

# **MEDIATING INDIGENOUS DISPUTES: LESSONS FROM AFRICA AND CANADA**

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DOI: 10.55662/JADR.2023.2301

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## **INTRODUCTION**

Mediation is not novel to indigenous peoples in Africa and Canada. It has been in existence long before codified regulation of mediation.<sup>i</sup> For instance, the ancient Yoruba peoples of Nigeria have been known to mediate street fights, trade and communal disputes long before the emergence of formal courts and institutional mediation.<sup>ii</sup> Indigenous mediation in Africa and Canada share certain characteristics. First, the recognition of the supernatural and/or ancestry. Secondly, these mediations possess some cultural flavour peculiar to the indigenous peoples represented at the session, particularly reflected in their language, attire and the use of proverbs.

And thirdly, many indigenous mediations are facilitated by elders who often hold governance functions in their respective families and communities. This article addresses common causes of indigenous disputes, factors that enhance mediation of indigenous disputes and hindrances to successful indigenous mediation, especially in Africa and Canada. Indigenous mediation in this article includes situations where indigenous persons participate in mediation as parties and disputes mediated by indigenous persons.

## **COMMON CAUSES OF CONFLICT INVOLVING INDIGENOUS PEOPLES**

Indigenous peoples inherit and possess unique social, cultural, economic and political characteristics which distinguish them from the dominant societies in which they live.<sup>iii</sup> Indigenous disputes vary in scope, ranging from family disputes to International disputes. The

time frame and effects can also be far-reaching, affecting inter and intra-communal travel, inter-marriage among disputing communities, trade and cultural activities. Indigenous disputes can arise from ethnic clashes, foreign intrusion, religious crises, conflicts over hunting and farming rights, land, water and commercial disputes. This is by no means an exhaustive list. Conflict involving indigenous peoples commonly arise from disputed land, water and associated natural resources. This is because most indigenous peoples depend on these resources for sustenance and commerce.

Recital 12 of the 1992 Convention on Biological Diversity for instance, recognises and highlights their dependence on biological resources and traditional knowledge. The Recital reads, “Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.” In sum, a threat to indigenous peoples’ right to water, land, associated natural resources and traditional knowledge is a direct threat to their existence.

A good relationship with indigenous peoples and a basic understanding of indigenous dispute resolution may be the foremost determinant of commercial success in indigenous territories. Several business sectors are likely to interface with indigenous peoples in the course of their corporate activities. Generally, businesses whose interest would compete with indigenous peoples' use of resources, environment and/or fundamental human rights. In particular, companies involved in activities such as construction and extraction (example - oil and gas and mining companies) which engage with their environment. The pharmaceutical, nutraceutical, cosmetology and biotechnology industry may also need to brave up to indigenous dispute resolution if they incorporate unauthorised indigenous traditional knowledge and genetic resources in the manufacturing of their products.

## **FACTORS THAT ENHANCE MEDIATION OF INDIGENOUS DISPUTES**

The flexibility and simplicity of the mediation process accommodates experts from every career. While no special qualification is required to facilitate indigenous disputes, the underlying factors have been proven to enhance successful mediation sessions.

### ***Understanding Indigenous Peoples' Heritage:***

Indigenous peoples tenaciously hold onto their duty to preserve age-long traditions and cultures. Disregarding these cultures may be the sole reason for the summary termination of a mediation session involving indigenous peoples. Disrespect for heritage may be assumed from the mistreatment of cultural objects, practices or persons vested with special authority to represent indigenous peoples. Mediators should be sensitive to the particularities of parties whose disputes they have committed to mediate. The mediator should either co-mediate with an experienced mediator or work towards understanding the cultural and historical affiliations of indigenous peoples, especially, if this historical background is relevant to the disputed issue.

Even when such historical facts are not related to a dispute, mediators should be alert to the parties' predominant interests. A dispute between an indigenous group and a carpet manufacturer who has allegedly misappropriated an indigenous cultural design for the manufacture of his carpet may be interpreted as a commercial dispute. The indigenous group's interest may turn out not to be financial or compensatory but rather their focus could be on the preservation of cultural arts from contempt and commercial exploitation. Failure to understand indigenous cultures and histories may result in misjudgment, a failed attempt at mediation and may strain business relationships entangled in the dispute.

