

FOCUS ON ALTERNATIVE DISPUTE RESOLUTION

COMMENTARY: Aboriginal ADR needs to be intercultural

The president of the Boreal Centre For Dispute Resolution in Thunder Bay, Ontario, argues that ADR practitioners who are working with Aboriginal groups must take a step back and look at the cultural context.

By Sheriden Barnett



The field of Alternative Dispute Resolution (ADR) is struggling with fundamental issues of fairness and power imbalances within processes such as mediation and negotiation. While major critics of ADR have most often focused on the extent to which parties' rights may be ignored by mediation and negotiation processes, there is a slow but growing awareness among practitioners of ADR that the models they promote often perpetuate certain cultural values that may be inappropriate in cross-cultural contexts. However, the courts continue to recommend ADR as an efficacious method of resolving complex, historic conflicts such as disputes relating to Aboriginal and Treaty rights.

Such disputes raise deeply embedded questions about the

interplay of culture, power, rights and interests – and the extent to which mainstream models of ADR create or maintain existing structural inequities between parties as a result of unexamined or intentional cultural biases – and whether such processes result in fair and equitable settlements.

Structural dominance in the Aboriginal ADR processes

Disputes involving Aboriginal and Treaty rights are intercultural or ethnic conflicts. The fundamental conflict arises as a result of different world views, languages, histories, systems of government and laws. It is a battle for power and recognition, which is articulated in terms of access to land, resources and self-determination. However, Aboriginal legal theory has been largely undermined both within the courts and within ADR processes that attempt to resolve these issues outside of the courts. In many cases, governments unilaterally create structures of negotiation to resolve Aboriginal disputes through internally developed and externally applied policies.

One illustration of this tendency is the *Specific Claims Policy* set out by Indian and Northern Affairs Canada. The policy delineates who may submit a claim (and therefore who is left out), defined in accordance with the *Indian Act*: what issues may be addressed (and which are left outside of that definition); the method

for evaluating the merit of claims to be negotiated or rejected (an internal review based on the historical record – primarily written by colonial officers and traders – and the domestic rule of law); as well as the compensation criteria for negotiated claims. This effectively restricts the issues to be negotiated, the parties included in the process, the conceptualization and evaluation of proposed options, and results in a form of structural dominance which is often to the detriment of Aboriginal peoples.

A model for intercultural dispute resolution

It is essential to view Aboriginal disputes through a lens of cultural conflict, by which the structural dominance of existing processes, and therefore the inequities of their outcomes may become visible and thereby may be redressed. I have developed a model based on the assertion that in order to achieve meaningful and equitable participation and outcomes in Aboriginal ADR processes there must be a fundamental recognition of the distinct cultural worldviews, histories, legal theory, languages and inalienable rights held by Aboriginal groups.

This recommendation goes beyond a need for sensitivity to Aboriginal culture, which is usually limited to an influence at the personal or perhaps relational

dimensions of power. Instead, such recognition calls for a rejection of the primacy of colonial culture in favour of a process of negotiations that embraces the full participation of Aboriginal peoples in decision-making processes, including co-creation of the structure of those processes. Truly equitable ADR processes must embrace Aboriginal laws, systems of governance, languages, cultures and histories as legitimate frameworks for conceptualizing the issues to be discussed, the participants to be involved, and the generation and evaluation of options in a meaningful attempt to truly reconcile the intercultural conflict between our societies. The United Nations Draft Declaration on the Rights of Indigenous Peoples similarly states that decisions involving indigenous peoples must consider their customs, traditions, rules and legal systems.

While often the focus of ADR processes, interests can only be effectively and meaningfully explored and addressed if the other layers of Aboriginal influence and participation are ensured. Governments and corporations are engaged in numerous negotiations with individual Aboriginal groups without clear rules or standards of consistency, fairness or principles of compensation beyond the litigation or policy context. Interest-based processes must embrace concepts of rights, including those established in international and Aboriginal law, as a basis of influencing power imbalances, as a method of evaluating solutions generated as a minimum standard of fairness and as a solid foundation for the exploration of genuine interests.

One of the paramount obstacles to effective and meaningful consultation is the capacity of the Aboriginal group to engage in the

process due to scarce human and financial resources. Equitable participation requires that the Aboriginal groups involved have access to adequate funding to ensure meaningful and informed participation. Further, the formation of negotiation coalitions to enhance the influence of Aboriginal groups, relative to the government and corporate parties, rather than participating in isolated, case-by-case, private negotiation processes is essential. While the idea of a formalized process to lend consistency to these private negotiations has obvious pitfalls – they are often pre-designed according to the priorities of the government body responsible for mitigating its own legal liabilities, not to mention being time consuming, costly, biased and at times ineffective – it is an important for an independent body to oversee Aboriginal negotiations, according to the principles outlined above.

