

**TOWARDS RESOLVING THE DIVISION OF
ON-RESERVE MATRIMONIAL REAL PROPERTY
FOLLOWING RELATIONSHIP BREAKDOWN:**

**A REVIEW OF TRIBUNAL, OMBUDS AND
ALTERNATIVE DISPUTE RESOLUTION MECHANISMS**



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A REVIEW OF TRIBUNAL, OMBUDS, AND ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

Introduction

Courts in Canada have ruled that provincial laws about equal division of matrimonial real property do not apply to First Nations women and men because the *Indian Act*¹, and not provincial law, governs real property on reserves. Since the *Indian Act* does not deal with the issue of matrimonial property, this means that “most of the legal rights and remedies found in Canadian laws relating to the matrimonial home which apply off-reserve, are not available to people living on a reserve.”²

The author was contracted by the Women’s Issues and Gender Equality Directorate of Indian and Northern Affairs Canada to research and review alternative dispute resolution (ADR) mechanisms, enforcement and appeal. The aim of this paper is to provide information on and evaluation of these ADR mechanisms’ positive and negative attributes, with reference where appropriate, to their potential application or adaptation to the context of the resolution of division of matrimonial real property on reserves on relationship breakdown. This paper therefore presents and reviews relevant tribunals, ombuds, and alternative dispute resolution practices of negotiation, mediation and hybrid processes, before briefly considering corollary matters to the division of real property, including policing and exclusive possession of the home, and, Aboriginal courts. Where useful, mechanisms examined include those practised in Australia and New Zealand.

Tribunals

Introduction to Tribunals

The *Canadian Law Dictionary* defines “tribunal” as “[a]n officer or body having authority to adjudicate judicial or quasi-judicial matters.”³ Tribunals are established by federal parliament or provincial/territorial legislatures through enabling legislation in order to provide an alternative to the court system for the resolution of specific issues. The enabling legislation identifies the tribunal’s power to adjudicate and make decisions

¹ *Indian Act*, R.S.C. 1985, c. I-5 [*Indian Act*].

² Indian and Northern Affairs Canada, *After Marriage Breakdown: Information on the On-Reserve Matrimonial Home* (Ottawa: Indian and Northern Affairs Canada, 2003) at 1. For comprehensive detail about on-reserve matrimonial real property legal issues, see especially W. Cornet & A. Lendor, *Discussion Paper: Matrimonial Real Property on Reserve* (Ottawa: Department of Indian Affairs and Northern Development, 2002) [Cornet].

³ *Canadian Law Dictionary*, 4th ed., s.v. “tribunal”.

on a particular matter. It usually provides direction on process and procedure, as well as defining the extent and limitations of the tribunal's jurisdiction, its enforcement capacity, and appeal steps, if any. If the desired result is to legally bind the parties to the tribunal's decision, the enabling legislation must designate that capability. The failure of a tribunal to operate within its particular legislated subject area creates an error in law and the decision or action taken by the tribunal may subsequently be quashed or reversed on appeal to a court of competent jurisdiction.

According to Peter Showler, Chairperson of the Immigration and Refugee Board, tribunals are not homogeneous: There are at least 1,500 tribunals in Canada in a spectrum of bodies from quasi-judicial to regulatory, dealing with government policy or performing administrative functions.⁴ Canadian courts have ruled that tribunals must function within the principles of natural justice and procedural fairness. Tribunals, forming what is sometimes referred to as the administrative justice system, commonly differ from courts by having simplified and more informal procedures, no formal record kept by transcript, and decisions rendered without written reasons. Not all tribunals will necessarily require a hearing or submissions for arguing positions; for example, in some jurisdictions, the application for a liquor licence is decided by an administrative tribunal. A tribunal may be a one-person or several member panel. The absence of bias and the presence of independence from government and other outside influence are important elements for the fair operating of a tribunal.

As indicated in the Introduction to this paper, the courts have found that division of matrimonial real property on reserve on the breakdown of a relationship falls into federal jurisdiction. This means that the current legislative gap on this subject could be closed through federal legislation creating a relevant administrative tribunal to deal with these issues. If such enabling legislation provided for court appeal of the tribunal's decision, it would then fall within the jurisdiction of the Federal Court of Canada.

Tribunal Examples

Canada

Indian Claims Commission

The Indian Claims Commission (ICC) was created by a 1991 order-in-council as an interim alternative to court for the resolution of rejected specific claims. The ICC is a commission of inquiry, enacted under Part I of the *Inquiries Act*⁵ and as such, after inquiring into the reasons for the First Nation's rejected claim, may only make recommendations. The ICC panel reviews all of the evidence available in order to

⁴ Peter Showler, "Tribunal Management In Search of Nimbleness" (Paper presented to the 18th Annual Canadian Council of Administrative Tribunals Conference, Ottawa, June 3, 2002) [unpublished, co-authored by L. Disenhouse], online: Canadian Council of Administrative Tribunals <[http:// www.ccat-ctac.org/en/conferences/docs/2002_showler.pdf](http://www.ccat-ctac.org/en/conferences/docs/2002_showler.pdf)>.

⁵ *Inquiries Act*, R.S.C. 1985, c. I-11.

determine if Canada has an outstanding lawful obligation to the claimant as defined in Canada's specific claims policy.⁶

The ICC is included in this section because it functions similarly to a tribunal, and has gathered valuable information over its more than ten years of existence on what a permanent independent specific claims body should look like.⁷ The ICC's recommendations may be pertinent when considering a tribunal as an option for the resolution of the division of on-reserve matrimonial real property.

The main ICC recommendation is that the specific claims body be able to function as a decision-maker and that their decisions be binding on the parties⁸. A further recommendation for such a permanent body is independence from outside influence.⁹ Other recommendations specifically related to the ICC include:

- a) A mandate to make findings of fact and to make awards in regard to all claims, [...].
- b) A mandate to provide alternative dispute-resolution mechanisms such as negotiation, mediation, and conciliation, along with the authority to set time frames within these mechanisms.
- c) Authorization to dispense with the strict rules of legal evidence and procedures when it conducts hearings. This flexibility will allow for a bicultural approach.
- d) The Commission should be a national body with strong regional representation, to mirror the different First Nations across the country.
- e) Sufficient Commissioners should be appointed to allow for more than one hearing at a time. Each Commissioner should be designated to a specific region.
- f) Commissioners must be knowledgeable in the field of land claims and its related aspects. They should be appointed by both the federal government and the First Nations on an equal basis.
- g) The Commission must be given sufficient funds and resources to carry out its mandate and to provide financial resources to the claimants.
- h) The Commission must take an active role in the alternative dispute resolution forums.

⁶ Canada, *Outstanding Business: A Native Claims Policy: Specific Claims* (Ottawa: Indian and Northern Affairs Canada, 1982).

⁷ Originally introduced by Robert Nault, Minister of Indian and Northern Affairs Canada on 13 June 2002 in the 1st Session of the 37th Parliament as Bill C-60, and currently on the 2nd Session Order Paper as Bill C-6, once enacted, *The Specific Claims Resolution Act* will establish the Canadian Centre for the Independent Resolution of First Nations Specific Claims as a permanent body.

⁸ D. Bellegarde & P.E. Prentice, "Human Rights, Justice, and The Need For An Independent Claims Body in Canada" (Brief presented to the House of Commons Standing Committee on Aboriginal Affairs on 29 May 2001) at 4 [unpublished].

⁹ *Ibid.* at 12.

- l) There should be an avenue of appeal to superior courts based on the same criteria as an appeal from an administrative law tribunal.¹⁰

The above-cited recommendations provide a summary of the missing elements in the current ICC process. Although tailored for the resolution of specific claims, they hold merit for consideration in the establishment of a tribunal that would deal with on-reserve matrimonial real property.

A unique step in the ICC inquiry process is the Community Session. The Community Session is an oral evidence gathering session which brings the ICC and the inquiry parties into the First Nation community. The Commission panel that is making the determination on the existence of an outstanding lawful obligation hears the oral evidence of elders and community members and a transcript of the session becomes part of the record. The premise for the Community Session is to provide a relaxed informal setting for the First Nation members who share information concerning their specific claim; cross-examination does not take place. Another benefit of the Community Session in a land-related claim is that the panel can actually look at its physical location.

Canadian Human Rights Commission and Tribunal

The *Canadian Human Rights Act*,¹¹ contains provisions for the formation and jurisdiction of the Canadian Human Rights Commission (CHRC) and Tribunal (CHRT). The *CHRA* addresses instances of discrimination and pay equity issues in federal government departments, corporations and service providers to the general public. The Commission and Tribunal are linked in their purpose to ensure “that Canadians have the right to equality, equal opportunity, fair treatment, and an environment free from discrimination;”¹² however, they operate administratively as independent units.

The first step in the human rights claim process is registering a formal complaint with the CHRC. The Tribunal only hears complaints that are referred by the Commission. Before a complaint is formally filed with the CHRC, an officer determines if the issue falls within the provisions of the *CHRA* and therefore is a matter subject to CHRC jurisdiction.

There are two points in the CHRC process where ADR methods are suggested for resolution of the complaint: The first is after filing the complaint when the CHRC officer will suggest mediation with the other party; the second is after the Commission reviews the investigator’s report and the parties’ responding submissions and considers if the evidence substantiates the issues raised in the complaint, when a conciliator will be

¹⁰ These recommendations for the establishment of a permanent specific claims body were published by the ICC in a special issue on land claims reform: A. Durocher, “Land Claims Reform” [1995] 2 ICCP 25 at 57-58.

¹¹ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [CHRA].

¹² [Main Page], online: Canadian Human Rights Tribunal <http://www.chrt-tcdp.gc.ca/index_e.asp>.

appointed. The conciliator attempts to resolve the complaint between the parties without resorting to more formal processes. If after a period of time the complaint remains unresolved, the Commission will either dismiss the complainant's claim or refer it to the CHRT.

If an agreement is reached between the parties during the Commission process, the Commission may approve or reject the terms of that agreement.¹³ Once the Commission has approved the agreement, a Federal Court order to enforce its terms may be sought by the Commission or one of the parties. The language of the *CHRA* implies that a Federal Court order is optional for enforcement purposes.¹⁴

An agreement, whether oral or in writing, made by two or more parties, forms a contract that could be enforced under contract law if necessary.¹⁵ A written agreement executed with witness to the signatures is a preferable form of contract because it is easier to prove. However, if one of the parties later proved there was duress or undue influence to participate in the agreement, a court could nullify the contract, whether oral or in writing, as if it had never been entered into. Since inequity between spousal partners and/or violence in the home is often a problem present in relationship breakdown, terms of agreement reached between spouses on division of on-reserve matrimonial real property during a tribunal process could perhaps benefit from scrutiny similar to the CHRC's, particularly if part of that scrutiny was to ensure that participation in the agreement was not the result of duress and/or undue influence on one of the parties.

A complaint referred to the CHRT means an inquiry before a panel consisting of one or three members, chosen by the Tribunal's Chairperson. If a three-person panel is appointed, the Chairperson selects one of them to act as panel chair for the duration of the claim inquiry. The Chairperson may sit on a panel and becomes the chair in that instance.

The Tribunal panel has authority to inquire into "all questions of law or fact necessary to determining the matter."¹⁶ The CHRT is not bound by the rules of evidence and may admit any information pertinent to the claim inquiry except privileged information. The panel has some discretion in the following: whom to include as parties; time limits prescribed in the procedures; evidence and the manner it will be presented; and, the payment of witnesses summoned before the Tribunal. Tribunal panels have the

¹³ *CHRA*, *supra* note 11, s. 48(1).

