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# INDIGENOUS SELF-GOVERNMENT AND THE FUTURE OF ADMINISTRATIVE LAW

LORNE SOSSIN<sup>†</sup>

## I. WHAT IS ABORIGINAL ADMINISTRATIVE LAW?

A great deal of advocacy, adjudication, and analysis has focused on the Aboriginal *right* to self-government under the Canadian Constitution.<sup>1</sup> Very little attention, by contrast, has been devoted to what happens the day *after* self-government is achieved, when the focus shifts to implementing rather than achieving self-government. For example, will the institutions and mechanisms of executive government in an environment of Aboriginal self-government look similar to executive governments in other Canadian settings (municipal, provincial, and federal)? Will Aboriginal communities be governed by an executive divided into an elected and politically accountable leadership, and an independent and expert career public service?

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<sup>†</sup> Professor and Dean, Osgoode Hall Law School, York University. I am grateful to John Borrows, Douglas Sanderson, Darlene Johnson, and Janna Promislow for several discussions over the past few years which have enriched and stimulated my thought on these questions. I have benefited from the insights of Jim Aldridge and Angela D'Elia who have served as counsel to the Nisga'a Lisims Government. I am also indebted to the work of Sari Graben. The research assistance of University of Toronto students AJ Winterburn and Karena Williams, and Osgoode Hall Law School students Kathrin Furniss and Lauren Rakowski, has been invaluable. The anonymous reviewers of this article provided constructive and helpful suggestions. Finally, I am grateful to the Social Sciences and Humanities Research Council, the Faculty of Law at the University of Toronto and the Osgoode Hall Law School at York University, for their generous financial support of this project.

<sup>1</sup> Although in many contexts, the international language of "indigenous peoples" may be preferable to "Aboriginal", I will refer to indigenous peoples as Aboriginal peoples, following the language of section 35 of the *Constitution Act, 1982*, intended to include First Nations, Inuit, and Métis peoples by this term.

Alternately, will these communities be governed by some variation on this liberal democratic theme, or by an entirely new political and legal system (or by a revival of a customary political and legal system)? Will those people who are adversely affected by administrative and regulatory decisions by Aboriginal governments have the same recourses to the same kinds of bodies as in the rest of the country (that is, will Aboriginal agencies, boards, and commissions emerge as a parallel structure to the federal and provincial agencies, boards, and commissions)?

To these questions, I offer an administrative law perspective. I leave it to scholars of Aboriginal law to provide an Aboriginal law perspective on these shared questions.<sup>2</sup> In my study, I embrace John Borrows' claim that Aboriginal law, along with the common law and civil law, are the founding legal traditions of Canada.<sup>3</sup> Each has an autonomous existence in Canada, but it is fair to say that what makes Canada a distinct, if not unique project, is the meaningful relationships between spheres of law. For example, the founding of Canada required interaction between principles of statutory and constitutional interpretation (and the adoption of the "living tree" approach to Canadian federalism). The introduction of the *Charter of Rights and Freedoms*<sup>4</sup> similarly led to intermingling between common law and fundamental rights (for example, the grafting of common law procedural fairness as the "principles of fundamental justice" under section 7 of the *Charter*). Aboriginal law and custom have been incorporated to some extent into the rights recognized through section 35 of the Constitution. Borrows is most concerned in his study with constitutional traditions. In this article, I

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<sup>2</sup> For an example of a governance approach from an Aboriginal point of view, see John Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28:1 UBC L Rev 1. For a broader discussion of the intersection of Aboriginal and administrative law, see J Promislow & L Sossin, "In Search of Aboriginal Administrative Law" in C Flood & L Sossin, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery, 2012) [forthcoming].

<sup>3</sup> John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 113–18.

<sup>4</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

explore the development of an autonomous Aboriginal administrative law and its relationship to Canadian administrative law, rooted in common law rights to fair and reasonable decision making on the part of executive officials.

The term “Aboriginal administrative law” is meant to capture the mutually reinforcing aspects of Aboriginal and administrative legal principles. In the context of this discussion, it is presented as a distinctive branch of administrative law that is capable of responding to and incorporating concepts of fairness, independence, and accountability from Aboriginal governance contexts and institutions. Aboriginal administrative law is discussed as a pan-Aboriginal concept, encompassing sufficient flexibility to respond to differences in Aboriginal governance traditions and institutions. As well, reference to the achievement of self-government might involve “recognition” of self-government in current negotiation contexts, an affirmation of historic self-government activities, or achieving “negotiated” self-government that promises better recognition and implementation within Canada.

With this context and these caveats in mind, I take the sphere of Aboriginal administrative law to capture at least three interrelated ideas.

The first idea underlying Aboriginal administrative law relates to how Canadian administrative law principles and doctrines should be applied in Aboriginal settings (if at all). At first glance, the flexibility and contextual nature of the doctrines and principles of Canadian administrative law appear well-suited to adaptation by First Nations governance, and some of these principles and doctrines, by inertia or by choice, already have come to define early experiences with self-government. For example, the Nisga’a Lisim Administrative Review Tribunal looks like many other administrative tribunals throughout the country, as discussed below. Also, as a matter of Canadian administrative law, Aboriginal band decision making taken pursuant to the *Indian Act*<sup>5</sup> or other statutory powers are covered by administrative law doctrines, so in that sense, applying Canadian administrative law to Aboriginal decision making is a long-standing feature

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<sup>5</sup> *Indian Act*, RSC 1985, c I-5.

of the governance of Aboriginal peoples (explored in the discussion of the *Matsqui* decision below in section 2, “Independence”).

Further, the hallmark of Canadian administrative law is arguably its ability to develop approaches to questions of fairness, independence, and accountability to apply in disparate settings within the administrative state (for example, government departments, hospitals, prisons, universities, regulatory agencies, and adjudicative tribunals, to name a few of these settings).

Do Aboriginal communities present a particularly distinct administrative setting in which to apply conventional administrative law doctrines, or do such communities require different doctrines altogether? An understanding of what constitutes a reasonable apprehension of bias developed in the context of a utility board (where, for example, a member makes public statements relating to the issue during hearings and may be perceived to have decided the issue before hearing all of the evidence)<sup>6</sup> may not be applied in the same way in the context of immigration decision making (where, for example, an immigration officer must consider the best interests of children in making a deportation decision and may be biased when expressing views contrary to a child’s best interest).<sup>7</sup> Yet the same principles are held to govern each under Canadian administrative law.

Principles of institutional independence forged in the setting of liquor regulation<sup>8</sup> are often applied in the setting of securities regulation.<sup>9</sup> Justice Louis Lebel once wrote that

not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but

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<sup>6</sup> See *Newfoundland Telephone Company Limited v The Board of Commissioners of Public Utilities*, [1992] 1 SCR 623, 95 Nfld & PEIR 271 [*Newfoundland* cited to SCR].

<sup>7</sup> See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker* cited to SCR].

<sup>8</sup> See *Québec Inc v Québec (Régie des permis d’alcool)*, [1996] 3 SCR 919, 140 DLR (4th) 577.

<sup>9</sup> See *Katz v Vancouver Stock Exchange*, [1996] 3 SCR 405, 139 DLR (4th) 575.

the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate.<sup>10</sup>

Is there any difference in grafting similar approaches developed through the review of liquor and securities regulators to the governing institutions of First Nations, or must a framework be developed that is consistent with customs, traditions, spiritual beliefs, and historical realities of Aboriginal peoples? In other words, a discussion of Aboriginal administrative law necessarily engages the limits of pluralism in public law. It reveals the tension between those features of administrative law with a claim to universality, and those which may be reduced, ultimately, to a particular culture's view of justice at a particular time in its history.

