FNLC Shared Territories and Overlaps Forum Discussion Paper: Western and Indigenous Dispute Resolution Mechanisms

Background

British Columbia has a unique place in the history of Canada. BC is the only jurisdiction where a majority of the land was not settled by the Government of Canada signing treaties with local First Nations. A small percentage of land in the northeast is covered by Treaty 8, and some land on Vancouver Island is covered by the historical Douglas treaties, however, however, across most of British Columbia treaty-making did not take place. For Indigenous peoples across British Columbia the unresolved land question, and the historic and on-going Crown infringement of inherent title and rights and treaty rights, remains outstanding.

The existing Aboriginal Rights and Title in the province has led to the "land question" in BC, which creates uncertainty for all parties with regard to management, use and benefit from the land. To address this uncertainty, the BC treaty process was commenced in 1992. This process has been less successful than hoped – resulting in only 3 modern treaties: Maa-nulth First Nations, Tla'amin Nation, and Tsawwassen First Nation. In most cases, courts have been hesitant to definitively rule on overlap cases, and have advised that these issues should be negotiated or mediated between the First Nations involved. Unresolved issues of shared territories and overlaps between nations in the treaty process are one of the main barriers to successfully concluding these agreements, and continues to be an implementation issue for the three modern treaties.

In the past few years, a number of forums and discussions have been held with Indigenous leaders and community members, governments, and lawyers to discuss the issues and find solutions. This paper is one of six discussion papers developed to support a Shared Territories and Overlaps (STO) forum in March 2020 being held by the First Nations Leadership Council in partnership with Canada and BC.

This paper focuses on the continuum of dispute resolution mechanisms that could be useful in the resolution of shared territories and overlaps. It outlines the variety of mechanisms, what their key features are, how they relate to each other, and what some key considerations should be around their application in supporting BC First Nations.

Discussion

In Canada, *judicial mechanisms* (i.e. courts) have been the main venue for resolving disputes between settlers, settler organizations and governments, and aboriginal peoples, and between aboriginal peoples and groups themselves. The courts are a rights-based system where parties, holding specific rights, are pitted against each other in an adversarial context. Decision-making power is held by an external authority figure (i.e. judge) who evaluates the parties' rights in competition and ultimately one rights-holder is deemed to "win" over the other.

"First Nations in BC have long identified the need for institutional supports in doing critical work such as the resolution of shared territory and overlap issues. While colonial laws, policies, and practices are largely responsible for this challenge, the reality is that a significant burden has

been placed on First Nations to address it in order to ensure that the outcomes are consistent with the furtherance of Indigenous protocols, history and laws and self-determination. As well, while at times the court system has been asked to weigh in on boundary resolution matters, the experience has been highly problematic. In addition to the inappropriateness of many aspects of adversarial court procedures for addressing issues of inter-Nation relationships, there also exist substantive and important differences between how common law and Indigenous legal orders envision, interpret, and express relationships to land and resources. The reality is that are very few, if any, instances where the courts have played a constructive role in territorial boundary disputes that have resulted in outcomes that are harmonious, constructive, and reinforce peace and cohesion. Given this, there has been a broad consensus from First Nations, experts and, increasingly, Crown governments that conventional, adversarial, court processes are not the best or appropriate venues for the resolution of territorial boundary disputes[1]."

Outside of the judicial system, there is a continuum of dispute resolution mechanisms and the processes that support the use of these mechanisms, is known as *Alternative Dispute Resolution or ADR*. Over the past 40 years, western scholarship and practice has developed and promoted interest-based ADR mechanisms, within which each party is seen to have a set of needs they hope to maximize. This focus on interests/needs is less adversarial, power is mostly retained by the parties' themselves and guided by mediators, and can create win-win outcomes.

There are three features that are important in order to understand ADR mechanisms: the degree of control asserted by the participants, the degree of decision making the respondents in the process hold, and the degree of finality that the process outcome produces. The ADR mechanisms potentially useful for resolving STO issues include negotiation, mediation, arbitration, and other hybrids, in particular traditional Indigenous methods.

Negotiation is the least formal ADR mechanism, where the two parties come together voluntarily, in a problem-solving process aimed at finding mutually agreeable resolution terms. In negotiations the parties may or may not be joined by others who support the negotiations, but the two parties retain control of both the process and the solution. In some cases, negotiations can lead to the development of a legally binding agreement that sets out the terms of the resolution – such as a contract.

Mediation "involves a third party neutral who does not have the power to impose a binding decision" (Smith & Martinez, 2009, p. 127). In mediations, the parties control the process by electing to engage (or not) in an assisted negotiation. Parties also control the decisions within and after the resolution process, as mediators help the parties develop the resolution themselves, and do not enforce those solutions after the process is complete. Similar to negotiations, mediations sometimes lead to the development of a binding agreement setting out the mediated terms.

[1] Danesh, R. 2020. *Resolving Territorial Boundary Issues: Preliminary Considerations for Creating an Indigenous Institution.* (Unpublished).

Arbitration is the next intervention along the continuum of dispute resolution. This model can be either interest-based, rights-based, or mixed. In arbitration, the power over both the process and decision is delegated to a neutral third party, and generally the participation of both parties has been mandated by a collective agreement, policy, regulation, or law. Respondents may or may not have the ability to collaborate jointly to develop solutions. In some cases, arbitrators simply listen to the evidence from both sides and issue a binding decision. Arbitration is the closest method in the spectrum to legal mechanisms such as litigation.

