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Walking Together:
Indigenous ADR in Land and Resource Disputes

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1 Introduction: Walking Together

In Canada, land and resource management is the principal site of conflict between First Nations[1], government and private industry. Historically, this has meant, and continues to mean, struggles between First Nations and European settlers to assert who owns the land and how it should be used. With the recognition of Aboriginal rights in the *Constitution Act, 1982*, these struggles evolved to include disputes over whether First Nations were sufficiently consulted on activities that impact their constitutional rights. Resolving these disputes outside the courtroom, and the consultation process itself as a means of achieving this goal, is the focus of this paper.

Alternative Dispute Resolution (ADR) is a promising mechanism for managing these disputes *if and only if* it is designed appropriately. Indigenous ADR, as I will refer to it, must be shaped by the legal traditions, values, processes, and wisdoms of the First Nation involved. With the endorsement of the First Nation, Indigenous ADR can also have broader utility for reconciliation by fostering legal and cultural pluralism based on mutual respect and recognition. I argue this by first framing the historical and legal context of land and resource conflict between the Crown and First Nations. I then address why mainstream ADR processes are inadequate for this context, and develop suggestions for how Indigenous ADR might be approached positively. I conclude with a broader discussion of

[1] I begin with an important clarification on terminology. In this paper, I use the terms "Indigenous", "First Nations" and "Aboriginal". They are not synonymous. I use "Indigenous" as a broad term to refer to the Indigenous peoples of Turtle Island (Canada) as a collective. I use "First Nations" to refer to the different, unique and specific nations comprising the Indigenous collective, including Inuit and Métis. Lastly, I use "Aboriginal" to refer to the set of legal rights and obligations that extend from section 35 of the Constitution Act, 1982.

the importance of involving Indigenous institutions in the design and application of ADR, and offer a vision for the future.

An important caveat: at times, I conflate dispute resolution with Crown-First Nations consultation, but this is intentional. In the lands and resources context, consultation and dispute resolution are not mutually exclusive. Rather, consultation is a dispute resolution process itself. For the purposes of this paper, ADR thus refers to both the resolving of a dispute once it is headed for litigation (retroactive) *and* the process of consultation itself, which I view as a path for avoiding conflict in the first place (proactive).

2 Context: European Colonization, Indigenous Law and Land and Resource Conflict

To see clearly the ways in which ADR can be usefully applied in the Crown-First Nations context, but also how mainstream models must be modified, we must first understand the nature of this conflict in historical, legal, cultural and economic perspective. Struggles for land are rooted in the history of land dispossession and colonization inflicted upon Indigenous peoples by European settlement and the ongoing preservation of this power structure through economic and cultural domination. A full analysis of these forces is beyond the scope of this paper, but acknowledging their sources and continued influence is fundamental to understanding both the promise and pitfalls of ADR in this process.

2.1 A brief, interdisciplinary narrative of Crown-First Nations land and resource conflict

With respect to land, concepts of Indigenous property and tenure usually exclude the right to sell land to outsiders, diminish lands and resources, or otherwise expropriate land

for private gain without considering reciprocal obligations[2]. Despite this, the written texts of many treaties claim an outright surrender of Aboriginal title to the Crown[3]. Until Aboriginal and treaty rights were affirmed under section 35 of the Constitution Act, 1982, the Crown had legal authority (under the common law) to extinguish Aboriginal title[4]. During this period, Indigenous peoples suffered a systematic carving out of their traditional territories through government policies and laws aimed at dispossession, expropriation and relocation. Indigenous laws were subordinated or outright ignored.

Post *Charter*, section 35 jurisprudence has acknowledged Aboriginal title and articulated the Crown's duty to consult on activities that engage a First Nation's section 35 rights[5]. But the crucial point is this: because Indigenous laws governing lands and resources existed prior to European contact and Canada's Constitution, section 35 is viewed by some as a Eurocentric prescription of Aboriginal rights that does not reflect the full scope of Indigenous authority[6]. In other words, for First Nations, Indigenous rights are not defined by the incomplete vision recognized under common law. Rather, Indigenous law gives meaning to these rights, and has since time immemorial, separate and distinct from European interference.

