



Centre for Excellence for Matrimonial Real Property

A Toolkit for On-Reserve Matrimonial Real Property Dispute Resolution



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INDIGENOUS LAW
RESEARCH UNIT

AT THE
UNIVERSITY OF VICTORIA



Acknowledgements



We would like to acknowledge the work of communities that have taken up the project of working with their laws and designing their own dispute resolution processes.

We thank Catherine Bell and her students, Rebecca Ratcliffe, Nisha Sikka, George Wong for their invaluable research on dispute resolution processes. Their comprehensive and excellent work grounded many of the discussions on different processes in this Toolkit.

We wish to thank Grace Nosek for her careful editing and plain language assistance. A big thank you to Lorinda Fraser for the seemingly endless task of formatting this Toolkit.

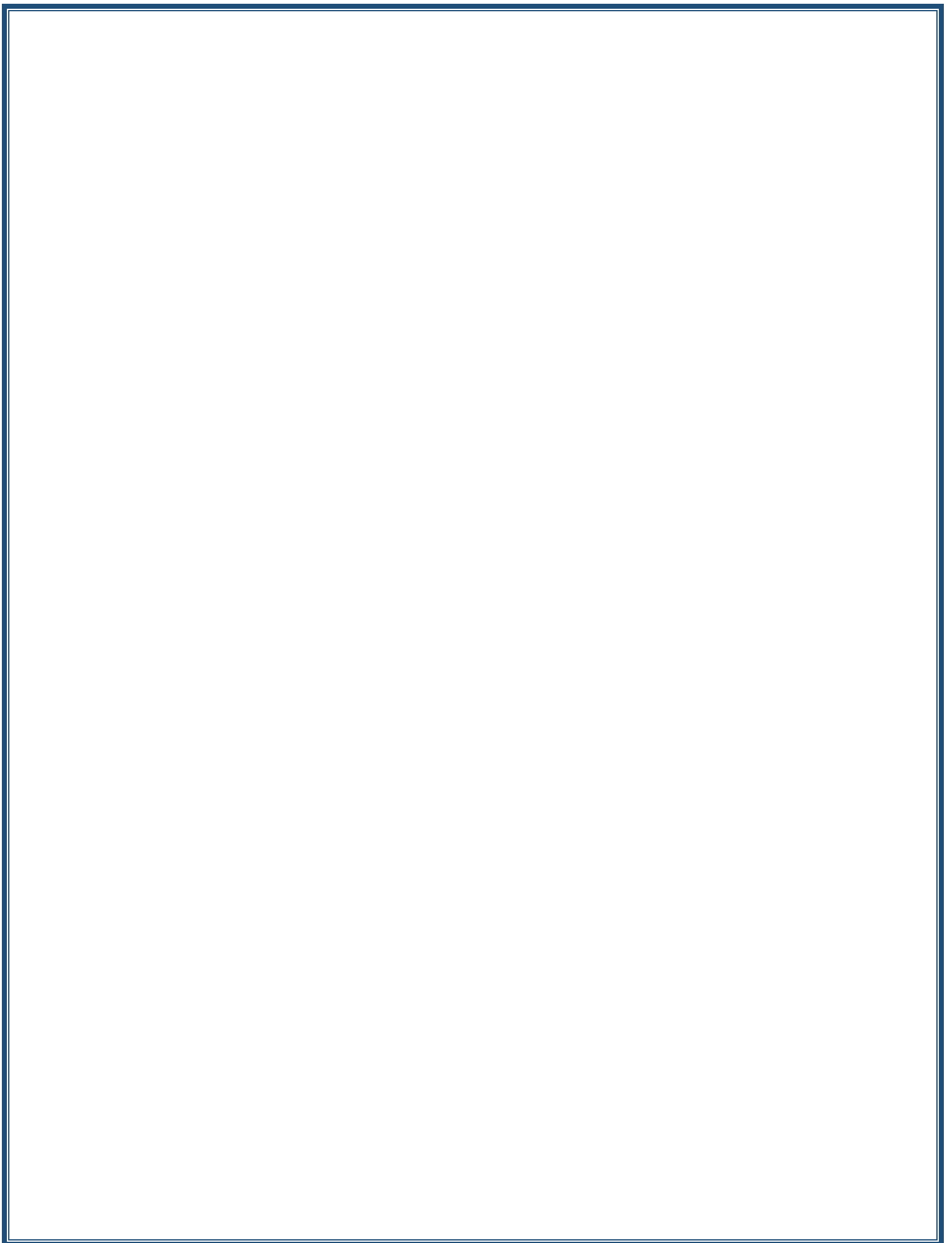
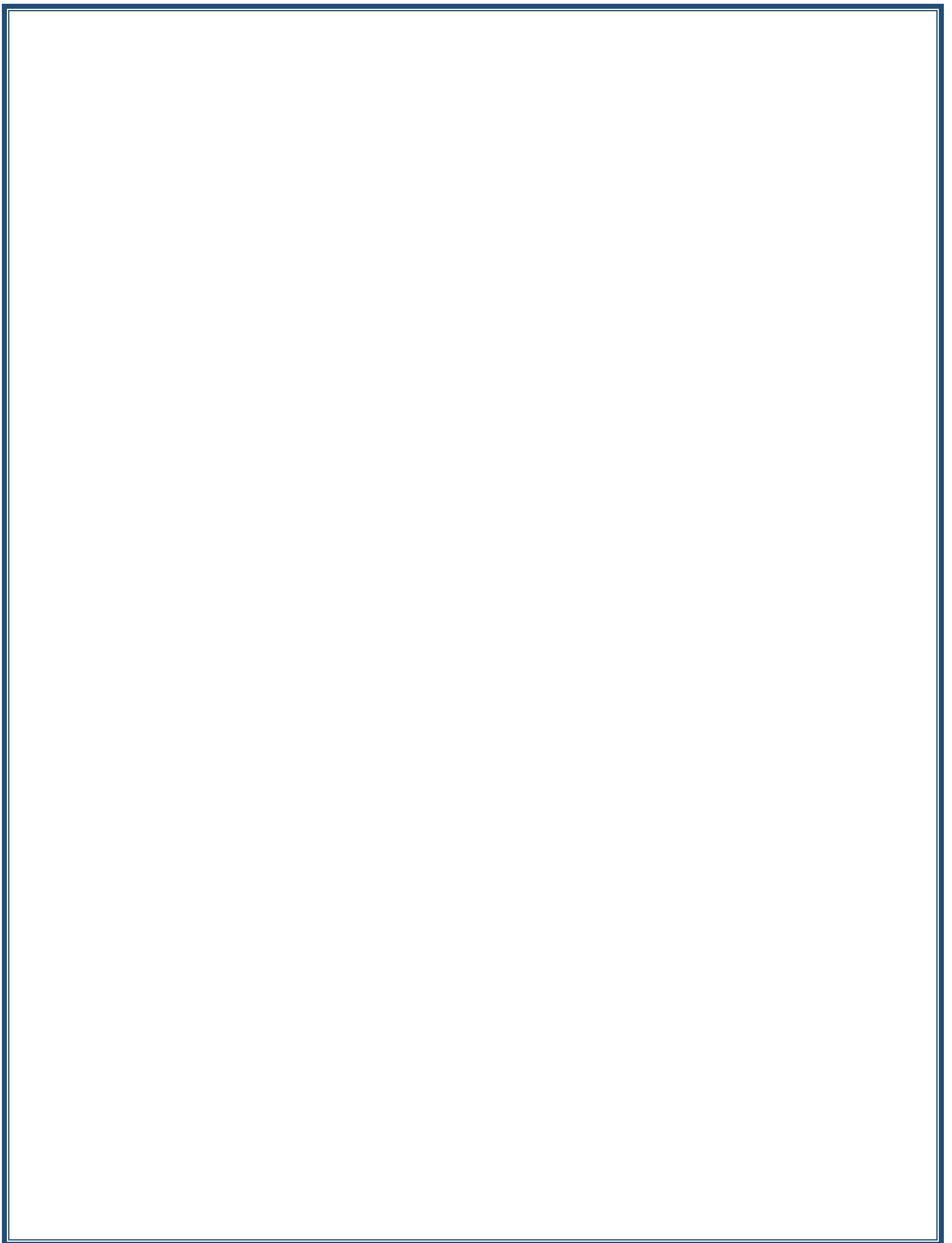


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1. BACKGROUND

1.1. FAMILY HOMES ON RESERVES AND MATRIMONIAL INTERESTS OR RIGHTS ACT

In 2013, the federal *Family Homes on Reserves and Matrimonial Interests or Rights Act* (the “Act”) was introduced and passed.¹ This federal statute provides for the enactment of First Nation laws to govern on-reserve matrimonial real property. It also provides provisional rules for First Nations that have not yet developed their own laws under the *Act*.

The provisional federal rules from this *Act* remain in effect to govern matrimonial real property on reserve until a First Nation develops its own laws to do so.

In the interpretation section of the *Act*, there is a clause that talks about “traditional” dispute resolution. It reads:

s.2 (3) For greater certainty, for the purposes of this Act, an agreement between spouses and common-law partners includes an agreement reached through traditional dispute resolution.

This means that First Nations can go further than drafting their own laws. They can revitalize or develop their own dispute resolution processes, to interpret and apply the provisional rules or their own laws.

A LESSON FROM THE U.S.

Indigenous peoples in the US (generally called American Indians or Native Americans) have been able to achieve and maintain more legal, political, and economic authority. This has included the ability to establish tribal courts with jurisdiction over a range of legal matters, except serious criminal cases.

For this Toolkit, there is one major lesson to draw from the US experience: when tribal groups have both laws for settling matrimonial real property questions AND dispute resolution forums, they have far fewer problems. In contrast, those tribal groups that only have either matrimonial real property laws OR dispute resolution forums have ongoing problems and conflicts.

Therefore, to effectively deal with matrimonial real property issues, communities need both:

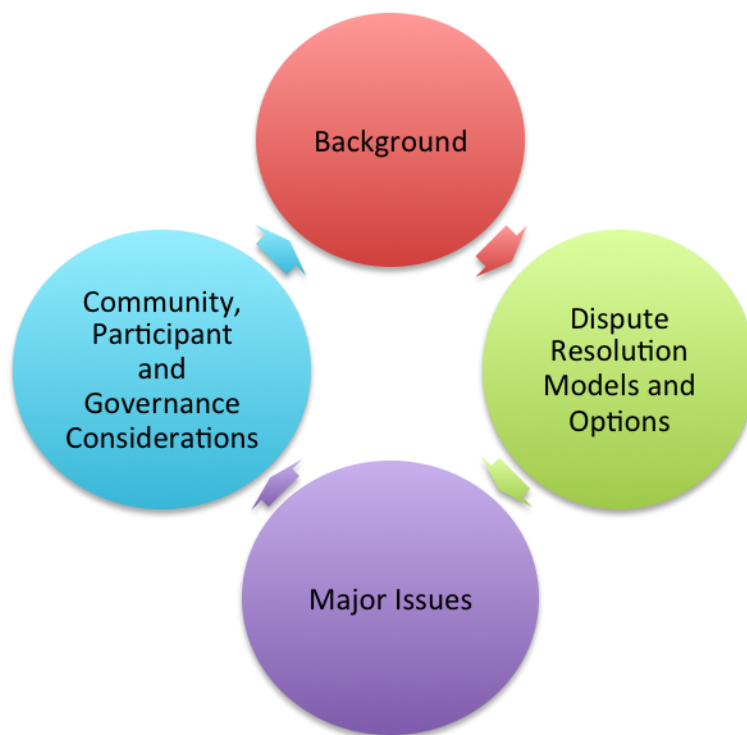
1. Matrimonial Real Property Laws; **AND**
2. Dispute resolution forums.

1.2. THIS TOOLKIT

One size doesn't fit all: choosing and developing dispute resolution mechanisms.

There is a huge diversity in First Nations across Canada, with a wide range of cultural, social, and economic circumstances, and an equally wide range of goals, needs, challenges, strengths and resources. We recognize that there is no way just one dispute resolution process, or just one way of developing dispute resolution processes, could possibly be useful for all communities.

There is no need to read this Toolkit in any particular order and you may not need or want all of it. It is *not* designed to lead you through a linear process to a certain end point. Rather, it acknowledges the work of developing, implementing and evaluating your community's own dispute resolution processes is best viewed as an ongoing cyclical process itself:



This Toolkit provides communities and individuals with basic information about dispute resolution options, major issues and important community, participants and governance questions to consider when developing matrimonial real property laws. It provides starting points for conversations on dispute resolution for matrimonial real property, or ways to renew or deepen conversations already in progress.

A range of dispute resolution options is provided for Indigenous communities to explore and consider, including:

- courts,
- problem-solving or integrated courts,
- tribunals,
- typical dispute resolution processes,
- community based justice and dispute resolution models, and
- Indigenous legal processes.

Each of these options includes information, critical questions, and building blocks to support Indigenous communities moving ahead with the development and implementation of their dispute resolution plans.

This is not a complete legal survey, but rather a general introduction to the field of dispute resolution for on-reserve real property issues. Sources and Resources for further discussions on topics in this toolkit can be found in Appendices "B" and "C."

Start where you are at. Take what you need. You are the expert on your own community.

1.3. THE CENTRE OF EXCELLENCE FOR MATRIMONIAL REAL PROPERTY

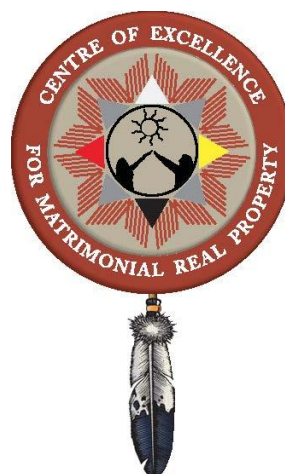
The Centre of Excellence for Matrimonial Real Property (the “Centre”) was established in 2013 and is hosted by the National Aboriginal Lands Managers Association. The Centre is committed to supporting First Nations with the implementation of the federal *Family Homes on Reserves and Matrimonial Interests or Rights Act*.

The Centre operates at arm’s length from the Government of Canada, and provides the following services:

- Guiding First Nations who are developing their own matrimonial real property laws,
- Providing information on the protections and rights available to individuals and families living on reserve,
- Assisting with implementing the provisional federal rules, and
- Providing research on alternative dispute resolution mechanisms.

The Centre of Excellence for Matrimonial Real Property has developed the **Matrimonial Real Property (MRP) Toolkit** (Version 2.0, July 17th, 2015) to help First Nations interested in developing their own laws.

This resource is available online at <http://www.coemrp.ca/resources/matrimonial-real-property-mrp-Toolkit>.



1.4. THE INDIGENOUS LAW RESEARCH UNIT

The Indigenous Law Research Unit is a dedicated research unit based out of the Faculty of Law at the University of Victoria. We believe Indigenous laws need to be taken seriously as laws. Our goal is to work with and for Indigenous communities to engage with and articulate Indigenous laws in a rigorous and transparent way so that all communities can access, understand, and apply their laws to today's issues and problems.

We also develop academic resources to support teaching Indigenous laws in law schools and we are working toward an Indigenous law degree program where students will receive both a Canadian law degree and an Indigenous law degree at the Faculty of Law, University of Victoria. Our vision is for Indigenous laws to be living and in use in communities, and to be researched, taught and theorized just as other great legal traditions of the world are.

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1.5. A NOTE ON LANGUAGE

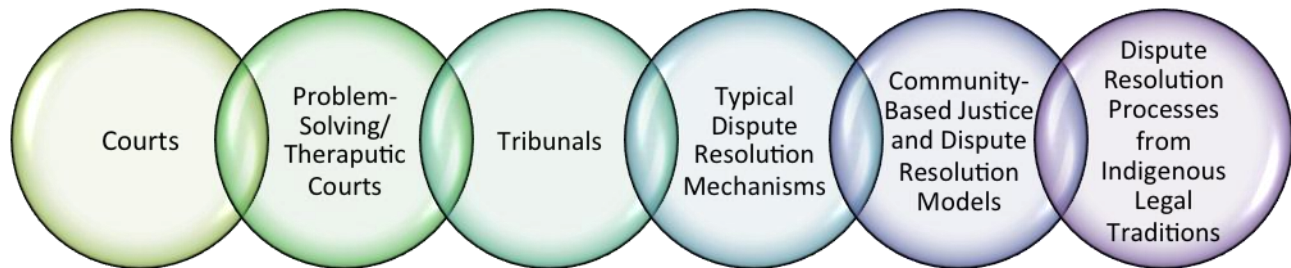
We use the terms Indigenous, Aboriginal, and First Nation throughout the Toolkit.

- “Indigenous” is the common international term and we use it here, especially when we want to move away from the language of Canadian courts and government policy. We use “Indigenous law” to describe law that comes from Indigenous people’s own societies, past and present.
- “First Nation” is the term used in most current federal legislation and many communities have adopted this language when describing themselves. We use First Nation when it is more appropriate to do so.
- “Aboriginal” is often the language of the courts and government, and we use this language when necessary.

1.6. DISCLAIMER (WE HAVE TO BE RESPONSIBLE FOR WHAT WE SAY)

This Toolkit contains general information about Canadian and Indigenous legal matters, but it is not legal advice and should not be treated as such. The content in this Toolkit is for general information purposes only and does not constitute legal, other professional advice or a legal opinion of any kind. Use of this Toolkit does not create a lawyer-client relationship. Readers are advised to seek specific legal advice from their own legal counsel regarding any specific legal issues or problems.

2. DISPUTE RESOLUTION MODELS AND OPTIONS



The purpose of this section is to provide a description of a full range of dispute resolution models and options, along with their advantages and disadvantages, key questions and basic elements.

These dispute resolution options are set out in a spectrum, from models most associated with the current justice system, to models more aligned with current and traditional methods of dispute resolution within Indigenous communities.

Choosing the model or models that work best for you is not an either/or question. There is no right or wrong answer for every community or even for every situation within a single community. In fact, most Indigenous communities that have developed and are implementing their own community-based dispute resolution processes use or rely on more than one of the above models.

2.1. COURTS

One process you can use is the Canadian court system. This means that when there is a matrimonial property dispute, the participants resolve it in a Canadian court and the decision-maker is a judge trained in Canadian law.



In Canada, there are many different courts. Each court has the power to make decisions about different problems. The provisional rules in the *Family Homes on Reserves and Matrimonial Interests or Rights Act* explains which court has the power to make decisions about matrimonial property disputes on reserves. Under that law, it is the superior court in each province that can hear these disputes in most situations.

Each court has a different name in each province. These are:

Province/Territory	Provincial Courts
British Columbia Prince Edward Island Newfoundland and Labrador Nova Scotia Northwest Territories Yukon	Supreme Court of the Province/Territory
Alberta Manitoba New Brunswick Saskatchewan	Court of Queen's Bench of/for Province
Ontario	Ontario Superior Court of Justice
Quebec	Quebec Superior Court
Nunavut	Nunavut Court of Justice

If participants do not agree with the decision of the judge in one of these courts, they can ask the provincial appeal court to look at the decision again. After that decision, final appeal can go to the Supreme Court of Canada in some cases.²

Some advantages...

There are some advantages to utilizing courts. Courts are already created. This means you do not have to put any time, effort or funding into designing or maintaining a process. Courts have a transparent process and clear rules. Decisions are binding (final and enforceable), which means parties have to follow the decision. If a participant refuses to follow the decision, there is a clear way to enforce it.

If a participant disagrees with the judge, there is a way to appeal the judgment. Because judges rely on precedent and there is a public record, decisions may be more consistent and accountable. Courts rely on many professional staff and no volunteers.

Sometimes it is helpful to have a judge be the decision-maker. Judges are considered impartial, which means that they look objectively at the dispute and make decisions based on the law. They understand Canadian law and have experience looking at complicated disputes involving economic, business and property rights and interests.

Judges make decisions after hearing from representatives (usually lawyers), which can help them make fair resolutions that are not influenced by one of the participants. However, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (Section 41) also provides that any person seeking an order under the Act must notify the First Nation's council. This allows the First Nation to make representation with respect to the social, cultural, or legal context of the application and to provide their views as to whether or not the order should be made. This does not apply when there is an application for an Emergency Protection Order or a Confidentiality Order, which is important when there are gender and power imbalances between the participants.

Alternative dispute resolution in court processes?

In some provinces, participants are encouraged to resolve some or all of a dispute in a more informal process before going to court. For example, in British Columbia, participants cannot go to court on many family law disputes until they have gone to a judicial case conference. In the judicial case conference, a judge sits down in a private and informal meeting. During that meeting, the judge sees if the participants can agree on any issues. The judge may provide an opinion on what the resolution would likely be if the participants went to court.³

The judge may order participants to attend a settlement conference. At a settlement conference the judge will try to mediate a solution. The judge will often give an opinion on the law.

Some disadvantages...

There are disadvantages to using courts. Courts are part of the Canadian legal system. There is usually no role for extended family, kinship groups or community members in the decision-making or court hearing process. While Section 41 provides for the First Nation Council to make representation, it is not yet clear how much weight that will carry in determining whether or not the order should be made. Indigenous legal traditions are not a part of court processes or decision-making.

Judges will typically be from outside a community and may lack important knowledge about your community in making their decisions. Judges are not trained in Indigenous legal traditions and may not believe that Indigenous law exists. The Canadian legal system has a history of bias against Indigenous law and people. As a result, Indigenous participants may not trust judges or the court process.

The experience in court is also different. Courts are adversarial. Participants are usually quiet during a court hearing. They normally have lawyers or representatives who argue their sides in the dispute. After the judge hears each side of the dispute, the judge makes a decision. This decision outlines who wins and who loses in a dispute. In other words, participants do not have a say in the court process or the resolution. This can be different from how many communities resolve disputes under Indigenous law.

Courts are expensive and it is difficult to go to court without a lawyer. The rules are complicated and hard for most people to understand. It may take a long time to get a resolution because you need to schedule a hearing and then wait for a decision. Participants may have to travel long distances to get to court. There may not be translation services for participants who prefer to have a process heard in their language.

How to use the courts

To use courts, participants usually contact a lawyer who specializes in family law. If the participant cannot afford a lawyer, they usually contact courts in each province to find out what process they need to follow. Sometimes, legal aid can cover the cost of a lawyer. Most provinces have websites with basic information on how to access courts and whether there is legal aid.

When might you want to use a Canadian court?

- When there is high conflict, safety issues or power imbalances between the participants.
- When you want to create a precedent. This means that you think there is an important issue in the dispute that you want decided by a judge because it will impact how future decisions will be made.
- When a participant may not comply with a decision and another participant may need to enforce it easily in court.
- When you want a third-party decision-maker.
- When participants have complicated disputes involving a lot of financial resources and/or business interests.
- To access or review **Emergency Protection Orders** or **Exclusive Occupation Orders** or enforce other Orders or Agreements under the *Act*.

Key questions to ask about adopting court processes:

- Will members of your community use the court process?
- Will a judge understand your community and your laws?
- Will extended family, kinship network, or community groups be able to participate?
- Will this process work well with existing Indigenous legal processes?
- What is your role when participants adopt court processes?

2.2. THERAPEUTIC OR PROBLEM-SOLVING COURTS

Therapeutic or problem-solving courts are specialized courts that are part of the regular court system, but aim to manage or resolve underlying socio-economic or health issues that lead to criminal behaviour, including intimate partner violence.⁴ Put simply, they have a more people-oriented, healing focus.



Image from the Yukon Community Wellness Court.

"[T]he most effective court models emerge from the needs of the community in combination with a strong understanding of the serious nature of intimate partner violence and the contradictions and challenges it presents to the criminal and civil justice system."

- Tutty, Ursel leMaistre,
What's Law Got to Do with it?
At page 278.

Although they are growing in number, therapeutic or problem-solving courts are still few and far between and usually focus exclusively on criminal matters. However, those that do exist may be useful to access or learn from.