The second idea animating Aboriginal administrative law involves the kinds of administrative justice which should be developed by Aboriginal communities as they assume control over their own public institutions through mechanisms of self-government. Consider, for example, the analogous experience of Canada's most ambitious instance of indigenous self-government to date—the Nunavut Land Claims Agreement (NLCA)—out of which the territory of Nunavut was established in 1999. The NLCA specifies that the number of Inuit employed in the public service be representative of Inuits in Nunavut society.<sup>11</sup> This figure was set at 50 percent for 1 April 1999, and was intended to slowly increase to 85 percent to reflect the fact that Inuit comprise the overwhelming majority of Nunavut residents. As a result of the NLCA, the government of Nunavut is unique in its ability to make decisions in certain areas of jurisdiction typically reserved for the federal government in Canada's other territories.<sup>12</sup>

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<sup>10</sup> *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 158, [2000] 2 SCR 307.

<sup>11</sup> *Nunavut Land Claims Agreement Act*, SC 1993, c 29, s 23.2.1.

<sup>12</sup> For example, along with federal government representatives, Inuit also hold representative positions on institutions of public government that were created by the NLCA. As a result, Inuit appointees and Nunavut government representatives sit side by side on such administrative bodies as the Nunavut Wildlife Management Board, Nunavut Planning Commission, Nunavut Impact Review Board, the Nunavut Water Board, and the

Another way Aboriginal administrative law has been understood is through Aboriginal participation on administrative bodies outside Aboriginal communities, but whose decisions affect those communities. In Canada, comanagement boards represent an example of this phenomenon. Reservations about whether comanagement arrangements permit Aboriginal values to impact decision making echo the concerns of critical legal scholarship that transplanted legal instruments have a limited capacity for transformative political change. Can such regulatory and administrative settings, however, provide the space necessary for adaptation that can transform regulation to reflect local values?

Sari Graben has explored how participatory processes have led to the adaptation of regulatory instruments that are, for all intents and purposes, a transplanted form of Aboriginal governance.<sup>13</sup> Using the case study of the Mackenzie Valley Environmental Impact Review Board, a comanagement board in Northern Canada, she describes how Aboriginal communities have provided input into the guidelines used by the Board and the impact of this participation. Furthermore, Graben finds those guidelines have proved instrumental in fostering private negotiation between Indigenous communities and industry as a central feature of environmental assessment.

The third idea relates to the relationship between Aboriginal and Canadian systems. To take a familiar concept from administrative law, what level of deference should apply when Aboriginal decision making is impugned in applications for judicial review in Canadian courts? In what circumstances should those courts overturn Aboriginal government or agency decision making? Where Aboriginal and Canadian regulatory jurisdictions apply to a given matter or individual, which should take precedence and why? These areas of the convergence of Aboriginal and Canadian administrative law principles remain largely unsettled. However,

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Nunavut Surface Rights Tribunal. See Mike Vlessides, "A Public Government", online: Nunavut 99 <<http://www.nunavut.com>>.

<sup>13</sup> Sari Graben, "Writing the Rules of Socio-Economic Assessment: Adaptation Through Participation" (Paper delivered at the annual meeting of the Law and Society Association, Chicago (27 May 2010), Osgoode CLPE Research Paper 23/2010.

recent jurisprudence such as the *Tlicho* case<sup>14</sup> (discussed below in the section “Is There an Aboriginal Model for Administrative Decision Making?”) suggests that, for at least the foreseeable future, Canadian courts will remain a key forum for Aboriginal administrative law.

This relationship is fundamental. If Aboriginal government bodies and agencies are designed to meet the requirements of Canadian administrative law as regulated by judicial review through Canadian courts, those bodies and agencies may look quite different than if those bodies and agencies are insulated from review and given the space to develop their own approaches to questions of procedural and substantive sufficiency.

Nowhere is the convergence of Aboriginal and Canadian administrative law more apparent than in the area of the duty to consult and accommodate.<sup>15</sup> The duty is derived from the “honour of the Crown”, and where it applies, it requires the Crown to consult with Aboriginal communities about land use where the land is associated with a claim by the Aboriginal community. Further, it compels the Crown not just to consult but also to accommodate Aboriginal concerns, though it leaves to the Crown the determination of how best to do so. While the Supreme Court has asserted that this duty is constitutional in nature, and therefore is not strictly speaking an instance of Aboriginal administrative law, it demonstrates the exact kind of convergence between procedural justice and distinctive Aboriginal approaches relevant to this discussion.<sup>16</sup> In the *Little Salmon/Carmacks* decision, the Supreme Court highlighted this

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<sup>14</sup> *Lafferty v Tlicho Government*, 2009 NWTSC 35, [2009] 3 CNLR 151 [*Tlicho*].

<sup>15</sup> For a broader discussion of the duty to consult and accommodate in the context of Aboriginal administrative law, see Promislow & Sossin, *supra* note 2.

<sup>16</sup> See *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 [*Little Salmon/Carmacks*]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at paras 20, 32 [*Haida Nation*]. For discussion, see David Mullan, “The Duty to Consult Aboriginal Peoples—The Canadian Example” (2009) 22:2 Can J Admin L & Prac 107; and Dwight G Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009). See also Lorne Sossin, “The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights” (2010) 23:1 Can J Admin L & Prac 93.



relationship. The Court *considered* the argument that administrative law principles “for all their tremendous value, are not tools toward reconciliation of Aboriginal people and other Canadians.”<sup>17</sup> The Court rejected this approach, building on the Court’s original pronouncement in *Haida Nation* that:

In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice *mandated by administrative law*.<sup>18</sup>

Justice Binnie noted in *Little Salmon/Carmacks*: “Administrative law is flexible enough to give full weight to the constitutional interests of the First Nation.”<sup>19</sup> In other words, the impact of an administrative decision on the interest of an Aboriginal community, whether or not that interest is entrenched in a section 35 right, will help shape the scope and nature of procedural justice applicable in this context. As the Court recently affirmed, administrative discretion is exercised in light of constitutional guarantees and the values they reflect.<sup>20</sup>

Turning now to the content of Aboriginal administrative law, I seek to explore the possible scope of this field rather than posing definitive answers as to its boundaries. Each of the three dimensions of Aboriginal administrative law explored below takes as its point of departure a concept well-recognized in Canadian administrative law. I leave for another day to consider dimensions of Aboriginal administrative law that may have no corollary or point of reference in any other administrative law system.

## II. WHAT IS (AND ISN'T) ADMINISTRATIVE LAW?

To grapple with the question of whether Aboriginal administrative law provides a necessary or helpful legal construct, it is first necessary to

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<sup>17</sup> *Little Salmon/Carmacks*, *supra* note 16 at para 45.

<sup>18</sup> *Ibid* at para 46 [emphasis in original].

<sup>19</sup> *Ibid* at para 47.

<sup>20</sup> See *Doré v Barreau du Québec*, 2012 SCC 12, 343 DLR (4th) 193.

understand what is meant by “administrative law” more broadly. I approach administrative law as encompassing any law, rule, principle, or practice which governs decision making by government or an entity governed by statute (e.g. agencies, boards, regulators, tribunals, commissions, etc.). This definition already covers, for example, the many functions performed by Aboriginal leaders and band councils which either exercised governmental or delegated powers pursuant to statutes or treaties. Administrative law may swallow up so much of public decision making that it is sometimes helpful to define it by what it does *not* include: namely, decisions taken by private individuals, organizations or entities, a legislature or court, or rules dictated by the constitution which cannot easily be altered by the government of the day. A narrower but more functional definition of administrative law is that it sets out the substantive and procedural standards by which those who exercise public authority will be held legally accountable.

What does it mean to say that a sphere of decision making is *covered* by administrative law? Administrative law is concerned generally with the legitimacy of public decision making. Administrative law in Canada, as elsewhere, has emerged out of a particular matrix of political, legal, economic, and social development predicated on a separation of powers between the executive, legislative, and judicial branches of government. At a minimum, it governs the authority to make decisions pursuant to statutory and prerogative powers.<sup>21</sup> To say a matter is covered by administrative law, generally, is to say that a person affected by a public decision has recourse to a legal process (a court, tribunal, etc.) if that person’s rights to a fair decision have not been respected, if the decision is unreasonable, or if the decision lies outside the decision maker’s jurisdiction.

