

ADMINISTRATIVE LAW AND ABORIGINAL GOVERNANCE IN THE CANADIAN NORTH

By
Louis E. Howe
University of West Georgia

ABSTRACT

This paper is a theoretically engaged study of Canadian indigenous administrative law and procedures, as they are unfolding in the Canadian North, with a view to the ways that public administration does and does not open avenues for fostering aboriginal power and self-determination. Studying administrative law cases is a way of inquiring, in a way vaguely indebted to Michel Foucault (2007; 2008), into the actual procedures and schemes that govern people's lives and strivings. Or more correctly, they focus attention on the procedural mechanisms that include aboriginal people into a general scheme of economic governance. Administrative law has become a useful mechanism for facilitating relations between the individualist imperatives of the majority and the indigenous agendas of the North. The paper is alert to three circulating energies: neo-liberal economies, governmentality, and states of exception in aboriginal administrative regimes.

INTRODUCTION

Administrative law has come to play a limited but important role in indigenous governance and identity formation. Administrative law cases arise when administrative decisions are contested in courts. First Nations have become deeply involved in public administration since the 1970s for a variety of reasons, but perhaps the main one is necessity. In Canada, at least in the North, the involvement in administration arises in the context of land-claim agreements which mandate strong roles for First Nations on resource, wildlife, environmental, and licensing co-management boards. The land claims themselves arise from at least two historic pressures. First, the need of aboriginal peoples to control and have a say in major decisions and developments affecting life in the North, and, second, the Canadian government's need, after the decision in the 1973 *Calder* case, to justify its sovereignty over lands occupied by aboriginal peoples who had never ceded their claims to aboriginal title. Starting in the 1970s an increasingly politicized and educated Aboriginal leadership (Yukon Native Brotherhood, 1973), combined with the Canadian government's desire to clarify its legal title, brought about a series of settlements and land claims (Isaac, 2004). The administrative decisions that result from the new institutional arrangements are often challenged in courts.

Studying administrative law cases is a way of inquiring, in a way vaguely indebted to Michel Foucault (2007; 2008), into the actual procedures and schemes that govern people's lives and strivings. Or more correctly, they focus attention on the procedural mechanisms that include aboriginal people into a general scheme of economic governance. Administrative law has become a useful mechanism for facilitating relations between the individualist imperatives of the majority and the indigenous agendas of the North. Court cases generally are sites to examine changes in a society's underlying cultural and philosophical assumptions and practices. In this paper I will be alert to four circulating energies: neo-liberalism economics, governmentality, states of exception and network governance. In fact, administrative law might be seen as a crucial intersection where such energies meet each other, and where accommodation is made between their majority and aboriginal instantiations.

Administrative law is situated at the intersection where the constitutional state, with its rights and limits, interacts with what Michel Foucault termed *governmentality*. Governmentality is defined here as a study of positive power that investigates how practices of individuality become invested by relations of power such that individuals and families come to enact socially prescribed duties as their own concern. Governmentalities operate differently in majority and aboriginal cultures, but they also provide an opening for at least some accommodations between them.

Neoliberalism is a contested term, but as I am using it here it refers to a form of governance in the majority culture that systematically insures and regulates the stream of on-going individual expectations (Engelmann 2003), enlisting them in the larger governance scheme of security, or, in Eva Sørensen's (2001) terms, it is the regulation of self-regulation. Neo-liberalism is a primarily economic doctrine that in the majority population targets individual security, understood as safety, employment, prosperity, etc. In Northern villages neo-liberalism affects security differently, and their response is to demand a voice in its management. Again, we are interested in the procedures by which native peoples are negotiating their encounter with it, and the ways these encounters include Northern communities, that is, render people as included.