Therapeutic or problem-solving courts vary, but are distinctive in that the judge actively interacts and supervises offenders. Typically they aim to be problem-solving rather than adversarial, and take an interdisciplinary team approach to address "recycling problems" that underlie criminal behaviour.⁵ Problem-solving courts have more holistic and collaborative decision-making and sentencing practices than typical courts, with a goal to "promote pro-social behaviours and positive change" in individual offenders.⁶

Aboriginal Courts are sometimes seen as a subcategory of problem-solving or therapeutic courts and share most of the common features and approaches discussed above.⁷ In addition to these, Aboriginal courts may "facilitate the trial court's ability to consider the unique systemic and individual factors that contribute to an Aboriginal person's criminal behaviour" and know about and have links to services for Aboriginal people within a particular community.⁸ They may incorporate Aboriginal language, culture and resources and allow more time than a regular trial court to "seek alternatives to prison that are informed by Aboriginal understandings of justice."⁹

Problem-solving courts include drug treatment courts, mental health courts, community courts, youth courts, Aboriginal courts and domestic violence courts.¹⁰ In Canada, there are a growing number of domestic violence courts.¹¹ Violence between family members has “unique characteristics,” including the “complex emotional, social and economic ties” between the parties. This violence often includes power imbalances, isolation, vulnerability, and is “usually repetitive in nature.”¹²

The Winnipeg family violence court addresses not just cases involving intimate partner violence, but “all cases in which the accused is in a relationship of trust, dependency and/or kinship.”¹³ This is significant, given the interconnected relationships in many Indigenous communities.

A therapeutic or problem-solving approach to intimate partner violence “recognizes the need for timely and efficient communication between different courts” and may “adopt information-sharing protocols to be better equipped to accommodate the needs, interests and safety of the family unit.”¹⁴

There are some pilot projects of “unified family courts” in the United States.¹⁵ Toronto has the Integrated Domestic Violence Court, which brings criminal charges and family court proceedings “before a single judge to provide a more holistic and coordinated court involvement.”¹⁶

When might you want to use the therapeutic or problem-solving courts?

- When there is intimate partner violence, high conflict, safety issues or power imbalances between the participants.
- When there are concurrent criminal charges.
- When you want to include an interdisciplinary team.
- When you want a active judicial supervision.
- When you want a healing focus.

Key questions to ask about adopting therapeutic or problem-solving court processes:

- Does the purpose of the therapeutic/problem-solving court fit and support your community? How or why not?
- Are there any assessments of the therapeutic/problem-solving court that you can look at?
- Will members of your community use the therapeutic/problem-solving court process?
- Will the judge understand your community and your laws?
- Will extended family, kinship network, or community groups be able to participate?
- Will therapeutic/problem-solving court processes work well with existing Indigenous legal processes?
- What is your role when participants adopt the therapeutic/problem-solving court processes?

Using Courts: Did You Know?

- **S. 41 (1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* says:** Any person who goes to court for an order under the *Act* **must** notify the First Nation's Council **unless** it is an Emergency Protection Order or a Confidentiality Order.
- **S. 41 (2) says:** If a First Nation's Council requests to make representations "with respect to the cultural, social or legal context" of the application and give their view as to whether or not an order should be made, the judge **must** allow them to do so **before** the court decides that matter.
- **S. 42 says:** **Except** in the case of an Emergency Protection Order, when a court grants an order, the person that order benefits must notify the First Nation's Council on whose reserve the land or structures are located "without delay".

2.3. TRIBUNALS



Tribunals or boards are similar to courts, but they make decisions only on specific areas of law. For example, a tribunal could have the power to make decisions only about matrimonial real property disputes.

Tribunals that are part of the Canadian legal system are created under a Canadian law. Indigenous communities also create tribunals, usually under treaty or land claim agreements.¹⁷ The laws creating tribunals also set out the powers and the rules of the tribunals. Like courts, tribunals have clear processes and rules to guide decision-making and appeals.

The decision-makers in tribunals are typically experts in an area of law. These experts may be from inside or outside your community. In some communities, tribunal members are a mix of respected members of their communities and elders. Sometimes, communities agree to use a single tribunal among them to resolve disputes.¹⁸ This makes it possible to create panels of decision-makers who are experts on an issue, but are not from the same community as the participants.¹⁹

Many tribunals use different dispute resolution processes, such as mediation, arbitration or mediation-arbitration (med-arb). Tribunals can also use Indigenous legal traditions²⁰ or a mix of Canadian and Indigenous legal processes.²¹

Tribunal hearings are similar to court hearings. The decision-maker or panel of decision-makers listens to the dispute and then goes away and makes a decision. Participants often have a representative or someone who can speak for them during the hearing.²²

Tribunal members usually write decisions that become a part of a public record. Tribunals rely on past decisions, or precedent, to come to their decisions. The decisions made in arbitration usually become part of a public record. Decisions can be enforced in court if they are registered. You may want to provide a way for Chief and Council or a lands management office to recognize decisions for enforcement as well.

Participants can usually appeal decisions, but the reasons to appeal may be limited. Under Canadian law, only some provinces allow participants the ability to appeal a tribunal decision in the same way as a court decision.²³ In other provinces, appeals are limited to administrative justice principles. This means participants can appeal when they believe the decision-maker has not been neutral or they have been treated unfairly. For example, if a participant thinks they did not get a chance to tell their side of

the story, they can ask a court to review the decision. Participants can also appeal decisions that are inconsistent with the law or if the tribunal did not have power to make a certain decision. However, because tribunals are made up of decision-makers who are experts in a certain area of law, courts will often respect their decisions.

Where Indigenous communities have created tribunals, there is usually a way to appeal those decisions.²⁴ These appeals often follow administrative justice principles.²⁵

Some advantages...

Unlike court, the processes and rules are more flexible and informal in a tribunal. Hearings usually take place in a meeting room rather than a courtroom. It also often costs less and takes less time to use a tribunal. This makes the tribunal setting less intimidating for participants.

If you are able to create a tribunal, it has many of the benefits that courts do. Decisions can form a public record and create precedents. This is important if you have written a new matrimonial real property law. Tribunals have transparent processes and clear enforcement mechanisms. The decision-makers appear neutral and impartial.

The expertise of tribunals also has its benefits. Having expert decision-makers is helpful for understanding the law and context surrounding matrimonial property disputes. This is particularly important if there is a gender or power imbalance between the parties or a history of conflict or violence.

The flexibility that tribunals have is helpful. You can choose a mix of decision-makers from inside or outside of your community. This is helpful to ensure that your community's values, principles and laws are considered and decisions are appropriately made. This may also help to provide space for extended family, kinship groups and community in the resolution-making process or decision where that is appropriate.

To think about...

Because of the time and resources involved in building a tribunal, it may make most sense when multiple communities sharing a language, principles, values, laws, or treaty areas build a tribunal together. This way the cost and effort can be shared.

Some disadvantages...

The main disadvantage with a tribunal is that it takes resources and time to build one. First, you need the authority to create the tribunal. This usually means creating a law that explains the powers and membership of the tribunal and the processes for using it. This sometimes means partnering with the Canadian legal system.

Second, you need to create rules and procedures for each dispute resolution process. You may need a range of decision-makers with different expertise, especially if your tribunal includes many processes. You need professional staff to organize and maintain your tribunal. Tribunals need someone to schedule hearings, provide information to participants about the process, and publish decisions. In other words, it is hard work to create and maintain a tribunal.

When might you want to build a tribunal?

- When you have the authority and resources to create and maintain a tribunal.
- When multiple communities that share language, values, and laws want to build a tribunal together to share effort and costs.
- When you want to offer many processes to participants under one organizational structure.
- When you want to include your own appeal processes and enforcement measures in your system.
- When you want decision-makers with special knowledge about an area of dispute.

2.4. COMMONLY-USED ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

Alternative dispute resolution mechanisms are non-court processes within the Canadian legal system. These were developed to provide more co-operative ways to resolve Canadian law disputes. Although some of these processes can provide space for Indigenous legal traditions, these processes are not themselves Indigenous.

2.4.1. Mediation

In mediation, a neutral third party works with the participants to voluntarily resolve their dispute. However, the mediator is not the decision-maker. The mediator is a facilitator who helps participants resolve their own dispute. The mediator's role is to help the participants identify what needs to be resolved and communicate with each other. The participants agree on who the mediator is for their dispute.



Often the mediator will also present options for resolutions and assist participants in creating agreements to resolve their conflicts. Sometimes a mediator gives thoughts on what a court might say about the dispute to give participants an idea of who might win in a courtroom context.²⁶

Mediators are usually trained professionals with special training, but do not need to have a legal education. This may make it more likely for you to find or train mediators from your community.

Advantages and disadvantages...

The process in mediation is informal and flexible. Participants meet in a room with their representatives and the mediator around a table. It is not necessary for participants to have lawyers in mediation to speak for them, but they often have some representative with them. Mediation is less expensive and takes less time than court.

Because the participants have more control over the process, mediation can include other people in the process or resolution. It is possible for extended family, kinship groups and community members to participate if that is what the participants want. Indigenous legal traditions can be accommodated if that is critical to resolving the dispute. However, the mediator may not understand Indigenous legal traditions.

Participants also have greater control over what is discussed in mediation. Mediation is meant to find resolutions that all participants agree to and preserve relationships rather than create a winner and a loser. This can be helpful for emotional resolution and deciding on creative remedies.

However, because mediation assumes two equal participants, it can hide gender and power imbalances. It may be easier for a participant to negatively influence the other's decisions when a power imbalance exists. Mediation assumes that participants are willing to cooperate to create a resolution. If there is a great deal of conflict between the participants, mediation may not be the best option to resolve the dispute.

The final resolution is usually written up in an agreement or a confidential report stating why and on what issues an agreement cannot be reached.

Participants cannot appeal a mediated agreement except when the agreement violates the law. Traditionally, mediation agreements are highly confidential and do not become part of a public record. However, if you want to create a record of issues and resolutions or outcomes of mediations so you have a body of decisions to rely on and provide to your community, you can do so by cutting out identifying information necessary to protect participants' privacy.

Because the participants have an agreement they are both satisfied with, they may be more likely to comply with the decision. However, if one participant does not agree with the outcome, it may be more difficult to enforce because it is not a decision from a judge. You may want to provide a way for participants to get an agreement recognized by the courts, Chief and Council or a lands management office for enforcement.

To think about...

Mediation has the advantage of having fewer operational costs compared to other, more formal, processes.

Your main tasks with this approach is to maintain a roster of mediators to provide to participants, provide basic information to participants, and maintain records.

When might you want to use mediation?

- When there may be conflict to resolve outside of the property dispute.
- When you want to space for other voices in the process or resolution.
- When preserving relationships is a key goal.
- When you want members of your community to facilitate disputes.
- When participants want an informal, private environment.
- When there are no power imbalances, safety concerns or high conflict.
- When the resolution can or should be private.

2.4.2. Negotiation



In negotiation, participants work together to come to an agreement about how to resolve their dispute. The participants can negotiate a resolution on their own, but usually use representatives or lawyers to do so. Sometimes a neutral third party will help the participants negotiate.

Negotiation involves the participants communicating what they will agree to in a dispute and then bargaining with each other to reach a resolution. Unlike mediation or more formal processes, a negotiation does not have to take place in person, at a specific location or over a set period of time. Negotiations can happen by telephone.

Advantages and disadvantages...

Negotiation gives participants control over the process and outcome. Participants can create agreements on any matter consistent with the law.²⁷ However, because negotiation assumes two equal participants, it can hide gender and power imbalances. This means it may be easier for one participant to negatively influence the other's decisions. It is also important that all participants are willing to co-operate to create

To think about...

Negotiation is the least expensive approach for a community since it involves participants finding representatives to help them resolve a dispute.

Your main tasks with this approach is to maintain a roster of representatives, provide basic information to participants, and maintain records of issues and resolutions.

a resolution. Negotiation is about finding resolutions all participants agree on rather than creating a winner and a loser.

The final resolution is usually written up in an agreement. Negotiated agreements are usually highly confidential and do not become part of a public record. However, like mediation outcomes, when agreements are registered with your First Nation, you may be able to create and maintain a record of issues and negotiated resolutions so you can refer to it for a rough range of workable solutions for future conflicts.

Because participants have reached an agreement they are satisfied with through negotiation, they may be more likely to comply with their decision. However, if one participant does not agree with the outcome, it may be more difficult to enforce. You may want to provide a way for participants to get an agreement recognized by the courts, Chief and Council or a lands management office for enforcement.

When might you want to use negotiation?

- When participants do not need a facilitator or decision-maker to resolve their dispute.
- When participants do not need to meet face to face.
- When preserving relationships is a key goal.
- When the resolution can be private.

2.4.3. Arbitration

Arbitrations are similar to court hearings. There is a decision-maker, usually called an adjudicator. Decision-makers are experts in an area of law and are normally from outside the community. Participants need the help of a representative (usually a lawyer) to speak for them during an arbitration. The decision-maker listens to the dispute and then goes away and makes a decision. Adjudicators often rely on past decisions, or precedent, to come to their decisions. Participants are legally required to comply with the final decision.

Advantages and disadvantages...

Arbitrations are not as formal as court hearings, but there are rules and procedures that participants have to follow during the process. Arbitrations often happen in a private room with just the participants, their representatives and the adjudicator. The participants can often choose the adjudicator and schedule adjudications to fit their

schedules. It often costs less and takes less time to go to arbitration rather than to court. As a result, arbitration is often less intimidating and more private than court.

Arbitration is helpful when a participant needs a clear decision and a straightforward way to enforce it. If there is a power imbalance in a relationship, arbitration may create a fair resolution. Decisions are usually written and can become part of a public record. Participants can usually enforce the decisions in court. You may want to provide a way for participants to get an agreement recognized by Chief and Council or a lands management office for enforcement as well.

There is usually a clear way to appeal the decision, but the reasons allowed for appeal may be limited. In some provinces, you can appeal an arbitration decision the same way as a court decision.²⁸ In other provinces, the appeal may be limited to administrative justice principles. This means that participants can appeal when they believe the decision-maker has not been neutral or they have been treated unfairly. For example, if participant feels that they have not had a chance to present their side of the story, they can ask a court to review the decision. Participants can also appeal decisions when they believe they are inconsistent with the law or if the decision-maker did not have the power to make a decision.

To think about...

Arbitration is typically a more costly approach for communities. This is because it often involves creating a tribunal.

Even without a tribunal, you need rules and procedures to conduct arbitrations and this will take time, effort, and expertise to create.

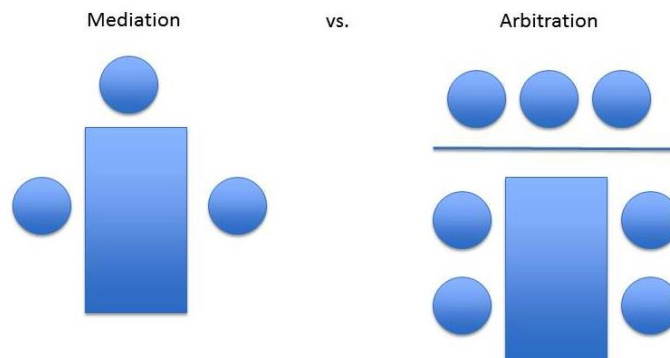
It may take more staff to support arbitration. This is because staff will need to understand the rules and procedures to give basic information to participants. They will also need to create and maintain records. Some communities have a roster of arbitrators and some appoint a standing panel.

When might you want to use arbitration?

- When you want a third-party decision-maker with special knowledge about an area of dispute.
- When you want clear appeal processes and enforcement measures.
- When there are high conflicts, safety issues, or power imbalances among participants.
- When you want to create a precedent. This means that you think there is an important issue in the dispute that you want decided by a decision-maker because it will impact how future decisions will be made.
- When a participant may not comply with a decision and another participant may need to enforce it easily in court.

2.4.4. Mediation-Arbitration

Mediation-arbitration (med-arb) is a Canadian legal process that blends the processes of mediation and arbitration into one. In med-arb, the participants try to reach an agreement together with a mediator. If the dispute or parts of the dispute cannot be resolved through mediation, the process switches to arbitration.



Sometimes the mediator is a trained mediator and adjudicator. This makes it easier for the process to smoothly move to arbitration if it is necessary. It is important to have a skilled mediator-arbitrator that both participants can agree on. If the participants need to agree on both a mediator and an arbitrator, this could create delays. This is especially the case if the parties are having difficulty resolving their dispute or if one of the participants believes the mediator cannot be a neutral decision-maker.

Advantages and disadvantages...

Med-arb can motivate participants to mediate to avoid having a decision made by a third party. Med-arb may also be useful in complicated situations where there are many disputes, but only some of them can be resolved easily. A med-arb process could provide space to include Indigenous legal processes or law for dispute resolution. Arbitrated decisions are usually written and may become part of a public record. Participants can usually enforce the decisions registered in court. You may want to provide a way for participants to get an agreement recognized by Chief and Council or a lands management office for enforcement as well.

Although mediation does not cost a lot to maintain as a process, arbitration may. Arbitration sometimes involves creating a tribunal. Even without a tribunal structure, you will need rules and procedures to conduct the arbitration, as well as maintaining a roster of qualified arbitrators, and this will take time, effort, and expertise to create. It may also take more staff to maintain a process that includes arbitration. This is because staff will need to understand the rules and procedures to give basic information to participants. They may also want to create and maintain records of issues and resolutions and decisions.

When might you want to use mediation-arbitration?

- When participants have many issues in a dispute, but only some of them can be resolved through mediation.
- When there isn't high conflict among participants and they hope to resolve their dispute through mediation.
- When you have the resources to support arbitration.
- When participants have access to trained mediation-arbitrators or many options for mediators and arbitrators.

2.4.5. Collaborative Law

In a collaborative law process, participants sign an agreement that they will not go to court to resolve their dispute. Instead, participants agree to work together with their lawyers to find a solution together. Their lawyers are trained in collaborative law and also agree not to go to court. If the participants later decide to go to court, they have to hire new lawyers. Participants cannot use information from the collaborative law process against other participants if they go to court.²⁹

Usually, there are a number of structured meetings in a collaborative law process. The participants agree to be open and honest with each other about the dispute and not hide information that is important to resolving it, such as financial information. They also agree to keep their conversations confidential. The meetings include the participants and their lawyers, but no mediator or decision-maker. Other professionals are available to the participants if they are needed. For example, a financial advisor or counselor may be involved in a dispute involving matrimonial property.³⁰

At the end of the process, the parties create a written agreement. This is a legal contract that can be enforced if it is filed in court.³¹ You may want to provide a way for participants to have an agreement recognized by Chief and Council or a lands management office for enforcement. Because the participants work together to create their agreement, it is more likely that they will comply with it.



Advantages and disadvantages...

Collaborative law is distinct from most Canadian law processes because it focuses on more than just the legal issues between the participants. Its goal is for participants to have the knowledge and skills to make their resolution successful. Because collaborative law uses non-legal advisors to help the participants, there is space for voices and advisors from a participant's family, kinship group, or larger community. The co-operative environment can be less stressful for participants. It takes less time and money than court.

Collaborative law may not be appropriate in some circumstances. For example, it is difficult to have open and honest meetings if there is a power imbalance or a history of domestic violence in a relationship. It may also be inappropriate if the participants do not have a good relationship and it would be difficult for them to reach an agreement.

To think about...

Collaborative law is a relatively low-cost option. Individuals access collaborative law processes by first contacting a collaborative lawyer.

Your community could support a collaborative law process by creating and maintaining a roster of professionals, such as collaborative lawyers, counselors, and financial advisors.

You will also likely need staff to explain collaborative law processes to participants and a means of maintaining a record of issues and resolutions.

When might you want to use collaborative law?

- When there is conflict to resolve in addition to the matrimonial property dispute.
- When you want space for other voices in the process or resolution.
- When you want a holistic approach to resolution, involving experts outside of the law.
- When preserving relationships is a key goal.
- When participants want an informal, private environment.
- When you don't need a decision-maker or mediator.
- When participants have access to trained collaborative lawyers.
- When there are no power imbalances, safety concerns, or high conflicts.

2.5. COMMUNITY-BASED JUSTICE AND DISPUTE RESOLUTION MODELS



2.5.1. Why Develop Your Own Community-Based Dispute Resolution Process?

The Siksika Nation said:

That the Siksika Nation developed the community-based justice *Aiskapimohkiiks* Program in order to “assist all Siksika Nation members to resolve disputes.” The *Aiskapimohkiiks* Program seeks to divert cases from formal adjudication, “thereby achieving maximum self-determination while restoring independence, solidarity, unity, peace and harmony.”³²

The Treaty Four Governance Institute said:

That the Treaty Four Governance Institute initially developed the Treaty Four Administrative Tribunal in response to the following needs and issues identified by community members:

- Internal appeals are seen as biased and ineffective
- External systems are seen as 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).³³

The Stó:lō Nation said:

That when developing the *Qwi:qwelstóm: Healing and Peacemaking Circles* Program, the Stó:lō Nation made a commitment that the Stó:lō justice program would:

- be based on Stó:lō culture, customs and traditions;
- be supported by the Stó:lō communities; and
- be driven by the Stó:lō people.

The core of these three guiding principles was a “desire that [a justice program] reflect the Stó:lō peoples’ aspiration to be self-determining and, by implication, to realize their right to experience “justice” according to Stó:lō customs and traditions. Doing so means bringing “justice” back to the people by giving them an opportunity to play meaningful roles not only in the problem, but also in its solution.”³⁴

2.5.2. Tribunals/Panels/Committees

Some Indigenous communities have developed, or are developing, dispute resolution tribunals, panels, or committees.

These processes can be organized by one community, a tribal council, or by a partnership between several communities. They often work together with other models, like mediation or peacemaking, or even with courts. These models have formal and transparent structures, policies, and procedures. There are clear rules and a process with clearly defined steps. They are usually public rather than private.

Elders and other respected people with relevant knowledge and expertise are selected to sit on a tribunal, panel, or committee. These decision-makers hear information and stories from all parties to an issue and then make a decision about it. They may be appointed for a certain term or may be drawn from a larger pool or roster of decision-makers in order to ensure they are impartial and there are no real or perceived conflicts of interests.



Tribunals, panels or committees may:

- **Be advisory** – give non-binding advice or recommendations on the best decision, plan, or resolution,
- **Be adjudicative** – make decisions that are binding (final and enforceable), or
- **Be an appeal mechanism** – hear and make rulings on appeals from other less formal processes.

Notes:

2.5.3. Some Tribunal Examples

Name	Communities served?	Who can access it?	How do parties access it?	Issues dealt with?
Long Plain First Nation ³⁵	Long Plain First Nation in Manitoba.	Longs Plain First Nation members.	A participant seeking the resolution of a dispute is required to file a written notice of appeal with the Land Authority within 30 days of becoming aware of the issue. This must include the issues, facts, and arguments relied on and relief sought.	Applies to disputes around "interests and rights in Lands." ³⁶ The tribunal does not deal with Chief and Council decisions that are unrelated to lands, to housing decisions or administration of estates, unless all the immediate relatives consent.
Anishina-bek Nation Tribunal and Commission ³⁷	39 Anishinabek First Nations in Ontario.	First Nations, citizens, and non-members of the Anishina-bek Nation.	This is typically used where mediation or sharing circles may not work well for the parties or where the parties would like a decision made.	The tribunal's issues vary and includes nation-wide disputes such as between First Nations, governance and administration, election codes, constitutions, matrimonial real property, citizenship, etc.
Treaty Four Administrative Tribunal ³⁸	34 First Nations in Treaty 4 territory.	First Nation members where the First Nation law designates the Tribunal as the dispute resolution mechanism.	It is intended to be available when disputes cannot be resolved at the community level through other processes (mediation and peacemaking attempted first).	The tribunal deals with disputes involving the application of First Nation laws in Treaty 4 territory. Does not deal with criminal matters or make decisions dealing with awards for costs or damages.