¹⁴ *Ibid.*, s. 48(3).

¹⁵ The author assumes for present purposes that the requisite legal elements of a contract are present in the agreement.

¹⁶ *CHRA*, *supra* note 11, s. 50(2).

authority to issue summons and enforce attendance at a hearing, and to administer oaths.¹⁷

A CHRT panel can issue an order for costs and compensation. The result of filing that order with the court means that if the party obliged to comply with the order does not do so, the other party has legal recourse in the Federal Court. At any point in the process where a decision is made by the Commission or Tribunal, a party may seek judicial review of that decision in Federal Court.

Since a tribunal's general function is to provide an alternative to the court system, the CHRC's incorporation of two points of ADR further this objective. Additionally, if there is no resolution at the CHRC stage, and the matter is referred to the CHRT, court is still avoided. In the CHRT stage, the parties may still arrive at an agreement before the inquiry is decided. Once the inquiry decision has been rendered, the choice has been made for the parties in the binding order provided.

The combined process of the Commission and Tribunal, in some instances, is lengthy. Parties, especially the complainant, may experience personal difficulty and financial hardship as a result. These factors are important considerations in the context of finding appropriate mechanisms for the resolution of division of matrimonial real property on reserve on the breakdown of a relationship.

In summary, the author suggests that the positive aspects of the Canadian Human Rights Commission are that:

- Alternative dispute resolution opportunities are included in its process;
- It promotes educational programs on discrimination; and,
- It will take complaints forward to the Tribunal on behalf of the complainant.

The positive aspects of the Canadian Human Rights Tribunal are that:

- The Chairperson has the discretion to draft relevant rules for Tribunal procedure, and
- The Tribunal's decisions are binding and enforceable in court.

Drawbacks of the CHRC and CHRT are that:

- A claim may remain in the Commission for years before its referral to the Tribunal, and
- The dual mechanism requires a large support staff since an investigator may not be a conciliator and neither of these may be a Tribunal member.

¹⁷ *Ibid.*, ss. 50(3)(a)-(b).

Australia

Australian National Native Title Tribunal

*Mabo v. Queensland (No. 2)*¹⁸ was the first successful case in Australia which recognized the existence of Aboriginal (native) title and rights to traditional territory in situations where it has not been extinguished. In response to the High Court of Australia's decision, the federal government enacted the *Native Title Act 1993*,¹⁹ which established the independent National Native Title Tribunal (NNTT).

When a native title application is submitted to the Federal Court, it is referred to the NNTT for a registration test.²⁰ If the application passes the registration test, the Native Title Registrar²¹ registers the application, which conveys certain rights to the claimant for the duration of the native title process.

The NNTT itself does not have the authority to decide whether native title exists. The NNTT mandate is to bring parties together to form agreements on rights issues and other interests related to native title, through negotiation, mediation/facilitation and arbitration.²² This includes assisting in negotiations for future use and development of the land in question where native title may exist, for example, on whether mining, exploration or pipeline activities can take place.²³

The *Native Title Act* provides authority for the Federal Court to issue an order for the agreement made by the parties in their NNTT mediation or arbitration processes, once the court has determined the terms of the agreement are within its jurisdiction to order. An approved agreement may or may not involve a determination of native title, since some kinds of agreements made by the parties may satisfy their interests without deciding the title issue.²⁴

¹⁸ *Mabo v. Queensland (No. 2)*, (1992) 175 CLR 1 (H.C. Aust.).

¹⁹ *Native Title Act 1993*, No. 110, 1993, online: SCALEplus Law Resource <<http://scaleplus.law.gov.au/html/pasteact/2/1142/pdf/NativeTitle93.pdf>> [*Native Title Act*].

²⁰ *Ibid.*, ss. 63, 64(4), 190A(6).

²¹ The appointment and powers of the Native Title Registrar, who maintains the Register of Native Title Claims, the National Native Title Register, and the Register of Indigenous Land Use Agreements, are specified in Part 5 of the *Native Title Act*.

²² As amended by *Native Title Amendment Act 1998*, No. 97, 1998.

²³ Aiding in the negotiation of Indigenous Land Use Agreements is also a function of the NNTT. There are several types of Indigenous Land Use Agreements, and they all have contractual force when completed. For further detail, refer to *Division 3— Future acts etc. and native title* in the *Native Title Act*, Part 2. See also P. Lane, "A Quick Guide to ILUAs For Governments" (Paper presented to the National Native Title Tribunal Agreements Workshop, Melbourne, Australia, 13 September 2000), online: National Native Title Tribunal <http://www.nntt.gov.au/metacard/files/Speech/Quick_Guide_to_ILUAs_for_Governments.pdf> at 3.

²⁴ *Native Title Act*, *supra* note 19, s. 87.

If there has been no agreement between the parties at the NNTT, the Federal Court hears evidence about the parties' respective interests, and either refers the matter back to the NNTT for mediation, or proceeds with hearing and deciding the native title case.²⁵

The National Native Title Tribunal's function in dealing with native title claims in Australia is mainly administrative. There are only two points when fettered discretion is exercised by the tribunal: The first is in determining if the application meets the requisite criteria for registration, thus granting the claimant special status until the matter is settled; Secondly, during arbitration sessions, at the request of the Federal Court, the tribunal may make an agreement decision based on the evidence produced.

In summary, the author suggests that the positive aspects of the National Native Title Tribunal are that:

- All interested parties are invited to take part in the process,
- It provides alternate resolution processes to standard court settlement,
- Agreements formed between the parties are recognized as contractual for enforcement purposes, and
- The Federal Court may issue orders to enforce the agreements.

Drawbacks of the National Native Title Tribunal include that:

- The NNTT has no quasi-judicial decision-making authority; that is, it does not make any decisions on the issue of native title;
- Despite its independent status, the NNTT remains connected to the Federal Court; and
- NNTT processes are founded on non-Indigenous methods of resolution.

New Zealand

In contrast to the multiple treaties made in Canada, New Zealand's Indigenous people, the Maori, formed only one treaty with the British colonial government, the Treaty of Waitangi in 1840. The *Treaty of Waitangi Act, 1975*²⁶ was enacted to support the Treaty's provisions, and included the creation of a permanent commission of inquiry called the Waitangi Tribunal. Another statutory creation, the Maori Land Court, records land ownership and deals with issues concerning land title. Both mechanisms for dealing with Maori land-related issues are reviewed here in turn.

²⁵ For a flow chart of the NNTT processes, see the NNTT's publication *What happens when there is a native title application?*, online: National Native Title Tribunal <http://www.nntt.gov.au/publications/data/files/NTF_1d.pdf>.

²⁶ *Treaty of Waitangi Act 1975* (N.Z.), 1975/114, 33 RS 907, as am. by 1977/178, 1985/148, 1988/233, 1993/92, 1998/13, online: New Zealand Legislation – Statutes <http://www.legislation.co.nz/browse_vw.asp?content-set=pal_statutes> [*Treaty of Waitangi Act*].

Waitangi Tribunal

As a commission of inquiry, the Waitangi Tribunal operates similarly to the Indian Claims Commission in Canada. Its mandate is to inquire into Maori allegations that Crown policy or actions are not complying, or are interfering, with the rights and provisions embodied in the English and Maori versions of the Treaty.²⁷ With one limited exception, the Tribunal may only make recommendations and does not possess authority to bind the parties to its recommendations. The exception provides the Tribunal with a specific power to bind the parties in certain circumstances. A Waitangi Tribunal publication explains:

In some limited instances, the Tribunal has the power to make 'binding recommendations' for the return of certain lands to Maori ownership. [...]

Where the Tribunal makes a binding recommendation, it is an interim recommendation for the first 90 days. This period is intended to allow the Crown and the claimants to reach a negotiated settlement in place of, or incorporating aspects of, the Tribunal's binding recommendation. If a settlement is reached in the 90-day period, the Tribunal amends its recommendation to give effect to the terms of the settlement. If no settlement is reached in that period, the interim binding recommendation takes full effect and must be implemented by the Crown. If lands were to be returned to Maori ownership under a binding recommendation, the landowner would receive compensation under the Public Works Act.²⁸

This is an unusual power for a commission of inquiry and certainly the Indian Claims Commission in Canada has no comparable authority. With respect to this exceptional authority it is worth noting that:

In its 25-year history, the Tribunal has used its binding powers only once - in 1998 in relation to the Turangi township claim. A 90-day binding order was made, but the Crown responded before the expiry of that order, and was able to reach an agreement with the claimants.²⁹

The Waitangi Tribunal is considered part of New Zealand's judicial system. To facilitate common research capacity and in order to hear inquiries in the claim district, the country is divided into 37 districts.³⁰ The Department for Courts, through the

²⁷ For a flow chart of the Waitangi Tribunal claim process, see G. Melvin, *The Claims Process of the Waitangi Tribunal: Information for Claimants* (Wellington, NZ: Waitangi Tribunal, 2001) at 45, online: Waitangi Tribunal <<http://www.waitangi-tribunal.govt.nz/doclibrary/TheClaimsProcessoftheWT.pdf>>.

²⁸ "Frequently Asked Questions", online: Waitangi Tribunal <<http://www.waitangi-tribunal.govt.nz/faq/>>.

²⁹ *Ibid.*

³⁰ "Introduction to District Inquiries", online: Waitangi Tribunal <<http://www.waitangi-tribunal.govt.nz/inquiries/districtclaims>>

Waitangi Tribunal Business Unit, provides the Tribunal's administrative services.³¹

Inquiries are heard by a three- to seven-person panel, selected from the Tribunal members by the Tribunal's Chairperson. At least one member of the panel must be Maori.³²

In considering the lessons to be learned from the Waitangi Tribunal process that might be applicable in the matrimonial real property resolution context, it must be noted that the Waitangi Tribunal, as a commission of inquiry, has the same weakness as the Canadian Indian Claims Commission; that is, it lacks real decision-making or meaningful quasi-judicial powers. What is unique to the Waitangi Tribunal, however, is its power to make a binding recommendation which is interim during a 90-day period that is extendable while the parties attempt to reach a negotiated settlement including in whole or in part replacing the Tribunal's recommendation. This power may provide incentive for negotiation of the claim in question. However, since the Tribunal has only used this power once in its more than 25-year history,³³ it might be concluded that the grant of exceptional powers in a potential legislated matrimonial real property (MRP) resolution context would first benefit from careful scrutiny into such powers' practicality and probable implementation.

A positive attribute of the Waitangi Tribunal is in its panel selection process which facilitates adaption to claims circumstances; for instance, depending on the nature of the claim, a community member with traditional knowledge or a historical researcher may form part of the panel.³⁴ The majority of the Tribunal members, however, have law backgrounds. The inclusion of Maori Tribunal members is a positive example, as is the statutory requirement for consideration of the Maori version of the Treaty of Waitangi, which allows for Maori protocol to exist beside English law requirements in conducting inquiries. Additionally, the Tribunal can adapt to local tribal customs by conducting its

³¹ "The Waitangi Tribunal Business Unit", online: Waitangi Tribunal <<http://www.waitangi-tribunal.govt.nz/about/waitangitribunal/businessunit/>>.

³² *Treaty of Waitangi Act*, *supra* note 26, s. 4.

³³ The solitary use in this long period may potentially be an indication that the Tribunal members are consistently conservative or Tribunal processes are successful to an extent that its invocation is rarely required. However, in 2000, New Zealand Indigenous rights lawyer Maui Solomon stated that the Tribunal had not exercised the binding power despite the fact that Crown-owned forests and State-owned assets were sold to foreign-owned companies, which would have been an appropriate occasion for using the binding recommendation power. Further, he stated: "A previous Minister of Justice threatened to repeal those powers if they were ever exercised!" See Maui Solomon, "Intellectual Property Rights and Indigenous Peoples' Rights and Obligations" (Paper presented to the United Nations Environment Programme Global Biodiversity Forum 15, May 2000), online: In Motion Magazine <<http://www.inmotionmagazine.com/ra01/ms2.html>>.

