dynamics of ADR disadvantage those with less economic or social power? How are concepts of justice and approaches to dispute resolution inflected by culture, and how can approaches to ADR take seriously the challenges of intercultural justice, understanding, and negotiation?

These questions seem particularly pressing, as ADR processes are designed and implemented in the context of Aboriginal land claims, treaties, and self-government agreements, and in connection with court-based institutions in indigenous communities. On the one hand, ADR offers the prospect of resolving disputes involving Aboriginal communities more effectively than is possible through formal legal processes, and in ways potentially informed by indigenous knowledge, concepts of justice, and approaches to conflict resolution. On the other hand, there are uncertainties about how to write effective ADR mechanisms into new agreements or implement them under existing agreements; questions around the design of fair and culturally appropriate ADR processes and the interface between such processes and existing state legal mechanisms; concerns about whether the outcomes of such processes will approximate the rules of natural justice; and skepticism about the ability to design culturally appropriate mechanisms with sufficient delegated substantive and procedural

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authority, given limits imposed by Canadian law. Questions also arise concerning the impact of delegated forms of decision making on Aboriginal autonomy and the survival and promotion of separate Aboriginal justice systems. Underlying this concern is a fear that modification of conventional ADR mechanisms furthers the project of colonization by adopting only those aspects of indigenous knowledge, values, and processes that do not conflict with Western values and laws.

These hopes, uncertainties, and concerns around ADR in Aboriginal contexts are intensely practical, yet also have extensive theoretical connections. Indeed, they can only be fully addressed by bringing together indigenous and non-indigenous legal and political theorizations of justice, dialogue, culture, and power with detailed reflection on actual cases. This volume establishes such dialogue between theories and practices of dispute resolution in Aboriginal contexts, thereby focusing and developing existing scholarship on intercultural approaches to ADR, including mediation, negotiation, and arbitration. The volume also makes available reflections on how the establishment of effective intercultural processes may be constrained by the institutionalizations of problem solving with ADR by jointly appointed Aboriginal/government tribunals, and other hybrid and indigenous processes. It also offers examples of indigenous dispute resolution philosophies and systems and explores the critical issue of whether it is possible to design ADR processes that empower indigenous institutions given the impact of colonization.

Although significant progress has been made in developing intercultural processes and joint Aboriginal and non-Aboriginal dispute resolution bodies in Canada, lessons learned from the design and implementation of these processes have not been recorded in a comprehensive fashion, have yet to significantly inform scholarship, and are slowly filtering into the language and implementation of agreements. Further, negotiators, dispute resolution practitioners, lawyers, tribunal members, and others engaged in dispute resolution in Canada have never systematically shared their knowledge in person or in print, nor has there been a review of the extent to which existing mechanisms are serving community needs. And while other countries such as Australia, the United States, and New Zealand employ models of culturally based dispute resolution in connection with Aboriginal justice, few of these models have been canvassed in writing from the point of view of Canadian needs and practices.

The chapters that follow engage these issues in both theoretical and practical registers, from the perspective of Aboriginal and non-Aboriginal scholars and practitioners. It is our hope that by framing a discussion between theorists and practitioners of ADR in Aboriginal contexts, this volume advances debates within legal and political theory over intercultural dispute resolution, and offers much-needed guidance to scholars,

lawyers, negotiators, dispute resolution practitioners, and representatives concerned with dispute resolution in Aboriginal contexts.

Part 1: Theoretical Perspectives

The first section of the volume offers theoretical explorations of cross-cultural communication and dispute resolution between Aboriginal and non-Aboriginal parties. In particular, it grapples with the question of how concepts such as culture, power, dialogue, constitutionalism, liberalism, and tradition play out in theories and practices of conflict resolution. Authors in this section help the reader to understand how concepts that appear to be value-neutral can operate to undermine intercultural understanding. These authors lay the groundwork for a deeper understanding of the opportunities and challenges of intercultural dispute resolution demonstrated in the case studies and practical proposals that follow in subsequent sections.