Steps in Process?	Outcomes?
<p>Parties move through the following ordered stages of dispute resolution: "facilitated discussions," appeal, or as a final option, court adjudication.</p> <p>If the parties are unable to reach consensus through facilitated discussion, the appeals stage is triggered.</p>	<p>The Appeal Panel may order an action be taken or stopped; confirm, reverse, substitute a decision; or refer a matter back for a new decision.</p> <p>The decisions of the Appeal Panel must be in writing and signed by the Chair and are binding except for review by a court of competent jurisdiction.</p>
<p>Typically, three community members, who are trained in hearing evidence, sit on a panel and hear the parties.</p> <p>In cases where the community panel members may be in conflict with the dispute or the parties, a panel member may be brought in from another community.</p>	<p>The panel is given the authority to hear evidence, make recommendations, and to make a final decision.</p>
<p>The process involves five stages:</p> <ol style="list-style-type: none"> 1. determination of Treaty 4 jurisdiction, 2. pre-hearing stage, 3. the hearing, 4. decision writing, and 5. after the decision <p>Lawyers for both disputing parties may be present but are precluded from actively participating and cross examination is limited.</p>	<p>The Tribunal can make findings of fact and settle disputes through the application of First Nation law. They may also make non-binding recommendations on possible ways to resolve the conflict, 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."</p> <p>While recommendations of the tribunal are non-binding, "the agreement to participate in the adjudicative process amounts to consenting to the binding Tribunal decision."</p>

2.5.4. Other Examples of Tribunals, Committees, and Panels:³⁹

Community based Justice Committees – These committees or panels deal with mainly criminal matters. They don't make findings of fact when people disagree about what actually happened. These are most often advisory and give advice to a judge about sentencing plans or options. The judge usually follows their advice.⁴⁰

- ***Aiskapimohkiiks Program*** was developed as a community-based justice program in order to “assist all Siksika Nation members to resolve disputes.”⁴¹ The *Aiskapimohkiiks* Program seeks to divert cases from formal adjudication, to achieve maximum self-determination while restoring independence, solidarity, unity, and peace and harmony.

The *Aiskapimohkiiks* process involves two phases – mediation and arbitration – and endeavors to incorporate Blackfoot traditions, values, and customs.

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 includes an elder, a member of the Siksika community, and an independent chairperson who conducts the arbitration. The *Aiskapimohkiiks* Program also involves an Elders Advisory Committee.

- **First Nations Custom Advisory Panels Program:** Yellowhead Tribal Community Correction Society. This justice initiative operates in the five member First Nations in the Yellowhead Tribal Council. The recipient nations are the Alexander First Nation, Alexis Nakota Sioux Nation, Enoch Cree Nation, O'Chiese First Nation, and the Sunchild First Nation.⁴²

Tribunal Models:

- **Iroquois Dispute Resolution Tribunal – Six Nations of Grand River:** This tribunal is set out in the matrimonial real property law of the Six Nations of Grand River: *A Law Concerning Matrimonial Real Property*. The tribunal is anticipated to be the final decision-maker with regards to matrimonial real property disputes, but there is a right to appeal in certain circumstances.

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.”

Six Nations has also developed a regulation to govern the tribunal process. 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 must be "fair, just and equitable."

There are detailed regulations that outline: a mandatory mediation step, exceptions in cases of domestic violence, how to commence a tribunal proceeding, anticipated steps in the tribunal process, appeal procedures to an Iroquois appeal body, and compliance or enforcement measures.⁴³

- **Métis Settlements Appeal Tribunal** is one of the longest standing Indigenous tribunals in Canada. It is also unique in that it was established by the *Métis Settlements Act* in Alberta.⁴⁴ Part 7 of the *Act* addresses the establishment and powers of the tribunal. The *Act* sets out who makes up the tribunal as well as the powers and responsibilities of the appeal tribunal.

The tribunal has a number of panels which can hear appeals on several types of matters including membership appeals, land appeals, surface access, and other disputes such as business property or mineral projects. In addition, they can hear appeals on anything where all the parties agree the tribunal can decide the matter.⁴⁵

The *Act* allows the tribunal to set up "any means of dispute resolution process that it considers appropriate, including mediation, conciliation and arbitration processes."⁴⁶

2.5.5. Circle Processes

Some Indigenous communities have adopted circle models of decision-making and dispute resolution. These typically address issues involving harm or safety concerns and are most commonly connected to criminal justice or child protection systems.

Circle processes are called many different things, but tend to follow a similar format, with certain elements in common. All participants have to consent to participating in them. They are facilitated by a trained facilitator. They are usually private with only the participants and invited others being involved and aware of what happens. Family, community members, and professionals may be invited to participate and there is a focus on involving extended family and community where possible.



Most circle processes have a pre-process to evaluate and prepare participants. There are often high expectations about confidentiality about what happens in the circle process itself. They usually use holistic and restorative approaches to the issue and people involved. They range from standardized processes to processes where communities have included or deeply integrated their own legal, cultural, and spiritual principles and practices into the process as key elements and overarching guiding principles. Circle processes usually lead to a written agreement or plan. Some have follow-up sessions to see how the agreement or plan is working.

Common circle processes in use include:

- **Sentencing Circles** – facilitated circles connected to the criminal justice system and often conclude by advising a judge as to the appropriate sentencing plan for an individual offender.
- **Healing/Peacemaking Circles** – facilitated circles usually connected to the criminal justice system but may extend beyond to other harms and disputes. They may be extended processes over a period of time, and include or connect people to therapeutic, cultural, and other resources needed for positive change.
- **Family Group Conferencing** – facilitated group processes that started in New Zealand but have become widely used and accepted in Canada, particularly in relation to child protection and youth issues. They are usually child-focused and invite family and extended family members to come together and share perspectives and brainstorm solutions for a specific issue.

Common Steps in Circle Processes:

1. Referral:	Depending on the issue, participants may be referred through the court system, the child welfare system, or, in some cases, they can self- refer or be referred through Chief and Council or other community-based helpers or service-providers.
2. Preparation:	A trained and paid facilitator talks to the referred individuals and identifies family, extended family and community members, elders, supporters and professionals who should be present. The facilitator usually talks privately and individually to all possible participants, to gauge the dynamics, risks, and likelihood of success. In some processes, an elder or spiritual leader may also be involved. In some processes, there may be behavioural or spiritual preparation required.
3. Opening:	The facilitator welcomes participants to the circle. Sometimes an elder or spiritual leader will open with a prayer, a smudge or a brief ceremony. Rules and expectations are clearly outlined for safety.
4. Introductions/ Role Identification:	Most circle processes begin with a round of introductions, with all people identifying their roles and why they are present.
5. Issue Identification	The facilitator invites all participants to talk about how they view the issue. This may include sharing impacts or taking responsibility, as well as discussing worries, strengths, priorities, interests, and hopes. Participants may feel and share strong emotions. This step may be more or less structured but it is always facilitated by a trained facilitator.
6. Teaching/ Expanding Understanding:	There is often a teaching component to circle processes. Where elders, spiritual leaders, or other knowledgeable and respected people are involved, they may give cultural or spiritual teachings, advice or words of hope and encouragement. Where professionals are involved, they may discuss rules, expectations, and resources available to help.

7. Development of a plan or resolution:	The facilitator may assist or may leave while participants develop an action plan or proposed resolution. This plan or resolution is usually put into writing. It may or may not follow a pre-made form.
8. Acceptance of the plan or resolution:	The facilitator or someone else with authority (e.g., a social worker in child welfare matters) reviews the proposed plan or resolution and suggests modifications as required and accepts or approves it. Typically participants sign this agreement, which the facilitator types up afterwards, gives to participants, and keeps on file.
9. Closing:	The facilitator brings the circle to a close. Typically, all participants are given a chance to say something and check in about how they feel. Where elders or spiritual leaders are involved, they may end with a prayer, smudge, or brief ceremony.
10. Follow-up:	The facilitator should follow up to see if the agreement or plan is being carried out. This may include assistance to connect to resources, or the provision of support and problem-solving. There may be specific timelines and dates to check in about progress, as well as consequences or alternate resolutions when a plan is not being followed. There may be an additional closing ceremony or celebration when the plan is complete, or a positive report to an authority like a court or government department involved.

Notes:

Some Circle Examples:

	1. Communities served?	2. Who can access it?	3. How do parties access it?
Tsuu T'ina Office of the Peacemaker ⁴⁷	Tsuu T'ina Reserve in southern Alberta	Residents of the Tsuu T'ina First Nation	Cases go through the Tsuu T'ina Court. Cases are reviewed by the Crown counsel and the coordinator and, matters are diverted from regular court to the Office of the Peacemaker for resolution if appropriate. Participation must be voluntary and victims (if there are any) must agree to the peacemaking process.
Qwi:qwelstóm - Stó:lō Healing and Peacemaking Circles ⁴⁸	24 Stó:lō First Nations in British Columbia	Residents of 24 Stó:lō First Nations	There are referrals from the RCMP (pre-charge), Crown Counsel (post-charge), probation officers (pre-sentence), department of fisheries and oceans, Xyolhemeylh, the Ministry of Children and Family Development, community members, and self-referrals. The person who has done the harm must take responsibility for it.
Meenoostahtan Minisiwin Family Justice Program ⁴⁹	17 First Nation Communities in northern Manitoba plus Thompson, Winnipeg, the Pas, and Gillam.	First Nations families, children and service providers living in these areas.	There are referrals from Child and Family Services [CFS], CFS agencies, schools, Chief and Council, court system, community service providers, and self-referrals. Issues must be related to a mandated CFS matter and participation must be voluntary.



4. Issues dealt with?	5. Steps in Process?	6. Outcomes?
Reserve bylaws and all criminal matters other than homicide and sexual assaults.	The process follows a standard routine, with an opening, 4 rounds, and a closing. There is preparatory work and follow up.	The offender signs an agreement to follow through with certain tasks according to the resolution reached within circle. Once these tasks are completed, there is a final peacemaking circle with a ceremony and celebration. The matter is then returned to court with the peacemaker's report. The prosecutor assesses the outcome and the nature of the offence and may withdraw charges or submit the report to the court for serious offences.
Criminal matters, to replace trial process, make sentencing recommendations, reintegrate offenders after prison, or develop healing plan as part of sentencing or probation orders. Community issues, such as family disputes, custody concerns, divorce settlements and improving relations between community members and professionals, between community members and Stó:lō employees, between Stó:lō staff and supervisors.	The process varies depending on the issue and whether it is a healing or peacemaking process. Participants are required to abstain from drugs and alcohol and rest for four days prior to a circle.	The outcome varies based on the issue, it may result in sentencing recommendations, healing plans, or agreements between participants.
All aspects of mandated child welfare, other situations where children's best interests are at risk, including: care placement, parent-child conflict, family-agency-system conflicts, service plans for neglect and abuse, family violence, larger community-wide conflicts, advocacy for families trying to access service and to address larger systemic problems affecting children and families.	The process varies depending on the issue., It may include lengthy and complex shuttle diplomacy and use of representatives where warranted.	The outcome is a Family Action Plan, which details how the long term care and protection of children will be addressed, including who and what resources need to be involved, each participant's contribution, monitoring, and contingencies. Standard follow up is 1, 3, and 6 months following agreement, but varies greatly according to specific issue and needs.

Other Examples of Circle Processes

B.C. Circle and Family Group Conferencing Models

Over 2004 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.

There are eleven participating agencies that have implemented various "collaborative decision-making" processes including family group conferencing, traditional decision-making, and hybrid models. 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."⁵⁰

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. 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."⁵¹

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.⁵² Traditional decision-making processes also involve Elder wisdom and knowledge. They also generally 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." 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." Multiple meetings may be required in order to reach a resolution.⁵³

Some examples of these circle processes in BC include:

- *Carrier Sekani* Family Services Society,
- *Haida* Child and Family Services Society,
- *Kla-how-eya* Aboriginal Centre,
- Northwest Inter-Nation Family and Community Services Society,
- *Nuu-chah-nulth* Tribal Council, and
- Squamish Nation.

Calgary Rockyview Child and Family Services (CRCFS) Native Services Traditional Mediation Circle

The mediation circle process offered by CRCFS is based on the Blackfoot Circle Structure model and is a "process based on traditional Blackfoot ceremonies." The process is conducted within a tipi circle arrangement in which participants and those with the rights and responsibilities as ceremonial bundle holders have a seating position in accordance with Blackfoot legal traditions.

The circle process follows ceremonial protocols that have "a specific beginning and ending" and define "the appropriate position and duties of each individual participating in the ceremony, as well as the role of the cultural materials involved, namely, the bundle itself, the pipe, and the smudge."

The mediation circle process "gives all participants non-exclusive access to the process and ensures that they all contribute to the same goal." Thus, "all participants have to be clear about their roles in that process" and be willing to "learn and take on the responsibilities that come with a specific position in the circle."

The model is "based on community participation because it allows for each individual's voice" and is not based on favouring "experts" or "outsiders to the community."⁵⁴

Mi'kmaq Family Group Conferencing

The Mi'kmaq Family and Children Services Agency developed Family Group Conferencing in 2005, as "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."

The Agency offers Mi'kmaq families the opportunity to engage kinship networks for child placement as opposed to foster care or family court. Family Group Conferencing

has expanded and presently receives referrals from the Family Support Department and the various Family and Community Healing Centres.

One reason it has expanded is, as the Mi'kmaq Family and Children Services Agency indicates is that 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 freely spoken. Everyone in the Circle has a piece of truth and everyone's contribution is intended to make it whole.”⁵⁵

Nishnawbe Talking Circles

The Nishnawbe-Aski Legal Services Corporation developed a process called the Talking Together Program in 2002 to address the child welfare needs of 51 First Nations communities in the Nishnawbe-Aski Nation (NAN) territory. The program works with on- and off-reserve NAN First Nations children who have been apprehended and their families. The Talking Together Program utilizes a restorative, circle approach to bring participants together to discuss family problems in a non-judgmental way.

The circle is comprised of family members, workers, agency representatives, and community elders. In the circle, participants examine the ramifications of the issues experienced by a particular family. "If an agreement is reached, it is used as the basis for the Plan of Care, and filed with the Court." Ultimately the purpose of the Talking Together initiative is to strengthen the family unit.⁵⁶

2.5.6. Mediation/Mediation-Arbitration

Some First Nations who have implemented their own land codes have decided to require or recommend that separating couples involved in matrimonial real property disputes attempt to reach an agreement through mediation prior to going to arbitration, a tribunal, or a court to resolve the matter. Interestingly, many provincial courts across Canada have a similar requirement or offer mediation services for family law matters. Where mediation is required there are usually exceptions made for certain circumstances, such as cases involving power imbalances or intimate partner violence.

A First Nation may refer parties to an already existing outside roster of provincially regulated mediators, or create its own inside roster. Where First Nations create their own roster of mediators, they may include elders or other knowledgeable and respected community-based people on the roster, who can add cultural, spiritual, or ceremonial aspects to the mediation process.

Mediation is a highly individualized and private process that typically results in a signed, written agreement or a confidential report stating why and on what issues an agreement cannot be reached. Agreements reached or confidential reports explaining why an agreement could not be reached are then filed with land managers.

Examples:

First Nation:	Is mediation mandatory or voluntary?	Mediation Roster – Is it maintained inside or outside community?	What is the next step if an agreement is not reached?
Beecher Bay First Nation ⁵⁷	Mandatory	Inside community, Council maintains rosters, they must include “one or more elders qualified to apply traditional laws of the big house.”	Court
Kitselas and WestBank First Nations ⁵⁸	Mandatory	Outside the community, parties access the BC Mediator Roster Society.	Court
Six Nations ⁵⁹	Mandatory	Inside the community, mediators are drawn from inside the community and given mediation training if necessary.	Iroquois Dispute Resolution Tribunal

Other Examples:

Haisla First Nation:

The Haisla Nation Land Code was ratified in 2014⁶⁰ and incorporates 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.”

If informal discussions are unsuccessful, the parties may attempt mediation, with a mediator selected from the British Columbia Mediator Roster Society. 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.

If mediation fails, then the parties may apply to the British Columbia Arbitration and Mediation Institute in order to commence arbitration proceedings. The rules of the British Columbia Arbitration and Mediation Institute govern the arbitration process. The process is not currently available for determining housing allocations.⁶¹

Opaskwayak 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
- Matsqui First Nation
- McLeod of Lake Indian Band
- Lheidli T’enneh First Nation
- Muskoday First Nation
- Nipissing First Nation
- Opaskwayak Cree Nation⁶²

However, the Opaskwayak Cree Nation does not mandate mediation. According to their matrimonial real property law, mediation is an option that either participant can arrange prior to seeking formal adjudication through the Canadian courts.⁶³

The Mississaugas of Scugog Island First Nation’s process is mandatory, but the spouses may choose the mediator. If the spouses cannot agree on a mediator, the Band Council will choose a suitable mediator.

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. An alternative process, such as formal adjudication, may not be pursued unless such a certificate can be produced.⁶⁴

Skawahlook First Nation:

The Skawahlook First Nation community, as part of the Qwi:Qwelstom process, provides “justice assistance” to disputing spouses. Qwi:Qwelstom refers to “justice” and states it is based on traditional dispute resolution techniques. 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.”⁶⁵

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. If mediation is unsuccessful and a 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 chair).

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 Nation land.

Stz-uminus First Nation:

The Stz’uminus First Nation employs informal discussions, mediation and arbitration in order to settle land-based disputes. If parties are unable to resolve their dispute through informal discussions, mediation may be pursued. The parties may jointly appoint a mediator or may request that the Lands Advisory Board Resource Centre do so. If mediation is unsuccessful, the parties may seek arbitration. The same appointment process that governs the mediation also governs the arbitration.⁶⁶

Tsawout First Nation:

The Tsawout First Nation encourages spouses to resolve property disputes “through cooperative discussion or through mediation or other alternative dispute resolution” prior to applying to the court for formal adjudication. Spouses may apply to the court provided reasonable efforts have been made in order to resolve the dispute. The burden is on the person opposing the application to court to demonstrate that reasonable efforts have not been made through alternative dispute resolution.⁶⁷ This approach is also adopted by the Tzeachten First Nation.⁶⁸

2.6. DISPUTE RESOLUTION PROCESSES FROM INDIGENOUS LEGAL TRADITIONS

*Indigenous legal traditions can have great force in people's lives despite their lack of prominence. Indigenous legal traditions are a reality in Canada and should be more effectively recognized.*⁶⁹



2.6.1. Indigenous Law – What Are We Talking About?⁷⁰

What is law? In its simplest understanding law is found in the ways we solve problems, make decisions, create safety, and maintain or repair relationships. When discussing what law is we often recognize it in our daily lives as something written in acts, codes, or regulations and enforced by judges and police. While this understanding of law is a correct, we believe that it is only one form that law can take. Different approaches to solving problems, making decisions, creating safety, and maintaining or repairing relationships exist.

We start with the belief that forms of law also existed, and continue to exist, in Indigenous communities. However, with the absence of courts and written texts, the expression of Indigenous law is not the same as Canadian law. Instead Indigenous law can be found in stories and in the interactions between people and their environment as they respond to harm, injuries, and disputes. For example, within these responses Cree law is expressed in principles, procedures, obligations, and rights that communities have used, upheld, and passed on for thousands of years. This was not just about obeying certain individuals or following certain rules. It was about people thinking through principles and acting on their obligations together. This still goes on today in different ways.

We believe that Indigenous laws and their approaches to problem solving, making decisions, creating safety, and maintaining or repairing relationships are still capable of thriving and serving the needs of communities. This belief is held despite historical efforts to minimize the role of Indigenous laws in communities and its treatment as something other than law. An important question is how these laws can best thrive and serve the needs of Indigenous communities today.

Law is something that people do – and it has to be practical and useful to life – otherwise, why bother?⁷¹

Where there are Indigenous people resolving disputes there is Indigenous dispute resolution:

In many community-based dispute resolution processes, Indigenous communities work hard to include their own Indigenous laws, to greater or lesser extents, often through language, teachings, and ceremony that guide participants in identifying and practicing important values and principles, roles, and responsibilities.

For example:

- The **T'suu T'ina Peacemaking Circles** work to “resolve the conflict, heal the offender and the victim, and restore relationships.” A Peacemaking Circle always begins with a ceremony.“ It may be a traditional ceremony using sage or sweetgrass, a prayer, or just a simple statement that the circle is about to deal with an important matter.”⁷²
- The **Anishinabek Nation Tribunal and Commissions** use several different dispute resolution processes, including sharing circles, mediation, and panels. All these processes “draw on the traditional values and dispute resolution processes of the communities” served. In particular, they respect the seven Anishinabek grandfather teachings: wisdom (nbwaakawin), love (zaagidwin), respect (mnaadendmowin), bravery (aakdehewin), honesty (gwekwaadziwin), humility (dbaadendiziwin), and truth (debwewin).

The appeals and redress system involves community members by having them sit on the committees. It respects community individuality by providing for the procedures to be shaped to fit the particular community's tradition or desired system. Some of the goals are to maintain relationships and to be fair, neutral, and confidential.⁷³

- When consulting with elders while developing the **Stó:lō Qwi:qwelstóm Program**, it came out that 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.

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. It has four key elements: “the role of Elders; the role of family, family ties, and community connections; teachings; and spirituality.” 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.”⁷⁴

- The **Treaty Four Administrative Tribunal** incorporates specific ceremonies (if requested by participants) and Elders advise participants so that they are aware of the method, process, and the “Laws of Kinship that govern the community.”⁷⁵
- The **Calgary Rockyview Child and Family Services Native Services Traditional Mediation Circle** was developed in a collaborative process by the Calgary Rockyview Child and Family Services Native Office and Reginald Crowshoe, a Piikani Blackfoot elder and keeper of the Small Thunder Medicine Bundle Pipe. The process is based on traditional Blackfoot ceremonies and includes seating arrangements, protocols, and cultural materials that are rooted in Blackfoot legal traditions.

All participants, including service providers “have to be clear about their roles in that process” and be willing to, “learn and take on the responsibilities that come with a specific position in the circle.” The model “is based on a worldview that is not structured in a hierarchy and combines a balance of abstract and physical components that needs to be carefully maintained.”⁷⁶

- The **Beecher Bay First Nation’s Land Code** states that Council is responsible for maintaining a roster of mediators after consultation with the Elders Advisory Council and the Lands Management Advisory Committee. 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.”⁷⁷
- The development team for the **Meenoostahtan Minisiwin Family Justice Program** decided it was important, from the outset, to access the worldview and nuances contained within the Cree language. The name of the program was chosen very deliberately, and translates into “let’s all set our families right.” Eleven Cree expressions were selected as cornerstones for the program. These include inninu (human being) and inisiwin (wisdom), the connection between these two terms implies that wisdom lies within the individual. Minahsin (beautiful or good) and minisiwin (family), and this connection suggests the family is seen as a place of

beauty or a place to create beauty. The facilitator is known as okweskimowew (headman or person who speaks, one who speaks well).⁷⁸

Your Indigenous laws for dispute resolution will reflect the realities of the world around you today. This includes considering how these laws continue *and* interact with:

- damage, hurts, and losses due to residential schools and colonialism generally;
- the current court system and available enforcement/compliance methods,
- the *Indian Act*;
- the *Family Homes on Reserves and Matrimonial Interests or Rights Act*,
- the provisional rules or the new laws you create;
- Chief and Council, and the political and social issues on and off reserve;
- practical details of day-to-day land management;
- available resources and critical needs;
- the many interconnected relationships within and between communities; and
- your dreams, hopes and goals for your community and future generations.

The above examples demonstrate that where there is community control over development and operation of dispute resolution processes, Indigenous communities find creative and meaningful ways to express and practice aspects of their own Indigenous legal traditions. Indigenous people are doing this today regardless of the particular model or models used, whether through mediation, circles processes, panels, tribunals, or a combination of the above.

