

Indigenous Centered Conflict Resolution Processes in Canada

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I. Introduction

This paper discusses dispute resolution systems in Canada that are designed to implement Indigenous laws and values. It draws largely on models from First Nation contexts and publicly available material. It is the second of two papers on methods for conflict resolution in First Nation communities prepared for the Centre of Excellence for Matrimonial Real Property.¹ Not intended as an exhaustive review, it provides examples of a wide variety of First Nation approaches to conflict resolution operating in Canada. We begin with a general discussion of Indigenous legal traditions and approaches to conflict resolution. This is followed by examples that draw on Indigenous and Canadian dispute resolution values and processes operating at the community level in matrimonial real property and other family contexts as well as under the *First Nations Lands Management Act*.²

II. Indigenous Legal Traditions and Conflict Resolution

“Indigenous legal traditions” is a phrase adopted by the Law Commission of Canada and Indigenous Legal scholars to describe a body of Indigenous law including “Aboriginal dispute resolution systems” and “governance process.”³ Legal principles and values these traditions frequently embody include: respect, restitution, reconciliation, responsibility and connection with natural and spiritual environments, Creator and community. However,

while there is often a strong emphasis on some of these concepts, they are not idealized, simple, or stand-alone responses to harms and conflicts. Every Indigenous legal tradition [has]... nuanced and robust understandings of what implementation of these principles entail, each legal order has a much broader repertoire of principled

¹ See also Rebecca Ratcliffe & Catherine Bell, “Conflict Resolution Practices in Canada” (2014) also posted on this website.

² SC 1999, c. 24 [*First Nations Land Management Act*].

³ Andrée Lajoie, “Introduction: Which Way Out of Colonialism?” in Law Commission Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 3 at 3 [Law Commission Canada].

legal responses and resolutions to harm and conflict to draw as factual situations warrant.⁴

Indigenous laws are reflected in stories, oral traditions, practices and other lived experiences of Indigenous peoples. They also exist as broad legal principles derived from and reflecting societal values. For example, laws, practices and processes articulated in *Book One of the Statutes of the Carcross Tagish First Nation* (CTFN) are based on core virtues or values that flow from CTFN stories, traditions, and practices.⁵ *Book One* and the CTFN Constitution are the primary sources for developing and interpreting CTFN laws. Among the core virtues is respect. A “fundamental principle of survival that comes from timeless wisdom,” it is considered “a core law.”⁶ Respect includes caring about people and treating them with dignity, to “treat everyone how you want to be treated.”⁷ Practicing respect engages other virtues such as acceptance, obedience, patience, and diligence. Diligence includes “attention and care legally expected or required of a person” and “being respectful of your place, your role, and your responsibilities in the community and to honour these by constantly striving to achieve the best for all in every aspect of our lives.”⁸ Not surprisingly, this law permeates throughout all aspects of Carcross/Tagish law and that of other Yukon First Nations, including CTFN family law and negotiated legal regimes with Canadian governments.⁹ Other virtues informing CTFN legal traditions include the capacity to love, selflessness, courage, knowledge, compassion, honesty and integrity in relationships.¹⁰

These core values are aimed at establishing conditions necessary to live in harmony, respect differences, promote the well-being of individuals, families and the community, and resolve disputes in ways that promote better relationships. *The Boy Who Shot the Star*

⁴ Hadley Friedland, *IBA Accessing Justice and Reconciliation Project: Final Report* (4 February 2014), online: Accessing Justice and Reconciliation Project <http://indigenousbar.ca/indigenouslaw/wp-content/uploads/2013/04/iba_ajr_final_report.pdf> at 8 [Friedland].

⁵ Carcross/Tagish First Nation, *Statutes of Carcross/Tagish First Nation Book One Traditional Beliefs and Practices: Our Place, Our Responsibilities (Draft)*, online: Carcross/Tagish First Nation <http://www.ctfn.ca/documents/doc_download/80-book-one-doc> at 54 [*Carcross*].

⁶ *Ibid* at s 3.4.1 .

⁷ *Ibid*.

⁸ *Ibid*.

⁹ An example is found in the objectives of Chapter 13, the heritage chapter of the *Umbrella Final Agreement* which emphasizes “respect for Yukon Indian values and culture” and consistency “with the values of Yukon Indian People.” Council for Yukon Indians, *Umbrella Final Agreement* (29 May 1993), online: Aboriginal Affairs and Northern Development Canada <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al_ldc_ccl_fagr_ykn_umb_1318604279080_eng.pdf> at 121.

¹⁰ *Carcross*, *supra* note 5 at s 3.4.

reproduced in *Book Two: Government of Carcross/Tagish Traditional Family Beliefs and Practices* (and appended to this paper) is an example of how some foundational laws, values and processes are reflected in stories and oral traditions.¹¹ The teachings from this story are explained as follows:

Stories say different things to different people. At different times new things will be found in the same story. All traditional stories are rich, magically full of lessons, insights and meaning. Each will take what they need from a story. Here are some insights about our values that can be taken from this story.

This story speaks of loyalty, of connection to family and home, and of how harmony in our lives can be broken by speaking disrespectfully of others.

The story demonstrates the harm in resorting to anger and revenge when we are hurt or suffer loss. Shooting arrows at the moon did not save a friend, but taking risks, persevering through great difficulties and seeking the helping hands of others did save a friend.

Focussing on what is most important to our hearts brings us back to our family, to those we love, and to the life that is most important to us. We come home safely when we concentrate on what is most important to us, and act on our values.

Opening ourselves in a good way to the lessons life provides about acting on our values lies at the core of all stories.¹²

1. Accessing Justice and Reconciliation Project

Two important themes about Indigenous legal traditions around conflict resolution emerge from research conducted by the Accessing Justice and Reconciliation Project [AJR].¹³ Under the direction of Indigenous legal scholar Dr. Val Napoleon, the AJR is a recent collaboration between the University of Victoria Faculty of Law Indigenous Law Research Clinic, the Indigenous Bar Association, and the Truth and Reconciliation Commission, funded by the Ontario Law Foundation. The goal of the AJR research project on conflict resolution was to better recognize how Indigenous societies used their own legal traditions to successfully deal with harms and conflicts between and within groups and to identify

¹¹ Carcross/Tagish First Nation, *Statutes of Carcross/Tagish First Nation Book Two: Government of Carcross/Tagish Traditional Family Beliefs and Practices* (January 29, 2006), online: Carcross/Tagish First Nation <www.ctfn.ca/documents/doc_download/42-family-act-2010> at s 1. The story, The Boy Who Shot The Star, was shared by an Elder in John R Swanton, *Tlingit Myths and Texts* (Washington: Government Printing Office, 1909) at 209 and retold in Mary Pelton & Jacquelle DiGennaro, *Images of a People –Tlingit Myths and Legends* (Englewood: Libraries Unlimited, 1992) at 113.

¹² *Ibid* at s 2.

¹³ Friedland, *supra* note 4 at 3.

and articulate legal principles that could be accessed and applied today to work toward healthy and strong futures for communities.¹⁴

Applying a similar method to that adopted by lawyers to identify legal principles in Canadian court decisions, researchers on the AJR project analyzed publicly available materials, stories and oral traditions of partner First Nation communities in collaboration with Elders and other knowledgeable people from those communities.¹⁵ Their research revealed two important themes about dispute resolution:

(1) *There is no 'one size fits all' approach within or among Indigenous legal traditions. There are a wide variety of principled legal responses and resolutions to harm and conflict available within each legal tradition.*¹⁶

...

(2) *Indigenous legal traditions reveal both consistency and continuity over time, and responsiveness and adaptability to changing contexts.*¹⁷

For example, in the Mi'kmaq legal tradition, *abeksikdawaebegik* (reconciliation) and *abeksikdewapan* (responsibility) are core values.¹⁸ They promote the taking of responsibility by those that cause harm by, for instance, offering restitution and empathy to victims.¹⁹ Cree legal tradition emphasizes healing of the offender, but may also use principles of separation "to keep others safe," while "acknowledging responsibility," undertaking "re-integration," and learning from the consequences.²⁰ The Tsilhqot'in legal tradition emphasizes "maintaining individual and community safety."²¹ In their tradition, separating offenders from the community and deterrence were used to help in achieving this goal.²² Healing, in the Tsilhqot-in tradition, is a "preferable resolution," but separation may be helpful in achieving healing by "creating space for the wrongdoer to reflect and change the thinking and behaviour that led to the harm in the first place."²³

The AJR's review of Anishinabek legal traditions also illustrates the theme of consistency and continuity. It reveals a consistent legal principle that community participation in

¹⁴ *Ibid* at 2.

¹⁵ See *ibid* at 5 for a list of partner communities.

¹⁶ *Ibid* at 3.

¹⁷ *Ibid*.

¹⁸ *Ibid* at 8.

¹⁹ *Ibid*.

²⁰ *Ibid* at 9, citing *Accessing Justice and Reconciliation Project: The Cree Legal Traditions Report* (2013) [unpublished] at 31-37.

²¹ *Ibid* at 10.

²² *Ibid*.

²³ *Ibid*.

decision making is central to determining how serious harms to a community are addressed.²⁴ Who decides and how the collective decision is made depends on the nature of the dispute. Decision makers may include a small, directly affected group, such as a family harmed by someone's actions, or extend to the entire community, including outside experts depending on the harm in issue.²⁵ In 2003, the 39 communities of the Anishinabek Nation began developing current processes for conflict resolution operating in their communities as part of their self-government negotiations.²⁶ After engaging in extensive consultation with Anishinabek citizens along with one national and four regional processes, processes that engage tribunal, mediation and Circle decision making were developed within Anishinabek territory.²⁷ Elaborated on later in this paper, these processes are grounded in seven Anishinabek grandfather teachings, involve community members and those affected by the conflict in decision making, and seek to restore relationships.²⁸

Diversity and consistency are also demonstrated in the examples below. Although Indigenous legal traditions have been undermined, many persist or are in the process of revival and revitalization. Like other systems of law, they are dynamic - evolving and adapting over time to internal and external influences. We begin with a discussion of two examples of Indigenous approaches to collective decision making and conflict resolution used to address a wide range of disputes, including property disputes. Aspects of these processes are common to many Indigenous legal traditions including Circle discussions, ceremony, performance, listening and witnessing. This is followed by an overview of dispute resolution services and models from across Canada that draw on both western and Indigenous legal traditions to resolve family, land and matrimonial property disputes implemented through negotiated agreements or federal legislation such as the *Family Homes on Reserves and Matrimonial Interests or Rights Act*²⁹ and

²⁴ *Ibid* at 13.

²⁵ *Ibid*.

²⁶ Canada, Canadian Human Rights Commission, *A Toolkit for Developing Community-based Dispute Resolution Processes in First Nations Communities*, online: National Aboriginal Initiative <http://www.doyouknowyourrights.ca/sites/nai-ina/files/pdf/toolkit_trousse-eng.pdf> at 40 [Canadian Human Rights Commission].

²⁷ *Ibid* at 40-41.