Clearly, the countless court battles, local disputes and negotiations involving Aboriginal groups are a manifestation of a wider, deeper conflict relationship that will continue to go unaddressed until equitable processes for resolving those disputes are adopted.

The model presented outlines a structure of meaningful participation through the collaborative design of processes that represent diverse cultures equally and removes the structural domination inherent in our current frameworks of negotiation. It calls for a radical departure from the mainstream approach to Aboriginal disputes that requires a high level of consciousness about the ways in which the conceptualization of issues, the problems and solutions are being framed, by whom, and to

see DEPARTURE p. 13

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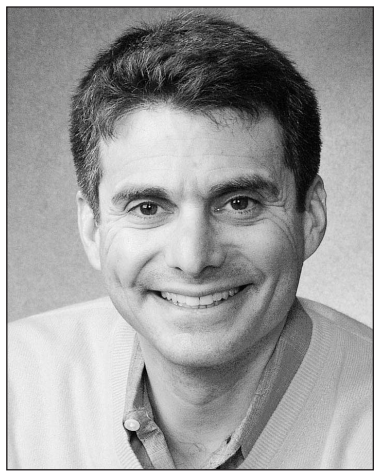
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SCC decision helps the evolution of international arbitration law

As this Montreal lawyer explains, the SCC may not have intended to set such a precedent in the area of international arbitration, but it did.

By Stephen L Drymer



GreCon Dimter Inc. v. JR Normand Inc. and Scierie TL Tremblay Inc. ([2005] S.C.J. No. 46, No. 30217, July 22 “*GreCon Dimter*”) did not originate as an international arbitration case. Nor did the Supreme Court need so emphatically to turn it into one. The dispute concerned a forum selection clause, not an arbitration clause. The parties likely never imagined that their contract raised issues of international law and comity. Still less did they envisage that whatever issues might arise would be resolved by reference to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the “*New York Convention*”) or the United Nations Commission on International Trade Law’s *Model Law on International Commercial Arbitration* (the “*UNCITRAL Model Law*”). But

the Supreme Court saw things differently. And the fact that it did – the fact that it went out of its way to say so – makes this decision particularly important.

The facts are these: A German manufacturer’s failure to deliver certain equipment to a Quebec supplier caused the partial non-performance of the supplier’s contract with its customer. The customer sued the supplier in Quebec Superior Court. The supplier called the manufacturer in warranty. The manufacturer, for its part, raised a “declinatory exception” – literally, a plea declining the court’s jurisdiction over the action in warranty – on the basis of a forum selection clause in its contract with the supplier, which provided that all disputes in connection with that contract would be resolved by a court in Germany “to the exclusion of the courts of any other state or country.”

The Superior Court dismissed the declinatory exception on the basis of art. 3139 of the Civil Code of Quebec (“*CCQ*”), which confers jurisdiction on a Quebec judicial authority to hear an action in warranty if it has jurisdiction over the principal action. It found that the unity of the principal and incidental actions must prevail over the supplier’s and manufacturer’s choice of a German court to resolve disputes, notwithstanding that art. 3148, para. 2 *CCQ* recognizes parties’ freedom to submit disputes “to a foreign authority or

to an arbitrator” and thereby oust the jurisdiction of the Quebec courts. The Court of Appeal affirmed this decision, purporting to reconcile the principles of contractual freedom and unity of actions by applying art. 3135 *CCQ* relating to *forum non conveniens*.

As noted, the Supreme Court saw things very differently. It overturned the decisions below, allowed the declinatory exception, and dismissed the supplier’s action in warranty. It did so on the grounds of “primacy of the autonomy of the parties,” “certainty and foreseeability in international commercial relations,” the “tendency toward recognizing the existence and legitimacy of the private justice system,” and the requirement that federal and provincial laws be interpreted in a manner that “must necessarily be harmonized with the international commitments of Canada and [the provinces],” among which the obligation expressed in the *New York Convention* to respect arbitration agreements (*GreCon Dimter*, at paras. 20, 22, 23, 39).

International arbitration counsel will immediately recognize here the traditional language of decisions enforcing arbitration clauses or deferring to arbitral awards. This is no coincidence. The Supreme Court did not so much *apply by analogy* fundamental concepts of arbitration to a case involving forum selection; it effectively conflated the two con-

cepts and relied *directly* on domestic and international arbitration law (including Canadian and foreign case law) to enforce a forum selection clause.