³⁴ "The Waitangi Tribunal Members", online: Waitangi Tribunal <<http://www.waitangi-tribunal.govt.nz/about/waitangitribunal/wtmemb/>>.

hearings in the inquiry sub-district and evidence provided in the hearings may be given in Maori.³⁵

In summary, the author suggests that the positive aspects of the Waitangi Tribunal are that:

- Its processes may be adapted to the traditional protocol for each tribal community;
- Incorporation of native language in inquiry hearings and in consideration of the Treaty principles are provided;
- Unilateral Crown issue of licences for natural resources on native title land may be prevented using exceptional powers to bind on an interim and if necessary, then permanent basis; and,
- The selection process for a Tribunal panel allows the inclusion of Elders, community members, experts in the field under inquiry and persons possessing traditional knowledge of related subject matter such as plants and forests.

Drawbacks of the Waitangi Tribunal include that:

- It does not have comprehensive decision-making or quasi-judicial power to bind the parties to the Tribunal's findings and recommendations; and
- The inquiry process may become lengthy because of the necessity to accommodate the parti-time-appointed Tribunal members' schedules.

Maori Land Court

Like the Waitangi Tribunal, the Maori Land Court is considered part of the New Zealand court system and is administered by the Department for Courts. In 1993, the current Maori Land Court replaced its predecessor, the Native Land Court, which had been established by statute in 1865. The *Te Ture Whenua Maori Act 1993 (Maori Land Act 1993)*³⁶ is a comprehensive piece of legislation consisting of 362 sections and two schedules, including provisions on jurisdiction, powers, structure of the Land Court and Appellate Court, procedure, rules and regulations.

The original Native Land Court's purpose was to record and convert Maori customary land title into European law concepts. Maori had to prove their rights to the land by occupation, conquest, or ancestry. The custom of gifting land was taken into consideration as well. The new Maori Land Court's mandate is to promote and assist in

³⁵ E. Stokes, "The Treaty of Waitangi and the Waitangi Tribunal: Maori Claims in New Zealand" in G. Cant, et al., eds. *Indigenous Land Rights In Commonwealth Countries: Dispossession, Negotiation and Community Action*, Proceedings of a Commonwealth Geographical Bureau Workshop Christchurch, February 1992 (Christchurch, NZ: Department of Geography, University of Canterbury and the Ngai Tahu Maori Trust Board, 1993) 66 at 72.

³⁶ *Te Ture Whenua Maori Act 1993/Maori Land Act 1993*, 1993/4, as am. by 1993/70, 1993/104, 1994/69, 1996/35, 1996/153, 2001/11, 2002/16, online: New Zealand Legislation – Statutes <http://www.legislation.co.nz/browse_vw.asp?content-set=pal_statutes> [TTWMA].

the retention of Maori-owned land as well as its “effective use, management, and development.”³⁷ The Court facilitates the registration of Maori-owned land and maintains the records of such registrations. Many of the hearings held by the Maori Land Court are to handle issues of land transferred by will or intestacy.

The Maori Land Court is a two-tiered structure composed of the Maori Land Court and the Maori Appellate Court. The Court conducts itself in a culturally relevant manner; for example, it may open and close with Maori prayer and hold sessions in the Maori language. New Zealand is divided into three Maori Land Court Regions and sub-divided into seven districts where the Court holds its application hearings. The Maori Land Court Services Offices help with the application process and general enquiries.

Judges may sit alone or on a panel of two or more.³⁸ The Court’s decisions are final and binding; however, application for a rehearing, if requested by “any person interested in any matter in respect of which the Court has made an order”, the judge having made the order or any other judge, may be made within 28 days after the order.³⁹ Furthermore, the Maori Land Court has the power to amend any order or court document as necessary, provided it does not remove any right already conveyed, in order “to give effect to the true intention of any decision or determination of the Court.”⁴⁰

Appeal of Maori Land Court decisions is made to the Maori Appellate Court. The Maori Appellate Court, and by leave, the Land Court, may obtain the opinion of the High Court of New Zealand on any point of law arising in its proceedings.⁴¹ In certain situations such as assigning costs and issuing injunctions within its jurisdiction, the Land and Appellate Courts each enjoy certain powers of the High Court which tribunals generally do not possess.

It is interesting to note the power of the Maori Land Court to make occupation orders vesting in “the owner of any beneficial interest in that land; or a person who is entitled to succeed to the beneficial interests of any deceased person, in that land.”⁴² Part 15—Occupation Orders of the *TTWMA* deals with occupation orders, including matters to be considered in deciding an occupation order, as well as the power to amend or cancel an occupation order, and make related regulations.⁴³ The Maori Land Court has the discretion to order the “exclusive use and occupation of the whole or any part of that

³⁷ *Ibid.*, s. 17(1).

³⁸ *Ibid.*, s. 38.

³⁹ *Ibid.*, ss. 43 (1)-(2).

⁴⁰ *Ibid.*, ss. 86-88.

⁴¹ *Ibid.*, s. 72.

⁴² *Ibid.*, s. 328(1).

⁴³ *Ibid.*, ss. 328-331.

land as a site for a house.”⁴⁴ The caveat to this provision is that the occupation order does not constitute “partition, development, or subdivision of the land to which the order relates.”⁴⁵ The Court has to take into consideration the opinion of the owners, the effect of their interests and the best use of the land before making an occupation order.⁴⁶ If the land in question is held in trust or by a Maori corporation, consent must be obtained before issuing the order.⁴⁷ The existence and application of this power in New Zealand may provide an example and/or lessons for potential solutions to the current Canadian unavailability of orders for exclusive possession of the matrimonial home on reserves.⁴⁸

Judicial review of the Maori Courts’ decisions or orders is by appeal to the New Zealand High Court and then the Court of Appeal. Maori Land Court decisions are enforced in various ways depending on the nature of the issue before the Court. For instance, enforcement for an order for money payment may, on application by one of the parties or the judge’s own motion, be filed with and thus become a record of the District Court.⁴⁹ The filed order acts as a debt and is registered against the Maori-owned land title until paid. Enforcement of other orders may involve registration on title in land registry records.⁵⁰

In terms of evaluating the Maori Land and Appeal Courts’ effectiveness as a potential model for the Canadian context, it is worth noting that they form the only Maori court in New Zealand. The challenge with implementing a similar system in Canada would arise in accommodating the diversity of customs and cultures of multiple First Nations. Although the Maori have differing customs among their regional tribes, they share a common language and the same Nation. Additionally, First Nations may object to having the decision about land use and transfer taken completely out of their hands and put into a court setting.

Making the Maori Land Court process accessible appears to be a goal of the New Zealand government and recognizes the importance of the land to the Maori people, as well as their special relationship to it. In summary, the author suggests that in addition to this purpose, the noteworthy and positive aspects of the Maori Land and Appellate Courts are:

- The ability to conduct hearings in the Maori language;

⁴⁴ *Ibid.*, s. 328(1).

⁴⁵ *Ibid.*, s. 328(3).

⁴⁶ *Ibid.*, s. 329 (1)-(2).

⁴⁷ *Ibid.*, s. 328(2).

⁴⁸ It was beyond the scope of this paper to complete in-depth research into, and analysis of, the occupation orders power and its application by the Maori Land Court.

⁴⁹ *TTWMA*, *supra* note 36, s. 81.

⁵⁰ *Ibid.*, ss. 140-142.

- Specific judicial authority with respect to hearing Maori land matters, including the ability to order costs, issue land occupation orders and injunctions that are enforceable in the High Court system, and, to make binding decisions; and,
- The power to grant rehearings and the authority to amend any court document or court order to clarify the court's intention and determination.

Although a tribunal in concept and including administrative features, drawbacks of the two levels of the Maori Land Court may rest in its more judicial nature than most tribunals:

- Judges are the decision-makers, requiring a legal background; and,
- Decisions and orders are imposed on the parties in the manner of a standard court.

Additional Comments on Tribunals

Among the criticisms of administrative tribunals discussed at the 18th annual conference of the Canadian Council of Administrative Tribunals (CCAT) held in Ottawa in June 2002, was the judicialization of tribunals. Administrative tribunals were initiated in large part as a cheaper alternative to the court system. And, the ability to conduct investigations and hearings in a more relaxed manner with fewer procedural formalities and rules was attractive.

The concern expressed by some of the presenters at the referenced conference pertains to increased pressure felt by quasi-judicial tribunals to function more like courts. Additional procedures, for example discovery and pre-hearing disclosure requirements, increase the claimant's costs and complicate the process.⁵¹ Furthermore, courts conducting judicial reviews have commented on the lack of transcribed hearings, which suggests they may eventually become a requirement.⁵² Another complicating factor for tribunals is their being "forced into the realm of the judicial"⁵³ during consideration of issues tied to *Charter*⁵⁴ rights.⁵⁵ The potential connection of the *Charter* right to "life, liberty and security of the person"⁵⁶ to on-reserve matrimonial real property

⁵¹ See e.g. Anne L. Mactavish, "Administrative Justice-Reflections On The Road Ahead" (Paper presented to the 18th Annual Canadian Council of Administrative Tribunals Conference, Ottawa, 4 June 2002) [unpublished] at 4-5 [Mactavish].

⁵² *Ibid.* at 6.

⁵³ A.M. Wallace and J.T. Casey, "The March Towards Judicialization: Administrative Tribunals at the Crossroads" (CBA Administrative and Labour Law Update, Ottawa, 19-20 November 1999) [unpublished] cited in *ibid.* at 7.

⁵⁴ *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 [*Charter*].

⁵⁵ Mactavish, *supra* note 51, at 7.

⁵⁶ *Charter*, *supra* note 54, s. 7.

issues might merit further enquiry and consideration in specifying the procedures and requirements of a tribunal as a potential resolution mechanism.

Citing the Supreme Court of Canada as contributing to the increased judicialization of tribunals, Anne L. Mactavish, Chairperson of the Canadian Human Rights Tribunal, and presenter at the 2002 CCAT conference, stated: "Another factor ... is the increased obligation on the part of the administrative decision makers to provide reason[s] for their decisions."⁵⁷

To be effective, delegation of the decision-making authority to a tribunal dealing with the resolution of the division of matrimonial real property on reserves in Canada would have to be carefully constructed to not create further conflict of laws between the spectrum of federal, provincial/territorial and First Nations jurisdictions.

Ombuds Processes

Introduction to Ombuds Processes

The office of ombudsperson,⁵⁸ in its modern form, originated in Sweden in 1809 with the appointment of a *justitieombudsman* (the old Norse word was *umbodhsmadr*). The meaning of the word is "entrusted person" or "grievance representative."⁵⁹ This official is usually only found in democratic countries. New Zealand was the first English-speaking country, in 1962, to offer the services of an ombudsperson. Canada does not have a federal ombudsperson and is one of the few larger democratic countries that does not.

Variations in the definition of an ombudsperson exist. An accepted version issued by the Ombudsman Committee of the International Bar Association is:

An Office provided for by the constitution or by action of the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees, or who acts on his own motion, and who has

⁵⁷ Mactavish, *supra* note 51, at 7. (Mactavish supports her assertion in a footnote referring to *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and states in part:

In *Baker*, the Supreme Court of Canada reversed the long-established principle that administrative decision makers are not obliged to provide reasons for their decisions, unless required to do so by their enabling legislation. The Court found instead that in certain circumstances, the duty of fairness may require the provision of reasons.)

