

The Inherent Right of Unethical Governance

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In Canadian political science, there has been an increasing interest in “ethical governance”.¹ This interest has grown with the unfolding of the sponsorship scandal and the findings of the Gomery Commission.² Questions have been asked as to whether the events that transpired are indications of widespread structural problems within the Canadian political system. As a result, proposals have been made to minimize the potential for future breaches of the public trust so that the credibility to the Canadian political system can be restored.³

But while instances of malfeasance in the Canadian political system should be a concern, they are minor when compared to the existence of “unethical governance” in aboriginal communities across Canada. As will be shown below, the development of aboriginal self-government in Canada has resulted in the documentation of a disproportionate amount of political corruption in native communities. These problems led the former Liberal government to launch the First Nations Governance Initiative in 2001.⁴ While this initiative died with the Liberals’ defeat in the last election, concerns about accountability and transparency in aboriginal governance persist with the new Conservative government.⁵

Despite the magnitude of the problems, the subject has not been extensively examined in Canadian political science. Only a few works document the corruption occurring in many aboriginal communities.⁶ When “unethical governance” is examined, it is often argued that incidents of corruption are exaggerated, or are due to the systemic consequences of colonialist

¹ See, for example, Michael M. Atkinson and Gerald Bierling, “Politicians, the Public and Political Ethics: Worlds Apart”, *Canadian Journal of Political Science* 38(4), December 2005, pp. 1003-1028; CES Frances, “Parliamentarians and the New Code of Ethics”, *Canadian Parliamentary Review* 28(1), Spring 2005, p. 11; Maureen Mancuso, “Contexts in Conflict: Public and Private Components of Assessment in Ethical Judgements”, *Journal of Canadian Studies* 39(2), Spring 2005, pp. 179-205; Paco Francoli, “Government should have new charter of values: Savoie”, *The Hill Times*, 754, September 13-September 19, 2004, p. 1.

² Thomas S. Axworthy, “The Responsibility Crisis in Canada”, *Canadian Parliamentary Review*, 28(2), Summer 2005, p. 7.

³ See, for example, the June 2005 issue of *Policy Options* entitled “The Gomery Effect” with articles by Desmond Morton, Antonia Maioni, L. Ian MacDonald, François Beaudoin, Heather MacIvor, and Nik Nanos.

⁴ Dwight Dorey, “Why Congress of Aboriginal Peoples supports Nault’s bill”, *The Hill Times*, 694, July 7, 2003.

⁵ See www.conservative.ca/EN/2692/41651 (accessed May 12, 2006) for a discussion of the Conservative Government’s “Aboriginal Affairs Principles”.

⁶ The most well known work is Tom Flanagan’s *First Nations? Second Thoughts* (Montreal: McGill-Queen’s University Press, 2000).

oppression by the Canadian state.⁷ The solution proposed is usually a restoration of aboriginal traditions and reduced federal government interference in the lives of the native population.⁸

A neglected explanation concerns the combination of aboriginal cultural traditions with the requirements of much larger, complex and productive societies. Aboriginal social organization was traditionally based on kinship reciprocity – a feature that continues to bring aboriginal self-government into conflict with the legal-rational authority of the modern nation-state. While patronage is clearly “unethical” in the context of liberal democratic government, it is valued in traditional societies as “loyalty” to friends and relatives. It is the kinship basis of personal and traditional forms of authority in native political systems, in fact, that constitutes one of the essential aspects of “difference” being nurtured by aboriginal self-government.

Such a circumstance has been obscured by the intrusion of political advocacy into studies of aboriginal communities.⁹ Because of the current political orientation towards unconditionally supporting aboriginal self-government in recent scholarship, political scientists who expose “unethical governance” in native communities are either ignored or subjected to *ad hominem* attacks and accusations of racism, colonialism or “cultural insensitivity”. This prevents undemocratic character of aboriginal politics from being understood, impeding the analysis of public policies related to aboriginal self-government.

What is “Unethical Governance”?

In discussions about “ethical governance”, terms like “accountability”, “transparency”, “responsiveness”, and “inclusiveness” are used.¹⁰ But what do these terms mean, and how do they relate to “ethics” and “governance”? To answer these questions it is necessary to examine the characteristics of political systems and how they have evolved to incorporate certain ethical principles.

⁷ Chief Stanley Arcand, chairman of AFN Chief's Summit Steering Committee on Financial Accountability, for example, insists that "the vast majority of First Nations in Canada are being well managed financially" since "the government's own records strongly demonstrate this". He then argues that instances of corruption are due to "chronic underfunding, past oppressive and racist legislation, past attempted cultural genocide, and the past kidnapping of our children through residential schools and adoptions [thus claiming first that this is not the case, and then that it is a result of past injustices]". Stanley Arcand, "Don't paint all First Nations with the same damning brush", *The Globe and Mail*, October 30, 1998, p. A25.

⁸ See, for example, Menno Boldt, *Surviving as Indians* (Toronto: University of Toronto Press, 1993) and Dan Smith, *The Seventh Fire: The Struggle for Aboriginal Government*, (Toronto: Key Porter Books, 1993).

⁹ See Noel Dyck, “Telling it like it is”, in Noel Dyck and James Waldram (eds), *Anthropology, Public Policy and Native Peoples in Canada* (Montreal: McGill-Queen's University Press, 1993), pp. 194-5 for a discussion of this problem. In this article, Dyck specifically mentions that anthropologists routinely do not mention the “misuse of band funds and other resources” for fear that it will negatively impinge upon the political gains aboriginal organizations have made. Albert Howard and I also have attempted to outline this circumstance in “The Aboriginal Industry's New Clothes”, *Policy Options*, March 2002, pp. 30-35.

¹⁰ See, for example, Marcus Taylor, “Good Governance in a Globalizing Era”, in Janine Brodie and Sandra Rein (eds), *Critical Concepts: An Introduction to Politics* (Toronto: Prentice Hall, 2005). In this article, Taylor uses the words “good governance” instead of “ethical governance”.

The discipline of political science generally defines “governance” as an organized and specialized activity designed to resolve political disputes through binding public decisions.¹¹ Such a definition distinguishes between “public decisions” and private arrangements because the latter are voluntary, while the former are not. As is indicated by the above definition, government dictates are imposed upon the entire political community; individual members of a society do not have a choice as to whether or not they abide by the decisions made by government decisions. Consequently, disputes between groups with conflicting interests can be contained, and disruptions to the social order minimized.

Associated with the term “government” and its role in making binding public decisions are two other important concepts – law and the state. Laws are the definitive and written expression of the government’s public and binding decisions, while the state is the collection of institutions that “successfully uphold a claim to the monopoly of the legitimate use of physical force” for a permanent population within a defined territory.¹² Laws, therefore, are required to specify the nature of these decisions and how they should be carried out; the state, on the other hand, ensures that the population in a territory that is governed is, in fact, “bound” by the decisions that are made. State institutions such as the military, the police force, the courts and the penal system employ coercion to ensure that the laws passed by the government are obeyed.

This capacity of a government to make laws, and the state to enforce them, is related to what is referred to as “sovereignty” in political science. Sovereignty has been defined as “the authority to override all other authorities” or the “bundle of powers associated with the highest authority of government”, including “the power to enforce rules” and “the power to make law”. It also pertains to “control of all the normal executive functions of government such as raising revenue, maintaining armed forces, minting currency, and providing other services to society...sovereignty always means the power to deal with the sovereigns of other communities as well as the right to exercise domestic rule free from interference of other sovereigns”.¹³ As Janine Brodie explains,

there is no question or debate about the right to exercise power where sovereignty has been established. In feudal societies, power and authority were dispersed and divisible, often shared and struggled for among the nobility, the monarch, and the Church. Gradually, from the fifteenth to the seventeenth centuries, coinciding with the demise of feudalism and the ascendancy of capitalism, political power began to consolidate both territorially and practically within the early predecessors of the modern state.¹⁴

¹¹ Mark O. Dickerson and Thomas Flanagan, *An Introduction to Government and Politics: A Conceptual Approach*, Sixth Edition (Toronto: Nelson-Thomson, 2002), p. 19; Fred Judson, “Political Regimes”, in Brodie and Rein (eds), *Critical Concepts*, p. 80; Eric Mintz et al, *Politics, Power and the Common Good* (Toronto: Pearson-Prentice Hall, 2006, p. 29; Robert Jackson and Doreen Jackson, *An Introduction to Political Science: Comparative and World Politics, Fourth Edition* (Toronto: Prentice Hall, 2003), p. 8.

¹² This definition is drawn from the one initially provided by the German sociologist Max Weber, but then quoted in Jackson and Jackson, *An Introduction to Political Science*, p. 15. For a similar definition, see also Dickerson and Flanagan, *An Introduction to Government and Politics*, p. 47.

¹³ Dickerson and Flanagan, *An Introduction to Government and Politics*, pp. 44-45.

¹⁴ Janine Brodie, “Power and Politics”, in Brodie and Rein (eds), *Critical Concepts*, pp. 10-11.

Notions of “sovereignty”, therefore, are related to the consolidation of political power and its deployment through state institutions.

But how is governance, as well as the related concepts of law, sovereignty, and the state, related to ethics? Ethics concern “the moral principles governing or influencing conduct”. Therefore, determining if “ethical governance” exists would involve making a value judgment as to whether or not “binding public decisions” were being developed and carried out in accordance with principles considered to be morally acceptable.

Morally correct behaviour with respect to governance in Canada is closely linked to the principles of what is known as “legal-rational” forms of authority.¹⁵ Political systems that are based on legal-rational principles are different from those that are governed by “traditional” forms of authority because the former are circumscribed by law, while the latter rely on custom, heredity and the personal attributes of leaders.¹⁶ In systems based on legal-rational principles “authority is attached to offices rather than to the individuals occupying them” and there is “a formal and abstract conception of legal order existing and having significance apart from the interests of individual persons”.¹⁷ In such a political system, “written rules govern conduct in almost all settings, decisions are made consistent with rules rather than on a case-by-case basis, and exceptions to rules require formal justification, sometimes in new rules. The constraints that action must be consistent with rules, that rules must apply to every case, and that the rules themselves must remain consistent hold in organizations of all kinds”.¹⁸ With systems based on traditional authority, on the other hand,

what rules exist are those that have operated in the past; often, tradition demands only obedience to a traditionally designated individual, such as hereditary chief, who remains free to make whatever choices he desires except that he, too, is bound to respect tradition and precedent. There is no requirement that rules be consistent, and appeals made to those exercising traditional authority are made personally, not as matters of principle....¹⁹

¹⁵ This type of authority was identified with Max Weber along with two other types – traditional and charismatic. Charismatic authority is also vested in individuals, but in “the personal qualities of the charismatic leader, rather than in tradition or in birth”. Because charismatic authority is not necessary to our discussion of aboriginal governance, it will not be discussed in this paper. For a further elaboration upon this type of authority, see Brodie, “Power and Politics”, in Brodie and Rein, *Critical Concepts*, p. 9.

¹⁶ Brodie, “Power and Politics”, pp. 8-9; Mintz, *Politics, Power and the Common Good*, p. 16; Jackson and Jackson, *An Introduction to Political Science*, pp. 12-14.

¹⁷ Peter M. Blau and Marshall W. Meyer, *Bureaucracy in Modern Society, Third Edition* (New York: Random House, 1987), pp. 64-65.

¹⁸ Blau and Meyer, *Bureaucracy in Modern Society*, p. 64. University of Toronto political scientist Graham White identifies seven principles associated with legal-rational authority: 1) “Hierarchical with Power Concentrated at the Top”; 2) “Extensive, Written, Impersonal Rules and Procedures”; 3) “Authority based on Office-Holding”; 4) “Compartmentalization and Division of Labour”; 5) “Merit”; 6) “Adversarial Challenging of Assertions and ‘Rational’ Evaluation of Evidence”; and 7) “Maximum Public Release of Information”. For a further discussion see Graham White, “Culture Clash: Traditional Knowledge and EuroCanadian Governance Processes in Northern Claims Boards”, paper presented at the “First Nations, First Thoughts” Conference, Centre of Canadian Studies, University of Edinburgh, May 2005, pp., 13-20.

