



Northwest Tribal Treaty Nations

Governance Project

***“Best Practices and Standards and
Regulations with Respect to Law Making”***

FINAL REPORT

Northwest Tribal Treaty Nations
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PREFACE

One of the things which became clear through the introduction of the *First Nations Governance Act* in the House of Commons was that governance needed to be looked at in a way which was aware of the elements of traditional aboriginal governance in Canada and attempted to reconcile those elements with the objectives of good governance in a western democratic society. This paper begins that work. The first part of the paper takes the following shape:

1. Introduction, Identifying the Northwest Tribal Treaty Nations;
2. Background, Setting out Some of the History of the First Nations Governance Act, and Some of the Responses to it;
3. Considerations about Law Making in an Aboriginal Setting;
4. A Survey of Traditional Governance in the Northwest; including examples from Kitselas traditions set out in *The Men of Medeek*, the potlatch system of the Carrier, and the Gitksan;
5. A Survey of some contemporary models of law making from the Gitanyow; the Nisga'a, the Westbank First Nation;
6. An examination of the proposed *First Nations Governance Act*;
7. A study of the federal parliamentary system of governance;
8. A study of the present *Indian Act* system—to understand some of the problems of the Indian Act system, one must see it in the context of federal parliamentary governance as a whole;

The initial part of the paper is concerned to identify best practices from current models of First Nations Governance, and compare them with the model of parliamentary democracy. In order to evaluate them, however, we needed to shift that focus to more general considerations of what makes good governance. The second part of the paper deals with these topics:

1. Legitimacy and the Rule of Law;
2. The Separation of Powers;
3. Best Practices;

4. Some Principles;
5. A model of Governance;
6. Recommendations for further Steps.

In general the purpose of this paper is to demonstrate that traditional governance adhered to the principles of good governance in making rules for the Nations based upon careful observation of what was needed, achieving consensual decision making, and not behaving in an arbitrary or despotic way. Traditional Governance models and principles cannot be ignored in the creation of contemporary institutions for First Nations. This work is directed toward the goal of ensuring that First Nations' traditions are recognized as an integral part of future reform of governance.

INTRODUCTION

The Northwest Tribal Treaty Nations is an association of First Nations and Tribal Groups in Northern British Columbia. The traditional territory of its members extends from Haida Gwaii to beyond Prince George and into the lower area of the Yukon. The purposes of the NWWT are set out in the treaty signed between its member groups on February 11, 1991 as follows:

1. We shall continue to practice our own tribal political system and laws, and we intend these separate jurisdictions to continue.
2. We shall continue to express our sovereignty as Nations.
3. We shall assist each other to reaffirm our continuing Hereditary Title and give expression to our rights; and to defend these against any erosion through external forces.
4. We shall collectively join the other First Nations efforts to pursue the explicit recognition of aboriginal title in Canada's constitution.
5. We shall continue to enter into bilateral and multilateral relationships with each other to strengthen and assist in settling matters and common concerns regarding our respective cultural identities, traditions, diversity, equality of our peoples and our common boundaries according to our traditional laws.
6. We shall, in the spirit of sharing and co-existence, continue to enter into mutually beneficial relationships regarding access to traditional territories and natural resources. These include all resources that come from our territories.

The Northwest Tribal Treaty Nations has agreed to participate in the Federal government's Governance Initiative to make sure that the interests of First Nations in northern B.C. are adequately and accurately addressed.

The Purpose of this paper is to review current and traditional models of governance and law making processes of First Nations, and the blending of the traditional with modern democratic practices with an eye to developing Best Practices in the territories occupied by the Northwest Tribal Treaty Nations, as set out in a letter from Indian and Northern Affairs Canada to Gerald Wesley, Co-Chair of the Northwest Tribal Treaty Nations, dated November 26, 2003.

As part of the initial work to prepare the Law Making: Best Practices report, we have reviewed the available literature on various Aboriginal self-government projects including negotiation documents, process reports, discussion papers, legal opinions, and decision-making processes. While most of these materials are from northern British Columbia, other materials were collected from Aboriginal groups across Canada.

In conducting this review, the following questions were posed:

1. What types of law-making models have groups implemented or proposed?
2. What issues do current law making practices or proposals raise?
3. Are there discernable patterns or trends arising from the practice of Aboriginal law making?
4. What are the basic assumptions underlying current and proposed Aboriginal law-making practices?
5. How have different Aboriginal groups managed to combine historical cultural governing institutions and practices with contemporary governing entities?

This report is preliminary and as such, only highlights the issues, questions, and concerns raised thus far by the review process.

Comments

Law making includes developing and exercising legal jurisdiction. For the purposes of this project and over the long term, NWTT may find it helpful to consider the function of jurisdiction. The first aspect of jurisdiction is how it enables groups of people to imagine and organize space such as the topographical boundaries between public and private

space, land-use planning and zoning decisions, and perceiving and relating to nature. Basically the notion of social space is constructed by human beings and may include meanings given to local and external space and boundaries – all of which are embedded in broader social and political processes. Social space includes how individuals and communities observe those who are on the outside of the group’s topological and social boundaries.¹

Other important aspects of jurisdiction are (1) how jurisdictional rules enables a community to establish authority over people who break the rules, (2) how the assertion of jurisdiction extends community membership to those brought within its boundaries, and (3) how the declaration of jurisdiction can create opportunities for groups of people to develop norms that challenge imposed sovereign power.²

the exercise of jurisdiction has always been part of the way in which societies demarcate space, delineate communities, and draw both physical and symbolic boundaries. Such boundaries do not exist as an intrinsic part of the physical world; they are a social construction. As a result, the choice of jurisdictional rules reflects the attitudes and perceptions members of a community hold toward their geography, the physical spaces in which they live, and the way in which they define the idea of community itself.³

As NWTT develops its law-making models, it may be useful to explicitly ask questions about jurisdiction and (topographical and social) space in order to create a broader context in which to consider its options.

BACKGROUND

Much of the materials we surveyed were initially generated in response to the unsuccessfully proposed *First Nations Governance Act*. Mainly the papers focussed on the legal issues relating to self-government, the *Indian Act*,⁴ and the Crown’s fiduciary duty. The main questions posed were whether the *First Nations Governance Act* infringed an Aboriginal right to self-government, and if so, whether the infringement was

¹ Paul S. Berman, “The Globalization of Jurisdiction” (2002) 151:2 U. Pa. L.R. 423 at 426-27.

² *Ibid.* at 424.

³ *Ibid.* at 427.

⁴ *Indian Act*, R.S.C. 1985, c. I-5 [*Indian Act*].

justified, as is required by s. 35 of the *Constitution Act, 1982*. The materials included discussions about the law regarding proof of the right of self-government, the Crown's duty to consult around legislative activities that would infringe that right, and the justification process. Generally, the authors agreed that the *First Nations Governance Act* constituted an infringement of the aboriginal right to self-government, and to this end, various legal strategies to challenge the bill were developed. A key concern was the inadequate consultation under s. 35 of the *Constitution Act, 1982*.⁵

The following quotation from Kent McNeil is an apt introduction to aboriginal law making.

The inherent right of self-government can be defined as the right of the Aboriginal peoples of Canada to govern their own territories and peoples. It is inherent in the sense that it is derived, not from the Canadian Constitution or Canadian law, but from the existence of Aboriginal nations as independent cultural, social and political entities with their own laws and systems of government prior to European colonization of North America.⁶

The papers provide an insightful view into a number of factors that may relate to future law-making proposals. Some of these are:

- The passing of a band bylaw is a legislative function of band councils.
- Under the current *Indian Act* regime, band councils have both executive and legislative functions. In addition, bands also have administrative functions that they are required to perform.⁷ At the local level, these functions blur, and this has caused problems for bands.⁸

⁵ *Constitution Act, 1982*, Schedule B to the *Canada Act 1982*, c. 11 [*Constitution Act, 1982*].

⁶ Kent McNeil, "The Implication of Parliament's Exercise of Section 91(24) Powers for the Inherent Right of Self-Government" (October 2002) paper prepared for the Assembly of First Nations, Office of the BC Regional Vice-Chief [unpublished, archived at the Office of the BC Regional Vice Chief-Assembly of First Nations] at 1 [McNeil, Parliament's Exercise].

⁷ Mark Stevenson & Albert Peeling, "Memo to Gerald Wesley and Justa Monk – Co-Chairs, Northwest Tribal Treaty Group: RE: Key Legal issues related to First Nations Governance (FNG) Process" (March 31, 2002) [unpublished letter, archived in Mark L. Stevenson's law office in Victoria, B.C.] at 17 [Stevenson & Peeling, memo].

⁸ See the discussion of the Separation of Powers, below.

- Band councils have two distinct functions – governmental and fiduciary – and each involves differing issues of liability.⁹ This causes much confusion because “[i]n one case it acts *qua* Band Council, in the other *qua* the Band”.¹⁰
- The band bylaw powers under the *Indian Act* are limited and offer little as enforcement authority to bands.
- The small size of some bands requires the modification of standard fiduciary and conflict of interest concepts.¹¹
- The community population size is of great importance when considering governing powers, and there are serious questions as to whether effective checks and balances can actually be established to prevent an unhealthy erosion of community and culture.¹²
- The number of reforms underway in recent times raises dangers about the overall consistency and clarity of those reforms.
- Bands, as opposed to band councils, were not created by the *Indian Act*,¹³ and the two are legally distinct. It may be important to design new governance structures in a way to prevent the inadvertent termination of the historical continuity of “bands” that may be caused by sourcing the authority of new governing institutions entirely in any new legislation.¹⁴
- There are questions about identifying the Aboriginal group that holds the right of self-government. RCAP was of the view that the right of self-government vested in larger nations rather than local communities. However, some larger nations, such as the Cree, share a culture and language, but do not have a unifying political structure. Since “Aboriginal nations” cannot be applied universally to the holders of the right of self-government, Kent McNeil uses the term “Aboriginal polity” to avoid having to identify the holders of the right as bands or nations.¹⁵

⁹ Stevenson & Peeling, memo, *supra* note 7 at 18.

¹⁰ *Ibid.* at 4.

¹¹ *Assu v. Chickite*, [1998] B.C.J. 2775 at para. 53 (B.C.S.C.).

¹² John Borrows, “Stewardship and the Proposed First Nations Governance Act” (October 2002) paper prepared for the Assembly of First Nations, Office of the BC Regional Vice-Chief [unpublished, archived at the Office of the BC Regional Vice Chief-Assembly of First Nations] at 17-18 [Borrows].

¹³ This is not to say that bands the proper body to exercise communal aboriginal rights, or that regulation of membership under the *Indian Act* since 1876 has not significantly affected the composition of bands. See John Giokas and Robert K. Groves, “Collective and Individual Recognition in Canada: The Indian Act Regime” *Who Are Canada’s Aboriginal Peoples? Recognition, Definition, and Jurisdiction*, ed. Paul L.A.H. Chartrand (Saskatoon: Purich Publishing, 2002) pages 41-82.

¹⁴ *Ibid.* at 6, 11.

¹⁵ Kent McNeil, “Section 91(24) Powers, the Inherent Right of Self-Government, and Canada’s Fiduciary Obligations” (October 2002) paper prepared for the Assembly of First Nations, Office of the BC Regional Vice-Chief [unpublished, archived at the Office of the BC Regional Vice Chief-Assembly of First Nations] at 14-16 [McNeil, Section 91(24)]. McNeil suggests that developing an approach that takes account of both the historical and current differences among the various Aboriginal nations might be more suitable.

- According to McNeil, s. 35 consultation regarding self-government must take place with the polity that holds the right, which in most cases is the Aboriginal nation rather than an “*Indian Act* band”.¹⁶

LAW MAKING – SOME CONSIDERATIONS

Harvard Project

Key research findings of the Harvard Project on American Indian Economic

Development indicate that economic success is predicated on three factors:

1. **Practical Sovereignty:** The nation has taken effective control of its affairs, resources, institutions, developmental strategies, and other decision-making.
2. **Capable Governing Institutions:** The nation supports its jurisdictional power with governing institutions that exercise its powers effectively. Such effective capability is typically demonstrated by a court system that is politically independent and separate from politics and business management.
3. **Cultural Match:** The formal institutions of government must fit the indigenous conceptions of how authority should be organized and exercised.¹⁷

Two other important factors for the economic success of Aboriginal nations are (1) strategic orientation as demonstrated by long term planning, and (2) creative leadership that can move beyond the status quo.¹⁸ One of the central problems facing aboriginal peoples and governments is how does a people create an political environment which makes economic success and prosperity possible within their nations, or, in terms of the Harvard Project, how to create an environment where these factors exist.

¹⁶ *Ibid.* at 17. McNeil also contends that “by the time their inherent right [of self government] received constitutional protection in 1982, the [Indian] Act’s band council form of government had been operating on most Indian reserves for several generations, and had become established. Even when leaders are chosen by custom rather than by election, the authority they exercise in relation to the *Indian Act* is derived from the statute, not from the inherent right of self-government. So as long as an imposed legislative regime is in place, whether it is in the form of the *Indian Act* regime or the modified regime provided under the *FNGA*, there will always be tension between that regime and the inherent right. They cannot occupy the same space because they are fundamentally inconsistent with one another” (at 30).