Michelle LeBaron describes how forms of domination are sedimented in established modes of conflict resolution, including ADR: communication skills central to ADR training may not translate well across cultures, standardized ADR processes mistakenly assume that “one size fits all,” and mediators aren’t sufficiently prone to recognize their own cultural horizons. She offers a historical sketch of how issues of culture have entered conflict resolution, and suggests that an emphasis on efficiency and cost-management has obscured key complexities, at the expense of intercultural appropriateness. She then suggests how dispute resolution could better adapt itself to intercultural challenges: intervenors could develop intercultural competencies, which would involve leadership, creativity, authenticity, and empathy; and process design could become more elicitive and open to multiple meanings, in part through the use of intercultural facilitation teams.

David Kahane lays out shortcomings with conventional understandings of legal processes as potentially neutral between cultures, showing how these tend to favour dominant groups; he then explores how incorporating cultural sensitivity into theories and practices of dispute resolution may provoke legitimate worries about the potentially confining or oppressive effects of generalizations about specific cultures. Having characterized the complex “politics of cultural generalization” necessary within alternative dispute resolution, he explores its implications for ADR training and system design.

Dale Turner focuses on how differences between Aboriginal and non-Aboriginal worldviews have played out legally, especially around issues of sovereignty and land ownership. Taking up the work of Canadian political philosopher Will Kymlicka, Turner shows how even “diversity-friendly” accounts of intercultural negotiation inadvertently privilege dominant

languages of law and justice, with the result that Aboriginal understandings become unjustly distorted when presented within these frames. He argues that Aboriginal perspectives on ownership of and relationship to land have been distorted by the requirement of translation into discourses of Aboriginal title and sovereignty; he then considers how Aboriginal voices might achieve equal dignity and influence within processes of dispute resolution, and the distinctive role for Aboriginal intellectuals in bringing this about.

Natalie Oman lays out a continuum of approaches to intercultural relations, from egregious misrecognition (denying moral status to the other), to solely instrumental recognition (assimilating the other to you), to fuller recognition of the other in her own terms. She then focuses on two complementary approaches to intercultural understanding, one associated with the Gitksan-Wet'suwet'en model of intercultural relations and the other developed in the recent work of the Canadian philosopher, Charles Taylor: each of these associates dialogue with actual participation in others' cultural practices, and each preserves a place for moral judgment as part of intercultural understanding.

In her commentary on Part 1, Julie Macfarlane weaves together and extends the arguments of the four chapters to explore appeals to shared meanings in dispute resolution, and then charts a number of forms taken on by collisions between "cultures of conflict resolution."

Part 2: International Contexts

In this second section, authors discuss indigenous and hybrid forms of dispute resolution in the United States, Australia, and New Zealand. Values informing design and implementation and dispute resolution procedures and outcomes are elaborated for comparative purposes and to offer lessons from a wider range of ADR models than those found within the Canadian context. The chapters in this section also discuss the limitations of the ADR processes described and raise important questions about how indigenous processes can, and whether they should, fit into non-indigenous systems of law.

Robert Yazzie, chief justice of the Navajo Court, discusses the historical marginalization of Indian law and the rise of contemporary Navajo courts. He considers whether and how Navajo peacemaking can be transposed to other communities as a form of dispute resolution. He doubts that there are culture-transcending "principles" to be found beneath particularities of the practice, suggesting that any community wanting to learn from the Navajo must go through the same process as gave rise to Navajo peacemaking: plumbing their own indigenous values and understandings of leadership and wisdom. Yazzie discusses two particular dangers of legal indigenization: the reiteration of current legal and political pathologies

when dominant systems incorporate traditional practices, then use them “on” indigenous peoples; and the setting up of mainstream courts as “gatekeepers” empowered to ignore or initiate peacekeeping.

Larissa Behrendt sketches struggles over Indigenous dispossession in Australia as these have played out in the legal system as well as in public debates over reconciliation. She shows how Indigenous cultural values conflict with those of the legal system, and characterizes a rival Aboriginal approach to conflict resolution. Against this background, she describes the limitations of existing approaches to intercultural mediation in the Australian context and describes changes that might make dispute resolution processes genuinely empowering for Aboriginal communities.