¹⁹ Blau and Meyer, *Bureaucracy in Modern Society*, p. 65.

It is important to note, however, that a “traditionally designated individual” is not “bound” like those who are subject to the law in modern societies. As will be explained in more detail below, people who act in a manner contrary to customary patterns of behaviour in traditional societies can be shamed, ostracized or even subjected to violent retribution, but there is no state apparatus to ensure that they conform to “tradition and precedent”.

Although forms of traditional authority exist in modern societies (i.e. the “Crown” is a remnant of hereditary leadership), there has been a general trend for them to be replaced by legal-rational principles because of the increasing productivity, size and complexity of societies.²⁰ In small societies where everyone knows everyone else, and there is constant interaction in the context of little social change, personal forms of authority can be used to ensure cooperation. But as a society grows it is no longer possible to maintain social cohesion and cooperation through face-to-face contact. Impersonal and abstract rules must be developed to regulate the interaction of strangers in new situations, since forms of dispute resolution for past social relationships no longer apply. As Peter M. Blau and Marshall W. Meyer explain, “change undermines traditional authority because such authority is basically rigid and does not readily adjust to new situations. This is the case whether change is caused by foreign enemies, major technological innovations, basic economic developments, or some other alteration in social structure”.²¹ Legal-rational forms of authority are adaptable, on the other hand, because they are rooted in abstract principles that can be reworked with standardized procedures if they are not effective in meeting new social requirements.

Besides the difficulties of adapting past practices to new situations, traditional forms of authority tend to break down because it is difficult to justify them in periods of change. The notion that people should obey a dictate just because it has always been so gains little acceptance when society itself is being radically transformed. Legal-rational forms of authority, on the other hand, are derived from rational principles with universal applicability; they can be justified without reference to the past. Because modern governance can be judged rationally in terms of its ability to achieve results, dictates and policies can be justified even when they have no historical precedent.²²

The best example of the justifiable character of legal-rational authority concerns the principle of merit. Before legal-rational principles were instituted in countries like Canada, bureaucracies were run on the basis of patronage, where positions were awarded according to “kinship, friendship, or personal favour”.²³ The increasing size and productivity of societies, however, meant that governance became more complex, requiring more expertise in public administration. Merit, not one’s personal connections, became the more prominent principle by which appointments to the bureaucracy were made. At the same time, such appointments also could be justified to all people in society. Unlike patronage, which does not benefit those who are not receiving the favour, hiring civil servants on the basis of merit is acceptable even to those who are excluded from employment. This is because, all things being equal, merit enables the

²⁰ Dickerson and Flanagan, *An Introduction to Politics and Government*, pp. 20, 38, Blau and Meyer, *Bureaucracy in Modern Society*, p. 83; Jackson and Jackson, *An Introduction to Political Science*, pp. 286-289.

²¹ Blau and Meyer, *Bureaucracy in Modern Society*, p. 70.

²² Blau and Meyer, *Bureaucracy in Modern Society*, p. 65.

²³ Dickerson and Flanagan, *An Introduction to Politics and Government*, p. 482.

bureaucracy to operate more efficiently and effectively, which is a benefit to all members of society.

Although traditional forms of authority are seen as being inconsistent with “ethical governance” in modern societies, they still exist in many developing countries. As Jackson and Jackson explain, “many countries have not developed an ‘ethical’ model of bureaucratic behaviour, and bribery and to some degree corruption are standard methods of getting things accomplished”.²⁴ These systems have not developed forms of government based on legal-rational principles that “[separate] the personal interests of an individual from his official or organizational role”, where “a person’s private acts, such as acquiring a financial interest in a firm doing business with government, may be viewed as compromising his or ability to carry out official responsibilities”. In traditional societies, there is no such thing as being in a “conflict of interest” because there are “few rules and no conception of official responsibilities apart from personal interest”.²⁵ The expectation is that resources will be distributed according to what has been called “patron-client relationships”, where “relatives or those with higher status provide those with lower status protection, goods and services in return for loyalty, obedience and other services such as voting according to instructions during voting campaigns”. It has been observed that

when modern bureaucratic practices are superimposed on such cultures, distortions arise. Officials from each group or kinship line regard themselves as representatives of that association, and therefore use their office to enhance the well-being of their own people. Subversion of the rules becomes standard as bureaucrats are forced to choose between the principles of rational bureaucracy and the cultural exigencies of their patron-client relationships...Relatives and patrons are simply expected to find employment and promotion for their friends. Public office holding is thus a means of legitimately enriching both oneself and one’s friends. Westerners are likely to describe these distortions in pejorative terms such as bribery, nepotism and corruption.²⁶

The existence of nonrational forms of authority in modern governance is also perceived as being “unethical” because of its inconsistency with democratic precepts. Legal-rational forms of authority and democracy are connected, since a fundamental principle of democratic governance is the rule of law. The rule of law is based on the idea that citizens “should be subject to known, predictable, and impartial rules of conduct rather than to the arbitrary orders of particular individuals”, ensuring that both “rulers and the ruled are subject to the law”.²⁷ Such a principle is essential for democracies since “it prevents rulers from using their coercive power arbitrarily against those who are the object of their dislike” and punishing people just because of their personal attributes.²⁸ It also prevents citizens from coercing and intimidating one another, enabling individual autonomy to be maximized within “a stable, ordered society in which we can plan our lives with reasonable expectations about how others will respond to our initiatives”.²⁹

²⁴ Jackson and Jackson, *An Introduction to Political Science*, p. 303.

²⁵ Blau and Meyer, *Bureaucracy in Modern Society*, pp. 64-5.

²⁶ Jackson and Jackson, *An Introduction to Political Science*, p. 308.

²⁷ Mintz et al., *Politics, Power and the Common Good*, p. 103.

²⁸ Dickerson and Flanagan, *An Introduction to Politics and Government*, p. 95.

²⁹ Dickerson and Flanagan, *An Introduction to Politics and Government*, p. 97.

It should be pointed out that drawing such a distinction between “modern” and “traditional” political systems not mean that the former are immune from corruption. As the sponsorship scandal and numerous other examples indicate, charges of “conflict of interest” and “breach of trust”, as well as problems with accountability and transparency, abound. However, when these incidents occur they are viewed as being a violation of fundamental principles. Once detected, intensive questioning is publicly undertaken, inquiries are held, and wrongdoers are punished. If the breach is of a serious enough nature, proposals are made to prevent a recurrence. As is pointed out in an introductory political science text,

no society manages to live up to the ideal of the rule of law at all times. Perpetrators of crimes sometimes go unpunished, and innocent people may be punished for actions they did not commit...The wealthy or the well placed may succeed in skirting the law by exerting personal influence. Those in government may use their position to obtain special privileges for themselves. But an ideal is no less important if it is not fully adhered to. Things, after all, would be much worse if no one even tried to live up to it. An ideal still retains its validity as a means of judging the performance of the government.³⁰

The fact that “the ideal of the rule of law” exists is what distinguishes modern forms of governance from traditional political systems. This is also the distinction that needs to be made between aboriginal and Canadian governance. As will be shown in the following section, the authority existing in aboriginal communities is traditional and personal, not legal-rational, in character. Consequently, aboriginal governance would be considered “unethical” in the modern context.

Is there an “Inherent Right” of Aboriginal Self-Government?

In discussions about aboriginal self-government, it is generally argued that this right is “inherent”. The right is described as being “inherent” because it is alleged to have originated “within the Aboriginal nations” (often as a gift from “The Creator”) and therefore “constitutional provision serves to recognize, delimit, and protect the right rather than create it”.³¹ This view about the source of the right are then used to maintain that it should not be circumscribed by federal, provincial or territorial governments in Canada and subordinated to their powers. On the contrary, those assuming that the aboriginal right to self-government is “inherent” maintain that it should be “sovereign within its sphere”.³² As Ovide Mercredi and Mary Ellen Turpel explain,

we can never be truly self-governing under a form of government delegated by Parliament. The inherent right to govern means that we do not need Parliament's permission to run our own affairs, although we have a political relationship with the Crown through our governments. It means that our rights come from our own people,

³⁰ Dickerson and Flanagan, *An Introduction to Politics and Government*, p. 98.

³¹ Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa: Supply and Services, 1992), p. 16.

³² C. Dunn, “Is There an Inherent Right of Aboriginal Self-Government”, in C. Dunn, *Canadian Political Debates* (Toronto: McClelland and Stewart, 1995), p. 22.

our own past; they cannot be delegated from the federal or provincial governments as some kind of handout.³³

Because declarations about the inherency of self-government are based on the premise that native governance existed before contact, assertions about the truth of this circumstance are prominent in the literature. In the introduction to a recent edited volume on aboriginal self-government, for example, John Hylton maintains that “the history of Aboriginal self-government in Canada can be traced to a time well before settlers first came to this land” and “there is significant evidence, including Western ‘scientific’ evidence, that Aboriginal cultures, economies, and political systems existed for thousands of years before Europeans discovered what one Aboriginal legend calls Turtle Island”.³⁴ The next article in the volume by Bradford Morse supports Hylton’s claim, stating that “...no one today can question that self-governing nations existed throughout the Americas before the arrival of Europeans...”. According to Morse, “the original nations of what is now called Canada governed this land with care and reverence for thousands of years before the arrival of newcomers from Europe”.³⁵

Although it is maintained that there is “significant evidence” to show that aboriginal self-government existed before contact, what is striking is how little support is provided to show that this was the case.³⁶ In the entire volume edited by Hylton, in fact, the only “evidence” provided is the selective use of information from historical legal documents that aboriginal peoples were referred to as “Nations”.³⁷ What is not mentioned is that these documents also referred to aboriginal peoples as “Tribes” – societies organized according to kinship, not governed by laws enforced by a state. In addition, information is provided that actually contradicts assertions about the existence of pre-contact aboriginal governance. One article argues that in hunting and gathering societies “no one drafts or enforces laws or rules, and there is no formal, structured government” and “each member of the society must decide how he or she will or will not participate in communal activities” since “participation...is voluntary”.³⁸ Another maintains that “aboriginal societies prior to contact...had their own ways of ensuring that order was maintained” – ways that were different from the “formalized legal systems that

³³ Ovide Mercredi and Mary Ellen Turpel, *In the Rapids: navigating the future of First Nations* (Toronto: Viking, 1993), p. 95.

³⁴ John H. Hylton, “Introduction”, in Hylton (ed), *Aboriginal Self-Government in Canada* (Saskatoon: Purich Publishing Ltd., 1999), p.1.

³⁵ Bradford W. Morse, “The Inherent Right of Aboriginal Governance”, in Hylton (ed), *Aboriginal Self-Government in Canada*, p. 16.

³⁶ Similarly, in an introductory political science text, Kiera Ladner even maintains that “a growing body of literature shows that Indigenous ideas and practices contributed to how concepts such as rights, liberty, happiness, equality, democracy, and federalism were understood by American founding fathers”. Ladner then just refers to “(Johansen, 1998)” - Bruce E. Johansen’s *Debating Democracy* - to show that there is “much evidence to suggest that these leaders emulated the Haudenosaunee political system of he [sic] Iroquois confederacy”. Ladner, “Rethinking Aboriginal Governance”, p. 45.

³⁷ Morse, “The Inherent Right of Aboriginal Governance”, pp. 16-17. This is also how the political scientist Kiera Ladner uses legal documents. According to Ladner, “referring to Aboriginal peoples as ‘nations,’ the proclamation established in British law the recognition of Aboriginal nationhood”. Kiera Ladner, “Rethinking Aboriginal Governance”, in Janine Brodie and Linda Trimble (eds), *Reinventing Canada* (Toronto: Prentice Hall, 2003), p. 45.