¹⁷ Stephen Cornell, Miriam Jorgensen, & Joseph Kalt, “The First Nations Governance Act: Implications of Research Findings from the United States and Canada” (October 2002) paper prepared for the Assembly of First Nations, Office of the BC Regional Vice-Chief [unpublished, archived at the Office of the BC Regional Vice Chief-Assembly of First Nations] at 4-5 [Cornell].

¹⁸ *Ibid.* at 5.

Culturally Grounded Independent Courts

For our purposes here, it is significant that an independent court system and a cultural match between governing institutions and cultural conceptions are determinants of the overall economic success of an Aboriginal nation.¹⁹ Borrows recognizes the importance of tribal courts in the United States for holding Aboriginal leadership to the highest level of accountability in accordance with principles of stewardship.²⁰ Basically, Borrows argues that self-government accountability must be culturally grounded and contextualized within the larger principles of stewardship, and enforced by community practices of approbation and disapprobation:

The idea of approbation received for proper performance of duty, or disapprobation flowing from failure to fulfill a responsibility, complete the Ojibway circle of stewardship. . . . Accountability is thus given meaning by the knowledge one has about how to prepare to exercise and implement this responsibility. Stewardship is only effective when people recognize that specific consequences flow from how duties are acknowledged and accomplished.²¹

According to Borrows, a better path to ensuring government accountability is to recognize that Aboriginal governance rests on the legal foundation of inherent law making and dispute resolution authority. Given this, the power of Aboriginal people to judge and hold their own members accountable for their actions is an Aboriginal right that was integral to Aboriginal peoples prior to European arrival. This right has not been extinguished and can be exercised in a contemporary form.²²

Ultimately, accountability within Indian communities must flow from “principles of constitutionalism and the rule of law [that] lie at the root of our system of government”, in keeping with the Supreme Court’s admonition. The fact that the rule of law has not been considered in an Aboriginal legal context indicates that current proposals for Indian governance do *not* flow from accepted principles of constitutionalism.²³

¹⁹ A more in-depth discussion of the different measures of success exceeds the intent of this paper.

²⁰ Borrows, *supra* note 12 at 22.

²¹ *Ibid.* at 3-4.

²² *Ibid.* at 24.

²³ *Ibid.* at 22. Among other things, Borrows argues that the problem with the FNGA was its failure to address issues of normative order (as per the S.C.C. in the *Quebec Succession* reference) and cultural values that have persuasive meaning for Aboriginal people.

One of the principles of constitutionalism concerned is as stated by in *R. v. Van der Peet*²⁴ by Lamer C.J.:

It is possible, of course, that the Court could be said to be "reconciling" the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.²⁵

Earlier, he had written:

In his comment on *Delgamuukw v. British Columbia* ("British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 Queen's L.J. 350), Mark Walters suggests at pp. 412-13 that the essence of aboriginal rights is their bridging of aboriginal and non-aboriginal cultures:

The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined. . . . a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives. [Emphasis added in the original.]²⁶

Any system of governance for aboriginal people must take into account the legal culture and traditional governance of the aboriginal peoples themselves, and then reconcile that with the Canadian political structures. And of course, the traditions of governance which ground the aboriginal right of self government can be exercised in a modern form and according to the preferred means of the aboriginal people themselves.²⁷

Constitutions

²⁴ [1996] 2 S.C.R. 507.

²⁵ at para. 50.

²⁶ at para. 42.

²⁷ *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

Contemporary Aboriginal law-making models will most likely require the corresponding development and ratification of a constitution by the Aboriginal group.²⁸ Constitutions have been described as “codes of norms” intended to “regulate the allocation of powers, functions, and duties among the various agencies and offices of government, and to define the relationship between these and the public.”²⁹ These codes depend on the minimum consensus among citizens about basic questions as to the relationship between the state and the individual.³⁰ Such consensus is required for the form and procedures of the governing institutions support for the rule of law, general social goals and philosophy of government, and policy goals.³¹

The functions of a constitution are described as “system maintenance” and include

- legitimization of governing authority,
- recognition of the rights and freedoms of citizenship,
- delineation of the roles and limits of authority of the different political actors,
- establishment of mechanisms for adjudication,
- expression of basic beliefs and symbolism,
- provision of flexibility of amendment, and
- provision of a mechanism for effective citizen participation.³²

According to Mel Bevan of the Kitselas First Nation, “A constitution is an expression of the will of the people to govern themselves and to define how they are to be governed.”

TRADITIONAL GOVERNANCE IN THE NORTHWEST

²⁸ There are arguments against the adoption of constitutions by Aboriginal communities, but an exploration of these issues is beyond the scope of this paper. For example, Robert Yazzie, Chief Justice of the Navajo Tribal Court, made this argument at the 1999 IBA Annual Conference held in Vancouver, B.C.

²⁹ John Graham & Elder C. Marques, “Understanding Constitutions: A Roadmap for Communities” [unpublished paper, archived at the Institute on Governance, Ottawa] at 1.

³⁰ This is reflective of a centralized system whereby each citizen has a direct relationship with the state. Such an approach effectively could eclipse other forms of social relationships such as those in decentralized societies. For example, many Aboriginal peoples have complex social structures that create many levels of relationships with corresponding roles and responsibilities. A question for future discussion might be how a centralized governing structure might affect decentralized cultural social systems.

³¹ *Ibid.* at 4.

³² *Ibid.* at 8-10.

We preface our observations about traditional governance with a caution that in each area of the Northwest, the rules could be different in each area. Each group adapted to its specific needs, in order to maintain a coherent society. So, for example, leadership was sometimes determined by heredity, and sometimes by performance, and sometimes by a mixture of the two. Nevertheless, there were methods by which a chief could be removed or restrained because in most cases decision making was governed by personal authority rather than power. But there were laws governing succession, for example, as said in *the Men of Medeek*, ch. 39:

Normally succession followed different lines. Unless a special Law was invoked the son of the eldest sister of a Chief inherited the "Power" when his uncle died.

Decisions were made consensually and the persons with recognized authority (a product of experience and wisdom) were able to build consensus. Authority characterized like that can be lost if the decisions reached prove unpopular, and persons in authority who offend against the laws and morals of the people lose their authority.

The Men of Medeek

This remarkable work is the oral history of *the Men of Medeek*, the people of Kitselas, as told by Chief Walter Wright to Will Robinson in the earlier part of the last century. In the Prologue Chief Wright explains:

Neas-D-Hok is my name, and I am the head Chief of the Grizzly Bear People of Kitselas. I have "Power" on both sides of The Big Canyon. On the right hand side I have the power of my Chieftainship. For many generations Neas-d-Hok has had that right. On the left hand side I carry the "Power" of Neas Hiwas, for in my generation there is no Chief of that name.

When I was a boy my Grandfather, who was Neas Hiwas, taught me the history of Medeek. His had been the duty of carrying it through his generation. His was the responsibility of choosing one of The Royal Blood to keep it safe after he had died.

As a lad I sat at my Grandfather's feet. Many times he told me the story. It is long. In the Native tongue it takes eight hours to tell.

So, several times each year, I sat at his feet and listened to our records. I drank in the words. In time I became word perfect. I knew all the story. I could repeat it

without missing any of its parts. So I became the historian of Medeek. So I took my place in a long line that had gone before me.

For so it is. In our land of Ksan there was no written word; the record had to be passed down from man to man by word of mouth.

Now my years are increasing. Now I have seen 65 summers.

When I was a lad few white men lived in our land. Now there are many. And with the coming of the men whose skins are white like the peeled willow stick there have come many new modes of life.

The life of my People has left its accustomed ways. There is little time to learn the history on our People. Many things have drawn the minds of our young men from the habit of peacefully listening to their elders.

So, lest the record be lost, I tell it that it may be written down and preserved. Thus may the Men of Medeek, now scattered in many places, read. Thus may they learn of the deeds that are recorded on their Totem Poles. Thus may they come to have an honest pride in their lineage, and the deeds performed by their ancestors.

The Men of Medeek is what literary scholars term a primary epic which stems from heroic deeds and which is composed in the first instance, in order that such deeds may not be forgotten.³³ It has its parallels with the works of Homer, and with the *Exodus*, for example. *The Men of Medeek* is the story of the people of Kitselas, reaching back over thousands of years from their migration from Ksan to their present territory. The Wars of Medeek takes the story up until post contact times. It contains history, claims to territory, records laws, and even details the making of bent wood boxes. In a real sense it contains the much of the culture of the people of the Northwest, both implicitly and explicitly. What is implicit raises a problem for us in that because we do not share in the culture described, some of the references are mysterious to us.

Nevertheless it is clear both implicitly and explicitly that the society described was a society very much ordered by rules, and law is from the outset a central topic of *The Men of Medeek*. So in chapter 2, the following words are found:

³³ As to primary epic, a general introduction is given in C.S. Lewis, *A Preface to Paradise Lost* (London: Oxford University Press, 1942).

Laws they had; but these were few; laws framed by Wise Men who watched the face of nature; who pondered long on the workings of Gyamk, the Sun God who lived in the Sky City of Lahah; laws that were made as they watched cause an effect work out their ends in the lives of men.

Some happening came to the people. The result was good and fortunate. "This is right," said the Wise Men. "This shall be embodied in a new law so that good fortune may be still more assured to our People." And when misfortune came these Wise Men delved deeply to find its cause.

At last, satisfied they had learned that which they had sought for, they said, "The action that lies at the root of this difficulty is wrong. Our People must be protected in the future that the same error may not be committed again. We make a new law forbidding that action."

So grew the Code. So were the children instructed in the ways of Right and Wrong. So generation followed generation, each one more vigorous; more prosperous.

This passage shows clearly the people of the Northwest had a clear idea of law rooted in custom, which will be discussed a little later. It is an idea of law shared with western society at least up until the 19th century, when scholars such as Austin could write, under the influence of positivism, that:

[Customs] exist as positive law by the spontaneous adoption of the governed, and not by position or establishment on the part of political superiors. Consequently, customary laws, considered as positive law, are not commands. And, consequently, customary laws, considered as positive law, are not laws or rules properly so called.³⁴

Legal Positivism originated in the search to try and apply a scientific method to the study of law. Its main components include the separation of law and morality, and the principle that law has social, and not absolute, origins. It originates not in a divine order but in social circumstances:³⁵

Legal positivism is a view according to which law is produced by the ruling power in society in a historical process. In this view law is only that which the

³⁴ John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (Cambridge, Cambridge UP, 1995) at page 34.

³⁵ See Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (Cambridge: Harvard UP, 1962, 1967) particularly at pages 92 and 93.

ruling power has commanded, and anything which it has commanded is law by virtue of this very circumstance.³⁶

Austin's insistence that law is a command from a political superior to a political inferior excludes by definition many forms of customary law and especially customary laws alien to English sensibilities. Thus for much of the time from the 19th century up until the decisions of the Supreme Court of Canada in *Calder v. A.G.B.C.*³⁷ and *Guerin v. the Queen*,³⁸ it was thought that aboriginal customs, originating not in the sovereign command of the King in Parliament, could not be law or recognized as law in Canada. Thus, however much in accord with earlier conceptions of law in Western Europe were aboriginal conceptions of law, an intellectual fashion which connected well with Social Darwinism during that time denied those conceptions were law, led to the conclusion that societies governed by customary laws could not be societies at all because they had no law, and "Without society no law, without law no society."³⁹

This fashion, which lies at the root of the dismissal of custom, is not without its detractors. It excludes the whole realm of natural law, which Cicero defined as:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator and its enforcing judge. Whoever is disobedient is fleeing from himself, and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment. . . .⁴⁰

³⁶ Julius Moor, "Das Problem des Naturrechts" 28 *Archiv fur Rechts-und Wirtschaftsphilosophie* 331 (1935), cited *ibid*.

³⁷ [1973] S.C.R. 313.

³⁸ [1984] 2 S.C.R. 335.

³⁹ Westlake, *Chapters on the Principles of International Law*, (Cambridge, Cambridge University Press, 1894, Reprinted Littleton: Fred Rothman and Co. 1982) page 3.

⁴⁰ Cicero, Marcus Tullius. *De Re Publica III. XXII. 33. Loeb Classical Library Cicero XVI*. Translated by C. W. Keyes (Cambridge, Massachusetts: Harvard University Press, 1928.)

In the terminology of *The Men of Medeek*, natural law is the law of Gyamk, discoverable through the careful observation of the world by Wise Men.

It also excludes the whole realm of international law, because international law international society, as a society of equals without political superiors or sovereignty over each equal state. But to reiterate the obsession with positivism and the idea of law as sovereign command had grave consequences for the recognition of aboriginal customary law such that it was thought in some quarters at least up until *Calder v. Attorney General of British Columbia*,⁴¹ that no customary law of aboriginal people could be enforced by the common law courts absent specific legislative recognition.

“Laws they had; but these were few”. For us today living in a regulatory world with an abundance of law, the idea of few laws is foreign and strange, but many have advocated it. Thoreau, for example, wrote:

I heartily accept the motto,—“That government is best which governs least”; and I should like to see it acted up to more rapidly and systematically. Carried out, it finally amounts to this, which also I believe—“That government is best which governs not at all”; and when men are prepared for it, that will be the kind of government which they will have. Government is at best but an expedient; but most governments are usually, and all governments are sometimes, inexpedient.⁴²

But this passage from *The Men of Medeek*, taken as a whole, illustrates clearly a process of law making rooted in:

1. the close observation of events to observe their consequences;
2. the making of laws to encourage those events having good consequences;
3. the making of laws to discourage those events having bad consequences.