The historical development of Aboriginal communities has certainly been markedly different from the rest of Canada. As such, one might expect the forms and principles of administrative law to look correspondingly different

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<sup>21</sup> David J Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 3–4. For an excellent, all-encompassing introduction to administrative law, see “Chapter One: The Administrative State and the Rule of Law” in Gus Van Harten, Gerald Heckman & David J Mullan, *Administrative Law: Cases, Text, and Materials*, 6th ed (Toronto: Emond Montgomery, 2010).

in Aboriginal communities that attain self-government. There are many aspects of administrative law that could explore these distinctions—I have chosen to focus on those areas which reflect, in my view, both culturally determined and universal features: these are concepts of (1) fairness, (2) independence, and (3) accountability in administrative law. Each of these is discussed briefly below.

#### A. FAIRNESS

Fairness, or procedural justice, in administrative law captures a range of participatory rights organized around the requirement that those affected by a non-legislative and potentially adverse decision have a right to be heard. It is also a hallmark of fairness in Canadian administrative law that a decision maker must not have a personal or private stake in the outcome of a decision. The current standard of impartiality and disinterestedness developed in the late 1970s and focused on the “reasonable apprehension of bias”—what matters is not what actually is in the heart and mind of a decision maker (which can never be established with certainty), but rather what a reasonable observer would conclude looking at the situation objectively. This standard is set out, somewhat elliptically, by Justice de Grandpré, dissenting in *Committee for Justice and Liberty v Canada (National Energy Board)*:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [T]hat test is ‘what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.’<sup>22</sup>

In short, according to this standard, the closer the connection a decision maker has to the issues to be decided, or to the parties who are affected by the decision, the more likely it is that a reasonable person would perceive bias. Bias, though, like the whole corpus of procedural fairness, may vary

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<sup>22</sup> *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394, 68 DLR (3d) 716.

with context.<sup>23</sup> The differences in First Nations' perspectives may be intimately tied with ideas about the nature of authority: how it is circumscribed, to whom duties of leadership are owed, and how conflicts are to be resolved.

It has been accepted as self-evident under the common law that a decision maker can act more fairly when having no connection to the parties affected by the decision.<sup>24</sup> However, this may be a standard particularly ill-suited to Aboriginal communities, especially ones with small populations of extended families and a long, shared history.

I had an opportunity to explore this issue during a research trip to Nunavut in 2003.<sup>25</sup> Nunavut did not set out to create a series of Inuit laws; rather, it inherited the Northwest Territories' entire legislative system, which remains in place. This includes legislation which creates a number of administrative boards, agencies, and commissions, such as a labour standards board and a liquor licensing commission. Because of the small and scattered nature of Nunavut's population, I encountered people who served multiple roles in the territory's emerging administrative state—one person might drive a cab, serve part-time with a regulatory commission, and have a post with a community agency. Keeping these hats distinct over time is not possible, even if it were desirable. Over the course of conducting interviews and reviewing administrative decisions, I found a significant basis for the conclusion that the perception of fairness may well be enhanced, at least in the Inuit context, by the fact that a decision maker is likely to know those subject to the decision. As such, the decision maker understands the social

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<sup>23</sup> See *Newfoundland*, *supra* note 6; *Baker*, *supra* note 7 at para 47.

<sup>24</sup> See Lorne Sossin, "An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law" (2002) 27:2 *Queen's LJ* 809; Lorne Sossin, "Public Fiduciary Obligations, Political Trusts and the Equitable Duty of Reasonableness in Administrative Law" (2003) 66:1 *Sask L Rev* 129.

<sup>25</sup> See e.g. *Indian and Northern Affairs Canada*, "Nunavut—September 2003", online: Government of Canada <<http://www.ainc-inac.gc.ca>>. This research was part of a SSHRC-funded research project on "The Law of Public Administration in Canada". Nunavut became Canada's third territory on 1 April 1999, following a comprehensive land claim settlement with the Inuit of the Eastern Arctic.

forces and individual challenges that those individuals and their families have experienced.

In other words, many of those with whom I spoke would put it this way: how can you be truly fair to someone you do not know? Indeed, one could go further and identify one of the roots of the systemic discrimination of the justice system against Aboriginal peoples as flowing from the fact that judges, administrators, and others making decisions affecting Aboriginal community life did not know the people involved. Patricia Monture has explored a similar dynamic in the context of nepotism in community governance in indigenous contexts. She writes,

Sometimes issues attributed to a lack of accountability actually stem from lack of clarity about the expectations of imposed structures of governance and law. An obvious example of the concurrent experience of conflict and contradiction would be the frequently heard concerns about nepotism. In a social system structured on objectivity and the distance of decision makers from the matters under review, it is not appropriate to hire family simply because they are family. All such hirings are at least suspicious if not wrong. However, in a social system that is structured on family and often clan as the primary component, decisions based on family and clan obligation and/or responsibility become characterized as something they are not, nepotism. This is often the outcome because the Indigenous reasons for the decision are often not express in the hiring process. This is not a justification of nepotism but rather a demonstration of the degree to which “culture” conflict impacts on the analysis of good governance.<sup>26</sup>

There is obviously a difference between cultural sensitivity to social context and actual knowledge of a particular individual, but I would suggest this is a difference of degree rather than kind. The very reason why many advocate for a representative bench, or for public institutions which reflect the societies they serve, is so that those who make decisions will have a sense of the lives of

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<sup>26</sup> Patricia A Monture, “Community Governance and Nation (Re)Building: Centering Indigenous Learning and Research” (2004), online: Norman Wells Land Corporation <<http://nwlc.ca>> [footnotes omitted].

the people those decisions affect.<sup>27</sup> The reasonable apprehension of bias is directed at the openness of the decision maker's mind to a just decision.<sup>28</sup>

It is intended to ensure that decision makers acting under public authority make decisions in the public interest and are not furthering their private interest. Neither of these goals, however, requires that the decision-maker and those affected by decisions be strangers to one another.

The law of bias, however, may be one of those areas which can be adapted to Aboriginal government contexts without altering the nature of the doctrine. If the reasonable apprehension of bias is seen through the lens of the reasonable Aboriginal person, rather than some more abstract reasonable person, then greater leeway may exist to infuse administrative law with the perspectives of Aboriginal community life. That said, it remains as true in Aboriginal contexts as governments throughout Canada that a decision maker should not be motivated by self-gain in discharging public duties. Thus, it is possible, and necessary in my view, to disentangle the universal concern against bias (i.e., self-dealing) from the more culturally determined application of that principle (e.g., decision maker and affected parties knowing each other or having relationships with one another constituting a reasonable apprehension of bias).

## B. INDEPENDENCE

Administrative law is concerned not only with the impartiality of the decision-maker, but also with the independence of the decision maker. While impartiality usually refers to the mindset of the decision maker, independence refers to the structures and conditions of decision making, and typically captures independence *from* government and partisan concerns. Here, too, the question is whether those structures and conditions give rise to a reasonable apprehension of bias, as opposed to actual bias.

It is perhaps a coincidence, or even irony, that the leading precedent from the Supreme Court of Canada on the meaning of independence in

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<sup>27</sup> See generally Lorne Sossin, "Discretion and the Culture of Justice" (2006) *Sing JLS* at 356.

<sup>28</sup> This point is the shared consensus of the divided Supreme Court in *R v S(RD)*, [1997] 3 SCR 484, 161 NSR (2d) 241.

administrative decision making arose in the context of an Aboriginal tribunal. In *Canadian Pacific Ltd v Matsqui Indian Band*,<sup>29</sup> the Court considered the validity of an Aboriginal Band's Tax Assessment Review Committee. The Court was split on whether the challenge should have been raised before the committee itself before being brought to Court, but the majority held that the committee lacked sufficient administrative independence from Band chiefs and councils. For example, the Committee members could be fired at any time and their compensation was left to the discretion of the Band. In his reasons, Chief Justice Lamer observed:

[W]hile I agree that the larger context of Aboriginal self-government informs the determination of whether the statutory appeal procedures established by the appellants constitute an adequate alternative remedy for the respondents, I cannot agree with Sopinka J.'s conclusion that this context is relevant to the question of whether the bands' tribunals give rise to a reasonable apprehension of bias at an institutional level. In my view, principles of natural justice apply to the bands' tribunals as they would apply to any tribunal performing similar functions.<sup>30</sup>

The basis of the dispute in *Matsqui* was whether or not certain lands were within the Matsqui reserve for the purposes of taxing a rail line which Canadian Pacific Ltd hoped to build in the region. The Matsqui sent Canadian Pacific a tax assessment, which the company then sought to have judicially reviewed. As a result, the Matsqui brought a motion to strike the claim, arguing that judicial review was not appropriate since the assessment bylaws allowed for an eventual appeal in Federal Court. The motions judge struck out the application, but this was overturned by the Federal Court of Appeal and the Supreme Court. The majority of the Court held that the motions judge did not consider whether the appeal tribunals were sufficiently independent from Band chiefs and councils, and found that in fact they were not, thus justifying the jurisdiction of the Federal Court to hear the case as a judicial review.