Dr. Val Napoleon explains that all legal traditions must change over time. In reference to her work regarding the Gitksan legal tradition, she points out:

The reality is that over time, implicit and explicit Gitksan law will reflect the world around it – including personal, political, economic, and legal relationships with other peoples. This does not mean, however, that Gitksan people will somehow cease to be Gitksan people, but rather that the Gitksan legal order now reflects the realities [of the present].¹



“The existence and ongoing meaningful presence of living Indigenous legal traditions in many Indigenous people’s lives and communities is a fundamental premise [underlying the Indigenous Law Research Unit’s work]. Still, it would be misleading to suggest that all Indigenous laws are completely intact, employed formally or even in conscious or explicit use. We are not suggesting that here. Rather, when we talk about Indigenous legal traditions at this point in history we are necessarily talking about an undertaking that requires not just articulation and recognition, but also mindful, intentional acts of recovery and revitalization.”

- Friedland and Napoleon, *Gathering the Threads*.

Getting Started: Assessing Strengths

Do you have one or more of the following resources in or near your community?

- Are there elders or other people in your community who speak, or are learning to speak your language?
- Are there elders or other people in your community who know, practice, or are learning about ceremonies and protocols?
- Are there elders or other people in your community who have personal or life experiences solving problems, resolving disputes, or managing conflicts?
- Are there elders or other people in your community who spend time on the land, with the water, or in the bush, and observe and learn from nature?
- Are there elders or other people in your community who know or tell old stories or oral histories about how people or animals solved problems, dealt with harm or danger, resolved disputes, mended relationships, or made peace?
- Are there recorded interviews, transcripts, or other records that contain stories about how people or animals solved problems, dealt with harm or danger, resolved disputes, mended relationships, or made peace?
- Are there publically available or published materials that, however imperfect, contain stories about how people or animals solved problems, dealt with harm or danger, resolved disputes, mended relationships, or made peace?

2.6.2. Shifting Thinking and Perspectives⁸⁰

In order to work with Indigenous law, it is helpful to shift how we think about law and how we think about Indigenous people. Canada's colonial story is powerful, so is Canada's story about Canadian law. There are negative stereotypes and ways of thinking about Indigenous peoples inside these overall Canadian assumptions.

The first shift is a shift in assumptions so we can move past stereotypes in Canadian history and materials.

1. **Reasoning and Reasonable:** Indigenous peoples were and are reasoning people with reasonable social and legal orders.
2. **Present Tense:** Use present tense to talk about and consider Indigenous law today so it is not relegated to the past.
3. **Particular:** Think about Indigenous laws as a particular response to universal human issues.



Assumptions – the notions or thoughts we have about the world that we take for granted and do not usually talk about.

Sometimes we have to look underneath and behind our assumptions to figure out why we think and do certain things.

Only by unpacking assumptions do they become transparent. They have to be visible in order to challenge and change them.



The second shift is to move past the usual generalizations about Indigenous peoples so that we can see and work with Indigenous law.

This is not to say that the general questions are not important, but if you only ask general questions, you will only get general answers rather than something practical and useable.

Shifting Into Indigenous Law	
From questions about:	To questions about:
What is aboriginal justice?	What are the legal concepts and categories within this legal tradition?
What are cultural values?	What are the legal principles?
What are the 'culturally appropriate' or 'traditional dispute resolution forms'?	What are the legitimate procedures for collective decision-making?
Overall Shift	
What are the rules?	What are the legal processes for reasoning through issues or problems?
What are the answers?	

2.6.3. Sources of Law (From John Borrows)

Just as it is useful to look at the background of Canadian state law, it is useful to think about, and be able to talk about, some of the foundations of your Indigenous laws when you are developing dispute resolution processes.

Professor John Borrows lists five main categories of sources of Indigenous laws. Can you think of others?

1. Sacred Law

- Laws that are understood to be based on spiritual principles, from the Creator, creation stories, or revered ancient teachings.
- For example, the numbered treaties can be thought of as a sacred agreements, creating Canada.

“Indigenous peoples are diverse and their laws flow from many sources. Understanding their communities’ legal foundations can lead to a better understanding of their contemporary potential, including how they might be recognized, interpreted, enforced and implemented.”

John Borrows, *Canada’s Indigenous Constitution*, page 23.

2. Natural Law

- Laws that are understood to be literally “written on the earth”. Legal reasoning, guidance, standards of judgment and analogies developed based on close observations of, and experiences interacting with, the physical world, including the land, landmarks, water, animals, natural cycles and natural consequences.
- For example, you can look at the the cycle of milkweeds and butterflies or an ancient grizzly creating a landslide.

3. Deliberative Law

- Laws developed through people talking with each other. This is the ‘proximate source’ of most Indigenous laws, as all other sources still require human interpretation and implementation.
- Law is a conversational process, one that occurs over generations and includes methods of deliberation, debate, persuasion, re-examination, and revision, based on the entire body of knowledge available.
- KEY to resisting fundamentalist and dogmatic practices and ensuring laws remain relevant.

For example, feasts, circles, some band council, and community decisions.

4. Positivistic Law

- Legal rules, regulations and teachings that people follow based solely on their perception of the authority of the person or persons proclaiming them.
- This is dangerous if this source operates without other sources, as it can become a list of “dos and don’ts” or even oppression in any tradition.
- Realistically, it is hard to untangle law and politics – in states, and in small communities.
- For example, rules based on what a king, a powerful leader, or a respected elder says should be the rule.

5. Customary Law

- Legal practices developed through repetitive patterns of social interaction, or specific routines, procedures, or conduct that relies on unspoken or intuitive agreements about how relationships should be regulated and what conduct is appropriate within a given community.
- For example, customary adoption; wearing a suit in court, and offering tobacco to elders.



2.6.4. Resources for Researching Indigenous Laws



Sources of law and resources for accessing and understanding laws are connected, but different. For example, a land code is a *source* of law, while a discussion paper about the land code is a *resource* that makes the land code more accessible and understandable to those who use it and who are affected by it. While there are not many written resources, like papers or textbooks, for Indigenous law, there are many other resources for you to draw law from.

For example:

John Borrows said there is Indigenous law in:	<ul style="list-style-type: none"> • Elders, families, clans, and societies • Stories, songs, practices, and customs • Language • Historical descriptive accounts by outsiders • Artifacts, petroglyphs, scrolls
Val Napoleon said there is Indigenous law in:	<ul style="list-style-type: none"> • Narratives, practices, rituals, and conventions • Types of oral histories and collectively owned oral histories • Witness testimony, trial transcripts • Personal memories and direct experiences • Published anthropological and historical research • Published collections of stories • Human social interaction, how we treat one another, and why • Kinship roles and relations
Matthew Fletcher said there is Indigenous law in:	<ul style="list-style-type: none"> • Elders and knowledge keepers • Language • Published anthropological and historical research • Written works by community members: poems, fiction, stories, legends
Andree Boisselle said there is Indigenous law in:	<ul style="list-style-type: none"> • Dances, songs, ceremonies
The <i>Justice Within, Indigenous Legal Traditions</i> report said there is Indigenous law in:	<ul style="list-style-type: none"> • Dreams, dances, art, land, nature

2.6.5. Case Study: The Accessing Justice and Reconciliation Project

The Accessing Justice and Reconciliation Project (AJR Project) was a national research project launched by the University of Victoria Faculty of Law's Indigenous Law Research Clinic, the Indigenous Bar Association and the Truth and Reconciliation Commission, and funded by the Ontario Law Foundation, from 2012 to 2014.

The overall vision for this project was to honour the internal strengths and resiliencies present in Indigenous societies, including the resources within these societies' own legal traditions.

The goal of the AJR Project 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 and articulate legal principles that could be accessed and applied today to work toward healthy and strong futures for communities.

This project reflected only a small taste of the broad diversity of Indigenous societies and communities across Canada. There were six distinct legal traditions, and seven partner communities represented. Partner communities had to submit an expression of interest, have a community justice or wellness program in current operation, and have a number of elders or knowledge keepers willing to participate in interviews for the project.

From west to east, the representative legal traditions and partner communities were as follows:

Coast Salish – Snuneymuxw First Nation and Tsleil-Waututh Nation

Tsilhqot'in – Tsilhqot'in National Government

Northern Secwepemc – T'exelc Williams Lake Indian Band

Cree – Aseniwuche Winewak Nation

Anishinabek – Chippewas of Nawash Unceded First Nation #27

Mi'kmaq – Mi'kmaq Legal Services Network, Eskasoni

The AJR Project's approach was to engage with Indigenous laws seriously as *laws*. Researchers analyzed publically available materials and oral traditions within partner communities, using adapted methods and the same rigor required to seriously engage with state laws in Canadian law schools.

Researchers used an adapted case brief method to analyze a number of published and oral stories, and identify possible legal principles. They presented this work to elders and other knowledgeable people within our partner communities, who graciously shared their knowledge, opinions and stories with them.

This helped our researchers to clarify, correct, add to, and enrich their initial understandings. The results were synthesized and organized in an analytical framework for accessibility, overall coherence, and ease of reference.

The main research question was as follows: How did/does this Indigenous group respond to harms and conflicts within the group?

The analytical framework used to approach, explore, and organize the information gathered in this project consists of five parts. In answering the research question, researchers looked for:

- **Legal Processes:** Characteristics of legitimate decision-making/problem-solving processes, including:
 - Who are authoritative decision makers?
 - What procedural steps are involved in determining a legitimate response or resolution?
- **Legal Responses and Resolutions:** What principles govern appropriate responses and resolutions to harms and conflicts between people?
- **Legal Obligations:** What principles govern individual and collective responsibilities? Where are the “*shoulds*”?
- **Legal Rights:** What should people be able to expect from others (substantive and procedural)?
- **General Underlying Principles:** What underlying or recurrent themes emerge in the stories and interviews that might not be captured above?

There are two important functions we believe this analytical framework serves.

First, it focuses our attention to the specifics and working details of Indigenous legal traditions, rather than remaining at the level of broad generalities which can not only flatten the complexity of these traditions into over-simplified or pan-Indigenous stereotypes, but are hard to imagine applying to concrete issues.

Second, while focusing on specific details, we are reminded that, just as with other legal traditions, specific principles, practices, and aspirations within Indigenous legal traditions do not stand alone, but are all interconnected aspects of a comprehensive whole.

The AJR project produced seven comprehensive legal tradition reports, one for each of our partner communities, each with detailed discussion of specific legal principles based on the research question, using the analytical framework as an organizational guide.

These were *not* comprehensive or complete statements of legal principles and were not intended to be. They were simply some examples of what could be produced even a relatively short period of serious engagement with Indigenous laws. These reports were also *not* intended to be a codification of law, like legislation. Nor were they claiming to be an authoritative statement of law, like a court judgment.

Rather, the reports were more like a legal memo back to our partner communities. A legal memo summarizes and brings together a legal researcher’s best understanding of relevant legal principles. It organizes information in a way that makes it simpler for others to find, understand,

and apply those principles to current issues or activities. It was up to the partner communities to build on, change, and use them as they saw fit.

Two major overall themes became evident from our analysis of the individual reports that made up the project as a whole.

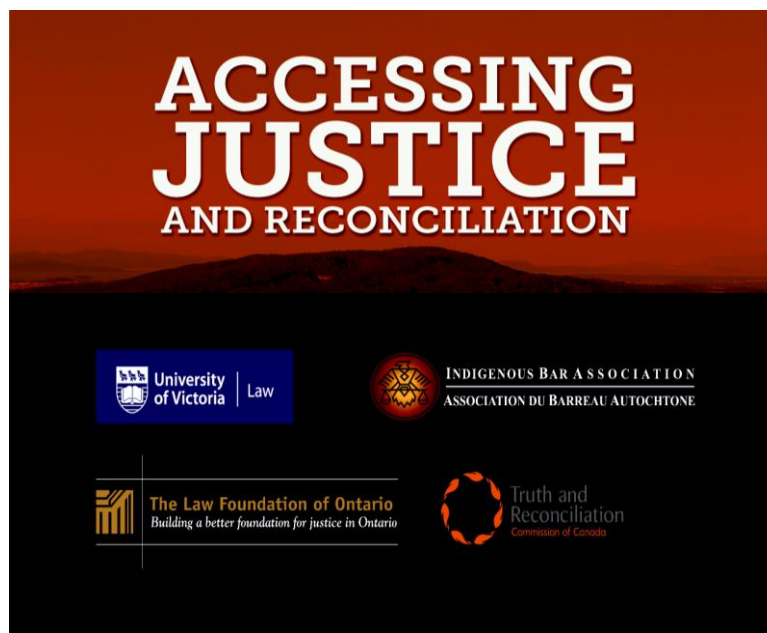
The **first theme is diversity** – there is a wide range of principled legal responses and resolutions to harm and conflict in each Indigenous legal tradition.

The **second theme is consistency, continuity and adaptability**. While there is a remarkable consistency and continuity in legal principles over time, how they are implemented demonstrates their adaptability and responsiveness to changing contexts.

This sort of structured research project is one way communities can start to identify dispute resolution processes that are rooted in their own Indigenous legal traditions. The ILRU has worked with and witnessed several other Indigenous communities as they begin seriously researching their own legal traditions in a rigorous and transparent way, in order to better access, understand, and apply their own legal principles to specific issues.

2.6.5.1. Examples of Legal Processes from the AJR Project Research Results

The following are copied from the short summaries of the sections: Characteristics of legitimate decision-making/problem-solving processes in three reports.



Please note: In the actual reports, a longer more detailed discussion followed each section. You will notice that each principle refers to specific stories and/or interviews. In order for this work to be rigorous and transparent, it was important to cite our sources, whether the source was an elder, a story, a history book, court case, or a dream.

CHARACTERISTICS OF LEGITIMATE DECISION-MAKING/PROBLEM-SOLVING PROCESSES

Question One: Who are Authoritative Decision-Makers?

EXAMPLE 1: Coast Salish—Snuneymuxw First Nation and Tseil-Waututh Nation ⁸¹	EXAMPLE 2: Northern Secwepemc—T'exelc Williams Lake Indian Band ⁸²
<p>a. Elders: Elders are the knowledge keepers and as such are legitimate decision-makers: <i>Snuneymuxw' Interview: Geraldine Manson, Anonymous Snuneymuxw' Interview, Snuneymuxw' Interview: Edison White.</i></p> <p>b. Family: Parents and grandparents as well as youth all have roles to play in a collective decision-making process: <i>Snuneymuxw' Interview: Dr. Ellen Rice White, Tseil-Waututh Interview: Carleen Thomas, Tseil-Waututh Interview: Ernest George.</i></p> <p>c. Those who are trained: Decisions are normally made in consultation with experts and leaders within the community: <i>Tseil-Waututh Interview: Leah George-Wilson, Tseil-Waututh Interview: Dr. Ellen Rice White, Tseil-Waututh Interview: Ernest George.</i></p>	<p>a. Chiefs: The Chief played a vital role as decision-maker and was heavily involved in problem solving in general: <i>Old-One and the Sweat-house, WLIB Interviews #1, #2, #4, and #5.</i></p> <p>b. Tribunal, Council, or Circle: A special gathering might be called to resolve a dispute: <i>WLIB Interviews #1, #2, and #4.</i></p> <p>c. Family: Family members have an obligation to help resolve conflict and maintain relationships: <i>Coyote and his Son, WLIB Interviews #1, #4, and #5.</i></p> <p>d. Elders/Grandparents: Elders and grandparents watched over the community in order to give advice to others and decide when to intervene: <i>WLIB Interviews #1, #2, and #4.</i></p>

EXAMPLE 3: Cree—Aseniwuche Winewak Nation⁸³

Medicine People: Medicine people who have specialized spiritual and medicine knowledge are relied upon and sought out to use their power to address harms and protect the community: *Killing of a Wife, Anyway, Water Serpent, The Hairy Heart People, AWN Anonymous Interview #2.*

Elders: When there is a risk of danger, or harm, if elders have greater knowledge, they may collectively act or direct action to prevent harm and protect people: *AWN Anonymous Interview #2, The Water Serpent, AWN Anonymous Interview #2, AWN Anonymous Interview #3.*

Where there is an interpersonal conflict, but no immediate danger or risk of harm to people, elders take on a more persuasive role: *AWN Anonymous Interview #4.*

Family Members: The family members of the person who has caused harm may act to remedy the harm or to prevent further harm from occurring when necessary: *Indian Laws, Mistacayawis, Thunderwomen.*

Family members may take a pro-active role to prevent harm from occurring: *AWN Anonymous Interview #2, AWN Anonymous Interview #4.*

Family members take a persuasive role in resolving interpersonal conflict: *AWN Anonymous Interview #4.*

Group: Important decisions for community safety are made collectively by a group: *Mi-She-Shek-Kak, AWN Anonymous Interview #3, AWN Anonymous Interview #2, AWN Anonymous Interview #5.*

Question Two: What procedural steps are involved in determining a legitimate response or resolution?

Examples from three different Indigenous Legal Traditions:			
	Step 1	Step 2	Step 3
<p>Example 1:</p> <p>Coast Salish— (Snuneymuxw First Nation and Tsleil-Waututh Nation)</p>	<p>Recognition of a Problem/Conflict: The initial step is to recognize the occurrence of a problem or conflict: <i>Boys Who Become a Killer Whale, Marriage of Sea Lion and Crow, Sea Lion – Penelekut, Snuneymuxw’ Interview: Geraldine Manson, Snuneymuxw’ Interview: Edison White, Snuneymuxw’ Interview: Gary Manson.</i></p>	<p>Identify Family: As family members are the primary decision-makers, they must be identified and engaged early in the process: <i>Anonymous Snuneymuxw’ Interview, Tsleil-Waututh Interview: Deanna George, Tsleil-Waututh Interview: Ernest George, Snuneymuxw’ Interview: Geraldine Manson, Tsleil-Waututh Interview: Carleen Thomas.</i></p>	<p>Ask for Help: Both wrongdoers and victims should ask for help: <i>Flea Lady, Boys Who Became a Killer Whale, Marriage of Seagull and Crow, Wolf and Wren, Anonymous Tsleil-Waututh Interview, Snuneymuxw’ Interview: Geraldine Manson, Snuneymuxw’ Interview: Dr. Ellen Rice White.</i></p>
<p>Example 2:</p> <p>Northern Secwepemc —(T’exelc Williams Lake Indian Band)</p>	<p>Discovery and Identification of the Harm: The first step in responding to a harm is to discover and identify the harmful acts and actor: <i>Coyote and Grisly Bear, WLIB Interview #1.</i></p>	<p>Community Consultation: Decision-makers should consult with community members before making a decision: <i>WLIB Interviews #1, #4, and #5.</i></p>	<p>Negotiation or Mediation where appropriate (Conflicts): Conflicts can be resolved amicably, without further harm or punishment, through sharing, negotiation, and mediation: <i>Coyote and Grizzly Bear Make the Seasons, and Night and Day, Story of Porcupine, WLIB Interview #5.</i></p>
<p>Example 3:</p> <p>Cree— Aseniwuche Winewak Nation</p>	<p>Recognizing warning signals that harm may be developing or has occurred: <i>The Hairy Heart People, Mistacayawis, AWN Anonymous Interview #2, Killing of a Wife, AWN Anonymous Interview #5, AWN Interview: Marie McDonald.</i></p>	<p>Warning others of the potential harm and taking appropriate safety precautions to keep people within the group as safe as possible: <i>The Hairy Heart People, Mi-She-Shek-Kak, Mistacayawis, AWN Anonymous Interview #1, AWN Interview: Marie McDonald, AWN Anonymous Interview #2.</i></p>	<p>Seeking guidance from those with relevant understanding and expertise: Indian Laws, Anyway, The Water Serpent, Thunderwomen, The Hairy Heart People, AWN Anonymous Interview #1, AWN Anonymous Interview #4, AWN Interview: Joe Karakuntie, AWN Anonymous Interview #2.</p>



Examples		
Step 4	Step 5	Step 6
<p>Collective Deliberation to Determine the Best Response to Harm: While the forums vary, it is a collective responsibility to address harms: <i>Marriage of Seagull and Crow, Battle at Alberni, Snuneymuxw' Interview Jimmy Johnny, Anonymous Snuneymuxw' Interview, Tseil-Waututh Interview: Leah George-Wilson, Anonymous Tseil-Waututh Interview, Tseil-Waututh Interview: Carleen Thomas, Tseil-Waututh Interview: Deanna George, Snuneymuxw' Interview: Dr. Ellen Rice White, Tseil-Waututh Interview: Ernest George, Snuneymuxw' Interview: Gary Manson.</i></p>	<p>Re-integration/ Rehabilitation of Wrongdoer back into Coast Salish Society: The process of resolving conflicts continues past the end of the conflict: <i>Snuneymuxw' Interview: Dr. Ellen Rice White, Snuneymuxw' Interview: Edison White, Anonymous Tseil-Waututh Interview, Tseil-Waututh Interview: Carleen Thomas.</i></p>	
<p>Public Confrontation/Witnessing: Individuals who have caused, or are suspected of causing, harm should be confronted publically and any confession witnessed: <i>The Young Hunter and his Faithless Wife, Coyote and his Son, WLIB Interviews #1, #2, #4, and #5.</i></p>		
<p>Observing and collecting corroborating evidence: <i>The Hairy Heart People, AWN Anonymous Interview #2, Killing of a Wife, Mistacayawis.</i></p>	<p>Public confrontation and deliberation by appropriate decision-makers when possible: <i>Indian Laws, Killing of a Wife, Mistacayawis, AWN Anonymous Interview #4, AWN Interview: Joe Karakuntie, Thunderwomen, AWN Anonymous Interview #1, AWN Anonymous Interview#2.</i></p>	<p>The appropriate decision-makers are identified and implement a response. This may be a pre-emptive response in some cases: <i>Indian Laws, Anway, The Water Serpent, Mi-She-Shek-Kak, Whitiko and the Weasel, Mistacayawis, AWN Anonymous Interview #2, AWN Interview: Joe Karakuntie.</i></p>

3. SOME MAJOR ISSUES

There are some major issues that can become major stumbling blocks, conversation stoppers, or worse, if they are not examined and addressed in some way when developing and implementing your own dispute resolution processes. Three of the most common and difficult issues Indigenous communities face in this area are (1) Common Colonial Beliefs, (2) Gender and Sexuality, and (3) Violence versus Conflict.

3.1. COMMON COLONIAL BELIEFS

Colonialism is made possible when there are ideas and beliefs about Indigenous peoples that justify it. The colonial history of Canada has produced a number of widely held common beliefs about Indigenous peoples – these are the ideas that justified colonization. These ideas and beliefs have not completely disappeared, but they have become almost invisible. They are hard to see because they are understood as “common sense” and so are rarely questioned. However, they often underlie actions and inform decisions that have real consequences for Indigenous communities.

These common beliefs can be the “why” behind racist or disrespectful behaviours and actions, and the resistances to building non-colonial relationships with Indigenous peoples. Some of these beliefs underlie court decisions, government action or inaction, and third party action that ignore Indigenous land ownership. Indigenous peoples know these beliefs are common and that they continue to operate and circulate in the world around them, but they are powerful and slippery – and hard to overcome.

It is important to recognize, challenge, and counter those common colonial beliefs.

Some of these commonly held beliefs are:

- Indigenous people were and are lawless. Indigenous societies were not advanced enough or evolved enough to have law.
- Indigenous laws are only custom. Indigenous peoples were simple and had habits, not real ways of governing through law.
- Indigenous laws are sacred. Indigenous law is not about dealing with real issues or problems, so it is not useful today. The world is too complicated for Indigenous law which is only about spiritual beliefs.

3.2. REFRAMING INDIGENOUS LAWS

The big questions are:

- How can one counter and challenge these commonly held beliefs that were created by colonialism?
- How can Indigenous peoples push them back to create space for respectful, non-colonial beliefs?
- How do Indigenous peoples create new commonly held beliefs?

Here are some ideas to reframe how Indigenous laws are talked about and thought about...