²⁸ See Anishnabek Nation, "Appeals and Redress Part 1 of 2" (Union of Ontario Indians: Nipissing First Nation, 2008) (video), online: Youtube <https://www.youtube.com/watch?v=tHIAO0CA_xo> [Anishnabek Nation, Appeals and Redress Part 1 of 2]. See also discussion in Sikka, Wong & Bell, *infra*.

²⁹ *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20.

First Nations Land Management Act.³⁰ The approach we use to describe these processes is informed by the AJR project and seeks to answer one or all of the following questions:

1. What are the key characteristics of the decision-making/problem-solving processes, including: (a) who are the authoritative decision makers? (b) what procedures or processes are involved in determining a legitimate response or resolution to conflict?
2. What principles govern responses to conflict?
3. What principles govern individual and collective responsibilities and expectations?³¹

2. Stó:lō Healing and Peacemaking Circles

Stó:lō approaches to conflict resolution are grounded on the principle that their programs be supported by the Stó:lō people and be based on Stó:lō “culture, customs, and traditions”³² - principles that reflect their aspirations for self-determination by giving themselves and their legal institutions more meaningful roles in the justice system. For the Stó:lō, self-determination and justice are about being held responsible in a variety of ways.

In general terms, a person who has caused harm is given the opportunity to take responsibility within a forum that focuses on maintaining family ties and community connections. All of this occurs within a context in which community takes responsibility for dealing with the troubles that exist among its people and in its external relations with other communities.³³

The goal is to restore the community to harmony rather than just on punishing the offender.

The Indigenous language of the Stó:lō is *Xwélmexwqel* or *Halq'eméylem*.³⁴ The Stó:lō believe that their essence as a people is embodied in their language and so it is important to use it as much as possible.³⁵ Use of their language in conflict resolution and describing their conflict resolution systems also helps ground the discussion in their worldview and away from responding only to demands and judicial processes of the Canadian justice system. Language is also important when describing their justice system. For example, referring to Stó:lō justice

³⁰ *First Nations Land Management Act*, *supra* note 2.

³¹ Friedland, *supra* note 4 at 7.

³² Ted Palys & Wenona Victor, “Getting to a Better Place”: Qwi:qwelstóm, the Stó:lō, and Self-Determination” in Law Commission Canada, ed, *supra* note 3, 12 at 18.

³³ *Ibid.*

³⁴ *Ibid* at 19.

³⁵ *Ibid.*

programs as “alternative” and the Canadian criminal justice system as “mainstream” can delegitimize the justice system of the Stó:lō and reinforce colonial relationships.³⁶ Stopping the use of such terms in their justice programs was a “small decolonizing step.”³⁷

As Stó:lō Nation legal traditions do not have a word for “justice,” Stó:lō Elders created the word, *Qwi:qwelstóm kwelam t’ ey (qwi:qwelstóm)* - roughly translated as, “they are teaching you, moving you toward the good” - to describe program initiatives developed with the assistance of Wenona Victor in the late 1990s.³⁸ It is a concept of “justice” centered upon the family and reflects a way of life that focuses on relationships and the interconnectedness of all life.³⁹ It has four key elements: “the role of Elders; the role of family, family ties, and community connections; teachings; and spirituality.”⁴⁰

Qwi:qwelstóm is “accountable to two main bodies within the Stó:lō Nation governance structure: the House of Justice and the Elders council for *Qwi:qwelstóm*.”⁴¹ It is concerned largely with matters that Canadian law would characterize as criminal. The House of Justice provides the mandate for the program and the Elders Council looks after the day-to-day operations.⁴² *Qwi:qwelstóm* accepts referrals from “the RCMP (pre-charge), Crown counsels, (post charge), probation officers (pre-sentence), community members, self-referrals from the ones harmed or those causing harm” and government departments such as the Department of Fisheries and Oceans, and the Ministry of Children and Family Development.⁴³ It also has a role in resolving conflicts internally between community members and between community members and institutional employees such as school staff.⁴⁴

The Stó:lō have two basic criteria for participation:

First, the person who has done the harm must be taking responsibility for his or her behaviour. Second, all relevant persons, particularly those who have been harmed are fully informed of the *Qwi:qwelstóm* process and are offered the opportunity to participate when they are ready.⁴⁵

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid* at 20.

³⁹ *Ibid.*

⁴⁰ *Ibid* at 21.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid* at 24.

⁴⁴ *Ibid* at 29.

⁴⁵ *Ibid* at 25.

When asked to participate in a Circle, participants are also asked to "come prepared to share all four sacred parts of being...the physical, the mental, the emotional, and the spiritual."⁴⁶ Preparation for a Circle engages the person's mental, physical, emotional and spiritual lives.⁴⁷ Not only are participants asked to come physically ready to participate by being "well-rested, fed, and drug- and alcohol-free for at least four days prior to the Circle date" but they are also asked to be mentally ready by coming to the Circle with "a strong mind, in order to make best use of the words that will be shared."⁴⁸ Preparing for participating in a Circle may depend on whether the Circle is a "healing or a peacemaking Circle" since in healing Circles the focus is "almost exclusively on restoring balance to an individual(s)" where a peacemaking Circle focuses mostly on gaining an "understanding by all Circle participants regarding a specific incident."⁴⁹

Acceptance is determined on a case by case basis depending on a range of factors such as the "remorse (level of awareness) of the person who caused the harm," "the community's willingness to deal with the person" and the "resources available to the person(s) who caused the harm, the person(s) harmed, and family members" to handle the situation.⁵⁰ If the people involved in the conflict are in the midst of their own "journey of healing" then the "thoughts and opinions of the harmed person(s)" and the "positive actions the wrongdoer has taken" are also considered.⁵¹

At the centre of the *Qwi:qwelstóm kwelam* program are healing and peacemaking Circles and the *Smómíyelhtel*, a group of community members who organize and lead restorative Circles. They undergo extensive training on traditional Circle processes and other "Aboriginal justice initiatives, fetal alcohol syndrome, restorative justice and conflict resolution."⁵² They organize and lead the Circles, inform participants of expectations, document the proceedings and, when necessary, the resolution.⁵³ They are free to use their own personal style when leading the Circle but have "guiding principles to follow."⁵⁴ These principles include "building relations

⁴⁶ *Ibid* at 28.

⁴⁷ *Ibid* at 30.

⁴⁸ *Ibid* at 28.

⁴⁹ *Ibid* at 29.

⁵⁰ *Ibid* at 25.

⁵¹ *Ibid* at 25-26.

⁵² *Ibid* at 26.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

and resolving conflict “in a good way,”” reconnecting "family members to their extended family and to their community," encouraging participants to bring Elders to share in the Circle, and focusing on being responsible and working on the self.⁵⁵

Qwi:qwelstóm offers healing and peacemaking Circles at four times during the prosecuting process: "to replace the trial process, to make a sentencing recommendation, to assist with reintegrating Aboriginal people who have been incarcerated back into their communities, and/or to develop a healing plan to be part of sentencing and/or probation orders."⁵⁶ However, it also uses these processes to “assist with family disputes, custody concerns and divorce settlements” and to improve relations between other parties to disputes.⁵⁷ As elaborated below under the heading “B.C. Circle and Family Group Conferencing Models,” the Circle process has also been adapted to bring together extended family in child welfare matters to learn from teachings of Elders and develop family plans. Peacemaking Circles share some characteristics with Euro-Canadian mediation processes and healing Circles with transformative mediation and counseling sessions. Mediation and peacemaking seek to achieve better understanding among those affected by the conflict and to seek solutions that address all concerns. Healing Circles share these features and are also focused on restoring balance and harmony to individuals and relationships harmed by past and present events.⁵⁸

Participants in the Circle vary depending on the nature of the dispute but always include the *Smómíyelhtel*, the parties involved in the dispute, and at least one Elder.⁵⁹ Each participant is asked to bring an Elder from their family.⁶⁰ Circles are rescheduled if an Elder is not able to attend.⁶¹ Elders have a special role because they are accorded respect by Stó:lō people, “really listen and come without their own agenda.”⁶² They "know how each person is tied to the community," bring spiritual guidance to the process, and their advice is generally well accepted by Circle participants.⁶³

⁵⁵ *Ibid* at 26-27.

⁵⁶ *Ibid* at 29.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*.

⁶⁰ *Ibid* at 26.

⁶¹ *Ibid* at 29-30.

⁶² *Ibid* at 30.

⁶³ *Ibid*.

Extended family is also important to the process. The Stó:lō consider cousins as siblings and do not “place distance between family” as non-Indigenous peoples might in the case of extended family by using words such as “step,” “in-law,” and “half.”⁶⁴ People are often introduced to each other in the community in terms of their family connections. These connections are reinforced in the Circle process, providing greater incentive to listen and change.⁶⁵ Names and connections come with responsibility and those who have gone through naming ceremonies to receive ancestral names may be “stripped...until they show they can carry it with responsibility and respect.”⁶⁶ Connection to family in Stó:lō culture makes it easier for a wrongdoer to face a stranger in a courtroom than to sit in an intimate Circle with family they love and respect and acknowledge how they harmed them.⁶⁷

All participants are encouraged to be kind, respectful and acknowledge the courage it takes to ask for help and to change.⁶⁸ They are expected to “share all four sacred parts of being, namely, the physical, the mental, the emotional, and the spiritual.”⁶⁹ Involvement in the process calls for full participation through “actively listening, verbally sharing or both.”⁷⁰ Participants are expected to be mentally strong enough to hear what may be difficult to hear and to extrapolate the good from what is being said.⁷¹ Sharing emotions is also encouraged.⁷²

Circle processes are highly spiritual and sacred to the Stó:lō. “[A]ll of life is best understood in terms of a Circle” and Circle work has “the power to protect and to heal.”⁷³ The Circle process “creates space for Elders and invaluable teachings” they have to share and a forum for community members to relate in a “safe and non-confrontational” way.⁷⁴ It is a way for people to connect with Elders, family and ancestors. Each session “always starts and finishes with a prayer.”⁷⁵ This is usually conducted by the Elder and is done to “ground the participants

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid* at 31.

⁶⁸ *Ibid* at 26-27.

⁶⁹ *Ibid* at 28.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid* at 29.

⁷⁵ *Ibid* at 32.

and acknowledge Stó:lō ancestors.⁷⁶ Sometimes a meal is shared to further promote closeness and a feeling of well-being.⁷⁷

Receiving and sharing teachings is an important part of the Circle process and establishing one's identity and sense of self-worth.⁷⁸ Tools used to help to facilitate this include a talking piece, sacred and unique to each *Smóyelhtel*.⁷⁹ It is given to him or her by family relations to represent their ability "to bring people together "in a good way."⁸⁰ It is treated with respect by all participants and only the person holding it may speak. This enables speakers to proceed at their own pace, uninterrupted, slows the pace of discussion and ensures that nobody speaks out of turn.⁸¹ It also reminds the speaker to speak truthfully and from the heart – an "I" frame of reference that personalizes the interactions in the Circle."⁸²

3. Gitanyow Legal Order and the Feast System

Ceremony, images, language, music, telling, performing and witnessing also have a significant role in many Indigenous legal systems and dispute resolution processes. For example, under Gitanyow law, the "highest legal and political unit is the House group" (matrilineal family lineage group).⁸³ Each house continues to evidence its territory, familial property and political authority through a sophisticated interweaving of song, performance, verbal record and images witnessed at feasts or potlatches by chiefs and members of other houses.⁸⁴ A unique set of crest images (*ayuks*) on blankets, rattles, poles and other regalia, as well as hereditary names of honoured ancestors, legends, songs, dances, secret words, ceremonial prerogatives and other intangibles belong to each House and are held by the Chief on their behalf.⁸⁵

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid* at 31.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid* at 31-32.