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<sup>29</sup> *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3, 122 DLR (4th) 129 [*Matsqui* cited to SCR].

<sup>30</sup> *Ibid* at para 74.

Although a minority judgment, Chief Justice Lamer's standard for independence was the one adopted by later courts as the framework of independence to be applied in the context of administrative adjudication (in settings far removed from Aboriginal government decision making). After determining that "members of the appeal tribunals perform adjudicative functions not unlike those of courts,"<sup>31</sup> he found that "under the By-laws, there is nothing to prevent the Band Chiefs and Councils from paying tribunal members only after they have reached a decision in a particular case, or not paying the members at all."<sup>32</sup> In addition, he found that tribunal members could be removed from their positions at any time by the bands, which left open the possibility of "considerable abuse."<sup>33</sup> Furthermore, the fact that the Chiefs and Band Councils selected the members of their tribunals contributed to the appearance of a dependent relationship between the tribunal and the band. As already quoted above, in coming to this conclusion, Chief Justice Lamer did admit that "the larger context of Aboriginal self-government informs the determination of whether the statutory appeal procedures established by the appellants constitute an adequate alternative remedy for the respondents."<sup>34</sup> Yet, he did not see how this was relevant to the question of whether the bands' tribunals give rise to a reasonable apprehension of bias at an institutional level.

In other words, the Supreme Court simply grafted the test for judicial independence (security of tenure, financial independence, and institutional autonomy) onto the context of administrative tribunals generally, and to an Aboriginal dispute resolution tribunal specifically. While Justice Sopinka argued that it was premature to evaluate the independence of the Assessment Review Committee because it had not yet been in operation, Chief Justice Lamer held that a lack of independence could be determined by simply looking at the makeup of the Board; that is, without having to wait to see it operate in context.

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<sup>31</sup> *Ibid* at para 92.

<sup>32</sup> *Ibid* at para 94.

<sup>33</sup> *Ibid*.

<sup>34</sup> *Ibid* at para 74.



In coming to its decision, the Court, and particularly Justice Sopinka, made numerous references to Aboriginal self-government. Justice Sopinka prefaced his analysis with the caveat that “[c]onditions of institutional independence must take into account their context.”<sup>35</sup> He then stressed that a very significant contextual factor in this case was that the purpose of the scheme was to foster Aboriginal self-government.<sup>36</sup> This led him to resolve that “before concluding that the by-laws in question do not establish band taxation tribunals with sufficient institutional independence, they should be interpreted in the context of the fullest knowledge of how they are applied in practice.”<sup>37</sup>

The desire for administrative decision makers to be insulated from political manipulation has become a central motif in Canadian administrative law. From labour boards to liquor control boards, human rights tribunals to international trade tribunals, independence has become one of the most common grounds on which to challenge administrative decisions. While the Supreme Court remains perhaps divided on the extent to which Aboriginal tribunals require modified administrative law principles in the context of independence, the question remains whether such an ideal resonates with Aboriginal tradition. According to John Borrows:

Aboriginal peoples need recognition of their own independent norms, and dispute resolution mechanisms to ensure that accomplishments are consistent with stewardships. These mechanisms need not be courts, but they should possess an independence from band councils that would enable them to act as a countervailing source of authority within the community[.]<sup>38</sup>

Ironically, well-intentioned attempts to “fix” First Nations political structures by making them more accountable may end up doing just the opposite: further entrenching top-down, elected, hierarchical politics that has little

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<sup>35</sup> *Ibid* at para 113.

<sup>36</sup> *Ibid* at para 114.

<sup>37</sup> *Ibid* at para 115.

<sup>38</sup> John Borrows, “Stewardship and the First Nations Governance Act” (2003) 29:1 *Queen’s LJ* 103 at 121 [Borrows, “Stewardship”].

respect for First Nations traditions of polyfunctional decision making and dispute resolution structures. If the proposals are implemented, they may make it even more difficult to diffuse power throughout Indian communities in the future. What is needed, before the creation of administrative law codes, are First Nations–designed adjudicative or dispute resolution bodies that can independently review decisions of the executive and legislative bodies in the band. There must be bodies that can independently articulate legal principles of stewardship and responsibility whenever a dispute arises.<sup>39</sup>

While Borrows was not referring specifically to *Matsqui*, the Supreme Court's approach seems to fit with the hierarchical politics that Borrows discourages those in positions of political and legal authority outside the Aboriginal context from doing. More broadly, the debate in *Matsqui* raises the question of which administrative law principles are culturally specific and which are of universal application. Arguably, rules against self-dealing and bias arise in any public decision-making process conducted under the rule of law. Is the concern for institutional independence similarly universal? The further development of Aboriginal administrative law would seem to present a promising setting within which to explore this question.

### C. ACCOUNTABILITY

Beyond questions of independence and the relationship between administrative decision makers and government, administrative law is also concerned more broadly with questions of legal accountability in governmental decision making. Accountability can refer to a recourse for those aggrieved by such decisions (a topic discussed above), or to a broader legal culture of transparency, oversight, and justification (where a privacy or access to information commission, Ombudsman or Auditor General, acts to supervise government conduct).

Many have formed the view that Aboriginal institutions are less accountable than those outside Aboriginal communities. This view is often based on a lack of understanding and knowledge about how First Nations institutions work, or it may arise from the media profile of a particular

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<sup>39</sup> *Ibid* at 123.

scandal generalized across other institutions.<sup>40</sup> In order to cope with these challenges to their legitimacy, many Aboriginal institutions model themselves on Anglo-American institutions.<sup>41</sup> Yet, such a solution can be problematic. John Borrows explores this issue in his response to the aborted *First Nations Governance Act*, which would have required Aboriginal communities to approve written codes for the election of leaders, government administration, and accountability measures. In his response, Borrows writes:

First Nations must ensure that issues of accountability are explored by reference to their own world views and traditions. Without such examination, 'there is a very real possibility of a mismatch between their formal governments and the standards of political legitimacy found in their cultures.'<sup>42</sup>

Traditionally, Aboriginal ceremonies were often performed in conjunction with creation stories to communicate to the Creator and to acknowledge before others how one's duties and responsibilities had been performed. This practice put in place the principle that people are responsible for their actions and must be held accountable for the consequences of those actions. John Borrows states:

For First Nations, to speak of accountability detached from notions of to whom duties are owed (acknowledgement), how they should be exercised (accomplishment), and the consequences that flow from such exercise (approbation) is to speak of a hollow, almost meaningless concept. Accountability is given context by its relationship to larger principles of stewardship. It draws its significance from the fact that the Creator, the earth, plants, animals and other beings are those to whom responsibility flows. 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. Unfortunately, while the specific practices proposed in the *Act* are appropriate and admirable, they

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<sup>40</sup> Nell Jessup Newton, "Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts" (1998) 22:2 Am Indian L Rev 285.