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[2] Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation and Judicial Discretion" (Vancouver: *Centre for First Nations Governance* 2002) at 4. This essay was part of a series of research papers commissioned for the Delgamuukw/Gisday'wa National Process.
[3] *Ibid*.
[4] *Ibid*.
[5] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.
[6] Hannah Askew et al, "Between Law and Action: Assessing the State of Knowledge on Indigenous Law, UNDRIP and Free, Prior and Informed Consent with Reference to Fresh Water Resources" (Vancouver: Decolonizing Water Project 2017) at 16.

For this reason, First Nations often feel that consultation on large-scale resource development projects is inadequate. According to Sarah Morales, this tension stems from a failure to recognize that Indigenous laws are the true source of Aboriginal rights and title, and the unequal bargaining power that results[7]. For many First Nations, the doctrine of Free, Prior and Informed Consent (FPIC) better reflects meaningful consultation[8]. FPIC holds that First Nations have the right to be fully informed and to engage with, and grant or withhold consent, to development projects within their lands that impact their resources and/or ways of life[9]. FPIC is a central feature of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), an instrument of international law ratified by countries across the world. Canada has explicitly endorsed UNDRIP, and recently stated that it intends to begin the process of implementation by introducing legislation that will reflect its principles[10].

Since FPIC is premised on the notion that Indigenous peoples have ultimate sovereignty, its use as a lodestar for consultations and dispute settlement could facilitate harmony between the common law duty to consult and Indigenous legal orders in ways that uphold the broader objective of reconciliation. As it stands, conflict over land and resource simmers somewhere in the gulf between settler society's concept of consultation

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[7] Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in Jennifer Goyder, ed, *UNDRIP Implementation: Braiding International, Domestic, and Indigenous Laws – Special Report* (Waterloo: Centre for International Governance Innovation, 2017) at 65.
[8] James (Sa'ke'j) Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing 2008) at 86–87.
[9] Article 32, *United Nations Declaration on the Rights of Indigenous Peoples*.
[10] John Paul Tasker, "Liberal government backs bill that demands full implementation of UN Indigenous rights declaration", *CBC News* (November 21, 2017), online: http://www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037.

(section 35) and the expectations of First Nations (FPIC). FPIC addresses this key grievance held by First Nations.

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

Canada's legal landscape encourages us to embrace ADR models that incorporate both Indigenous and western approaches to dispute resolution. As we have seen, Indigenous laws existed prior to European contact and continue to apply within First Nation communities. It only makes sense that Indigenous legal traditions also inform approaches to conflict management in the context of land disputes involving First Nations. Moreover, the Supreme Court of Canada has confirmed that because the common law did not alter First Nations law, Indigenous customs and conventions give meaning and content to First Nations legal rights[11]. These same sources should also guide ADR that involves First Nation parties asserting their rights.

The Court has also acknowledged that Indigenous and non-Indigenous legal principles can be consistent and co-exist without conflict[12]. As Canada increasingly recognizes the inherent jurisdiction and authority of First Nations laws and institutions, ADR models will be integral to navigating conflict between Indigenous and non-Indigenous parties, and Indigenous principles should shape these processes. ADR, if designed appropriately to uphold and apply Indigenous customs and conventions, can become a

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[11] John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:1 McGill LJ 629 at 636, citing *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193; *Guerin v The Queen* [1984] 2 SCR 335, 13 DLR (4th) 321; *Calder et al v Attorney General of British Columbia* [1973] SCR 313, 34 DLR (3d) 145.
[12] *Ibid* at 638.

useful mechanism for harmonizing Indigenous and non-Indigenous perspectives along the most fundamental fault lines underlying consultation and Crown-First Nations disputes.