⁵⁸ In this paper, the terms "ombudsperson" and "ombudsman/men" are both used. The gender-neutral form is used in general contexts referring to the holder of an ombuds role. Many organizations and countries retain the use of the term "ombudsman"; therefore, in reference to specific established ombuds roles and offices or direct citation, the organization's or country's own term is respected.

⁵⁹ Judge A. Satyanand, "Human Rights in the Commonwealth: The Ombudsman Role" (Paper presented to the Royal Commonwealth Society Meeting, London, England, 22 May 2002) at 1, online: Royal Commonwealth Society International Headquarters <<http://www.rcsint.org/texts/satyanand.doc>> [Satyanand].

the power to investigate, recommend corrective action and issue reports.⁶⁰

Similar to the role of a commission of inquiry, such as the Indian Claims Commission, the office of ombudsperson may make recommendations on the findings of its self-initiated or complaint-initiated inquiries, acts impartially, and reports on its recommendations. A difference between the two entities is that the ombudsperson may make recommended solutions for correcting the situation if the findings of its investigation substantiate the complaint. The office of the ombudsperson generally does not have decision-making capabilities.

The enabling legislation that creates an ombudsperson office generally includes its jurisdiction, method of complaint processing, i.e. received directly from the complainant or through a Member of Parliament, powers to access relevant materials, and where to report. Chief Roberta Jamieson has recognized that there “may be considerable differences among Ombudsmen” but there are basic characteristics that qualify the office as an ombuds one.⁶¹ Briefly, the characteristics she provided are: “independence, fairness, transparency, accessibility, respect, efficiency, accountability, stability, investigative powers, confidentiality, public reporting, powers only to recommend, and ability to undertake investigations on own initiative.”⁶²

An additional component of accessibility to an ombuds office for redress is no or minimal cost to gain access to a forum for airing a grievance. The alternatives, such as court, trying to work through a member of Parliament, newspaper attention and group organization, can be costly and lengthy, and may not achieve the same result. While the government or offending body does not have to follow the recommended solutions, the government or body under investigation would realize the issue had been thoroughly investigated. An ombudsperson may include non-compliance or a lack of response in a report. However, the only available enforcement mechanism is relying on the embarrassment factor and public pressure, if the issue is of public interest. The advantage to the ombuds model is that the complaint investigation has the potential to effect change, which in turn might prevent a reoccurrence of the unfair or egregious policy or action. A complaint settled out of court, or even by a court order, may not have the same result.

Ombuds issues and processes in Canada and New Zealand are reviewed here in turn.

⁶⁰ Nuba Survival, “Administration of Justice and Legal Aid” (Issue Paper A-3 presented to the Steering Committee for Human Rights in the Transition in Sudan, Kampala, 8-12 February 1999) at para. 4.2 online: Nuba Survival <<http://www.nubasurvival.com/conferences/conferences%20%20index.htm>>.

⁶¹ Chief R. L. Jamieson, “The First Nation Ombudsman” (Paper presented to the IBA Spring Conference: “Specialized Tribunals and First Nations Legal Institutions”, 29-31 May 2002) at 5 [unpublished] [Chief Jamieson]. (Chief Jamieson served as the Ombudsman of Ontario from 1989 to 1999.)

⁶² *Ibid.*, at 5-7.

Canada

With the exception of Prince Edward Island, all the provinces in Canada have an ombudsperson for complaints and investigation into provincial administrative issues. As already noted, there is no federal ombudsperson, however it is interesting to note that in the last session of Parliament, a Private Member's Bill known as the "*First Nations Governance Review Act*" proposed to establish a federal First Nations Ombudsman Office and a First Nations Auditor.⁶³ The proposed First Nations Ombudsman would investigate administrative, communication and election problems and irregularities, as well as deal with complaints between members and their own First Nation communities, and between First Nations. Also, unfair or unreasonable dealings and/or policies and practices between these parties and the government of Canada would be investigated.

A group called the First Nations Accountability Coalition (FNAC), a grassroots organization claiming a membership of 5,000 from across Canada, has called for an independent body to hear complaints of band council improprieties. FNAC, along with the Alliance Party, has called for a First Nations Ombudsman.⁶⁴ The ultimate purpose in common of the two proposals for a federal level First Nations Ombudsman as noted here, is achieving good governance by monitoring First Nation and Aboriginal governments' accountability.

Indian and Northern Affairs Canada (INAC) requested that the Centre for Municipal-Aboriginal Relations undertake a study to examine and compare Municipal and First Nations accountability regimes in identified political, financial and administrative areas.⁶⁵ The First Nations government information was gathered from *Indian Act* provisions, their funding agreements, and four First Nations with accountability mechanisms in place.

The areas covered by the government financial accountability mechanisms comparisons provided in the report were on: Financial Accountability - Transparency, Elements of Accountability Disclosure and Redress. The Municipal requirements of accountability are more stringent. The two noticeable differences in the accountability regime requirements are under disclosure and redress. The report points out that First Nations, unlike municipalities that have several options, with a few exceptions do not have independent third party systems of redress. The main systems used now are INAC, courts and the Human Rights Commission.⁶⁶ Also mentioned are the use of an

⁶³ Bill C-399, *An Act to establish a First Nations Ombudsman and First Nations Auditor to assist with administrative and financial problems*, 1st Sess., 37th Parl., 2001 (debated at second reading; dropped from the Order Paper -- June 20, 2002.)

⁶⁴ In 2000, FNAC received recognition on CBC's "Canada at Five" radio news broadcast, when they claimed "native people aren't properly represented by chiefs and band councils [...] and corruption and mismanagement of band funds [are] rampant." Canadian Broadcast Corporation, "Canada at Five" (News Report) (Toronto: CBC, 4 April 2000).

⁶⁵ T. Chowdhury et al., *Municipal Government Accountability Regimes: A Benchmark For First Nation Government Accountability?* (Ottawa: Centre for Municipal-Aboriginal Relations, 1998).

⁶⁶ *Ibid.*, Table 4 at 53.

Elders Tribunal to provide a review process⁶⁷ and the idea of establishing an Aboriginal Auditor General or Ombudsman.⁶⁸

Law Professor Larry Chartrand's purpose in discussing the creation of a federal Ombudsman Office differs from the First Nations Accountability Coalition and the Canadian Alliance Party. His mandate for a federal ombudsperson would be to "monitor the non-Aboriginal governments' accountability to Aboriginal peoples."⁶⁹ All aspects of the Aboriginal/government relationship could be investigated by this ombudsperson, including land issues. Of course, the scope and jurisdiction of such an ombudsperson would have to encompass this aspect in the enabling legislation.

Chief Roberta Jamieson supports the concept of having a First Nation Ombudsman for similar reasons to those of the FNAC and the Alliance Party. Her purpose would be to provide an "effective redress mechanism to offer protection for the ordinary citizen against the possible abuse of delegated power."⁷⁰ The citizens she is referring to are First Nation people whose Nations, as they become self-governing, may in their actions or decisions, as commonly occurs in governments according to Chief Jamieson, make an error that adversely impacts them.⁷¹ Her concept of a First Nation Ombudsman office would be to provide a flexible source of redress for individuals or groups of First Nations people, outside of court.

Comments on the ombudsperson model for dispute resolution follow a description of the New Zealand's ombuds process.

New Zealand

In New Zealand there are three Ombudsmen appointed by the Governor-General as recommended by the House of Representatives, and they are considered to be Officers of Parliament, not the current government.⁷² The *Ombudsmen Act 1975*⁷³ is the main

⁶⁷ *Ibid.*, Table 3 at 52.

⁶⁸ *Ibid.*, Table 4 at 53.

⁶⁹ L. Chartrand, "Furthering Accountability By Governments for Aboriginal Rights Mechanisms for Achieving Good Governance in Canada" (Paper presented to the IBA Spring Conference: "Specialized Tribunals and First Nations Legal Institutions", 29-31 May 2002) at 14 [Chartrand].

⁷⁰ Chief Jamieson, *supra* note 61, at 2.

⁷¹ *Ibid.* at 1.

⁷² "History of the Office of the Ombudsmen", online: New Zealand Office of the Ombudsmen <<http://www.ombudsmen.govt.nz/history.htm>>.

⁷³ *Ombudsmen Act 1975* (N.Z.), 1975/9, 35 RS 469, as am. by 1982/89, 1982/164, 1988/77, 1988/205, 1991/121, 1992/25, 1993/34, 1996/137, 1997/72, 1999/44, online: New Zealand Legislation – Statutes <http://www.legislation.co.nz/browse_vw.asp?content-set=pal_statutes> [OA].

statute governing the ombuds process that began in 1962.⁷⁴ The purpose of the New Zealand Office of the Ombudsmen is “to inquire into complaints raised against New Zealand central, regional and local government organisations or agencies.”⁷⁵

If the complaint is substantiated, the Ombudsmen may make recommendations for remedies. They do not have the power to enforce the recommendations. The OA requires all available appeals and other remedies to be exhausted before bringing a complaint to the Ombudsmen Office.⁷⁶ On average, a complaint under the OA takes 42 working days to be processed and there is no charge for an investigation.⁷⁷

The procedure for registering a complaint with the Office of the Ombudsmen is much the same as the CHRC’s. First, a determination of jurisdiction must be made. When a claim is accepted, an investigator gathers the information, and in conjunction with the relevant Ombudsman,⁷⁸ establishes whether the claim has merit. Following investigation and the report being provided to the government department in question, if no action has been taken on it after passage of a reasonable time, the Office of the Ombudsmen may send a copy of the report and recommendations to the Prime Minister and Parliament.⁷⁹

Section 25 of the OA amounts to a privative clause, in that, a proceeding or decision made by an Ombudsman cannot be reviewed by a court, or challenged, except for lack of jurisdiction.⁸⁰ Furthermore, the Office of the Ombudsmen or its representatives may not be sued, and the information received during the proceedings is privileged.⁸¹ The Office of the Ombudsmen is to report annually to Parliament.⁸²

⁷⁴ Three other statutes convey roles and powers to the Ombudsmen: *Official Information Act 1982* (N.Z.), 1982/56, 35 RS 403; *Local Government Official Information and Meetings Act 1982*, 1987/174, 35 RS 347; *Protected Disclosures Act 2000*, 2000/7; online: New Zealand Legislation – Statutes <http://www.legislation.co.nz/browse_vw.asp?content-set=pal_statutes>.

⁷⁵ “Functions of the Ombudsmen”, online: New Zealand Office of the Ombudsmen <<http://www.ombudsmen.govt.nz/>>

⁷⁶ OA, *supra* note 73, s. 13(7).

⁷⁷ “Frequently Asked Questions”, online: New Zealand Office of the Ombudsmen <<http://www.ombudsmen.govt.nz/frequent.htm>>.

⁷⁸ There are three New Zealand Ombudsmen in office at one time.

⁷⁹ OA, *supra* note 73, s. 22(4). For a flow chart of the New Zealand Ombudsmen’s Office complaint process, see “How a Complaint is Processed”, online: New Zealand Office of the Ombudsmen <<http://www.ombudsmen.govt.nz/layinga.htm>>.

⁸⁰ OA, *ibid.*, s. 25.

⁸¹ *Ibid.*, s. 26.

⁸² *Ibid.*, s. 29.