Morris Te Whiti Love, director of the Waitangi Tribunal in New Zealand, describes the historical bases for grievances and disputes between the Maori and the Crown. He then describes the structure and procedures of the tribunal in addressing inter- and intratribal disputes, bringing out the distinctiveness of its approaches to researching claims, mandating tribal representation, and mediating settlements. Through this account, he presents approaches to culturally appropriate dispute resolution that highlight its complex challenges, but also its promise.

Jeremy Webber’s commentary on Part 2 shows how all three chapters point to features of successful mechanisms and to specific challenges of indigenous dispute settlement in the shadow of the colonial experience. He points in particular to the importance of incorporating indigenous standards of authority and wisdom, and of recognizing dispute resolution as a genuinely deliberative and collective process. Webber suggests that the fashioning of mechanisms of dispute resolution by Aboriginal communities represents a new generation of theory and practice of Aboriginal rights, one that moves beyond equality within dominant institutions to challenge existing institutional forms; he then shows how such modes of adjustment and accommodation have a hidden history within courts and governments, and considers how non-indigenous jurists can best foster culturally responsive means of dispute resolution.

Part 3: Canadian Contexts

This section offers four perspectives on efforts within Aboriginal communities to return to traditional models of dispute resolution, and sharpens the reader’s sense of the challenges of accommodating these models within contemporary contexts and established systems of law. Each chapter demonstrates the tensions that arise in attempts to reconcile Aboriginal knowledge and processes with Canadian law and legal process but also offers a vision for intercultural dispute resolution that more adequately addresses Aboriginal justice issues.

Elmer Ghostkeeper argues that dispute resolution in Aboriginal contexts

calls for more than good mediation skills: it requires an engagement with different knowledge systems. He articulates his conception of *Weche*, a partnership of Aboriginal wisdom and Western scientific knowledge; in doing so he characterizes a holistic Aboriginal worldview focusing on balance, and a Western scientific search for underlying laws. Ghostkeeper describes how these worldviews encounter one another at negotiation tables, using examples from forestry disputes and from Metis settlements legislation. He then suggests ways that translation across cultures and languages can enable just accommodations.

Val Napoleon begins from the context of reconciliation agreements between the Gitksan Nation and the province of British Columbia, turning to broader questions of trust, forgiveness, and the construction of narratives of reconciliation. Napoleon draws lessons from modes of reconciliation in the following contexts: practices of restorative justice, reconciling Aboriginal and Crown sovereignty, the Australian council for Aboriginal Reconciliation, and ceremonies of reconciliation in British Columbia. She then articulates a Gitksan perspective first on external reconciliation, insisting on the prerogative of Aboriginal peoples to define the standards of success and decide how they are willing to forgive; and then on internal reconciliation, wherein the Gitksan must grapple with changes to their society and culture under the pressures of colonialism and the Indian Act.

Richard Overstall suggests that the legal device of the trust can help us conceptualize a just interface between Aboriginal legal orders and those of the state. He describes challenges of external reconciliation between these orders, internal reconciliation for Aboriginal communities based on kinship institutions, and future-use reconciliation whereby land is preserved for future generations. Overstall suggests that the cultural and political requirements of these diverse areas of reconciliation might be met through the legal device of the trust, exploring the strengths of this model using the example of a fishery co-management trust; such a model "shifts the locus of power from the nation state to the community and shifts the focus of change and experiment from positivist legal rules to equitable legal structures."

Dale Dewhurst discusses the shortcomings of incorporating indigenous models of dispute resolution into authoritative state systems. The Tsuu T'ina First Nation Court is a provincial court with jurisdiction limited to on-reserve offences; First Nations judges and prosecutors work with peacemakers to resolve conflicts, the emphasis being on the restoration of healthy relationships by addressing underlying causes of conflict. Dewhurst offers an illuminating parallel between the development of hybrid and indigenous justice mechanisms within the state system, and the development of the courts of common law and equity in English law; this parallel suggests that the expectations of Aboriginal people for their cultural

norms and spiritual laws to be incorporated into the justice system are neither unreasonable nor unique. He considers the main objections to granting greater authority to Aboriginal courts – that Aboriginal spiritual values are not shared by all Canadians, that there is no monolithic “Aboriginal spirituality,” and that a parallel system of justice invites too much conflict with adversarial standards of law – concluding that Aboriginal courts, to be legitimate, need far greater authority relative to the established adversarial system.