³⁸ Douglas Durst, “The Wellness of Aboriginal Children: Seeking Solutions Through Self-Government”, in Hylton (ed), *Aboriginal Self-Government in Canada*, p. 190.

operate...throughout the Western world” where “positions of authority are occupied by individuals with specialized training”.³⁹

Unquestioned assertions about pre-contact aboriginal governance exist because such notions are consistent with the political climate in which aboriginal issues are currently studied. In the voluminous literature on aboriginal self-government that has emerged since the 1970s, it is taken for granted that separate government institutions should be developed for the native population. This vision, referred to by Alan Cairns as “parallelism”,⁴⁰ assumes that aboriginal cultures and the wider Canadian society can exist separately from one another, and continuously reproduce distinctive economies, political systems and "world views".⁴¹ Parallelist arguments maintain that it is essential for aboriginal governments to develop their own laws without interference from the Canadian state, because they have traditional “ways of life” that differ from the Canadian mainstream. Only by “recognizing” and “respecting” aboriginal differences, can aboriginal peoples assume their rightful place in the Canadian federation.⁴²

The parallelist political vision, however, can only be sustained if aboriginal traditions are shown to be capable of meeting modern requirements. It is for this reason that current scholarship spends a great deal of time examining the history of aboriginal-non-aboriginal relations, and documenting how both European and aboriginal societies had similar kinds of institutions. The Royal Commission on Aboriginal Peoples, for example, finds from its extensive historical analysis that "Aboriginal societies were self-governing nations and conducted themselves as such. Confederacies, leagues and alliances were formed...and rules of law governed within the nations".⁴³ This assumption also forms the basis of the Royal Commission’s claim that aboriginal rights to self-government are "inherent". Aboriginal self-government is an "inherent right", according to the Royal Commission, because "it finds its ultimate origins in the collective lives and traditions of Aboriginal peoples themselves rather than the Crown or Parliament. More specifically, it stems from the original status of Aboriginal peoples as independent and sovereign nations in the territories they occupied".⁴⁴

Much of the support that the Royal Commission uses for this assertion, however, does not come from “Western ‘scientific’ evidence”, but is obtained from aboriginal oral accounts heavily influenced by unverifiable native spiritual beliefs. It uses the arguments from an aboriginal organization, for example, to put forward the view that "sovereignty" is "the original freedom conferred...by the Creator rather than a temporal power". The Royal Commission then maintains that

³⁹ Jonathan Rudin, “Aboriginal Self-Government and Justice”, in Hylton (ed), *Aboriginal Self-Government in Canada*, p. 203.

⁴⁰ Alan C. Cairns, *Citizens Plus* (Vancouver: UBC Press, 2000), pp. 70-3, 117, 132.

⁴¹ In a review of Cairns’ book *Citizens Plus*, Michael Murphy notes that parallelism’s “primary metaphor of a nation-to-nation relationship governed by treaties conjures up the image of a mini-international system of separate communities whose paths never converge”. Michael Murphy, *Canadian Review of Sociology* 25(4), Fall 2000, p. 517.

⁴² Tim Schouls et al., “The Basic Dilemma: Sovereignty or Assimilation”, in D. Engelstad and J. Bird (eds), *Nation to Nation* (Concord: Anansi, 1992), p. 14.

⁴³ *Report of the Royal Commission on Aboriginal Peoples [Final Report]* (Ottawa: Supply and Services, 1996), 4, p. 131.

⁴⁴ *Final Report*, 2(1), p. 166.

as a gift from the Creator, sovereignty can neither be given nor taken away, nor can its basic terms be negotiated. This view is shared by many Aboriginal people, whose political traditions are infused with a deep sense of spirituality and a sense of the interconnectedness of all things. Such concepts as sovereignty, self-government and the land, which for some Canadians have largely secular definitions, all retain a spiritual dimension in contemporary Aboriginal thinking.⁴⁵

But in the absence of these unverifiable spiritual beliefs, is it really accurate to imply that aboriginal groups had obtained a comparable level of political development as Europeans before contact by maintaining that they consisted of "sovereign nations" with "governments" operating according to the "rule of law"? Before the 1970s, for example, aboriginal groups were generally referred to as bands or tribes, rather than nations, since they were organized according to kinship not property relations and territory.⁴⁶ The Royal Commission, in fact, often refers to aboriginal groups as "tribal nations", obscuring the fundamental difference between these two forms of political organization.

The Royal Commission's assertion that aboriginal groups were "sovereign" would also be challenged by political scientists not influenced by the political climate in which aboriginal governance is currently studied. As was mentioned earlier, "sovereignty" in political science generally has been conceptualized as an aspect of societies with states,⁴⁷ and there is no evidence that any such institution existed in North America before contact.⁴⁸ And glossing over the absence of state institutions in pre-contact aboriginal groups is not just omitting a minor detail in analyzing aboriginal-non-aboriginal relations. As the anthropologist Morton Fried explains, "a state is not simply a legislature, an executive body, a judiciary system, an administrative bureaucracy, or even a government... a state is better viewed as the complex of institutions by means of which the power of the society is organized on a basis superior to kinship".⁴⁹ He goes on to point out that

⁴⁵ *Final Report*, 2(1), p.109. The aboriginal organization that provided the assertion that sovereignty was "conferred...by the Creator" was the Chiefs of Ontario.

⁴⁶ I have elaborated upon this point earlier, and it will not be undertaken again here. For a further discussion of this point see Frances Widdowson, "Inventing Nationhood: The Political Economy of Aboriginal Self-Determination in the Context of Quebec Sovereignty", Paper Presented at the Annual Meeting of the Canadian Political Science Association, June 2004.

⁴⁷ Mark O. Dickerson and Thomas Flanagan, *An Introduction to Government and Politics*, pp. 44-55.

⁴⁸ This circumstance was glossed over by the Royal Commission, which maintains that there were "few pre-existing centralized state structures among the indigenous inhabitants" of North America before contact. The reference to "centralized" leaves open the possibility of state structures existing, but being decentralized. A state was not even present for those groups that made up the Iroquois Confederacy after an increased rate of development had occurred after contact. As Eric Wolf explains, "the bonds that tied [the Iroquois Confederacy] together were those of kinship and of ceremonial" where "cohesion was created by ritual means. Ritual could create politically viable ties as long as political interests worked in a common direction. It could not, however, furnish these populations involved in the contradictions of fur trade and politics with any mechanism for making the temporary consensus binding for all parties. Sophisticated as they were in council and warfare, the Iroquois had not succeeded in creating a state, and in competition with more centralized political entities they found themselves at a disadvantage". Eric Wolf, *Europe and the People Without History* (Berkeley: University of California Press, 1982), p. 170.

⁴⁹ Morton Fried, *The Evolution of Political Society* (New York: Random House, 1967), p.229.

to the extent that a stratified society lacks formal and specialized mechanisms of control it courts disaster, for in the face of weakening bonds of kinship, in face of the commonplace realization that the web of kin cannot contain the enlarged population or the increasing numbers of others, of non-kinsmen in the society, it becomes a question of developing formal, specialized instruments of coercion or reverting to a more easily maintained system of access rights to basic resources. It is the task of maintaining general social order that stands at the heart of the development of the state. And at the heart of the problem of maintaining general order is the need to defend the central order of stratification – the differentiation of categories of population in terms of access to basic resources. Undoubtedly...one means of doing this is to indoctrinate all members of society with the belief that the social order is right or good or simply inevitable. But there has never been a state which survived on this basis alone. Every state known to history has had a physical apparatus for removing or otherwise dealing with those who failed to get the message.⁵⁰

Although the absence of state structures in aboriginal societies before contact challenges the notion that these groups could be "sovereign nations", the question of whether or not "governance" and "laws" existed at this time is more debatable. These concepts are defined more loosely, and determining their existence (or absence) depends upon the criteria employed. Morton Fried has pointed out that the definitional problem has been compounded by the fact that a number of social scientists oppose any evaluation of different cultures and consequently "raise objections at the point at which some primitive cultures are said to lack one or more...institutional sectors". A number of these objections have centred around "assertions that specific cultures or societies of certain levels of developmental complexity lack law or state organization". According to Fried, "in recent years, those who view law as a universal complement of culture have tended toward philosophical idealism and cultural relativism, whereas those who would restrict the appearance of law to a more rigid set of criteria have tended to be philosophical materialists favoring some theory of cultural evolution".⁵¹

Attempts to define the nature of law and understand its emergence (i.e. the impetus for the formation of the subfield of legal anthropology) began with the jurist Sir Henry Maine's theory that social control evolved "from status to contract"⁵² – a conception that stressed the personal, spontaneous and informal character of earlier forms of social control in contrast with later developments. Such a conception was adopted by the evolutionary anthropologist and lawyer Lewis Henry Morgan (and by extension Karl Marx and Frederick Engels),⁵³ who maintained that legal developments were associated with the transition from kinship-based societies to those organized according to property relations and territory. It was also elaborated upon extensively by the jurist John Austin, who followed the English rationalist philosophers in arguing that law could not be separated from sovereignty, since it required "a paramount and determinate

⁵⁰ Fried, *The Evolution of Political Society*, pp. 230-231.

⁵¹ Fried, *The Evolution of Political Society*, p. 15.

⁵² Rebecca Redwood French, "Law and anthropology", in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Cambridge: Blackwell Publishers, 1996), p. 397.

⁵³ For a discussion of the relationship between the ideas of Morgan, Marx and Engels, see Lawrence Krader, "The Ethnological Notebooks of Karl Marx: A Commentary", in Stanley Diamond (ed), *Toward a Marxist Anthropology* (The Hague: Mouton Publishers, 1979), pp. 153-171.

social locus of command with the power to enforce its directives”.⁵⁴ For Austin, “the important thing is that the sovereign enforces some rule”,⁵⁵ because without an ultimate source of authority, there would be no mechanism to ensure that the commands of the lawgiver were obeyed. This requirement in turn involved “the existence of an independent political society with primary access to power concentrated in the hands of an individual or group” that “constitutes the locus of sovereignty”.⁵⁶ These institutions constituted the formality and regularity necessary to ensure “the party who will enforce [the same sanction] against any future offender is...determinable and assignable”.⁵⁷ As Robertson (following Austin) pointed out, “we have all the elements of a true law present when we point to a community habitually obedient to the authority of a person or a determinate body of persons, no matter what the relations of that superior may be to any external or superior power. Provided that in fact the commands of the lawgiver are those beyond which the community never looks”.⁵⁸

In the twentieth century, Austin’s linkage of law with sovereignty, determinability and assignability was continued by E. Adamson Hoebel, who maintained that two requirements must be met before law could be said to exist - some kind of court no matter how remote from Western conceptions and “the legitimate use of physical coercion” to which the court must be subordinated.⁵⁹ Hoebel then used this “associat[ion of] legality with the application of threat of sanctions by a determinate social body” to claim that all cultures have law.⁶⁰ This assertion, therefore, differed from earlier developments in legal anthropology, which maintained that primitive societies lacked state institutions that asserted a monopoly over the legitimate use of force within a defined territory.

Hoebel’s attempt to develop the universal characteristics of law was debated by a number of legal anthropologists, the most notable of whom was Leopold Pospisil.⁶¹ Pospisil maintained that law was a “form of decision” with four attributes – legitimacy,⁶² universal intention,⁶³ true

⁵⁴Fried, *The Evolution of Political Society*, p. 18. Austin’s view was similar to Weber’s, which maintained that “a system of authority will be considered as law if it is externally guaranteed by the probability that unusual behavior will be met by physical or psychic sanctions aimed at compelling conformity or at punishing disobedience and administered by a group of men especially charged with the authority for that purpose”. Weber, quoted in Fried, *The Evolution of Political Society*, p. 23

⁵⁵ Fried, *The Evolution of Political Society*, p. 20.

⁵⁶ Fried, *The Evolution of Political Society*, pp. 18-19.

⁵⁷ Austin, quoted in Fried, *The Evolution of Political Society*, p. 152.

⁵⁸ Robertson, quoted in Fried, *The Evolution of Political Society*, p. 19.

⁵⁹ E.A. Hoebel, *The Law of Primitive Man* (Cambridge: Harvard University Press, 1958), p. 470.