⁴¹ [1973] S.C.R. 313

⁴² Henry David Thoreau, “Resistance to Civil Government”, *Political Writings*, ed. Nancy L. Rosenblum (Cambridge: Cambridge UP, 1996) at page 1. A more recent exponent of the minimal state is Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), who writes at page ix that: a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified;... any more extensive state will violate persons’ rights not to be forced to do certain things, and is unjustified;... a minimal state is inspiring as well as right.

It should also be noted that the idea that following the laws brings good fortune and disobedience to laws brings bad consequences has parallels with the biblical Old Testament, where so long as the people of Israel followed the law, they were blessed, but when they strayed, they brought about their own downfall. So in *The Men of Medeek*, as illustrated in the fifth chapter:

They died because they failed to teach their children kindness; because they stood and laughed while a kid was tortured and burned in your town. They had become indolent and careless.

They had ignored the Law of Gyamk the Sun God.

Knowing what was right they turned their backs and permitted evil.

So they have died.

Some of the important elements in this passage include that:

1. the law must be taught to the children;
2. the law of Gyamk is as noted earlier what others have termed natural law; and
3. Knowledge of the law and failure to live up to it brings punishment.

This same law is reiterated in Chapter 6:

"Men must respect the creatures of the wild," its dictate ran. "Gyamk has said that birds, and fish, and animals may be killed when food and raiment are needed; when their sinews are to be used in making utensils and when all their parts are of service to the men who take them."

To take in sport the life that Gyamk gave is forbidden.

So, too, the blood, and hair, and any parts of animals that are left on the hunting grounds must be buried, or hidden. For Gyamk is grieved and angry when he sees carelessness and waste with the creatures of His Land.

Teasing, tormenting, and ill-treating is forbidden. For Gyamk, who gave you life, gave life to these creatures as well.

"Mark well," it ends. "Gyamk has his messengers of vengeance, his Narnaks, the Spirit Life of the wild creatures can help the humans; they can also wreak revenge."

"Ill treat a bird and its Narnak will exact retribution. Torment the Beavers and the King of the Beavers will claim your lives in return."

Many laws are mentioned expressly in *The Men of Medeek*:

When a man dies in another land "The Power" of that land goes to his descendants. When a man dies in a strange land it is the right of his successors to use the emblem of the place in which he died (ch. 6).

And after the disaster of the bear of Medeek, in chapter 8, is found the following:

Great disasters are the landmarks of a people who are wise.
They mark the ending of a time of error.
They set a starting point for a better mode of life.
So in the days that followed the visitation of Medeek, the giant grizzly bear, Wise Men pondered long over what had come to pass.
To them the situation became clear.
Once again Gyamk, the Sun God, had been offended.
The dancing maidens, decked with trout bones, had violated the Law; They had desecrated His beings.
And the Spirit of the Trout People, taking the form of Medeek, had been sent to exact recompense; an awful retribution from the men who had failed to train their children in the ways of wisdom.
In due courses Neas Hiwas called a Council.
Many things had to be done. New Chiefs had to be raised up in the place of those who had been slain.
New laws, governing the proper training of children, had to be made.

This is an illustration of the process of law making as a response to an event in traditional times.

In Chapter 19 is stated the following:

"When the Blood is unpaid retribution must follow".

This law is of course known to the West in the form: "Eye for eye, tooth for tooth..."⁴³ but it is important to note that, as is illustrated by much of the Men of Medeek, in traditional societies of the Northwest, the harshness of the law in the form of retribution could be avoided if the Blood were paid in the form of compensation. The decision to exact retribution was not made unilaterally but after years of failure to pay, and after thorough consultation. The law of retribution is also expounded in *The Downfall of*

⁴³ *Exodus* 22, 24 and *Deuteronomy* 19, 21.

Temlaham,⁴⁴ where tumult was caused because a man was hanged by British justice after compensation in the form of land had been paid to avoid retribution.

In Chapter 24 is another law of names:

Here was a lad, who, in due course, would be a chief. His captor, if he could learn his name, would be entitled by the laws of the People to take that name as his own; to have added power that would come with the name.

Because the significance of the taking of a name may be lost on many, we will venture a few cautious observations. In *The Golden Bough*, a pioneering work of anthropology and comparative folklore, Sir James Frazer noted:

the North American Indian “regards his name, not as a mere label, but as a distinct part of his personality, just as much as are his eyes or his teeth, and believes that injury will result as surely from the malicious handling of his name as from a wound inflicted on any part of his physical organism. This belief was found among the various tribes from the Atlantic to the Pacific, and has occasioned a number of curious regulations in regard to the concealment and change of names.”⁴⁵

But it should be noted that the consequences of a name taking in the societies of the Northwest were not simply based in belief. The wound which Frazer speaks of would manifest itself in at least two concrete ways:

1. In a society where authority is rooted in the power to persuade and in the respect others give to a person, to lose a name is a loss of respect and hence an injury therefore to one’s power. Frazer also noted for example the taboos on the naming of gods, which is part of western cultural inheritance in the Ten Commandments:

Thou shalt not take the name of the Lord thy God in vain: for the Lord will not hold him guiltless that taketh his name in vain.⁴⁶

⁴⁴ Marius Barbeau, *The Downfall of Temlaham* (Second edition) (Edmonton : Hurtig, 1973. (Canadiana Reprint Series)).

⁴⁵ Frazer, James George, Sir. *The Golden Bough*. New York: Macmillan, 1922; Bartleby.com, 2000. www.bartleby.com/196/55.html [March 26, 2004].

⁴⁶ *Exodus* 20, 7 and *Deuteronomy* 5,10.

It should be noted as well that in western society those in traditional authority are not addressed by name. The Queen, for example is Her Majesty, and not addressed familiarly.

2. In oral cultures a name has special legal significance where, as in the Pacific Northwest, the name of a person is associated with specific territories. A name signifies the recognition by the society of a connection between person and land, and the taking of a person's name may give power over territory. This is not dissimilar to the recognition in a written society of possession of the land where one has possession of a deed.⁴⁷

In Chapter 26 there is mention of another law of international relations:

desiring peace, he followed the Law and swung his fleet in the path of the advancing strangers. He slowed his paddlers that he might be overtaken. Such was the sign of Peace upon the waters

Another international law is as follows:

Here he landed, and with the blowing of great horns his men signalled his approach.
Singing the ancient funeral song of Medeek, Neas Hiwas entered the town. Such was the Law of the People when a Chief came to visit others of high rank in distant towns.

And also:

The ancient law still ran in Ksan. Women and children were safe from harm. Theirs, in the years to come, would be the lot of slaves.

Chapter 28 sets out a law fostering social cohesion:

Whether the absence was due to hunting or to war the wives of those who were away must practice a stiff, unfaltering self-denial.
Feasting in the absence of a husband was taboo, carefree visiting was forbidden. On the women rested the task of spiritually upholding their men.
So, as the warrior ate sparingly on a campaign, his wife, who stayed at home must be equally abstemious in her feeding.

⁴⁷ See generally, J.L. Austin, *How to Do Things with Words* (2nd ed.) (Cambridge: Harvard UP, 1962, 1975)

Only by rigorous self-denial of the appetites of the body, of mental self-discipline on the part of the wife, could that spirit force go forth to ensure success and safety for the man.

And relaxing of the code placed their men in danger; wilful disregard of the rule was sure to bring disaster.

So ran the Law.

Marriage laws could serve to encourage peace:

"Peace runs in Ksan," he began, "Our troubles are over. Let us bind our houses more closely together. Your daughter is beautiful, she is comely. It is pleasant to be in her company. I am a young man. It needs must be that I marry a maiden of the Royal Blood. The Law dictates that she be of different Totem from mine. You are a Bear and I am an Eagle." (Ch. 32)

Leadership selection is the theme of chapter 39, which makes it clear that variation in succession could be allowed in special circumstances, such as to recognize the special gifts of a person:

Eight years passed, and the lad waxed strong. Wisdom had its beginnings in his countenance; strength and dignity were in his bearing.

Day after day the Chief watched his son. Here was a fitting successor for his post as Ruler.

Normally succession followed different lines. Unless a special Law was invoked the son of the eldest sister of a Chief inherited the "Power" when his uncle died. Neas Ham Geiss pondered the matter for many months.

At last he made a decision and called a feast.

A great feast, one to which came all the lesser chiefs, the Elders, the Wise Men and all the people of the town.

From his storehouse Neas Ham Geiss took gifts for all, gifts that varied according to the ranks of those who received them.

From his storehouse he chose buckskins C "A Man" of the finest, and piling one of the other, constructed a platform of the velvety skins.

To the top of this pile he lifted his son, Neas Nawah.

Then, turning to the watching throng, "This day," he proclaimed, "My son goes to my Chair. To-day he becomes Ruler in my stead. Until he is of age I shall watch over the people, act in his stead. But when he is grown to manhood he will be your Ruler. From this day on Neas Nawah is ruler of Git-Luet-Zar."

Thus, in the self-sacrificial manner of the special Law the father abdicated, the son was raised up in his stead.

Born to the Eagle, his Mother a Bear, descent ran through the distaff side of the family.

And so it came to pass that the Eagle Totem moved to the place of second rank. Medeek, the Grizzly Bear, the Totem of the Canyon folk, became supreme.

It is important to note that the tenor of this special law is one of self sacrifice so that such a law would not be abused.

It is apparent from *The Men of Medeek* (see for example Coor's story) that decision making took years and was based on consultation in many forms—from asking is it ok if I do this, to asking tell me how to do this, to asking what should I do. In traditional society, being Chief did not necessarily give you power to do anything. Power lay in the ability to persuade in consultation, in debate, in participatory decision making. Similarly, the Chiefs name was a title to land, but people under him had the right to use that land. Others needed to ask if they wanted to use it, but the Chiefs name was title so they knew who to ask. If he granted permission, then a share of the take was given to him in payment.

Again, the model of law making set out in *The Men of Medeek* was composed of:

1. observation of events;
2. consultation to determine what to do, which safeguards the legitimacy of the law and the authority of the Chief;
3. publication of a new law in the feast hall;
4. accountability for bad law making in loss of authority and loss of persuasive authority;
5. teaching the children (publicize) the law; and
6. observation of events after law making to ensure that it works.

It should be noted that there are two basic forms of law to be considered. One is the actual process of law making—which may be considered as the way in which a community achieves consensus on what is right. The other for concerns the actual substance of the laws concerned. It would be very useful if each Nation were to consider researching in depth the traditional manner in which laws were made in their communities and comparing them against western democratic standards. It should not be assumed that traditional law making was autocratic, or that the common term in English “hereditary chief” which to the European mind stirs up memories of despotic monarchs claiming to rule by Divine Right, is an accurate translation. In the house system a high

degree of public participation, for instance in the law making process, is encouraged. We also would encourage thinking strategically about the option of cataloguing or codifying those laws. This is important because aboriginal customary laws have the force of federal common law in Canada, which is paramount to provincial law.⁴⁸ To date however the scope of recognition of laws in Canada has been limited to such matters as family relationships marriage and adoption. The possibility of a more broadly based understanding of customary laws—for example customary land use laws—could be very exciting. Strategic thinking about the means of achieving recognition of customary law in the courts is also necessary.

The Potlatch System

Justa Monk, Co-Chair of the NWT Nations, prepared a paper entitled “Governance System of First Nations before Contact and after Contact”. In it, he provides some details of the working of the potlatch, and community and land use law, particularly in Carrier territories. The potlatch, he says, is based on four principles: honesty, love, respect, and sharing, and promotes self worth, cooperation, equality, acceptance and connectedness through the operation of the clan system, by which every person has a role to play in the potlatch ceremonies. There are four Carrier clans, caribou, bear, beaver and frog, and no marriage among persons of the same clan is permitted. Quarrelling among clan members is forbidden and can result in a ceremony of gift giving where the quarrelling members publicly exchange gifts, shake hands and sit together adorned in feathers as a symbol of peace.

At a death potlatch, clan members gathered to put away a loved on, relative and community member. In it, payment was made to those who put away the deceased with gifts from the deceased’s possessions. Distributions were made to those of high status and those who were important to the deceased, then to family members, and then to community members.

⁴⁸ *Casimel v Insurance Corporation of British Columbia* (1993) 106 DLR (4th) 720; as to federal common law see *Roberts v. Canada*, [1989] 1 S.C.R. 322.

Social assistance was non-existent, as a person's needs were met through the potlatch system. If someone was in need, other community members were expected to help. Furthermore, the potlatch provided a mechanism for the repayment of debts, which maintained an individual's self-worth, maintained equilibrium in the community, and promoted sharing.

The potlatch also provided a naming ceremony where a hereditary chief name was given to an individual who demonstrated having lived according to the core values of honesty, sharing, respect and love in order to receive the name. Names often were accompanied by a traditional song, territory and status in the community.

Community laws were enforced by watchmen under the direction of headmen. The entire community was expected to abide by and implement the laws, and to report concerns to the watchmen.

Embarrassment was the first stage of punishment where a transgressing member was made to stand up in front of the community. Repeated offences progressed through stages of whipping (corporal punishment) confinement in a "dark hole", and banishment from the community.