Indigenous law are part of legal traditions:

All societies have to govern themselves, create order, and ensure safety. All societies have to deal with conflict, human violence, and vulnerabilities. Indigenous societies were no different – both in the past and today. All societies have law, organized in different ways, to manage the best and the worst of human behaviour that happens whenever human beings live together.

No legal system is perfect - that is impossible and systems do not have to be perfect – but they enabled people to govern themselves well enough through time. Each generation of Indigenous people has solved problems and managed conflicts – they did this collaboratively with the intellectual resources from their legal traditions and according to the circumstances around them. Each generation has drawn from its legal traditions, including its stories, and in doing so, brought them to life through the centuries. So every generation has adapted the law as necessary to their time in order to deal with current problems.

Indigenous laws are part of the ongoing and constant *legal traditions* of a people, and this includes the organization and processes of law, problem solving and decision-making, legitimacy, and an accessible collective public memory of stories and past legal responses to problems.

Indigenous laws are laws:

Indigenous law must be taken seriously as *law* so that it can do the necessary and hard work of law – collectively solving problems, governing, managing conflict, and creating peace through diversity and difference.

Calling Indigenous law a cultural practice or custom is a way of undermining it. Imagine calling Canadian law the cultural practices of Canadian society. What is lost by refusing to call Indigenous law – *law*? When Indigenous law is not taken seriously and is not applied today in the lives of Indigenous peoples, then Canadian law becomes the default and the lie of Indigenous lawlessness continues.

Indigenous laws require a collective human process of interpretation and deliberation:

All law reflects the overall society that created it – that is where it comes from. This includes the overall political organization or governing structure, and the world view which includes an understanding of the sacred and the spiritual.

The thing is, law does not interpret itself. People interpret and then apply law to human problems. How and why people do this is informed by their spiritual beliefs, but they are still human laws and human beings have to be accountable for their legal decisions. So while there are often spiritual consequences for poor behaviours, *humans* interpret those consequences – to understand them, learn from them, and teach them.

There is another important aspect here. The Dalai Lama was once asked why he did not talk more about spirituality. He explained that if he talked about spirituality, then that is all people would focus on and in doing so, they would ignore the real and serious problems of poverty, land loss, and political disparity. He argued that it was necessary to practically deal with the reality of people's lives – not to forget spirituality, but to not allow it to be an easy way of opting out from taking responsibility and action for ourselves and each other.

As explained earlier, there are different sources of Indigenous law just as there are different sources for non-Indigenous law. Again, these sources are the sacred, natural, positive (authority), customary, and deliberation (people reasoning together).⁸⁴

Legal Interpretation:

To seek the intended meaning or meanings of a law, a story, or other expressions of law (e.g., carved poles, oral histories and stories, songs, dances, or art).

People will likely draw different meanings and will have different approaches to finding meaning.

Law is a collective process to legitimately work through those differences.

For law to apply collectively, it has to be interpreted collectively to include diversity and different opinions. It is not just one person's ideas about law.

All the sources of law and types of law require discussion and sometimes debate. People have to reason through the legal problem together in order to understand it and apply it. The activity of collective deliberation is an essential part of all law.

What the heck? Well, legal reasoning is:

Law is a public and collaborative process. Legal reasoning is a way of framing a problem and then working through how the law applies to that particular problem.

In a nutshell, basic legal reasoning in a common law system includes:

- What is the problem and does the law have anything to do with that problem? This is the legal issue.
- What is the legal rule that governs this problem? This is the rule/law.
- What facts matter to this particular problem? What is relevant? These are the “material facts.”
- How should the law apply to the facts of this problem? This is the legal analysis.
- How should the law on this problem be decided? This is the application of law, the conclusion.

Indigenous Laws require a Public Memory and Record:

Again, law is a public process and it is something everyone does. To engage in law, there has to be a collective memory of how people solved legal problems in the past – this is called legal precedent. The Canadian legal system also has precedent (these are law stories called case law), but it is more restrictive in that it is mainly lawyers and judges who access it and who can work directly with law to solve legal problems.

Indigenous peoples had shared public memories or legal precedent too, but they were recorded in the form of oral histories, stories, songs, and other expressions. Historically, these public memories were accessible by everyone because they were not just available to selected people like judges and lawyers. In other words, Indigenous law belonged to everyone and everyone was responsible for it because everyone was taught the oral histories or stories. The oral histories and stories contain law and legal processes as a public intellectual resource – and many of these same stories and oral histories are available to you. Each generation records and teaches in the present as they are best able.

Part of rebuilding of Indigenous law is to recreate Indigenous public memory, those law records or legal precedent, so that everyone can access them, understand them, and apply them through legitimate legal processes. Indigenous law, like so many other aspects of Indigenous peoples' lives, has been impacted by colonization.

At the Truth and Reconciliation Commission's Knowledge Keepers Forum in 2014, Mi'kmaq Elder Stephen Augustine spoke about the Mi'kmaq concept for "making things right." He shared a image about an overturned canoe in the river to explain this:

We'll make the canoe right and ... keep it in water so it does not bump on rocks or hit the shore.... [When we tip a canoe] we may lose some of our possessions.... Eventually we will regain our possessions [but] they will not be the same as the old ones.⁸⁵

Indigenous peoples are regaining and rebuilding their possessions. This Toolkit is one way to help that regaining and rebuilding.



3.3. GENDER AND SEXUAL ORIENTATION

The issues of gender disparity and oppression, and discrimination based on sexual orientation are concerns within both Canadian law and Indigenous law.

3.3.1. Some Issues

Given that law is something that people do as an active collaborative and public process, law is not insulated from the larger social and political forces around it. Law can be understood as being shaped by and contributing to those constant social and political forces or dynamics.

If there are negative or limiting norms about women or sexual minorities in the community or in any society, then those negative norms can shape the law and our legal responses in a harmful way. More positively, we can also use law to reshape or work to change those harmful norms so that they are not oppressive. This is why law is sometimes described as two-faced or as a double-edged sword.

Norms are those things that, at least generally, we believe are right and wrong.

Norms are the commitments that we want to live up to and that we want others to live up to.

We aspire to our normative commitments even if we do not always succeed in achieving them.

Here are some helpful ways of thinking about and approaching questions concerning gender and sexual orientation:

All law is gendered:

This means that the way people experience the consequences of law depends on their gender. For example, if more women are poor and single parents, then laws about housing will have more impact on them than on others who have good paying jobs and no children.

Similarity and differences in experiences based on gender:

Indigenous men and women have many of the same experiences caused by colonialism, but Indigenous women also have additional and different experiences because they are women.

Sexism and sexual orientation discrimination will not just go away:

Ignoring the lived realities of Indigenous women or gay, lesbian, and transgender people will not deal with or solve these difficult issues. Current and future Indigenous governance must deliberately take up these challenges in order to change and eliminate them.

Idealized stereotypes won't help:

Creating or maintaining romantic or negative stereotypes about Indigenous women or gay, lesbian, and transgender people will not address the causes of sexism, oppression, discrimination, or violence. And, romantic stereotypes are just as limiting as negative ones. They can just mean that Indigenous women or gay, lesbian, and transgender people will have fewer options in their lives and will likely be judged when they fall short of the ideal and the stereotype.

Within Indigenous legal orders are legal principles about community **safety, fairness, and peace.**

These same legal principles are resources that can be applied to sexism, sexual orientation discrimination, and sexual violence.

There is a spectrum and it is all connected:

The experiences of Indigenous women and girls can be understood as a forming a spectrum. At one end of the spectrum are the missing and murdered Indigenous women and girls in Canada. At the other end of that same spectrum are the limiting, romantic stereotypes of Indigenous women, often considered “cultural” and therefore harmless. All along the spectrum are the everyday practices of sexism and discrimination (e.g., housing and membership policies, leadership practices) that have very real consequences in the lives of Indigenous women and girls.

We need to ask: Whose experiences are being used to interpret law?

What is important here is that the oppression of and violence against Indigenous women do not arise in a vacuum. They are the result of the invisible and visible political, economic, and social conditions within Indigenous communities and in Canada – those everyday practices of sexism and discrimination. So what are those conditions of vulnerability? How were they created? How have they been maintained?

The thing is, it is not Indigenous women and girls who are killing other Indigenous women and girls. Even if violence against Indigenous women and girls was not a part of Indigenous societies historically, it is present today – both inside and outside of Indigenous communities. Indigenous law can perpetuate gendered and other oppression or it can challenge them.

Resist fundamentalism:

Fundamentalism is the tendency to interpret law – or dogmas and ideologies – in a strict and literal way that is based on exact wording.

Often fundamentalism includes creating distinctions of who belongs and who is excluded.

In doing so, the focus becomes purity, authenticity, and a desire to return to some idealized, but non-existent past.

Along with the exciting resurgence of Indigenous law, there is a creeping fundamentalism that threatens to undermine the validity, strength, and efficacy of Indigenous legal traditions.

The potential danger of fundamentalism is that it can limit and narrow the definitions and interpretations in the reasoning and application of Indigenous law. When this happens, the life, wisdom, and humanity of law are lost, and people and governments resort to force and coercion to maintain social order.

3.3.2. Shifts: Gender, Sexuality, and Sexual Orientation⁸⁶

Rather than assuming that Indigenous laws, and the responses of Indigenous law to gender, sexuality and sexual orientation are unchanging and fixed, the following shifts assume Indigenous laws are dynamic and include internal resources to help us first recognize and then change oppressive practices.

These shifts perceive Indigenous legal actors reasoning with Indigenous legal principles, rather than simply obeying rules. They are intended to encourage discussion and exploration of issues related to gender, sexuality and sexual orientation, including the possibility for principled change and adaptation where necessary.

Shifts: Gender, Sexuality, And Sexual Orientation	
Moving from general questions about:	To asking specific questions about:
What are “traditional” gender roles?	How do our understandings about gender and sexuality shape our legal interpretations ?
What are the cultural values concerning gender, sexuality, and sexual orientation?	What legal principles should guide our decisions about gender, sexuality, and sexual orientation? For example, principles of fairness, safety, and participation.
What are “culturally appropriate” definitions of gender, sexuality and sexual orientation?	Who is interpreting Indigenous laws? What assumptions underlie how they define and view gender, sexuality, and sexual orientation?
What are the “culturally appropriate” ways to treat women?	What assumptions underlie principles about how to treat women? How do these influence people’s decisions and everyday practices?
Overall Shift	
What are the laws about gender, sexual orientation, and sexuality?	How are Indigenous laws gendered - how do different people experience Indigenous law differently, based on gender, sexuality or sexual orientation?
How can Indigenous people recreate gender balance, and restore historic sexuality and sexual orientation?	How can a deliberative approach to Indigenous law help to promote anti-oppressive and anti-colonial legal relations inclusive of everyone?

“We are particularly concerned about how conceptions of [historic] gender balance are used to deny sexism in Indigenous communities today.

The ‘traditional’ gender roles that Indigenous women are encouraged to practice are often framed in ways which are restrictive and at odds with today’s social context.

This is similar to the rhetoric of motherhood raised in discussions on Indigenous women’s gender roles [which] ... mischaracterizes and too narrowly frames Indigenous women’s options, choices and contributions within their societies.

This is particularly problematic when women’s responsibilities and contributions as citizens are only framed in relation to nurturing and caring for the nation.

While ‘mothering the nation’ is espoused as something to take pride in as a highly respected role, [it] ... too often forecloses a multitude of other functions and roles that Indigenous women assume in their societies.”

Emily Snyder, Val Napoleon, and John Borrows, *“Gender and Violence: Drawing on Indigenous Legal Resources”* (2015) 48:2 UBC Law Review.



Our children, our young women and our young men, need to and deserve to be protected and live in communities they feel safe in and proud to be a part of today. If we or our families are not in a safe place, then none of the other principles we discuss can have positive effect. Safety is foundational.

- Friedland and Borrows, *Creating New Stories: Indigenous Legal Principles on Reconciliation*

3.4. VIOLENCE VERSUS CONFLICT

There are a number of common causes for conflict including:

- Scarcity or unequal sharing (e.g., resources such as money, shelter, food, and material things, as well as natural resources such as water, land, trees, fish, etc.);
- Attitudes, values, and perceptions;
- Different goals, needs, priorities, or interests;
- Exclusion;
- Unequal power relations; and
- Differing expectations and lack of clarity about roles and responsibilities.

Conflict is more than a disagreement and it tends to fester when it is ignored. We all respond to conflicts based on our perceptions about scarcity, attitudes, or whatever the cause, and this can trigger strong emotions and create stressful situations. While there are common causes of conflict, our responses to it differ. One response is violence.

Conflict is not the same as violence and not all conflict results in violence. When you are working to manage conflict, it is critical to not lump violence and conflict in together as one issue. When this conflation of violence and conflict happens, the tendency is to focus only on the conflict and to assume that the violence is just a natural outcome of that conflict. The problem is that then violence does not get dealt with and potentially dangerous situations are left untouched.

The following assumptions remind us to take violence seriously and address violence first and separately from conflict, even when they are related:

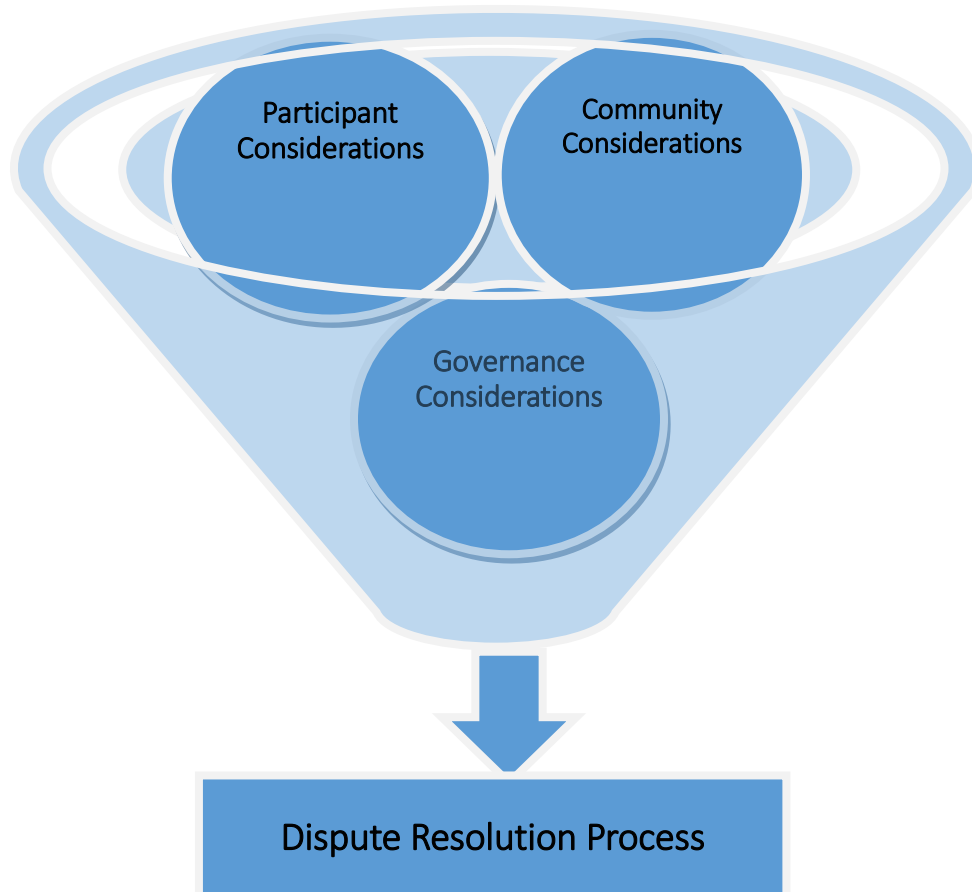
- Conflict does not cause violence.
- Not all conflict results in violence - it is one learned response.
- Violence is not always an outcome of a conflict - there are many other reasons for it.
- When someone chooses to be violent, this choice is never justified by conflict, no matter what the cause of that conflict is.⁸⁷

4. GOVERNANCE, COMMUNITY, AND PARTICIPANT CONSIDERATIONS FOR DISCUSSION

These questions and considerations are suggested for community conversations as a way to center and ground your development, implementation, and evaluation of a dispute resolution process that will work for your community. Finding ways to talk about these issues and to invite hard questions will help you create a legitimate dispute resolution process that community members will take seriously and support.

While there can be both overlap and conflict between these considerations in real life, for clarity, we identify three important perspectives to take into account:

- **Governance Considerations** – these are practical, political, and aspirational issues that community leaders, such as Chief and Council, are likely to find important.
- **Community Considerations** – these are practical issues that are part of the reality of any community, such as social, economic, geographical, and historical elements.
- **Participant Considerations** – these are practical and personal issues that participants and individuals most directly affected by the outcomes of dispute resolution processes are likely to care about deeply.



4.1. GOVERNANCE CONSIDERATIONS

Governance considerations: *Practical, political, and aspirational issues that community leaders, such as Chief and Council, are likely to find important.*

4.1.1. Community Aspirations

Aspirations are your hopes, dreams, and goals as a community. They are what you are aiming for and working toward achieving.

Many Indigenous communities have common aspirations such as self-determination, self-governance, community safety, and mutually respectful relationships. However, every community will also have its own unique aspirations. These aspirations will change or expand over time as Indigenous people maintain themselves and respond to a changing world.

When deciding on developing dispute resolution processes, it is important to know how this fits with or will help work toward your own community aspirations. For example, if you have developed your own matrimonial property laws, it may be important to the community to see those laws being recognized, respected, and enforced by a Canadian court. On the other hand, it may be important to the community to rebuild or revitalize your own dispute resolution processes. You may not want to rely on outside processes all the time.

It is important to make time for conversations about community aspirations with the leadership and broader community. These will inform your decisions about what dispute resolution processes you want to pursue or focus on at a certain point in time.

Some questions to think about and discuss:

- How does your dispute resolution process fit with your community's aspirations?
- What dispute resolution processes are consistent with your community's values, principles, and laws?

4.1.2. Who Interprets The Law and Makes Final Decisions?

A decision-maker is the person who interprets law and makes final decisions. Judges, arbitrators, mediators, elders, or a combination thereof are types of decision-makers that may be part of your process. The participants themselves may also be the main decision-makers in a process.

Your process may have a decision-maker from inside or outside of your community. Often outsiders are chosen because they look neutral and independent when making their decisions. You may prefer someone from inside your community who understands your community's values, principles, and Indigenous laws. This grounding can help the decision-maker find appropriate resolutions. You may also want to include decision-makers who are trusted members of the community. This helps participants build trust in your process. Participants will usually accept and follow resolutions better when they trust the process.

Some decision-makers are trained to help people tell their own stories and express their feelings about a dispute. This is helpful in cases where the participants need to resolve issues in addition to their matrimonial property dispute to move forward. Often participants prefer having a greater role in the decision-making process. Many decision-makers can work with participants to help them reach a resolution together. This helps participants feel like they are part of the process and may help them accept and follow decisions better.

In many formal dispute-resolution processes, decision-makers are trained to listen and talk to professional representatives, such as lawyers. They make decisions on their own, often after the process has happened. This may be important in cases where there is a gender or power imbalance and one participant can easily influence the other participant in the process. This is often important in cases involving domestic or intimate partner violence or high conflict.

Your decision-makers may or may not be experts in Canadian or Indigenous laws. Having decision-makers or facilitators with legal training can help participants view your process as reliable and legitimate. However, requiring legal training will limit the people who can be decision-makers and may exclude possible decision-makers from your community. It will also make your process more expensive.

How do you select decision-makers?

Choosing who will be involved in community-based dispute resolution processes is very important to their ultimate success. Who is involved will depend on your particular community, legal traditions, community goals, values, and needs as well as the nature of the dispute and the type of process you choose.

- The **T'suu T'ina Office of the Peacemaker** chose its first peacemakers by going door to door to all houses in the community and asking people who they trusted to be fair.⁸⁸
- For the **Treaty Four Administrative Tribunal**, the Institute keeps a "roster of professional panel members to adjudicate disputes involving the application of First Nation community-based law." To help ensure a sense of fairness and absence of bias, the roster "includes professionals from throughout the Treaty Four territory" so that "the panel members have no direct connection to the community that they are helping."⁸⁹
- In the **Stó:lō Qwi:qwelstóm Program**, participants in Healing and Peacemaking Circles vary depending on the nature of the dispute but always include 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."

Circles also always include the parties involved in the dispute, and at least one Elder. Participant are asked to bring an Elder from their families. Circles are rescheduled if an Elder is not able to attend. Elders have a special role because they are accorded respect by Stó:lō people; they "really listen and come without their own agenda." 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.⁹⁰

How do you select decision-makers? *continued...*

- The **Iroquois Dispute Resolution Tribunal** sets minimum standards for member qualifications, which include impartiality and being of good character and reputation. Members cannot be related by blood or marriage to each other, or to anyone whose case “is subject of a review, decision or appeal which is before the tribunal.” 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.

If a case involves "culture, tradition, heritage and language," then the tribunal may need input from the Elders. In such a 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."⁹¹

- The **Beausoleil First Nation’s Dispute Resolution Panel** contained in their Draft Land Code includes a roster panel made up of twenty panelists at most, appointed by the Beausoleil First Nation Council. 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.

The panel hearing the dispute is made up of three panelists selected from the roster panel. Each participant is permitted to select a panelist, with the third being selected by "the rest of the panel." However, all three panelists may, alternatively, be selected by the roster panel.⁹²

Some questions to think about and discuss:

- Who will be the decision-makers in your process?
- What are the negative and positive consequences of locating decision-makers outside of communities? Inside of communities?
- What are the consequences of having a judge with minimal understanding of your community or Indigenous law?
- Will there be one decision-maker or many? Will there be standing committee or panel, or will you maintain a roster?
- What knowledge, training and experience will decision-makers need?

4.1.3. Is There a Public Record and Precedents?

The final decision, agreement or outcome from your dispute resolution process is the record. Having a public record means the decisions from your process are published and any person can see them. Precedents are past decisions that help decision-makers think about similar problems. When decision-makers resolve problems based on past decisions, they are following precedent.

Having a public record is important to show that you are open and transparent about your processes and your decisions are clear and consistent, thereby demonstrating accountability and legitimacy, since the decisions that are made public are often written, it also helps people participating in the process understand how decisions are made, and may reduce the number of appeals.⁹³ It also helps you keep an organized record of decisions.

Some processes do not typically create a public record. This is sometimes because the facts of the case are sensitive and the participants want the details of their agreement to be private. However, you can create and maintain a limited public record while still protecting participants' privacy. For example, you can publish some basic information about the matrimonial real property related issues in dispute and their resolution without including names or details that identify the parties. You can also choose to make some decisions publicly available and others not.

Decision-makers in processes that include a public record usually follow precedent. Basing decisions on precedent shows that your decision-makers are being fair and

consistent in their decision-making process. Using precedents also helps build a body of law to rely on. This makes future decisions more predictable to participants. However, it is more difficult to change the law when your process relies on precedents, so how change will be made is also an important question to ask. This will be necessary so that your process reflects your community's realities, such as the creation of new laws and changing norms.

Some questions to think about and discuss:

- What are the strengths and weaknesses of having a public record?
- What are the strengths and weaknesses of setting precedents?
- How will you build a public record for private dispute resolution processes?
- How will you make records and decisions available to the community?

4.1.4. What Remedies Does Your Process Offer?

Remedies are the steps participants take to restore harmony in a dispute.⁹⁴ For example, deciding who lives in a property or apologizing to another participant are forms of remedies. There are many kinds of remedies and they depend on the type of process you set up, what the issue is about, and the people involved in the problem.

Often, Canadian law limits what remedies are available. Sometimes these remedies are not grounded in communities' values, principles, or Indigenous laws. You should consider what remedies you want to have in the design of your law and consider which processes can include those remedies.