Additional Comments on Ombuds Processes

A general comment on the non-binding recommendations and solutions given to the offending agency and the complainant is that public pressure is relied upon for compliance. However, if it is not an issue of public interest, then the offending party may not resolve the situation, and reoccurrence is a possibility as well. In the context of resolving matrimonial real property issues on reserves on relationship breakdown, issues tend to be very personal in interest. Additionally, defined processes for the resolution of matrimonial property disputes, whether through custom, land codes, band laws, etc., may or may not exist, or in fact be supported locally, to underpin a formal ombuds-type investigation and process for this context. This view may not necessarily be the only interpretation for this context however.

While not speaking to MRP issues in his paper, Professor Chartrand acknowledges that a common criticism of the ombuds role is its advisory nature and lack of compliance mechanisms; however, he suggests that the non-compliance power may in fact be positive and present the possibility of a culturally relevant component through consensus building for resolution.⁸³ This is an interesting thought, especially given that lack of cultural sensitivity is one of the complaints against the CHRC.

Judge Anand Satyanand, a New Zealand Ombudsman, in a presentation in 2002 to the Royal Commonwealth Society included a quote by Justice Michael Kirby from a 1995 Australian case on the “usefulness of Ombudsman methodology.”⁸⁴ Justice Kirby said:

[The] Ombudsman lacks the power to make orders as a Court may do. But the sanction of the provisions of a report to the responsible Minister and to Parliament and the requirement upon the Minister to respond promptly to any such report also affords significant sanctions. These have proved effective in all jurisdictions in which the Office of the Ombudsman has been created, to obtain reconsideration of administrative action found by the Ombudsman to be unlawful, unreasonable, mistaken or wrong.⁸⁵

The sanctions mentioned by the Justice are only available to the Ombudsman if included in the enacting legislation. The New Zealand legislation does have a further discretionary avenue of redress to the Prime Minister and Parliament that may be exercised by the Ombudsmen. It continues to be notable though, that by not allowing the review, quashing or challenge of the Ombudsmen’s recommendations, the resulting findings and proposed solutions may be final, however, they are still not binding.

⁸³ Chartrand, *supra* note 69, at 14.

⁸⁴ Satyanand, *supra* note 59 at 3.

⁸⁵ *Ibid.*

The New Zealand Office of the Ombudsmen follows the general model described in this paper's introductory material about ombuds processes. What is unique, is the ombuds jurisdiction of similar but slightly different subject areas provided for by four separate pieces of legislation. However, the purpose and function of the Office of the Ombudsmen remains consistently to investigate complaints against government departments and agencies, and the aim is "protection of human rights and ensuring transparency in government administrations."⁸⁶ To mention once again nonetheless, the *Ombudsmen Act 1975* ultimately does not contain an enforcement mechanism to ensure compliance with any recommended changes or proposed solutions to resolve the offending action or policy in question.

In summary, the author suggest that the positive aspects of the ombuds office are:

- It provides an independent flexible avenue for redress to government actions and decisions that impact negatively against individuals and groups;
- Issues can be high profile and public, while maintaining case-specific confidentiality;
- Ombudspersons may be delegated wide investigative and procedural powers in the enabling legislation;
- The ombuds process may provide recommendations and solutions for a complaint substantiated by investigation;
- The ombuds process is accessible to all citizens at no or minimal cost; The complainant may not have to have independent legal representation; and
- In New Zealand: by not allowing review or challenge, the ombuds process sends the message that the recommendations/solutions are final.

Drawbacks include that the ombuds process or ombudsperson:

- May only make recommendations, so findings and recommended solutions are not binding on the parties involved;
- Its main purpose is to investigate government actions/policy in its administration processes so may not be suited to disputes between individuals;
- The investigation and reporting requirements of the ombuds procedure may still create lengthy delays before any action is taken to resolve the situation; and
- Relies on the offending party for compliance, as a matter of goodwill or through public pressure, not through the existence of enforcement mechanisms.

⁸⁶ *Ibid.* at 8.

Alternative Dispute Resolution (ADR)

Methods of ADR were utilized in Aboriginal societies before the introduction of the European court system in Canada. By comparison, ADR as an alternative to court processes is relatively new. The main impetus for the growth of modern ADR mechanisms is the elapse of time and high expense which accompany resolving issues in the court system.

Advantages of utilizing ADR mechanisms are: the confidentiality of the process, reduced risk of imposed decision-making, possible involvement of subject area experts, innovative solutions, mutual problem solving and retaining or fostering a good relationship between the parties. Another benefit of ADR mechanisms is the ability of the parties to be directly involved in reaching a solution of their choosing, as compared to a decision or order imposed unilaterally by a judgement of the court.

ADR processes share the requirement for success that participants take part in the process in good faith. The opportunity exists for abusing an ADR process by not acting in good faith, such as when one party agrees to participate with the intent to harass, intimidate, or stall litigation, and has no real intention to reach agreement.

Most ADR mechanisms involve a third-party, who is neutral, to assist in the dispute resolution. Lee Axton, in the *Appendices to the Report On: Alternate Dispute Resolution Within DIAND*, paraphrases a statement by Ben Hoffman from a previous INAC report on ADR. He states: "Hoffman observes that it is the nature of alternatives that they be flexible, capable of responding to the specific needs of disputants and to the circumstances of the dispute."⁸⁷ Although variations on the names used to describe them exist, the standard forms of ADR are negotiation, mediation, hybrid and adjudicative processes. There is a variety of theories and models for procedure and steps to reaching an amicable solution to a dispute within each of them. It is beyond the scope of this paper to describe these theories; however, an overview of the standard processes is given and some examples employed to achieve an agreement are reviewed here.

Negotiation

Negotiation is something that occurs in everyday life without most of us really being aware that we are engaging in a process. A dictionary definition of negotiate is:

- 1 talk over and arrange terms; parley; confer; consult [...]
- 2 arrange for [...]
- 3 transfer, assign, or sell ownership in return for equivalent value.⁸⁸

The following definition encapsulates the negotiating process:

⁸⁷ L. Axton, *Appendices to the Report On: Alternate Dispute Resolution Within DIAND* (Ottawa: Indian and Northern Affairs Canada, 1994), Appendix B at 1[ADR Appendices].

⁸⁸ *Gage Canadian Dictionary*, revised, s.v. "negotiate".

[Negotiation is] ... a process of adjustment of existing differences, with a view to the establishment of a mutually more desirable legal relation by means of barter and compromise of legal rights and duties and of economic, psychological, social and other interests. It is accomplished consensually as contrasted with the force of law.⁸⁹

Negotiation is a voluntary process. A power imbalance may exist between the parties in a negotiation, notwithstanding agreeing to participate in finding a mutual agreement to end the conflict. Decision-making about the most appropriately designed mechanism to address the subject matter in question may include considering who the parties are, including their cultural differences. Identity conflict is a concern in all the forms of ADR mechanisms, unless they are specifically designed to be culturally relevant; for example, for Aboriginal people, circle settings and Elders panels.⁹⁰ Important to the success of negotiation, as well as other ADR mechanisms, is trust between the parties and the third-party neutral. Careful consideration of the appropriate dispute resolution mechanism for the subject matter is paramount.

An advantage of negotiated agreements is that the parties participated in the solution and are subsequently less likely to go to court for further resolution of the situation.⁹¹ INAC reports that negotiated agreements with outstanding actions tend to be fulfilled, and compliance in general is greater due to the participation of the parties.⁹²

Among the disadvantages of negotiation and other ADR mechanisms is that it may not be as cost effective as expected. The length of time to reach a settlement may be much less than court time, but the payment of the third-party neutral, facilities and lawyers and/or negotiators increases the cost of resolution. Enforcement of the agreement is left to contract law and enforcement by a court. Again, a power imbalance may exist, for example the relationship between First Nations and Canada during negotiations when Canada has a seemingly unlimited resource base in comparison to the First Nations. An individual in a violent relationship attempting to resolve the division of on-reserve matrimonial real property would experience a similar imbalance of power.

Canada

⁸⁹ G. Bellow & B. Moulton, *The Lawyering Process* (Mineola, NY: Foundation Press, 1978) at 11, cited in *Dispute Resolution Readings and Case Studies*, J. MacFarlane, ed. (Toronto: Emond Montgomery, 1999) at 100.

⁹⁰ Institute on Governance, *Dispute Resolution Systems: Lessons From Other Jurisdictions* (Report dated 12 March 1999) [unpublished] at 10 [Institute on Governance]. (A study being the research and development component of a Joint Fiscal Relations Table whose members included the Federation of Saskatchewan Indian Nations, Indian and Northern Affairs Canada, and the Government of Saskatchewan.)

⁹¹ ADR Appendices, *supra* note 87, Appendix C at 1.

⁹² *Ibid.*

Ridgewood Foundation for Community-Based Conflict Resolution (Int'l)

The Ridgewood Foundation located in Ottawa, founded in 1992, is a Registered Canadian Charitable Organization committed to “the continued development of Community-Based Conflict Resolution through foundational and principled best practices, process design and training.”⁹³ The Foundation has provided conflict resolution training in Foundational Process™, Third-Party Neutral and Community-Based Conflict Resolution Field Process. Ridgewood has provided services to a variety of groups, including acting as third-party neutral to community groups such as First Nations, government, police, youth, community developers and professionals. The unique aspect of Ridgewood’s approach to conflict resolution is the training provided before the actual conflict resolution sessions begin. To make each training session a positive experience, the Foundation aims for a “positively-centred, barrier free and inclusive”⁹⁴ gathering process.

Training sessions are interactive with the use of role playing while conveying principles of and education on the ADR process, such as negotiation or mediation, that the community is to be involved in. The training workshops are part of a week-long process that is set out in a schedule of activities. The Foundational Process developed by Ridgewood is a principled approach to conflict resolution and intervention by providing what to expect in the negotiation experience and the skills needed to own the process and be able to address the issues that caused the conflict. The training sessions are based on the principles and values that embody the Foundational Process.

Following the training session or sessions, the participants must do their own background preparation to take part in their community negotiation session. The training session equalizes the power imbalance between parties such as a First Nations community and the federal government.

Although a community-based conflict resolution process, Ridgewood’s Foundational Process provides a unique educational aspect to resolution conflict for the group seeking to reach an agreement. It appears that a modified form of this process might be adapted for training individuals, for contexts such as the resolution of on-reserve MRP after relationship breakdown.

Adaption would have to address some specific areas of concern. Specifically, feminist critique of ADR processes points out the imbalance of power usually experienced between couples seeking to settle their affairs on the breakdown of their relationship. The man in the relationship typically has the larger income and more resources to influence or coerce outcomes, effectively forcing what may not be an appropriate settlement upon his partner. The partner may not understand her non-agreement alternatives or lack the resources to pursue a court settlement. The situation for families that experience violence in the home is even more imbalanced. The abuser

⁹³ Ridgewood Foundation for Community-Based Conflict Resolution (Int'l), “Foundational Process Principles, Process, Techniques and Tools” (Workbook) (Ottawa: Ridgewood Foundation, 2001) at xiv.

⁹⁴ *Ibid.*

has already asserted control over the partner. Further, the violence in the home may not have been previously disclosed. Being in the same room with the abuser is not only very intimidating, but for some victims may be impossible at the relationship breakdown stage. Negotiation would not generally be appropriate in this situation; however, a Ridgewood training session could potentially redress this imbalance by preparing the partners and provide the tools for engaging in a positive negotiation session.⁹⁵

Another benefit from the combined educational training and negotiation approach is the ability to address identity or cultural conflicts. In First Nations communities, deep-rooted internalized feelings are often attached to the conflict. The Foundational Process encourages self-assessment and the surfacing of the deep-rooted issues for consideration and resolution in the process. Well-defined core values and issues identified in this way will help prevent derailment of the process.⁹⁶ However, if the issues are not handled properly, and time given for resolution of the deep-rooted issues is inadequate, the process may break down and any trust and calm developed will dissipate.