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

Canada also has a moral imperative to explore ADR models that capture the spirit of nation-to-nation partnership, mutual recognition and understanding, and the interaction of Indigenous and western legal traditions. Duty to consult and Aboriginal title litigation are immensely time consuming and costly, for First Nations and Canadian taxpayers alike. More importantly, protracted litigation battles represent the ongoing unwillingness of the state to accept and take seriously the perspectives and historical position of Indigenous peoples. Dispute resolution that embraces the principles of legal and cultural pluralism, grounded in concepts such as FPIC, could offer an opportunity to address the sources of lands and resources conflict directly, while simultaneously strengthening Indigenous institutions and facilitating cross-cultural understanding[13].

In its current form, Canada's approach to consultation is Crown-centric and primarily concerned with Crown conduct in relation to Indigenous peoples[14], rather than a genuine concern for the interests and goals of both parties. The problem with the duty to consult is that:

> "The [First Nations] community feels powerless. It is difficult to trust a process of consultation when they know that no matter what happens, the final decision is not in their hands. It is through

[13] *Ibid* at 655. Borrows opines, "First Nations law has an important place in a broad intercultural context".
[14] Shin Imai, "Consult, Consent and Veto: International Norms and Canadian Treaties" (2016) 12:5 Osgoode Hall Law School Legal Studies Research Paper Series, Research Paper No 23 at 17.

> recognition of the necessity of consent that Indigenous communities will have power that can be a balance to the superior economic power of the mining company and the superior political power of government"[15].

The essential question is really one of power: who has it, how they got it, and how they exert it. For First Nations, state power was acquired illegitimately through dispossession and colonization, and the push for economic development reinforces this fact with every project proposal pushed down their throats. Canada must do better. Take, for example, the Supreme Court of Canada's latest decision in *First Nation of Nacho Nyak Dun v Yukon*[16], where the Court held that the Yukon government breached the honour of the Crown when it disregarded the appellant First Nations' contributions to the Peel Watershed Regional Land Use Plan.

Perhaps surprisingly, for their part, private industry is doing better (at least in some instances). Industry has a strong incentive to seek the full consent of First Nations before proceeding with a project. The costs of community conflict are significant and can result in serious impacts to companies, including suspensions and project closures, not to mention legal fees. Failure to adequately consult leads to such litigation. In response to *Tsilhqot'in Nation v British Columbia*[17], which held that Aboriginal title confers possession and ownership of titled lands and resources, several industry organizations developed engagement guidelines that apply principles of FPIC[18]. Industry is quickly moving toward a

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[15] *Ibid* at 13.
[16] *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58.
[17] *Tsilhqot'in Nation v British Columbia*, 2004 SCC 44, [2014] 2 SCR 257.
[18] Boreal Leadership Council, *Understanding Successful Approaches to Free, Prior and Informed Consent in Canada. Part I* (Victoria: The Firelight Group 2015).

broader concept of consultation—it is not a far stretch to develop complementary ADR mechanisms alongside these procedures.

3 The Way Backwards: Why Mainstream ADR Approaches are Insufficient

Is there anything wrong with transplanting traditional, mainstream approaches to ADR into the Crown-First Nations context? The short answer is yes. There is growing empirical evidence to suggest that mainstream models of dispute resolution, "particularly facilitative and determinative approaches", can be alienating to Indigenous parties[19]. In an intercultural context, they can favour more powerful parties and inadvertently favour a dominant cultural perspective[20]. "When dispute resolution involves Indigenous parties, mediators still often represent the dominant culture, styles of mediation are still considered formalistic, and remain firmly embedded in the western legal system"[21]. Some dispute resolution scholars, such as Bernhardt and Kelly, have proposed an "Indigenized" western ADR model that incorporates culturally appropriate methods of resolving disputes[22].