⁸³ Richard Overstall, in consultation with Val Napoleon & Katie Ludwig, "The Law is Opened: The Constitutional Role of Tangible and Intangible Property in Gitanyow" in Catherine Bell & Val Napoleon, eds, *First Nations Cultural Heritage and Law Case Studies, Voices and Perspectives* (Vancouver: UBC Press, 2008) 92 at 94 [Overstall].

⁸⁴ *Ibid.*

⁸⁵ *Ibid* at 101.

Godfrey Good is *Gwinu*,⁸⁶ a Gitanyow hereditary chief. As a chief he is expected to remain visible by wearing his chief's regalia and participating in feasts and to maintain a moral code so as not to disgrace his name through negligent or selfish behaviour.⁸⁷ In describing the legal order applicable to a Chief's holding of house possessions, he describes it as "automatic," deliberative, communal and witnessed by chiefs today as it was in the past.⁸⁸ When the Gitanyow stop following these legal traditions, "they will cease to be the Gitanyow people and will be something else."⁸⁹ The legal and political significance of these legal traditions are "constitutional" in the sense that they are about more than creating clear rules to govern relationships and disputes.⁹⁰ Rather, Gitanyow "centrally define themselves as a people who follow these laws."⁹¹ Good explains that the law is not just a set of rules to resolve conflicts:

When a chief dies, this is when the law is opened. It is automatic. No one can break the law when a chief dies. The chiefs will gather, have a feast and decide what to do. The law is the same today...

When a chief dies, the law happens automatically. It is in the feast hall that the business is taken care of. If the law is not followed properly, the chiefs will ask why and state that it is not right. The law of our people is very good.⁹²

Telling of *adaawk*, (formal oral history) is fundamental to transmission of laws and clarification of rights and responsibilities.⁹³ While crests represent important events that occur in the history of a House, these events are more fully recorded in the *adaawk*. *Adaawk* are sung or repeated orally but in some instances the telling of *adaawk* has also been recorded orally, visually and in writing.⁹⁴ Hereditary chiefs have a responsibility to pass on the *adaawk* and members of the House have a responsibility "to listen and to witness."⁹⁵ The chief has the responsibility of "telling the truth" and the listeners are responsible for understanding what they

⁸⁶ *Ibid* at 96. *Gwinu* means "to ask for something" and this meaning is acted out in a "naxnox" or spirit dance by its bearer (*Ibid* at 103).

⁸⁷ *Ibid* at 98.

⁸⁸ *Ibid* at 96.

⁸⁹ *Ibid* at 97.

⁹⁰ *Ibid*.

⁹¹ *Ibid*.

⁹² *Ibid* at 96.

⁹³ *Ibid* at 104.

⁹⁴ *Ibid* at 110.

⁹⁵ *Ibid* at 109.

have heard.⁹⁶ They may be called “mediators” if there is disagreement or misunderstanding within the House.⁹⁷ For example, "by listening at the feast, a person becomes familiar with the geographic place names" and territories associated with different Houses as the

traditional way of showing ownership to land is to repeat the *adaawk* [and] share it with other chiefs. All present at the feast will hear and be witness. The guest chiefs will respond. They will affirm the *adaawk* or they will state it is not correct.⁹⁸

Adaawk and *naxnox* (spirit dance, performance) are also associated with specific objects (e.g. masks) and crest images.⁹⁹ For example, Robert Good (Sindihi) tells an *adaawk* associated with *Simgyak*, a bird’s head mask with a small human figure inside the beak, used in a *naxnox*.¹⁰⁰ In the *adaawk*, the small human figure is a “higher power that descended from the heavens and speaks through the bird’s mouth.”¹⁰¹ It tells the chief of the House of Luuxhon to fish at a certain site. The “spirit of the place (*spanaxnox*) gives the House Chief permission to use the site” and is the underlying legal authority for ownership and use of the fishing site by the House.¹⁰²

Disputes sometimes arise between Houses and members concerning House property, such as unauthorized use of crest images.¹⁰³ Authentication of the use of the symbol according to aboriginal legal traditions anticipates the affected House groups host a feast, and invite chiefs to attend along with “others with an interest in the crest being displayed.”¹⁰⁴ There is also a broader application of this approach to other disputes and Nations through intermarriage. However the centrality of the feast, telling and witnessing to articulate law and applying it to the resolution of a wider range of disputes depends in part on whether the feast system continues to be recognized and reinforced as an effective and workable system for clarifying laws and resolving disputes within a particular community and beyond members of a particular House and collective property.¹⁰⁵

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid* at 104.

⁹⁹ *Ibid* at 103.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid* at 106.

¹⁰⁴ *Ibid* at 107.

¹⁰⁵ *Ibid.*; See e.g. Val Napoleon, “Looking Beyond the Law: Questions about Indigenous Peoples’ Tangible and Intangible Property,” in Catherine Bell & Robert Paterson, eds., *Protection of First Nations Cultural Heritage: Laws Policy and Reform* (Vancouver: UBC Press, 2009) 370 at 385.

III. Hybrid Models Drawing on Indigenous and Euro-Canadian Traditions

The following section provides an overview of dispute resolution processes that draw on Indigenous and Euro-Canadian legal traditions and dispute resolution processes. These processes include adaptations of mediation and tribunal processes, dispute resolution committees and collaborative decision-making.¹⁰⁶

1. Ridgewood

In 1992, the Ridgewood Foundation for Community-Based Conflict Resolution was founded in order to develop, promote, and enhance Indigenous community-based conflict resolution “through foundational and principled best practices, process design and training.”¹⁰⁷ Though it is no longer active due to the death of its founder,¹⁰⁸ the Ridgewood Foundation provided training and services to various groups including First Nations, government, police, community developers and professionals. The training was informed by a principled approach to dispute resolution based on interest based negotiation skills training. The training sessions formed part of a seven-day schedule designed to expose parties to negotiation processes while “equaliz[ing] the power imbalance between parties such as a First Nations community and the federal government.”¹⁰⁹ Sessions were interactive and engaging “with the use of role playing while conveying principles of education on the ADR process, such as negotiation or mediation.”¹¹⁰ Following the negotiation training sessions, the affected parties prepared to negotiate actual conflicts with which they were involved.¹¹¹ Such training is now offered through other Indigenous conflict resolution programs such as those offered by the Indigenous Leadership and Management Programs offered by the Banff Center in Alberta.

¹⁰⁶ For more examples and elaboration of these processes see Ratcliffe & Bell, *supra* note 1.

¹⁰⁷ Jo-Ann EC Greene, *Towards Resolving the Division of On-Reserve Matrimonial Real Property Following Relationship Breakdown: A Review of Tribunal, Ombuds and Alternative Dispute Resolution Mechanisms* (2003), online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/adr_1100100032666_eng.pdf> at 24 [Greene].

¹⁰⁸ Ridgewood Foundation, *Community-Based Conflict Resolution* (2007), online: Ridgewood Foundation <<http://rpbirt.com/ridgewood/ridgewoodtrust/index.htm>>.

¹⁰⁹ Greene, *supra* note 106 at 24.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

Jo- Ann Greene has suggested this process might be adaptable to matrimonial real property disputes.¹¹² Applicable aspects include:

- It provides training in the process and skills for an 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 negotiation; and
- It encourages full participation by the parties by paying attention to the environment in which the negotiation process occurs.¹¹³

Another benefit of the Ridgewood process is its focus on identifying and addressing the reasons and feelings underlying the conflict. Within First Nation and other communities “deep-rooted internalized feelings are often attached to the conflict.”¹¹⁴ The Ridgewood process facilitates the consideration and resolution of such feelings in order to prevent “derailment of the process.”¹¹⁵ This is crucial in that the process may collapse if the resolution of such concerns is inadequate, since any trust developed will disappear.¹¹⁶

However, Greene also points out some of the limitations of applying this model to matrimonial property disputes. For instance, one person in the relationship may generate the majority of the income and as a result, have more resources at his or her disposal to influence or “coerce outcomes”¹¹⁷ by threatening litigation. Power issues are particularly prominent in families that experience domestic violence. For these reasons involvement of a third party or other process for addressing power imbalances is often needed to ensure fair and enduring resolution to such disputes.

2. Treaty Four

Established in 1999, the Treaty Four Governance Institute is “part of the Treaty Four Governance Model that promotes self-determination, self-government and the development of governance capacity.”¹¹⁸ It provides “advice to First Nations on the function & development of

¹¹² *Ibid.*

¹¹³ *Ibid* at 25.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid* at 24. For further discussion see also Ratcliffe & Bell, *supra* note 1.

¹¹⁸ *Greene, supra* note 106 at 32.

constitutions, laws [and] policies” as well as development and training for treaty wide and community level dispute resolution.¹¹⁹ In October of 2000, it adopted a policy, “to provide a mechanism whereby the First Nation can resolve community disputes...by proceeding through mediation, and adjudication if necessary, all the time drawing upon the mediation and peacemaking traditions of the Nation.”¹²⁰ The Treaty Four Governance Institute has since incorporated mediation, as the first level in settling disputes, and adjudicative mechanisms, as the second level in resolving disputes. It also established the Treaty Four Administrative Tribunal (Tribunal) to “adjudicate disputes involving the application of First Nation law within Treaty Four territory. In order for the Tribunal to assert its jurisdiction, the First Nation law must designate the Tribunal as the dispute resolution mechanism to use.”¹²¹ It is intended to be available when disputes cannot be resolved at the community level through other processes.

Tribunal members are selected from the 34 First Nations of Treaty four and do not participate in resolution of conflicts from their own community.¹²² The Treaty Four Governance Institute is responsible for developing and training Tribunal members, including in First Nation community based laws. The Tribunal was initially developed in response to the following needs identified by community members:

- 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)¹²³

The process followed incorporates Canadian administrative tribunal laws designed to ensure procedural fairness as well as ceremonial practice and respect for First Nations law and legal process. It involves five stages: “determination of Treaty Four jurisdiction” “pre-hearing stage,” “the hearing,” “decision writing” and “after the decision.”¹²⁴ Lawyers for both disputing parties may be present but are precluded from actively participating and cross examination is

¹¹⁹ Treaty Four Governance Institute, “The Treaty Four Justice System: Alternative Dispute Resolution Projects”, online: Treaty Four Governance Institute <<http://www.docstoc.com/docs/163155616/The-Treaty-Four-Justice-System--Alternative-Dispute-Resolution-Projects>> [Treaty Four Governance Institute].

