INDIGENOUS Alternative Dispute Resolution

What is it?

Indigenous Alternative Dispute Resolution (IADR) refers to ways of settling disputes outside the adversarial Canadian court system that are employed in Indigenous communities.[1] First Nations, Inuit, or Métis people may seek to settle disputes outside of the adversarial systems to avoid the cost and time demands associated with the use of the Canadian court system, the damage that the adversarial process can do to relationships, and the inaccessibility and cultural unsuitability of the Canadian justice system.

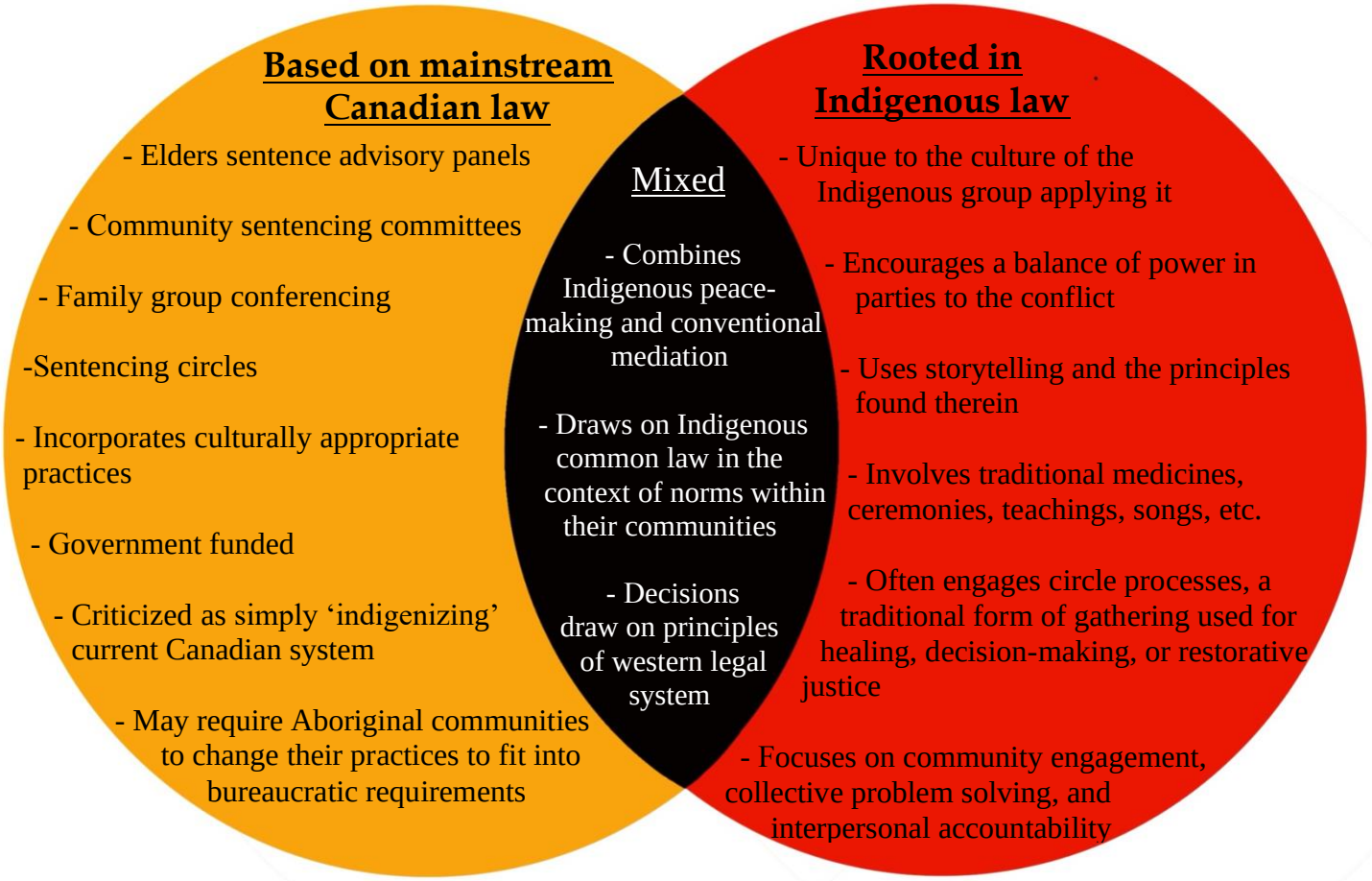
Traditionally, ADR often takes the forms of arbitration, mediation, or negotiation. However, IADR is distinct from other mainstream forms of ADR because it is based in Indigenous legal traditions and has developed to suit the unique needs of Indigenous communities.[2] Communities may make use of mainstream ADR processes, but IADR can also take diverse forms based on the individual community using it. No matter what form of IADR a community chooses, it will come with unique benefits and drawbacks.