I think we should proceed with caution here. ADR does offer the possibility of resolving Crown-First Nations disputes in ways that honour Indigenous institutions and knowledge, but efforts will fail spectacularly if they represent mere token acceptance of Indigenous systems but the overall framework of the process remains couched in western

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[19] Sarah Ciftci and Deirdre Howard-Wagner, "Integrating Indigenous Justice into Alternative Dispute Resolution Practices: A Case Study of the Aboriginal Care Circle Program in Nowra" (2012) 16:2 AILR 81 at 83.
[20] *Ibid*.
[21] *Ibid*.
[22] *Ibid*.

ways of doing. Rather than an "Indigenized" western ADR model that introduces Indigenous cultural elements to the mainstream process, perhaps what is needed is a unique and organic model that embeds elements of both Indigenous and non-Indigenous dispute resolution mechanisms into the process itself. As Bell observes, "it remains unclear how best adopt to avoid co-optation of the processes…how these would interact with existing legal mechanisms, and how to operate this system within the limits of Canadian law as it currently exists"[23].

Indeed, concerns surrounding implementation and authenticity are important considerations. In my view, however, we must start with the correct end-goal in mind and work towards it incrementally, working out the kinks along the way. Getting the end-goal right is the difficult part; meshing it within our current system is a challenge, but not impossible. To ensure ADR processes in the lands context are appropriately structured, local-specific and avoid cultural co-optation, it is important, as a starting point, to have a robust and nuanced understanding of the commonalities and differences between Indigenous and western worldviews and how they clash in the arena of land conflict and dispute resolution.

3.1 The cultural and political element

The intercultural element of Crown-First Nations ADR creates a host of challenges. Intercultural competence is critical to successful dispute resolution, yet many ADR

[23] David Kahane and Catherine Bell, "Introduction" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 2.

mediators possess no such skillset[24]. Mediators might be trained to approach ADR from the perspective of the dominant culture, using off-the-rack methods designed to encourage efficiency of process, "all of which work to embed cultural values in the process that do not fit well to the First Nations context"[25]. Michelle LeBaron helpfully illustrates this point, observing that dominant cultural leadership is marked by jealously guarding your reputation and status, constantly analyzing resources and the opportunity structure, making others aware of their dependence on you, and creating a web of relationships to support your power[26]. Conversely, First Nations leadership tenants involve drawing on your own personal resources as a source of power, generosity and non-materialistic resources, taking risks needed for the good of the community, being modest and funny, and using humour to deflect anger [27].

Beyond the interpersonal, there are deeper cultural clashes that interfere with an effective ADR process in the Crown-First Nations context. Dominant western approaches follow a general template that involves each side making its case before a neutral third party, who, in the case of evaluative mediation or arbitration, will objectively suggest or decide a just settlement[28]. In mediation, this involves a back-and-forth compromise facilitated by a neutral third party who manages the process towards a negotiated settlement, usually involving money. According to David Kahane, these methods have "deep roots in western cultural, legal and philosophical traditions and is closely tied to political

[24] Michelle LeBaron, "Learning New Dances: Finding Effective Ways to Address Intercultural Disputes" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 16.
[25] *Ibid*.
[26] *Ibid* at 24.
[27] *Ibid*.
[28] David Kahane, "What is Culture? Generalizing about Aboriginal and Newcomer Perspectives" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 29.

legitimacy"[29]. Transposing traditional ADR processes on Crown-First Nations disputes would necessarily mean adopting this system.

However, from the point of view of First Nations' struggles for survival, equality and self-determination, "this dominant western account of justice seems deeply corrupt"[30]. Kahane takes aim at the liberal narrative of justice, observing that "accounts of justice brought by European arrival often explicitly excluded Aboriginal peoples from full membership in the political community within which justice was to prevail; liberals have deemed Indigenous peoples beyond the scope of liberal justice: too savage, insufficiently settled, unreasonable"[31]. Cultural concepts of justice and their political implications play into the history of land dispossession and colonization noted at the outset of this paper, and further entrench conflict.