¹²⁰ *Ibid.*

¹²¹ Canadian Human Rights Commission, *supra* note 26 at 64.

¹²² *Ibid.*

¹²³ Treaty Four Governance Institute, *supra* note 118.

¹²⁴ *Ibid.*

limited. The primary purpose of the Tribunal is to make findings of fact and settle disputes through the application of First Nations law. But the Tribunal may also make non-binding recommendations on possible ways to resolve the conflict,¹²⁵ suggest "recommendations on the development [and] implementation of First Nation law and policy," and issue "interim orders or injunctions during the course of its' proceedings."¹²⁶ While recommendations of the tribunal are non-binding, "the agreement to participate in the adjudicative process amounts to consenting to the binding Tribunal decision."¹²⁷

3. Siksika Nation

In Alberta, the *Aiskapimohkiiks* Program was developed as a community-based justice program in order to "assist all Siksika Nation members to resolve disputes."¹²⁸ The *Aiskapimohkiiks* Program seeks to divert cases from formal adjudication, "thereby achieving maximum self-determination while restoring independence, solidarity, unity, peace and harmony."¹²⁹ The *Aiskapimohkiiks* process involves two-phases: mediation and arbitration and endeavors to incorporate Blackfoot traditions, values and customs.¹³⁰ The first phase, "*Aiipohtsinimsta*," utilizes mediation. The second phase, "*Aiskapimohkiiks*," relies on arbitration if the parties are unable to settle their dispute during the first phase. A three-member tribunal comprised of an Elder, a member of the Siksika community and an independent Chairperson, conducts the arbitration. The *Aiskapimohkiiks* Program also involves an Elders Advisory Committee.¹³¹

¹²⁵ Canadian Human Rights Commission, *supra* note 26 at 65.

¹²⁶ Treaty Four Governance Institute, *supra* note 118.

¹²⁷ Greene, *supra* note 106 at 34.

¹²⁸ Department of Justice, "Location of Aboriginal Justice Strategy Programs in Canada," (online): Department of Justice <<http://canada.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/location-emplac/ab.html>> [Department of Justice].

¹²⁹ *Ibid.*

¹³⁰ See Ratcliffe & Bell, *supra* note 1, for further discussion of Blackfoot legal traditions in dispute resolution.

¹³¹ Department of Justice, *supra* note 127.

IV. Hybrid Models Directed at Matrimonial Property Disputes

1. Six Nations of Grand River

The matrimonial law of the Six Nations of Grand River community provides for mandatory real property mediation.¹³² An exemption from this process is possible in situations where domestic violence is present or if parties agree “there is no reasonable chance for reconciliation.”¹³³ Third party mediators are drawn from the community, and if necessary, given training in mediation.¹³⁴

Section 8.2 of *A Law Concerning Matrimonial Real Property* sets out the purpose of the mediation, the process of selecting a mediator, and the steps that will happen leading up to and after the mediation.

The mediator will be appointed by an Iroquois Tribunal Judge from a roster of trained mediators identified from within the community. Rules and procedures for mediation will be developed by the Office of the Iroquois Tribunal. Once engaged, the mediator will confer with the parties, and with the children, if the mediator considers it appropriate to do so, and will give their best effort to obtain an agreement between the parties. Success or failure to come to agreement will be reported to the Six Nations – Iroquois Dispute Resolution Tribunal. A mediated agreement will be registered.¹³⁵

The tribunal is anticipated to be the final decision-maker with regards to matrimonial real property disputes, but with a right to appeal in certain circumstances to an Iroquois appellate body.¹³⁶ It is anticipated the tribunal will hold hearings in the communities where the dispute is located and apply local matrimonial real property law.¹³⁷ It will be comprised of community members from Iroquois communities in Ontario and Quebec: the Six Nations of Grand River, Mohawk Council of Akwesansé and Mohawks of Kahnawà:ke.¹³⁸ Section 9.1 of the *Law*

¹³² Six Nations of the Grand River Elected Council, *A Law Concerning Matrimonial Real Property* (18 January 2011, amended 19 August 2012), online: Six Nations Council <<http://www.sixnations.ca/MRPLawNovember2012.pdf>> at s 8.1 [Six Nations of the Grand River, *Law Concerning Matrimonial Real Property*].

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ Six Nations of the Grand River Elected Council, *Six Nations of the Grand River - Iroquois Matrimonial Real Property Tribunal Process* (18 January 2011, amended 19 August 2012), online: Six Nations Council <<http://www.sixnations.ca/MRPLawNovember2012.pdf>> at s.15 (regulations to *A Law Concerning Matrimonial Real Property*) [Six Nations of the Grand River, *Tribunal Process*].

¹³⁷ Six Nations of the Grand River, *Law Concerning Matrimonial Real Property*, *supra* note 131 at s 9.2.

¹³⁸ *Ibid* at s 9.1.

Concerning Matrimonial Real Property states that each of these will appoint three tribunal judges creating a roster of nine tribunal judges in total. Only three of the nine, one from each community and at least one from the community where the disputants reside, will sit to hear a case.¹³⁹ The process anticipates that expenses for the tribunal will be shared among the Iroquois communities and that the three communities will develop matrimonial real property laws that are “similar and have core [Iroquois] elements.”¹⁴⁰ Although the tribunal will follow rules of administrative justice applicable to Canadian tribunals, as much as possible the dispute resolution will be “based on traditional approaches, such as those used in Justice Sentencing Circles.”¹⁴¹

At the time of writing this paper, Six Nations was the only Iroquois community that enacted matrimonial real property laws and as such, its law anticipates Six Nations will operate the tribunal alone with three judges from that community until other Iroquois matrimonial real property laws are in place.¹⁴² The traveling nature of the tribunal will not be implemented until all three communities have appointed their respective judges.¹⁴³ Six Nations has also developed a regulation to govern the tribunal process.¹⁴⁴ The regulation emphasizes that the Tribunal's remedies and processes must comply with the "Matrimonial Real Property laws of Six Nations of the Grand River and other member communities of the Iroquois Caucus, who have an Matrimonial Real Property Law" and be “fair, just and equitable.”¹⁴⁵ It also sets minimum standards for member qualifications, which include impartiality and being of good character and reputation.¹⁴⁶ Members cannot be related by blood or marriage to each other, or to anyone whose case “is subject of a review, decision or an Iroquois which is before the tribunal.”¹⁴⁷ Members appointed to the tribunal will serve for an indefinite period of time although their position is subject to review by their respective Council after five years.¹⁴⁸ If a case involves "culture, tradition, heritage and language," then the tribunal may need input from the Elders.¹⁴⁹ In such a

¹³⁹ *Ibid* at ss 9.1-9.3.

¹⁴⁰ *Ibid* at s 9.3.

¹⁴¹ *Ibid*.

¹⁴² *Ibid* at s 9.1.

¹⁴³ *Ibid* at ss 9.1-9.2.

¹⁴⁴ Six Nations of the Grand River, *Tribunal Process*, *supra* note 135.

¹⁴⁵ *Ibid* at s 1.2.

¹⁴⁶ *Ibid* at s 3.1.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid* at s 5.

¹⁴⁹ *Ibid* at s 11.

case, "any person who is an Elder of Six Nations of the Grand River has the right to give relevant input at the request of either spouse."¹⁵⁰

To commence a tribunal proceeding, a written and signed application must be submitted to the Office of the Registrar along with proof of service on any named Respondents.¹⁵¹ The anticipated process for the tribunal hearing is as follows:

- a. Opening and closing prayer;
- b. Acknowledge people present;
- c. States rules of procedure to be used;
- d. Deal with any preliminary objections concerning jurisdiction, irregularities, service and any other preliminary matters of a material nature;
- e. The Applicant presents his or her case and calls witnesses;
- f. Each Respondent has the opportunity to cross examine the witness of the Applicant;
- g. At the conclusion of the case of the Applicant, each Respondent shall present their evidence and call witnesses;
- h. All other parties have the opportunity to cross examine the Witnesses of the Respondent(s);
- i. Re-examination and rebuttal evidence is at the discretion of the Iroquois Tribunal Panel;
- j. At the conclusion of the case each party shall be given the opportunity to provide argument;
- k. The Hearing can be adjourned from time to time;
- l. The Hearing is concluded when the Iroquois Tribunal declares the Hearing as concluded.¹⁵²

The process also requires all witnesses to provide testimony under oath or by way of affirmation and hearings will generally be open to the public unless the tribunal determines protection of privacy is required.¹⁵³ Hearings may be completed or terminated in any of the following circumstances: the rendering of a decision of the panel, if the parties have settled, "if the applicant withdraws the notice of proceeding," if the parties agree to terminate the hearing or if the tribunal considers continuation of the hearing to be unnecessary.¹⁵⁴ Tribunal decisions can be appealed to the Iroquois Tribunal Appeal Body which will include one of the original members who heard the dispute.¹⁵⁵ The appeal must be premised on an error in the application of

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid* at s 10.

¹⁵² *Ibid* at s 13(1).

¹⁵³ *Ibid* at ss 13(2)-13(3).

¹⁵⁴ *Ibid* at s 14.

¹⁵⁵ *Ibid* at s 15.

relevant Iroquois matrimonial real property laws.¹⁵⁶ The appeal body has the authority to award costs to either party and such costs will usually be awarded if an appeal is deemed “frivolous or vexatious.”¹⁵⁷ If an individual fails to comply with a decision rendered by the tribunal, the tribunal may also order costs, or engage the assistance of the Six Nations Government or a Compliance Officer, where one exists, to enforce the decision.¹⁵⁸

2. Beecher Bay First Nation

Beecher Bay First Nation matrimonial real property law requires parties to participate in mediation if they are unable to successfully negotiate and conclude an Interspousal Contract with regards to the division of matrimonial real property upon relationship breakdown.¹⁵⁹ An Interspousal Contract refers to “an agreement entered into between Spouses who are married to each other or intend to marry” or “a Separation Agreement entered into between Spouses who are married to each other and are living separate and apart”:

...made in writing, signed by the Spouses and witnessed, in which they agree on their respective rights and obligations under the marriage or on separation, with respect to the possession or division of Interests in Beecher Bay First Nation Land.¹⁶⁰

The Council of Beecher Bay First Nation are responsible for developing the policy and procedures for mediation and maintaining a roster of mediators after consultation with the Elders Advisory Council and the Lands Management Advisory Committee.¹⁶¹ The roster must “include one or more Elders who are qualified to apply the traditional laws and customs of the Big House of the Beecher Bay First Nation [and] available to assist Spouses in resolving disputes.”¹⁶²

Spouses may jointly or independently initiate mediation. If mediation is initiated independently, the initiating spouse is required to file a Notice of Request for Mediation with the

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid* at s 17.

