

Book Review: International Dispute Resolution in Aboriginal Contexts, by Catherine Bell and David Kahane (eds)

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Book Review

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INTERNATIONAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS EDITED BY CATHERINE BELL & DAVID KAHANE (VANCOUVER: UBC PRESS, 2004) 384 pages.¹

BY COLLEEN HANYCZ²

I. INTRODUCTION

International Dispute Resolution in Aboriginal Contexts, edited by Catherine Bell and David Kahane, is a collection of essays penned by conflict theorists and practitioners from Canada, the United States, Australia, New Zealand, and elsewhere. The editors recount that the idea for this volume and many of its organizing themes grew out of the 1999 National Forum on Intercultural Dispute Resolution held at the University of Alberta. In short, the entire volume of essays considers the notion of integrating the various ways in which we understand cultural diversity with frameworks of dispute resolution from the perspectives of both indigenous and non-indigenous participants and intervenors.

II. SUMMARY

The collection is divided into four perspectives on intercultural dispute resolution: theoretical, international, Canadian, and design and implementation perspectives. In their overview and introduction to the volume, Bell and Kahane note the absence in Canada of a systematic model of culturally-based dispute resolution connected to Aboriginal disputes, drawing the reader's attention to the more developed and institutionalized frameworks offered by nations such as New Zealand, the United States, and Australia. While it is conceded that Canada has made significant progress in developing these intercultural processes and dispute resolution bodies, these scattered and disparate processes have failed to crystallize into accepted models or even comprehensive scholarship on the topic. The editors seek to fill that void, gathering together conflict scholars and practitioners to propose new models and theories to underlie and justify these models.

¹ [*International Dispute Resolution*].

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A. *Theoretical Perspectives*

The authors in this opening section examine the central concepts of culture, power, liberalism, and constitutionalism.

This section opens with a compelling piece by Michelle LeBaron, focusing on the ways in which the “dominant culture” has dictated the common models of and approaches to dispute resolution, with nary a nod to the value of other cultures—most notably, that of Aboriginal peoples. In particular, LeBaron points out that many of the key components of standard dispute resolution training—for example, the focus on effective communication—promote skills and approaches that may be antithetical to participants from other cultures, such as those of Aboriginal background. She points out, rightly, that training mediators to maintain eye contact, to engage in “active listening” and to continually reframe and rephrase a disputant’s statements may serve to alienate those participants who belong to Aboriginal cultures.

Her suggested approach to this situation, however, leaves me slightly uneasy. She recommends that intervenors develop “intercultural competencies” involving leadership, creativity, authenticity, and empathy, the four key qualities that LeBaron argues have been historically absent from negotiations between the federal government and Aboriginal peoples. While these competencies are central to being an effective third-party intervenor in conflict, I would question whether it might be oversimplifying the challenge to suggest that a mediator could be adequately trained in intercultural differences so as to provide effective third-party assistance.

I was pleased to see this thread taken up in the contribution to this section made by David Kahane. Kahane starts by shining a light on the battered notion of institutional neutrality in the context of cross-cultural conflict, but his greatest addition to the research lies in his focus on the “politics of cultural generalization.” Negotiation theorist James Sebenius recently offered a cautionary piece on the risks of assuming cross-cultural insight.³ As he notes, any consideration of approaches to negotiation adopted by one cultural group risks potentially inaccurate stereotyping of and overattribution to national cultures. Kahane transplants this reasoning to the arena of Aboriginal dispute resolution, offering his own take by asking “where are the boundaries to cultural groups?” and by noting our scholarly temptation to “view human societies as neatly parceled into different, homogenous cultural units—oh look, there’s the Azande worldview! And over there, it’s the French! And of course Canadians have their

³ “Caveats for Cross-Border Negotiators” (2002) 18 *Neg. J.* 121.

own distinctive shared culture!”⁴ Clearly, any discussion of intercultural dispute resolution would be incomplete without the recognition that developing any level of intercultural competency poses a number of significant challenges, not the least of which is the trap of cultural generalization.