Land use was determined by the entire community and trespassing was punishable by death. Any changes to the land law required community consensus. Only the owners or "keyoh" could determine if someone was to be allowed to use their territory, and this was commonly done by accompanied trips where, in accordance with community values, the invited person would be expected to share a portion of the catch. Land use was governed by spiritual beliefs surrounding acceptable harvesting practices.

Membership and status were determined through the potlatch system. Every person belonged to the clan of the mother by birth but could be adopted into another clan through the consensus of the clan and the consent of the individual, which was necessary since clan membership brought with it responsibility to other clan members. When such an adoption takes place, the person can either retain or relinquish membership in his birth clan particularly because of the inherent social and economic responsibilities among clan

members. If a person is a member of two clans, that person becomes a “double header” and has greater responsibility in the potlatch system and higher status in the community. But membership could be lost through non participation in the potlatch system as custom dictated.

Inside the Gitksan

This document prepared for the Gitksan Treaty Society dated March 2, 2004, outlines the workings of Gitksan society. We would like to draw particular attention to a few of its aspects.

Firstly, a child born into a Gitksan house is watched, and a few are “singled out for more intense deliberate shaping, defining, and refining reserved for candidates likely to inherit the title, status, and associated power, responsibility, and burden of a *Simogyat*.” [Chief] (page 11). The process of leadership selection thus begins in earliest childhood and candidates receive education suitable to leadership roles in a manner which is not unlike that proposed for Plato’s Guardians in *The Republic*. These are candidates for the title of *Simogyat* when one dies. And the *Simogyat* become responsible for Gitksan government.

Decision making processes are described at pages 14 and 15:

Because an important question or issue arose that has ramifications that may, say, impinge on the *wilphl Gitksan* [Gitksan House] is brought to the attention of the *Simogyat*. After serious consideration, the *Simogyat* simultaneously seeks advice from his father’s side and summons the *Simgigyat* of each member lineage and formally raises the matter with them. After consideration amongst them, a *si gotxw*, a decision from the heart, is arrived at. At this time, typically, the *Simogyat* restates the decision for all to hear. The venue from which the decision will be pronounced and or implemented is determined. Plans of actions ensue, ready for implementation. If *li’iliget* [feast] is selected, then preparations ensue. *Simgigyat* are *t’eets* – ed. At the *li’iliget*, the *Simogyat* or designated *galdim’algyax* make the pronouncements or declarations decided upon witnessed by the attending *Simgigyat*. The *wilphl Gitksan* who made the pronouncement and or declaration through its *Simogyat* seek an explicit nod of endorsement from its *Nii dill* [father clan]. If the *Nii dill* endorse the pronouncements and or declarations, then the *wilphl Gitksan* as led by the *Simogyat* will proceed to implementation. If not, the *wilphl Gitksan* must reconsider or stop.

To reconsider, the *Simogyat* may have to start over again culminating into another *li'iliget*. And because the *li'iliget* is very costly, the *Simogyat* of the *wilphl Gitksan* is compelled to get it right the first time.

It is important to note for our purposes that the selection of a *Simogyat* is not hereditary in the same manner that the monarchy was hereditary, and that the decisions made by a *Simogyat* are not dictatorial but done in a form which requires consensus and consent.

LAW-MAKING MODELS

Example One: Gitanyow

The small independent Gitksan community of Gitanyow recently set out a number of premises on which it proposes to negotiate a treaty.⁴⁹ These include recognizing Gitksan traditional systems as the basis for its governing system, and further, recognizing Gitanyow's right to evolve its traditional systems over time. Gitanyow also argues that it should only negotiate with the federal government on a bilateral basis until Gitanyow's governing institutions are accepted. Furthermore, Gitanyow refuses to accept a governance model of delegated authority, but rather proposes that its governance system be recognized as an inherent Aboriginal right.

The Gitanyow Government Chapter outlines Gitanyow's proposed governing structure and functions.⁵⁰ The highlights relating to law making are:

- Gitanyow has adopted a provisional Constitution that provides for governing principles, governance structures, leaders, roles and responsibilities, members, lands and resources, decision making, legal status, and administration.
- Gitanyow plans to adopt Part II of its Constitution which, among other things, will provide a process for the Gitanyow Government to enact laws through a Gitanyow Community Council.
- The Gitanyow Government will comprise the *Simgiget'm Gitanyow* (head chiefs of the eight house groups or their designate) and a Gitanyow Community Council.

⁴⁹ Gitanyow Hereditary Chiefs, "Gitanyow Governance Paper – Back to Fundamentals" (January 30, 2003) [unpublished paper archived with the Gitanyow Hereditary Chiefs' office in Gitanyow, B.C.] at 12 [Gitanyow, Fundamentals].

⁵⁰ Gitanyow Hereditary Chiefs, "Gitanyow Governance Chapter, Draft 6" (January 30, 2003) [unpublished, archived with the Gitanyow Hereditary Chiefs' office in Gitanyow, B.C.] [Gitanyow, Governance].

- The Gitanyow Community Council will comprise four elected members representing Gitanyow citizens. Two will be from the Lax Gibuu clan, two will be from the Lax Ganada, and one will represent non-Gitanyow.
- The Simgiget'm Gitanyow will appoint a speaker for the Gitanyow government.
- The general assembly will comprise
 - Gitanyow citizens,
 - non-Gitanyow aboriginals resident in Gitanyow territory, and
 - non-aboriginal people resident in Gitanyow territory.
- The Simgiget'm Gitanyow will have law-making authority for lands, resources, culture, internal governance, and house groups.
- The Gitanyow Community Council will have law-making authority for land-use planning, infrastructure on Gitanyow lands, administration of Gitanyow government, and human services including education, social services, health, marriage, estates and wills, and justice.
- A law proposed by the Gitanyow Community Council will be enacted after
 - consensus has been reached, as evidenced by a majority vote,
 - it has been signed by the speaker,
 - the Simgiget'm Gitanyow has ratified or amended it, and
 - each member of the Simgiget'm Gitanyow has signed it.
- Appeal procedures will be established including judicial review by B.C.S.C. of decisions after all other local appeal processes have been exhausted.
- A registry of laws will be established and maintained by the Gitanyow Community Council.

Example Two: Nisga'a Nation

The Nisga'a Constitution⁵¹ was ratified on October, 1998.⁵² The constitution begins with a declaration of the Nisga'a Nation to, among other things, observe Nisga'a law (ayuukhl Nisga'a) and flourish as a free and democratic society.

Founding Provisions

⁵¹ *The Constitution of the Nisga'a Nation*, ratified October, 1998, online: www.nisgaalisims.ca [Nisga'a Constitution].

⁵² Nisga'a Nation, Canada, and British Columbia, *Nisga'a Final Agreement* (1998). See *Nisga'a Final Agreement*, S.B.C. 1999, c. 2 and *Nisga'a Final Agreement*, R.S. 2000, c. 7 [Nisga'a Final Agreement]. Ratification is set out in Chapter 22, s. 12: "Adoption of the Nisga'a Constitution required the support of at least 70% of those eligible voters who vote in a referendum on the Nisga'a Constitution".

According to the founding provisions in the constitution, the Nisga'a Nation is a "collectivity of those aboriginal people who share the language, culture, and laws of the Nisga'a of the Nass Area, and their descendants".⁵³ The founding provisions also include the following:⁵⁴

- The Nisga'a Nation is further described as comprising the four tribes:⁵⁵ Laxsgiik (Eagle), Laxgibuu (Wolf), Gisk'aast (Killerwhale), and Ganada (Raven), and their subcrests.
- The simgigat, sigidimhaanak, and elders are to provide guidance for the interpretation of the ayuuk or other specified matters.
- The constitution is the supreme law of the Nisga'a Nation and is subject only to the Constitution of Canada and the Nisga'a Treaty⁵⁶ which sets out the authority of the Nisga'a government to make laws.
- The *Canadian Charter of Rights and Freedoms*⁵⁷ applies to the Nisga'a government.
- The validity of Nisga'a law may be challenged in the Supreme Court of B.C.

Rights

- The Nisga'a government is required to provide appropriate procedures for the appeal or review of administrative decisions of Nisga'a public institutions.
- The Nisga'a government must make access to information laws for its public institutions.
- The rights set out in the Nisga'a constitution are subject only to reasonable limits prescribed by Nisga'a law that can be demonstrably justified in a free and democratic Nisga'a society.⁵⁸

Governing Structure

⁵³ Nisga'a Constitution, *supra* note 33 at 6.

⁵⁴ *Ibid.* at 6-8.

⁵⁵ Also called clans.

⁵⁶ Nisga'a Treaty means the *Nisga'a Final Agreement* between the Nisga'a Nation, Canada, and British Columbia.

⁵⁷ *Canadian Charter of Rights and Freedoms*, Part I, *Constitution Act, 1982*, Schedule B to the *Canada Act 1982*, c. 11 [*Canadian Charter of Rights and Freedoms*].

⁵⁸ Nisga'a Constitution, *supra* note 33 at 9-10.

The Nisga'a government is composed of the (1) Nisga'a Lisims Government, (2) the Nisga'a village governments of New Aiyansh, Gitwinksihlkw, Laxgalt'sap, and Gingolx, and (3) representatives from the Nisga'a urban locals in Vancouver, Terrace, Prince Rupert/Port Edward, and any other urban locals established according to Nisga'a law.⁵⁹ Elections for these positions will be held every four years as of 2004.⁶⁰

- Within the Nisga'a Lisims Government, there is
 - a legislative house known as the Wilp Si'ayuukhl Nisga'a, and
 - the Nisga'a Lisims Government Executive.⁶¹
- The Nisga'a Lisims Government consists of
 - the president, chairperson, secretary-treasurer, chairperson of the Council of Elders, and any other officer of the Nisga'a Lisims Government,
 - the chief councillor of each Nisga'a village government, and
 - one representative from each Nisga'a urban local.
- The Wilp Si'ayuukhl Nisga'a is the assembly of the Nisga'a Lisims Government that exercises legislative authority of the Nisga'a Nation.⁶² It is composed of every individual who is
 - an officer of the Nisga'a Lisims Government,
 - the chief councillor of a Nisga'a Village Government,
 - a village councillor of a Nisga'a Village Government, or
 - a representative from a Nisga'a urban local.⁶³

Law-Making Authority

Wilp Si'ayuukhl Nisga'a is the law-making authority for the Nisga'a Government and Nisga'a Lisims Government. Law is distinguished from ayuukhl Nisga'a or ayuuk.⁶⁴ Further, in accordance with Nisga'a law, the Wilp Si'ayuukhl Nisga'a

- may adopt any federal or provincial law,

⁵⁹ *Ibid.* at 14.

⁶⁰ *Ibid.* at 15.

⁶¹ *Ibid.* at 18.

⁶² *Ibid.* at 43.

⁶³ *Ibid.* at 18.

⁶⁴ *Ibid.* at 41. "Law' includes federal, British Columbian, and Nisga'a legislation, acts, ordinances, regulations, orders in council, bylaws, and the common law, but for greater certainty, does not include Ayuukhl Nisga'a or Ayuuk."

- may amend the Nisga’a constitution,
- may pass a resolution proposing a question for a referendum,
- may refer matters to or consult with the council of elders,
- may enact legislation,
- will establish a registry of Nisga’a laws,
- will keep a record of its in camera and public sittings,
- will establish procedures for public information and review of legislation,⁶⁵
- may establish the number of Nisga’a Lisims Government officers and duties of officers, and
- may remove an officer of the Nisga’a Lisims Government.⁶⁶

Wilp Si’ayuukhl Nisga’a Jurisdiction

The Wilp Si’ayuukhl Nisga’a will make laws in respect to elections, referendums, Nisga’a village lands and boundaries, expropriation, urban representation, conflict of interest, special assemblies, disputes between Nisga’a Lisims Government and village governments, financial reporting and controls.

Nisga’a Village Government Legislative Authority

A Nisga’a Village Government may have a Village Charter that is consistent with the constitution, and it may make laws within its charter for the administration of the village, or it may adopt a federal or provincial law in respect of a matter within the authority of the Nisga’a government or Nisga’a village government. A Nisga’a Village Government may enact legislation in accordance with its rules and with the majority of members.⁶⁷

5.2(7) Administration of Justice

Provision is made in the Nisga’a Final Agreement for the administration of justice through these initiatives:⁶⁸

- police services,
- Nisga’a court, and
- community justice services.

⁶⁵ *Ibid.* at 19-20.

⁶⁶ *Ibid.* at 23.

⁶⁷ *Ibid.* at 28-29.

⁶⁸ Nisga’a Final Agreement, *supra* note 34 at 185-194.

Such initiatives must be in accordance with provincial standards and must be approved by the Lieutenant Governor in Council. A Nisga'a court may impose penalties and remedies under the laws of the Nisga'a Government, Canada, or British Columbia.⁶⁹ Decisions of the Nisga'a court may be appealed to the Supreme Court of B.C.