¹⁵⁹ Beecher Bay First Nation, *Beecher Bay First Nation Matrimonial Real Property Act*, online: First Nations Land Management Resource Centre < http://www.labrc.com/wp-content/uploads/2014/03/Beecher_Bay_Matrimonial_Law.pdf> at s 14.

¹⁶⁰ *Ibid* at s 5(j).

¹⁶¹ *Ibid* at s 15.

¹⁶² *Ibid.*

Lands Manager and serve it on the other party.¹⁶³ Once the Lands Manager has been notified that the spouse has been served, the Notice of Request for mediation is delivered to the Land Management Advisory Committee.¹⁶⁴ Within thirty days the Lands Manager must schedule the mediation.¹⁶⁵ This time period may be extended at the request of the spouses or if the Lands Manager is unable to arrange for a qualified mediator within the required time period.¹⁶⁶ Ten or more days prior to the commencement of the mediation, the Lands Manager must serve a Notice of an Appointment for Mediation upon both spouses and the Lands Management Advisory Committee.¹⁶⁷ Spouses who have been served are required to attend mediation¹⁶⁸ and the mediation will be conducted expeditiously and in confidence.¹⁶⁹ If mediation is successful, a Separation Agreement is drafted.¹⁷⁰ The mediator is responsible for notifying the Lands Manager, who will then inform the Lands Management Advisory Committee.¹⁷¹ If the mediation process is unsuccessful, the mediator must issue a confidential report outlining the unresolved issues to each spouse and the Lands Manager.¹⁷²

3. Opaskwaya Cree Nation and Mississaugas of Scugog Island First Nation

Similar processes to those adopted by Beecher Bay First Nation are adopted by several other communities including the: Chippewas of Georgina Island First Nation, Lheidli T'enneh First Nation, Matsqui First Nation, McLeod of Lake Indian Band, Muskoday First Nation, Nipissing First Nation, and Opaskwaya Cree Nation.¹⁷³ However, the Opaskwaya Cree Nation does not mandate mediation. According to their matrimonial real property law mediation is an option that either party can arrange prior to seeking formal adjudication through the Canadian courts.¹⁷⁴ The Mississaugas of Scugog Island First Nation's process is mandatory, but the

¹⁶³ *Ibid* at ss 18, 20.

¹⁶⁴ *Ibid* at s 22.

¹⁶⁵ *Ibid* at s 23.

¹⁶⁶ *Ibid* at s 24.

¹⁶⁷ *Ibid* at s 25.

¹⁶⁸ *Ibid* at s 26.

¹⁶⁹ *Ibid* at ss 27, 28.

¹⁷⁰ *Ibid* at s 29.

¹⁷¹ *Ibid* at s 31.

¹⁷² *Ibid* at s 32..

¹⁷³ "Matrimonial/Spousal/Family Property Laws" (2014), online: First Nations Land Management Resource Centre <<http://www.labrc.com/resources/matrimonialspousalfamily-property-laws/>>.

¹⁷⁴ Opaskwaya Cree Nation, *Spousal Interest Land Law* (2006), online: First Nations Land Management Resource Centre <<http://www.labrc.com/wp-content/uploads/2014/03/OCN-Spousal-Interest-Land-Code-law-2006-001.pdf>> at s 10.2.

spouses may choose the mediator.¹⁷⁵ If the spouses cannot agree on a mediator, the Band Council will choose a suitable mediator.¹⁷⁶ Regardless of the outcome of the mediation, in all of the aforementioned First Nations, Council provides a certificate to the parties confirming compliance with the mediation requirement.¹⁷⁷ An alternative process, such as formal adjudication, may not be pursued unless such a certificate can be produced.¹⁷⁸

4. Kitslas and Westbank First Nations

Both the Kitselas First Nation and the Westbank First Nation require mediation before formal adjudication of matrimonial property disputes.¹⁷⁹ Under the Kitselas First Nation's process, either spouse may initiate mediation by providing a written request to the British Columbia Mediator Roster Society.¹⁸⁰ If the disputing spouses do not agree upon a mediator within fourteen days of the initial request, the British Columbia Mediator Roster Society, at the request of either spouse, will appoint one.¹⁸¹ Furthermore, within fourteen days of the appointment of a mediator, each spouse is required to provide the mediator with a written summary outlining all relevant facts and issues.¹⁸² The mediator is then required to provide copies of the summaries to the other party while determining the suitability of the parties for mediation. The mediator may refuse to mediate if he/she determines that the process will be unsafe for one or both spouses.¹⁸³ The mediation may be conducted "in joint meetings or private caucus" and the mediator may "determine his/her own rules and procedures applicable to the conduct of the mediation in accordance with the BC Mediation Roster Society standards."¹⁸⁴

¹⁷⁵ Mississaugas of Scugog Island First Nation, *Matrimonial Real Property Law*, online: First Nations Land Management Resource Centre <<http://www.labrc.com/resources/matrimonial-spousalfamily-property-laws/>> at s 13(d).

¹⁷⁶ *Ibid.*

¹⁷⁷ See e.g. *ibid* at s 22.

¹⁷⁸ *Ibid* at s 23.

¹⁷⁹ Kitselas First Nation, *Kitselas Family Property Law* No 2009-1, online: First Nations Land Management Resource Centre < http://www.labrc.com/wp-content/uploads/2014/03/Kitselas_Family_Property_Law_2009-1Final_draft.pdf> at s 7.2 [*Kitselas Family Property Law*]; Westbank First Nation, *Westbank First Nation Family Property Law* No 2006-02, online: First Nations Land Management Resource Centre <http://www.labrc.com/wp-content/uploads/2014/03/Westbank_Family_Property_Law.pdf> at s 7.2 [*Westbank First Nation Family Property Law*].

¹⁸⁰ *Kitselas Family Property Law*, *ibid* at s 6.1.

¹⁸¹ *Ibid* at s 6.3.

¹⁸² *Ibid* at s 6.5.

¹⁸³ *Ibid* at s 6.6.

¹⁸⁴ *Ibid* at s 6.7.

Parties may attend mediation in the presence or absence of legal counsel and have a duty to attend upon receiving a notice of appointment.¹⁸⁵ All statements made in the course of mediation are confidential unless the mediator is concerned for the safety of a child.¹⁸⁶ If the parties successfully reach an agreement through mediation, after advising the parties to seek independent legal advice, the mediator or a lawyer will draft a separation agreement for the spouses to sign.¹⁸⁷ The mediator is required to prepare a report if he/she deemed mediation to be an unsuitable dispute resolution process, if a spouse refused to attend or if the mediation did not result in an agreement.¹⁸⁸ In that event, the report is to be sent to both spouses and may be submitted to the Court in order to prove that mediation has occurred.¹⁸⁹ Furthermore, a spouse may commence further alternative dispute resolution processes in relation to matters that do not concern First Nations land.¹⁹⁰ The Westbank First Nation adopts the same process.¹⁹¹

5. Skawahlook First Nation

The Skawahlook First Nation community provides “justice assistance” to disputing spouses.¹⁹² Qwi:Qwelstom refers to “justice” and is based on traditional dispute resolution techniques.¹⁹³ This form of mediation requires “affected family and community members to discuss what has happened and to reach an agreement on how best to repair harm and restore balance and harmony.”¹⁹⁴ If mediation is successful, the chair is required to provide a copy of the agreed upon Domestic Contract to the Lands Manager, who is responsible for notifying the Lands Advisory Committee.¹⁹⁵ If mediation is unsuccessful and domestic contract cannot be achieved, the chair must deliver a confidential report to the spouses and the Lands Manager (if the report is oral, the Lands Manager must reduce it to writing and it must be initialed by the

¹⁸⁵ *Ibid* at ss 6.8, 6.9.

¹⁸⁶ *Ibid* at ss 6.11, 6.12.

¹⁸⁷ *Ibid* at s 6.13.

¹⁸⁸ *Ibid* at ss 6.14, 6.15.

¹⁸⁹ *Ibid* at s 6.16.

¹⁹⁰ *Ibid* at s 6.18.

¹⁹¹ *Westbank First Nation Family Property Law*, *supra* note 178 at ss 6.1-6.18.

¹⁹² Skawahlook First Nation, *Skawahlook First Nation Spousal Property Law*, online: First Nations Land Management Resource Centre <http://www.labrc.com/wp-content/uploads/2014/03/Skawahlook_Spousal_Property_Law.pdf> at Part 3.

¹⁹³ *Ibid*.

¹⁹⁴ *Ibid*.

¹⁹⁵ *Ibid* at s 14.

chair).¹⁹⁶ Spouses may then apply to the Court for adjudication and resolution. A spouse may commence further alternative dispute resolution processes in relation to matters that do not concern First Nations land.¹⁹⁷

6. Tsawout First Nation

The Tsawout First Nation encourages spouses to resolve property disputes “through cooperative discussion or through mediation or other alternative dispute resolution”¹⁹⁸ prior to applying to the court for formal adjudication.¹⁹⁹ Spouses may apply to the court provided reasonable efforts have been made in order to resolve the dispute.²⁰⁰ The burden is on the person opposing the application to court to demonstrate that reasonable efforts have not been made through alternative dispute resolution.²⁰¹ This approach is also adopted by the Tzeachten First Nation.²⁰²

7. Anishinabek Nation (Union of Ontario Indians)

The Anishinabek Nation, which was incorporated in 1949 as the Union of Ontario Indians, represents 39 First Nations in Ontario. In 2003, the Anishinabek Nation began looking into creating community-based dispute resolution processes.²⁰³ While engaging in self-government negotiations, they began crafting the processes after receiving funding.²⁰⁴ The Anishinabek Nation has established dispute resolution systems to govern disputes including matrimonial real property, education and governance.²⁰⁵

From the start, the Anishinabek Elders Council was involved in the four regional workshops and the “wrap-up conference” that played a role in building the processes, bringing “a

¹⁹⁶ *Ibid* at ss 15, 16.

¹⁹⁷ *Ibid* at s 17.

¹⁹⁸ Tsawout First Nation, *Tsawout First Nation Smeli (Matrimonial) Real Property Law* No 01-2012, online: First Nations Land Management Resource Centre <http://www.labrc.com/wp-content/uploads/2014/03/Tsawout-Matrimonial-Real-Property-Law-No_01-2012.pdf> at s 5.1.

¹⁹⁹ *Ibid* at s 5.3.

²⁰⁰ *Ibid* at s 5.3(1).

²⁰¹ *Ibid* at s 5.3(2).

²⁰² Tzeachten First Nation, *Tzeachten First Nation Matrimonial Real Property Law* No 09-03, online: First Nations Land Management Resource Centre <http://www.labrc.com/wp-content/uploads/2014/03/Tzeachten_Matrimonial_Real_Property_Law.pdf> at ss 6.1-6.4.

²⁰³ Canadian Human Rights Commission, *supra* note 26 at 76.

²⁰⁴ *Ibid* at 40.