States of exception have been the subject of much recent scholarly attention (Agamben, 2005; Shapiro, 2003). The state of exception is usually associated with states of national emergency and with the writings of Carl Schmidt, but in this essay we are interested in exploring a more work-a-day versions of exceptional states. However, in this essay I will be following Aihwa Ong (2006). Ong defines a political exception as "an extraordinary departure in policy that can be deployed to include as well as to exclude" (p. 5), a definition that allows her to account for the recent production in Asian business hubs of both a jet-setting affluent business class on the one hand and, on the other, the marginalized population of immigrant nannies. In Canada the state of exception exists a process. Canadian courts have insisted that there is an affirmative duty to consult with any Aboriginal peoples who might be adversely affected by government action (*Halfway River* [1999]; *Haida Nation* [2004]; *Taku River* [2004]; *Mikisew* [2005];

Dene Tha' [2006]). Standard notice and comment procedures are not enough (*Mikisew*, 2005). The First Nation must be invited to participate at very early stages of planning processes and government agencies must genuinely seek to incorporate Aboriginal participation and concerns into their regulatory procedures. Courts have insisted that the relation between government Ministries and Aboriginal people must be “trustlike, rather than adversarial” (*Sparrow*[1990], quoted in *Halfway River*, para. 123).

The method deployed here will be an almost pedantic obsession with the details of court opinions. Again, we are not as interested in broad sweeps as in the actual procedures and traffic habits of people and public official finding their way in a difficult engagement.

ADMINISTRATIVE LAW AND ABORIGINAL GOVERNANCE

The ideal of administrative law is to afford “every citizen . . . the concrete, institutionalized, and effective possibility of recourse against the public authorities” (Foucault, 2008, p. 170). Historically this regime replaces, in the mid 19th century, a more narrow conception of the rule of law that conceived of lawful states as those that acted according to law. Now there are ‘laws.’ In fact, there is a system of laws. But there is also a system of judicial arbitration concerning the way public officials carry out their legal mandates. In Canada this system of judicial arbitration has been undergoing some mutations, first, to accommodate what I have been calling neo-liberal economic arrangements—increasingly Canadian courts have had to deploy a ‘pragmatic and flexible’ approach which allows officials to respond at decentralized levels to new details in governance (McCormack, 1995; MacLauchlin, 2001; Henderson, 2006; Lemieux & Clocchiati, 1991). Second, Canadian administration has had to accommodate the changed constitutional status of aboriginal peoples since 1982, major decisions by the Supreme Court of Canada such as *Calder* [1973], and also the completing of land-claim agreements in the North. In this section I want to review four cases, two of them very briefly.

Administrative law is firmly anchored in individualist understandings of what is called ‘natural justice’ and ‘procedural fairness.’ These norms assume that nature is a common pool of resources, that each individual has an equal natural right to everything, and, since resources are scarce, that coercive government is necessary to adjudicate individual acquisition. Aboriginal people have usually espoused a different understanding of the relation between the goods of life and the governance systems that regulate access to them. In their view, each being, including non-human beings, has a reciprocal obligation *with* everything in a shared social space (Duthu, 2008; Walters, 2008; Mills, 2008; Nadasdy, 2003; Napoleon, 2001; Alfred, 2009). These two understandings come into conflict in *Sparvier v. Cowessess Indian Band No. 73* [1994]. The judicial solution in the case was to simply bracket aboriginal understandings while at the same time protecting non-judicial spaces where aboriginal traditions can function.

The case involved a disputed election for tribal chief. The ousted chief, Kenneth Sparvier, challenged the decision of the Band’s Election Appeals Board on procedural grounds, alleging that the Board was biased and that it failed to give him adequate time and notice to prepare for the case against him. The band argued that because the procedure of the Appeal Tribunal was in accordance with band custom, the degree of natural justice or procedural fairness owed to the applicant is minimal. One member of the three-member Tribunal, Clifford Lerat, was said to have repeatedly spoken in a derogatory manner about Kenneth Sparvier, including, “Kenny is too mean to the people.” The other two members were apparently uncomfortable with this, and after a discussion with them Lerat excused himself from the Tribunal. He did not vote. The band had asked for opportunities to show, through oral testimony, that their procedures were in keeping with band traditional practices, but Rothstein, J. rejected any attempt to bring aboriginal law into his court.