Dale Turner considers the impact of the differing worldviews of Aboriginal and non-Aboriginal stakeholders, illustrating his ideas via the legal issues of sovereignty and property ownership. He provides a compelling argument that Aboriginal ideas surrounding law and justice are disadvantaged in even the least hostile intercultural negotiations.

Natalie Oman attempts to further the reader’s intercultural understanding by presenting a continuum of approaches to intercultural relations, on which at one extreme, parties deny each other recognition, while at the other extreme, parties fully recognize each other on the other’s own terms, and various intermediate approaches fall in between.

Finally, Julie Macfarlane offers a commentary on this section, suggesting a number of common threads concerning notions of shared understanding in dispute resolution. Certainly, the combined efforts of the authors and commentator in this opening section leave even a novice reader in this field with a basic understanding of some of the discipline’s terms and language. For the more committed conflict scholar, there is much in this section that is well-founded and thought provoking.

B. *International Contexts*

The editors move from the theoretical frame to a more practical consideration of indigenous and hybrid models of dispute resolution in the United States, Australia, and New Zealand. As a result, the reader is offered a far broader range of alternative dispute resolution (ADR) frameworks than those that form the Canadian experience.

The first piece, written by Chief Justice Robert Yazzie of the Navajo Court, examines disputes among Navajo peoples, noting the historical foundation of their courts in non-indigenous models of dispute resolution. The other two essays focus more explicitly on the intercultural nature of disputes between indigenous and non-indigenous disputants. Larissa Behrendt chronicles the experience of Aboriginal Australians, while Morris Te Whiti Love focuses on the approach of the Waitangi Tribunal of Aotearoa/New Zealand. All three authors identify the pervasive alienation that has resulted from colonialism in these contexts.

⁴ *International Dispute Resolution*, *supra* note 1 at 35.

While each component of this section brings its own distinct perspective, of particular note is the commentary provided by Jeremy Webber. He links the three chapters on the basis of their common illustration of the varying degrees to which colonial history has both influenced and limited the success of indigenous models of dispute resolution operating within the larger context. Webber points out, quite rightly, that the success of dispute resolution in these three contexts hinges on the reassertion and renewal of indigenous culture, noting the need for community institutions to reflect the indigenous culture of the communities in which they are situated.

C. *Canadian Contexts*

If the previous section on international contexts is expansive in its scope, the five-piece unit on the Canadian context converges to a fine point. The four essays on our own national experience attain the elusive balance between chronicling our significant achievements in Aboriginal and non-Aboriginal relations, while still underlining the enormous task that remains.

The commentator for this section, Bruce Duthu, notes the recurring theme of reconciliation of Aboriginal and non-Aboriginal interests, a task which includes “reconciling our memories.” In the first piece, Elmer Ghostkeeper examines the potential for *Wechewehtowin*, a Woodland Cree word meaning “partnershiping,” between Aboriginal wisdom and Western scientific knowledge. Val Napoleon follows with a discussion of the ways and extent to which reconciliation has been defined and applied, particularly in the post-*Delgamuukw v. British Columbia*⁵ negotiations between the Gitksan nation and the Canadian government. In a somewhat overlapping piece, Richard Overstall draws attention to the limitations created by the structural/systemic environment in which intercultural discourse occurs between Aboriginal and non-Aboriginal parties. Overstall proposes a model of intercultural dispute resolution which has as its linchpin a legal “trust” intended to serve as an intermediary between the different cultures. Finally, through an historical perspective, Dale Dewhurst chronicles the establishment of Canada’s first Aboriginal Court, the Tsuu T’ina First Nation Court, noting it to be a significant achievement of arduous intercultural negotiation and compromise in this country.

⁵ [1997] 3 S.C.R. 1010.

D. *Issues of Design and Implementation*

The final section of this collection focuses on issues of design and implementation. If the earlier essays theorize concerns surrounding intercultural understanding and progress, this section provides more practical suggestions for techniques and models to reconcile intercultural notions of justice.

