INDIGENOUS LEGAL LODGE: A Proposed Model for Addressing Indigenous Conflict

Presentation

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1. INTRODUCTION AND BACKGROUND

In 2005, I began working with Val Napoleon, June McCue, Dawn Mills and Gordon Christie on the Treaty 8 Governance Research Initiative. The T8GRI is funded through a SSRCH grant that involves the University of British Columbia Law School, the Centre for International Indigenous Legal Studies (CIILS) and the B.C. Treaty 8 communities of Doig River, Halfway River, Prophet River, Saulteau and West Moberly First Nations.

- The purpose of the Project is to research, record and articulate the customary laws and legal order of the Dunne-za, Slavey, Cree and Saulteau groups of the Treaty 8 in British Columbia.
- Instead, the GRI will focus on identifying, through oral text chronicles and research into archival information, the traditional or customary laws of the Treaty 8 Dunne-za, Slavey, Dene Tsaa K'nai, Cree and Saulteau peoples with respect to:
    - customary leadership structures, roles and responsibilities;
    - historical mechanisms for building consensus and settling disputes;
    - traditional access rules and methods of determining boundaries; and
    - laws governing the land, i.e., how subsistence/commercial activities were conducted;

- It is hoped that this research will not only create a better understanding of Dunne-za, Slavey, Cree and Saulteau customary laws, but will hopefully provide alternative tools for contemporary leadership and decision-makers, so they may effectively manage conflict and draw upon former practices and customary laws to guide governance issues and decisions.

At the time that we were initiating community based research and the literature review for the T8GRI, the Lheidli T'enneh was in the process of negotiating a modern-day treaty with British Columbia and Canada.[1] Unfortunately, the northern boundaries of the proposed Lheidli T'enneh treaty area overlap the southern boundaries of the historic 1899 *Treaty 8*.[2]

As the treaty negotiations were being finalized, the boundary issue between the Nations evolved into a serious concern, which ultimately resulted in the West Moberly First Nation and Saulteau First Nations (the communities that Diane, Val and I are from) seeking an interlocutory injunction to delay the ratification of the Lheidli T'enneh treaty pending further consultation. In the end, this application was denied.

At the same time that all these issues were culminating, our project team was conducting research into historic Aboriginal conflicts and it was clear that in the past, Aboriginal Nations had conflict, but also had many solutions and there was a process for achieving these solutions. Even the Peace River is the result of a historic conflict with a resulting peace treaty between the Cree and Dunne-za people, hence its name the Unchaga, or Peace River in English.

History has shown that external boundaries have always been sites of ongoing negotiations in accordance with each indigenous group's laws and political

[1] This was negotiated in accordance with the British Columbia Treaty Commission mandate and process, and required a majority membership vote for its ratification on March 31, 2007.
[2] *Treaty 8* spans an enormous land base that includes northeast British Columbia, northern Alberta, and part of the Northwest Territories. A number of adhesions to *Treaty 8* were signed later in the early 1900s. More recently in 2000, the *McLeod Lake Adhesion* (Sekani peoples) in 2000 was negotiated.

structures. Certainly, there were devastating conflicts among Indigenous peoples prior to contact that evolved around these external boundaries, but they also had effective systems to manage and resolve them.

Before contact and the early treaties, indigenous peoples in northern British Columbia deliberately negotiated arrangements for recognition of lands, trade, marriage, resource sharing, and access. Through these processes, they established enduring political and legal relationships. For *Treaty 8* and Lheidli T'enneh peoples, their historic international relationship included intermarriage and extensive trade with each other as well as with other peoples from the west, east, and south. Today, this means that families are related with close ties throughout the region.

In recent history, indigenous peoples have begun to turn to the courts to settle disputes between and among ourselves. While there are often good reasons to litigate, Canadian courts are limited by their jurisdiction and the law. And all legal proceedings are expensive, costing at least $10,000 per day of trial.

This is not a negative reflection of the skill of the legal counsel representing the parties, but rather a recognition that they will be operating within the constraints of Canadian law, according to the rules of Canadian law, based on their experience and training with Canadian law. Simply, and without disrespect, Canadian law forms the universe for the courts and those acting within it. And in any event, Canadian courts do not have the capacity to interpret or apply indigenous law.[3]

But what is the alternative?