In his commentary on the four chapters, N. Bruce Duthu draws out their common emphasis on the challenges of reconciling Aboriginal and non-Aboriginal institutions: there are not only struggles over power and jurisdiction but deeply divergent conceptions of power and conflict, and distinctive “negotiating postures” cultivated by Aboriginal and non-Aboriginal mechanisms of conflict resolution. The goal of institutionalizing culturally diverse forms of dispute resolution may first require clarity and even consensus between parties about the substantive content, language, and conventions at stake.

Part 4: Issues of Design and Implementation

This section explores in greater detail issues of design and implementation. In particular it considers how issues of intercultural understanding and accommodation explored in previous chapters have played out on the broad landscape of Canadian legal institutions. Through a detailed review of emerging intercultural legal institutions and agreements, the authors provide examples of methods designed to reconcile justice goals and tensions identified in this and earlier sections.

Catherine Bell surveys a broad array of “indigenized” legal forms and agreements in Canada, drawing in part on presentations to the national forum on Intercultural Dispute Resolution: Opportunities and Issues. She highlights a number of questions about indigenized forms of dispute resolution, including concerns about their tendency to adopt only those aspects of indigenous ways that are congruent with dominant legal forms, and then explores how diverse Canadian experiments with Aboriginal forms in conventional legal contexts help to bear out the risks and also the promise of alternative dispute resolution. Drawing on examples such as the Metis Settlements Appeal Tribunal, the Nisga’a youth justice initiative, the Tsuu T’ina court, and the Nunavut justice system, Bell brings out not only the deep challenges of intercultural negotiation faced in establishing such programs but also the overlaps between conventional ADR rationales and the values of indigenous communities. She goes on to explore aspects of institutionalization that have enabled hybrid and bicultural legal institutions to meet challenges posed by particular cultural, social, and legal contexts.

Diana Lowe and Jonathan H. Davidson focus on innovations within the Canadian civil justice system and consider the extent to which such innovations may make space for traditional Aboriginal modes of dispute resolution. Lowe and Davidson survey indigenous approaches to justice, as well as fusions of traditional dispute resolution with contemporary legal systems in the Canadian context. Against this background they discuss the impetus toward court-annexed dispute resolution models and suggest that such models offer significant openings to Aboriginal attempts to have indigenous values reflected in at least some aspects of the civil justice system.

Nigel Bankes surveys dispute settlement provisions in three northern land claims agreements, offering a detailed picture of how quasi-judicial forms of dispute resolution and arbitration may be accommodated within existing regimes of law. Whereas Bell, and Lowe and Davidson see promise in the incremental incorporation of alternative dispute resolution into established legal forms, Bankes shows the variety and complexity of mechanisms that result from this piecemeal approach to change. He also reveals the forlornness of dispute resolution mechanisms, given the availability of recourse to known, adversarial mechanisms. Articulating and comparing features of particular land claims agreements, Bankes draws lessons for the incorporation of dispute resolution mechanisms into broader systems of law.

Commenting on the three chapters of this section, Andrew Pirie points out the extent to which all the authors invest hope in the proper design of institutions so as to be sensitive to or reflect Aboriginal values, while also acknowledging the asymmetries of power that shape the design of institutions. Pirie sees troubling tensions here: while the authors evince optimism about the openness of ADR to Aboriginal perspectives and aspirations, they may not fully credit the susceptibility of ADR to more conservative appropriations, especially given the deep challenge to existing distributions implicit in many Aboriginal claims.

Conclusion

In the concluding chapter, John Borrows argues for recognition of separate indigenous justice systems, weaving in observations and examples offered by other authors in this volume. Responding to six common objections to separate justice, he persuades the reader that indigenous separatism is not detrimental to intercultural harmony or Western democratic notions of citizenship, fairness, equality, and justice. Integral to his analysis is an understanding that "intercultural dispute resolution is best facilitated through separate systems because they most strongly promote answers to questions guided by indigenous traditions." However, Borrows does not advocate separate justice at the expense of developing appropriate intercultural dispute resolution processes. Rather, he argues that these activities must proceed together to address the injustices and disadvantages suffered by indigenous peoples in postcolonial states.