### ***Use of Indigenous Language:***

Whilst an interpreter may breach the language barrier between parties and a mediator; indigenous peoples are prone to trust and confide in mediators who understand their language. Understanding the verbal and body language of indigenous peoples grant deep insights into their perception, hints on acceptable terms of settlement and misunderstandings at the root of the conflict. This is because many indigenous people communicate with gestures and proverbs which are more accessible to persons with an advanced knowledge of a language. Ultimately,

the use of local languages in conflict resolution helps indigenous persons ground the discussion in their worldview, away from the judicial processes and legal language of justice systems.<sup>iv</sup>

### ***Recognition of Elders:***

In many indigenous communities in rural Africa, traditional governance rests significantly on male elders. They are custodians of traditions, governance and in many cases, determine access to wealth-creating assets like land, houses and even farming rights. In Canada as well, indigenous elders play a significant cultural role. They are usually consulted before important governmental and non-governmental decisions that could affect indigenous persons are taken. Irrespective of the mediator's gender or background, it seems that if mediators are cautious to respect and recognise elders, the honour would be reciprocated by their cooperation. Recognition of elders encompasses an understanding of how they would like to be addressed, greetings and consultation in the course of the mediation, provided these acts do not breach the mediator's neutrality or engender compromise.

### ***Apology and Restitution:***

Like any other dispute resolution process, mediation is significantly facilitated by an apology, restitution and reconciliation. Apologies and proposals for restitution are commonplace in African and Canadian mediation. Indigenous mediations use these tools generously to achieve success. In addition to apology, indigenous mediators often encourage a person who has caused harm to take responsibility for dealing with the troubles arising from such a dispute.<sup>v</sup> Practical examples are mediation sessions between multinational oil companies and indigenous groups aimed at compensating indigenous communities for communal damages incurred as a result of oil flaring and spillage.

### ***Knowledge of Indigenous Peoples' Rights***

When mediation involves indigenous peoples, insight on indigenous peoples' rights is advantageous. A general knowledge of indigenous peoples' rights enable the mediator to identify and accommodate their special needs during mediation. The 2007 United Nations Declaration on the Rights of Indigenous People (UNDRIP), endorsed by more than 145 states summarises their rights. Concisely, the Declaration protects individual and collective cultural, educational, health, employment, language rights and their unique identity.<sup>vi</sup> In the course of mediation, the mediator should be mindful to ensure a fair and neutral environment for all

parties without compromising their self-determination and distinction. It is noteworthy that accommodations may be required where the language of mediation is distinct from the indigenous peoples' language. Language-related accommodation should also be considered where the subject-matter of mediation is technical and/or distant from the indigenous peoples' world-view.

The mediator should also watch out for inaptness or reluctance when deliberations at mediation signal a possible change in culturally-established norms. Accommodations in the instances above may include the use of interpreters and reminders that indigenous persons may consult attorneys and other professionals as the case may be. Nonetheless, a cautious line should be drawn between maintaining a non-discriminatory quality of mediation and holding an over-protective stance towards indigenous peoples that could be interpreted as a compromise of neutrality.

### ***Compliance with Self-Determination Principle***

In regard to mediations which involve indigenous peoples, self-determination plays a multi-faceted role. First, parties' self-determination is a mediation requirement. Secondly, self-determination is an indigenous peoples' right recognised internationally. As a universal requirement for mediation, Article 3(1) of the Canadian Code of Conduct for Mediators for example, provides that it is the right of parties to make voluntary, un-coerced decision towards the resolution of any disputed issue. Self-determination requires voluntary decision-making so that each party makes free and informed choices regarding the process and outcome of mediation.<sup>vii</sup> Self-determination may be exercised at every stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.<sup>viii</sup>

Self-determination as an international indigenous peoples' right is enshrined in Article 3 of UNDRIP. The Article provides that indigenous peoples have the right to self-determination. By virtue of that right indigenous peoples should freely determine their political status and pursue their economic, social and cultural development. It is noteworthy that this right finds expression in commercial, governmental, international settings, as well as in mediation. Obviously, self-determination is a per-requisite to a valid indigenous mediation.

## **HINDRANCES TO SUCCESSFUL INDIGENOUS MEDIATION**

### ***Less Party Control:***

It seems that parties to an institutional mediation enjoy more liberties with respect to the choice of mediators and the venue of mediation. In Canada, courts typically keep a roster of qualified mediators from which parties may choose. Additionally, parties can choose to attend mediation at agreed physical locations or virtually. However, in many scenarios, the spontaneous response to conflict may not afford parties the luxury of time to choose their mediator. For instance, street fights and market brawls are usually settled by persons at the scene of such incidents.