Several people involved with the T8 Governance Research Initiative were thinking about this issue and possible solutions when the ratification of the Lheidli T'enneh treaty was defeated by a very narrow majority of the membership. Still, this overlap issue is serious and remains to be resolved. It was at that time that Val Napoleon,

[3] This is not Canadian law's treatment of aboriginal legal issues, which is often referred to as aboriginal law.

with the help in input of June McCue, Don Ryan and others came up with the Indigenous Legal Lodge model, which consequently, these seven first nations' communities have agreed to utilize to try to resolve the boundary dispute and other related issues.

2. THE INDIGENIOUS LEGAL LODGE

The theory underlying the Indigenous Legal Lodge is that it is possible to develop a flexible, overall legal framework that indigenous peoples might use to express and describe their legal orders[4] and laws so that they can be applied to present-day problems. This framework must be able to do two things: (1) reflect the legal orders and laws of decentralized (i.e., non-state) indigenous peoples and (2) allow for the diverse way that each society's culture is reflected in their legal orders and laws. In turn, this framework will allow each society to draw on a deeper understanding of how their own legal traditions might be used to resolve contemporary conflicts.

It is expected that this model, once designed and tested, will be useful in other legal and political disputes between indigenous peoples. For example, there is an overlap between the Lheidli T'enneh treaty claim, and the lands that the Shuswap peoples claim aboriginal title to. There is another ongoing overlap dispute between the Nisga'a peoples and the Gitksan community of Gitanyow in northwest British Columbia. These are enormously costly disputes that damage historical neighbourly relationships between indigenous peoples and undermine efforts to negotiate just relationships between the Crown and indigenous peoples.

The Indigenous Legal Lodge is not intended to establish a time when there was no overlap. It is to begin by assuming that there were close international political relationships established over time. Through such protocols and arrangements, the many indigenous peoples historically managed overlap areas.

[4] Legal order here refers to the structure and organization of the laws rather than the laws themselves.

- How is this proposed model different from litigation? Rather than focus on the legal "rights" of each party flowing from historical use and occupancy, the Indigenous Legal Lodge will focus on "social and political relations" between the parties. Such relations might include those created through marriage, kinship, being neighbours, trade, and other arrangements, both modern and historic. This approach will consider how the various social and political relationships generate ongoing obligations for each party. This is far more inclusive than simply considering how to reconcile competing legal rights. For instance, a web of dynamic historic and contemporary relationships surrounds and involves Treaty 8 and Lheidli T'enneh.

2.1 Structure

It is proposed that an Indigenous Legal Lodge be established to (1) inquire into the boundary dispute and overlap area, (2) hear the information submitted by either party, (3) work with the parties to discuss and develop optional agreements, and (4) facilitate agreement between the parties around one or more of the options.

The Indigenous Legal Lodge will be structured as follows:

1. A panel with three members from a neutral indigenous group with no direct interest in the dispute (e.g., the Haida, Wet'suwet'en, Tsimshian, or other group).
2. A legal expert in Canadian law to provide advice and support to the panel.
3. Three facilitators with knowledge and experience with indigenous legal orders and law to work with the Treaty 8 and Lheidli T'enneh communities.
4. A number of individuals from each of the nations will each select to tell the panel about their experience and knowledge of the overlap area, their understanding of the historic and current relationships between Treaty 8 and Lheidli T'enneh, and how their legal traditions might be drawn upon to deal with the overlap issue.

The Lodge would sit for a minimum of five days to hear the parties and in order to facilitate the development of an overlap agreement. If there is no consensus around an agreement, the facilitator will make non-binding recommendations to the parties within thirty days of having adjourned. The recommendations will not focus on rights based upon historic use and occupancy, but on interests, relationships and reconciliation. The panel will then work with the parties to draft an agreement on managing joint interests in the overlap area and on future political affirmation and commitment requirements for each generation (for ten-year periods).

3.0 CONCLUSION

It is expected that there may be several outcomes of the Indigenous Legal Lodge, including that the parties agree to:

- Shared jurisdiction of the overlap area and an agreement for the mutual recognition of various joint interests in that area (the legal trust would be useful here, see Overstall[5]).
- Joint Management arrangements
- Draft and negotiate an adhesion to *Treaty 8* that sets out the terms and conditions for Lheidli T'enneh's use of the overlap area. This option would be complicated because both the provincial and federal Crowns are involved with *Treaty 8* and adhesions, as in the case of McLeod Lake (see note 2 above).
- Draft and negotiate a treaty for the overlap area. This could be modeled on the historic oral treaty between the Gitksan and Sekani peoples.
- Other expressions of priority use in the overlap area.

[5] Richard Overstall, "Reconciliation Devices: Using the Trust as an Interface between Aboriginal and State Legal Orders" in Catherine Bell & David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 196.