For Kahane, fairness—and its role in intercultural dispute resolution—is rooted in particular cultural traditions, rather than a transcultural definition of reason, interests and rights[32]. Cultures exist in relation to one another, in contexts shaped by power[33], which, in this case, means the colonial power to coerce, dispossess, rule, and as discussed previously, define the scope and content of Aboriginal rights within this framework. In sum, "treating Aboriginal claims as properly resolved within the supposedly neutral procedures of an

[29] *Ibid*.
[30] *Ibid* at 30.
[31] *Ibid*.
[32] *Ibid* at 31.
[33] *Ibid*.

existing nation state already reiterates historical injustices that ought themselves to be in question"[34].

Precisely for this reason, ADR involving Indigenous peoples, and in particular Crown-First Nations consultation related to land and resource disputes, must be, at least in equal measure and force to western traditions, grounded in First Nations laws. It is as much about power and coercion as it is about intercultural understanding and respect.

3.2 The spiritual and philosophical element

Land disputes also underscore fundamental divergences between Indigenous and non-Indigenous worldviews. Different and often opposing philosophies of land and resource management inform each party's values, interests and goals, and work to frustrate the consultation process. For example, protecting lands and resources lies at the heart of many Indigenous philosophies. The centrality of land, water and animals to Indigenous peoples is expressed in their rich and varied stories, laws and customs[35]. This stands in contrast to the broad desire of government to harness and develop natural resources for economic gain, and of course, the desire of private industry to engage in extractive activities for profit[36]. An intercultural approach that bridges these gaps can help manage this divide.

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[34] *Ibid*.
[35] See generally Chapter 2 of John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press 2010).
[36] Randy Kapashesit and Murray Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1991) 36 McGill LJ 925 at 570.

Between these competing visions is the tension between environmental protection and resource development, or as it is commonly referred to, "sustainable development". In discussing the problem and paradox of sustainable development, Thom Alcoze offers this insight:

> "the way in which native traditions have always dealt with this problem is to consider seven generations into the future…native traditions have always maintained an integrated relationship with the land. An intimate relationship with nature's resources, with nature, with the earth"[37].

Conversely, western viewpoints pit "nature" in distinct opposition to humans—something to be commodified for profitable gain and use[38]. A successful ADR model must recognize this asymmetry, appreciate how and why Indigenous and Eurocentric worldviews are different, and facilitate dialogue accordingly.

From a philosophical standpoint, an effective ADR model must empower Indigenous epistemologies in its discussion framework. This is because, as Elmer Ghostkeeper writes, "capitalism is the main economic paradigm within which we are forced to negotiate and talk with non-Aboriginal people about our land"[39]. When this paradigm collides with fundamentally different beliefs about sustainable development, miscommunication, frustration and anger occur, and talks disintegrate. Indigenous peoples have long been forced to articulate their perspectives to the European and justify their place amongst

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[37] Thom Alcoze, "Our Common Future: Native Land Use and Sustainable Development" in The Guelph Seminars on Sustainable Development (Guelph: University of Guelph 1990), reproduced in E.L. Hughes, ed, *Environmental Law and Policy* (Toronto: Emond Montgomery, 1993) at 568.
[38] Leroy Little Bear, "Jagged Worldviews Colliding" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press 2000) at 77.
[39] Elmer Ghostkeeper, "*Weche* Teachings: Aboriginal Wisdom and Dispute Resolution" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 162.

western intellectual traditions[40]. Mainstream ADR processes are no different. By prioritizing Indigenous philosophies in ADR, Indigenous knowledge becomes justified on its face as an integral component of the process, rather than acting as a hindrance to a successful outcome that favours western goals and values.