In summary, with respect to considering the needs for on-reserve MRP dispute resolution, the author suggests that the positive aspects of the Ridgewood Foundation process for community-based conflict resolution are that:

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

Drawbacks to the Ridgewood Foundation Process are that:

- It is currently designed for community-based conflict resolution;
- Costs will be incurred for the training process as well as the actual negotiation session, adding to the expense of the process; and
- The cooperation of the parties is necessary.

Mediation

Mediation is a process that involves a neutral third-party who brings parties together to resolve a dispute for themselves by consensus, in other words agreement. A mediation session is facilitated by the third-party mediator who assists the parties by guiding the process, keeping it on track, drawing out the issues and urging the parties to

⁹⁵ The same would apply in a mediation mechanism. Few mediators will take couples that have disclosed the presence of violence in the home.

⁹⁶ J. Rothman, *Resolving Identity-Based Conflict in Nations, Organizations, and Communities* (San Francisco: Jossey-Bass, 1997) at 12-13.

deal with them appropriately, and facilitating communication. A mediator will interact frequently with the parties to assist them to arrive at an agreement, which is what differentiates negotiation and mediation. However, the mediator is not a decision-maker and does not provide the solution.⁹⁷ The agreement reached is the result of the interaction between the parties, and an important aspect of mediation is the authority of the parties to settle and sign the agreement themselves.

The mediator's goal is to establish a comfortable environment, foster trust in the mediator, and provide a fair, neutral process that encourages the parties to interact for resolution of the dispute. Mediation is a cooperative process; therefore, problems may arise for reaching an amicable agreement if the parties do not want to be involved in the mediation.⁹⁸

Mediation sessions tend to be informal and provide a situation where emotions and concerns surrounding the dispute may be aired. Previously agreed upon ground rules, such as no offensive or derogatory language, establish the boundaries for communication. The process is empowering for the parties, in that it requires them to make an effort to convey their own interests and feelings while attempting to listen and hear the other's points of view and experience. The parties must take ownership of the process to reach an agreement.

Most sessions are held on a without prejudice basis; that is, nothing said and the information exchanged may not be used to the detriment of the other party in another setting, such as litigation. Enforcement of a mediated agreement, unless provided for in some other form in the agreement, is through contract law.

A disadvantage of mediation is that the parties may fail to reach agreement. In this case, the costs and time spent, usually benefits of the successful use of this ADR mechanism, instead add to the parties' expenses of finding a solution.⁹⁹ As in negotiation, a power imbalance may be present between parties to the mediation process. To ameliorate the disparity between them, some mediators will conduct the mediation process with the parties in separate rooms. This may potentially provide a method of implementing mediation where violence has been experienced in the home; however, the results of such sessions may be inconsistent depending upon the parties and the mediator's methods.

⁹⁷ J. MacFarlane, "Mediation (Introduction)" in *Dispute Resolution Readings and Case Studies*, J. MacFarlane, ed. (Toronto: Emond Montgomery, 1999) 257 at 257[MacFarlane].

⁹⁸ Mandated mediation, as provided for in Ontario court case management (reviewed subsequently in the main text of this paper), has more potential to experience this problem. It should be noted however that the hesitation or reluctance of one or both parties to participate in mediation does not necessarily engender or equate to participation in bad faith. Appropriate education of the parties about the mediation process and the appropriate use of mediation skills by the mediator may successfully overcome this problem.

⁹⁹ Legal counsel may have represented the parties throughout the mediation sessions.

Hybrid Processes

There is no set definition for hybrid processes, however on a spectrum starting with negotiation – the ADR process being furthest away from court settlement at the other end of the spectrum – mediation is next, then elements combined from evaluation, adjudication, mediation and negotiation mechanisms, which are referred to as hybrid processes.¹⁰⁰ A third-party neutral is still involved but the difference is a part of the ADR process includes a non-binding evaluation of a portion of the dispute, by the third-party. For instance, the non-binding evaluation may be on facts, legal issues, or assessment of litigation outcomes.¹⁰¹ The parties are still responsible for reaching an agreement that allows them to experience empowerment, such as ownership of the process outcome, without prejudice status, and confidentiality, not available in a court settlement.

Hybrid processes currently in use mostly in relation to court programs include: private mini-trial, moderated settlement conference, early neutral evaluation, summary jury trial, judicial mini-trial, case management and fact finding by an ombudsperson.¹⁰² Case management in Ontario is an example reviewed in the examples accompanying this section. Hybrid processes may be mandated in some legislated dispute resolution situations, which is described below in the examples of this section.

In some respects hybrid processes are controversial, raising questions about the overlapping of the mechanisms making them more complex than a mediation or negotiation session. As with the other ADR mechanisms, the process is only as good as the third-party's style and expertise in the subject under dispute.

Canada

Legislated Hybrids

As previously noted, legislative provision may impose hybrid processes. An example is the *Cree-Naskapi (of Quebec) Act*,¹⁰³ which is a self-government agreement derived from the 1975 James Bay and Northern Quebec Agreement (JBNQA) and the 1978 Northeastern Quebec Agreement (NEQA) with the Cree and Inuit in northern Quebec. There are no ADR process provisions in the original Agreements, however they are included in the *CNQA* and subsequent Implementation Agreements.¹⁰⁴ Part XII of the *CNQA* provided for the creation of the Cree-Naskapi Commission to privately investigate complaints arising from the JBNQA, NEQA or the *CNQA* implementation or

¹⁰⁰ Ellen Zweibel, "Hybrid Processes: Using Evaluation To Build Consensus (Introduction)" in MacFarlane, *supra* note 97, 463 at 463 [Zweibel].

¹⁰¹ *Ibid.*

¹⁰² Institute on Governance, *supra* note 90 at 9.

¹⁰³ *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c. 18 [CNQA].

¹⁰⁴ L. Axton, *The Application of ADR within DIAND: An Inventory of Dispute Resolution Activities and Processes* (Ottawa: Indian and Northern Affairs Canada, 1994), at 40 [Application of ADR].

lack thereof.¹⁰⁵ The Commission, a hybrid process, has the same failing as the Indian Claims Commission and Ombudsperson processes: Recommendations are non-binding on the parties.

Some of the Implementation Agreements provide for a three-stage series of ADR mechanisms starting with consultation, then mediation followed by arbitration. A mediated negotiation for the Implementation Agreement between Canada and the Makivik Corporation, representing the James Bay and Northern Quebec Inuit, in September 1990, included this format of ADR mechanisms.¹⁰⁶

Ontario Courts Case Management

As already noted with respect to ADR techniques, evaluation provided by a third-party can be an important component in these mechanisms; it is often a form of reality check for the parties. Case management, which is also known as early neutral evaluation (ENE) in some jurisdictions, incorporates this component. In the Ontario case management system,¹⁰⁷ an objective non-binding assessment of the parties' positions and potential litigation success is completed by a master or judge during the case conference. The parties may decide to accept that assessment or not, and an agreement may be reached during this session as result of the judge's or master's evaluation. The master or judge presiding at the case conference may not preside at the case's subsequent trial or hearing.¹⁰⁸

By authority of the Ontario *Courts of Justice Act*, case management masters are appointed by the Lieutenant-Governor in Council.¹⁰⁹ A qualified case management master must have been called to the Bar of a province or territory for a time prescribed by the regulations and/or been a judge for that period of time.¹¹⁰ With a few exceptions, such as participation in alternative dispute resolution, case management masters apply the same rules of procedure and evidence as the provincial court.¹¹¹

¹⁰⁵ CNQA, *supra* note 103, ss. 158-172.

¹⁰⁶ Application of ADR, *supra* note 104.

¹⁰⁷ Case management procedures, currently applicable to civil applications and actions in Ottawa and a portion of eligible Toronto cases which are chosen randomly, are governed by r. 77 of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194. A number of exceptions apply depending upon the type of case; for example, cases to which the Toronto Family Case Management Rules apply (r. 77.01(2)(a)), or mortgage actions (77.01(2)(d.1)), among others. Case management along with fastracking a case, where there are fewer steps before getting to the actual court hearing, are methods employed in an attempt to reduce the workload experienced by the courts in Ontario.

¹⁰⁸ Ontario, *Rules of Civil Procedure*, r. 77.13(8) [Ontario Rules]

¹⁰⁹ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 86.1 [OCJA].

¹¹⁰ *Ibid.*, s. 86.1(2).

¹¹¹ *Ibid.*, s. 86.1(7)-(8) and s. 87(2)-(3).

As part of the process, the parties are required to participate in mandatory mediation.¹¹² Strict time limits govern submission of the claimant's choice of mediator to the mediation co-ordinator as well as when the mediation must take place, unless court exception is ordered. If a mediator is not chosen by the claimant, one will be assigned by the co-ordinator, from a list maintained by the local mediation committee.¹¹³

Procedures required before the mediation session, and attendance at the session by the parties and their legal counsel, if any, must be complied with or the mediation co-ordinator will file a certificate of non-compliance.¹¹⁴ Certificates of non-compliance are referred to a case management master or judge, and a variety of steps may result: The case management master may, for example, call for a case conference and issue an order for costs, strike documents, set a timetable for the action, dismiss the action, or make any order suitable to the specific circumstance.¹¹⁵

In common with mediation concepts already reviewed in this paper, confidentiality and the without prejudice status of mediation discussions are part of Ontario's mandatory mediation. Within ten days of concluding mediation, the mediator issues a report to the mediation co-ordinator and the parties. If a signed agreement has been made, a judgement order in the terms of the agreement may then be sought for enforcement purposes. The court may order continued mediation sessions, with the parties' consent, at any point in the process.¹¹⁶ Failure to reach agreement in mediation means the action will continue and the next step is a case conference held by a case management master or judge.

All the filing of material and discovery should be done by the time of the case conference. The case management master has time to review the material to make an assessment of the issues, facts and related law. Each of the parties presents a brief before the case conference. The master is able to assess the likely success of the application or action, based on the strengths and weaknesses of the parties' positions in the case and discuss it with the parties. A trial date will be set either by the master or by a judge. If no agreement is reached following this step, the case proceeds to court for an imposed settlement.

With respect to evaluating a case management system for lessons that might be applied in the on-reserve MRP context, reference to recent work in the Canadian family law context may be useful. Specifically, the California Special Masters Program was referenced during consultations held in Canada regarding "the best interests of the

¹¹² Ontario Rules, *supra* note 108, r. 24.1.01-24.1.17.

¹¹³ *Ibid.*, r. 24.1.07. (The mediation committee, whose membership appointed by the Attorney General for Ontario includes persons with a variety of legal experience, mediators, from general public, and possibly a judge, monitors mediators and handles complaints against them.)

¹¹⁴ *Ibid.*, r. 24.1.10(5) and r. 24.1.12.

¹¹⁵ *Ibid.*, r. 24.1.13(2).

¹¹⁶ *Ibid.*, r. 24.1.16.

child” and mediation or mandatory mediation for resolving issues of custody and access during divorce or relationship breakdown.¹¹⁷ It was reported that “[t]he Special Masters program in California should be assessed for its potential application in Canada. A ‘special master’ is someone who can deal with family issues but practices outside the court.”¹¹⁸ The California Special Masters mediate, arbitrate or do evaluations. The participant must be from an area that does not have case management by a Master.¹¹⁹ Professor Zweibel includes comments on a study done of the California case management or ENE mechanisms in her chapter on hybrid processes. One of the differences she outlines between the California and Ontario case management methods is that in California, the case conference is held before discovery takes place. The suggestion in her materials is that consequently the parties may not have all the information needed to make appropriate decisions leading to an agreement.¹²⁰ However, the Ontario model conducts the mandatory mediation session under the same circumstances. There is the opportunity in the Ontario mechanism to delve into all the issues as agreed upon by the parties.