⁶⁰ Fried, *The Evolution of Political Society*, p. 17.

⁶¹ French, “Law and anthropology”, p. 400. The most significant work of Pospisil in this regard was *The Anthropology of Law: A Comparative Theory* (New York: Harper and Row Publishers, 1971)

⁶² With respect to legitimacy, Pospisil argued that “a decision, to be legally relevant, or in other words, to effect social control, must either be accepted as a solution by the parties to a dispute or, if they resist, be forced upon them. Such a decision, of necessity, is passed by an individual, or group of individuals, who can either persuade the litigants to comply or who possess power over enforcement agents or the group membership in general to compel them to execute the verdict, judgment of informal decision even over protests and resistance of either or both parties to the dispute. Individuals who possess the power to induce or force the majority of the members of their social group to conform to their decisions I shall call the legal authority. Whereas this authority is formalized and specialized on the state level in our own and in other civilizations, in tribal societies and in some of the state’s subgroups it often coincides with the leadership of various groups that exercises several functions besides the legal one”. Leopold Pospisil, *The Anthropology of Law*, p. 44.

obligatio,⁶⁴ and sanction.⁶⁵ These attributes, according to Pospisil, enabled anthropologists to distinguish law from politics and religion, thus aiding the task of cross-cultural definition.⁶⁶ In characterizing law thusly, Pospisil maintained that not all societies historically had developed law, although they usually had “law-like” processes for repairing social breaches where “one or more of the criteria of law are present and active, yet at the same time one or more of the criteria of law are absent”. Max Gluckman also attempted to make a similar distinction between formal, legal decisions and informal mechanisms for social control by differentiating between “multiplex relationships” and “single-interest relationships”.⁶⁷ “Multiplex relationships” were identified by their “diffuse, multidimensional, and normative” character, and are “common in small face-to-face societies”. “Single-interest relationships”, on the other hand, are “specialized, functionally specific, instrumentalist, and goal-oriented” and “are common in large urban areas”.⁶⁸

Differentiating law from law-like processes is useful, according to Fried, because it enables social scientists to “analytically distinguish legal institutions from those that fall short, thereby assisting in discovering what developments go with others in the evolution of general sociocultural systems”.⁶⁹ One of the most important distinctions to be made is between mechanisms of social control rooted in kinship and those that rely on the authority of the state. As Leslie A. White has pointed out,

in primitive society an injury or a death was avenged by the injured party or by his kinsmen. And in case the actual culprit could not be found for punishment, revenge could be inflicted upon members of his family. In short, in tribal society, vengeance was an affair among kin groups, a private right rather than a public, tribal prerogative. On higher cultural levels, where property is more abundant and is coming to be more

⁶³ This stipulation concerns “demands that the authority, in making a decision, *intend* it to be applied to all similar or ‘identical’ situations in the future”, and pertains to “genuine cases showing the repetitive application of uniform settlements and penalties”. Fried, *The Evolution of Political Society*, p.152. According to Pospisil, “repetitive behavior, based upon the decisions and choices of followers, which is not the subject of the authority’s decision is simply custom”. Pospisil, *The Anthropology of Law*, p. 79.

⁶⁴ Pospisil maintains that this concerns “that part of a decision which states the rights of one party to a dispute and the duties of the other. It defines the social-legal relations between the two litigants as they supposedly existed at the time of the defendant’s violation of the law. It also describes...how the relations became unbalanced by the act of the defendant”. According to Pospisil, true *obligatio*, is the “legal tie between two parties, a tie that manifests itself in the form of a duty on the part of one and a right on the part of the other to a contract or litigation”. Therefore, in Pospisil’s view, “a pronouncement of an authority which gives no one party a right while not stating the duty of the other one is not law even though the attributes of authority and of the intention of universal application are present. Such a statement becomes law only when a duty on the part of someone is implied or included in the decision”. Pospisil, *The Anthropology of Law*, pp. 81-82.

⁶⁵ Fried (following Pospisil) argues that sanction includes the following: “a threatened penalty for disobeying a law or rule”, “measures taken by a state to coerce another to conform to an international agreement or norms of conduct”, or “official permission or approval”. He maintains that “sanctions are distinctly social and usually cultural as well and must be consciously applied, which is to say that, during the course of their formulation or application, the party that applies them does so with awareness of the line of conduct that is to be approved or censured. Not that the sanction will necessarily accomplish its intended end or that it will have no other effects; but there must be a concept of breach or there cannot be a sanction”. Fried, *The Evolution of Political Society*, p. 10.

⁶⁶ French, “Law and anthropology”, p. 400. French notes that Max Gluckman also “stressed the importance of generalized concepts for cross-cultural comparison”.

⁶⁷ French, “Law and anthropology”, p. 403.

⁶⁸ French, “Law and anthropology”, pp. 400-401.

⁶⁹ Fried, *The Evolution of Political Society*, p. 145.

significant in social relations, the rule of a life for a life, an eye for an eye, becomes commuted into money, and the wergild is established in a series of gradations corresponding to the seriousness of the offense...with the advent of civil society private vengeance becomes outlawed, and the state assumes an exclusive right to kill. This applies both to personal vengeance and private ‘wars’, such as used to be fought by Scottish clans...The outlawing of private vengeance and wars is one of the best indications that could be cited of the achievement of full status of civil society.⁷⁰

It is by making such a distinction between kinship-based vengeance and state sanctioned violence, in fact, which leads Fried to criticize Hoebel’s contention that all cultures have law. Fried maintains that Hoebel’s assertion is due to an incorrect interpretation of cases. In examining “cases such as describe the reaction of a community to recidivist homicide, which [Hoebel] asserts is the community imposition of a privileged sentence of death”, for example, Fried comes to the conclusion that such a decision does not constitute law since “there is no legitimacy here, for those that carry out the killing of an offender cannot know that they themselves will not suffer the same fate for their act unless they liquidate all of the offender’s relatives who might try to avenge him”.⁷¹ No distinction is made between violence meted out on the basis of “an unspecified, anonymous, undifferentiated aggregation of fellow tribesmen or citizens...or a special social or political mechanism, acting in the name of and by the authority of the society as a whole...”.⁷² As a result, Fried maintains that it “does not seem useful...to identify such action as law though it does clearly pertain to social control”.⁷³

In order for there to be true law, in Fried’s view, there must be a form of authority that is “recognized by the malefactor or those who would avenge him”. A recognition that a malefactor *might* be avenged, Fried argues, is an indication that those who impose a sanction do not have faith in its legitimacy, thus negating one of Pospisil’s criteria for the existence of law. Fried points out that law must be distinguished from actions that are not “binding upon any of the parties except as they are members of a society carrying out the patterns of their culture”, as well as actions where individual cases appear to exist by themselves so that “the only precedents that may be formed are those advanced by outside observers”. It is also not sufficient to point to violence being carried out against an offender because “while law without sanction is chimerical, sanction itself cannot define law”.⁷⁴ As Pospisil points out, “sanction alone cannot define a social phenomenon as law for the simple reason that many political decisions which are made *ad hoc*, without the leader’s intention to apply them to future ‘same’ or similar situations, certainly are not laws, because they lack one of the most essential legal attributes, which I have identified broadly as the ‘intention of universal application’”.⁷⁵

⁷⁰ Leslie A. White, *The Evolution of Culture* (New York: McGraw Hill, 1959), pp. 316-17.

⁷¹ Fried, *The Evolution of Political Society*, p. 90.

⁷² White, *The Evolution of Culture*, p. 232.

⁷³ Fried, *The Evolution of Political Society*, p. 90.

⁷⁴ Fried, *The Evolution of Political Society*, p. 91.

⁷⁵ Pospisil, *The Anthropology of Law*, p. 87. Marshall Sahlins makes a similar point with respect to groups in Fiji, where he notes that “given pervasive rivalry in the village, the private right to secure redress and the chief’s only limited command of force, the traditional chief’s peace was an uncertain business, depending largely on the willingness of contending parties to adhere to it”. Sahlins, quoted in Fried, *The Evolution of Political Society*, p. 147.

Fried argues that such a distinction between law and “law-like” processes has been impeded because “many distinguished writers have applied the term ‘law’ to customary actions or idealized versions of situations described by informants”. He points out that “Hopi law”, for example, also has been translated as “the way” of the Hopi, which is not really law at all but “the idealized-ideological self-image of the culture in question” where “violations of such standards are more likely to be regarded as normal than would be adherence”.⁷⁶ Fried maintains that claims about the universality of law in all cultures, in fact, are based upon a relativized criteria that either equates law with social control or even goes further to “identify law with general cultural norms”.⁷⁷ This is part of a larger trend in anthropology, where “the profession of ideas went from the identification of custom as an important source and basis for law through the holding of legislation subordinate to custom, finally arriving at the point at which law was figuratively swallowed by custom”.⁷⁸

This trend of “law [being] figuratively swallowed by custom” is a problem, in Fried’s view, because the definition of law becomes so broad as to be an unworkable tool for the ethnographer. For Fried, using a more restrictive definition “is not a matter of determining the ‘true’ meaning of a word but of stating clearly what that word is to mean in our usage and why it is advantageous to use it that way”.⁷⁹ Using Pospisil’s criteria is important, argues Fried, because it underlines “the terrible paraphernalia of law which ultimately intends the destruction of those who do not conform and possesses the physical means to carry it out and to prevent further vengeance”.⁸⁰ It is this coercive character of law and its capacity to bind all members of the community regardless of their kinship relations that is lost in conceptions that equate law and custom.

Such efforts by Fried and other anthropologists to develop a cross-cultural definition of law, however, did not continue beyond the 1970s. As Rebecca Redwood French notes, “by the 1980s, there were many comments about the futility of this area of inquiry and it gradually ceased to be a central concern of legal anthropology”.⁸¹ Instead, more relativistic and subjective

⁷⁶ Fried, *The Evolution of Political Society*, pp. 91-92.

⁷⁷ Fried, *The Evolution of Political Society*, pp. 149, 153.

⁷⁸ Fried, *The Evolution of Political Society*, p. 16.

⁷⁹ Fried, *The Evolution of Political Society*, p. 227.

⁸⁰ Fried, *The Evolution of Political Society*, p. 150. There are, in fact, many examples in anthropological accounts of aboriginal groups in what is now Canada, where vengeance was the mechanism of social control between different kinship groups. In the case of the Northwest Coast, for example, Philip Drucker notes that “there were two courses of action open to an offended group. One was to exact revenge by slaying one of the adversaries, and it was deemed proper to take vengeance not on the person of the killer but rather on a member of his group whose status was as nearly as possible equivalent to that of the victim... The second recourse, usually subsequent to blood vengeance, was to make a settlement through payment of valuables and wealth”. Within the kinship group, however, “in the rare instances in which blood was shed, usually nothing was done about it. The group would not take vengeance on itself, nor demand *wergild* of itself, and there was no higher authority”. Drucker, *Cultures of the North Pacific Coast* (San Francisco: Chandler Publishers, 1965), pp. 71-74. In a case where a “bully” was terrorizing a community, for example, Drucker notes that “there was no formal machinery to punish wrongdoers. People did not know quite what to do about the situation. They talked against [the offender] and refused to cooperate with him, but his rank gave him a certain immunity from physical harm. To the advice and pleas of his elders he turned a deaf ear. Finally the resentment became so obvious and unpleasant that thick skinned as he was he had to leave. Informants do not know what would have happened to a man of lesser rank who behaved [thus]; none ever did”. Drucker, quoted in Fried, *The Evolution of Political Society*, p. 148.