²⁰⁵ Anishinabek Nation, “Appeals and Redress”, online: Anishinabek Nation <<http://www.anishinabek.ca/roj/appeals-and-redress.asp>> [Anishinabek Nation, Appeals and Redress].

strong source of Traditional Knowledge to help solidify the Anishinabek Nation's understanding of dispute resolution."²⁰⁶ With the hopes of incorporating the Anishinabek citizens' views on the issue of dispute resolution, the workshops helped to strengthen the communities' support in starting and shaping such a process.²⁰⁷ During 2004-2005, another set of workshops and a second conference occurred, this time focusing on discussions about "external dispute resolution processes" such as dispute resolution panels and the Commission's process.²⁰⁸

Some of the communities are very small, with populations no larger than a couple hundred. For those communities, it would be difficult for it to have its own process.²⁰⁹ Thus, the decision was that there would be "one national and four regional dispute resolution processes in the Anishinabek territory."²¹⁰ The regional processes are aimed at dealing with regional challenges or disputes.²¹¹ The types of disputes that may be considered by the Anishinabek Nation Tribunal and Commission are varied and include those that "concern the entire nation, [disputes] between First Nations, governance and administration of First Nations, Election Codes, Constitutions, matrimonial real property, citizenship, etc."²¹² Moreover, "First Nations, citizens, and non-members of the Anishinabek Nation" may utilize the Anishinabek Nation Tribunal and Commission.²¹³

Between 2005-2008, the structures, policies and practices of the four Dispute Resolution Commissions and the Anishinabek Nation Tribunal and Commissions were determined.²¹⁴ All five Commissions ultimately rely on several alternative dispute resolution processes including sharing Circles, mediation and dispute resolution panels.²¹⁵

The processes draw on the traditional values and dispute resolution processes of the communities.²¹⁶ Respect is paid to the 7 grandfather teachings: wisdom (nbwaakawin), love (zaagidwin), respect (mnaadendmowin), bravery (aakdehewin), honesty (gwekwaadziwin),

²⁰⁶ Canadian Human Rights Commission, *supra* note 26 at 40.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid* at 41.

²¹⁰ *Ibid.*

²¹¹ Anishinabek Nation, Appeals and Redress Part 1 of 2, *supra* note 28.

²¹² Anishinabek Nation, Appeals and Redress, *supra* note 204.

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ Appeals and Redress Part 1 of 2, *supra* note 28.

humility (dbaadendiziwin) and truth (debwewin).²¹⁷ The processes arise from models that are "culturally appropriate" to the community and designed by the communities, resulting in a greater understanding of what the process represents.²¹⁸ The appeals and redress system that was created involves community members by having them sit on the committees and respects community individuality by providing for the procedures to be shaped to fit the particular community's tradition or desired system.²¹⁹ Some of the goals in the processes are to keep relationships²²⁰ and to be fair, neutral, and confidential.²²¹

One of the processes is the sharing Circle service. In this process, an Elder or member of the committee works with the parties involved in a dispute in a voluntary, informal process where they can discuss the dispute and explore how the dispute arose, the effects that have flowed from the dispute, and how it may be resolved.²²² This process encourages the community and the person to take ownership of the act or harm.²²³

Another process is mediation. Here, a trained community member acts as a mediator to lead a voluntary mediation.²²⁴ The process allows the parties to voice their concerns and empowers the individuals to consider what they, and their communities, can do to move forward from the dispute.²²⁵

Lastly, there is the dispute resolution panel service, which is typically used where mediation or sharing Circles may not work well for the parties or where the parties would like a decision made.²²⁶ Typically, three community members, who are trained in hearing evidence, sit on a panel and hear the parties.²²⁷ In cases where the community panel members may be in conflict with the dispute or parties, a panel member may be brought in from another community.²²⁸ The panel is given the authority to hear evidence, make recommendations, and to

²¹⁷ *Ibid.*

²¹⁸ Anishinabek Nation, "Appeals and Redress Part 2 of 2" (Union of Ontario Indians: Nipissing First Nation, 2008) (video), online: Youtube <<http://www.youtube.com/watch?v=p2FaHsCT6aU>> [Appeals and Redress Part 2 of 2].

²¹⁹ Appeals and Redress Part 1 of 2, *supra* note 28.

²²⁰ Appeals and Redress Part 2 of 2, *supra* note 217.

²²¹ Appeals and Redress Part 1 of 2, *supra* note 28.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ Appeals and Redress Part 2 of 2, *supra* note 217.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

make a final decision.²²⁹ The overall goal of the processes is to promote the upkeep of relationships and to avoid situations that can divide people or communities.²³⁰

In March 2007, the Grand Council, Chiefs in Assembly of the Union of Ontario Indians passed a draft version of matrimonial real property legislation in principle. The Anishinabek Nation subsequently passed the law in June 2007.²³¹ In terms of enactment, in 2010, the Grand Council, Chiefs in Assembly passed a plan to develop and implement various regulations that will “give effect” to the matrimonial real property law.²³² The division and distribution process for matrimonial real property in the event of marital breakdown must be initiated through an application.²³³ Ultimately, the law states that its purpose “is to promote the best interests, protection, and well being of members, citizens, and non-members who reside within First Nations of the Anishinabek Nations, regarding the division and distribution of matrimonial real property.”²³⁴

V. Hybrid Models Directed at Family Disputes

Although not directed at matrimonial real property, these processes draw on Indigenous and Canadian legal traditions and can be adapted to address other family disputes, including matrimonial real property disputes.

1. Nishnawbe Talking Circles

In 1990, the Nishnawbe-Aski Legal Services Corporation was tasked by the Chiefs of Treaty Nine to establish alternative justice services for its community members. The process, called “the Talking Together Program” was created in 2002 to address the child welfare needs of 51 First Nations communities in the Nishnawbe-Aski Nation (NAN) territory.²³⁵ More specifically, the program works with on- and off-reserve NAN First Nations children who have

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ Anishinabek Nation, “Matrimonial Real Property”, online: Anishinabek Nation <<http://www.anishinabek.ca/roj/matrimonial-real-property.asp>>.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ Nishnawbe-Aski Legal Services, “Talking Together”, online: Nishnawbe-Aski Legal Services <<http://www.nanlegal.on.ca/article/talking-together-126.asp>>.

been apprehended and their families.²³⁶ Talking Together utilizes a restorative, Circle approach “to bring participants together to discuss family problems in a non-judgmental way.”²³⁷ The Circle is comprised of family members, workers, agency representatives and community Elders.²³⁸ In the Circle, participants examine the ramifications of the issues experienced by a particular family.²³⁹ “If an agreement is reached, it is used as the basis for the Plan of Care, and filed with the Court.”²⁴⁰ Ultimately the purpose of the Talking Together initiative is to strengthen the family unit.²⁴¹

2. Mikmaw Family Group Conferencing

Commencing in 2005, the Mi’kmaw Family and Children Services Agency developed Family Group Conferencing, “which is a culturally aligned strategy for family healing that uses a healing Circle format to assist families in open protection cases, cases before the courts, children in care and kinship placement in foster care and adoption.”²⁴² As explained in our discussion of BC Initiatives below, Family Group Conferencing is a phrase used to describe a participatory process used in New Zealand and adapted in Canada. Here it often takes the form of Circle decision making processes for conflict resolution in accordance with many First Nation legal traditions. The Agency offers Mi’kmaw families the opportunity to engage kinship networks for child placement as opposed to foster care or family court.²⁴³ Family Group Conferencing has expanded and presently receives referrals from the Family Support Department and the various Family and Community Healing Centres.²⁴⁴ One reason it has expanded is, as the Mi’kmaw Family and Children Services Agency indicates, it:

very much resembles the healing Circle and the talking Circles of [Mi’kmaw] culture. For many Mi’kmaq and other Aboriginal people the Circle is a powerful symbol of connectivity and completeness. The healing Circle / talking Circle has long been a place where everyone is equal, where all can have a say. It is a healing Circle where the heart can be unburdened, and words of consolation can be

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² L. Jane McMillan, *Addressing Mi’kmaq Family Violence* (May 2011), online: Tripartite Forum <<http://www.tripartiteforum.com/downloads/x/Tripartite%20Family%20Violence.pdf>> at 166.

²⁴³ *Ibid.*

²⁴⁴ *Ibid* at 167.

freely spoken. Everyone in the Circle has a piece of truth and everyone's contribution is intended to make it whole.²⁴⁵

3. B.C. Circle and Family Group Conferencing Models

In 2004, 2006 and 2008, the British Columbia Ministry of Children and Family Development provided significant funding to the Law Foundation of British Columbia for the purposes of expanding alternative dispute resolution processes with respect to child protection, particularly in the Aboriginal context.²⁴⁶ There are eleven participating agencies that have implemented various "collaborative decision-making" (CDM) processes including family group conferencing, traditional decision-making and hybrid models.²⁴⁷ Some of these are discussed below.

Family group conferencing was originally used to describe a process used in New Zealand where families, service providers and other professionals engage in collaborative decision-making. It was "developed in response to the need for a culturally sensitive, family-based approach to the care of Maori children, who, like Aboriginal children in BC, were disproportionately over-represented in the country's foster care system."²⁴⁸ This model is premised on the notion of collective responsibility and involves the child, immediate and extended family members and community members (as identified by the family) in the development of a plan of care.²⁴⁹ An "underlying assumption of the [Family Group Conferencing] process is that the family itself is best able to understand and articulate its strengths, challenges, resources and supports, [and] therefore plans created by the family have a higher probability of success."²⁵⁰

A family group conference facilitator or coordinator is responsible for assisting families in identifying and inviting appropriate individuals to the conference. Such conferences are ultimately designed to enhance and augment a particular family's support network.²⁵¹ Traditional decision-making processes also involve Elder wisdom and knowledge. They also generally

²⁴⁵ *Ibid.*

²⁴⁶ Leanne Harder, *Report of Aboriginal Child Welfare Collaborative Decision-Making Models* (2009), online: Law Foundation of British Columbia <<http://www.lawfoundationbc.org/wp-content/uploads/Report-of-Collaborative-Decision-Making-Models.pdf>> at 1 [Harder].

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid* at 40.

²⁴⁹ *Ibid* at 40-43.

²⁵⁰ *Ibid* at 1.