In their analysis of the California study, Rosenberg and Folberg note that a benefit derived by an attorney from the ENE process was a re-assessment of the merit of the case, due to a better understanding of the legal and factual issues, and clarification of the issues.¹²¹ These authors suggest changes found in the settlement terms were related to the parties’ better understanding of the facts and law due to the ENE process, “rather than by either external pressure or frustrations, as may be the case with some settlements.”¹²² A court imposed settlement may elicit this type of reaction. A disadvantage noted in the California case management resides in the different styles imposed by the evaluator during the sessions, despite the training received. For instance, if the evaluator was trained in mediation, the ENE session was the same, more interaction by parties, or if interested in discovery, then there was almost no settlement discussion.¹²³

¹¹⁷ IER Planning, Research and Management Services, “Custody, Access and Child Support in Canada, Report on Federal-Provincial-Territorial Consultations” (Presented to the Federal-Provincial-Territorial Family Law Committee) (Ottawa: Department of Justice Canada, 2001) at 71, online: Justice Canada <http://canada.justice.gc.ca/en/cons/fpt_cons/toc.html>.

¹¹⁸ *Ibid.*

¹¹⁹ Toronto area has *Toronto Family Case Management Rules*, O.Reg. 704/91 for managing family law cases. Civil case management is available in the Algoma and Essex Districts.

¹²⁰ Zweibel, *supra* note 100, at 489-90.

¹²¹ H. Jay Folberg & Joshua D. Rosenberg, “Alternative Dispute Resolution: An Empirical Analysis” 46 *Stanford L.R.* 1486 at 1538 cited in E. Zweibel, *ibid.*, at 490-91.

¹²² *Ibid.*, at 491.

¹²³ Zweibel, *supra* note 100, at 491.

As in any mediation situation, the mediator's style is important. The mediators on the local list may have different styles, resulting in potentially different outcomes. This difference is moderated by the presence of the mediation committee. The Ontario case management design allows for the two processes, mediation and case conference, to take place separately. The masters may not receive specific training for handling the case conferences but they have seven year terms¹²⁴ that allow for continuity.

In summary, the author suggests that the positive aspects of the Ontario case management system are that:

- It provides a format for out-of-court settlement;
- It allows for an objective assessment of the parties' arguments and legal issues;
- It includes the case conference which acts as a reality check for the parties; and
- It allows court enforcement of agreements reached.

The negative aspects or drawbacks are:

- It is still a process of the court system; therefore, if an agreement is not reached between the parties it proceeds to trial or hearing for resolution;
- It is designed to reduce costs but may add to the parties' expenses if extended mediation sessions are required and/or the case proceeds to court; and
- The master's or judge's evaluations at case conference are not binding.

Adjudicative Processes

Arbitration

Administrative tribunals, reviewed under their own rubric at the beginning of this paper, are an example of an adjudicative process, since those participating in the process follow the law, but are outside the actual legal system. Arbitration is an adjudicative process that is closest to the court end of the spectrum of ADR mechanisms. The third-party(ies) neutral are decision-makers in this ADR process.

Arbitration as a format for dispute resolution may be the first avenue or the final one at the end of a series of other methods, such as negotiation or mediation sessions where an impasse was experienced in the process. The consensus aspect of the other ADR processes is lost in arbitration. The decision made by the arbitrator is binding on the parties. The parties' ownership in the resolution is lost if the full dispute is determined by the third-party. Conversely, only portions of the dispute or the issue creating the impasse may be resolved by the arbitrator. Labour disputes are commonly resolved by arbitration.

¹²⁴ OCJA, *supra* note ?, s. 86.1(3).

Depending on the source of the right to arbitrate, through legislation or informal agreement, the parties may have input on matters such as choosing the arbitrator(s), rules of evidence, method of presentation (oral or written), detailed issues to be addressed, rules for the process including a timetable, and what the parties are looking for in resolution. Legislation governing arbitration in the different provinces may impose required procedures depending on the subject matter. Participation in the procedure does give the parties a form of empowerment.

An advantage of arbitration is the parties will be regarded equally in their positions before the arbitrator panel, aside from the problems of resources available to prepare for the submissions or presentations to the panel. The process is private. The courts will enforce the agreements provided by the arbitrator unless there is an error or an appeal, much the same as administrative tribunals, thereby affording a measure of deference to the decision. Not all arbitrations provide for an appeal process. Further, benefits from arbitration settlement are the lower costs and time involved, although, there is some criticism that the processes are taking longer and are more costly.¹²⁵

The disadvantage in the arbitration process, as noted already, is that the arbitrator makes a decision within the law without regard to agreement by the parties. The result is much like a court decision because arbitration is adversarial, resulting in a win/lose situation. Reasons do not have to be given by the arbitrator for the decision made.¹²⁶

Canada

Treaty Four Governance Institute

The Treaty Four Governance Institute is part of a collective process by eleven First Nations in the Treaty Four area of Saskatchewan. The Institute is part of the Treaty Four Governance Model that promotes self-determination, self-government and the development of governance capacity. The basis of the collective is the Treaty Four Proclamation and Convention. The Institute is responsible for developing models of First Nation constitutions, laws and policy framework, providing professional advisory services, coordinating special governance projects and governance training.¹²⁷ The Institute is about the accessibility of justice for First Nation people and how to deal with the inherent right to self-government.

Daniel Bellegarde, Senior Governance Co-ordinator, Treaty Four Governance Institute, in his oral presentation at the 2002 CCAT Conference, suggested that working towards justice for First Nations involved the use of ADR processes. The problem according to him, is First Nation people do not trust the Canadian justice system, and trust is a required aspect of accessibility and participation in a fair, open and transparent

¹²⁵ J.W. Hamilton, "Adjudicative Processes" in MacFarlane, *supra* note 97, 523 at 533.

¹²⁶ *Ibid.* at 534.

¹²⁷ D.J. Bellegarde, "Treaty Four Governance Institute, The Treaty Four Justice System: Alternative Dispute Resolution Projects" (Paper presented to the 18th Annual CCAT Conference, Ottawa, 4 June 2002) [unpublished] at 6.

process.¹²⁸ To meet the needs of the eleven Treaty Four First Nations, the Institute has incorporated the use of mediation, first level of dispute resolution, and adjudicative mechanisms, the second level for dispute resolution, in keeping with their peacemaking traditions. The base or starting point in resolving disputes is First Nation law.

The Treaty Four Administrative Tribunal's purpose is "to adjudicate disputes involving the application of First Nations law within the Treaty Four area."¹²⁹ Panel members are from the Treaty Four area. The Institute's mandate is to develop and train the panel members, which takes two years. The Tribunal was established to meet the following community needs:

- Internal appeals seen as biased and ineffective
- External systems are too distant and inefficient
- Dispute resolution is a key component to all governance developments
- Desire to incorporate "traditional" principles and practices in settling disputes
- Improve quality of life (by settling disputes).¹³⁰

The Administrative Tribunal five-step procedure for handling a dispute appeal is: determination of Treaty Four jurisdiction, pre-hearing stage, the hearing, decision writing and after the decision.¹³¹

Lawyers for the appellant and respondent of the dispute appeal may be present during the hearing but do not take an active part. The Chair of the Tribunal conducts the proceedings. Each party presents an opening statement, a clause-by-clause review is done of the appeal, and panel members may ask questions. The appellant has to prove the position taken in the appeal. The more invasive aspect of litigation, cross-examination, is limited in the hearing process. An example of a Tribunal decision was the Cowessess Election appeal that alleged 15 election violations.¹³² The election dispute was resolved in six weeks by the Tribunal compared to potentially two years through INAC and court processes.¹³³

The mechanisms employed by the Treaty Four Governance Institute to resolve disputes within the eleven First Nations are community-based and driven. The First Nation people have direct input on the mandate and structure of the Institute including the Tribunal. Mr. Bellegarde asserts the "keys for justice are accessibility to the system,

¹²⁸ *Ibid.* [orally].

¹²⁹ *Ibid.* at 14.

¹³⁰ *Ibid.* at 22.

¹³¹ *Ibid.* at 16.

¹³² *Ibid.* at 23.

¹³³ *Ibid.*

effectiveness, efficiency and non-bias.”¹³⁴

The process is empowering for the First Nation communities involved. A significant complaint amongst First Nations is the imposition of outside rules and procedures. The Institute and Tribunal alter the pattern, creating self-determination mechanisms. There was no mention of enforcement of the Tribunal’s decision. The agreement to participate in the adjudicative process amounts to consenting to the binding Tribunal decision.

In summary, the author suggests that the positive aspects of the Treaty Four Governance Institute and Tribunal are:

- It has a tiered dispute resolution system;
- The Tribunal may include recommendations for ADR in its binding decisions;
- The starting place is First Nation law;
- It is mandated and structured by the collective First Nations;
- Costs to the disputing parties are reduced;
- Training for the Tribunal panel members who are from the Treaty Four communities is provided;
- The process avoids unilateral externally imposed decisions; and
- It provides an alternative to resolution in the Canadian justice system.

Drawbacks or negative aspects of the Treaty Four Governance Institute are:

- It provides the Administrative Tribunal with a limited jurisdiction; it has to stay within the First Nation legislation, is not able to make awards of costs or damages, and has no criminal jurisdiction;
- It relies on the agreement of the collective First Nations, which is harder to achieve on a larger scale, due to conflict of traditions and culture; and
- Although experiencing reduced costs over court, it still may be prohibitive for an individual.

¹³⁴ *Ibid.* [orally].

Policing and Exclusive Possession of the Family Home

Police services are usually a provincial responsibility, however the federal responsibility for “Indians and Lands reserved for the Indians” means policing falls into federal jurisdiction on reserve.¹³⁵ The Department of the Solicitor General of Canada (SolGen) has had responsibility for First Nations Policing Policy¹³⁶ since 1992; the Aboriginal Policing Directorate is responsible for the implementation and administration of the Policy. SolGen, in partnership with First Nation communities or their regional organizations, and the provinces and territories, makes Tripartite Policing Agreements. The result is that reserves most commonly receive policing services from the RCMP-First Nations Community Policing Services (FNCPS) or establish their own police force, although other arrangements also exist which may incorporate policing from provincial or municipal forces.

Response to Domestic Violence

First Nations policing guidelines for handling family violence are adapted from the province in which the community is located. Therefore, the procedure may vary from one province or territory to another. In Ontario, the Policing Services Division’s Model Police Response to Domestic Violence is composed of four guidelines. The four guidelines are:

- Domestic Violence Occurrences,
- Bail and Violent Crime,
- Criminal Harassment, and
- Preventing or Responding to Occurrences Involving Firearms.

The RCMP follow a modified form of the provincial guidelines but do not have any written guidelines for responding to violence in the home on reserve. The Ontario Model is a detailed procedure for officers to follow. A brief summary of the steps involved to remove the abuser and have the other family members stay in the home on reserve are:

1. The police respond to a complaint of violence. They respond to calls about threats by known abusers, parole violation, etc.
2. An investigation of the complaint takes place. The parties are questioned and so are witnesses. The officers are to ensure any children in the home are taken care of and are safe during the questioning and investigation.
3. Following the investigation, if the police are certain an assault or an offence under the *Criminal Code of Canada*¹³⁷ has occurred the person

¹³⁵ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(24), reprinted in R.S.C. 1985, App. II, No. 5.