⁸¹ French, “Law and anthropology”, p. 400.

conceptions of law began to take hold, where legal anthropology tended to define law from an “insider perspective” that used concepts from each society’s “legal folk culture” as the basis for analysis. She notes that the subdiscipline “takes as an initial premiss [sic] the assumption that the legal system of the developed Western world does not serve as an adequate model for comparative studies of legal systems”, which “has come at the expense of cross-cultural comparison and integration with Western legal terminology”. In addition, an interest in “legal pluralism” has increased - a circumstance that is related to “the recent outpouring of works on indigenous claims, ethnic sovereignty and human rights”. There also has been a “shift from the case method to a focus on narratives, practices, events and processes” and the development of “an interpretive and hermeneutic approach to law” that “advances a view of law as a distinctive way of ‘imagining the real,’ and focuses on discourse, translation, meaning and what law shows us about local culture, particularly the similarities between ordinary and judicial concepts”.⁸²

Almost all discussions of “law” in pre-contact aboriginal societies have been influenced by these developments. But while “law” is being used in association with the social structures of a number of aboriginal groups,⁸³ what is being referred to would be characterized by Austin, Pospisil and Fried as “custom” or “law-like” forms of social control.⁸⁴ The Royal Commission, in fact, defends its use of the term law to refer to custom in a section on “the rule of law” in the chapter on governance. Drawing heavily on the testimonials of aboriginal peoples (i.e. Fried’s “idealized versions of situations described by informants”), it is maintained that

the traditional laws of most Aboriginal peoples are customary and usually unwritten. They are embodied in maxims, oral traditions and daily observances and are transmitted from generation to generation through precept and example. This practice is often misunderstood. Some outside observers, accustomed to thinking of the law as rules laid down by legislatures and embodied in written statutes, have denied that custom truly can constitute law. They forget that, even in mainstream society, few individuals are familiar with more than a small portion of the written law; in practice, ordinary people conduct their lives in accordance with what amounts to a living customary system. Moreover, English common law, which is the basis of the legal system in Canada outside Quebec,

⁸² French, “Law and anthropology”, p. 402.

⁸³ See, for example, *Final Report*, 1, pp.600, 609, 639-40, 654, 668, 656 for the Royal Commission's application of the word law to aboriginal societies.

⁸⁴ The misapplication of the term law can be seen in the Royal Commission's references to the Mi'kmaq and the Dene. With the Mi'kmaq, for example, the Royal Commission refers to “the symbolic wampum laws of the Mi'kmaq alliances” (*Final Report*, 1, p.50). The following is provided as an explanation: “wampum was made traditionally of quahog (clam) shells, drilled and threaded into strings or woven into belts. Wampum of various colours carried different symbolic meanings. Wampum strings and belts were used as aids to memory and to validate the authority of persons carrying messages between communities and nations” (*Final Report*, 1, p. 91, note 8). But “aids to memory” and indications of status are not the same thing as “law”. No one is obligated to recognize the “symbolic meanings” of wampum or the “authority” of persons carrying it. In its analysis of “The Yamoria Law of the Dene”, the Royal Commission relies on a research study prepared by George Blondin (*Final Report*, 1, p.652) According to Blondin, the Dene have eight “laws”, but as can be seen from a shaded box appearing in the *Final Report*, these eight statements have nothing to do with “law”. Some, like “Law Number Two” - “Do not run around when Elders are eating, sit still until they are finished” - would be more accurately characterized as “good manners” or “ethics”. This would be a “habitual or usual course of action”, or custom, practiced by many families today. Others, such as “Law Number Eight” - “Be happy at all times because mother earth will take care of you” - is similar to many of the meaningless platitudes that adorn household kitsch.

originated as a body of customary law under the supervision of the courts. To this day, it is largely uncodified.⁸⁵

But this conflation of custom with law relies on two incidences of faulty reasoning. The first uses the fact that many individuals in mainstream society are unfamiliar with laws and "conduct their lives in accordance with what amounts to a living customary system" to imply that there can be no distinction between custom and law. The second was the argument that since customs can become laws, customs must somehow *be* laws. But these assertions simply show that laws and customs can co-exist within a society, and that the latter can become the former. This does not mean the two are the same. The fact that we can state that customs can become part of a "legal system" that is "under the supervision of the courts", shows the difference between the two - one concerns sanctions that are "administered by a determinate locus of power", while the other does not since it is just a "habitual or usual course of action" or "established practice".

With respect to the aboriginal cultures being described, no evidence, besides the opinions of aboriginal peoples about their "inherent sovereignty", is provided of there being sanctions "administered by a determinate locus of power".⁸⁶ The Royal Commission itself recognizes that aboriginal leaders act as "guides" or "counsel", since "they typically do not exercise the authority to make unilateral decisions or to impose their will."⁸⁷ This, however, means that there is no "sovereign" to ensure that decisions are binding and commands are obeyed. Instead, "consensus" must be found to obligate members of the group to follow a designated course of action. Such a system is sufficient in small groups that rely on kinship reciprocity, but it breaks down as surpluses increase and larger groups form, requiring more impersonal and standardized procedures, supported by legitimate coercion, to enforce property relations and distribute social resources. Also, because of the greater social complexity brought about by an increased number of occupational groups and social strata, there is more of a need for impersonal and all encompassing rules to regulate behaviour.⁸⁸

The tendency of current scholarship to conflate law with social control, or custom more generally, inhibits an understanding of how dispute resolution and forms of social control were much more developed in Western Europe than they were in North America during the 15th and 16th centuries. It is generally recognized, in fact, that kinship was the basis of aboriginal societies before contact.⁸⁹ Understanding this is important, because it raises questions about whether or not forms of social control based on kinship are compatible with those that require

⁸⁵ *Final Report*, 2(1), p. 120.

⁸⁶ To illustrate the existence of pre-contact aboriginal "laws", the Royal Commission relies on research reports obtained by Paul Williams and Curtis Nelson. This report relies heavily on the opinions of "oral historians", resulting in contradictory and romanticized accounts of pre-contact Iroquois life. For example, at the beginning of this research report, Williams and Nelson state that "The Great Law is not based on precise words but on principles", but then they go on to argue that "in Haudenosaunee society there was a well defined set of constitutional and internal laws that the people as a whole would obey and enforce...". Paul Williams and Curtis Nelson, "Kaswentha", *For Seven Generations* (Ottawa: Libraxis, 1997).

⁸⁷ *Final Report*, 1, p.87.

⁸⁸ White, *The Evolution of Culture*, p.230.

⁸⁹ The Royal Commission, in fact, argues that "Aboriginal societies in Canada were generally either foraging societies — such as those based around seasonal hunting, fishing and gathering — or settled, resource-based communities — such as those based on agriculture. In either case, kinship was the organizing institutional basis of production and consumption". *Final Report*, 2(2), Chapter 4, Section 3.2.

legal-rational types of authority. The state came into existence as a result in increases in scale, productivity and complexity – including the development of stratification - that could no longer be reproduced on the basis of kinship alone. If this is the case, how can aboriginal societies, which are now much larger and embedded within the complex network of economic processes and political relations with the wider Canadian society, “govern” themselves with kinship-based traditional values? What results, in fact, is a form of government that is inherently unethical.

The Inherently Unethical Character of Aboriginal Governance

Earlier on in this paper, it was argued that traditional forms of authority are seen as being “unethical” in the modern context because no distinction is made between personal interests and one’s official or public position. There are no procedures to guard against “conflict of interest” or “breach of the public trust”, since “public property and private property are inseparable; the administrative staff of a chieftain are his personal retainers”.⁹⁰

The disproportionate amounts of what has been called “fraud”, “corruption”, “nepotism” and “mismanagement” in aboriginal politics, in fact, is an indication of the continuation of personal forms of authority in the modern context. Because kinship is the organizing principle in aboriginal culture, one’s personal relationship to those in power tends to determine access to jobs, contracts and housing.⁹¹ There is little appreciation of the need for the universal application of abstract rules; as is the case with all traditional systems based on “patron-client” relationships, “public office holding is...a means of legitimately enriching both oneself and one’s friends”.

This problem, in fact, is recognized by the Royal Commission, which refers to it as the “inappropriate mix of politics and business” in aboriginal communities. According to the Royal Commission,

whether in Inuit, Métis or First Nation communities, it is not difficult to find examples of political leaders interfering with economic development organizations and projects for political reasons - for example, demanding that certain individuals be hired, standing in the way of lay-offs that may be necessary on financial or business-related grounds, or trying to influence the distribution of grants or loans. The result of these interventions is the demoralization of staff, the failure of individual business ventures, and sometimes the undermining of an entire economic development organization. Over the long term, the result is an unpredictable, arbitrary business environment that discourages investment and commitment. There are important, indeed crucial, roles for political leadership - to create and sustain an appropriate environment, establish guidelines, and make important strategic decisions about the direction of development - but they do not lie in day-to-day decisions about economic development.⁹²

⁹⁰ Blau and Meyer, *Bureaucracy in Modern Society*, p. 66.

⁹¹ For an overview of this circumstances in aboriginal communities, see Edward W. Van Dyke, "Families in Other Cultures", unpublished paper (Calgary: Bear-Spike Holdings Ltd., May 1998), p. 2. The paper is in the author’s possession.

⁹² *Final Report*, 2(2), p. 843.

This problem is compounded by the fact that most of the “economic development” in aboriginal communities consists of the distribution of federal transfers. Native “corporations”, for example, are not privately owned, but belong to an aboriginal collective, usually beneficiaries of a land claims settlement. Their mandate is to invest and distribute the money obtained from the federal government in the interests of all aboriginal beneficiaries. Immediately after the settlement is reached, however, pressure is placed on the heads of these “corporations” to distribute funds and award contracts to cronies. Although some organizations do put in place rules and procedures to counterbalance these pressures, such a development means that aboriginal political traditions are being replaced by legal-rational forms of authority.

The most significant example of this problem of “the inappropriate mix of business with politics” occurred in the case of the Inuvialuit land claim in the Western Arctic. Problems with this land claim settlement were raised in the 1980s. In a confidential evaluation of the claim, it was noted that management was reliant on a “traditional aboriginal form of organization whereby business and politics are mixed and whereby all economic and political matters are controlled by a single chief”. According to the evaluation, this

creates the problems of defining the role of the 'leaders'. It is impossible to be a good political leader and a good business leader at the same time. These qualities do not go together in the modern society. The 'leaders' therefore end up being either commercial leaders who loose [sic] touch with the electorate or political leaders who will squander the land claims capital, or both.⁹³

“Squander[ing] of the land claims capital” reached its peak in the early 1990s, when Roger Gruben was chair of the Inuvialuit Regional Corporation. During his tenure with the IRC, Gruben and the vice-President of Finance, Preston Maddin, used their authority to award more than \$1.6 million in bonuses to 25 employees between 1993 and 1995. Of this, Gruben received about \$322,000 and Maddin \$346,000. Although the bonuses were supposedly awarded for a “job well done”, the IRC reported an \$18.5-million loss in 1995.⁹⁴ These circumstances, however, led to a shake up of Inuvialuit Regional Corporation, ending its “inappropriate mix of business and politics” phase. In January 1996, Nellie Cournoyea was elected Chairman and set to work putting in administrative controls and making more responsible investments – i.e. by instituting legal-rational procedures.⁹⁵

Similar problems have also occurred in the case of Makivik Corporation in Northern Quebec and with the Nunavut land claim. In the case of the former, the Makivik President from 1978-82 and 1988-94, Charlie Watt, was the subject of various conflict of interest allegations. Although Watt claimed to be “just a humble hunter”, his salary as president of Makivik was \$120,000 a year plus expenses and he lived in a \$912,000 mansion in Beaconsfield, Quebec. Concerns were raised when it was discovered that the mansion had been bought by the Makivik Corporation, enabling Watt to live there rent free. Watt was also accused of being in a conflict of interest

⁹³ Pedro van Meurs, "'Ten Years IFA' - Successes and Failures, A Report Card", December 1993, p.3. This confidential evaluation is in the author's possession.

⁹⁴ Glenn Taylor, "Former IRC chair under investigation. Roger Gruben: facing tax fraud allegations", *Northern News Services*, August 15, 1997.