<sup>41</sup> *Ibid.*

<sup>42</sup> Borrows, "Stewardship", *supra* note 38 at 109–10.

have not been contextualized within these broader notions of First Nations stewardship. This is the case despite a clause in the *First Nations Governance Act's* preamble: 'Whereas bands, within the meaning of the Indian Act, require effective tools of governance that can be adapted to their individual traditions and customs.'<sup>43</sup>

Borrows suggests that the principles underlying stewardship should be used by First Nations to structure contemporary policy concerning Aboriginal self-governance. He argues that First Nations must not try to examine issues of accountability and governance without framing the concept within their own understanding of the world. By explaining that governing structures need to reflect the peoples they are designed to serve, he states that to speak of accountability in terms of Aboriginal self-government detached from notions of to whom the duties are owed, including the Canadian state (acknowledgement), how they should be exercised (accomplishment), and the consequences that flow from such exercises (approbation and disapprobation), is to speak of a meaningless concept.<sup>44</sup>

Borrows criticized the proposed *First Nations Governance Act* by pointing out that the Act both puts Aboriginal people in charge of monitoring their continued colonization, and gives bands far too much authority in terms of setting up the systems of accountability. He argues that this actually further entrenches top-down politics that have little respect for First Nations' traditions of polyfunctional decision making and dispute resolution techniques. Borrows explains the need for an independent court or tribunal to play the role of an independent dispute resolution mechanism. Additionally, he suggests that there should be both formal and informal adjudicative mechanisms in place to deal with questions concerning the integrity of the leaders of a community, and explains that these mechanisms should be based on First Nations' laws and traditions relating to stewardship.<sup>45</sup>

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<sup>43</sup> *Ibid* at 110 [emphasis in original].

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

Borrows states that the power of Aboriginal peoples to judge and hold their own members accountable for their actions (i.e., self-government) is an existing Aboriginal right that is protected under subsection 35(1) of the *Constitution Act, 1982*. He goes on to recommend that the Aboriginal remedies of approbation and disapprobation would be more appropriate than administrative codes in considering issues of accountability in Aboriginal communities. Systems of accountability should be structured in such a way that approbation (e.g., feasts, dances, songs, names) and disapprobation (e.g., shaming feasts, loss of names, loss of property, loss of those things over which the person formerly had stewardship, and in some cases, removal from the community) should be attached to conduct over which people have stewardship. The notion of approbation is different from most administrative schemes, which tend only to demarcate and punish wrongful behaviour, as opposed to also rewarding good behaviour.<sup>46</sup>

There are other perspectives on how the traditions and oral culture of Aboriginal peoples could be translated into governance principles capable of grappling with the complexities of twenty-first-century government accountability. For example, the Institute on Governance, an Ottawa think tank, has studied the issue of the proper relationship between Aboriginal leaders and their staff. In “Policy Brief No. 27: Clarifying Roles of Aboriginal Leaders and their Staff: A Model Governance Policy”, the Institute has adopted the model of complementarity: where leaders and their staff are seen as performing overlapping roles in an interdependent and interactive framework, rather than one of hierarchy and separation. Mutual reciprocity and mutual respect are fundamental to such a relationship.<sup>47</sup>

To deal with potential disputes, John Graham, who authored the Institute on Governance study, advocates the use of various administrative instruments based on participation by those affected by decisions and recourse to impartial adjudicators where disputes arise. In particular, he suggests the following mechanisms for dealing with potential disputes:

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<sup>46</sup> *Ibid.*

<sup>47</sup> John Graham, “Policy Brief No. 27: Clarifying Roles of Aboriginal Leaders and their Staff: A Model Governance Policy” Institute on Governance (January 2007), online: <<http://iog.ca>>.

1. the use of policies and codes (e.g., model governance policy setting out roles, responsibilities, expectations);
2. structures such as complaints adjudication or boards;
3. nurturing the relationship through retreats, orientation, training, etc;
4. encouraging the involvement of citizens in decision making; and
5. other tools and approaches, such as use of technology for polling, etc.<sup>48</sup>

The Institute on Governance argues against giving band councillors specific portfolios along the lines of cabinet ministers (such as health or education) because it leads councillors to believe they are “in charge” of the area and inevitably lock horns with program administrators. In turn, this may result in partisan politics playing a greater role in program decision making, as it so often does in the context of provincial and federal government action. Distributing responsibility for portfolios may also be inconsistent with a council acting collectively, and instead promote councillors acting independently as ministers in a government.<sup>49</sup> That said, the absence of portfolios may present a challenge with respect to accountability as well, since no individual has ownership over particular programs or the performance of particular units.

Another common theme in Aboriginal institutions is the concept of consensus and the accountability issues that arise in trying to bring it about. For instance, for the Ojibway government, the object of decision making is attaining consensus. Historically, the Ojibway government has not maintained a separation of powers. Rather, it contains one council which renders decisions, whether legislative, executive, or judicial.<sup>50</sup> This system of government might be seen as incoherent and problematic from the perspective of Canadian administrative law (for example, by allowing the same people who make laws also to enforce and interpret them). From

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<sup>48</sup> *Ibid* at 3.

<sup>49</sup> *Ibid* at 7.

<sup>50</sup> Mark D Walters, “‘According to the Old Customs of Our Nation’: Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826–1847” (1998) 30:1 *Ottawa L Rev* 1 at 12–13.

another perspective, however, such a system could be seen as more accountable. This is because, as Mark Walters has observed, “[t]he need for community consensus [means] that councils [have] to be much more than meetings of chiefs—they [are] public gatherings of the band’s people, or at least ‘chiefs and principal men’, at which anyone [can] speak, subject to procedural customs and ceremonies that [give] precedence to ‘age and wisdom.’”<sup>51</sup> Compliance was ensured in this context through the use of social pressure. Can similar mechanisms of social pressure lead to meaningful accountability in the twenty-first century?

### III. IS THERE AN ABORIGINAL MODEL FOR ADMINISTRATIVE DECISION MAKING?

While there are examples of Aboriginal approaches to fairness, independence, and accountability, it is misleading to suggest that there is one Aboriginal view on any of these spheres of administrative law. Another important insight into models of Aboriginal government comes from the contributions of the Royal Commission on Aboriginal Peoples (RCAP), which delivered a mammoth report in 1996 with scores of far-reaching recommendations.<sup>52</sup> RCAP devoted significant attention to Aboriginal self-government. That part of the report highlights that Aboriginal government will look different depending not only on the band or tribe, but also depending on the territory and population base. Thus, those Indigenous groups which must govern both Aboriginal and non-Aboriginal peoples (e.g. northern governments), will look very different from those whose jurisdiction covers only an Aboriginal population. Similarly, governments in urban areas will be much more focused on gaining control over social services than would rural governments.

The RCAP suggested three models of Aboriginal government: the nation government model, the public government model, and the community of interest model. In each of these models, an Aboriginal government “would

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<sup>51</sup> *Ibid* at 12.

<sup>52</sup> Royal Commission on Aboriginal Peoples, “3.1 Models of Aboriginal Government: An Overview” Royal Commission Report on Aboriginal Peoples (1996), online: Collections Canada <<http://www.collectionscanada.gc.ca>>.

have powers and authorities in respect of law making (legislative); administration and policy making (executive); and interpretation, application and enforcement of law (judicial).<sup>53</sup> The legislative component “may resemble historical structures, existing structures (a council) or government structures common to other Canadian governments (such as a legislative assembly).”<sup>54</sup> Likewise, the executive may be composed of individuals, such as chiefs, bodies, or councils, for example. Finally, judicial powers will most likely rest with those Aboriginals seen as providing good “counsel and wisdom,” such as elders and women.<sup>55</sup> In the end, the RCAP provides a useful point of departure, but surprisingly little in the way of specific models that might inform Aboriginal administrative law. As with so much in the field of Aboriginal and constitutional law, the focus has been on achieving Aboriginal self-government, rather than what happens the day after.

As was pointed out in the RCAP report, notions of accountability vary not only between non-Aboriginals and Aboriginals, but amongst different bands and tribes as well. Robert Cooter and Wolfgang Fikentscher provide an excellent explanation of this variability in their research into tribal courts.<sup>56</sup> Thus, for instance, some tribal courts have no appeals court, some have one combined with their tribal council, some insist upon hiring judges from outside their tribe, and still others have an appeals court that is virtually identical to any state court in the United States.<sup>57</sup> In addition, the level of control that a tribal council may have over the judges in a tribal court also varies. For example, the Navajo Supreme Court was able to try its tribe’s former chairman for crimes that he allegedly committed. In contrast, many judges have been replaced in the White Mountain Apache Reservation after

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> See Robert D Cooter & Wolfgang Fikentscher, “Indian Common Law: The Role of Custom in American Indian Tribal Courts (Parts I & II)” (1998) 46:2 Am J Comp L 287. For a more detailed look at the Navajo tribal courts in particular, see Tom Tso, “The Process of Decision Making in Tribal Courts” (1989) 31:2 Ariz L Rev 225.