4.1.5. What is the Level of Finality?

When a participant is not happy with a legal decision or resolution, some processes allow them to ask another decision-maker to review it. This is an appeal. Having an appeal process is important for showing that your process is fair, and helping participants understand and accept decisions that have been made.⁹⁵

A decision is final if the participants can no longer have it reviewed through an appeal process. You should be clear when decisions or agreements reached through your process are final and how they can be appealed. You should consider what participants can appeal, and who will review the appeal.

4.1.6. What is the Level of Certainty?

The more transparent and clear your process is, the more certain it is. Clear procedures and rules help people understand what is expected of them and what they can expect when participating in your process. You need to consider what procedures and rules you need for your process and how you communicate them to participants.

When one of the participants in your process does not follow an agreement or the final decision made, the other participant will want a way to make that participant comply with it. This is called enforcement. Enforcement may be needed when participants do not want to comply with the decision. For example, a participant may not want to comply if they think the decision is unfair. Processes that involve the participants in the final decision may be more certain because the participants have agreed on how to move forward and may not need to be enforced.

Sometimes, enforcement is necessary when a person has a pattern of not following decisions or when two participants have a difficult relationship. In these situations, you may want a transparent and formal process with clear access to built-in enforcement mechanisms. For example, if a participant has a decision from a court, they can go back to the court to make the other participant comply. If you offer a process outside of court, you may want to create stronger enforcement measures. For example, you may include a step that allows participants to file agreements with Chief and Council, a lands management office, or a court so they can enforce them if necessary.

Clear access to enforcement if needed reinforces certainty and finality, because participants know they will be held accountable for following through with the outcome, resolution or decision.

Some questions to think about and discuss:

- How will you communicate rules and procedures to participants?
- What remedies do you want your process to have available to participants?
- What appeal processes should be available in your process?
- What will be your timelines for appeal?
- How will participants be able to enforce agreements if necessary?

4.1.7. Is There Room for a Voice and Role for Extended Families, Kinship Groups, and Community?

Many Canadian legal or ADR processes are focused on only the individual participants. Some processes only provide space for lawyers or representatives of the participants to speak. Families, kinship groups, and the wider community do not have a say in the process or in the decision made. This can unintentionally create conditions for further conflict or undermine agreements or decisions in the long run. In some communities, it is important to hear from others to resolve a conflict.⁹⁶ Building a process that can involve family, kinship groups, or the wider community in the process may be key for resolving a dispute successfully and avoiding future problems arising from it for participants still living in the community.

Some questions to think about and to discuss.

- What are the strengths and weaknesses of providing a voice for family, kinship groups, and community?
- What are the consequences if you do not provide space for them to participate in the process or decision-making? What about if you do?

4.1.8. What is the Space for Indigenous Legal Traditions?

Indigenous legal traditions are Indigenous laws, including Aboriginal dispute resolution and governance processes.⁹⁷ These are diverse and unique to different Indigenous communities or nations. Most Canadian dispute resolution processes do not provide space for Indigenous legal traditions. Canadian law also has a history of repressing Indigenous legal traditions and peoples. People trained in Canadian law may not believe that Indigenous law exists or understand how to incorporate it into a Canadian process.

Including Indigenous legal traditions from your community in your process may be critical to reaching resolutions participants will respect and feel good about following through with. Processes that reflect your community's values, principles, and laws can empower participants in the process. When participants trust a process because it matches their own understandings and way of life, this may increase their willingness to agree with and comply with decisions made through your process.

On a community level, basing processes on Indigenous legal traditions can help you articulate your laws and build Indigenous governance.⁹⁸ Creating space for Indigenous legal traditions is important even where it is not obvious that Indigenous legal traditions

are practiced. It will allow your community to re-build crucial legal skills and confidence in people's capacity to resolve disputes and reach legitimate decisions. This foundation will assist you in revitalizing your Indigenous laws if you decide to investigate your community's legal traditions in the development of your process or in the future.

"When Indigenous laws are not recognized or harmonized [with Canadian laws], Indigenous peoples experience conditions that resemble a legal vacuum.

When their own laws are not respected, it creates chaos and makes legal systems ineffectual for them. As a result, there is a mounting crisis in the rule of law in Indigenous communities.

The crisis does not exist because Indigenous peoples lack legal rules; Canadian law rests on shaky foundations within Indigenous communities because it pays so little attention to their values and participation.

If Indigenous peoples could start to see themselves and their normative values reflected in how they conduct their day-to-day affairs, some of the legal challenges in Indigenous communities would diminish. ...

Furthermore, Indigenous governance would enjoy greater accountability and legitimacy if Indigenous peoples' own dispute resolution bodies were properly recognized as being able to resolve their disputes."

- John Borrows, Canada's Indigenous Constitution, page 208-209.

Some questions to think about and discuss:

- What are the consequences of not providing space for Indigenous legal traditions?
- Are there laws and processes that will not be used or revitalized if your community only uses Canadian legal processes?
- How will judges interpret your community's laws?
- Does your community want to revitalize or use Indigenous legal traditions?
- If so, who will you involve in the process of revitalizing Indigenous laws related to dispute resolution? What resources do you have now, and what research needs to be undertaken? How will you record and share these laws?

4.2. COMMUNITY CONSIDERATIONS

Community Considerations: *Practical issues that are part of the reality of any community, such as social, economic, geographical, and historical elements.*

4.2.1. Community History and Dynamics

Every community has its own unique history and its own internal familial, social, and political dynamics. Strengths, solutions, challenges, and conflicts can be passed down from generation to generation. Given that each generation makes choices about what to teach the next generation, we all have to ask: *What should be passed on? What should not be passed on?*

Many Indigenous peoples struggle with difficult histories of colonialism, dislocation, and the residential school legacy. This can lead to challenging dynamics within communities, like internal conflicts, blame and distrust, and high rates of lateral violence and intimate partner violence. Violence can be minimized by people denying it and saying it is not an actual problem. Or violence can just be accepted as part of life and normalized into the everyday experience.

“Dispute resolution cannot be forced on people, and it cannot be forced to work. ... every participant [has to agree] to go through this process of change.”

Marie Boglari, *“Why Conflict in Our Communities Needs a Diversity of Approaches for Resolution”* (2014).

A dispute resolution process that does not take into account the history, level of health, and the very real dynamics within a community may do more harm than good.

Colonialism is not the only narrative. Every Indigenous community also has courageous histories of resistance, resilience, and creative solutions. Many leaders work tirelessly to build a better life for their community and future generations. Many elders and other people within communities continue to practice and pass down language, laws, and ways of life. Often people know more than they think they do and many communities are in the process of relearning and revitalizing language and cultural practices.

You are the expert on your own community history and dynamics. For example, on a practical level, when looking for decision-makers or facilitators for a dispute resolution process, you know who people trust and you know how to find this out. You know if your community has had a good or bad experience with a certain type of dispute resolution process, and that experience will affect how they will view a new project.

Some questions to ask about your own community's dynamics:

- Are there internal conflicts? Is there blame and distrust? What are the main internal conflicts?
- Is there lateral violence and intimate partner violence? How extensive is it? How do you know?
- Is violence minimized by denial? Is violence accepted as normal?
- Whose voices do you hear from the community? Whose voices are missing? Why?
- What are the community strengths? How have leaders, elders, and community members tried to create better lives?
- What kinds of dispute resolution have people had experience with? Was it positive or negative? Why?

These can be really difficult questions and there can be complicated problems. Nothing in a community – in any community – is simple. This is especially true in smaller communities where there are so many entangled connections and relationships. But, you will have to think about how to ask these questions and how to find ways to talk about them.

At a conference held in Saskatoon, Saskatchewan, the late Indigenous scholar, Patricia Monture, said, *"Sometimes being self-governing means going and getting your brother's kids because he is drinking. It is putting up with people being mad at you because you don't take no for an answer when someone's safety is at risk."*

Do you agree? What do you think?

4.2.2. Sustainability and Efficiency

In Canada and around the world, the cost of formal legal systems – legal representation for poor people, adjudication, enforcement, and incarceration – is high and funding often inadequate. Unfortunately, what usually loses out is legal representation and accessible legal services. This has been a constant struggle in Canada in most provinces.

Given this reality, one of the matters you will have to think about is cost and where the funds will come from. While some legal processes are less expensive, cost and long-term sustainability is still an important issue. We have all seen good social and legal service

programs set up only to suffer funding cutbacks. The result is that the quality of what was a good, solid program can deteriorate with loss of management, inadequate staff, and too few resources. As a program loses effectiveness it will also lose credibility.

A major community issue is whether the dispute resolution process will be sustainable over the long-term – five years, ten years, and beyond.

Some questions to ask about your sustainability and efficiency:

- What will it cost to create your dispute resolution process?
- Where will you get operational funding?
- What costs are involved in maintaining your dispute resolution process?
- How will you sustain your dispute resolution process? Do you have secure funding over the long term?
- Will the dispute resolution process be free to community members? If not, who will have to pay for services? How will you decide this?

4.2.3. Time

It has been said that if people do not have enough time to do something, then it would fail no matter how skilled or smart they were. Time is a critical piece for governance and for any community initiative. We know that at the local level, there are lots of hard working people and that there are usually not enough of them. This is also an issue in many community justice projects that rely on volunteers – the work is demanding and there is usually too much of it. Burn out is an all too common experience for people working at the community level.

When thinking about a dispute resolution process for your community, consider who will have the time and energy to develop it and implement it. Is there an expectation that the people who are already doing everything will also be responsible for dispute resolution?

You need to consider who is responsible for the daily administration of the process once it is created. For example, you will need people to provide information, keep records of decisions or agreements, and schedule meetings between decision-makers and participants. You need to ask whether these people are going to be professionals or

volunteers. If you do not have funding to hire administrators, you need to design a process that is not time-consuming to maintain or difficult to teach to a volunteer.

Community members have different strengths, experiences, and knowledge – these might be potential resources for your dispute resolution process. Often people do not know their own strengths and knowledge so they do not see how they might get involved in community initiatives. Also, there may be people in your community who are working “under the radar” by quietly teaching their grandchildren the language, hide tanning, hunting, or other important skills that require special knowledge.

4.2.4. Including the Community in Designing Your Process

Creating a dispute resolution process takes time, energy, and money. The more you design a process to your community’s needs, the more time it will take to create. However, if the process is designed to work best for your community, it will be easier to maintain and may need fewer changes over time. This will help your process become successful over the long-term.

Your first step is to create a planning committee. Consider who can help you design a process with your entire community in mind. This means including more than leaders in your community or experts on dispute resolution processes. It is critical to create safe spaces to hear the voices of those most affected by matrimonial property disputes, and from different parts of your community, such as elders and women’s groups, in your planning.⁹⁹

For practical tips on **Community Engagement** and **Community Meetings**, see:

The COEMRP’s MRP Toolkit at pages 44-45.

The Canadian Human Right’s Commission Toolkit for Developing Community-based Dispute Resolution Process in First Nations Communities at pages 26-28.

You should include the community in the development of your process through broad consultation. This helps the community learn about your process and build broader support for it. People are more likely to use processes if they have been involved in their design. Provide information to the community on what you are thinking about, what the advantages and disadvantages of different processes are, and then invite feedback. Be clear about what the costs will be to your community and participants when discussing different processes. Talk to people about how they resolve conflicts now.

There are many ways you can start the community engagement process. You can hold community meetings, use technology, or hold small meetings with different groups to engage with your community.¹⁰⁰

Some questions to think about and discuss:

- Who will develop, implement and administer your dispute resolution process? How many staff will you need? Will they be paid staff?
- Who are the people in your community that might be interested in learning about dispute resolution?
- Who do you need to get involved with the dispute resolution process? How might they be involved?
- Who is already involved in community initiatives? Who is not involved and how might they be invited to work with you?
- What are the kinds of things that you need help with to develop and to implement the dispute resolution process? (For example, special skills or knowledge, past experience, leadership qualities, communication skills, credibility, etc.)
- What will people need from you in order for them to get involved in some way with the dispute resolution process?
- Who might have the time and interest to help with dispute resolution? What might be stopping them now? Is there a way to help them get involved? (For example, transportation, house to house visits, providing information and explanations, confidence building, etc.)
- Is there a way to free people up from their present commitments? (For example, job reorganization, childcare, etc).
- How will you engage with the community in the design of your process?
- How will you engage individuals or groups who are likely to be most impacted by matrimonial real property disputes but may not feel safe or comfortable talking in a large community meeting (For example, women or non-member spouses)?

4.2.5. Education and Skill Development

Whatever dispute resolution processes your community chooses, you will then need to figure out the qualifications people will need to do the work. Beyond formal education, you will need people with “good people skills” who are approachable, trustworthy, reliable, and motivated. Again, depending on the dispute resolution models your community selects, you may have to consider organizing or accessing some skill development, training or educational resources.

These resources could include:

- researching your Indigenous legal tradition and legal practices,
- mediation and negotiation skills
- active listening and interviewing skills,
- understanding conflict dynamics and types of conflicts,
- understanding and working with relevant Canadian legislation,
- record keeping, report writing, and record management,
- group dynamics and development,
- gender and power dynamics.

This is not a complete list – what you will need will depend on your community. Some of these programs might already be available to you, but there will be others that you and your community will have to find out about and assess.

Some questions to think about and discuss:

- What skills, education and training will people need to administer, implement and evaluate your process?
- What are the different roles you need to create and maintain your process?

4.2.6. Population Composition and Size

The 1996 Royal Commission on Aboriginal Peoples defined an Aboriginal Nation as a sizeable body of people with a shared sense of national identity, a common history, language, laws, governmental structures, spirituality, ancestry, homeland, and political consciousness.¹⁰¹ Historically, there were 500 distinct Indigenous societies or nations in North America.¹⁰² In Canada, there were some 60-80 larger Indigenous societies or nations, and now there are some 1,000 Indigenous communities – both reserves and other settlements, most of which are fairly small.

Colonialism has resulted in a political reorientation away from the larger historic societies that were usually organized along linguistic lines to smaller, sometimes mobile communities living over large territories. Today, Indigenous communities are fixed geographically on reserves with smaller land bases. They are also fixed to varying degrees by Canadian legal benchmarks such as the *Indian Act*, historic treaties, and today, the contemporary treaties and agreements. Generally, the political focus has moved away from the former horizontal relations of Indigenous communities *within* Indigenous societies and *between* Indigenous societies.

Today we see more direct vertical and hierarchical relations between small Indigenous communities and Canada rather than those historical horizontal relations between communities and societies.

Small populations with close relationships have unique strengths and risks. People know what is going on and can find ways to help one another when they need to. People who are experiencing trouble and hard times know who they can trust and who they can ask for help. On the other hand, if our communities are not yet healthy, the close relationships can actually increase risks or be harmful for vulnerable people in them.

For instance, in small communities, people usually know what is going on – including whether someone is being abused. In a healthy community, others will act on their responsibilities and help the person suffering from violence and abuse. But in unhealthy communities, relationships are unhealthy too. The violence might be viewed as justifiable or considered so normal that no one helps those suffering from it. This situation requires hard-headed honesty, a commitment to non-violence and protection, and rebuilding of healthy family and community relationships.

When you are considering dispute resolution for your community, you will have to ask some tough questions about the strengths and risks related to your population size and composition. It may be that you will have to consider creating dispute resolution

processes by working with other Indigenous communities if your community is too small, your population is too young, or too many family and community dynamics are still unhealthy.

Some questions to think about and discuss:

- What is the population of your community? How many people live in the community?
- What is the composition of your community (who - age, genders, sexual orientation, citizenship, membership, status, educational level etc.)?
- How many matrimonial property disputes might arise in a year?
- What kind of historic relations does your community have with other Indigenous communities? What are your community's current relations with other communities?
- What will people need from you in order to feel invited and to get involved in some way with the dispute resolution process?
- With the present conflicts or disputes in your community, are there community members who are not a part of them?
- Will you have enough community members who will be able to remain outside of matrimonial property disputes in order to be fair, and who will be seen as being fair?
- Will there be community members who will be able to see and act on the larger community good despite the matrimonial dispute, and who will protect the integrity of the dispute resolution process?
- How will you identify these community members? How will you involve them in the dispute resolution process?
- Does it make sense to work with other Indigenous communities to create dispute resolution processes?

4.2.7. Relative Geographic Isolation

Many Indigenous communities are in remote parts of the country with limited transportation options. This usually, but not always, means fewer community resources (e.g., housing) and problems of accessing services such as shelters, law enforcement, social workers, legal representation, etc. If this is your situation, most likely you will have found ways to deal with these issues, but there may be new problems that arise.

Some questions to think about and discuss:

- Is there adequate housing now?
- What happens now if community members don't have a house or their home is not safe?
- When thinking of your community's dispute resolution process, what outside resources and services will you need?
- Are there currently issues of accessibility or lack of resources that create problems (e.g., safety) for community members experiencing matrimonial property disputes?
- How has your community dealt with resource, transportation and access problems in the past?
- Are there other ways that resources, transportation, and access shortcomings might be dealt with in the future?
- How likely or realistic is it for people in your community to access outside dispute resolution processes, such as courts, or outside enforcement, such as police, now? How will this reality impact your process?

4.2.8. Types of Conflicts

There are some common causes for conflict such as scarcity and unequal sharing, different goals and needs, attitudes and perceptions, inequality and power relations, and lack of clarity about goals, expectations, and responsibilities. We all know that conflict is uncomfortable and stressful, and when it is not dealt with, it can be paralyzing and damaging to everyone.

Conflict is more than disagreement and we all respond differently to it – sometimes in a healthy, constructive way, but other times in a less positive manner . It is important to recognize that not all conflict is negative and it will always be a part of life when human beings live together. However, sometimes the way we respond to conflict makes it worse and we all have responsibilities to do a better job in dealing with conflict when it happens – which it will. The options set out in this Toolkit provide some practical approaches to deal with matrimonial property disputes before they add to or complicate community conflicts.

One way of understanding conflicts better is to identify different types of conflict that all human beings can find themselves in – including within Indigenous communities. There are many resources that list types of conflict that are available to you, and while not all of these will relate to your community, it is helpful to look at how others think about types of conflict.

Some of the types of conflict we see are:

- **Ethics** – such as a breach of confidentiality or other unethical behaviours. Ethics are deeply held and are about beliefs, trust, and commitments, so they can be difficult to discuss.
- **Leadership** – there are different ways to lead and to manage, and some styles can generate resentment and conflict (e.g., too bossy, not talking things through, not informing people, etc.).
- **Ways of working** – some people are really driven and passionate, others are more laid back. Some people are patient, others are in a hurry. People can rub each other the wrong way without meaning to and when we just react, we can make things worse.
- **Personality and behaviour** – what we see and our emotions can determine whether we like or dislike someone. Some people are more outspoken, others are quieter. If you think others are rude or disrespectful, it makes it harder to work together. It can be really hard to see our own personalities and just as hard to see the good in others who have different personalities.

“We are all of two minds about conflict. We say that conflict is natural, inevitable, necessary and normal, and that the problem is into the existence of conflict but how we handle it.

But we are loath to admit tht we are in the midst of conflict. ...

Somehow, to say that we are in a conflict is to admit a failure and to acknowledge the existence of a situation we consider hopeless.”

Bernard S. Mayer, The Dynamics of Conflict Resolution.

- **Interests** – time, money, resources – and disagreements over how to address problems and differences. We all have ideas about the best way to do things, but our way is usually not the only way and there is room for difference.

- **Relationships** –there are many types of relationships and when there is miscommunication, fears, or unmet needs, it can be hard to agree on how to resolve problems between people. This is especially the case if one or more of the people is battling addictions, mental health disorders, or other challenges.

- **Inequality or power differences** – there are power relations and hierarchies all around us that can create resentment and anger. These power relations can involve unequal opportunities, education levels, money, or job authority (e.g., with social workers or others that have real power over people’s lives). Power doesn’t exist outside human

relationships – only inside relationships – so we have to see it and name it. Power is not necessarily a bad thing – but oppression and misuse of power over others is wrong. People will always resist oppression, as they should, and they will try to find dignity and respect for themselves no matter what.

- **History and systems of political beliefs or political ideologies** – there are many serious Indigenous issues that have never been dealt with or were never adequately addressed. These include land, resources, governance, relocations, and economic inequality – which are not going anywhere - and the challenge is to find constructive ways of taking them on. However, sometimes deep anger that is caused by external events or history can be internalized in ourselves and in communities. When this happens, people can end up blaming each other and taking their anger out on others who have not caused the problems, because those are the faces in front of them.

As you think about conflict in your community, take some time to reflect on how you might be a part of that conflict. People have complicated reasons for perpetuating conflict and one of the hardest things to ask ourselves is, “What do we get out of

“Whether we are aware of them or not, we all enter conflict with certain assumptions about its nature.

Sometimes these assumptions are very helpful to us, but at other times they are blinders that limit our ability to understand what lies behind a conflict and what alternatives exist for dealing with it.

We need frameworks that expand our thinking, that challenge our assumptions, and that are practical and readily usable.

As we develop our ability to understand conflict in a deeper and more powerful way, we enhance our ability to handle it effectively and in accordance with our deepest values about building peace.”

- Bernard S. Mayer, *The Dynamics of Conflict Resolution.*

perpetuating conflict?” Sometimes the answer is a way to maintain the status quo, sometimes it is maintaining certain ways of doing things, or it might be a way to maintain our own role and importance.

A question to think about and discuss:

- What types of conflicts might participants be affected by or dealing with in addition to their matrimonial property dispute in their dispute resolution process?
- How will your dispute resolution process recognize and deal with different and overlapping types of conflict?

Basic Conflict Resolution Steps...

Whatever dispute resolution your community chooses, there are some basic conflict resolution steps for each individual involved, whether they are participants, facilitators or decision-makers. You can use this overview as a way to double check how you are working and as a way to assess your dispute resolution process.¹⁰³

(a) Know yourself and take care of yourself:	<ul style="list-style-type: none"> • What are your perceptions, biases, and triggers? • Make sure you eat, sleep, and exercise.
(b) Clarify personal needs that are threatened by the dispute:	<ul style="list-style-type: none"> • Substantive (e.g., safety, bodily integrity). • Procedural (e.g., fairness, process).
(c) Identify a safe place for the dispute resolution process:	<ul style="list-style-type: none"> • Private, neutral, safe. • Mutual consent to participate, appropriate time. • Skilled and empathetic support staff and/or volunteers • Agreement of ground rules (e.g., conduct, confidentiality, participation).
(d) Listen (really listen):	<ul style="list-style-type: none"> • Seek to understand, then seek to be understood. • Actively listen to others: What are they saying and how are they saying it?

<p>(e) Be clear and assertive and specific about what you need:</p>	<ul style="list-style-type: none"> • Identify issues clearly and concisely – don't go on and on. • Use "I" messages to describe your own thoughts, feelings and needs (I feel sad/worried when...) • Check and clarify what the other person is saying (I hear you saying..., Do you mean...?). • Build from what you hear and keep listening.
<p>(f) Be flexible in how you approach problem-solving:</p>	<ul style="list-style-type: none"> • Brainstorm and generate options without judgment. • Be open to other ways of defining the problem. • Be clear about the criteria for making decisions.
<p>(g) Manage any logjam or impasse with respect, calmness, and patience:</p>	<ul style="list-style-type: none"> • Clarify feelings. • Focus on the underlying needs, interests, and concerns. • Take breaks as needed and put limits on the length of the break.
<p>(h) Build an agreement that works:</p>	<ul style="list-style-type: none"> • Is the agreement fair? • Does everyone have a role and stake in fulfilling it? • Are the action steps realistic? Is there the time, energy, skills, and resources to follow through? • Is it specific so people understand what they have to do? • Is the agreement self-enforcing or does it rely on someone else to enforce it? • What if others are unwilling to do their part? • Does the agreement focus on the future so there is a way to deal with any possible future problems?
<p>(i) Learn from your work:</p>	<ul style="list-style-type: none"> • Build in ongoing evaluation of your work. • Ask others to help you – include people who will be critical or disagree with you.