African mediators are usually village elders. The rationale for the choice of elders is because they are knowledgeable in local customs and practices.<sup>ix</sup> Mediations are typically held in village town halls with intermittent visits to the sites of the dispute where applicable. Often, the location of the mediation is determined by its availability and suitability for each case. This is also applicable to mediation of commercial dispute. For instance, a conference hall may be more suitable for a multi-party mediation while a dispute with a single party on both sides can easily be settled in an office. Typically, a party objecting to the choice of a venue and/or mediator would be expected to provide reasons for the objection. A party objecting to an available venue may have to bear the cost of finding and renting a “better venue.” Ultimately, parties self-determination is essential for a successful mediation. The mediator should take cognisance of this principle in every decision involving parties to mediation.

### ***Cultural Bias:***

Cultural practices that have been accepted as norms may trickle into mediation conducted by indigenous persons. Cultural narratives reflecting African gender roles may be re-echoed in mediation sessions. In thirty-three observed marital cases, mediators urged wives more often than husbands to be patient and forbearing.<sup>x</sup> On the other hand, males were admonished to provide and care for their wives.<sup>xi</sup> Authors in Canada have however noted equality in the treatment of males and females in indigenous dispute resolution.<sup>xii</sup>

In Africa, indigenous mediators are expected not only to mediate but they are also expected to counsel the parties.<sup>xiii</sup> Perhaps, this explains the agitation of indigenous peoples in Uganda, following the appointment of law students as mediators.<sup>xiv</sup> Understandably, they (Ugandans)

were accustomed to having their disputes mediated by elders.<sup>xv</sup> In Canada, aboriginal law gives the responsibility for problem-solving to parties whilst third parties like elders participate only as teachers of traditional values.<sup>xvi</sup> Where there is a clash of cultures or a perceived cultural dominance, mediators should work towards finding a balance between the two sides, and combat misinformation that might have triggered the conflict.<sup>xvii</sup> Foreigners participating in indigenous mediation should make sufficient prior inquiries to prevent excessive cultural shock at an indigenous mediation session.

### ***Religious/ Ancestral Acknowledgement:***

Indigenous communities are inseparable from their beliefs. It is not uncommon for mediations hosted by indigenous elders to commence with the invocation of the supernatural in Africa and the acknowledgment of ancestral ties in Canada. Chikaodili Nwachukwu in “Traditional Shrine: A Place For Alternative Dispute Resolution in Igbo Land,”<sup>xviii</sup> deliberates on the practice of voluntarily holding dispute resolution in shrines to seek justice from the deity in Igbo land, Nigeria. The rationales for this practice range from the desire to recognise the gods and attract their benediction to the believe that the fearsome presence of the gods would inspire parties to be truthful. In Canada, authors writing about circle processes (indigenous mediation) in the Stó:lō of British Columbia, have stated that participants in circle processes are expected to "share all four sacred parts of being, namely, the physical, the mental, the emotional and the spiritual towards a wholesome dispute settlement."<sup>xix</sup>

Whether the mediation session is focused on commercial or cultural interests, it is important that spiritual exercises are not coerced. According to Article 18 of the 1948 Universal Declaration of Human Rights (UDHR), freedom of religion is a fundamental human right, mediators in scenarios described in the previous paragraph should be mindful to excuse persons who do not want to practice spiritual exercises; just as courts permit affirmation instead of oaths for persons who do not align with popular beliefs. It seems that mandating parties to attend such sessions could raise human right concerns. If a party or parties consider that the lingering unpleasant effect of “forced worship” affected his self-determination, composure or mental capacity to participate in mediation. That would be a valid reason for the court to set aside the settlement agreement.

The mere involvement of indigenous groups in a mediation does not automatically entail that their concerns trump others' concern.<sup>xx</sup> A hybrid view to dispute resolution is recommended to build trust among indigenous communities and other interest groups.<sup>xxi</sup> In every mediation, multiple interests compete for protection. In an indigenous mediation, for example, a mediator should not ignore the political, commercial and foreign interests – where represented. Care should be taken to ensure that the urge to protect “vulnerable indigenous groups” does not translate to bias against other interest groups. The mediator's ultimate duty is to diligently protect the cardinal pillars of mediation – voluntariness, neutrality, confidentiality and the prescribed quality of the mediation process.