²⁵¹ British Columbia, "Collaborative Planning and Decision-Making in Child Welfare", online: British Columbia <http://www.mcf.gov.bc.ca/child_protection/mediation.htm>.

commence and close with a prayer. If the Circle format is employed, there are typically “four rounds: introduction/role identification; issue articulation; family planning; finalization of the plans and/or check in. Teachings are shared by those with influence and authority in the meeting - often Elders.”²⁵² The individuals that comprise the Circle develop resolutions and as such, “the individuals are the Circle and are encouraged to take responsibility of the resolution.”²⁵³ Multiple meetings may be required in order to reach a resolution.²⁵⁴

(a) *Carrier Sekani Family Services Society*

The Carrier Sekani Family Services Society utilizes traditional decision-making regarding child welfare disputes. A Family Justice Facilitator (Facilitator) is responsible for arranging all pre-meeting and meeting details in addition to ensuring the safety of all participants.²⁵⁵ Usually the Facilitator meets with the social worker prior to contacting the parents and arranging the pre-meeting. During the pre-meeting, the Facilitator is responsible for assisting participants to articulate and express their concerns and gauging relationship dynamics between participants.²⁵⁶ Many individuals are invited to participate including children, siblings, parents, Elders, extended family members and Clan members depending on the families’ preferences.²⁵⁷

The process is “child centered and ensures that the child’s voice is included.”²⁵⁸ The Facilitators, which are “primarily of Carrier Sekani heritage,” generally “have a variety of qualifications and experience” with many holding a social work degree or similar education.²⁵⁹ He or she typically conducts an individual orientation with each participant, including service providers, to discuss various issues and concerns prior to the meeting.²⁶⁰ The Facilitator, or if the family elects, Elders, share teachings from both Western and Indigenous traditions: “participants teach each other informally by relating their own similar personal experiences.”²⁶¹ Once the

²⁵² Harder, *supra* note 245 at 6-7.

²⁵³ *Ibid* at 7.

²⁵⁴ *Ibid*.

²⁵⁵ *Ibid* at 12.

²⁵⁶ *Ibid* at 11.

²⁵⁷ *Ibid* at 10.

²⁵⁸ *Ibid*.

²⁵⁹ *Ibid*.

²⁶⁰ *Ibid* at 11.

²⁶¹ *Ibid* at 12.

family hears all protection and welfare concerns, they develop a plan and reduce it to writing.²⁶² Depending on the nature of the case, the social worker may have ultimate decision-making responsibility.²⁶³ The family and the social worker review the final agreement, which must outline the manner in which it is to be executed and evaluated, and sign it accordingly.²⁶⁴ A date for a review meeting must be scheduled, usually three months after the plan is finalized and subsequent meetings may be arranged depending on the plans progress to account for any issues and revisions.²⁶⁵

(b) *Haida Child and Family Services Society*

Pursuant to Haida culture and values, “disputes are typically resolved by consulting Elders, matriarchs, or “aunties.” In the event of a concern about a child, a community member will approach one of the people previously mentioned and ask for their assistance to intervene.”²⁶⁶ The Coordinator is responsible for inviting participants according to the families’ wishes and will contact all identified family members, community members, the social worker and all other professionals involved.²⁶⁷ On occasion, some professionals have been precluded from participating in the Circle “because the family does not want them there.”²⁶⁸ The Coordinator also outlines the structure and purpose of the meeting during the pre-meeting stage. During this stage participants will be asked to articulate “what they want for the child.”²⁶⁹

The meeting is often initiated by an opening prayer and "always with a song."²⁷⁰ Elders and cultural support people “may share teachings.”²⁷¹ The Circle provides all participants with an "equal opportunity to speak."²⁷² While the family is responsible for developing a plan, it is subject to social worker approval.²⁷³ The meeting concludes with "a final round of the Circle where participants are asked to say one thing each found significant. Then there are closing

²⁶² *Ibid* at 13.

²⁶³ *Ibid* at 12.

²⁶⁴ *Ibid* at 13.

²⁶⁵ *Ibid*.

²⁶⁶ *Ibid* at 14.

²⁶⁷ *Ibid* at 15.

²⁶⁸ *Ibid*.

²⁶⁹ *Ibid*.

²⁷⁰ *Ibid* at 16.

²⁷¹ *Ibid*.

²⁷² *Ibid*.

²⁷³ *Ibid*.

prayers and music."²⁷⁴ In terms of accountability, the Coordinator conducts approximately three follow-up meetings for each conference, which is monitored by the social workers and any other appropriate professionals.²⁷⁵

(c) *Kla-how-eya Aboriginal Centre*

The Kla-how-eya Aboriginal Centre engages a hybrid process that is primarily child-focused.²⁷⁶ During the pre-meeting stage, the family determines who to invite to the Circle with the support of two Facilitators.²⁷⁷ The Facilitators explain the process to the family, discuss potential options for resolution including the benefits of the Circle process, and advise the social worker required to consent to any plans developed by the family.²⁷⁸ A four round talking Circle is then utilized, which typically commences with a smudge and a prayer.²⁷⁹ The four rounds of the talking Circle are as follows: role/relationship identification, issue identification, family planning, and formalization of plans.²⁸⁰ Elders are available to provide "support and recommendations from a neutral, community point of view" as requested.²⁸¹ The meeting ends with "a final round to debrief the process and acknowledge the relationships built."²⁸² Food is served to encourage sharing and relationship building, while also celebrating the commitments contained in the plan.²⁸³ Another meeting and/or Circle may be arranged if necessary.²⁸⁴

(d) *Northwest Inter-Nation Family and Community Services Society*

Northwest Inter-Nation Family and Community Services Society also employs a hybrid process. The Coordinator is required to determine "who should be invited" to the meeting "based on discussions with the parents, children (12 years and older) and other family members" during the pre-meeting phase.²⁸⁵ The actual meeting is often opened with a prayer, if the family

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid* at 25-27.

²⁷⁷ *Ibid* at 27.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid* at 28.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² *Ibid* at 29.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid* at 32.

requests, and is facilitated by the Coordinator.²⁸⁶ Traditional teachings are discussed and “taking into account everyone’s different perspective, [the Coordinator] facilitates some mutual understanding by assisting some parties to understand each other in individual meetings and within the [Family Group Conferencing] meeting.”²⁸⁷ During the introductions, participation is encouraged through the use of flip charts titled “Hopes,” “Strengths,” and “Issues/Concerns.”²⁸⁸ The Circle process then commences and all participants are permitted to speak.²⁸⁹ The affected family is responsible for developing their own plan although it must be approved by the Delegated Agency.²⁹⁰ Once a plan has been agreed on, the Coordinator formalizes it, a plan-monitoring schedule is developed, and the Coordinator’s role concludes.²⁹¹ Within three to six months of the formalization of the agreement, a Family Group Conference Evaluator will also follow-up with the family in order to gauge progress.²⁹²

(e) *Nuu-chah-nulth Tribal Council*

The Nuu-chah-nulth Tribal Council relies on a traditional approach in settling child welfare and safety disputes that maintains: “opportunities for change and growth start with the basic precepts of traditional family as the support system and strength to begin the healing of the self.”²⁹³ The process includes as many family and community members as possible and preparation for the main meeting involves several “cultural preparation and cleansing ceremonies.”²⁹⁴ The Coordinator is responsible for explaining the process to participants and encouraging them to consider traditional teachings and “to use those teachings or to seek out Elders who will counsel them as to their family practices.”²⁹⁵ The Coordinator also arranges one-on-one meetings in order to empower individuals to actively participate.²⁹⁶ The family conference meeting starts with an opening prayer and the Coordinator establishing guidelines

²⁸⁶ *Ibid* at 33.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ *Ibid* at 37.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

and encouraging all participants to express views, opinions and concerns.²⁹⁷ All family members who participate are equally responsible for the development and execution of a plan.²⁹⁸ Once consensus is reached, the family and the social worker file any and all necessary paperwork.²⁹⁹ Follow-up meetings are arranged to measure progress and make adjustments.³⁰⁰

(f) *Squamish Nation*

The alternative dispute resolution processes developed by the Squamish draw on traditional teachings and the Circle format. Proceedings are initiated by a social worker who meets with the Coordinator/facilitator (facilitator) to discuss agency concerns and objectives for the affected family.³⁰¹ The social worker and the family identify individuals they believe will contribute positively to the Circle.³⁰² The Circle begins with a prayer by an Elder, family member or community member.³⁰³ “[T]eachings are shared about local history, Squamish laws, protocols, customs and the significance of these are explained. There is a respectful acknowledgment of the family’s strengths and their value to the community.”³⁰⁴ The facilitator encourages and supports participants to express their views while explaining the Circle process.³⁰⁵

During "private family time," the family develops a resolution plan based on the information presented and issues addressed in the Circle.³⁰⁶ The final agreement is formalized in the full Circle after the family’s plan has been considered and accepted by the social worker.³⁰⁷ The Circle concludes with "a blessing and closing comments by an Elder, community member, or family member."³⁰⁸ The facilitator, "one month after a Circle and three months thereafter for a period of up to 18 months, "is responsible for interviewing at least three people from each Circle in order to determine the executions and ramifications of the plan.³⁰⁹ If deemed necessary, the

²⁹⁷ *Ibid* at 38.

²⁹⁸ *Ibid*.

²⁹⁹ *Ibid* at 39.

³⁰⁰ *Ibid*.

³⁰¹ *Ibid* at 47-48.

³⁰² *Ibid* at 47.

³⁰³ *Ibid* at 49.

³⁰⁴ *Ibid*.

³⁰⁵ *Ibid*.

³⁰⁶ *Ibid*.

³⁰⁷ *Ibid*.

³⁰⁸ *Ibid*.

³⁰⁹ *Ibid*.

facilitator may arrange a follow-up Circle provided the social worker and the family approve.³¹⁰

(g) *Sto:lo Nation*

The Sto:lo Nation promotes a traditional decision-making model in which ancestral teachings are relied upon in order to resolve child welfare issues.³¹¹ A Family Justice Worker, who often conducts home visits and pre-meetings in order to establish a relationship with the affected family, is responsible for facilitating the Circle and is appointed within one to two days of receipt of a request for service.³¹² At the request of Sto:lo Elders, children presently are not permitted to attend any meetings or conferences.³¹³ Ultimately the Circle provides a safe forum for the discussion of concerns and possible solutions. Prior to attending the Circle, individuals must refrain from substance use for at least four days.³¹⁴ Elders attend the Circle with no prior knowledge of the conflict in order to ensure that they “come in with no pre-judgment or pre-solutions to [the] conflict.”³¹⁵ Their role is to support the family and provide traditional guidance based on oral teachings.³¹⁶

The ‘Smoyelhtel’ guides the Circle through several processes including: opening prayer, rules, introductions, explanation of the conflict, resolution development, check-ins and a closing prayer.³¹⁷ The Family Justice Worker then assists the affected parties in establishing a written implementation plan.³¹⁸ Once the Circle is completed and resolutions are established, “the file remains open for up to two months.”³¹⁹ The Family Justice Worker is responsible for following up with the family through personal contact to inquire into whether additional support is required approximately one month after resolutions are developed, depending on the plan that was set up.³²⁰ If necessary, “the file will remain open for another two to four weeks” prior to its closing.³²¹ Ultimately the length of time required to execute the plan varies on a case-by-case,

³¹⁰ *Ibid.*

³¹¹ *Ibid* at 50.

³¹² *Ibid* at 51.

³¹³ *Ibid.*

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ *Ibid* at 52. Smoyelhtel is defined as the “one who guides the Circle.”

³¹⁸ *Ibid.*

³¹⁹ *Ibid* at 53.