In the opening essay, Catherine Bell reviews a series of indigenized legal forms and agreements across Canada. She underlines a pervasive problem with the tendency of these forms to include only those aspects of indigenous dispute resolution models that correspond most closely with the legal forms of the dominant culture. Where, might she ask, is the risk or progress in that?

Diana Lowe and Jonathan Davidson consider a variety of indigenous and hybrid approaches to justice, noting the growing movement towards court-connected models of dispute resolution as an opportunity to integrate indigenous values in mainstream civil justice. Finally, Nigel Bankes reviews the incremental inclusion of quasi-judicial forms of dispute resolution in three northern land-claims agreements. While Bell, Lowe, and Davidson paint a rosy picture in suggesting significant progress towards intercultural understanding, Bankes' piece is far less optimistic as it chronicles the disempowerment of Aboriginal dispute resolution models resulting from their tendency to operate always in the shadow of the law.

Andrew Pirie's commentary leaves readers disconcerted as he implies the presence of a certain naïveté in the conclusions of the section's contributors. While their collective message is one of careful optimism surrounding the integration of Aboriginal values into the design of community institutions, his is far more cautionary, warning of ADR's susceptibility to power imbalances, especially when the dominant power has so much to lose in any situation involving the sharing of power.

III. DISCUSSION

Bell and Kahane should be congratulated for bringing together such diverse views and voices. This is a significant and welcome collection that should grace the bookshelf of any serious conflict theorist attempting a level of competency in intercultural conflict, not only in the Aboriginal/non-Aboriginal context, but more generally. Each linked piece adds to this rapidly developing body of literature in a variety of ways, and the editors' choice of a format featuring sectional commentaries by leading conflict scholars allows for the development and expansion of themes raised by the various essayists.

The commentaries also provide the reader with a forum for discussing the gathered essays. For example, while I found myself at times somewhat unconvinced by Lowe and Davidson's picture of increasing integration of Aboriginal dispute models into mainstream systems of civil justice, Andrew Pirie's commentary offered a space within which I could examine my own views more critically. This added layer of analysis gently prods the reader to develop more concrete responses to the offerings than is often the case in the more passive conventional format of articles aggregated and presented without substantive comment.

Also noteworthy are the balanced perspectives that characterize this collection. If one of the messages about intercultural communication is the necessity that the "other" be recognized and respected for its contribution, the authors and editors of this book have clearly heeded the message. Whether intended or not, the editors' aims are well served by the resulting union of message and *meta*-message. Modelling the very intercultural sensitivity and awareness that is a central thrust of this collection, the contents and organization of this group of essays and commentaries anticipate and respond to the views and expectations of the diverse readers.

The development of ADR as a field in Canada and elsewhere has, unfortunately, been characterized by the proverbial cart of practice going before the horse of theory. I am persuaded by Joseph Folger's recent piece on mediation research⁶ that describes a paradigm shift in mediation research in the past generation, prior to which the prevailing ideology of mediation dictated a limited and targeted research paradigm. Folger and others⁷ suggest that while mediation practice grew rapidly from the mid-1960s until the early 1990s, especially in its pursuit of improved case management efficiency, its theoretical foundation was not in evidence and has had to develop since then in the shadow of the practice. Bell and Kahane offer a treasury of foundational conflict theory in this collection, and in so doing carry us much further toward an understanding of the core elements and competencies of intercultural dispute resolution.

⁶ Joseph P. Folger, "Mediation Research: Studying Transformative Effects" (2001) 18 *Hofstra Lab. & Empl. L.J.* 385.

⁷ See e.g. Dorothy J. Della Noce, "Mediation Theory and Policy: The Legacy of the Pound Conference" (2002) 17 *Ohio St. J. Disp. Resol.* 545; Carrie Menkel-Meadow, "Mothers and Father of Invention: The Intellectual Founders of ADR" (2000) 16 *Ohio St. J. Disp. Resol.* 1.