What does it look like?

Indigenous systems of ADR are as diverse as the unique cultures and traditions of Canada's Indigenous Peoples. Each Nation has its own traditions, including unique and varied legal orders, stories, customs, political and jurisdictional considerations, as well as site-specific attachments to certain land formations or bodies of water. This means IADR techniques may not look the same between communities, or between different kinds of disputes being dealt with.[3]

There are 3 main types of IADR[4]:

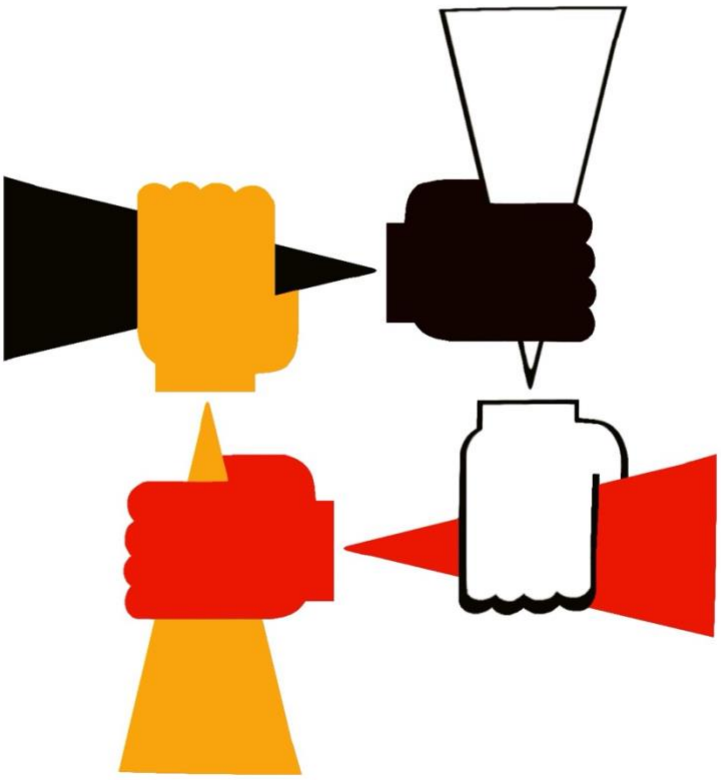
1. ADR based on mainstream Canadian law;
2. ADR rooted in Indigenous law; and
3. ADR that is a mixture of both Canadian and Indigenous law.



Benefits

Encourages cooperation and relationship building within communities, rather than adversarial processes.[5]

Pursues reconciliation by acknowledging the legitimacy of Indigenous legal traditions, revitalizing Indigenous cultures, and redefining the relationship between Canada and Indigenous Peoples.[6]



Resolves disputes without involving the cultural bias and power imbalances within the Canadian justice system, and may provide more beneficial outcomes like culturally appropriate processes, decisions, and healing.[7]

Increases the community's capacity for self-determination, encouraging a nation-to-nation relationship between Canada and Indigenous Peoples.[8]

History

Indigenous Peoples have always had their own legal traditions and ways of settling disputes and resolving conflicts. However, over several centuries of colonialism, many of these legal systems have been suppressed.[9]

In the mid-1980s, the field of conflict resolution began recognizing the importance of cultural issues. There was also increasing awareness of the overrepresentation of Indigenous people within the criminal justice system and the lack of Indigenous people in positions of authority within justice system. This indicated that something needed to be done to increase Indigenous Peoples' involvement in resolving disputes.[10]