⁹⁵ "Inuvialuit profit up: Beneficiaries get \$1.3 million", *Northern News Services*, May 4, 1998.

position with respect to two privately owned companies, Lunakut Inuit Enterprise and Caribou Ungava Ltd.⁹⁶ Lunakut Inuit Enterprise, a company formed to take advantage of construction contracts brought by the Great Whale hydroelectric project, was owned by Watt's son, but the address of its headquarters was Watt's home in northern Quebec, leading to questions as to whether there was a potential for Watt to influence the contracts awarded to the company. Caribou Ungava Ltd., on the other hand, was owned by Watt during his time as the treasurer of Makivik. According to Harry Tulugak, a former mayor of Puvirnituk who ran against Watt in 1991, Watt used his position as treasurer of Makivik to settle one of Makivik's debts. During Watt's tenure as president during 1988-94, he also served as president of Air Inuit Ltd., as well as Chairman of Seaku Fisheries, Uttuulik Leasing, and Kigaq Travel.⁹⁷ Although there were no public complaints about Watt's role in these companies at the time, one could see how Watt's simultaneous position as president of Makivik had the potential to create conflict of interest situations.

With the Nunavut settlement, problems arose in Nunavut Tunngavik Incorporated, the organization developed to oversee the implementation of the land claim. Paul Quassa, who was elected president in 1999, ran up over \$30,000 on Nunavut Tunngavik's Incorporated's credit card during his first ten months in office, \$13,000 of which had been cash withdrawals from bank machines around the country. Although Quassa had used the organization's credit card for numerous personal and family expenses and the \$13,000 in cash withdrawals was completely unaccounted for, he maintained that the scandal could have been avoided if he had just done the required "paperwork". In fact, there was a complete refusal to recognize any wrongdoing on his part.⁹⁸ Such an attitude was reflective of a traditional, as opposed to legal-rational, form of authority, where there is no separation of personal interests from public responsibilities.⁹⁹

What is disturbing about these cases is not that "unethical governance" could be involved, but the fact that both leaders showed complete contempt towards any person who wished to hold them accountable for their actions. Charlie Watt, for example, reacted with anger when questions were raised by rank and file Inuit about the large sums of money spent on a mansion when most of Watt's constituents lived in poverty. Watt, in fact, implied that opposition to his actions were motivated by a grudge against him, and attempted to quash all public criticism.

⁹⁶ Stevie Cameron, "Boss of the North", *Maclean's*, March 28, 1994, pp. 12-14.

⁹⁷ www.liberal.ca/senate_bio_e.aspx?site=senator&id=102 (accessed May 12, 2006).

⁹⁸ Jim Bell, "Paul Quassa's 10-month credit card orgy revealed", *Nunatsiaq News*, December 15, 2000.

⁹⁹ Using government/organizational credit cards for personal also has been a problem for other aboriginal leaders. Ethel Blondin Andrew, an aboriginal cabinet minister with the former Liberal government, used a government credit card for over four thousand dollars of personal expenses, including a down payment on a fur coat. In spite of the questionable nature of the expenditures and the timing of her payments for reimbursement, Blondin-Andrew claimed that she was being "villianized" by opposition members and the media. Another case was Martha Flaherty, long-time president of the Inuit women's association Pauktuutit, who was fired after she admitted buying thousands of dollars worth of goods for herself and her family using Pauktuutit credit cards and that she had double-billed the organization for association-related travel expenses. Ms. Flaherty, however, was unrepentant and claimed she intended to pursue a wrongful dismissal suit. Although her actions were clearly fraudulent, in her defense, Flaherty stated: "I haven't killed anybody, I haven't raped anyone, I never assaulted anyone. This is about money that's recoverable". For a further discussion of these cases see "Minister admits mistake in credit card flap", *Canadian Press NewsWire*, October 31, 1996; "Reform waging campaign of vilification, says Blondin-Andrew", *Canadian Press NewsWire*, November 6, 1996; and Jeff Colbourne, "Problems at Pauktuutit", *News/North*, May 4, 1998, p. A5.

According to Watt, "The discussion didn't go very far... We cut it off very quickly. It should have been raised behind closed doors".¹⁰⁰ A similar response was made by Paul Quassa, when Nunavut's newspaper, *Nunatsiaq News*, questioned him about the details of his inappropriate spending. The Inuit leader maintained that he was being persecuted and that the media had exaggerated what he had done. "You hate my guts, I know. Sticks and stones will hurt my bones but names will never hurt me", Quassa replied when he was asked how he acquired the money to pay back Nunavut Tunngavik. When the newspaper attempted to get him to explain what the \$13,000 was spent on, Quassa said "I've already given [the money] to the board, it's a done deal and I've got no more comments. I'm not accountable to you".¹⁰¹

In addition to aboriginal "corporations", there are numerous other instances of the "inappropriate mixing of business and politics" in aboriginal communities themselves. Because reserve lands are not privately owned, there are ample opportunities for breaches of the public trust if legal-rational procedures are lacking. A number of these problems have been outlined in an article entitled "Conflict on reserve: how to stop it before it happens".¹⁰² The article starts with examples such as "the chief and council and their relatives get all the 'perks'" and "the band manager uses band-owned equipment for his private logging contract". It then asks "does this sound familiar?", taking it for granted that this type of activity is common on reserves.

Throughout the article, advice is offered on how to stop such conflicts before they occur. It first cites Andy Noel, a spokesperson for Indian Affairs, who suggests that band members make written, specific, and dated complaints to the band council, and then keep copies of all correspondence. He also explains that audited financial statements can be requested under the Access to Information Program, and evidence of wrongdoing can be submitted to the RCMP "preferably in writing". Advice is also provided by lawyers Robert Reiter and Jeffrey Rath. Reiter points to the need for "bylaws, codes, policies and powers", as well as conflict of interest rules and "all of the stuff that is in the non-Indian system". Rath, however, cautions that not all documents about the activities of bands can be accessed by members, even under the Access to Information Act:

private documents, like the documents of band corporations, whether the shares are held in trust for all the members or not, are the subject of a private trust and Indian Affairs may or may not have access to them... Indian Affairs doesn't [always] have access to the records or the books of privately held band corporations.

In this case, according to Rath, the only remedy is to pursue the matter through the courts, which can cost as much as \$60,000.

It is important to note, however, that these instances of "unethical governance" concern the band leadership's control of a reserve's economic activity in their own private interests. This has little applicability in many aboriginal communities because there are few productive enterprises. Financial rewards are mostly obtained by working for the band council. Consequently, traditional forms of authority come into play in determining who is selected for the various

¹⁰⁰ Stevie Cameron, "Boss of the North", *Macleans*, March 28, 1994, pp. 12-14.

¹⁰¹ Jim Bell, "Quassa denies getting job-saving loan from Royal Bank", *Nunatsiaq News*, December 22, 2000.

¹⁰² Noah Black, "Conflict on reserve: how to stop it before it happens", *Windspeaker* 14(4), August 1996, pp.18-19.

positions.¹⁰³ Relatives, friends and supporters of the chief are chosen, since many communities do not have job descriptions, conflict-of-interest policies or hiring and complaints procedures.¹⁰⁴ It is not uncommon for all band employees to be replaced if one familial faction on a reserve defeats another in an election.¹⁰⁵

The kinship basis of aboriginal politics also has made it difficult for unions to gain a foothold in native communities, compounding the problem. Unions pose a threat to tribal politics, because class, not kinship, constitutes the basis for membership and political mobilization. As a result, leaders discourage native peoples from joining them on the basis that "unions aren't Native", or are an "instrument of White control". It is also difficult to maintain solidarity within a union when its membership consists of large numbers of aboriginal employees because of the lack of working class consciousness in native culture.¹⁰⁶

As well as employment opportunities, personal and kinship connections often determine perks such as travel benefits and honoraria for meetings. These additional payments can substantially increase the money obtained from working for the band. In the case of the Virginia Fontaine Treatment Centre in Manitoba, for example, funds were used to send 70 employees on a seven-day Caribbean cruise.¹⁰⁷ Such a trip was not new, since staff also had been sent to Australia, Europe and Las Vegas on "professional development" tours.¹⁰⁸ Furthermore, an audit of the centre showed that the president, Perry Fontaine, obtained nearly \$1.2 million in perks over a 29-month period.¹⁰⁹ The dispersal of these perks, the audit argued, were made possible by the "management culture" of the centre, where "virtually no checks or restraints placed on [Fontaine] by the board of directors or other management."¹¹⁰ Once again, these are circumstances indicative of the traditional type of authority that permeates many aboriginal communities.

The existence of this type of authority is further evident in Fontaine's reaction to criminal charges that were brought against him by the RCMP. When he was charged, Fontaine denied any wrongdoing, and placed all blame on the head federal civil servant, Paul Cochrane, who he had bribed to facilitate large transfers to the centre. According to Fontaine, "when you are doing

¹⁰³ J. Anthony Long, for example, found that candidates were "motivated by the prospect of economic gain for themselves and their relatives". Long, "Political Revitalization in Canadian Native Indian Societies", *Canadian Journal of Political Science* 23(1990), p. 761.

¹⁰⁴ Sue Bailey, "First Nations strive for open government, job creation amid reports of mismanagement", *Canadian Press NewsWire*, March 2, 2000.

¹⁰⁵ Strater Crowfoot notes that nepotism is the "sustaining discourse" of reserve politics. According to Crowfoot, "relatives routinely approach those in power for financial assistance. Opposing factions interpret decisions in nepotistic terms and plan to decide the same way when they came to power", whereby defeat results in another family filling the positions. Crowfoot, "Leadership in First Nations Communities", in Rick J. Ponting (ed), *First Nations in Canada* (Toronto: McGraw-Hill Ryerson, 1997), pp. 313-15.

¹⁰⁶ For discussions of the problems of forming unions with mostly aboriginal employees, see Janet Mary Nicol, "Unions Aren't Native: The Muckamuck Restaurant Labour Dispute, Vancouver, B.C. (1978-1983)", *Labour*, pp.235-51; and John Stackhouse, "Norma Rae of the Okanagan", *The Globe and Mail*, November 8, 2001, pp.A14-15.

¹⁰⁷ Paul Barnsley, "Charges laid over Sagkeeng health centre", *Windspeaker*, August 2003, 21(5), p. 14.

¹⁰⁸ Sue Bailey, "The Manitoba Native addictions centre at the heart of a multimillion dollar spending scandal will accept new patients next month", *Canadian Press NewsWire*, March 20, 2004.

¹⁰⁹ Sue Bailey, "The Manitoba Native addictions centre...", *Canadian Press NewsWire*, March 20, 2004.

¹¹⁰ Sue Bailey, "The Manitoba Native addictions centre...", *Canadian Press NewsWire*, March 20, 2004.

business with government, you have to buy them dinner, you have to brown nose them, you have to kiss their ass...They like to play God because they got the taxpayers' money." Fontaine also painted himself as the victim because of his legal expenses and the fact that he had lost his job. He even criticized the RCMP investigation into the foundation, claiming that many people had lost their jobs because of it, resulting in higher levels of poverty, crime and addiction in the community.¹¹¹

Similar denials of wrongdoing and assertions of persecution have accompanied other exposés of “unethical governance”. Chief Florence Buffalo and administrator Bobbi Okeymaw of the Samson Cree Reserve in Alberta, for example, both repeatedly stonewalled questions from *The Globe and Mail* about why 13 leaders received \$1.9 million in salaries, committee fees and employee and travel benefits when 80% of “their people” lived in deplorable conditions. At one point, Ms. Okeymaw expressed anger at the continued criticism, stating: “We are just a community like any other. What about the mayor of Calgary? He makes as much as the chief, and there are homeless people in his city. Is he responsible for them?”.¹¹² Phil Fontaine, Grand Chief of the Assembly of First Nations, made similar comparisons in response to allegations of voting irregularities following the receipt of a \$40,000 tax-free raise after only one year in office, maintaining that it was unfair to focus on his salary when executives around the country were making so much more.¹¹³ Deborah Robinson, the Chief of the Acadia band in southwestern Nova Scotia, also justified her decision to give herself a large raise. When it was revealed that she was receiving a tax free six-figure salary while most of her band lived in poverty she merely stated the following: “I don't owe an explanation to the citizens of Nova Scotia or anyone else in this country”.¹¹⁴

In addition to inflated salaries and top-ups for travel and honoraria, one of the major areas that is impacted by traditional forms of authority is housing. Because most housing in aboriginal communities is not privately owned and largely consists of social housing, there is considerable competition for new allocations. It has been generally observed that the chief and his relatives receive the best houses, while those with no connections live in terribly crowded conditions often without running water.¹¹⁵ This was a problem that I personally witnessed while working for the Northwest Territories Housing Corporation, where housing was supposed to be allocated on the basis of need. What transpired, however, was that people who sat on local housing associations constantly tried to subvert objective allocations so that their relatives could obtain newly available housing units, regardless of their level of need. So pervasive was this problem, in fact, that cynical comments about “relative need” were used behind closed doors in reference to it.