<sup>57</sup> Cooter & Fikentscher, *supra* note 56 at 317.



a new chairman assumed office.<sup>58</sup> In the end, Cooter and Fikentscher conclude that the Aboriginal approach to law should be shaped by traditional notions. That is, “law should follow culture.”<sup>59</sup>

A good example of Aboriginal governance that reflects culture and custom is the San Carlos Elders Cultural Advisory Council (Elders Council) in the United States.<sup>60</sup> It was created by a Tribal resolution in 1993 and “advises the Tribal Council on matters of culture, conducts consultations with off-reservation entities regarding cultural matters, and administers the cultural preservation activities of the Tribe. It is comprised of elders from the reservation’s four districts and meets every two to four months.”<sup>61</sup> The Elders Council uses its knowledge of Apache traditions and the natural world, an important connection in Apache culture, to contribute to the governance of the Tribe. It has been particularly concerned with the high rates of assimilation among Apache youth, general dependence on the federal government, the political turmoil suffered by the Apache government of the 1990s, and the Tribe’s financial mismanagement that led to economic disaster.<sup>62</sup>

Originally, the Elders Council focused on preserving the Tribe’s botanical knowledge, but its role has expanded to providing “guidance on tribal environmental policies . . . on cultural politics . . . and on guidelines for non-

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<sup>58</sup> *Ibid* at 318.

<sup>59</sup> *Ibid* at 314.

<sup>60</sup> For comparative background on the U.S. and Canada, see Stephen Cornell, *Indigenous Peoples, Poverty, and Self-Determination in Australia, New Zealand, Canada, and the United States* (Harvard Project on American Indian Economic Development, 2006), online: Joint Occasional Papers on Native Affairs <<http://jopna.net>>.

<sup>61</sup> Miriam Jorgenson, “Aboriginal Governing Institutions: Connections between Research and Policy Advice” (Lecture presented at University of Toronto Department of Political Science seminar series, Toronto, 12 October 2007) [unpublished]. See also M Jorgensen, ed, *Resources for Nation Building: Governance, Development, and the Future of American Indian Nations* (Tucson: University of Arizona Press, 2007); and see especially Stephen Cornell and Miriam Jorgensen, “Getting Things Done for the Nation: The Challenges of Tribunal Administration” in Miriam Jorgensen, ed, *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson: University of Arizona Press, 2007) 146.

<sup>62</sup> *Ibid*.

tribal researchers.”<sup>63</sup> Much of the Council’s work has been successful. Not only have the Tribe’s citizens responded to the Council’s advice, but the Council has also succeeded in changing the policies of the U.S. Forest Service, and has repatriated over seventy cultural artefacts under the *Native American Graves Protection and Repatriation Act*. The Elders Council functions by way of consensus, but maintains a coordinator and a facilitator to aid in administrative functions. It also brings in younger members to ensure its longevity. In respect of the Council’s contribution to tribal governance, according to Miriam Jorgenson, it “is deeply committed to making the tribal government more responsible and accountable by giving the traditional perspective an institutionalized and formal voice that the politicians cannot avoid,” a sort of “guidance of [the] elders.”<sup>64</sup> The Council has reprimanded one Tribal Council for renewing a corporate contract without community consent and another for its financial mismanagement. It has also striven to lead by example “operating as a self-sustaining volunteer entity,” rather than accepting tribal monies.<sup>65</sup> How would the Supreme Court’s approach to financial independence in *Matsqui* apply in this context?

Despite the success of many Aboriginal institutions at finding a balance between Western and Aboriginal values, many of them are still seen as lacking accountability by the justice system. With some exceptions, the approach of Canadian courts has been to impose existing Canadian administrative law principles on Aboriginal decision makers. The prime example of this dynamic was the Supreme Court of Canada’s judgment in *Matsqui*, discussed in Part II: Independence.

It is clear that First Nations have alternative views of accountability and how it is implemented, which from a general administrative law perspective, seem to breach the principles of natural justice (independence of decision makers from political authority, etc). Yet, perhaps what is really needed is a

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<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

change in outlook,<sup>66</sup> particularly since the ideals behind Aboriginal justice are different from those in the administrative state; namely, the importance of consultation with the community and of unanimity or consensus.<sup>67</sup>

One example of a cross between administrative law and Aboriginal approaches to justice can be seen in the Nisga'a Administrative Decisions Review Board. The Nisga'a Lisims Government is defined in Chapter 1 of the *Nisga'a Final Agreement* to mean "the government of the Nisga'a Nation described in the Nisga'a Constitution." Chapter 11 of the Nisga'a Final Agreement describes in some detail the powers of the Nisga'a Lisims Government, and the relationship of those powers to those of the federal and provincial governments. Section 16 of Chapter 11 provides that the Nisga'a Lisims Government will create appropriate procedures for the review of administrative decisions of Nisga'a institutions. That power has been exercised in the establishment of the Nisga'a Administrative Decisions Review Board, pursuant to the *Nisga'a Administrative Decisions Review Act*.<sup>68</sup>

The *Nisga'a Administrative Decisions Review Act* sets out the authority and process of the Board. Apart from a provision authorizing translation of a hearing into the Nisga'a language (though stipulating that the language of hearings unless ordered otherwise is English),<sup>69</sup> there appears to be little in the legislation denoting that this tribunal is different than other tribunals created to review executive decision making across the country.<sup>70</sup> The Board

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<sup>66</sup> Angela R Riley, "Good (Native) Governance" (2007) 107:5 Colum L Rev 1049.

<sup>67</sup> Lewis Henry Morgan, *League of the Ho-dé-no-sau-nee, or Iroquois* (Rochester, NY: Sage & Brother, 1851).

<sup>68</sup> See *Nisga'a Administrative Decisions Review Act, NLGSR 2000/04* (2008), online: Nisga'a Lisims Government Wilp Si'Ayuukhl Nisga'a <<http://nisgaalisims.ca>>.

<sup>69</sup> *Ibid*, s 14(2).

<sup>70</sup> While it is common to have tribunal members recite an oath of impartiality upon appointment, the *Nisga'a Administrative Decisions Review Act* provides that in the case of the Nisga'a Administrative Decisions Review Board, that oath is taken before the Council of Elders. The oath reads: "Do you solemnly swear or affirm that you will faithfully, truly and impartially, without fear or favour and to the best of your judgment, skill and ability, perform the office of member of the Nisga'a Administrative Decisions Review Board and that you will not, except in the discharge of your duties, disclose to any person any of the evidence or other matter brought before the Board" (*ibid* at 19).

has the power to set aside a government decision complained against if it is found to have been made beyond the jurisdiction of the decision maker, reached unfairly, or based on an incorrect finding in law. In other words, the *Act* creates a Board very much within the Canadian administrative law tradition. Thus far, the Board has received very few complaints and has been concerned primarily with disputes relating to elections.<sup>71</sup> In *Azak v Nisga'a Nation*,<sup>72</sup> the British Columbia Human Rights Tribunal found that the Nisga'a Lisims Government and the Board fall under federal jurisdiction with respect to human rights. As such, the British Columbia *Human Rights Code* had no application to decisions of the Board. This case demonstrates the complexity of not just bijuralism but also federalism, which is knit into the fabric of Canadian and Aboriginal administrative law.

One of the important functions of Canadian administrative law is its role in ensuring accountability of government decision makers. When considered in the context of Aboriginal self-government, vital questions arise as to who has the authority to monitor the accountability of Aboriginal decision makers, and the standards against which accountability should be judged in those circumstances. The Ojibway government, sentencing circles, and the San Carlos Elders Council are examples of Aboriginal governance which ground their legitimacy in distinctly Aboriginal forms of accountability. One concern is that when those and other similarly Aboriginal institutions are subject to administrative review, traditional principles of administrative law will not adequately account for these alternative structures of accountability. It is therefore relevant to look at examples of how Canadian courts have assessed the accountability of Aboriginal decision makers and the structures within which they operate.