Since then, there have been efforts by the mainstream Canadian justice system to integrate Indigenous legal mechanisms into hearing cases, making decisions on resolutions or sentencing in these cases, and healing and rehabilitation of those involved in the case. There has also been a resurgence in Indigenous communities of using their own legal traditions settle disputes. There are several diverse examples of this that can be observed, such as the Mi'kmaq Legal Support Network, the Tsilhqot'in Culture and Customs Program, and the Tsuu T'ina Peacemaker Court.[11]

Future

There is a strong basis in Canadian law for the future of IADR. The *Sparrow* and *Van der Peet* cases asserted that Indigenous rights such as the power to judge and hold their own community members accountable for their actions stem from pre-European contact and are integral to preserving Indigenous culture, and as such may be an Aboriginal right affirmed by section 35 of the *Constitution Act, 1982*.[12] The Supreme Court of Canada has also held that Canadian and Indigenous legal systems can coexist.[13] Additionally, Canada's Truth and Reconciliation Commissions Calls to Action 24, 27, 28, 57, and 92 call for cultural competency and conflict resolution skills-based training.[14] Canada has also endorsed the United Nations Declaration on the Rights of Indigenous Peoples, article 34 of which supports the right to legal mechanisms within Indigenous communities.[15]

As Canada's legal reality continues to develop towards the goal of reconciliation, Indigenous rights must be prioritized, Indigenous values and cultures must be honoured, and Canadian and Indigenous societies must be seen as equal, sovereign nations. The development and implementation of IADR may be one promising way in which this shift can be pursued.

Works Cited

1 Robert Neron, "ADR in the Aboriginal Context" (n.d.) online: *ADR Institute of Canada* <adric.ca/adr-perspectives/adr-in-the-aboriginal-context/>.

2 *Ibid.*

3 Hadley Friedland, "IBA Accessing Justice and Reconciliation Project: Final Report" (14 February 2014), online: *Indigenous Bar Association* <indigenousbar.ca/indigenouslaw/wp-content/uploads/2013/04/iba_ajr_final_report.pdf> at 8-12 [*Accessing Justice and Reconciliation*].

4 Rupert Ross, "Dueling Paradigms? Western Criminal Justice Versus Aboriginal Community Healing" in Gosse, Henderson & Carter, eds, *Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*, (Saskatoon: Purich Publishing, 1994) 241, cited in Canada, Canadian Human Rights Commission, *Alternative Dispute Resolution (ADR) in Aboriginal Contexts: A Critical Review*, prepared by Wenona Victor (Ottawa: Canadian Human Rights Commission, April 2007) [*ADR in Indigenous Contexts*].

5 *ADR in Indigenous Contexts*, *supra* note 4.

6 Canada, Department of Justice Canada, *Exploring Indigenous Justice Systems in Canada and Around the World* (Report on the conference hosted by the Department of Justice Canada), (Ottawa: Her Majesty the Queen in Right of Canada, represented by the Minister of Justice and Attorney General of Canada, 2020) <https://www.justice.gc.ca/eng/rp-pr/aj-ja/eijs-esja/rep-rap.pdf> at 5-6 [*Exploring Indigenous Justice Systems*].

7 *ADR in Indigenous Contexts*, *supra* note 5.

8 *Exploring Indigenous Justice Systems*, *supra* note 6 at 5-6.

9 *ADR in Indigenous Contexts*, *supra* note 5.

10 *Ibid* at 33.

11 *Accessing Justice and Reconciliation*, *supra* note 3; *Exploring Indigenous Justice Systems*, *supra* note 6 at 14.

12 *R v Sparrow*, [1990] 1 SCR 1075; SCJ No 49 (QL); R v Van der Peet, [1996] 2 SCR 507; SCJ No 77 (QL).

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

14 Truth and Reconciliation Commission of Canada: Calls to Action. 2015. Winnipeg: Truth and Reconciliation Commission of Canada. 6 The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

15 *United Nations Declaration on the Rights of Indigenous Peoples*, UN General Assembly, A/RES/61/295 art 34 (entered into force 13 September 2007, adopted by Canada in May 2016).