The objective set out for the Nisga'a police services is to have the full range of police responsibilities and the authority to enforce Nisga'a and provincial laws, criminal law, and other federal laws within Nisga'a lands.⁷⁰

Example Three: Westbank First Nation

In 2003, Westbank First Nation and Canada (INAC) initialled a Self-Government Agreement.⁷¹ Westbank is a band pursuant to the *Indian Act* and is part of the larger Okanagan Nation. Westbank lands are those set apart by Canada as reserve lands under s. 91(24) of the *Constitution Act, 1867*.⁷²

Governing Structure

The Westbank First Nation acts through an elected governing council. The government of Westbank First Nation is subject to the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*,⁷³ and the *Freedom of Information and Privacy Act*.⁷⁴

Law Making

The Westbank First Nation has the capacity to pass and enforce Westbank law pursuant to its Self-Government Agreement.⁷⁵

- Jurisdiction is defined as law-making authority and does not extend to matters not specifically set out in the Self-Government Agreement.
- Westbank First Nation jurisdiction does not include

⁶⁹ *Ibid.* at 192.

⁷⁰ *Ibid.* at 185.

⁷¹ Westbank First Nation Self-Government Agreement between Her Majesty the Queen in Right of Canada and Westbank First Nation, initialled by negotiators on April 11, 2003, np [Westbank Agreement].

⁷² *Constitution Act, 1867* R.S.C. 1985, Appendix II, No. 5 [*Constitution Act, 1867*].

⁷³ *Canadian Human Rights Act*, R.S. 1985, c. H-6.

⁷⁴ *Freedom of Information and Privacy Act*, R.S.B.C. 1996, c. 165.

⁷⁵ Westbank Agreement, *supra* note 53 at Part III.

- criminal law, including the procedures in criminal matters,
 - protection of health and safety of all Canadians,
 - intellectual property, in respect of all matters within federal jurisdiction, or
 - broadcasting and telecommunications.
- Westbank law is defined as laws of Westbank First Nation enacted in accordance with the jurisdictions set out in the Self-Government Agreement and constitution.⁷⁶
- Westbank First Nation may make laws within the jurisdictions set out in its Self-Government Agreement including those in respect of
 - personal immunity from civil liability for employees, officers, and elected officials,
 - the establishment of administrative boards, tribunals, commissions and other administrative bodies,
 - membership,
 - wills and estates,
 - financial management,
 - lands and land management,
 - land registry,
 - expropriation of land for community purposes,
 - landlord and tenant matters,
 - resource management,
 - agriculture,
 - environment,
 - language and culture,
 - education,
 - health services,
 - licences, regulation, and operation of businesses,
 - traffic and transportation,
 - public works, community infrastructure, and local services,
 - public order, peace, and safety, and
 - prohibition of intoxicants.
- Westbank First Nation has the jurisdiction to enforce Westbank laws and to receive enforcement assistance from the RCMP.
- Westbank First Nation may make laws to provide for the imposition of penalties on persons convicted of violating Westbank law including fines (up to \$10,000), imprisonment (no greater than s. 787(1) of the *Criminal Code of Canada*,⁷⁷ or both.

⁷⁶ *Ibid.* at Part I.

⁷⁷ *Criminal Code*, R.S. 1985, c. C-46.

- The *Judicial Review Procedures Act*⁷⁸ applies to Westbank First Nation, and applications for judicial review may be brought the Supreme Court of B.C.
- Westbank First Nation may not delegate law-making authority.
- Westbank First Nation will set up a registry of laws.
- *Indian Act* bylaw provisions will continue to apply to health, fisheries, and property taxation, and
- *Indian Act* definitions of band, reserve, Indian, and Indian register will continue to apply.

Prosecutions

Westbank First Nation may prosecute offences or enter into an agreement with Canada to arrange for a federal agent or provincial agent to prosecute. Any prosecutions involving Westbank law will be heard in the provincial court and will be prosecuted in accordance with the summary conviction procedures of Part XXVII of the *Criminal Code*.

5.3(4) *Constitution*

A Westbank First Nation constitution will be prepared and will provide for (1) procedures for the passage and amendment of laws for Westbank First Nation, (2) provisions for the public notice of Westbank law, and (3) rules for conflict of interest, land, membership, referendums, elections, financial management, appeals, and constitution amendments.⁷⁹

First Nations Governance Act

What follows is an overview of some of the aspects of the recent attempt to remodel First Nations governance in the proposed *First Nations Governance Act* (the “Act”). We do not propose here to examine the procedural problems with the Act, but will confine our comments to the substance of it.

Band Governance

⁷⁸ *Judicial Review Procedures Act*, R.S.B.C. 1996, c. 241.

⁷⁹ *Ibid.* at Part V.

The Act provided for the development and adoption of leadership selection codes, administration of government codes, and financial management and accountability codes. While the enactment of a code was at the option of individual bands, codes may or may not be created by a band, the legislation was not truly optional since in the event a band did not chose to enact a code, the regulations would impose codes on it. In this respect the Act was not optional.

A proposed code had to be in writing and be adopted in a vote in which

- a minimum of 25% of electors participate , and
- a simple majority of those participating in the vote, voted in favour.

Given the seriousness of the matter it might be that this is insufficient. Also, given the fact that there are time constraints (two years) on the enactment of codes by custom bands—that is, if they do not enact a code within a given time, they cease to be custom bands, the threshold might be too high for them.

Leadership Selection

The provisions dealing with leadership selection treated custom bands and non custom bands somewhat differently. The prescriptive minimum criteria for leadership selection codes applied to non custom bands, but they were essentially the same criteria used by those Bands which develop their own Custom Election Codes, and less prescriptive than the criteria presently governing section 74 elections. It was notable that under the Act only a majority of councillors needed to be elected. Others could be chosen perhaps by traditional means. The Act provided that custom bands had to enact either a code that used the same criteria as non custom bands, or amend an existing custom code to ensure it included appeal and amending procedures. We note that in any case, a custom band had to enact a code, and that the process of writing down custom itself changes a custom code. On the other hand, some custom bands already have a written election code. Of special note was subsection 5 (3), which stated:

(3) A code consisting of custom rules may be adopted only during the period of two years beginning on the coming into force of this section.

After two years, the regulation code would apply to a custom band, so that the Act tended to minimize the distinction between s. 74 Bands and custom Bands.

Subsection 5(5) provides that “A leadership selection code... must respect the rights of all members of the band but may balance their different interests, including the different interests of members residing on and off the reserve.” The subsection followed *Corbiere v. Canada*, [1999] 2 S.C.R. 203 in allowing bands to recognize and treat differently different classes of members, so long as all members’ rights are respected. The final determination as to whether any variant treatment was acceptable would be for the Courts.

Administration of Government

The Act provided minimum criteria to be included in an Administration of Government code. There were to be Rules for rules for meetings of the general membership of the Band, rules for meetings of the Band Council, and rules for passing and registering Band laws. That there should be rules is of course fundamental to the Rule of Law. The scope of the Administration of Government Code included:

- meetings of the Band;
- meetings of council;
- enactment of laws;
- Band administration;
- conflict of interest;
- access to information; and
- amendment of the Code

Because the Codes were to have governed the exercise of Band powers, they had a quasi-constitutional status and would have requires great care in the drafting. Of particular importance were the rules for enacting Band laws. These were to have been legislative powers expanded beyond what is presently in the *Indian Act*. It is important to note that the passing of a Band by-law is the exercise of the legislative function of Band Councils.

Band Councils have both executive and legislative functions, in addition to the administrative functions which they may perform. Primarily, Band Councils operate administratively in part because administrative issues such as allocations to Band Members are the most important politically. This has the unfortunate consequence of reducing the amount of time a Band Council can devote to longer term and policy issues. Expanded legislative powers could have provided Band Councils with the ability to establish a longer term framework and administrative structure to aboriginal governance, binding in law, but we note that in the absence of some degree of separation of powers, so that programs were administered apart from politics by an independent civil service much of the focus of First Nation government would remain enmeshed in administrative decisions rather than policy questions.

The *Indian Act* does not mandate any particular public process for the enactment of bylaws at present, meaning effectively that the distinction between a by-law as a legislative act, and other forms of administrative business is not always clear. And it must be said that the absence of publicity may lead to community alienation from the Band Council, lack of community participation in the decisions on some level, and the feeling of illegitimacy which arises from that. It must be said as well that publicity serves as a safeguard of legitimate government. In *Scott v. Scott*,⁸⁰ Lord Shaw of Dunfermline said this, which is often repeated by the Supreme Court of Canada:

It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real

⁸⁰ [1913] A.C. 419 (H.L.).

freedom, where this condition is not found both in its judicial institutions and in their constant exercise.”⁸¹

The confusion of different types of powers, and the potential lack of open administration, causes issues such as accountability and transparency to emerge. But on the other hand, issues of the size of Aboriginal communities need more attention. For example any conflict of interest code must be adapted to the case where kinship and family are so important. It is important in any governance model to look at how those situations were handled. To take an example the requirement set out in *Inside the Gitksan* for the consent of the father clan seems to us to address conflict of interest very well.

In general then requiring a code for administration of government is positive. However, much could be learned from traditional ways in designing a system that works.

Financial Management Code

Proper financial accountability is perhaps the most fundamental key to the historical development of British parliamentary democracy, and it follows that the raising and spending of public moneys must be the subject of especial scrutiny. There need to be rules addressing the way in which revenue is raised, allocated and accounted for. One of the problems of Band governance is that for the most part financial requirements are set out not in laws where responsibility flows to the community but in funding arrangements where responsibility flows to the provider of funds—typically Canada or the province. So we are of the view that a Financial Management Code is a good thing but in the proposed changes, the fundamental problem of accountability to whom was not sufficiently addressed. We note that the same issue of the use of the so called spending power is central to relations between the provinces and Canada as well. We see the issue as one which can imperil the cornerstone of financial control by the people.

Additionally, the proposed removal of the Minister from the bylaw making processes of Bands raises issues about the fiduciary relationship between Canada and aboriginal peoples since the hallmark of fiduciary relationship is peculiar vulnerability to the

⁸¹ Ibid., at page 44.

unilateral exercise of power by another.⁸² Where the Minister withdraws from processes involving the Band, it may become more difficult to attach a fiduciary responsibility to the government, and we believe that any such change requires extensive consultations with the First Nations. The relationship between self government and fiduciary duty is difficult, but there will always be a special relationship between the Crown and Aboriginal peoples by virtue of the Constitution. Self government ultimately the complete expression of that special relationship, but it is worrisome that in the absence of full self government, Band governments might find themselves without the ability to fix a fiduciary duty on the Crown, despite continuing vulnerability.

We note that the provisions for financial administration in the *First Nations Governance Act* and the provisions in the proposed *First Nations Fiscal and Statistical Management Act* were not always in agreement. This too needed to be addressed.

Complaints and Redress

The proposed Act provided for the hearing of complaints and redress but it failed to modify itself to local circumstances particularly in dealing with the degree of interconnectedness between band members. It is particularly troubling that concerns over conflict of interest could have the ultimate effect of stifling the move toward self government. Aboriginal societies are societies based on kinship and conflict of interest ideas adapted for a large scale industrial society cannot be simply transposed or imposed on them. Very few people in an aboriginal community are not interested in the decisions of the Band government, or related to someone who is. In *Assu v. Chickite*,⁸³ the Court said:

It must be remembered that this is a Band of 204 electors, that many members of the Band are related to each other, and that it would be impossible for Band Councils to operate if courts applied strict rules regarding conflicts of interest.

The proposed Act did not accommodate itself to the life of small interrelated communities in disallowing arbiters who had interests defined very broadly in a decision.

⁸² See *Frame v. Smith*, [1987] 2 S.C.R. 99.

⁸³ [1998] B.C.J. 2775 at para. 53 See also *Sparvier v. Cowesses Indian Band No. 73*, [1994] 1 C.N.L.R. 182 (F.C.T.D.), and *James v. Jules*, [1995] 3 C.N.L.R. 90 (B.C.P.C.).

What room is left for self government without such an accommodation is difficult to see. Conflict of interest rules and their application should draw inspiration from tradition, if this is to be avoided.

Powers of Band Councils

The proposed Act would have given Bands the powers of a natural person exercisable through the Band Council. Whatever else was said, this effectively would have created Band corporations, since the conferring of the powers of a natural person on an entity is incorporation. As well giving bands the capacity to sue and be sued deprives them of something akin to sovereign immunity where perhaps the origin of the lack of capacity to be sued. We suggest that a rather than a corporate model of personality, a governmental model would be better, and this means that looking at the various federal and provincial Acts relating to crown liability, and setting out more carefully the manner in which Bands and Councils can be sued.

The Act also contained many powers of enforcement including fine and imprisonment, for breach of a Band law. It also included the power to conduct searches to ensure compliance with the law, without a warrant if the search was to be conducted outside of living quarters. We think this raised issues under s. 8 of the *Charter*.

The Act also contained powers of delegation of the Council's powers to any person or body. We are concerned that delegation in general and without defining how the power is to be exercised seems to run counter to the decision of the Supreme Court of Canada in *R. v. Adams*.⁸⁴

Band Council members and Band employees were also given protection from law suit in the standard way that people exercising statutory powers "in good faith" are protected. This is lacking and needed in the present *Indian Act* regime.

Federal Government Operations

⁸⁴ [1996] 3 S.C.R. 101 at paras. 53 and 54

The following excerpt⁸⁵ sets out the basic process for the enactment of federal legislation:

Before an Act becomes law, it goes through different stages:

1. A member of parliament (Minister or regular MP) is given permission to introduce the Act in the House of Commons in Ottawa;
2. The Act is read a first time and printed;
3. The Act is read a second time;
4. The Act is referred to Committee;
5. The Report Stage is when the Committee prepares a report for the House;
6. The Act is read a third time and passed by the House;
7. The Act goes through similar stages in the Senate;
8. The Act gets Royal Assent;
9. Regulations to implement the Act are developed.