## **CONCLUSION**

In line with the voluntariness that should characterise mediation, the words of Albert Einstein ring true – “Peace cannot be kept by force; it can only be achieved by understanding.” Currently, the picture of the court with multiple doors to justice embraces mediation in any fora as a valid means of dispute settlement. Mediations featuring indigenous persons and those championed by indigenous persons are recognised by the law. Indigenous mediations may however be subjected to the court's scrutiny if tainted with bias and disregard for fundamental human rights. I do not recommend that indigenous mediations become stereotyped to replicate institutional mediation styles; rather, indigenous mediation should uphold the essential attributes that characterise mediation – voluntariness, neutrality and confidentiality.



## REFERENCES

### *Articles*

- Adeyinka Ajayi and Lateef Buhari, Methods of Conflict Resolution in African Traditional Society African Research Review Ethiopia Vol. 8 (2), Serial No. 33, April, 2014:138-157 [143,150]
- ADR Institute of Canada, “Code of Conduct for Mediators” Amended 15 April, 2011 <https://adric.ca/rules-codes/code-of-conduct/>
- African Centre for the Constructive Resolution of Disputes (ACCORD), “African Union Mediation Support Handbook” <https://www.peaceau.org/uploads/06-au-mediation-support-handbook-2014.pdf>
- Anurathna Mathivanan and Rakshna Natarajan, “Mediating The Development Of The Canadian Keystone XL Pipeline And The Rights Of Indigenous People” The IMW Post, 26 June 2020 <https://imwpost.com/MEDIATING-THE-DEVELOPMENT-OF-THE-CANADIAN-KEYSTONE-XL-PIPELINE-AND-THE-RIGHTS-OF-INDIGENOUS-PEOPLE/>
- CBC News, “Mi'kmaw Chiefs look for Mediator Help to Solve Wind Energy Conflict” February 19, 2023 <https://www.cbc.ca/news/canada/newfoundland-labrador/mi-kmaw-chiefs-mediator-wind-energy-conflict-1.6751861>
- Chikaodili Nwachukwu, “Traditional Shrine: A Place For Alternative Dispute Resolution in Igbo Land” 7073 (e). Vol. 3 No. 5 . 2020 396 – 414 [408]
- Jacqueline Nolan-Haley, “Mediation and Access to Justice in Africa: Perspectives from Ghana” 78 [https://www.hnlr.org/wp-content/uploads/sites/22/HNR102\\_crop-1.pdf](https://www.hnlr.org/wp-content/uploads/sites/22/HNR102_crop-1.pdf)
- Jessie Sutherland, “Colonialism, Crime, and Dispute Resolution: A Critical Analysis of Canada’s Aboriginal Justice Strategy” October 21, 2002 <https://mediate.com/colonialism-crime-and-dispute-resolution-a-critical-analysis-of-canadas-aboriginal-justice-strategy/>
- Mark Davidheiser, “Harmony, Peacemaking, and Power: Controlling Processes and African Mediation” Conflict Resolution Quarterly, Vol. 23, No. 3, Spring 2006 281-299 [287]

- Nisha Sikka, George Wong and Catherine Bell “Indigenous Centered Conflict Resolution Processes in Canada” 6 <https://www.nawash.ca/wordpress/wp-content/uploads/2016/10/Web-version-Final-Indigenous-Centred-Conflict-Resolution-app.pdf>
- United Nations Department of Economic and Social Affairs, “Indigenous Peoples at the United Nations” <https://www.un.org/development/desa/indigenouspeoples/about-us.html>

### *Statutes*

- Convention on Biological Diversity( CBD) 1992
- Organization for the Harmonization of Business Law in Africa (OHADA) Uniform Act on Mediation 2017
- UNCITRAL Model Law on International Commercial Conciliation 2002
- United Nations Declaration on the Rights of Indigenous People (UNDRIP) 2007
- United States Model Standards of Conduct for Mediators 2005