4 The Way Forward: Reimagining Indigenous ADR

4.1 What should it look like?

Several core features of mainstream ADR must be changed before it can be legitimately used to resolve Crown-First Nations disputes. Successful and legitimate Indigenous ADR can reduce costly litigation, introduce FPIC into the consultation process, and bring us closer to the nation-to-nation partnership promised to Indigenous peoples in the historical treaties. As Catherine Bell observes, "it is only when Aboriginal jurisdiction and dispute resolution systems are equal in authority and legitimacy to, rather than alternative or delegated from, non-Indigenous governments and processes that true Aboriginal justice can be obtained"[41].

To achieve this, the Crown must concede several key points and embrace a new framework for dispute resolution and dialogue. For example, Indigenous dispute

[40] See generally Dale Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press 2006).
[41] Catherine Bell, "Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 244.

settlement must come to terms with broader colonial interaction[42]. This would require apology and acknowledgement of the historical alienation of Indigenous peoples from concepts of justice and ownership[43]. As Jeremy Webber points out, to secure Indigenous willingness to participate, "the very structure of dispute settlement may have to be re-negotiated"[44]. This also includes the selection of the mediator, because within Indigenous communities, it is not the personal stature of the person who seeks to resolve the dispute, but rather the person's wisdom and experience[45].

Another crucial element is the importance of involving the entire community in the dispute resolution process. Such an approach is entirely different from a conflict between two individuals, which speaks to the fundamental distinction between Indigenous deliberative processes and western approaches to dispute resolution. Webber analogizes this process of collective deliberation to a typical community meeting or legislative assembly[46].

Lastly, the process must be alive to the specific concerns of a specific community, not just Indigenous values in general[47]. An off-the-rack model of Indigenous ADR will be insufficient. Each nation has its own traditions, including unique and varied legal orders, stories, customs, and more, as well as site-specific attachments to certain land formations or bodies of water. Moreover, each First Nation may have its own set of complex political

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[42] Jeremy Webber, "Commentary: Indigenous Dispute Settlement, Self-Governance, and the Second Generation of Indigenous Rights" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 150.
[43] Webber, page.
[44] *Ibid*.
[45] *Ibid*.
[46] *Ibid* at 150–51.
[47] *Ibid*.

considerations related to the jurisdictional distinction between their hereditary chief and Band Chief and Council elected under the *Indian Act*. A one-size fits all approach is unlikely to be successful.

Suggestions for developing an appropriate framework have included identification of community values and processes, a balance of traditional values with those of modern contemporary ways of life[48], and adopting an "elicitive approach that is participant led and recognizes process design as a political and functional issue"[49]. As I have also suggested, grounding such a process in the principles espoused by UNDRIP, and specifically FPIC in the lands context, is an appropriate structural guideline that will fulfill Canada's political commitments and further the broader project of reconciliation. In New Zealand, the Waitangi Tribunal's role in the dispute resolution of Maori treaty claims is a good example to follow.

The Waitangi Tribunal was established to manage the claims of the Maori against the Crown arising from the historical Treaty of Waitangi. Claims received are classified as either historical (past government action), contemporary (current government action) or conceptual (related to "ownership" of natural resources)[50]. Dispute resolution is built into the Waitangi claims process and uses a bicultural and bilingual mediation process. Typically, co-mediation is used, where one mediator with general skills is paired with a

[48] Bell, *supra* note 34.
[49] Kahane, *supra* note 24 at 47.
[50] Morris Te Whiti Love, "The Waitangi Tribunal's Role in the Dispute Resolution of Indigenous Treaty Claims" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 136.

kaumatua (elder) skilled in *tikanga* (traditional Maori practices)[51]. There is preference for consensual or interest-based processes rather than positional bargaining[52]. This is a new and evolving area for the Tribunal, and as it develops, scholars are emphasizing that Maori protocol should be observed where possible[53]. Canada has nothing comparable for the moment, but the utility of co-mediation in an intercultural setting is evident, and offers helpful lessons for how an Indigenous ADR processes might be designed.