¹³⁶ *First Nations Policing Policy*, online: Solicitor General of Canada, <http://www.sgc.gc.ca/publications/abor_policing/fnpp_handbook_e.pdf>.

¹³⁷ *Criminal Code*, R.S.C. 1985, c. C-46.

- will be charged.
4. When the abuser is charged, the police may intervene for the safety of the other family member(s) and ask the Justice of the Peace for an order of restriction (an undertaking) that the accused is to have no contact with the individual in the house or not come within 100 feet of them or the house.
 5. The police can enforce the order issued by the Justice of the Peace because it is a court order.
 6. Once the charges against the accused are settled in court, the undertaking does not continue in force. The police in conjunction with other on-reserve service providers such as wellness initiatives and social services may make recommendations for residency. The ultimate decision rests with the Band Council. The court does not determine the issue of residency.¹³⁸

The order provided by the Justice of the Peace is only a temporary solution. It is not a permanent exclusive possession order.

RCMP Constable Wes Heron suggested to the author that a potential solution for the current non-application of provincial law to the division of matrimonial property on reserves might be found in a combination of the negotiated tripartite agreement for policing services with Band by-laws.¹³⁹ He provided his basis for this suggestion by an example from the Lexus Island First Nation, Prince Edward Island, which relates to child protection. The tripartite agreement incorporates the provisions of the relevant child protection laws applicable on the reserve. Before the RCMP can assist the provincial authorities in apprehending a child on reserve, a fax must be received from the Band's on-reserve social worker granting permission. The tripartite agreement delegates the social worker to provide approval for the apprehension. Without the agreement, the approval would have to come from the Chief and Council.¹⁴⁰ However, the author suggests that it is unclear in law whether the tripartite agreement/by-law combination could function in relation to exclusive possession of the home on reserve. Furthermore, not all First Nations have policing agreements.

Officer John Syrette, of the Anishinabek Police Services, described to the author the difficulty in getting Band by-laws prosecuted. He stated that First Nations ask for their by-laws to be enforced by the police services but there is no place to prosecute. He elaborated that there is no problem with enforcing traffic tickets, but by-law infractions are a problem. The provincial court will not handle the enforcement; Crown Attorneys in charge appear either not to know how to deal with the prosecution, or confused about it.

¹³⁸ Interview of RCMP Officer D. Gray by the author, (20 July 2002 at RCMP Headquarters, Ottawa) [Gray] and interview of RCMP Constable W. Heron by the author, (15 August 2002 at RCMP Headquarters, Ottawa) [Heron].

¹³⁹ Heron, *ibid.*

¹⁴⁰ Heron, *ibid.*

Anishinabek Police Services has been asking the provincial courts to provide a specific date during the month to hear the First Nation by-law infraction cases, however as of discussion with the author, there had been no solution.¹⁴¹

The author suggests that a by-law designed to address the division of matrimonial property on reserves might encounter similar enforcement challenges unless jurisdiction and procedure for their prosecution are clearly established.

Role of Aboriginal Policing in ADR Enforcement

The agreements arising from ADR processes reviewed earlier in this paper are primarily designed to take the parties outside an official resolution forum such as court. Policing has no role in enforcing ADR agreements or resolution unless there is some court order attached.¹⁴² Once the police are brought in for enforcement of an agreement, the process becomes official and the nature of the ADR mechanism is lost.¹⁴³

Restorative Justice

Restorative Justice Initiatives, such as sentencing circles, allow for the stay of criminal proceedings while the accused follows through with an approved alternative process. A comprehensive review of the nature and practice of restorative justice is beyond the scope of this paper, however, it may for present purposes be said that the main goal in the criminal law context is resolution of the wrongdoing without incarceration. On successful completion of the alternative process, the accused's charges will be dropped. If the accused does not follow through, then the court charges and processes will continue.

Justice Canada started the Aboriginal Justice Strategy (AJS) approximately five years ago. Its objectives include supporting Aboriginal communities taking on greater responsibility in the administration of justice, assisting in the reduction of crime and incarceration rates in Aboriginal communities with justice programs, and fostering justice system improvements that respond to the needs of Aboriginal peoples. The AJS program now has partnerships in 90 Aboriginal initiatives in 280 communities. There are four program models that communities may adopt: "diversion or alternative measures; community sentencing and peacemaking; mediation and arbitration in family and civil case; and justice of the peace or tribal courts."¹⁴⁴

The associated Aboriginal Justice Learning Network (AJLN) is a network of volunteers that are trained to facilitate various programs in the community. The volunteers are, for instance, community members, lawyers, justice personnel, judges,

¹⁴¹ Interview of Anishnabek Police Services Officer J. Syrette by the author, (9 September 2002, Garden River, Ontario).

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ "The Aboriginal Justice Strategy", online: Justice Canada <<http://canada.justice.gc.ca/en/ps/ajln/strat.html>>.

police officers and corrections officers and receive training as appropriate to facilitate community programs such as circle sentencing and peacemaking circles, community justice committees, court diversion programs, and Elders councils among others.

RCMP Aboriginal Policing Services are one of the AJLN partners who help train volunteer facilitators for their Community Justice Program.¹⁴⁵ The Community Justice Forums (CJF) training involves three areas of discussion. The three components to the CJF learning map are:

1. Traditional vs Restorative Approaches: The first component, represented by key theme words surrounding the process of CJF, outlines traditional and restorative approaches to justice.
2. The Processes of CJF: The second component or circle of the map illustrates the process of Community Justice Forums (CJF).
3. Theory of Community Justice Forums: The final inner circle of the learning map, represents the sociological and psychological theory behind the CJF process.¹⁴⁶

The aim of the training is to engage the volunteers in discussing the issues in the three components.

Cheryl Joyce is a trainer for the RCMP and has travelled to many Aboriginal communities. She told the author that some of the communities have successfully established their Community Justice Programs and have Justice Committees and co-ordinators; however, to date an assessment of the communities implemented and their success rate has not been done.¹⁴⁷

Aboriginal Courts in Canada

The theme of the Indigenous Bar Association's 2002 Spring Conference was "Specialized Tribunals and First Nations Legal Institutions." One of the specialized tribunals needed in Canada according to one presentation, is an Aboriginal and Treaty Rights Court. In this court, issues affecting treaty rights and "the regulation of the Crown's fiduciary relationship with Aboriginal peoples both inside and outside of treaty negotiations"¹⁴⁸ would be handled. Academics and Aboriginal organizations have called for a third legal court system for the Indigenous population in Canada to address

¹⁴⁵ The Community Justice Program includes Group Family Conferences and Victim-Offender Models.

¹⁴⁶ RCMP Community, Contract and Aboriginal Policing Services, *Community Justice Forum Facilitator's Guide To The RCMP Learning Map* (Ottawa: RCMP, 2002) at 2, online: RCMP <<http://www.rcmp-ccaps.com/ccaps.htm>>.

¹⁴⁷ RCMP C. Joyce, (RCMP Cadet Training Facility, Regina: orally, 10 September 2002).

¹⁴⁸ A. Peeling & M. Stevenson, "The Creation of An Aboriginal and Treaty Rights Court" (Paper presented to the IBA Spring Conference: "Specialized Tribunals and First Nations Legal Institutions", 29-31 May 2002) [unpublished].

Aboriginal over-representation in the criminal justice system. In his Spring Conference presentation, James (Sakej) Youngblood Henderson cited the constitutional supremacy of Aboriginal people in Canada and the judicial theory of convergence of rights and power, to substantiate establishing an Aboriginal Attorney General to protect Aboriginal and treaty rights.¹⁴⁹

The Canadian Bar Association's magazine the *National*, in its June-July 2002 publication, described three Canadian courts for Aboriginal people only. The article by Amy Jo Ehman, entitled "A People's Justice," briefly covered the Saskatchewan Cree Court, Tsuu T'ina Nation Peacemaking near Calgary, Alberta and the Gladue (Aboriginal Persons) Court in Toronto, Ontario.¹⁵⁰ The statement heading the articles reads: "Three new Aboriginal courts are finding innovative solutions for the long standing problem of achieving justice for Aboriginal Canadians." The initiatives as outlined in the article are summarized below.

Saskatchewan Cree Court

The Saskatchewan Cree Court, established in October 2001, is the first Cree-speaking provincial court in Canada.¹⁵¹ Judge Gerald Morin, Crown Counsel Don Bird and the Cree Court team travel to three northern Saskatchewan communities from Prince Albert to hold court there.¹⁵² Cree and English are spoken in the court and the court provides translators. The aim of the Judge is to probe into the behaviour behind the offences and attempt to heal the situation without sending people to jail. Few people have been sent to jail but are diverted to programs that promote healing and restorative justice in the community.

Tsuu T'ina Nation Peacemaking

Tsuu T'ina Nation Peacemaking, which commenced in October 2000, is a traditional justice initiative where the Alberta provincial court operates beside the Peacemaker. The decision on which cases are sent to the peacemaking program is made by the Peacemaker Coordinator and Crown counsel. The community Elders stated that offences involving homicide and sexual assault may not be part of the program. In addition, the accused must admit to being responsible for the offence and the victim has to agree to take part in the oval-shaped court setting.¹⁵³

Judge Tony Mandamin presides over the court, which opens with a smudging ceremony and is held twice a month in the Tsuu T'ina council chambers. Those

¹⁴⁹ J.(S.)Y. Henderson, "Aboriginal Attorney General" (Paper presented to the IBA Spring Conference: "Specialized Tribunals and First Nations Legal Institutions", 29-31 May 2002) [unpublished].

¹⁵⁰ A.J. Ehman, "A People's Justice" [*The Canadian Bar Association*] *National* 11:4 (June-July 2002) 12.

¹⁵¹ *Ibid.* at 12.

¹⁵² *Ibid.* at 12-13.

¹⁵³ *Ibid.* at 15.

accused chosen for the peacekeeping program have their cases adjourned by the court and a trained Peacemaker arranges and presides in the circle that includes “members of the community, elders, resource people, the accused and the victim.”¹⁵⁴ Again the aim of the process is restitution and healing for those involved and the community. The circle decides what form the healing and restitution will take, for example, addiction treatment and/or community service. At the completion of the peacemaking process, the accused goes back to the provincial court for a final disposition that may include dropping the charges or the issue of a peace bond to guard against reoffending. The process actually takes longer than regular criminal justice processes and means the files are open longer.¹⁵⁵

Gladue (Aboriginal Persons) Court

Established in October 2001, the Gladue (Aboriginal Persons) Court, for downtown Toronto Aboriginal people charged with criminal offences, is held one and a half days a week in Old City Hall Court.¹⁵⁶ After talking to the accused, his acquaintances, and social services, Jonathan Rudin and Mandy Eason of Aboriginal Legal Services of Toronto provide the court with a history of the life of the accused in order that a fully informed sentencing decision may be made.¹⁵⁷ Sentences may not be any shorter but the alternative to incarceration may, as in Peacemaking court, be compulsory treatment and counselling. The accused participates in the Gladue Court voluntarily. Unfortunately, since there are no holding cells for females, Aboriginal women in custody go to regular court elsewhere.¹⁵⁸ In theory, this model of addressing criminal charges against Aboriginal people should work in other communities; however, the article points out that Toronto has both Aboriginal and non-Aboriginal social service programs to draw on, that smaller communities may not have.¹⁵⁹

Conclusion

The tribunals, ombuds and alternative dispute resolution mechanisms described in this paper present a variety of attributes which might be adapted to address the division of matrimonial real property on reserves on the breakdown of a relationship. Attention to cultural differences and traditions in First Nation communities is essential for a successful solution.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.* at 16.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*