An illustration of the intersection of administrative law approaches to accountability and Aboriginal self-government occurred in the *Tlicho* case, in which three dissident chiefs challenged a law enacted by the Tlicho

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<sup>71</sup> This assessment is based on a conversation with Angela D'Elia and Jim Aldridge, counsel to the Nisga'a Lisims Government, in the fall of 2009. The decisions of the Board do not appear to be published.

<sup>72</sup> *Azak v Nisga'a Nation*, 2003 BCHRT 79, [2003] BCHRTD No 75 (QL).

government. Section 13 of the *Tlicho Constitution* contains a process for challenging laws enacted by the Tlicho Assembly. The dissident chiefs who used this process did not obtain a favourable result in their community, and so chose to dispute the law in Canadian court. Justice Richard of the Supreme Court of the Northwest Territories struck out their claim as an abuse of process because the claim had “already been adjudicated upon by the process chosen by the Tlicho in developing their *Constitution*.”<sup>73</sup> Justice Richard further affirmed Tlicho self-government by holding that “[t]he most that could be said for the Applicants’ position . . . is that there is concurrent jurisdiction,”<sup>74</sup> but the “[c]ourt cannot simply ignore the fact that the Tlicho Assembly has, under the *Constitution*, already ruled on the validity of the impugned law.”<sup>75</sup> Overall, Justice Richard saw the Applicants’ claim as disrespectful of the newly established Tlicho self-government,<sup>76</sup> even going so far as to override criticisms of the Tlicho government’s accountability. For instance, he observed that “[w]hile it may appear an anomaly to have a legislative body . . . re-constitute itself into an adjudicative body (the Tlicho assembly under section 13.3) to hear a challenge to the validity of one of its own laws, that is the process that the Tlicho people decided upon in adopting the *Tlicho Constitution*.”<sup>77</sup>

The *Tlicho* case seems to assert the autonomy of decisions made by Aboriginal governments, so long as adequate internal accountability exists. In the Tlicho example, it did not matter that the accountability mechanism in question was unique to the Aboriginal context. The Tlicho government did not follow the separation-of-powers model popular with most Canadian governments, but rather chose a governance structure that ensured accountability through principles of “complementarity”. This principle had

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<sup>73</sup> *Tlicho*, *supra* note 14 at para 42.

<sup>74</sup> *Ibid* at para 41.

<sup>75</sup> *Ibid* at para 42.

<sup>76</sup> *Ibid* at para 38.

<sup>77</sup> *Ibid* at para 23.

been adopted democratically by the Tlicho people and was generally acceptable to them.<sup>78</sup>

Other cases have confirmed that the fundamental feature of an accountable and legitimate government decision is one that is consistent with traditional practices and is widely acceptable to the band community. In *McLeod Lake Indian Band v Chingee*,<sup>79</sup> when determining which band election practices were customary, and therefore valid, the Federal Court determined that “the custom of the band is the practices for selecting the council of the band that are generally acceptable to members of the band, upon which there is broad consensus.”<sup>80</sup> The Court further reinforced “that it is the Band itself, not the Band Council, that has the power to determine what constitutes the Band’s custom.”<sup>81</sup> This interpretation suggests that, at least insofar as band election practices are concerned, the accountability of Aboriginal decision makers and election officials is understood in relation to the Band members and their widely held customary beliefs. Although not explicitly stated in the court’s decisions, such an approach to accountability incorporates elements of stewardship, by recognizing the responsibility of Band Councils in relation to both the members of the Band at large, as well as the integrity of customs and traditions.

The difficulty with grounding accountability within notions of stewardship is that it can often be challenging to identify the parameters of that responsibility. Looking once again at the example of election procedures, it can be difficult to determine what constitutes customary election practices, and whether a particular procedure enjoys general consensus within the community. This is a particularly live issue in the context of the Aboriginal

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<sup>78</sup> Interestingly, the review process took place early in the evolution of Tlicho modern self-government, at a time where specific laws may have been open to change. Specifically, no laws had been enacted under s 13.2 of the *Tlicho Constitution* to provide for challenges to the validity of Tlicho law, despite a constitutional mechanism for resolving such disputes. See *ibid* at paras 23, 38.

<sup>79</sup> *McLeod Lake Indian Band v Chingee*, 153 FTR 257, 165 DLR (4th) 358 (FCTD) [cited to FTR].

<sup>80</sup> *Ibid* at para 17.

<sup>81</sup> *Ibid* at para 13.

tradition, which remains largely oral in nature. In an attempt to simplify determinations of authenticity and facilitate accountability, many bands have attempted to reduce their traditional practices to written Election Codes. However, it is understandably difficult to capture living stories into a static written text. Whose version of the story is legitimized, and what parts of the story are lost? What happens when parts of the story conflict? In other words, it is difficult to exercise stewardship when one's duties conflict.

While there is no definitive answer to such questions, foundational principles of fairness, balance, and inclusion in Aboriginal communities may help lay out parameters for decision making.<sup>82</sup> Though the mechanisms embodying such principles vary amongst First Nations peoples, their articulation outlines community values and ultimately how some conflicts might be resolved. Most tribes today operate under a written constitution, such as the Cherokee Nation, who set out their governmental structure in their constitution 200 years ago. Many have undertaken constitutional reform to address contemporary challenges. Some Aboriginal groups, such as the Navajo, govern pursuant to written tribal codes, while for many others oral tradition helps define parameters.<sup>83</sup> Of course, even oral tradition itself may lay out lessons, rather than identifying how to resolve a particular issue. Thus, the articulation of foundational principles in various forms help address issues of exercising stewardship to avoid conflicting duties, though naturally some overlap and conflicts are likely to always exist.<sup>84</sup>

When courts or other administrative bodies are called upon to make determinations as to custom and consensus, it is important, as Borrows stipulates, that those decision makers be able to independently articulate notions of stewardship, and use them to identify the realities of band custom and the will of the band's members. Non-Aboriginal courts have faced this dilemma, and have had to rely on evidence presented by the parties to determine the accurate content of band custom. In *Nekaneet First Nation v*

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<sup>82</sup> Riley, *supra* note 66 at 1081.

<sup>83</sup> *Ibid* at 1083.

<sup>84</sup> For a broader discussion of tribal constitutions, see Kristy Gover, *Tribal Constitutionalism* (Oxford: Oxford University Press, 2011).

*Oakes*,<sup>85</sup> there was disagreement as to which of two alleged customary governance procedures was valid and generally supported by members of the Band. Ironically, the court ruled that there was general consensus within the Band to do away with consensus, and move to a majority-rule model, since the Band felt that the consensus procedure had become too tainted by self-interest. In various cases, courts have deemed a procedure generally acceptable to members of a band if it had been originally used without complaint.<sup>86</sup>

In some contexts, deference to band-made expressions of custom might serve to reinforce problematic and colonially embedded power relations. An example can be found in the context of the *Indian Act* and custom rules about elections and membership.<sup>87</sup> In *Napoleon v Garbitt*,<sup>88</sup> members of the Saulteau Indian Band challenged amendments to the Saulteau Indian Band Government Law under which Council was chosen from the five founding families according to Band custom. The Court decided that the proper interpretation of Government Law, applying the custom of the Band, was that for the law to be amended, appropriate notice and consultation with citizens had to occur, and the majority of citizens had to consent to the amendment. The case, however, brings up issues of reification of the patriarchal family in the Saulteau First Nation, whereby only people directly descended from five founding families are seen as authentic.<sup>89</sup> Even Saulteau membership policies, passed pursuant to section 10 of the *Indian Act*, discriminated against women as second-class citizens or limited their ability

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<sup>85</sup> *Nekaneet First Nation v Oakes*, 2009 FC 134, 341 FTR 132.