4.3. PARTICIPANT CONSIDERATIONS

Participant considerations: *Practical and personal issues that participants and individuals most directly affected by the outcomes of dispute resolution processes are likely to care about deeply.*

4.3.1. Privacy versus Transparency

There is much in the news these days about breaches of privacy and confidentiality, and lack of transparency (e.g., just think of “wikileaks”). There are privacy commissioners as well as privacy legislation to protect personal information. When thinking of dispute resolution for your community, you will have to consider how these questions will apply to you.

In many ways, these concerns about privacy and transparency are born of today’s world where large population centers are made up of strangers. For the most part, in cities, people do not know each other and they are not responsible for one another either. In a city (or in the larger world) of strangers, privacy and confidentiality are important because they are a way to maintain safety. Lack of privacy and confidentiality can create vulnerability when you do not know what to expect from others or when you expect others will harm you if they get an opportunity.

As for transparency, lots of people believe that their governments are not telling the truth or are hiding something. There are also Indigenous people who believe their own governments are not sharing adequate information with them. Not having information can cause people to feel powerless. Giving people as much information as possible about what is going on is one way to empower people, as well as increase their trust and confidence in their own decisions and in their governments’ decisions. It may also prevent or de-escalate conflicts because people feel safer and less suspicious or on guard when they are not feeling (figuratively) blind, and so are in a better state to resolve specific disputes, trust appropriately and move forward constructively. Another

Privacy is the control over the extent, timing, and circumstances of sharing oneself – physically, behaviorally, or intellectually – with others.

The general principles behind privacy are:

- People are autonomous agents able to exercise their autonomy, including the right to privacy and the right to have private information remain private.
- Privacy and confidentiality help to protect people from potential harm including:
 - psychological harms such as embarrassment and distress; and
 - social harms such as loss of employment or damage to one’s financial standing.

way of thinking about this is that a lack of information can cause real vulnerability, so healthy people will expect, or even demand, transparency from those in positions of trust and authority.

Historically, most Indigenous communities had smaller populations, but they were part of a larger collectivity or alliance organized along linguistic lines with large land bases. Responsibility for one another was organized through kinship or on a more collective basis. In order to be responsible for one another, people had to know one another and about one another. There were levels of trust that enabled this individual and collective sense of responsibility – and trust had to be built in each relationship.

While most Indigenous communities in Canada are still small, there have been changes and the ways people were responsible for one another has been undermined. Also, with

To be **transparent** means to operate in a way that makes it easy for other people to see what actions are taken and what decisions are made.

Transparency is an intentional way of working that allows the sharing of information.

Sometimes information is not shared because we are afraid of criticism.

Sometimes we are afraid of people misusing information.

Intentionally sharing information so that it actually makes sense to others also takes time – and often we feel like we just do not have enough time to meet all the demands in our lives and in our work.

Transparency is worth it: Not being transparent has hidden costs. The consequences of not being transparent are always negative. No matter how good or important of work you are doing, a lack of transparency always breaks down trust and raises suspicions.

many of the unhealthy community dynamics today, there are valid concerns about vulnerability and continuing harms. However, the reality is both privacy and confidentiality are difficult to maintain in smaller communities – people see each other, know each other, are related to each other, or have other close connections and personal histories. All of this can be positive or negative depending on the health of the community's dynamics and the levels of conflict, lateral violence, and intimate violence.

Still, many participants in matrimonial property disputes value their personal privacy in the process and in the decision. They may not want people in their families, kinship groups, or broader community relationships to know the details of their dispute or how it was resolved. People may be less willing to be open in a process if they are concerned that details will emerge in their communities. To ensure that there is openness and fair resolutions, you must consider how your process will protect participants' privacy and confidentiality.

Privacy and confidentiality in Indigenous communities:

In thinking about dispute resolution for your community, what are the issues of privacy and confidentiality? How will you find a way to discuss these issues? After all, privacy is basically about respecting people's:

- Sense of being in control of who has access to us and our personal information, and
- Right to feel and be protected.

Confidentiality usually means that the personal information that you share with a lawyer, counsellor, doctor, or other person cannot be given to anyone else without your informed consent.

Some questions to think about and discuss:

- Who should have access to the personal information and records of those who participate in the dispute resolution? Who should not?
- Who will protect the confidentiality of personal information and records of the participants?
- How will this privacy protection be organized and maintained?
- What will happen if personal information is shared – intentionally or accidentally?
- What might some of the consequences of a breach of privacy be in your community?
- What concerns might members in your community have about privacy and confidentiality?
- What have the privacy and confidentiality experiences of community members been in the past? Did it work well? What made it work well? Did it not work well? Why not?

Transparency in Indigenous communities:

Transparency in law is critical if people are going to feel a sense of ownership and responsibility for it. People need to see the assumptions that are behind all the legal interpretations and the legal reasoning. How and why are legal decisions made? What was considered? Whose interests were considered?

There are similar transparency issues for dispute resolution – whether your community uses courts, therapeutic/problem solving courts, tribunals, circle processes, or legal processes from your own legal tradition.

Some questions to think about and discuss:

- Starting at the “get go”: How will people participate in choosing a dispute resolution option?
- What information will you provide to people so that they are informed about what is involved with each option?
- Once your dispute resolution process is established, what laws, policies, and guidelines do people need to know about? How will you let them know these?
- Where will people get information about the dispute resolution process? How easily might they get what they need?
- What aspects of the dispute resolution process should not be public? Why?
- What do you need to keep confidential about staff, management or operating decisions? What aspects of these decisions can you be transparent about?
- How will people be able to share their questions, insights, and suggestions? At the end of the day, people will need to feel that their input and feedback was taken seriously. How will people know this?

4.3.2. Fairness and the Appearance of Fairness

Within Indigenous legal traditions there are legal principles of fairness (e.g., Cree, Tsilhqot'in, Mi'kmaq, Secwepmec, Coast Salish, etc.) to guide the collective legal process and responses to problems.

All legal traditions, including Canadian legal traditions, exist because people uphold them as being legitimate. If people understand law as being legitimate, they will abide by legal decisions even when they do not get their own way. Fairness is central to how people understand legitimacy – people need to feel respected, allowed dignity, and believe that they are legal agents in their lives and in their community.

This idea of human agency is an important one for every community and legal tradition. What we mean here by agency is our individual ability to create meaning in our world, to understand what is expected of us by law and by others, and to be able to act on our understandings and meaning.

Agency also means that human beings have will and intent – we are not just passive or reacting. While some ideas of agency emphasize individual autonomy, as if human beings are completely independent from one another, we find it more useful to consider agency in relation to others. We are ultimately relational beings so we are relationally autonomous, not simply individually autonomous.¹⁰⁴ We act in these relations through our obligations to one another – we manage ourselves collectively through our legal traditions. Through these legal traditions we are accountable to others and others are accountable to us – we engage in our legal traditions as capable, thinking beings.

Our self-understanding is always in relation to others and our actions always affect others because individually, we are part of a community and also part of a larger society. In other words, we are individually self-governing, and our individual governance forms part of our collective governance. This is

Example

In Cree law people have fair procedural rights such as:

- Suspicion of harmful behaviours/actions must be corroborated by observation and evidence.
- People suspected of harmful behaviours/actions have a right to be heard.
- People who have committed harmful behaviours/actions have a right to decisions that are made through open, collective deliberation, and appropriate consultation.

AJR Project Cree Legal Traditions Report
(2012) at page 47.

one of the lessons we learned from our work with Indigenous legal traditions across Canada.

As for legitimacy, when our laws are not fair, we do not see them as legitimate and law loses its meaning and validity (this is not the same as disagreeing with the law, which happens all the time). We will challenge unfair laws, as we should, or we will ignore them and law loses its force. In this case, governments will either change the law or use force to enforce it (we see this in some countries around the world). Change and challenges are part of the history of Canadian law – and of any valid legal tradition.

In Canada, it is not just important for law to be fair, it must also be *seen* to be fair. Processes seem fair when the decision-making process looks impartial and the decisions are clear and objective. So it is also very important that Canadian law not be “brought into disrepute” – lawyers, judges, and legislators are legally responsible for maintaining the validity and legitimacy of Canadian law. They will get into very serious trouble, as they should, if they dishonor the law and cause it to lose credibility.

Your process should also feel fair to the participants. Processes feel fair when the participants believe the decision-makers have listened to their stories and are not taking sides when deciding a case. You want a process that looks and feels fair so people in your community trust and respect it. This means that more participants will use it and feel good when they use it. Participants will more likely comply with final decisions if they believe decision-makers are impartial.

Some questions to think about and discuss:

- How and why is fairness a part of your legal traditions?
- What will people understand as fairness in your community? What does being treated fairly in your community look like?
- What experiences has your community had with fair or unfair processes? What made them fair or unfair?
- How will you ensure fairness is a part of your dispute resolution?
- How will you ensure that your community’s dispute resolution process is seen as being fair?
- How will you respond if someone finds your community’s dispute resolution process unfair?

4.3.3. Access and Accessibility

Laws are accessible when people know where to find them, how to learn them, and who to speak to if they have questions about them. If too many people have difficulty understanding Indigenous laws because they are not readily available, steps should be taken to make them more accessible.¹⁰⁵

Access and accessibility are about the ability of community members to participate in your dispute resolution process.

Accessibility can refer to people knowing and clearly understanding what is expected of them and what they can expect from others. In the US, tribal court judge, Matthew Fletcher said, “Indigenous law must be accessible, understandable, and applicable”. If community members are going to be able to use your community’s dispute resolution process, you will have to make it accessible to them. This is an issue closely connected to legitimacy – for laws to be fair, people have to know what is expected of them.

Accessibility can also mean that participants can easily participate in the process itself. You should consider things like:

- Accommodating people with special needs or disabilities, such as single parents or people with mobility issues.
- Reading levels of materials you use.
- Languages that are spoken by the community that will use your process.
- Whether participants will need a lawyer or another representative.
- Whether there are any gender or other power imbalances and how to deal with them.
- The distances participants need to travel to participate.
- The time it will take to participate in the process.
- The different dispute resolution processes you will offer.¹⁰⁶

You should speak with a broad range of people in your community when designing your process to make it as accessible as possible. In particular, you should speak with groups that may need greater accessibility.¹⁰⁷

Access to effective dispute resolution processes is often discussed in terms of people’s “access to justice,” the “right to legal representation,” “access to legal services,” or “access to legal information.” Recently, the United Nations has said that access to justice

is essential to human development and the reduction of poverty.¹⁰⁸ These are national and international concerns that governments are responding to – because they are central to fairness and, therefore, to law’s legitimacy.

When participants cannot use your process, this is a barrier to access. For example, participants are unable to access your process if it costs too much to participate. Generally, the cost of participating in more formal processes, such as court, is higher. This is because it costs more to maintain formal institutions and have expert decision-makers. Also, participants typically need lawyers or other professional representatives to help them through the process in court-like settings.

Some questions to think about and discuss:

- What will your dispute resolution process have to look like and include so that it is accessible?
- What will create accessibility in your community? (For example, language, location, hours, cost, and visibility.)
- Who will have access to your community’s dispute resolution process? Who may have barriers to access?
- How will your community members know where to find the dispute resolution process? Who will they speak to if they want to access it?
- How will you know if community members have access or not?
- How will you address access or accessibility issues that arise?

4.3.4. How Does Your Process Affect Gender and Power Imbalances Between the Participants?

Power is the ability to influence other person and get them to do something they may not want to do.¹⁰⁹ In a dispute resolution process, a power imbalance might make a participants agree to something that is not in their best interest.

People may also be expected to act a certain way based on their gender. For example, western culture, women are often expected to be more co-operative and men are expected to be more assertive. This can create a specific kind of power imbalance in dispute resolution processes. It is important that your process can address these issues

in matrimonial property disputes. You will have to consider what safety measures must be in place to ensure people feel and *are* safe in the process.¹¹⁰

Some questions to think about and discuss:

- How will you screen for domestic violence or gender and power imbalances?
- How will you start and maintain conversations about gender and power dynamics? Who will be included in these conversations?
- How will you evaluate measures to address or mitigate gender and power dynamics? How will you know you have been successful?

4.3.5. How Might This Connect With Participants' Broader Family, Kinship Group or Community Relationships?

Most participants in matrimonial property disputes want privacy in the process and in the decision. They may not want people in their families, kinship groups, or broader community to know the details of the dispute or how it was resolved. Privacy is one reason why many separating couples prefer negotiation, mediation or collaborative law processes to court. It will be important to demonstrate how your process values and protects participants' privacy and confidentiality.

At the same time, it may be important, for emotional, spiritual and practical reasons, for participants to have support from broader family, kinship or community relationships when reaching a resolution about a seemingly private matter. This may be especially true in small communities where everyone is inter-connected and lives in close proximity. Participants may want the guidance, understanding or approval of certain people in these broader relationships. For example, if your ex-parent-in-laws live next door to you, and the resolution is that you are staying in the house and your spouse is not, you may think it is none of their business, or you may want them to understand fully why and how that resolution was reached, so negative feelings don't fester or build up. Considering and including participants' broader relationships may be a crucial aspect of the long term success of any resolution.

5. GUIDING QUESTIONS AND BUILDING BLOCKS FOR COMMUNITIES

Guiding Questions are questions taken from the governance, community and participant consideration in the previous section, that you can use to guide vital community conversations about developing, implementing, and evaluating your own dispute resolution processes.

Building Blocks are important components to identify and/or include in developing, implementing or evaluating any dispute resolution process, whether it is court, ADR, circle processes or revitalizing legal processes from your own Indigenous legal traditions.



5.1. GUIDING QUESTIONS

For Governance Considerations...

Community Aspirations:

- What are your main community aspirations at this time? How does your dispute resolution process fit with your community's aspirations?
- What dispute resolutions processes are consistent with your community's values, principles, and laws?

Decision-Makers:

- Who will be the decision-makers in your process?
- What are the negative and positive consequences of locating decision-makers outside of communities? Inside of communities?
- What are the consequences of having a judge with no understanding of your community or Indigenous law?
- Will there be one decision-maker or many? Will there be standing committee or panel, or will you maintain a roster?
- What knowledge, training and experience will decision-makers need?

Public Record and Precedents:

- What are the strengths and weaknesses of having a public record?
- What are the strengths and weaknesses of setting precedents?
- How will you build a public record if you use private dispute resolution processes?
- How will you make records and decisions available to the community?

Remedies, Appeal, and Enforcement:

- How will you communicate rules and procedures to participants?
- What remedies do you want your process to have available to participants?
- What appeal processes should be available in your process?
- What will be your timelines for appeal?
- How will participants be able to enforce agreements if necessary?

Role for Extended Family, Kinship Groups, and Community:

- What are the strengths and weaknesses of providing a voice for family, kinship groups, and community?
- What are the consequences if you do not provide space for them to participate in the process or decision-making? What about if you do?

Space for Indigenous Legal Traditions:

- What are the consequences of not providing space for Indigenous legal traditions?
- Are there laws and processes that will not be used or revitalized if your community only uses Canadian legal processes?
- How will judges or adjudicators interpret your community's laws?
- Does your community want to revitalize or use Indigenous legal traditions?
- If so, who will you involve in the process of revitalizing Indigenous laws related to dispute resolution? What resources do you have now, and what research needs to be undertaken? How will you record and share these laws?

For Community Considerations...

Community History and Dynamics:

- Are there internal conflicts? Is there blame and distrust? What are the main internal conflicts?
- Is there lateral violence and intimate partner violence? How extensive is it? How do you know?
- Is violence minimized by denial? Is violence accepted as normal?
- Whose voices do you hear from the community? Whose voices are missing? Why?
- What are the community strengths? How have leaders, elders, and community members tried to create better lives?
- What kinds of dispute resolution have people had experience with? Was it positive or negative? Why?

Sustainability and Efficiency:

- What will your dispute resolution process cost?
- Where will you get operational funding?
- How will you fund your dispute resolution processes? What costs are involved in creating it? What costs are involved in maintaining it?
- How will you sustain your dispute resolution process? Do you have secure funding over the long term?
- Will the dispute resolution process be free to community members? If not, who will have to pay for services? How will you decide this?

Time, Resources, and Community Engagement:

- Who will develop, implement and administer your dispute resolution process? How many staff will you need? Will they be paid staff?
- Who are the people in your community that might be interested in learning about dispute resolution?

- Who do you need to get involved with the dispute resolution process? How might they be involved?
- Who is already involved in community initiatives? Who is not involved and how might they be invited to work with you?
- What are the kinds of things that you need help with to develop and to implement the dispute resolution process? (For example, special skills or knowledge, past experience, leadership qualities, communication skills, credibility, etc.)
- What will people need from you in order for them to get involved in some way with the dispute resolution process?
- Who might have the time and interest to help with dispute resolution? What might be stopping them now? Is there a way to help them get involved? (For example, transportation, house to house visits, providing information and explanations, confidence building, etc.)
- Is there a way to free people up from their present commitments? (For example, job reorganization, childcare, etc).
- How will you engage with the community in the design of your process?
- How will you engage individuals or groups who are likely to be most impacted by matrimonial real property disputes but may not feel safe or comfortable talking in a large community meeting (For example, women or non-member spouses)?

Education and Skill Development:

- What skills, education and training will people need to administer, implement and evaluate your process?
- What are the different roles you need to create and maintain your process?

Population Composition and Size:

- What is the population of your community? How many people live in the community?
- What is the composition of your community (who - age, genders, sexual orientation, citizenship, membership, status, educational level etc.) ?
- How many matrimonial property disputes might arise in a year?
- What kind of historic relations does your community have with other Indigenous communities? What are your community's current relations with other communities?
- What will people need from you in order to feel invited and to get involved in some way with the dispute resolution process?
- With the present conflicts or disputes in your community, are there community members who are not a part of them?
- Will you have enough community members who will be able to remain outside of matrimonial property disputes in order to be fair, and who will be seen as being fair?
- Will there be community members who will be able to see and act on the larger community good despite the matrimonial dispute, and who will protect the integrity of the dispute resolution process?
- How will you identify these community members? How will you involve them in the dispute resolution process?
- Does it make sense to work with other Indigenous communities to create dispute resolution processes?

Relative Geographic isolation:

- Is there adequate housing now?
- What happens now if community members don't have a house or their home is not safe?

- When thinking of your community's dispute resolution process, what outside resources and services will you need?
- Are there issues of access or resources now that create problems (e.g., safety) for community members experiencing matrimonial property disputes?
- How has your community dealt with resource, transportation and access problems in the past?
- Are there other ways that resources, transportation, and access shortcomings might be dealt with in the future?
- How likely or realistic is it for people in your community to access outside dispute resolution processes, such as courts, or outside enforcement, such as police, now? How will this reality impact your process?

Types of Conflict:

- What types of conflicts might participants be affected by or dealing with in addition to their matrimonial property dispute in their dispute resolution process (For example, ethics, leadership, ways of working, personality and behavior, interests, relationships, inequality or power differences, history and systems of political beliefs, political ideologies)?
- How will your dispute resolution process recognize and deal with different and overlapping types of conflict?

For Participant Considerations...

Privacy:

- Who should have access to the personal information and records of those who participate in the dispute resolution? Who should not?
- Who will protect the confidentiality of personal information and records of the participants?
- How will this privacy protection be organized and maintained?
- What will happen if this personal information is shared – intentionally or accidentally?
- What might be some of the consequences of a breach of privacy in your community?

- What concerns might members in your community have about privacy and confidentiality?
- What have been the privacy and confidentiality experiences of community members in the past? Did it work well? What made it work well? Did it not work well? Why not?

Transparency:

- Starting at the “get go”: How will people participate in choosing a dispute resolution option?
- What information will you provide to people so that they are informed about what is involved with each option?
- Once your dispute resolution process is established, what laws, policies, and guidelines do people need to know about? How will you let them know these?
- Where will people get information about the dispute resolution process? How easily might they get what they need?
- What aspects of the dispute resolution process should not be public? Why?
- What do you need to keep confidential about staff, management or operating decisions? What aspects of these decisions can you be transparent about?
- How will people be able to share their questions, insights, and suggestions? At the end of the day, people will need to feel that their input and feedback was taken seriously. How will people know this?

Fairness and the Appearance of Fairness:

- How and why is fairness a part of your legal traditions?
- What will people understand as fairness in your community? What does being treated fairly in your community look like?
- What experiences has your community had with fair or unfair processes? What made them fair or unfair?
- How will you ensure fairness is a part of your dispute resolution?
- How will you ensure that your community’s dispute resolution process is seen as being fair?

- How will you respond if someone finds your community's dispute resolution process unfair?

Access and Accessibility:

- What will your dispute resolution process have to look like and include so that it is accessible?
- What will create accessibility in your community? (For example, language, location, hours, cost, and visibility).
- Who will have access to your community's dispute resolution process? Who may have barriers to access?
- How will your community members know where to find the dispute resolution process? Who will they speak to if they want to access it?
- How will you know if community members have access or not?
- How will you address access or accessibility issues that arise?

Gender and Power imbalances:

- How will you screen for domestic violence or gender and power imbalances?
- How will you start and maintain conversations about gender and power dynamics? Who will be included in these conversations?
- How will you evaluate measures to address or mitigate gender and power dynamics? How will you know you have been successful?

5.2. YOUR BUILDING BLOCKS

The following checklist provides a list of issues that should be considered and may guide the development of your dispute resolution process.

Building Blocks	✓
Development:	
What is your community engagement strategy?	
How will garner support from your leadership?	
What are your anticipated development and operational costs? How will these costs be funded?	
What training and education needs have you identified?	
What administrative support and human resources are required?	
Who should you partner with or inform about your dispute resolution process for maximum effectiveness?	
How will you select decision-makers?	
What community or communities will your dispute resolution process serve?	
What issues will your dispute resolution process address? What issues won't it address?	
Who can access your dispute resolution process? Who can not?	
Development and Implementation:	
How do participants access your dispute resolution process?	
Is your dispute resolution process recommended or mandatory?	

What model or models of dispute resolution processes will you use?	
What are the steps in your process or processes?	
What is the outcome of your dispute resolution process?	
How will you create a public record? Where do agreements or decisions need to be filed or registered?	
How will the public record be maintained and who will be responsible to do so?	
Appeals, Enforcement and Evaluation:	
What are the next steps if issues are not resolved? (i.e., appeal)	
How will you deal with enforcement/compliance?	
How will you monitor and evaluate your dispute resolution process?	
When and how often will you evaluate your dispute resolution process?	
What else?	

Appendices

Appendix “A”: GLOSSARY

Access	Access refers to whether a participant can participate in your process. For example, if your process is too expensive, people cannot access it.
Accessibility	Accessibility refers to how easily people can participate in your process. It requires you to think about how to accommodate different people who want to use your process, such as people with disabilities, single parents, or people who need translation services.
Agreement	The resolution reached by two participants through a dispute resolution process, including a traditional process. It is often written and outlines what the participants agree to do to resolve that dispute.
Alternative Dispute Resolution	Canadian law dispute resolution processes other than court, such as mediation, arbitration and negotiation.
Appeal Process	An appeal process allows a decision to be reviewed by a second decision-maker if a participant does not agree with the original outcome.
Arbitration	Dispute resolution process with a decision-maker (arbitrator) who hears the disputes and makes a decision.
Circle Process	Pan-Indigenous dispute resolution process that typically addresses issues involving harm or safety concerns and are most commonly connected to criminal justice or child protection systems. Typically, all parties have to consent to participating in circle processes and they are facilitated by a trained facilitator.
Collaborative Law	Dispute resolution process in which the participants agree not to go to court and work with their lawyers and other professionals to resolve their dispute together.
Colonialism	Refers to the period of early formation of Canada that shaped the unequal power relations between Canada and Indigenous peoples and through which the Canadian state attempted to displace Indigenous peoples politically and take their lands. Colonialism, although a marker of the past, has created the conditions Indigenous Peoples experience today and has produced a number of widely held common beliefs about Indigenous peoples that are racist and disrespectful.