## ENDNOTES

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- <sup>i</sup> ADR Institute of Canada, “Code of Conduct for Mediators” Amended 15 April, 2011 <https://adric.ca/rules-codes/code-of-conduct/>; In Africa, each country individually make legislative provision for regulating the conduct of mediation. Nonetheless, the African Union Mediation Support Handbook offers guidance towards the conduct of mediation in Africa - See African Centre for the Constructive Resolution of Disputes (ACCORD), “African Union Mediation Support Handbook” (2014) <https://www.peaceau.org/uploads/06-au-mediation-support-handbook-2014.pdf>. Additionally, the Organization for the Harmonization of Business Law in Africa (OHADA) member States have enacted a Uniform Act on Mediation, this was adopted on November 23, 2017. The OHADA Uniform Act was inspired by the 2002 UNCITRAL Model Law on International Commercial Conciliation.
- <sup>ii</sup> Adeyinka Ajayi and Lateef Buhari, Methods of Conflict Resolution in African Traditional Society African Research Review Ethiopia Vol 8 (2) Serial No 33 April 2014:138-157 [143,150]
- <sup>iii</sup> United Nations Department of Economic and Social Affairs, “Indigenous Peoples at the United Nations” <https://www.un.org/development/desa/indigenouspeoples/about-us.html>
- <sup>iv</sup> Nisha Sikka, George Wong and Catherine Bell “Indigenous Centered Conflict Resolution Processes in Canada” 6 <https://www.nawash.ca/wordpress/wp-content/uploads/2016/10/Web-version-Final-Indigenous-Centred-Conflict-Resolution-app.pdf>
- <sup>v</sup> Nisha Sikka, George Wong and Catherine Bell “Indigenous Centered Conflict Resolution Processes in Canada” 6 <https://www.nawash.ca/wordpress/wp-content/uploads/2016/10/Web-version-Final-Indigenous-Centred-Conflict-Resolution-app.pdf>
- <sup>vi</sup> Article 5 of UNDRIP
- <sup>vii</sup> Standard I(A) of the 2005 US Model Standards of Conduct for Mediators
- <sup>viii</sup> *ibid*
- <sup>ix</sup> Nisha Sikka, George Wong and Catherine Bell “Indigenous Centered Conflict Resolution Processes in Canada” 21 <https://www.nawash.ca/wordpress/wp-content/uploads/2016/10/Web-version-Final-Indigenous-Centred-Conflict-Resolution-app.pdf>
- <sup>x</sup> Mark Davidheiser, “Harmony, Peacemaking, and Power: Controlling Processes and African Mediation” *Conflict Resolution Quarterly*, Vol. 23, No. 3, Spring 2006 281-299 [287]
- <sup>xi</sup> *ibid* [288]
- <sup>xii</sup> Nisha Sikka, George Wong and Catherine Bell “Indigenous Centered Conflict Resolution Processes in Canada” 38-39 <https://www.nawash.ca/wordpress/wp-content/uploads/2016/10/Web-version-Final-Indigenous-Centred-Conflict-Resolution-app.pdf>
- <sup>xiii</sup> Jacqueline Nolan-Haley, “Mediation and Access to Justice in Africa: Perspectives from Ghana” 78 [https://www.hnlr.org/wp-content/uploads/sites/22/HNR102\\_crop-1.pdf](https://www.hnlr.org/wp-content/uploads/sites/22/HNR102_crop-1.pdf)
- <sup>xiv</sup> *ibid* 75
- <sup>xv</sup> *ibid*
- <sup>xvi</sup> Jessie Sutherland, “Colonialism, Crime, and Dispute Resolution: A Critical Analysis of Canada’s Aboriginal Justice Strategy” October 21, 2002 <https://mediate.com/colonialism-crime-and-dispute-resolution-a-critical-analysis-of-canadas-aboriginal-justice-strategy/>
- <sup>xvii</sup> CBC News, “Mi’kmaw Chiefs look for Mediator Help to Solve Wind Energy Conflict” February 19, 2023 <https://www.cbc.ca/news/canada/newfoundland-labrador/mi-kmaw-chiefs-mediator-wind-energy-conflict-1.6751861>
- <sup>xviii</sup> Chikaodili Nwachukwu, “Traditional Shrine: A Place For Alternative Dispute Resolution in Igbo Land” 7073 (e). Vol. 3 No. 5 . 2020 396 – 414 [408]
- <sup>xix</sup> Nisha Sikka, George Wong and Catherine Bell “Indigenous Centered Conflict Resolution Processes in Canada” 10 <https://www.nawash.ca/wordpress/wp-content/uploads/2016/10/Web-version-Final-Indigenous-Centred-Conflict-Resolution-app.pdf>
- <sup>xx</sup> Anurathna Mathivanan and Rakshna Natarajan, “Mediating The Development Of The Canadian Keystone XL Pipeline And The Rights Of Indigenous People” *The IMW Post*, 26 June 2020 <https://imwpost.com/MEDIATING-THE-DEVELOPMENT-OF-THE-CANADIAN-KEYSTONE-XL-PIPELINE-AND-THE-RIGHTS-OF-INDIGENOUS-PEOPLE/>
- <sup>xxi</sup> *ibid*