Land Claim Arbitration Panels and Treaty Interpretation

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Overview

- The Value of Alternative/Arbitration Processes
  - Crown's Under Utilization of Panels
  - Relevant Senate Recommendations
- Modern Treaty Interpretation Principles and Arbitration Panels
  - Principle of Deference
  - Principle of Relational Reconciliation

Modern Claims and Arbitration Processes

- Most modern claims processes contain provisions that address how disputes are to be resolved between the parties to the agreement.
- For example in the Sahtu Dene and Metis Agreement a framework for a modified arbitration process is included as an alternative to the courts.

Reliance on Arbitration Processes

- It has been noted by legal researchers and by the Senate of Canada that these more flexible and less costly processes have generally been under utilized.
- For example in 2004, Nigel Bankes noted that the “parties have not made extensive use of the arbitration provisions”

2008 Senate Report

- Made an important observation:
  - "The Committee expected that the inclusion of these mechanisms would have been of considerable assistance to the parties in resolving impasses over funding and other implementation matters. This has not been the case. Witnesses have testified that there has been an almost universal refusal by the federal government to submit to these processes despite their having been negotiated and included in final agreements."

Impact of Refusal

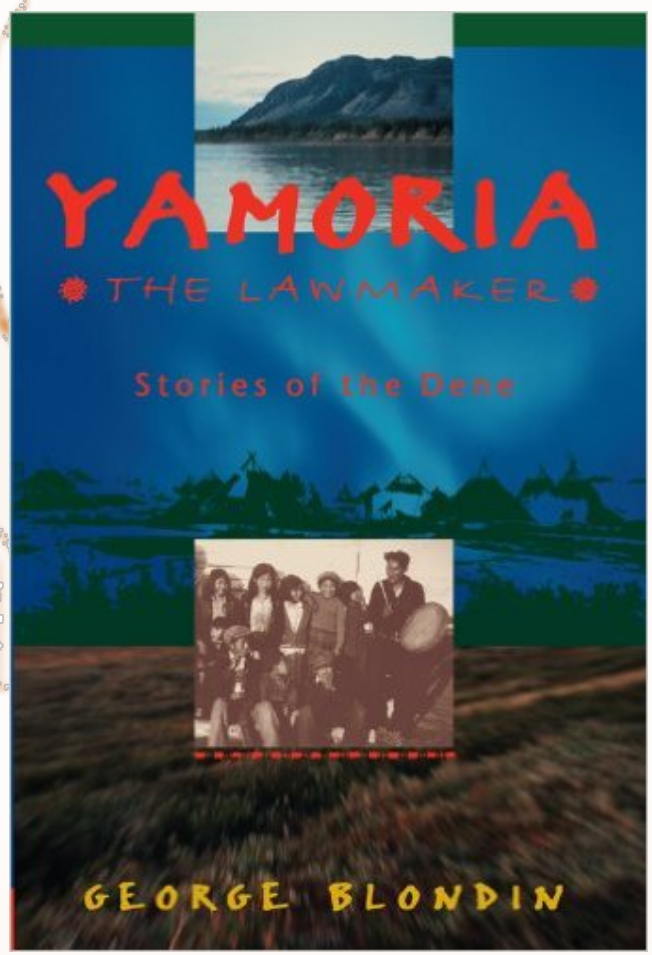
- "Most disturbing to members of this Committee is that the federal government's practice of consistently refusing to consent to arbitration has undermined the renewed relationships that treaties sought to establish."
- "Federal practices in this regard, we contend, are inconsistent with both the honour of the Crown and the government's fiduciary relationship with Aboriginal peoples and are destructive to the process of reconciliation."

Value of Arbitration as an Alternative

- Efficient and Cost effective
  - Designed to be a less costly more informal alternative to the courts.
- Flexible Process
  - Advantages
    - Provisions in land claim agreements generally allow for considerable scope for Arbitration panels to adopt models that can incorporate Indigenosu laws and practices and to be culturally sensitive and inclusive.

Relevance of Indigenous Legal Traditions

- Respect for Indigenous legal traditions:
- Arbitration Panels can incorporate a cross-cultural approach to decision making that is inclusive of Indigenous laws and processes where appropriate.



Modern Treaty Interpretation

- As decision-makers in an arbitration under the Sahtu or Gwitch'n agreements we may be asked to determine what principles of treaty interpretation we will apply.
  - In such modern Treaties, the parties will have turned their minds to this issue and those views should prevail (provided they are consistent with the overall honour of the Crown).

Modern Treaty Interpretation

- Principle of Deference
  - Unlike historical treaties, considerable deference will be given the express terms of the agreement. (*Beckman* @ para. 54)
    - Presumption of ambiguity to be resolved in favour of Aboriginal signatories not applicable in modern treaty context. (*Moses* @ para. 115)
      - Sahtu Agreement expressly excludes the presumption (s. 3.1.19)

Modern Treaty Interpretation

- Principle of Relational Reconciliation
  - Yet, like historical treaties, they are not meant to be understood as "everyday commercial contracts". Rather they are intended to be understood as instrument that are designed to "foster a positive long-term relationship". (*Beckman* @ para. 10)

Modern Treaty Interpretation

- Honour of the Crown
  - The duty to consult principle is particularly well-suited to addressing this unique relational aspect of treaties.
  - "Consultation in some meaningful form is the necessary foundation of a successful relationship with Aboriginal people … to avoid the indifference and lack of respect that can be destructive of the process of reconciliation that the Final Agreement is meant to address" (*Beckman* @ para. 55)

Implications for Arbitration Panels

- It may be necessary to conclude, depending on the facts, that the provisions on consultation are inadequate in the agreement and that arbitrators may be obliged to impose more onerous obligations on government notwithstanding that government may have complied with the letter of the law (Agreement).

Alternatives to Externally Imposed Consultation Obligations

- Other mechanisms are possible for upholding the Honour of the Crown.
  - Joint appointment Boards, or Implementation Committees where the Aboriginal party is an integral and active decision-maker in the governance of a resource for example.

- Arbitration panels are jointly appointed. Thus, based on this logic, reliance on the Arbitration panels by the Crown in a dispute over interpretation may be viewed as an "other mechanism" for satisfying the Honour of the Crown obligation – thus perhaps negating any need for the courts or the Arbitration panel itself to impose a further obligation to consult external to the arbitration process.

Mahsi Cho

Select References

- Nigel Bankes, "The Dispute Resolution Provisions of Three Northern Land Claims Agreements" in Cathy Bell and David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press, 2004)
- Senate of Canada, *Honouring the Spirit of Modern Treaties: Closing the Loopholes* (Ottawa, 2008) http://landclaimscoalition.ca/pdf/080515-Senate_Cttee_Report.pdf
- Larry Chartrand, *Principles of Dene Metis Dispute Resolution: Implications for the Sahtu Dene and Metis Land Claim Arbitration Panel* (Norman Wells, 1996) https://www.academia.edu/19468768/Principles_of_Dene_Metis_Dispute_Resolution_Implications_for_the_Sahtu_Dene_and_Metis_Land_Claim_Arbitration_Panel