1.0 Introduction of the Act to the House

To table a draft Act a Minister or regular member of the House of Commons has to give 48 hours written notice and then, by motion, get the approve from the House to table the draft Act.

2.0 First Reading

First reading is the official tabling of the draft Act. This stage usually takes place immediately after step 1.

Again, it is through a motion that First Reading takes place. The motion is automatically adopted.

There is no debate.

The motion includes an order that the draft Act get printed/copied so that it can get distributed.

3.0 Second Reading

This is the most important stage of the process. A debate takes place concerning why the draft Act is needed and what will be accomplished if the draft Act becomes law. The debate is not intended to review the details in the draft Act rather the debate is general. This debate is intended to produce an acceptance or rejection of the draft Act. Therefore, it can proceed further or stop.

In most cases the decision to reject or approve is not made at this time because an amendment to the motion for second reading can be made, and

⁸⁵ "The Legislative Process", R. Jones for BC-AFN, 2002

usually is, which usually sends the draft Act to a Standing Committee to do a detailed clause by clause study of the draft Act.

4.0 Committee Stage

Draft Acts are usually referred to some sort of House of Commons Committee. On draft Acts that are about First Nations peoples and/or First Nations issues the House of Commons Standing Committee on Aboriginal Affairs is the committee that studies these kinds of draft Acts.

The Committee usually starts its work of studying the draft Act by inviting the Minister responsible for the draft Act to make a presentation to them. Other people or organizations may also be invited or given permission to make a presentation as well and they may also propose amendments or oppose the draft Act.

After hearing from witnesses the Committee has to prepare a report which may include amendments.

5.0 Report Stage

The House of Commons gets the Report from the Committee and deals with the proposed amendments, if any are proposed in the report.

A debate takes place on proposed amendments.

After the debate a motion is made (with any amendments) for the members of the House to agree with the report.

6.0 Third Reading

The third reading is intended to be where the draft Act passes in the House.

Amendments can be made, but normally are not.

7.0 Passage by Senate

After a draft Act gets passed by the House it goes to the Senate. Again, the draft Act goes through a similar process in the Senate as it did in the House.

The Senate can pass the draft Act without amendments.

The Senate can propose amendments and request the House to approve the amendments and if the House agrees then the draft Act would be amended accordingly.

The House can reject the amendments and inform the Senate. If the Senate insists on the amendments then a meeting can take place between the representatives of the House of Commons and the Senate to resolve the issue.

8.0 Royal Assent

The last stage of the process is Royal Assent, usually by the Governor General. This stage means that the draft Act is being approved by the Crown or Queen's representative in Canada.

9.0 Regulations

Most laws have sections that state that in addition to the Act providing rules, etc. that regulations can also be made under the Act to cover other details that the Act doesn't. Usually Cabinet is given the authority to prepare and pass regulations which means that it doesn't go through the House of Commons or Senate.

It should be noted that despite the primacy we generally hear ascribed to Parliament's legislative function, it is not its exclusive function, and it is the function in present circumstances over which its hold is weakest.⁸⁶ It is important to note firstly that while Parliament has legislative supremacy in Canada, subject to the Constitution itself, it is not the sole source of legislation. Furthermore because of the predominance of the Prime Minister and Cabinet in Parliament, particularly in a situation of majority government, control over the legislative agenda of Parliament effectively lies with the executive branch. Bagehot⁸⁷ in 1867 identified five principle functions of the House of Commons:

1. to act as the electoral college;
2. to supply the government;
3. to express the mind of the people;
4. to teach the people what they do not know; and
5. to legislate.

⁸⁶ Adam Tomkins *Public Law* (Oxford: Oxford UP, 2003) at pages 94 and 95.

⁸⁷ Walter Bagehot, *The English Constitution*, ed P. Smith (Cambridge: Cambridge UP, 2001) chapters 5 and 6.

He added a further two functions for the Upper Chamber (in the United Kingdom, the House of Lords, in Canada, the Senate):

1. to delay; and
2. to revise.

Tomkins⁸⁸ proposes three main functions:

1. Supply;
2. Representation; and
3. Legislation

It is essential for our purposes that the primary power of Parliament is its control over supply. This allowed the Parliament to diminish the prerogative power of the Crown which Dicey defined as “the residue of discretionary or arbitrary authority, which at any given time, is legally left in the hands of the Crown”.⁸⁹

The power of the Crown was in truth anterior to that of the House of Commons. From the time of the Norman Conquest down to the Revolution of 1688, the Crown possessed in reality many of the attributes of sovereignty. The prerogative is the name for the remaining portion of the Crown’s original authority, and is therefore, as already pointed out, the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers. Every act which the executive government can lawfully do without the authority of the act of Parliament is done in virtue of this prerogative.⁹⁰

It is Parliament’s control over finance which enables it to ensure ministerial responsibility, and provide the scrutiny which is essential to responsible and accountable government.

The Indian Act⁹¹

⁸⁸ Tomkins at pages 95 and 96.

⁸⁹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (9th Ed.) London: MacMillan & Co., 1956 at page 424; approved by Lord Dunedin in *Attorney General v. DeKeyser’s Royal Hotel*, [1920] A.C. 508 at page 526.

⁹⁰ Dicey at page 425.

⁹¹ I am grateful to Mel Bevan for providing some of the insights in this section.

Bearing in mind what we have just said, we propose to turn briefly to the situation of Indian Act governments in Canada. In our opinion while politically Band Councils are responsible to their Bands, financial power lies with the Department of Indian Affairs, and other departments of government with whom First Nations deal. It is financial power which primarily determines the policy direction of bands, and band councils often find themselves limited in scope. They become service delivery mechanisms in the Department of Indian Affairs rather than the government of a people with a right of self government.

This of course has unfortunate repercussions. Elected officials are forced to function as administrators concerned with operations rather than policies. The expectations of the electorate in aboriginal communities drift lower so that particular service delivery issues and particular distributions, rather than policy, become the issues on which elections are won and lost. This in turn inhibits the development of an apolitical administration in First Nations communities.

Any change in the present system must ensure that financial and political accountability flow primarily in the same direction. This we suggest has two aspects:

1. First Nations governments must become financially independent of the Department of Indian Affairs: and
2. Approval of expenditures should be done by the community itself.

As to the first point, it must be stressed that this is not an argument that First Nations must engage in the taxation of their own people. That is one possible alternative, but there are others. In *Delgamuukw v. B.C.*⁹² the Supreme Court of Canada recognized that aboriginal title included the right to use the land for profitable purposes. They said that aboriginal title had an “inescapable economic component.”⁹³ The full implications of this portion of the case are presently unknown and far from being realized, but they should ultimately mean in many cases that First Nations have the resources necessary to govern

⁹² [1997] 3 S.C.R. 1010.

⁹³ *Ibid.*, at para. 166, 169.

themselves. But the ability of First Nations governments to access the profits of the land should be governed by principles of consent such as lie behind Parliamentary control over supply. This is because the profits of the land belong to the Nation, and not to the government.

Having considered some models of governance, we turn now to some central issues of good governance.

Legitimacy and the Rule of Law

There are 2 basic sources of legitimacy for any government. These are tradition, and the good of the people. As to the first, there is perhaps no better statement of this principle than that by Edmund Burke in his *Reflections on the Revolution in France*:

The science of government being, therefore, so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again without having models and patterns of approved utility before his eyes.⁹⁴

The idea here is that no person in the space of a lifetime can attain the wisdom to design a good society, and the only sure guide to government is therefore past practice. This we suggest is the idea which underscores the search for Best Practices. This is also, not coincidentally, the spirit which animates customary law:

For the Common Law of England is nothing else but the Common Custome of the Realm: and a Custome which hath obtained the force of a Law is always said to be Jus non scriptum; for it cannot be made or created either by Charter, or by Parliament, which are Acts reduced to writing, and are alwaies matter of Record; but being onely matter of fact, and consisting in use and practice, it can be recorded and registered nowhere but in the memory of the people.

For a Custome taketh beginning and groweth to perfection in this matter: When a reasonable act once done is found to be good and beneficiall to the people, and agreeable to their nature and disposition, then do they use it and practise it again

⁹⁴ Edmund Burke, *Reflections on the Revolution in France*, ed. L.G. Mitchell (Oxford: Oxford UP, 1993) at page 61.

and again, and so by often interation and multiplication of the act it becometh a Custome; and being continued without interruption time out of mind, it obtaineth the force of a Law.

And this Customary Law is the most perfect and most excellent, and without comparison the best, to make and preserve a Commonwealth. For the written Laws which are made either by the Edicts of Princes, or by Councils of Estates, are imposed upon the Subject before any Triall or Probation made, whether the same be fit and agreeable to the nature and disposition of the people, or whether they will breed any inconvenience or no. But a Custome doth never become a Law to bind the people, until it hath been tried and approved time out of mind, during all which time there did thereby arise no inconvenience: for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it had lost the virtue and force of a Law.⁹⁵

It is striking to note the similarity between this statement and the idea of law expressed in *The Men of Medeek*:

Laws they had; but these were few; laws framed by Wise Men who watched the face of nature; who pondered long on the workings of Gyamk, the Sun God who lived in the Sky City of Lahah; laws that were made as they watched cause and effect work out their ends in the lives of men.

Some happening came to the people. The result was good and fortunate. "This is right," said the Wise Men. "This shall be embodied in a new law so that good fortune may be still more assured to our People." And when misfortune came these Wise Men delved deeply to find its cause.

At last, satisfied they had learned that which they had sought for, they said, "The action that lies at the root of this difficulty is wrong. Our People must be protected in the future that the same error may not be committed again. We make a new law forbidding that action."

So grew the Code. So were the children instructed in the ways of Right and Wrong. So generation followed generation, each one more vigorous; more prosperous.

By way of comparison, the law making processes described in *The Men of Medeek* are more clearly legislative in character than that envisaged by the customary law making processes in England. In *The Men of Medeek*, the Wise Men make laws by:

⁹⁵ Sir John Davies, "Preface Dedicatory" *Les Reports des Cases & Matters en Ley* (London: 1674) iii-iv; quoted in part by Lambert J.A. in *Delgamuukw v. B.C.*, [1993] 5 W.W.R. 97 at para 693.

1. observing the happenings in the community;
2. determining if the happening causes good or bad to the people;
3. making laws to promote those things that cause good; and
4. making laws to forbid those things which cause misfortune.

This illustrates that traditionally the aboriginal people in the northwest had a clear understanding of the idea of law making. It is important to note that this law making was plenary, not restricted to heads of power such as federal and provincial governments are in Canada. In fact the idea that federal systems necessarily involve heads of power is not the only possible model, and even those systems which do divide power develop doctrines to settle cases where there is overlap—paramountcy being a good example. There is nothing inevitable in the treatment of aboriginal governance as a matter of identifying areas of jurisdiction where aboriginal people are more or less empowered. I will return to this issue when the topic of subsidiarity is discussed below.

When one evaluates the situation of aboriginal governments in Canada in terms of tradition, one must say that the traditional forms of government are in a state of decay, both because the way in which traditions were transmitted from generation to generation have been damaged, and because the mechanisms by which traditional government enforced its order have been undercut by the availability of western institutions and alternate and more powerful governments. But it must also be said that the present government has no traditional hold on the people.

The second legitimating factor of a government is the promotion of some good. As Aristotle put it:

EVERY STATE is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good.

the form of government is best in which every man, whoever he is, can act best and live happily.⁹⁶

Of course this leads to further consideration of what constitutes the good and what makes people happy—liberty, security, prosperity, spirituality and so on. People may differ as

⁹⁶ Aristotle, *The Politics*, Book I, ch. 1 and Book 7, ch 2.

to what is good, and it is clear that over time at least two different conceptions of the good have attempted to legitimate the dominant relationship assumed by the European settlers over indigenous populations: spreading religious truth to them, and civilizing them. Negatively, it was thought that pagans had no rights,⁹⁷ that there could be no ownership of land without its agricultural use,⁹⁸ or that aboriginal societies “are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society.”⁹⁹ However, time has also served to undercut the force of these justifications. Particularly after the horrors of the wars of the last century, the claims of Europeans to carry the “white man’s burden” could no longer justify their rule over non Europeans. Superior power was all that could justify it, and in parts of the world where the European population was never substantial, decolonization began. In parts of the world such as Canada where European dominance was reflected in demography, decolonization could not mean the same as it meant in Africa and Asia. But it left a grave problem because the rule of Europeans over indigenous populations was revealed as fundamentally illegitimate. This was reflected in the inequality of aboriginal people both politically and economically, illustrated by their comparative poverty, their inequality with Europeans before the law, the non recognition of their property rights and destruction of traditional social and political structures, and their being subject to a regime under the Department of Indian Affairs and its predecessors, characterized not by the rule of law, but by “the uncertain and crooked cord of discretion” in Lord Coke’s memorable words.¹⁰⁰

Section 35 of the Constitution Act, 1982, attempts, by recognizing and affirming aboriginal rights, to address the problem of illegitimacy. Lamer C.J. in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 31 spoke of this in terms of reconciliation:

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled

⁹⁷ *Calvin's Case* (1608), 7 Co. Rep. 1a at 17a and 17b per Lord Coke

⁹⁸ Vattel, *The Law of Nations*, Book I, ch. 7; Referred to in *Johnson and Graham's Lessee v. M'Intosh*, 8 Wheaton 543 at page 588 (1823) per Chief Justice Marshall

⁹⁹ *In re Southern Rhodesia*, [1919] A.C. 211 at pages 233 and 234 per Lord Sumner

¹⁰⁰ 4 *Inst.* 41.

with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

R. v. Sparrow, [1990] 1 S.C.R. 1075 at page 1077 in an important passage drew the link between this reconciliation and legitimacy:

Section 35(1) does not explicitly authorize the courts to assess the legitimacy of any government legislation that restricts aboriginal rights. The words "recognition and affirmation", however, incorporate the government's responsibility to act in a fiduciary capacity with respect to aboriginal peoples and so import some restraint on the exercise of sovereign power. Federal legislative powers continue, including the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867, but must be read together with s. 35(1). Federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.