4.2 The role of storytelling in Indigenous ADR

Societies have been telling stories forever. This is particularly true with respect to First Nations, whose laws, principles, values and histories are passed on orally. In many cases, these stories are not written down; they exist through living memory and teachings across generations. I have emphasized several times that grounding ADR processes in Indigenous laws and customs is an important way in which First Nations can embrace and utilize dispute resolution to both resolve the dispute at hand and strengthen their own institutions. Coincidentally, storytelling is an important aspect of mainstream ADR as well. Often, parties are equally as interested in telling their story and being heard as they are in reaching a settlement.

In thinking about how to conduct intercultural ADR in the Indigenous context, the parallels and opportunities here are clear. I have also stressed the importance of prioritizing Indigenous ways of knowing so that Indigenous peoples are no longer

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[51] *Ibid* at 142.
[52] *Ibid* at 143.
[53] *Ibid* at 146.

compelled to articulate their perspective to the dominant culture in ways alien to them. Incorporating Indigenous storytelling into the ADR process—to the extent that the First Nation in question would like to do so—would achieve the complementary goals of preserving the integrity of Indigenous intellectual traditions, drawing out Indigenous law and legal principles, and serving the basic function of communicating the interests and position of each party that is central to dispute resolution. Storytelling therefore offers a powerful way to manage the divide between the Crown and First Nations. The challenge is getting the Crown to listen.

5 Conclusion: Conflict in Harmony

I have argued that for dispute resolution to be effective and legitimate in the Crown-First Nations context, it must be grounded in Indigenous laws, and work to empower the sources of those laws (such as oral history, stories and ways of knowing). Since, as we have seen, the ADR design process is itself a political endeavour, the reimagination of Indigenous ADR could serve as an expression of Indigenous self-determination, and in the context of Crown relations, a vehicle for reconciliation and legal, philosophical and cultural pluralism. Such a model is premised on a nation-to-nation partnership, and becomes beneficial for both Indigenous and non-Indigenous participants. For non-Indigenous parties, it is an opportunity to expand cultural understanding by actively engaging with First Nations communities appropriately on equitable terms. For First Nations, it is an opportunity to assert sovereignty (particularly if FPIC is built into the process) and revitalize and develop their own institutions.

If done well, it promises to minimize protracted litigation battles premised on the section 35 duty to consult, which as we have seen, holds an insufficient understanding of what it means to acknowledge and respect Indigenous rights. Efforts made by some corners of private industry are already yielding positive results, demonstrating the utility of a forward-thinking approach to consultation. Recognizing the deficiencies of the duty to consult in relation to their own liabilities, private industry is developing ways of going above and beyond the legal requirements to obtain community consent and participation in projects[54].

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

From the perspective of further entrenching Indigenous rights and self-determination, Indigenous ADR also holds promise because it is easier to implement than a legal solution to the section 35 issues identified in this paper. As a non-legal process, weaving together Indigenous and non-Indigenous approaches to ADR reinforces Indigenous institutions without requiring courts to reconcile common law doctrines that

[54] Imai, *supra* note 12.

are inconsistent with Indigenous legal principles. The central question then becomes how best to model such a process. I have argued that, to answer this question, we must be aware of the shortcomings of mainstream ADR models in the Indigenous context and prioritize the role of the community itself in negotiating and setting the terms of any such process.

First Nations institutions have an important role to play in intercultural disputes, and they will help us navigate the paradox of sustainable development. We all have a great deal to learn about caring for the land from Indigenous wisdom, should we be lucky enough to be invited to learn from the teachings. Unfortunately, critics are often concerned that if we allow consultation and dispute resolution to be Indigenous-led in the lands and resources context, economic productivity will grind to a halt[55]. It is a false dichotomy to assume that all First Nations, in all cases, are concerned only with vitiating economic development in their territories. Rather, they are concerned with respect for their sovereignty and jurisdictional authority. Once we learn to walk together on this path, new possibilities will emerge for a shared future.

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

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