³²⁰ *Ibid.*

³²¹ *Ibid.*

Circle-by-Circle basis.³²²

VI. Conflict Resolution and the *First Nations Land Management Act*

Several First Nations have developed alternative dispute resolution processes under the *First Nations Land Management Act*. While these processes do not currently apply to the resolution of matrimonial real property disputes, similar models can be utilized and in some instances are being adapted. Signatories to this Act include the Aitchelitz, Beausoleil, Buffalo Point, Haisla Nation, Long Plain, Mashteuiatsh, Membertou, Miawpukek, One Arrow, Shushwap, Skowkale, St. Mary's, Stz'uminus, Tsuu T'ina, Williams Lake Indian Band and Yakwekwioose First Nations.³²³ Some examples of dispute resolution processes adopted under the Act follow.

1. Long Plain First Nation

The Long Plain First Nation has established, under the *Long Plain First Nation Land Code*, a dispute resolution process that can handle disputes around "interests and rights in Lands."³²⁴ Informal discussions are the first stage of resolving the dispute³²⁵ and if those fail the parties can then move through the following ordered stages of dispute resolution: "facilitated discussions," appeal, or as a final option, Court adjudication.³²⁶ The Long Plain Land Authority, developed to manage lands, is responsible for creating and maintaining a list of possible "appeal panelists from among Eligible Voters, who have relevant knowledge and experience to serve on the Appeal Panel for facilitated discussions and appeals."³²⁷ Sections 41 and 42 detail the facilitated discussion and appeal stages of the process, where the same panel acts as facilitators and as an appeal panel. When a dispute arises and an Appeal Panel is required, the Chief and

³²² *Ibid.*

³²³ Canada, Aboriginal Affairs and Northern Development Canada, "The Harper Government Announces 18 New Entrants to the First Nations Land Management Regime" (23 January 2012), online: Aboriginal Affairs and Northern Development Canada < <https://www.aadnc-aandc.gc.ca/eng/1327272437069/1327272513464>>.

³²⁴ Long Plain First Nation, *Long Plain First Nation Land Code* (draft as of 29 January 2014), online: Long Plain First Nation <<http://www.longplainfirstnation.ca/Land%20Code/files/Land%20Code%207th%20Draft%20Feb%202010.pdf>> at s 38.

³²⁵ *Ibid* at s. 38.3.

³²⁶ *Ibid* at s 38.4

³²⁷ *Ibid* at s 39.1.

Council appoint an “appropriate number of panelists from the roster to serve in the facilitated discussion and appeal stages.”³²⁸ A party seeking the resolution of a dispute is required to file a written notice of appeal with the Land Authority.³²⁹ Within fifteen business days the Land Authority must deliver a report to the Chief and council outlining the dispute, pursuant to section 41.1 of the *Land Code*. Within five business days, the Chief and Council establish the panel under section 41.2. Under section 41.3, the panel must then convene as facilitators within five business days. And if the parties are unable to reach consensus through facilitated discussion, the appeals stage is triggered.³³⁰

The Appeal Panel may confirm, reverse, substitute or refer a decision.³³¹ The decisions of the Appeal Panel must be reduced to writing³³² by the Chair and are “binding and shall be final except for review by a court of competent jurisdiction.”³³³ While this process does not apply to housing allocations or the settlement of matrimonial real property disputes,³³⁴ s. 37.1 indicates that Council is responsible for developing and implementing a “spousal property law” applicable upon marital breakdown to “the use, occupancy and possession” and “the division of interests” in First Nation land. Such laws must ensure each spouse has “an equal right to possession” and “an undivided half interest in their matrimonial home,” cannot “discriminate on the basis of sex” and must limit those entitled to hold a permanent interest in land to members.³³⁵

2. Beausoleil First Nation

Beausoleil First Nation has established a similar process in their draft *Land Code*. Citizens are required to “use best efforts to prevent disputes from arising and ... consider the use of dispute resolution processes at the earliest possible stage of any conflict.”³³⁶ The four stage process for land disputes includes: negotiation, facilitated discussions, mediation and “final arbitration by the Dispute Resolution Panel.”³³⁷ An individual seeking assistance must file

³²⁸ *Ibid* at s 41.2.

³²⁹ *Ibid* at s 40.

³³⁰ *Ibid* at s 41.5.

³³¹ *Ibid* at s 42.1.

³³² *Ibid* at s 42.4.

³³³ *Ibid* at s 42.5.

³³⁴ *Ibid* at s 40.4.

³³⁵ *Ibid* at s 37.4.

³³⁶ Beausoleil First Nation, *Beausoleil First Nation Land Code* (draft as of 16 June 2014), online: Beausoleil First Nation <<http://www.chimnissing.ca/landsdocs/LAND-CODE-DRAFT-JUNE2014.pdf>> at s 42.1.

³³⁷ *Ibid* at s 43.1.

written notice of the dispute.³³⁸ All individuals involved must be: "treated fairly," "given a full opportunity to present their case" and "given reasons for a decision made."³³⁹ Section 43.4 provides that a notice of termination will issue if it is determined that facilitated discussions or mediation are unsuccessful in resolving the dispute. In that case, the dispute may then progress to "the next stage of the dispute resolution process or to final arbitration."³⁴⁰

The Roster Panel is comprised of twenty panelists at most,³⁴¹ and is appointed by the Beausoleil First Nation Council.³⁴² Certain persons are precluded from being on the panel. In order to avoid conflicts of interest, "no Council member, or employee of Beausoleil First Nation or person already serving on another board, body, or committee related to Beausoleil First Nation" is permitted to be on the roster.³⁴³ The panel to hear the dispute is made up of three panelists selected from the roster panel. To select the panel, each party is permitted to select a panelist, with the third being selected by "the rest of the panel."³⁴⁴ However, all three panelists may, alternatively, be selected by the roster panel.³⁴⁵ This three person Dispute Resolution Panel may confirm, reverse, substitute or refer a decision.³⁴⁶ The Dispute Resolution Panel may also "direct an action be taken or ceased," make orders,³⁴⁷ and make recommendations.³⁴⁸ "Decisions of the Dispute Resolution Panel must be in writing" and provided to all parties of the proceeding within fourteen days of the decision date, if they so ask.³⁴⁹ Decisions of the Panel are binding, but can be reviewed on application by the Federal Court's Trial Division.³⁵⁰

³³⁸ *Ibid* at s 43.2.

³³⁹ *Ibid* at s 43.6.

³⁴⁰ *Ibid* at s 43.4.

³⁴¹ *Ibid* at s 44.1

³⁴² *Ibid* at s 44.3.

³⁴³ *Ibid* at s 44.2.

³⁴⁴ *Ibid* at s 46.2.

³⁴⁵ *Ibid*.

³⁴⁶ *Ibid* at s 47.1.

³⁴⁷ *Ibid*.

³⁴⁸ *Ibid* at s 47.2.

³⁴⁹ *Ibid* at s 47.5.

³⁵⁰ *Ibid* at s 47.6.

3. Haisla First Nation

The Haisla Nation Land Code was ratified in 2014³⁵¹ and relies on informal discussions, mediation and arbitration in the resolution of land-based conflicts. The Haisla Nation mandates “wherever possible, a dispute in relation to the Nation’s Land must be resolved through informal discussion by the parties to the dispute.”³⁵² If informal discussions are unsuccessful, the parties may attempt mediation, with a mediator selected from the British Columbia Mediator Roster Society.³⁵³ If the parties are unable to agree on a mediator, they may request that the Society appoint a mediator or they may select any other mutually agreed upon mediator.³⁵⁴ If mediation fails, then the parties may apply to the British Columbia Arbitration and Mediation Institute in order to commence arbitration proceedings.³⁵⁵ The rules of the British Columbia Arbitration and Mediation Institute govern the arbitration process.³⁵⁶ The process is not currently available for determining housing allocations.³⁵⁷

4. Stz’uminus First Nation

Similarly, the Stz’uminus First Nation employs informal discussions, mediation and arbitration in order to settle land-based disputes.³⁵⁸ If parties are unable to resolve their dispute through informal discussions, mediation may be pursued.³⁵⁹ The parties may jointly appoint a mediator or may request that the Lands Advisory Board Resource Centre do so.³⁶⁰ If mediation is unsuccessful, the parties may seek arbitration. The same appointment process that governs the mediation also governs the arbitration.³⁶¹

³⁵¹ "Ratification Vote Results" (28 June 2014), online: Haisla First Nation <<http://hfn-elections.ca/>>.

³⁵² Haisla First Nation, *Haisla Nation Land Code* (draft as of May 2013), online: Haisla First Nation <<http://www.haisla.ca/wp-content/uploads/2013/07/Haisla%20Land%20Code%20Draft%202.pdf>> at s 31.1.

³⁵³ *Ibid* at s 33.1.

³⁵⁴ *Ibid*.

³⁵⁵ *Ibid* at s 34.1.

³⁵⁶ *Ibid* at s 34.2.

³⁵⁷ *Ibid* at s 32.2.

³⁵⁸ Stz’uminus First Nation, *Stz'uminus First Nation Land Code* (25 July 2013), online: Oyster Bay Development <http://coastsalishdevcorp.com/userfiles/FINAL_LandCode.pdf>.

³⁵⁹ *Ibid* at s 42.1.

³⁶⁰ *Ibid*.

³⁶¹ *Ibid* at s 43.1.

VII. Conclusion

This paper considered examples of a wide assortment of First Nation approaches to dispute resolution in Canada. The discussion opened with a general overview of many Indigenous legal traditions and processes to resolve conflict. Next, the discussion shifted to looking at numerous examples of dispute resolution processes operating on a community level that draw on both Indigenous and Canadian dispute resolution processes and values. This review is not comprehensive, but illustrates the variety of dispute resolution processes and the commonalities that are shared in the dispute resolution models.

Several themes emerge. Cooperation appears to be an important part of many of the processes and traditions considered here. Family and tradition are also frequently identified as important factors in many of the dispute resolution processes. In the examples considered, panels of multiple members, mediation, informal discussions and Circle processes are more commonly employed as first resorts to dispute resolution rather than the relatively more adversarial processes of litigation or formal negotiation.

Considering the interplay of Indigenous legal traditions with the processes to dispute resolution and the models that have been developed in many communities, a number of other themes may be identified. Responsibility, community, respect and discussion make frequent appearances as principles that are incorporated into these processes. For example, Norman Arnold Yellowman, from the Aamjiwnaang First Nation and part of the Anishinabek Nation Youth Council described how the sharing Circle process developed by the Anishinabek Nation can give the participants a chance to see "what love is, especially coming from a community based approach."³⁶² He went on to explain that the involvement of the Elders and that leadership can bring a realization to the participant about their importance in the community.³⁶³

But, important to remember is that though some themes or commonalities have been suggested here, "there is no 'one size fits all' approach" that can be applied to all Indigenous legal traditions or community processes.³⁶⁴ Instead, there are a "wide variety of principled legal responses and resolutions to harm and conflict available within each legal tradition."³⁶⁵

³⁶² Appeals and Redress Part 1 of 2, *supra* note 28.

³⁶³ *Ibid.*

³⁶⁴ Friedland, *supra* note 4 at 3.

³⁶⁵ *Ibid.*