So in my view one of the fundamental purposes of section 35 is to safeguard the legitimacy of the sovereignty of the Crown, which has no persuasive philosophical basis but was historically based in power. And it is important to note that whatever regime of governance arises, it must be "an empire of laws and not of men":

government (to define it *de jure*, or according to ancient prudence) is an art whereby a civil society of men is instituted and preserved upon the foundation of common right or interest; or, to follow Aristotle and Livy, it is the empire of laws, and not of men.

And government (to define it *de facto*, or according to modern prudence) is an art whereby some man, or some few men, subject a city or a nation, and rule it according to his or their private interest; which, because the laws in such cases are made according to the interest of a man, or of some few families, may be said to be the empire of men, and not of laws.¹⁰¹

Now this empire of law, or the rule of law, has a few basic meaning and content. A.V. Dicey defined it as follows:

[The "rule of law"] means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and

¹⁰¹ James Harrington, *The Commonwealth of Oceana and a System of Politics*, ed. J.G.A. Pocock (Cambridge: Cambridge UP, 1992) at page 8.

excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of the law, but he can be punished for nothing else.

It means again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the “rule of law” in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals. . .

The “rule of law”, lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown, and its servants; thus the constitution is the result of the ordinary law of the land.¹⁰²

Professor Lon L. Fuller in his classic work *The Morality of Law* provided eight ways in which a legal regime may fail:

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.

A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all.¹⁰³

Fuller’s last point is significant. If a government does not adhere to certain fundamental behaviors, it is not ruling by law, but by discretion. It is also important and evident that the traditional ways of the people of the Northwest were predicated on rules and customs

¹⁰² A.V. Dicey, *The Law of the Constitution*, 10th ed., (London: Macmillan, 1959) at pages 202-203

¹⁰³ Lon L. Fuller, *The Morality of Law* (Revised Ed.) The Storrs Lectures (New Haven: Yale UP, 1969) at page 39.

not dependent upon the idiosyncratic behaviours of the chiefs. There were expected behaviours reinforced by division of responsibility, and consequent negotiation between parties. Fuller's statement that "failure... results in something that is not properly called a legal system at all" is reminiscent of the Aristotelian definition of natural justice:

Of political justice part is natural, part legal, natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent...¹⁰⁴

The distinction he makes can be put as follows. Justice consists of two elements which are natural and legal justice. Natural justice consists of those elements of justice which are universal. Legal justice consists of those elements which are dependent upon particular cultural adaptations. The difficulty is that:

Every man calls barbarous anything he is not accustomed to; it is indeed the case that we have no other criterion of truth or right-reason than the example and form of the opinions and customs of our own country.

* * *

It does not sadden me that we should note the horrible barbarity in a practice such as theirs: what does sadden me is that, while judging correctly of their wrong-doings we should be so blind to our own. I think there is more barbarity in eating a man alive than in eating him dead; more barbarity in lacerating by rack and torture a body still able to feel things, in roasting him little by little and having him bruised and bitten by pigs and dogs (as we have not only read about but seen in recent memory, not among enemies in antiquity, but among our fellow-citizens and neighbours—and what is worse, in the name of duty and religion) than in roasting him and eating him after he is dead.¹⁰⁵

It is remarkable that in evaluating the custom of cannibalism among certain peoples of Brazil, Montaigne was able with unblemished vision to see the barbarity of his own people, and not simply to condemn.

¹⁰⁴ Aristotle, *Nicomachean Ethics*, Book V, ch. 7.

¹⁰⁵ Michel de Montaigne, "On the Cannibals" Book I, 31, *The Complete Essays*, trans. and ed M.A. Screech (Harmondsworth: Penguin Books, 1991) at pages 231; 235 and 236.

The evaluation of aboriginal culture and laws by the courts has often suffered from this difficulty, but it is well to remember that courts of the highest authority have recognized that:

There is peril in assuming that only our rules are rational and justifiable.¹⁰⁶

It should be remembered that natural justice and procedural fairness are also a shifting standard depending upon context and the type of decision involved (*Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311). So In my view, just as the courts have recognized that the requirements of the fiduciary relationship between a band council and a band must be adapted to the particulars of a small and closely related community, so too the rules of natural justice and procedural fairness may vary.

Jerry Mashaw in his work *Bureaucratic Justice* gives three models of decision making which are procedurally fair depending upon the type of decision being made:

1. Bureaucratic Rationality, which is legitimated by accuracy and efficiency. Its goal is program delivery. Its structure is hierarchical. Its cognitive technique is information processing.
2. Professional treatment, which is legitimated by service. Its goal is client satisfaction. Its structure is interpersonal. Its cognitive technique is the clinical application of knowledge.
3. Moral Judgment which is legitimated by fairness. Its goal is conflict resolution. Its structure is independent. Its cognitive technique is contextual interpretation.¹⁰⁷

Each of these models is best and procedurally fair depending on the nature of the decision being made. And of course the categorization of governmental functions as legislative, executive and judicial is based on the same general idea, that certain types of structures are institutionally competent to handle certain types of decisions.

The Separation of Powers

¹⁰⁶ *Indyka v. Indyka*, [1969] 1 A.C. 33 at 76 per Lord Morris of Borth-y-Gest

¹⁰⁷ Jerry L. Mashaw, *Bureaucratic Justice* (New Haven: Yale UP, 1983) pages 21ff.

In its original form the separation of powers was born in the idea that a mixed form of constitution was best. Originally this meant that no class of people should be able to tyrannize the other classes—neither the monarch, nor the aristocracy, nor the common folk.

A moderate and balanced form of government, which is a combination of the three good simple forms is preferable even to the kingship. For there should be a supreme and royal element in the State, some power also ought to be granted to the leading citizens, and certain matters ought also to be left to the judgment and desires of the masses. Such a constitution, in the first place, offers in a high degree a sort of equality which is a thing free men can hardly do without for any considerable length of time, and secondly, it has stability. For the primary forms already mentioned degenerate easily into the corresponding perverted forms, the king replaced by a despot, the aristocracy by an oligarchical faction, and the people by a mob and anarchy; but whereas these forms are frequently changed into new ones, this does not usually happen in the case of a mixed and evenly balanced constitution, except through great faults in the governing class. For there is no reason to change when every citizen is firmly established in his own station, and there underlies it no perverted form into which it can plunge and sink.¹⁰⁸

Parliament in its original conception was an embodiment of this balanced form of constitution, being the King, Lords and Commons assembled, a neo-Roman embodiment of liberty in that “no laws could be imposed upon them without a consent first had in the people’s assemblies... the only way to prevent arbitrariness is, that no laws or dominations whatsoever should be made, but by the people’s consent.”¹⁰⁹ The ideal of the consent of different assemblies was in effect a separation of power based upon class:

Such orders may be established as may, nay must, give the upper hand in all cases unto common right or interest, notwithstanding the nearness of that which sticks unto every man in private and this in a way of equal certainty and facility, is known even unto girls, being no other than those that are in common practice with them in divers cases. For example, two of them have a cake yet undivided. That each of them therefore may have what is due, “Divide”, says one unto the other, “and I will choose; or let me divide and you shall choose.” If this be but once agreed upon, it is enough: for the dividend dividing unequally loses, in regard that

¹⁰⁸ Cicero, *De Re Publica*, Book I, XLV. 69.

¹⁰⁹ Quentin Skinner, *Liberty before Liberalism* (Cambridge: Cambridge UP, 1998) at page 27 note 85. The words are those of Marchamont Nedham.

the other takes the better half; wherefore she divides equally, and so both have right.¹¹⁰

We might add that the founding fathers of the United States advocated not only a separation of powers as commonly understood, but also a neo-Roman separation. The senate of the United States was until the enactment of Amendment XVII in 1912-1913, appointed by the various states, not directly elected by the people, and the President is still chosen through the Electoral College, not directly elected. *The Federalist*¹¹¹ expresses a concern that the democratic element in society should be restrained in the name of liberty, in a very Roman way.

As to the separation of powers in its present sense, the ethic is deeply rooted in political theory from Aristotle to Locke to Montesquieu, in the common law from at least Lord Coke's time, and has been incorporated into the constitutions of both the United States and Australia. But its position in the Canadian constitution is more tenuous, owing to the supremacy of parliament discussed above.

Locke's "An Essay Concerning the True Original, Extent and End of Civil Government"¹¹² despite his proximity to the Glorious Revolution, did not accept untrammelled legislative supremacy. I set out, by way of illustration, portions of §§. 135 to 137 of that work:

For nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another. A man, as has been proved, cannot subject himself to the arbitrary power of another; and having, in the state of Nature, no arbitrary power over the life, liberty, or possession of another, but only so much as the law of Nature gave him for the preservation of himself and the rest of mankind, this is all he doth, or can give up to the commonwealth, and by it to the legislative power, so that the legislative can have no more than this. Their power in the utmost bounds of it is limited to the public good of the society

¹¹⁰ James Harrington, *The Commonwealth of Oceana and a System of Politics*, ed. J.G.A. Pocock (Cambridge: Cambridge UP, 1992) at page 22, and see Skinner at page 28.

¹¹¹ Hamilton, Madison and Jay, *The Federalist*, ed. Terence Ball (Cambridge, Cambridge UP, 2003) at, for example, pages 40 to 46.

¹¹² John Locke, *Two Treatise's of Government*, ed Peter Laslett (Cambridge: Cambridge Texts in the History of Political Thought, Cambridge UP, 1988).

* * *

the legislative or supreme authority cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorised judges.

* * *

For all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws, that both the people may know their duty, and be safe and secure within the limits of the law, and the rulers, too, kept within their due bounds, and not be tempted by the power they have in their hands to employ it to purposes, and by such measures as they would not have known, and own not willingly.

Montesquieu thought, wrongly in retrospect, that the separation of powers was the key reason why more liberty was then enjoyed by the English than in other parts of Europe.

In every state there are three sorts of power: legislative power; executive power over the things dependent on the right of nations; and executive power over the things dependent on civil right.

By the first, the prince or magistrate makes laws for a time and for always and corrects or abrogates those that have been made. By the second, he makes peace or war, sends or receives embassies, establishes security, and prevents invasions. By the third, he punishes crimes or judges disputes between individuals. The last will be called the power of judging and the former simply the executive power of the state.

Political liberty in a citizen is that tranquillity of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty, the government must be such that one citizen cannot fear another citizen.

When the legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty; because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.

Nor is there liberty, if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary; for the judge would be the

legislator. If it were joined to executive power, the judge could have the force of an oppressor.¹¹³

The idea is that the separation of powers is a structural form which is best suited to preventing the fusion of the powers of legislation, execution and judging in a manner both arbitrary and oppressive to the people at whom they are aimed.

The idea of the separation of powers is summarized by William Paley in *The Principles of Moral and Political Philosophy* (1785) (London, 1824) beginning at 348 as follows:

The first maxim of a free state is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and the judicial character be kept separate. When these offices are unified in the same person or assembly, particular laws are made for particular cases, springing often times from partial motives, and directed to private ends: whilst they are kept separate, general laws are made by one body of men, without foreseeing whom they may affect; and, when made, must be applied by the other, let them affect whom they will.... When the parties and interests to be affected by the laws were known, the inclination of the law makers would inevitably attach to one side or the other; and where there were neither any fixed rules to regulate their determinations, nor any superior power to control their proceedings, these inclinations would interfere with the integrity of public justice. The consequence of which must be, that the subjects of such a constitution would live either without constant laws, that is, without any known pre-established rules of adjudication whatever; or under laws made for particular persons, and partaking of the contradictions and iniquity of the motives to which they owed their origin.

Which dangers, by the division of the legislative and judicial functions, are in this country effectually provided against. Parliament knows not the individuals upon whom its acts will operate; it has no case or parties before it; no private designs to serve: consequently, its resolutions will be suggested by the considerations of universal effects and tendencies, which always produce impartial, and commonly advantageous regulations.¹¹⁴

Most of the common law cases are directed at maintaining the independence of the judiciary and limiting the power of the executive. This must be understood in terms of the political struggle to control the Crown both by the legislature and the judiciary. So, in *Prohibitions Del Roy* (1608) 12 Rep. 63, 65 he denied, at some peril to his life, that

¹¹³ Montesquieu, *The Spirit of the Laws*, eds. Cohler, Miller and Stone (Cambridge: Cambridge Texts in the History of Political Thought, Cambridge UP, 1989)

¹¹⁴ I have quoted from F.A. Hayek, *The Constitution of Liberty* (London: Routledge and Kegan Paul, 1960) 173 and 174.

the King, though the font of justice, could hear and determine cases, and in the *Case of Proclamations* (1610) 12 Co. Rep. 74 he denied the King the power to legislate by proclamation without the assent of Parliament. Unhindered by any principle like what was later enacted by the Act of Settlement, 1701, the King first moved Lord Coke to another court and then removed him altogether.