While the above examples show that the existence of traditional forms of authority are causing a great deal of conflict in aboriginal communities, the problem becomes even more apparent when aboriginal forms of “governance” interact with mainstream institutions that operate according to legal-rational principles. This circumstance was evident in the political system of the Northwest

¹¹¹ Paul Samyn, “RCMP lay fraud, bribery-related charges against a former bureaucrat”, *Canadian Press NewsWire*, July 4, 2003.

¹¹² Peter Cheney, “The money pit: an Indian band's story”, *The Globe and Mail*, October 24, 1998, p. A13.

¹¹³ Janice Tibbetts, “Fontaine gets raise after first year as Grand Chief”, *Canadian Press Newswire*, July 1, 1998.

¹¹⁴ *The Globe and Mail*, March 10, 2000, p. A14.

¹¹⁵ Cheney, “The money pit: an Indian band's story”, *The Globe and Mail*, October 24, 1998, p. A13; Flanagan, *First Nations? Second Thoughts*, p. 98-99.

Territories during the 1990s. The territory, because of its large aboriginal population, instituted a system of "consensus government" to be more sensitive to native culture. It was promoted on the assumption that political parties would create racial conflict, while allowing each MLA to run as an independent was consistent with the community-based character of aboriginal politics. The result was a dysfunctional system lacking accountability, where blatant cronyism, squabbling over resources, deal-making and personal vendettas dominated the political agenda.¹¹⁶

These circumstances were brought out into the open in 1998 with what became known as the "Morin affair". In this incident, the Métis Premier of the Northwest Territories, Don Morin, used his authority to favour two cronies with a \$10 million office lease while inappropriately receiving benefits from them. Although Morin's actions would be considered "unethical" in the context of modern governance, he encountered little political opposition at the time. Most MLAs, in fact, refused to criticize the Premier or to support a vote of non-confidence against him, showing more of a concern for their loyalty towards Morin than in upholding ethical principles. Morin also indicated his contempt for legal-rational principles by flatly denying any wrongdoing, challenging the lone MLA who opposed him "to file a complaint" with the Conflict of Interest Commissioner if they had the "guts and political backbone" to do so. Although the Commissioner found Morin to be in a conflict of interest position, which resulted in his resignation, he continued to assert that he had done nothing wrong.¹¹⁷

An even more dysfunctional case of the continuing assertion of traditional forms of authority in the context of a modern institutional setting is the current case of the First Nations University of Canada (FNUC). FNUC is the only aboriginal-controlled university in Canada, but it operates under the ultimate authority of the University of Regina. Although the journalist Stephen LaRose maintains that there were "some early doubts" about the viability of FNUC, it "emerged to become a major player on the Canadian academic scene". In 2004, the university's budget was \$21 million and its enrollment had grown to 1,200 students. The university now operates campuses in Regina, Saskatoon and Prince Albert, and attracts a significant number of students from outside the province.¹¹⁸

These "doubts", however, have resurfaced with the recent events that have transpired at the university. Major problems became public in February 2005, when Federation of Saskatchewan Indian Nations' (FSIN) vice-chief, Morley Watson, took over the campus administration by firing three senior administrators and evicting human resources and finance staff from their offices. At the same time, computer hard drives containing confidential faculty and student records, research and e-mails were copied, and then the office locks were changed.

While such events were perceived as indicating Vice-chief Watson's interference with the day-to-day operations of the university, they also reflected deeper structural problems. This is largely

¹¹⁶ For a discussion of the problems we have identified with "consensus government" in the Northwest Territories, as well as criticisms of our views, see Frances Widdowson and Albert Howard, "Corruption North of 60", *Policy Options*, January-February 1999; Graham White, "The Tundra's Always Greener: A Reply to Widdowson and Howard", *Policy Options*, May 1999; Frances Widdowson and Albert Howard, "Duplicity in the North: A Reply to Graham White", *Policy Options*, September 1999; and Graham White, "Letter", *Policy Options*, March 2000, p.59.

¹¹⁷ *NWT Hansard*, February 4, 1998.

¹¹⁸ Stephen LaRose, "Situation normal, all fnuced up", *This* 39(2), September/October 2005, p. 8

due to the relationship between the Federation of Saskatchewan Indian Nations (FSIN) and the FNUC. FNUC is governed by a much larger board than most universities, and two thirds of the members are chiefs from Saskatchewan aboriginal groups. It is also expensive to run, costing the university somewhere in the area of \$600,000 each year for expenses such as honoraria, travel, and “board development”, among other things.¹¹⁹

This relationship between an aboriginal political organization and an academic institution acts to politicize the latter, leading to problems in hiring, fiscal management and the maintenance of academic freedom. A task force studying the university, for example, found “questionable fiscal controls and an outdated accounting system that provides little management support”, which “may permit individuals to conduct themselves improperly”. It was also pointed out that “personnel policies were either inadequate or not followed”.¹²⁰ Dr. Neil Stonechild, the first professor to teach at the institution, claimed that the firings of administrators had resulted in 19 chiefs appointing close associates who had no experience managing a university. According to Stonechild, “hirings on the basis of political or family connections have begun at the management level ... damaging the reputation and viability of First Nations University”.¹²¹

As well as creating serious financial problems for the university – a leaked report stated that the July 2005 payroll would have bounced if the federal government had not intervened and employee payroll contributions and union dues had not been remitted for the summer months¹²² – the politicization of the university also had serious consequences for academic freedom. According to LaRose, “the problems have started trickling down into the classroom. The board of governors has several times tried to impose gag orders on university staff and students”. The most significant incident was when Blair Stonechild was prevented from presenting a critical paper on the future of aboriginal education at a FSIN conference.¹²³

The case of the First Nations University of Canada provides important insights into the consequences of allowing traditional forms of authority to operate in a modern institution that requires impartial rules to operate effectively. It is clear from the Federation of Saskatchewan Indians’ takeover of the university that personal relationships are replacing standardized procedures, with disastrous consequences for “ethical governance”. Chiefs controlling the FNUC are not concerned with upholding the standards of a modern academic institution. Rather, it is with subverting universally applied rules so that the institution can serve the political interests of the FSIN leadership.

While the problems with the forms of “aboriginal governance” outlined above are extensive and endemic, they have been downplayed until recently. More and more instances of “unethical governance”, however, have made it necessary for some kind of federal government response.¹²⁴ “Accounting discrepancies” all across the country, for example, have been uncovered and it was

¹¹⁹ \$600,000 was the amount reported in the media. However, an interim report produced by the FSIN claimed that this was an exaggeration, but gave no evidence to support this in the report. For a further discussion see Paul Barnsley, “Interim report on First Nations U released”, *Windspeaker* 23(8), November 2005, p. 10.

¹²⁰ Barnsley, “Interim report on First Nations U released”, p. 10.

¹²¹ Stephen LaRose, “New governance needed”, *Windspeaker* 23(5), August 2005, p. 9.

¹²² LaRose, “Situation normal”, p. 8.

¹²³ LaRose, “Situation normal”, p. 8.

¹²⁴ See, for example, Sue Bailey, “Native fraud allegations soar”, *Canadian Press NewsWire*, November 9, 1999.

estimated in 2000 that 183 out of 609 aboriginal communities were in financial trouble.¹²⁵ Although disturbing for those who would assert the necessity of legal-rational procedures in the modern context, such an estimate is probably conservative given the previous Liberal government's reluctance to investigate allegations of corruption in aboriginal communities.¹²⁶ This government tended to adopt a hands-off approach under the auspices that it was not its role to interfere with how aboriginal peoples governed themselves.¹²⁷

An underestimation of the seriousness of the situation is also likely when one considers the national media's underreporting of instances of "unethical governance" with respect to aboriginal peoples. The media are often prevented from interviewing aboriginal people on reserves under the guise that it is "disrespectful", and so the undemocratic character of aboriginal politics is hidden from the public. Furthermore, pressure to be supportive of aboriginal initiatives often leads the media to be uncritical boosters of aboriginal leaders. In the case of Roger Gruben, for example, coverage portrays him as a "savvy", "tough-talking", "impressive" and successful entrepreneur who has been instrumental in developing the Inuvialuit economy,¹²⁸ and there is no coverage of his mismanagement of the IRC once it became public (in 1995). A strong taboo against criticizing aboriginal policy means that even newspapers considered to be right of centre are hesitant to enter into the fray. William Thorsell, for example, in a column in *The Globe and Mail*, admitted that journalists across Canada had been treating natives with "diffident paternalism". Although Thorsell assures readers that the media are beginning to apply "open-minded skepticism rather than benevolent indulgence" in their coverage of aboriginal issues, he notes that this is "risky" since "no one wants to be called an insensitive boor or, more

¹²⁵ Sue Bailey, "First Nations strive for open government, job creation and reports of mismanagement", *Canadian Press Newswire*, March 2, 2000.

¹²⁶ In 1997, the Department of Indian and Northern Affairs had to assume trusteeship of the Fort Albany First Nation in Ontario because in spite of its \$17,486,000 budget for 900 people, it was bouncing cheques. In the wake of allegations of fraud, corruption and neglect, Chief Arthur Scott refused to resign his position and opposed the federal government's intervention with the statement: "I don't like what Indian Affairs is doing to us. They're trying to take us back to the early 1900s. It's like Indian agents, where you simply hand out dog food or whatever to us". Peter Moon, "Reserve headed toward trusteeship", *The Globe and Mail*, September 1, 1998, p.A8.

¹²⁷ The past Liberal government constantly assured the Canadian public that any problems that do exist are temporary, isolated, and superficial. In the case of the Stoney Reserve in Alberta, for example, a July 30, 1997 briefing prepared for Jane Stewart, a former Minister of DIAND, warned that "serious governance and management problems exist at Stoney". Despite the fact that an internal audit had found the band had an operating deficit of \$5.6 million, and that an Alberta judge alleged that the Stoney's chief had stolen band property, taken bribes and withheld services from most community members, Stewart stated that there was no need for a public inquiry because she was "not all keen to see a process put in place where a community, a family's dirty laundry, is aired amongst the whole world". Gordon Laird, "The outlaw: judge John Reilly wanted to expose wrongdoing on the Stoney Reserve. What he didn't realize was that powerful forces, in Ottawa, in Edmonton, and in the band itself, had a vested interest in ignoring the problem", *Saturday Night*, v. 114(5), June 99, p. 64. In the case of allegations of corruption that were made against a number of bands in the Maritimes, the department also declined to become involved, stating that "the department [of Indian Affairs] is not going to tell First Nations how to spend their money," and that accountability would have to emerge through band council elections. "East coast natives gather to question band spending", *Canadian Press NewsWire*, July 14, 2000.

¹²⁸"First Nations ripe with opportunities", *Windspeaker*, 11(7) June 21, 1993 p.3; "Inuvialuit corporation lands largest bank loan for Aboriginal group", *Windspeaker*, 11(17) November 8-21, 1993 p. 11; "Investment firm launched", *Windspeaker*, 11(15) October 11-24, 1993, p. 12; and This land is my land: when Roger Gruben talks, Bay Street listens", *Financial Post Magazine*, March, 1993 pp. 16-22.

likely a racist for treating aboriginal stories without kid gloves".¹²⁹ Many of the instances of unethical governance mentioned above, in fact, were never reported in the national media; the only source that reported corruption in aboriginal communities with any regularity was a periodical from the right-wing fringe – *The Report Newsmagazine*.