<sup>86</sup> See e.g. *Bone v Sioux Valley Indian Band No 290*, 107 FTR 133, [1996] 3 CNLR 54. In this case, after a process of consultation, the Band's use of its new election code of ethics was sufficient to prove it was generally acceptable to members of the Band, and therefore reflected the Band's custom. However no evidence had been adduced to establish that the community had approved the Election Regulations so those were declared invalid.

<sup>87</sup> Val Napoleon, "Aboriginal Discourse: Gender, Identity, and Community" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009) 233.

<sup>88</sup> *Napoleon v Garbitt*, [1997] BCJ No 1250 (QL).

<sup>89</sup> Napoleon, *supra* note 87 at 249–51.



to pass on Indian status to descendants. A rule under the *Saulteau Indian Nation Citizenship Act* generally restricted membership to those entitled to be members prior to the April 1985 Indian Act amendments and those born after April 1985 to parents who were both Saulteau First Nation members.<sup>90</sup>

In *Sawridge v Her Majesty the Queen*,<sup>91</sup> three bands challenged amendments to the *Indian Act* that reinstated Aboriginal women who lost their status after marrying non-Aboriginal men. The bands claimed there was a “woman-follows-man” custom, whereby female members who married non-band members left the band. An interlocutory injunction suggested the band custom might have been disregarded, as Justice Hugessen stated:

[W]hatever inconvenience the plaintiff may suffer by admitting 11 old ladies to membership is nothing compared both to the damage to the public interest in having Parliament’s laws flouted and to the private interests of the women in question who, at the present rate of progress, are unlikely ever to benefit from a law which was adopted with people in their position specifically in mind.<sup>92</sup>

The issue was not ultimately decided since the plaintiffs claimed apprehension of judicial bias, amongst other claims, and closed their case after indicating that they would not be calling any further evidence.

These examples from the case law highlight how treating the band as the proper unit of determining band customs for elections or membership can exclude some Aboriginals, primarily women. It also highlights the importance of a gendered and feminist analysis in Aboriginal discourse. Arguably, courts should not be afraid to probe more deeply where something is announced as “custom”, before accepting it as an accountable and legitimate decision, or as representative of “Aboriginal tradition”. While administrative law should foster respect for band customs, a balance must be

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<sup>90</sup> Others could *apply* for membership if one birth parent was a Saulteau First Nation member, or for a child under 19 to be considered for adoption. The stringent criteria included that they must speak Cree or Saulteau, be knowledgeable of customs or way of life, have a long history of residency on the reserve, or have close community ties. See Napoleon, *supra* note 87 at 250.

<sup>91</sup> *Sawridge v Her Majesty the Queen*, 2008 FC 322, 319 FTR 217.

<sup>92</sup> *Sawridge Band v Canada*, 2001 FCA 338 at para 8, [2002] 2 FC 346.

found in exercising caution, particularly for *Indian Act* band “custom rules” that claim to be representative of Aboriginal communities. Through seeking this balance, Aboriginal administrative law can seek to develop a more nuanced approach in dealing with the complexities of Aboriginal governance and “within band” disputes.

From the above mentioned examples, it seems that courts are willing to interpret and apply the principles of administrative law in a way which respects and incorporates the accountability practices and traditions of Aboriginal communities. Aboriginal practices of stewardship, complementarity, and consensus have already been validated and upheld by certain decisions of Canadian administrative bodies. However, there have also been many examples in which Canadian courts have overturned or criticized the actions of Aboriginal decision makers, despite those decision makers having exercised their power in accordance with the procedures established by their band. Such decisions would most commonly be overturned for having breached one of the traditional principles of administrative law. For example, in *Martselos v Salt River Nation #195*,<sup>93</sup> the Salt River First Nation Council appealed a Federal Court decision allowing the judicial review of the Council’s decision to remove Martselos from office as Chief. Martselos was removed on the basis of 21 alleged grounds, involving contraventions of customs, their constitution, and the orderly administration of the Band. Without evaluating the merits of the allegations, the court found that the actual decision to remove Martselos lacked justification, transparency, and intelligibility, and thus dismissed the Council’s appeal.

A notable example of a situation in which a court will overturn the decision of an otherwise legitimate Aboriginal decision maker is on grounds of bias. Interestingly enough, the courts have acknowledged the unique circumstances of Aboriginal communities, admitting that greater flexibility is often required when applying the test for reasonable apprehension of bias. In *Sparvier v Cowessess Indian Band (TD)*, it was decided that:

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<sup>93</sup> *Martselos v Salt River Nation #195*, 2008 FCA 221, 411 NR 1.

If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in bands of small populations, would constantly be challenged on grounds of bias stemming from a connection that a member of the decision-making body had with one or another of the potential candidates. Such a rigorous application of principles relating to the apprehension of bias could potentially lead to situations where the election process would be frustrated under the weight of these assertions. Such procedural frustration could, as stated by counsel for the respondents, be a danger to the process of autonomous elections of band governments.<sup>94</sup>

This interpretation of bias is more consistent with the realities of Aboriginal communities, as well as notions of fairness and independence, as discussed earlier in this piece. However, despite this concession, there are still forms of bias which the court will deem unacceptable. In the *Sparvier* case, quoted above, a tribunal member voluntarily decided to abstain from participating in a vote due to his admitted bias against the applicant. The court found that even without having voted, the biased member's participation in the hearing was enough to taint the process and render it invalid.<sup>95</sup> Bias in this sense is understood as meaning a person having formed predetermined notions of guilt, rather than having a connection with someone outside of the decision making process. This was also the case in *Ballantyne v Nasikapow*,<sup>96</sup> where the decisions of an electoral officer to call a referendum and remove the Chief from office were quashed, since she believed that the Chief was guilty of corruption, and was not exercising her duties in an unbiased manner.

From this preliminary overview, it appears that judicial review of Aboriginal decisions often leads to mixed results. Decisions are sometimes overturned due to the decision maker's lack of accountability in the eyes of the court, either to band membership or to band custom, while other times internal procedures are deemed adequately accountable and an attitude of deference is apparent. While the courts do not always articulate alternate visions

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<sup>94</sup> *Sparvier v Cowessess Indian Band (TD)*, [1993] 3 FC 142 at para 64, 63 FTR 242 [*Sparvier*].

<sup>95</sup> *Ibid* at para 61.

<sup>96</sup> *Ballantyne v Nasikapow*, [2001] 3 CNLR 47, 197 FTR 184 (FCTD).

of accountability, such as through stewardship, there is evidence to suggest that there is flexibility within the principles of administrative law to recognize those practices. It remains unclear, however, whether the elasticity and adaptability of Canadian administrative law are sufficient to accommodate the evolution of Aboriginal self-government. More importantly, while it is clear that Aboriginal decision making is subject to administrative law, we have yet to see the extent to which administrative law will be reshaped by its encounter with Aboriginal self-government.

#### IV. CONCLUSIONS

This paper has explored both empirical and normative dimensions of Aboriginal administrative law as an idea (and an ideal). I have considered the extent to which Aboriginal administrative law is a distinct doctrine and the extent to which it ought to be treated as such. My approach has been animated by a commitment to pluralism which I believe lies at the heart of Canadian administrative law. In other words, while the principles of administrative law are arguably universal (e.g., to ensure all public decision making is fair and just, and does not exceed the authority of the decision maker) the application of those principles will be and should be deeply contextual. In the case of Aboriginal communities, core notions of fairness themselves need to be reconsidered, such as the connection between impartiality and the decision maker's knowledge of the party affected by the decision.

My core claim has been that through the encounter between Aboriginal law or custom and Canadian administrative law, each will be affected by the other, and ideally learn from the other. Aboriginal administrative law is the term I employ to capture the mutually reinforcing aspects of Aboriginal and administrative legal principle. I have discussed how this mutuality may be missed (as in *Matsqui*), and where it needs to be further developed (as in the Nisga'a context).

Returning to the bijuralism approach which Borrows urges for the development of Canada's Indigenous constitution, it is clear that Canada's First Nations will need to (re)develop their own administrative law, and that they will do so not in isolation but in dialogue with Canadian administrative law. In this way, Aboriginal administrative law will come more clearly to be a

constitutive element of Canadian administrative law— both familiar to and, I hope, distinct from Canadian administrative law as we now know it.