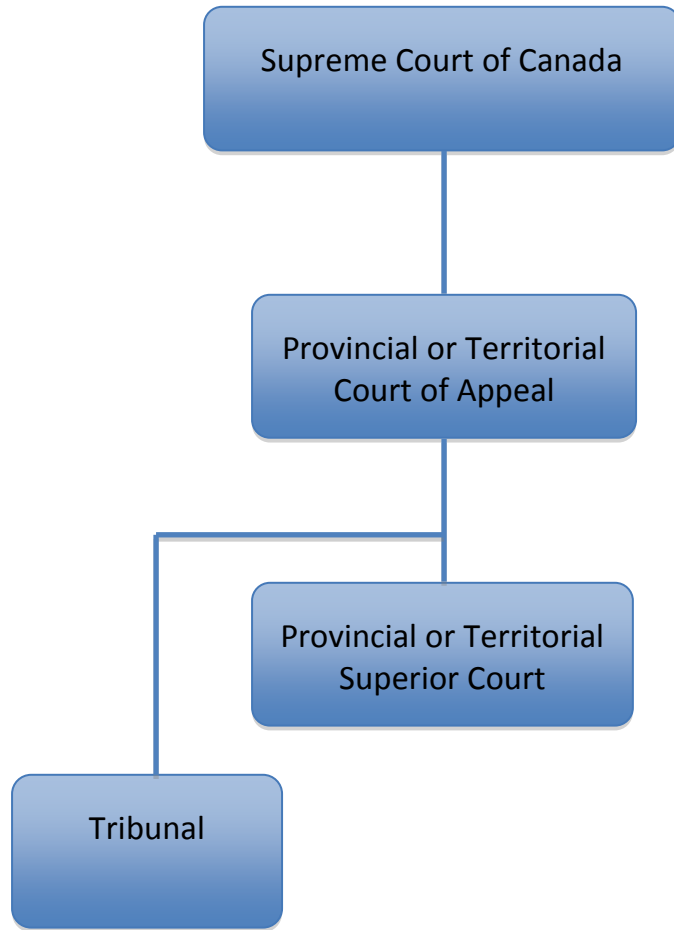
Community Aspirations	The hopes, dreams and goals of a community. What a community aims for and works towards achieving.
Community-Based Justice Committees	Committees or panels that deal with mainly criminal matters. They don't make findings of fact when people disagree about what actually happened. Most often are advisory and give advice to a judge about sentencing plans or options. ¹¹¹
Community Dynamics	The internal and historical forces that shape a community's strengths, solutions, challenges and conflicts.
Community Engagement	Reaching out to your community in appropriate and meaningful ways to consult with them on important decisions and projects. Includes thinking about how to get feedback from many different voices from your community, particularly those who normally don't have an opportunity to participate.
Confidentiality	Usually means that the personal information shared with a lawyer, counselor, doctor, or other person cannot be given to anyone else without that person's consent.
Conflict	Something more than a disagreement, arising from many issues, such as ethics, leadership, ways of working, personality and behavior, interests, relationships, inequality or power differences, history and systems of political beliefs or political ideologies.
Courts	Traditional dispute resolution process in the Canadian legal system. For matrimonial property disputes, participants will most often use the superior court of each province.
Customary law	Legal practices developed through repetitive patterns of social interaction, or specific routines, procedures, or conduct that relies on unspoken or intuitive agreements about how relationships should be regulated and what conduct is appropriate within a given community.
Decision	The resolution made by a decision-maker after hearing a dispute. It is usually a written decision.
Decision-maker	The person or people who decide how to resolve a dispute. Could be a neutral third party, a panel, the participants themselves, or a mix of people, including family, kinship groups or community members.
Deliberative Law	Laws developed through people talking with each other. This is the 'proximate source' of the most Indigenous laws, as all other sources still require human interpretation and implementation.

Enforcement	When one participant seeks to make another participant comply with an agreement or decision.
Fairness	The feeling that a person is being respected, allowed dignity and is a legal agent in their lives and in their communities. Processes look fair when the decision-making process looks impartial and the decisions are clear and objective. Processes feel fair when the participants believe that the decision-maker has listened to their story and are not taking sides when deciding a case.
Fundamentalism	The tendency to interpret law, dogmas and ideologies in a strict and literal way that is based on exact wording.
Gendered	The experience of someone based on their gender. For example, Indigenous women have different experiences than Indigenous men because they are women, such as sexual violence. Similarly, a transgender person will have different experiences than non-transgender people. Experiences based on gender and gender stereotypes create negative consequences for women and transgender people. This creates gender disparities in society.
Hearing	A process that looks similar to a court, but is less formal. A hearing-style process usually involves some sort of decision-maker, or panel of decision-makers, who would hear the facts of a complaint and provide a decision to resolve the dispute.
Indigenous Legal Traditions	Indigenous law including Aboriginal dispute resolution systems and governance processes. ¹¹³
Med-arb	A process that blends mediation and arbitration. In med-arb, the participants try to reach an agreement with a mediator. If the dispute or parts of the dispute cannot be resolved through mediation, the participants then use arbitration.
Mediation	A process during which a mediator works with the participants to voluntarily resolve their dispute together.
Natural Law	Laws that are understood to be literally “written on the earth”. Legal reasoning, guidance, standards of judgment and analogies developed based on close observations of, and experiences interacting with, the physical world, including the land, landmarks, water, animals, natural cycles and natural consequences.

Negotiation	A process during which the participants work together to come to an agreement about how to resolve their dispute without a mediator or facilitator. Participants usually have the help of lawyers in a negotiation.
Norms	Things that we believe are right and wrong.
Participant	A person who uses a process to resolve their dispute with another person.
Positivistic Law	Legal rules, regulations and teachings that people follow based solely on their perception of the authority of the person or persons proclaiming them.
Power Imbalance	Power is the ability to influence another person and get them to do something they may not want to do. ¹¹⁴ In a dispute resolution process, a power imbalance might make participants agree to resolutions that are not in their best interest.
Precedent	Precedents are past decisions that help decision-makers think about similar problems. When decision-makers resolve problems based on past decisions, they are following precedent.
Procedures	Practices that are used to implement a policy. They outline how an organization will carry out its policies. ¹¹⁵
(Dispute Resolution) Process	An organized way to resolve a dispute between participants.
Public Record	The final decision or agreement from your process is the record of the process. Having a public record means the decisions from your process are published and any person can see them.
Remedy	The steps participants take to restore harmony in a dispute.
Sacred Law	Laws that are understood to be based on spiritual principles, from the Creator, creation stories, or revered ancient teachings.
Sustainability	The ability to effectively maintain and manage something over the long term.
Therapeutic or Healing Courts	Specialized courts that are part of the regular court system, but aim to manage or resolve underlying socio-economic or health issues that lead to criminal behaviour, including intimate partner violence. ¹¹⁶

Transparency	An intentional way of working that allows the sharing of information. It allows people to operate in a way that makes it easy for other people to see what actions are taken and what decisions are made.
Tribunal	A body that hears and decides disputes in a specific area of law.
Violence	One type of response to conflict.

Appendix “B”: CANADIAN COURT HIERARCHY FOR APPEALS



Province/Territory	Superior Court
British Columbia Prince Edward Island Newfoundland and Labrador Nova Scotia Northwest Territories Yukon	Supreme Court of the Province/Territory
Alberta Manitoba New Brunswick Saskatchewan	Court of Queen's Bench of/for Province
Ontario	Ontario Superior Court of Justice
Quebec	Quebec Superior Court
Nunavut	Nunavut Court of Justice

Province/Territory	Appeal Court
Alberta British Columbia Ontario New Brunswick Northwest Territories Saskatchewan Yukon	Court of Appeal of/for the Province/Territory
Manitoba Nova Scotia Nunavut Prince Edward Island Quebec	Province Court of Appeal
Newfoundland and Labrador	Supreme Court of Newfoundland and Labrador

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¹ *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c 20, s. 43. This Act received Royal Assent in 2013, and is divided into two parts. The first part of the Act (came into force by Order in Council on **December 16, 2013**), and the remainder of the Act came into force twelve months later on December 16, 2014. Canadian constitutional and legislative citations are listed in Appendix “D”.

² See Appendix “B” for an outline of the structure of the provincial and territorial courts.

³ Supreme Court Family Rules, BC Reg. 169/2009 Part 7(15)(o).

⁴ Glen Luther, Mansfield Mela, Victoria J Bae. “Literature Review on Therapeutic Justice and Problem Solving Courts”. University of Saskatchewan, 2013, online: University of Saskatchewan <http://www.usask.ca/cfbsjs/documents/Lit%20Review%20MHC%20Saskatoon%20Academic%20Dec%202013.pdf> [Luther, Literature Review], at 12.

⁵ *Ibid* at 5.

⁶ Susan Goldberg, “Problem-solving in Canada’s Courtrooms: A Guide to Therapeutic Justice” (Ottawa: National Judicial Institute, 2011), online: National Justice Institute <https://www.nji-inm.ca/index.cfm/publications/?langSwitch=en>, at 8-9 [Goldberg, Problem-solving Courtrooms].

⁷ *Ibid* at 10-11.

⁸ *Ibid* at 11.

⁹ *Ibid* at 11.

¹⁰ *Ibid* at 7-16. In the United States, there are also unified family courts and re-entry courts for sex offenders and other offenders re-entering society after imprisonment. See: Bruce J Winick and David B Wexler, eds., *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (North Carolina: Carolina Academic Press, 2011) at 5 [Winick and Wexler].

¹¹ See Goldberg, Problem-solving Courtrooms at 12 and Leslie M. Tutty, Jane Ursel and Janice leMaistre, eds. *What’s Law Go to Do with it?: The Law, Specialized Courts and Domestic Violence in Canada* (Toronto: RESOLVE, Cormorant Books Inc., 2008).

¹² Goldberg, Problem-solving Courtrooms, see Note 6, at 12.

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¹⁴ Goldberg, Problem-solving Courtrooms, see Note 6, at 12.

¹⁵ In the United States, there are some unified family courts beginning as pilot projects: Winick and Wexler, see Note 10, at 5.

¹⁶ Goldberg, Problem-solving Courtrooms, see Note 6, at 12.

¹⁷ For example, the Métis Settlements Appeal Tribunal in Alberta was established by the *Métis Settlements Act*, RSA 2000, Chapter M-14, s 180(1); 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, *Treaty Four Justice System*]; 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>, s 8.1 [Six Nations of the Grand River, *Law Concerning Matrimonial Real Property*].

¹⁸ *Ibid*, Treaty Four Governance Institute, *Treaty Four Justice System*.

¹⁹ Canadian Human Rights Commission, *A Toolkit for Developing Community-based Dispute Resolution Processes in First Nations Communities* (Ottawa: Ministry of Public Works, 2013) at 64, online: National Aboriginal Initiative http://www.doyouknowyourrights.ca/sites/nai-ina/files/pdf/toolkit_trousse-eng.pdf [CHRC Toolkit] at 64.

²⁰ For example, *Aiskapimohkiiks* Program of the Siksika Nation, 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-emplace/ab.html>> [Department of Justice, *Location of Aboriginal Justice Strategy Programs*].

²¹ 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>>, s.15 (regulations to *A Law Concerning Matrimonial Real Property*) [Six Nations of the Grand River, *Tribunal Process*].

²² CHRC Toolkit, see Note 19, at 49.

²³ See for example, *BC Arbitration Act*, RSBC, 1996, c. 55, s. 31(3.1).

²⁴ Six Nations of the Grand River, *Tribunal Process*, s. 8, see Note 21.

²⁵ Treaty Four Governance Institute, see Note 17 and Six Nations of the Grand River, *Law Concerning Matrimonial Real Property*, see Note 17.

²⁶ For a discussion on the difference between interest and evaluative mediation, see Rebecca Ratcliffe and Catherine Bell, "Report on Western ADR Processes and Indigenous Dispute Resolution" Online: Centre of Excellence for Matrimonial Real Property <<http://www.coemrp.ca/file/report-on-western-adr-processes-and-indigenous-dispute-resolution.pdf>> [Ratcliff and Bell, *Western*] at 17.

²⁷ *Ibid* at 4.

²⁸ See for example, *BC Arbitration Act*, RSBC 1996, C 55, s. 31(3.1).

²⁹ Scott Booth, John-Paul E. Boyd, Sandra L. Dick and Trudy A. Macdonald, “Practice Material: Family,” in Alexis Kazanowski, ed. *Professional Legal Training Course 2015* (Vancouver: Law Society of British Columbia, 2015), online: Law Society of British Columbia <<https://www.lawsociety.bc.ca/docs/becoming/material/Family.pdf>> at 6.

³⁰ Legal Service Society of BC, “Collaborative family lawyers,” online: Legal Services Society of British Columbia <http://www.familylaw.lss.bc.ca/help/who_CollaborativeFamilyLawyers.php>.

³¹ Legal Service Society of British Columbia, “Collaborative family lawyers,” online: Legal Services Society of British Columbia <http://www.familylaw.lss.bc.ca/help/who_CollaborativeFamilyLawyers.php>.

³² Nisha Sikka, George Wong, and Catherine Bell, “Report on Indigenous Centered Conflict Resolution Processes in Canada” (footnotes omitted), online: Centre of Excellence for Matrimonial Real Property <<http://www.coemrp.ca/file/report-on-indigenous-centred-conflict-resolution-processes-in-canada.pdf>> [Sikka, Wong and Bell], at 16.

³³ *Ibid* at 17.

³⁴ Ted Palys and Wenona Victor, “Getting to a Better Place Qwi:qwelstóm, the Stó:lō and Self-Determination” in *The Law Commission of Canada’s Legal Dimensions Initiative regarding Indigenous Legal Traditions* (Vancouver: UBC Press, 2005) [Palys and Victor].

³⁵ *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>> [*Long Plain First Nation Land Code*].

³⁶ *Ibid*, *Long Plain First Nation Land Code*, s. 38.

³⁷ CHRT Toolkit, see Note 19, at 40.

³⁸ Treaty Four Governance Institute, *The Treaty Four Justice System*, see Note 17.

³⁹ The following examples are drawn from the research paper Sikka, Wong, and Bell, see Note 32. See online for more detailed description and citations.

⁴⁰ Department of Justice, *Location of Aboriginal Justice Strategy Programs*.

⁴¹ *Ibid*.

⁴² *Ibid*.

⁴³ Six Nations of the Grand River, *Law Concerning Matrimonial Real Property*, s. 8.1, see Note 17.

⁴⁴ *Métis Settlements Act*, RSA 2000, C M-14, s 180(1) [*Métis Settlements Act*].

⁴⁵ Métis Settlement Appeal Tribunal, *Appeals*, online: Métis Settlements Appeal Tribunal <<http://www.msat.gov.ab.ca/appeals/>>.

⁴⁶ *Métis Settlements Act*, s. 188, see Note 44.

⁴⁷ S. Tony Mandamin in consultation with Ellery Starlight and Monica One-spot, “Peacemaking and the

Tsuu T'ina Court" in *Justice as Healing: Indigenous Way*, Wanda D. McCaslin, ed, Justice as Healing: Indigenous Way (St. Paul, Minnesota: Living Justice Press, 2005) at 350-353 [Mandamin].

⁴⁸ Palys and Victor, see Note 34.

⁴⁹ Joe Pintarics and Karen Sveinunggaard, "Meenoostahtan Minisiwin First Nations Family Justice: Pathways to Peace" (2005) 2:1 *The First People's Child and Family Review* 67 at 71 [Pintarics and Sveinunggaard].

⁵⁰ 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>>.

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⁵³ Harder, see Note 51.

⁵⁴ Ratcliff and Bell, Western, see Note 26 at 20-23.

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⁵⁶ Nishnawbe-Aski Legal Services, *Talking Together*, online: Nishnawbe-Aski Legal Services <<http://www.nanlegal.on.ca/article/talking-together-126.asp>>.

⁵⁷ 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> [*Beecher Bay First Nation Matrimonial Real Property Act*].

⁵⁸ 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>, s. 7.2; 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>, s 7.2.

⁵⁹ Six Nations of the Grand River, *A Law Concerning Matrimonial Real Property*, s. 8.1, see Note 17.

⁶⁰ Haisla First Nation, *Ratification Vote Results* (28 June 2014), online: Haisla First Nation <<http://hfn-elections.ca/>>.

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- ⁶² First Nations Land Management Resource Centre, *Matrimonial/Spousal/Family Property Laws* (2014), online: First Nations Land Management Resource Centre <<http://www.labrc.com/resources/matrimonialspousalfamily-property-laws/>>.
- ⁶³ 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>>, s. 10.2.
- ⁶⁴ Mississaugas of Scugog Island First Nation, *Matrimonial Real Property Law*, online: First Nations Land Management Resource Centre <<http://www.labrc.com/resources/matrimonialspousalfamily-property-laws/>>, s. 13(d).
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- ⁶⁶ Stz'uminus First Nation, *Stz'uminus First Nation Land Code* (25 July 2013), online: Oyster Bay Development <http://coastsalishdevcorp.com/userfiles/FINAL_LandCode.pdf>.
- ⁶⁷ 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>.
- ⁶⁸ 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>, ss. 6.1-6.4.
- ⁶⁹ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23 [Borrows, Indigenous Constitution].
- ⁷⁰ Adapted from Kris Statnyk, written for the Indigenous Law Research Unit, 2013.
- ⁷¹ Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory*. Faculty of Law, University of Victoria Ph.D. Dissertation 2009 [unpublished, on file with the author] [Napoleon, *Ayook*] at 312.
- ⁷² Mandamin, see Note 17, at 350-353.
- ⁷³ 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>.
- ⁷⁴ Palys and Victor, see Note 34, at 20.
- ⁷⁵ CHRC Toolkit, see Note 19, at 64.
- ⁷⁶ Ratcliff and Bell, Western, see Note 26, at 20-23.
- ⁷⁷ *Beecher Bay First Nation Matrimonial Real Property Act*.

⁷⁸ Pintarics and Sveinunggaard, see Note 49, at 71.

⁸⁰ These shifts were created by Hadley Friedland, “Reflective Frameworks; Methods for Accessing, Understanding and Applying Indigenous Laws” (2012) 11:1 *Indigenous Law Journal* at 29.

⁸¹ *Accessing Justice and Reconciliation Project: The Coast Salish Legal Traditions Report – Community Partner: Snuneymux’w* (2013) [unpublished, on file with authors] (footnotes omitted) [Coast Salish Legal Traditions Report].

⁸² *Accessing Justice and Reconciliation Project: The Secwepemc Legal Traditions Report* (2013) [unpublished, on file with authors] (footnotes omitted) at 21 [Secwepemc Legal Traditions Report].

⁸³ *Accessing Justice and Reconciliation Project: The Cree Legal Traditions Report* (2013) [unpublished, on file with authors] (footnotes omitted) [Cree Legal Traditions Report].

⁸⁴ Borrows, *Indigenous Constitution*, see Note 69, at Chapter Two.

⁸⁵ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), online <www.trc.ca/websites/trcinstitution/index.php?p=890> at 259.

⁸⁶ This is adapted from the Gender Shift Chart created by Emily Snyder. See Emily Snyder, Lindsay Borrows, and Val Napoleon, *Mikomosis and the Wetiko: A Teaching Guide for Youth, Community, and Post-Secondary Educators* (Victoria: Indigenous Law Research Unit, 2015).

⁸⁷ See Alan Edwards and Jennifer Haslett, “Violence is not Conflict: Why it Matters in Restorative Justice Practice” (2011) 48:4 *Alberta Law Review* 893.

⁸⁸ Mandamin, see Note 47, at at 350-353.

⁸⁹ Treaty Four Governance Institute, *Treaty Four Justice System*, see Note 17.

⁹⁰ Palys and Victor, see Note 34.

⁹¹ Six Nations of the Grand River, *A Law Concerning Matrimonial Real Property*, s. 8.1, see Note 17.

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⁹³ CHRC Toolkit, see Note 19, at 53.

⁹⁴ *Ibid* at 54.

⁹⁵ *Ibid* at 55.

⁹⁶ Ratcliffe and Bell, *Western*, see Note 26, at 10.

⁹⁷ Sikka, Wong and Bell, see Note 32, at 1.

⁹⁸ Aboriginal Human Rights Project, “First Nations Legal Traditions and Customary Laws and the Human Rights Complaint Process: A Story, Reflections, Questions, Suggestions and an Offering,” (Mediate BC, July 15, 2012) at 10.

⁹⁸ CHRC Toolkit, see Note 19, at 21.

⁹⁹ CHRC Toolkit, see Note 19, at 21.

¹⁰⁰ *Ibid* at 26-27.

¹⁰¹ Canada, Report of the Royal Commission on Aboriginal Peoples, *Restructuring the Relationship* Volume 2 (Ottawa: Supply and Services Canada, 1996) at 235.

¹⁰² Canada, *Report of the Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back* Volume 1 (Ottawa: Supply and Services Canada, 1996) at 12.

¹⁰³ Office of Quality Improvement and Office of Human Resources, University of Wisconsin-Madison, *Academic Leadership Support, 8 Steps: Overview*, online: University of Wisconsin-Madison <<https://www.ohrd.wisc.edu/onlinetraining/resolution/stepsoverview.htm>>.

¹⁰⁴ See Jennifer Nedelsky, *Laws Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011).

¹⁰⁵ Borrows, *Indigenous Constitution*, see Note 69, at 142.

¹⁰⁶ CHRC Toolkit, see Note 19, at 43.

¹⁰⁷ *Ibid* at 29.

¹⁰⁸ United Nations, *Accelerating Access to Justice for Human Development: A UNDP Rule of Law Initiative* (2010 Global Programme Annual Report), online: United Nations <<http://www.undp.org/content/dam/undp/library/Democratic%20Governance/RoL-A2J%20GP%20Annual%20Report%202010%20DGG%20BDP.pdf>> at 1.

¹⁰⁹ Ratcliffe and Bell, Western, see Note 26, at 12

¹¹⁰ CHRC Toolkit, see Note 19, at 52.

¹¹¹ Department of Justice, *Location of Aboriginal Justice Strategy Programs*.

¹¹³ Sikka, Wong and Bell, see Note 32, at 1.

¹¹⁴ Ratcliffe and Bell, see Note 26, at 12.

¹¹⁵ CHRC Toolkit, see Note 19, at 72.

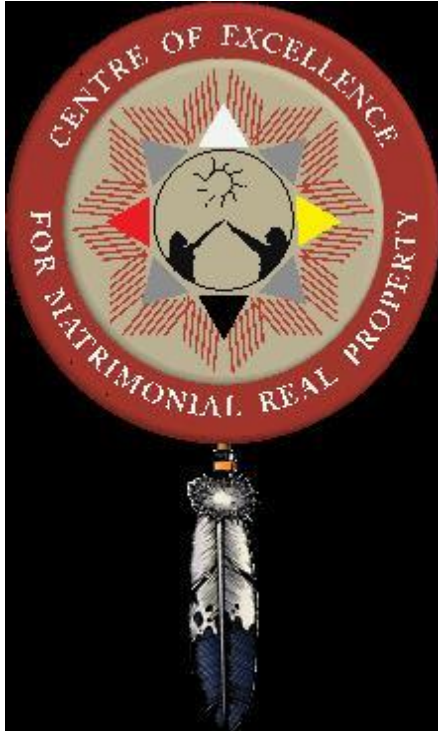
¹¹⁶ Luther, Literature Review, see Note 4, at 12.

KOKUM RAVEN SERIES: ARTIST STATEMENT

Indigenous law is in the world and there are many ways to learn about it, teach it, and to represent it. The way I have chosen here is with the raven – a trickster for some Indigenous peoples. She can teach us by being a trouble maker and by upsetting the log jams of unquestioned assumptions. She can also teach us with love, patience, and a wicked sense of humour. She can create spaces for conversations and questions – that is her job as a trickster and a feminist so that nothing is taken for granted and all interpretations are laid bare.

Val Napoleon





INDIGENOUS LAW RESEARCH UNIT

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