Thorsell's fears about being called "insensitive" or "racist" are well founded when one looks at how aboriginal leaders have responded to charges about "unethical governance". In reaction to Judge Reilly's endictment of the Stoney Band, Phil Fontaine maintained that further efforts of critics to highlight the financial problems of the band were an attempt "to discredit First Nations and put into question their ability to govern themselves. And that's racism. Pure and simple".¹³⁰ "Racism" was also the charge of Chief Stewart Phillip of the B.C. Union of Indian Chiefs, when he responded to an article by Jonathon Kay in the *National Post*, which drew parallels between aboriginal politics and "tribal societies...dominated by strongmen who dole out favours to kin and clan".¹³¹ Referring to Kay's column as "misleading and anti-Aboriginal racist drivel", Phillip went on to argue that it was "reprehensible that a national newspaper would allow Mr. Kay to express such patently racist opinions, which are not only grossly ill informed, but...border on promoting hatred against First Nations". But while Phillip was adamant that Kay's opinions were "misinformed" and "misleading", nowhere did he show how this was the case. In fact, Stewart did not even mention Kay's reference to the kinship orientation of aboriginal politics.¹³²

These accusations of "racism" are inhibiting analysts of public policy from developing a clear understanding of aboriginal self-governance. It is not recognized that aboriginal communities are combining the kinship forms of organization that are a holdover from their hunting and gathering traditions with the large surpluses that have been made possible by transfers from much more productive economies and societies. In fact, a great deal of the scholarship on aboriginal self-government maintains that it is not the development of legal-rational forms of authority, but a restoration of aboriginal traditions, that is the solution for creating more functional political systems in native communities. These assertions, however, are based on romanticized conceptions of aboriginal politics that fail to understand the kinship-based character of aboriginal traditions.

You Can't Go Home Again

While there is a large body of literature in political science documenting the differences between legal-rational and traditional forms of authority, this distinction has not been used to more fully understand aboriginal self-governance. One explanation for this circumstance is the extent to which political advocacy has entered into the scholarship pertaining to aboriginal peoples. Because a number of social scientists see their role as selecting information to support the demands of aboriginal organizations, arguments casting doubt on parallel aspirations are generally ignored. A recognition that aboriginal cultures embody traditional rather than legal-

¹²⁹ William Thorsell, "An open look at aboriginal issues", *The Globe and Mail*, October 31, 1998, p. D6.

¹³⁰ Erin Anderssen, "Reform, Fontaine square off over racism", *The Globe and Mail*, April 9, 1998, p. A3.

¹³¹ Jonathan Kay, "A better life for natives - a whiter one, too", *National Post*, June 19, 2002, p.A16.

¹³² This correspondence came from the Joint Policy Council of the Union of British Columbia Indian Chiefs in the form of a letter to the editor of the *National Post* on June 21, 2002. It was distributed on FNR_PUBPOL@YORKU.CA, and is in the authors' possession.

rational forms of authority is avoided since this would lead to the realization that aboriginal self-governance is unworkable in the modern context.

Along with the political advocacy that shapes studies of aboriginal self-governance, there is a tendency to romanticize aboriginal cultures and their political systems. Even scholarship that is critical of the aboriginal leadership tends to see a return to “traditional values” as a solution to these problems.¹³³ The Métis activist and academic, Howard Adams, for example, lambastes the aboriginal leadership as "collaborators" and "compradors", maintaining that they use the authority granted by the federal government to enrich themselves.¹³⁴ He argues that because these leaders are given a free rein by the federal government, the current system "is inclined to attract persons who are opportunists, drifters, hucksters, uncommitted and non-political workers. The flow of easy money and its unaccountability generate a basic rip-off philosophy. Because there is no real direction or purpose in the jobs, a 'free loading' philosophy develops".¹³⁵

But in Adams' view, the problems of “unethical governance” being experienced in native communities have been entirely created by European influence. This is because he believes that

before the Europeans arrived, Indian society was governed without police, without kings and governors, without judges, and without a ruling class. Disputes were settled by the council, among the people concerned. Indian government was neither extensive nor complicated, and positions were created to ensure effective administration for a given period of time. There were no poor and needy by comparison with other members, and likewise no wealthy and privileged; as a result, on the prairies there were no classes and no class antagonisms among the people. Members of the community were bound to give each other assistance, protection and support, not only as part of their economics, but as part of their religion as well. Sharing was a natural characteristic of their way of life. Each member recognized his or her responsibility for contributing to the tribe's welfare when required, and individual profit-making was unknown. Everyone was equal in rights and benefits. Some native communities still function communally in this manner, particularly in poor areas. Very few members see themselves apart from the community and attempted to accumulate material wealth for themselves.¹³⁶

These values and practices were eroded, according to Adams, by a "white supremacist society" that wanted to destroy aboriginal culture. For Adams, therefore, the solutions to aboriginal problems lie in restoring aboriginal political institutions, spirituality and their "indigenous lifestyle[s]".¹³⁷

Much of the reaction to instances of “unethical governance” within native communities is based on assumptions very similar to Adams’ - that corruption has been caused by European influences

¹³³ For some critical observations of the native leadership see James Burke, *Paper Tomahawks* (Winnipeg: Queenston House Publishing, 1976), pp. 111, 164; Doug Daniels, "Dreams and Realities of Dene Government", *The Canadian Journal of Native Studies* 7(1), 1987, pp.95-110; and Jeremy Hull, *Aboriginal People and Social Classes in Manitoba* (Canadian Centre for Policy Alternatives, 2001).

¹³⁴ Howard Adams, *Prison of Grass* (Saskatoon: Firth House Publishers, 1989), p. 184.

¹³⁵ Adams, *Prison of Grass*, pp.185-6.

¹³⁶ Adams, *Prison of Grass*, p.22.

¹³⁷ Adams, *A Tortured People: The Politics of Colonization* (Penticton: Theytus Books, 1999), p.79.

since pre-contact aboriginal societies shared resources, and individuals did not accumulate material wealth. These traditional aboriginal societies, often characterized as “communal” and “egalitarian”, are perceived to have been destroyed through colonization - i.e. the imposition of "colonial institutional structures, philosophies, and norms" on aboriginal political systems.¹³⁸ The political scientist Kiera Ladner even argues that federal government policies “in effect meant replacing inclusive, consensual, and democratic Indigenous political systems with the undemocratic and unrepresentative system of the colonizers”.¹³⁹ As a result of these kinds of assertions, it is believed that the key to solving the current political abuses in native communities is for aboriginal peoples to reject "European" values such as individualism and revert to their traditional forms of political organization.¹⁴⁰

These views, however, rely on a misunderstanding of historical circumstances. While aboriginal societies before contact were without class divisions, not all classless societies are socialistic. Aboriginal societies were actually pre-class - where distribution was determined by kinship relations. All human societies characterized by Neolithic technology and subsistence economies have shared resources communally and made decisions by “consensus”. This did not come about because of a socialistic or spiritual "world view" separate from material circumstances, but because sharing was necessary for group survival in small hunting and gathering bands and horticultural settlements. It was due to the fact that production with stone tools was too meagre for wealth to be accumulated. As soon as aboriginal peoples acquired Iron Age technology and participated in a market economy, economic differentiation and "hierarchies" began to form.¹⁴¹ Today, hundreds of millions of dollars are transferred to aboriginal communities, necessitating the development of legal-rational procedures to distribute these funds impartially.

Myths about the existence of some kind of natural socialism before contact also fail to consider that "consensus" and "sharing" occurred *within*, not *between*, kinship groupings. This raises questions about how disputes can be contained when a number of rival familial factions live in the same community. Questions also arise about how aboriginal and non-aboriginal peoples will settle disputes if the values of their parallel systems cannot be reconciled. As the Canadian anthropologist John Price points out, "the demands made by activists on behalf of Indians often conflict with general Canadian values and cultural features. The fundamentals of democratic life, the separation of religion and politics, industrialization, urbanization, and policies universally applicable to the whole citizenry are among the particular points of friction".¹⁴²

In liberal democracies, the mediation between diverse interests and values has been made possible by the development of individualism. Although individualism is often dismissed in discussions of self-government because it is argued that aboriginal peoples “possess an

¹³⁸ Menno Boldt, *Surviving as Indians* (Toronto: University of Toronto Press, 1993), p. 120.

¹³⁹ Kiera Ladner, “Rethinking Aboriginal Governance”, p. 48.

¹⁴⁰ For example, see Gail Kellough, "From Colonialism to Economic Imperialism: The Experience of the Canadian Indian", in J. Harp and J.R. Hufley (eds), *Structured Inequality in Canada* (Scarborough: Prentice-Hall, 1980), pp.343-75; and Tony Haddad and Michael Spivey, "All or Nothing: Modernization, Dependency and Wage Labour on a Reserve in Canada", *The Canadian Journal of Native Studies* 7(2), 1992, pp.203-228.

¹⁴¹ For a discussion of the economic factors behind increasing stratification, see Morton Fried, *The Evolution of Political Society*, pp. 182-4, 192-6.

¹⁴² John Price, in James Clifton (ed), *The Imaginary Indian: Cultural Fictions and Government Policies* (New Brunswick: Transaction Publishers, 1996), pp.258-9.

irreducible core” that is threatened by the promotion of individual autonomy,¹⁴³ this argument obscures the progressive character of individual rights. Individualism, in fact, makes the notion of human rights possible because it recognizes that all people (individuals) are entitled to respect on the basis of their common humanity. As the anthropologist Elizabeth Rata explains, the “idea of the individual as someone who can be simultaneously attached and separated from the group makes possible the concept of a common universal humanity. This enables people to belong to and identify with non-kin groups as well as with members of their kin or ethnic group”. She goes on to point out that

the concept of a primary human identity that is universal to all people, regardless of how they live, where they live and how they think, is the justification for universal human rights. However closely involved the individual is in the private world of family and friends, in the public sphere the individual has rights because of his or her status as a citizen, whose political rights are derived not from kinship or ethnic group rights, but from universal human rights. These political rights are available to all individuals.¹⁴⁴

The universalism of individualism is completely different from “group rights” such as the inherent right of self-government, which excludes those members of society whose ancestors were not the original occupants of what is now Canada. This is pointed out by the Canadian philosopher Charles Taylor, when he notes that with self-government “certain powers... will be given to a group that is defined by descent; that is, a group that others can't join at will”.¹⁴⁵

It is because the inherent right of self-government is opposed to “policies universally applicable to the whole citizenry”, in fact, that results in a disproportionate amount of “unethical governance” in native communities. These problems cannot be overcome by rejuvenating aboriginal traditions, because the kinship orientation of aboriginal cultures is a major contributing factor. Overcoming the dysfunctional character of aboriginal politics, in fact, will require extensive economic, political and intellectual developments in the native population more generally, since an imposition of legal-rational procedures will only result in the “distortions” and “subversions” that occur in other traditional systems where, as was discussed earlier, “bureaucrats are forced to choose between the principles of rational bureaucracy and the cultural exigencies of their patron-client relationships”.

Developing “ethical governance” vis-à-vis the native population will not be easy, and might even take a number of generations. While proposals for how this can be achieved are beyond the scope of this paper, it is important to understand that the solution to a problem first requires an accurate identification of its cause. Because there is a reluctance in political science to apply developmental concepts to aboriginal societies, the root causes of “unethical governance” in aboriginal communities have not been understood. By making a distinction between traditional and legal-rational forms of authority, and showing how the latter is lacking in aboriginal communities, it is hoped that this paper has made an initial contribution to more fully understanding the character of aboriginal self-government so that more effective solutions to aboriginal problems can be proposed.

¹⁴³ Schouls et al., “The Basic Dilemma”, p. 17.

¹⁴⁴ Elizabeth Rata, “Rethinking biculturalism”, *Anthropological Theory* 5(3), 2005, pp. 272-3.

¹⁴⁵ Charles Taylor, “On the Nisga'a Treaty”, *BC Studies*, 120, Winter 1998/99, p.37.