After the Glorious Revolution the *Act of Settlement* (1701) gave judges the independence which Coke lacked, effectively separating the executive and judicial function, which is a principle incorporated into the Canadian Constitution by virtue of s. 96 and the Preamble to the *Constitution Act, 1867* (*Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)* [1997] 3 S.C.R. 3).

Blackstone too, motivated by the dictum that “The true liberty of the subject consists not so much in the gracious behaviour as in the limited power of the sovereign.” (Blackstone *Commentaries*, Book IV, page 133), argued that the balance of the English Constitution required a separation of powers:

It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislature. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them for the present, would in the end produce the same effects, by causing that union, against which it seems to provide. The legislature would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power. Thus the long parliament of Charles the first, while it acted in a constitutional manner, with the royal concurrence, redressed many heavy grievances and established many salutary laws. But when the two houses assumed the power of legislation, in exclusion of the royal authority, they soon after assumed likewise the reins of administration; and, in consequence of these united powers, overturned both church and state, and established a worse oppression than any they pretended to remedy. To hinder therefore any such encroachments, the king is himself a part of the parliament: and, as this is the reason of his being so, very properly therefore the share of legislation, which the constitution has placed in the crown, consists in the power of *rejecting*, rather than *resolving*; this being sufficient to answer the end proposed. For we may apply to the royal negative, in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of *doing* wrong, but merely of *preventing* wrong from being done. The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two

houses. The legislative therefore cannot abridge the executive power of any rights which it now has by law, without it's own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it. And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked, and kept within due bounds by the two houses through the privilege they have of enquiring into, impeaching, and punishing the conduct (not indeed of the king, which would destroy his constitutional independence; but, which is more beneficial to the public) of his evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest; for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by themselves, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community. (*Commentaries*, I, 149-51)

* * *

In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removeable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over ballance for the legislative. For which reason, by the statute of 16 Car. I. c. 10. which abolished the court of star chamber. effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state. And indeed, that the absolute power, claimed and exercised in a neighbouring nation, is more tolerable than that of the eastern empires, is in great measure owing to their having vested the judicial power in their parliaments, a body separate and distinct from both the legislative and executive: and, if ever that nation recovers

it's former liberty, it will owe it to the efforts of those assemblies. In Turkey, where every thing is centered in the sultan or his ministers, despotic power is in it's meridian, and wears a more dreadful aspect. (*Commentaries*, I, 259-60)

But again the doctrine of the supremacy of Parliament undercut the separation of powers. No such principle was ever entrenched in the English Constitution, and its efficacy depended upon two factors:

- a) a shared value system among all members of Parliament that to do certain things would simply be wrong; and
- b) a parliament structured with checks and balances, composed of the King, Lords and Commons, which effectively prevented conspicuous departure from those norms.

One point which needs to be stressed is that the separation of powers in practice need not be in our view accomplished entirely along the lines proposed in the works of political theorists. For example, it has been pointed out that the English model of government divides sovereignty in between the Crown and Parliament, and the main separation occurs not by means of a constitutional separation of powers in the abstract, but by the necessity of parliamentary consent to the raising of revenue since *Magna Carta*.¹¹⁵ It is through the control of revenue that Parliament was able gradually to assert control over the prerogative powers of the Crown, by legislative enactment. This was not accomplished without civil war. It is because of the Parliament's control over finance that it could compel the Crown to agree to the enactment of legislation, could enforce ministerial responsibility to Parliament, and could ensure the independence of judges. Separation of revenue raising powers from the hands of the government is thus the critical element in ensuring responsible accountable government.

Subsidiarity

Subsidiarity is a principle used to govern the distribution of powers in the federal system implemented in the European Union, which we suggest could be used to gauge the distribution of powers between federal (provincial) and aboriginal governments in

¹¹⁵ See generally Adam Tomkins, *Public Law* (Oxford: Oxford UP, 2003).

Canada. It has roots going back to Protestant thinkers such as Althusius, and Catholic dogma as enunciated particularly by Pope Pius XI, whose statement of the principle is widely adopted:

It is indeed true, as history clearly proves, that owing to the change in social conditions, much that was formerly done by small bodies can nowadays be accomplished only by large corporations. None the less, just as it is wrong to withdraw from the individual and commit to the community at large what private enterprise and industry can accomplish, so, too, it is an injustice, a grave evil and a disturbance of right order for a larger and higher organisation to arrogate to itself functions which can be performed efficiently by smaller and lower bodies... Of its very nature the true aim of all social activity should be to help [subsidium affere] members of a social body, and never to destroy or absorb them.¹¹⁶ (emphasis added)

It is important to note that central to this principle is the idea that a higher power should be used in aid of, but not to dominate, a lower.¹¹⁷

This Principle of course supports the notion that aboriginal nations should be left to control their own governments and make their own policy choices unless an issue arises which necessitates the intervention of the federal government. It is we suggest a principle which illuminates many of the concepts which have found their way into the case law of section 35 of the Constitution Act. For instance, it sheds light on the concept of preferred means, can be used to understand the requirement of a valid legislative objective under s. 35 in order to justify infringements of aboriginal rights, and embraces the ideas of minimal impairment and of deference to the aboriginal perspective in the doctrine of section 35. We suggest that as a matter of policy, the principle of subsidiarity should be used to guide the exercise of the authority of the federal government. It is important to note that subsidiarity includes the principle that where possible, policy choices should be made by those proximate to them. First Nations will be in many cases the proper people to decide what policies are best for them.

A good example of how the principle of subsidiarity might work in aboriginal communities can be drawn from the example of child welfare.¹¹⁸ In traditional aboriginal

¹¹⁶ Pius XI, *Quadragesimo Anno*, 15 May 1931, para. 79

¹¹⁷ See John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford UP, 1980) at page 159.

communities, the operation of the clan system meant that an orphaned child was never without care. The place of his parents could be immediately filled by the appropriate member of his or her clan, as determined by clan rules, with a minimum of distress to the child. In present circumstances, where a child is orphaned, for example, the child is all too likely to be taken into foster care by government officials, despite the fact that customary adoption has been recognized by the Courts.¹¹⁹ A variety of factors including economic difficulties, might make it difficult for the clan system to work in present circumstances, and so a most drastic governmental interference occurs. And ironically, the government gives financial aid to foster parents who are strangers to the child. Subsidiarity suggests instead that the proper course would be for the government to enable the clan system to function properly.

Best Practices

Best Practices have been defined as “good practices that have worked well elsewhere. They are proven and have produced successful results.”¹²⁰ In our opinion in the circumstances of aboriginal governments in Canada, no model of governance has been around long enough to meet the Best Practices Standard, either because the time elapsed since the establishment of the model has not been sufficient for it to have been proven, or because the model has not been implemented at all. Furthermore, given the fact that there are many distinctive aboriginal cultures in Canada, each with their own traditions, and given the fact that a successful model of governance will derive its legitimacy in part from its incorporation of traditional values, we are hesitant to approach the problem of aboriginal governance in “a one size fits all” manner. Nevertheless it is appropriate to enumerate some of the guiding principles and propose a model of governance which might prove useful.

Some Principles

The Harvard Project on American Indian Economic Development suggested that economic success is predicated on three factors:

¹¹⁸ We are grateful to Elmer Derrick for this example.

¹¹⁹ *Casimel v. Insurance Corporation of British Columbia*, [1994] 2 C.N.L.R. 22

¹²⁰ Refer to definition by Best Practices Ad Hoc Committee in the GSA office of Government wide Policy.

1. **Practical Sovereignty:** The nation has taken effective control of its affairs, resources, institutions, developmental strategies, and other decision-making.
2. **Capable Governing Institutions:** The nation supports its jurisdictional power with governing institutions that exercise its powers effectively. Such effective capability is typically demonstrated by a court system that is politically independent and separate from politics and business management.
3. **Cultural Match:** The formal institutions of government must fit the indigenous conceptions of how authority should be organized and exercised.¹²¹

Two other important factors for the economic success of Aboriginal nations are (1) strategic orientation as demonstrated by long term planning, and (2) creative leadership that can move beyond the status quo.¹²²

The Institute on Governance issued a recent paper¹²³ which suggested five principles of good governance distilled from the United Nations Development Program document “Governance and Sustainable Human Development” (1997):

<i>Box 1: Principles of Good Governance</i>	
IOG Principles	<i>UNDP Principles</i>
Legitimacy and Voice	<p>Participation – all men and women should have a voice in decision-making, either directly or through legitimate intermediate institutions that represent their intention. Such broad participation is built on freedom of association and speech, as well as capacities to participate constructively.</p> <p>Consensus orientation – good governance mediates differing interests to reach a broad consensus on what is in the best interest of the group and, where possible, on policies and procedures.</p>

¹²¹ Stephen Cornell, Miriam Jorgensen, & Joseph Kalt, “The First Nations Governance Act: Implications of Research Findings from the United States and Canada” (October 2002) paper prepared for the Assembly of First Nations, Office of the BC Regional Vice-Chief [unpublished, archived at the Office of the BC Regional Vice Chief-Assembly of First Nations] at 4-5 [Cornell].

¹²² *Ibid.* at 5.

¹²³ John Graham and Jake Wilson “Aboriginal Governance in the Decade Ahead: Towards a New Agenda for Change” Revised March, 2004 (Institute on Governance)

Direction	Strategic vision – leaders and the public have a broad and long-term perspective on good governance and human development, along with a sense of what is needed for such development. There is also an understanding of the historical, cultural and social complexities in which that perspective is grounded.
Performance	Responsiveness – institutions and processes try to serve all stakeholders. Effectiveness and efficiency – processes and institutions produce results that meet needs while making the best use of resources.
Accountability	Accountability – decision-makers in government, the private sector and civil society organizations are accountable to the public, as well as to institutional stakeholders. This accountability differs depending on the organizations and whether the decision is internal or external. Transparency – transparency is built on the free flow of information. Processes, institutions and information are directly accessible to those concerned with them, and enough information is provided to understand and monitor them.
Fairness	Equity – all men and women have opportunities to improve or maintain their well-being. Rule of Law – legal frameworks should be fair and enforced impartially, particularly the laws on human rights.

Fuller set out eight criteria respecting the rule of law:

1. a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis;
2. a failure to publicize, or at least make available to the affected party, the rules he is expected to observe;
3. the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under threat of retrospective change;
4. a failure to make rules understandable;
5. the enactment of contradictory rules or
6. rules that require conduct beyond the powers of the affected party;
7. introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally,
8. a failure of congruence between the rules as announced and their actual administration.

The separation of powers need not be done in terms of the theories of Montesquieu, but fairness requires an independent judicial process judged against the criteria set out in *Canadian Pacific Ltd. v. Matsqui Indian Band*¹²⁴: security of tenure, security of remuneration and administrative control. Separation must also, we suggest, extend to the development of an independent administration to deal with operational matters, and leave questions of policy to the governors. And separation must also extend to matters of finance, so that budgets and expenditures must receive the informed consent of the members of the community.

A Model of Governance¹²⁵

In order to enact a law in first nations we suggest the following processes could be followed which are similar to the present parliamentary processes yet different to accommodate First Nations. We want to caution, however, that the traditions of each First Nation need to be looked at separately.

Any member of the community can propose a bill, in a proper form as proscribed by the community. It would be accompanied by a certain number of signatures. The proposal would be checked for legality and put to a preliminary vote by the elected government.

If the bill receives preliminary approval, it would enter a stage of public hearings where any person would be allowed to voice opinions and concerns concerning it. Submissions could be made in writing, or orally or a combination of the two. Before any representation is made, the speaker would have to give an estimate of the time the representation would take, and be held strictly to it. A clerk would note any proposals and they would have to be voted on at the conclusion of the hearing

If the vote is affirmative, it would then be put in the hands of technicians for consideration. They would make a report and recommendations which it would be mandatory for the elected representatives to consider and deal with. A final vote would then be held before the bill would become a law, on the signature of the Chief.

¹²⁴ [1995] 1 S.C.R. 3 at page 48.

¹²⁵ I acknowledge the guidance of Mel Bevan with respect to this model.

The composition of the Council should reflect the particular situation of the nation or community it represents, considering demographics, family and clan, elder status, and so forth. We would reiterate the rule of the two girls dividing the cake at this point.

Recommendations

1. Develop model Legislation concerning a Law Making Process and a Public Service Act;
2. Hold a governance conference in Terrace concerning First Nations and Provincial Relations;
3. Develop links with Governance Institutes, Federal Processes, and others in recognition that in the current time governance is a global and not simply a First Nations Issue;
4. Develop a model Law governing law making procedures.
5. Research into the traditional laws of the Nations of the NWTT, both with respect to the manner in which laws were made, and the substance of those laws.