Traditional Indigenous methods of resolving disputes can offer another, parallel paradigm to western approaches. A general description of Indigenous law is that they are "non-prescriptive, non—adversarial and non-punitive [and] generally promote values such as respect, restoration and consensus" (Borrows & Law Commission of Canada, 2006, p. 3). "Indigenous legal orders laws and customs… guide governance, conflict resolution, and peace-making within and between First Nations. These legal orders are diverse, dynamic, and distinct, and were a foundation for how relations between neighbouring Nations, including territorial relations, were governed and resolved for millennia" (Danesh, 2020).

Proponents of these mechanisms highlight that the benefits of using them include "the rejuvenation and reclamation of ways in which disputes may be resolved according to the culture and custom of the Indigenous party involved;" not just to "simply reproduce western, colonial, or imposed worldviews, approaches, and practices" (Danesh, 2020). Indigenous methods are seen as a tool for decolonizing conflict resolution.

"The aim of Indigenous laws and DR mechanisms is to restore peace within the community and amongst the affected parties. This is done by involving the community in determining the punishment and ensuring that communities concerns are taken into account, allowing for peace to be maintained[2]. Indigenous law emphasizes collaborative deliberation and including the community in applying the laws that govern the specific community[3]." "Examples include community mediation circles, Elders sentence advisory panels, community sentencing committees, family group conferencing and sentencing circles[4]." (Victor, 2007). It is important to note that these methods will be unique to each nation and each dispute.

Although there is no guidebook or definitive review of Indigenous dispute resolution mechanisms, there are examples of models that have been developed that can be a useful case study for First Nations to consider when developing their own mechanisms and supporting structures.

For example, "Dr. Val Napoleon has developed and championed the model of the Indigenous Legal Lodge for over the past decade, including through academic study, presentations, and

[2] Webber, Jeremy. (2005). Chapter 9 *Commentary: Indigenous Dispute Settlement, Self-Governance, and the Second Generation of Indigenous Rights,* in Bell, Catherine and Kahane, David. *Intercultural Dispute Resolution in Aboriginal Contexts.*
[3] Isic, Ermin. (2018). *Addressing Overlapping Territorial Disputes Among First Nations* (p. 26-27).
[4] Victor, Wenona. (2007). Alternative Dispute Resolution (Adr) In Aboriginal Contexts: A Critical Review (p. 41).

practical work on the ground with First Nations. As Dr. Napoleon described in 2007, the "Lodge" could operate through a combination of the:

- First Nations involved in the dispute (the Parties); an appointed panel of three individuals from a neutral First Nation who work with parties to draft agreements; three facilitators with knowledge and experience with Indigenous legal orders and law to work with leadership and members of the First Nations to articulate their Indigenous laws, frame legal perspectives, define legal obligations and principles, and consider their approach to the issues; and an expert in Canadian law to advise and support the panel working with parties to draft agreements"[5] (Danesh, 2020).

Considerations

Fundamentally, communities should have the flexibility to choose, adapt, develop, and implement dispute resolutions mechanisms based on their laws, governance, traditions, and also their practical needs. Below is a non-exhaustive list of things to consider when designing the mechanism for resolving shared territory and overlap disputes:

- Control – who develops and implements the process, and how flexible is it? Studies show that Indigenous communities should both develop and lead the process as a best practice.
- Determination – how is the final determination made, and is there a compliance process?
- Funding – who is funding the process? Does the mechanism fit the funding and vice versa? Does the funder have control over the process, products, or outcomes?
- Participants - who is involved in the process? Is there space for elders? Community? Youth?
- Incentives – what is the incentive for parties to participate and finish the process, and respect the outcome?
- Goals – what are the principle-level goals of the process? Is it seeking a rights-based resolution or a pragmatic, interests-based agreement? Is it focused on healing, or mending relationships? Is education of the participants important?
- Spirituality – is this included or not in the process?
- Inputs – in this process, what is "evidence," what inputs are decisions based upon? Who decides what is and isn't relevant information?
- Legitimacy – will the outcomes or decisions be supported by the Indigenous communities involved, and be applicable across the intersection of indigenous and non-indigenous legal systems? If the outcomes must be accepted by municipal, provincial or

[5] More examples can be found listed here: http://www.coemrp.ca/wp-content/uploads/2015/12/report-on-indigenous-centred-conflict-resolution-processes-in-canada.pdf

federal governments and the broader community at large, how is that built into the choice of mechanism and the outcomes developed?

Conclusion

The impacts of colonization have led to some communities experiencing loss of their traditional laws, structures, and relationships that govern conflict resolution. This includes past and current actions and policies by governments that disrupt traditional legal orders and protocols between Indigenous peoples about their patterns of relations, including regarding lands and resources, leading to the current state of numerous territorial boundary disputes between First Nations.

The ultimate goal of Indigenous sovereignty is "advanced when First Nations are organized as proper Title and Rights holders, with their systems of governance and law continuing to evolve and where territorial boundaries, and relations with neighbouring Nations, are clear, structured, and understood" (Danesh, 2020).

This paper supports the position that all First Nations should be supported to access and use the full spectrum of Western, ADR-type dispute resolution mechanisms, such as negotiation, mediation or arbitration, as well as use or develop their own traditional, culturally-appropriate Indigenous mechanisms to address issues related to shared territories and overlaps. This should include the flexibility to choose, adapt, develop, and implement dispute resolutions mechanisms based on their laws, governance, traditions, and also their situation-based needs. Self-determination in this area, with the appropriate resource support, will be a key foundation for successful resolution of shared territory and overlap issues.