The court observed that “Quebec is a party to the [*New York Convention*] as a result of Canada’s belated accession,” and that “[t]he legislature has incorporated the principles of the *New York Convention* relating to arbitration agreements into Quebec law by enacting the substance of the *Convention*.” (paras. 40-41) It noted that “the provisions of the *UNCITRAL Model Law* ... on which the 1986 reform and modernization of Quebec’s legal rules governing international arbitration agreements was based closely follow the provisions of the *New York Convention*,” (Id.) and held that the *Convention* “states a general principle: the recognition of arbitration agreements ... [It] gives an arbitration clause precedence over the jurisdiction of a Quebec authority ... [and confirms] the position that the enforcement of an arbitration agreement cannot be precluded by procedural rules relating to actions in warranty.” (paras. 42-43)

This reasoning applies not only to Quebec but to federal and provincial law generally. Indeed, drawing on doctrine and case law from Canada’s common law provinces as well as from abroad, the court emphasized the trend to “favour recourse to arbitration by limiting opportunities for departing from the autonomy of the parties.” (para. 44)

As to the forum selection clause actually at issue, the Supreme Court held:

“For the sake of consistency, the same position should be adopted in respect of both types of clauses. Indeed, it would be difficult to justify different interpretations for clauses that have the same

function, namely to oust an authority’s jurisdiction, and that share the same purpose, namely to ensure that the intention of the parties is respected in order to achieve legal certainty.” (para. 45)

The court went on to find that *forum non conveniens* does not even come into play. “The doctrine ... only allows for jurisdiction that is already recognized to be ousted,” (para. 48) it wrote, whereas faced with a valid arbitration or forum selection clause, a court simply has no jurisdiction.

The parties in *GreCon Dimter* were likely concerned solely with the practical outcome of the case: the dismissal of the action in warranty. The fact that the court dismissed that action “for the sake of consistency” between the interpretation of arbitration agreements and forum selection clauses likely meant little to them. Arbitration practitioners enjoy a different perspective. We recognize that in reaching its conclusions, the Supreme Court effectively overturned (distinguished, perhaps) a line of Quebec decisions adopting the “unity of actions” principle, which the court refused to apply since to do so “would mean to disregard certain principles that are now considered to be fundamental, in particular the primacy of the autonomy of the parties.” (para. 56). We also recognize that *GreCon Dimter* further confirms both this country’s reputation as an “arbitration-friendly” jurisdiction and our top court’s role in the evolution of international arbitration law.

Stephen L Drymer is a partner of Oglivy Renault LLP in Montreal, and chair of his firm’s Arbitration and ADR Group. His practice focuses on international commercial arbitration, including investor-state disputes, as well as disputes between states.

Patience has been shown

DEPARTURE

—continued from p. 9—

what end.

Aboriginal peoples in this country have shown extreme patience in waiting for their legitimate concerns to be meaningfully and finally addressed. How long will they continue to wait?

Sheriden Barnett is the president of the Boreal Centre For Dispute Resolution located in Thunder Bay, Ontario. She has worked with the Cree, Anishinabe, Dene and Inuit throughout Canada and is special adviser on mediation to the Nunavut Human Rights Tribunal.

47 mediations were completed in first nine months of operation

FILING

—continued from p. 11—

after Sept. 1, 2004, may file a Request to Mediate. Prior to filing the Request to Mediate, Affidavits of records of all parties must be filed and served and no Certificate of Readiness can be filed. A party served with a Request to Mediate who does not wish to proceed to mediation must file a Response to the Request to Mediate, listing the reasons for seeking an exemption. In this case, all parties must meet with a mediation coordinator to assess whether the case is appropriate for mediation.

In the first nine months of the program’s operation, 47 media-

tions were completed. Thirty-two actions were fully resolved in the mediation room, and five more were fully resolved after the parties had time to consider settlement options that were generated at mediation.

An additional eight actions were fully resolved prior to mediation being completed, after preparing for mediation. Participants indicated that the ability of lawyers to adapt their skills to the mediation setting, along with the efficacy of the informal, interest-based format and the skills of the roster mediators, have all been contributing to the successful resolution of Queen’s Bench disputes.

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Sandra Schulz, Erika Deines, and Kathleen Dimsdale are mediation coordinators with the Civil Mediation Program — Court of Queen’s Bench of Alberta.

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