I fully recognize that the political movement of Aboriginal People taking more control over their lives should not be quickly interfered with by the courts. However, *members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in procedures of tribunals that affect them.* To the extent that this court has

jurisdiction, the principles of natural justice and procedural fairness are to be applied. (*Sparvier* para 57) [my emphasis]

Instead the learned judge treated the band to an essay on the meaning of western-style natural justice reciting British and Canadian administrative common law legal traditions developed between 1880 and 1948. The case is replete with edifying quotes from Sir Arthur Moseley Channell, Lord Chief Justice Gordon Hewart, Viscount George Croke, Lord Chancellor, and Lord Alfred Thompson Denning. All great and impressive jurists and in non-aboriginal settings deserving of deference. And, of course, there is no mention of any great spokespeople for the aboriginal tradition. All these lords assume a world of self-interested individuals in adversarial disputes before neutral but coercive state decision makers adjudicating disputes over common pool resources. Aboriginal legal traditions, which are almost never coercive, are based in very different conceptions. The civil-individualist Denning, for instance, might be especially inappropriate.

This laughable case turns out to be typical in the sense that even very sympathetic judges deal only in western legal traditions. Aboriginal traditions are increasingly protected, of course, but not in their own language. What this case teaches is that administrative law is a tool of accommodation, not reconciliation. It has its limits. In practice Rothstein, J. rejected all the Tribunal's own arguments, but upheld the Tribunal on common law grounds, especially in the key area of undermining Kenneth Sparvier's election strategy. Allowing a majority to win, but for reasons it would prefer not to endorse, is, of course, an old and honorable judicial strategy stemming directly from the court's having no independent enforcement power.

The *Sparvier* case involved election laws that an Indian band had established to govern its own internal affairs. For a case reflecting relations between a First Nation and a third party we could look at *Canadian Pacific Ltd. v. Matsqui Indian Band* [1995]. Courts are often leery when First Nations people are regulating non-members on the grounds that no one should be subject to laws made without their consent, a doctrine whose irony is not lost on aboriginal people. However, increasingly Canada and the United States have sought to shift aboriginal administration over to First Nations, Bands, and tribes. Self-government requires the ability to tax. In 1988 Parliament amended the *Indian Act* to allow bands control over taxation on reserve lands.

In *CP v Matsqui* the band had issued a notice of assessment on a right of way that crossed the reserve. The railroad had challenged the Matsqui's jurisdiction to tax its right of way on the grounds that the right of way, having been acquired from the federal Crown in 1891, was no longer part of the reserve. Matsqui by-laws had set up a system of tribunals to hear assessment appeals, with recourse to judicial review in federal court once the assessment appeals process was exhausted. CP wanted to by-pass the appeals process and proceed directly into federal court to decide the issue of jurisdiction. CP argued that there was a reasonable apprehension of bias on the part of the board.

On the first count, Lamer, CJ found that generally an appeals tribunal, like a tax assessor in any jurisdiction, must be presumed competent to make determinations about its jurisdiction. As to bias, the court ruled that CP was merely speculating as to the competency and bias of the board. However, the court did rule in CP's favor because the tribunal did not seem to be independent enough from tribal officials. (My impression is that many administrative tribunals in Canada could not withstand scrutiny on these grounds, which is not to say the standard should not be upheld.)

What we can conclude, then, is that Canadian courts have moved to allow administrative tribunals to make decisions on their own legitimacy and competency, though on appeal they will be held to a standard of correctness and be given little deference by the courts.

It is now settled that while the decisions of administrative tribunals lack the force of *res judicata*, nevertheless tribunals may embark upon an examination of the boundaries of their jurisdiction. Of course, they must be correct in any determination they make, and courts will generally afford such determinations little deference. (*CP v. Matsqui* [1995], para. 27).

I will turn now to two cases presided over by the same justice, Michel Bastarache, J, because these cases not only help smooth the way for cases to follow, but because the learned justice articulates a coherent theory of the rule of law under neo-liberal conditions that will have relevance for aboriginal cases as well.

In *Paul v. B.C. (Forest Appeals Commission)*[2003], the Supreme Court of Canada affirmed that an administrative tribunal, the British Columbia Forest Appeals Commission, was competent to consider Aboriginal rights and title in its deliberations. Thomas Paul had cut three trees on Provincial Crown land and removed a fourth, all of which he towed to a sawmill on Vargas Island (Isaac, 2002). He intended to use the lumber to build a deck on his house. At the mill Forest officials seized the logs and charged Paul with violating the British Columbia Forest Practices Code and the Forest Act which forbade cutting Crown timber without proper tags. Paul went through several administrative proceedings and lost. Paul's defense was that he had an aboriginal right to cut trees for home construction, that under the *Indian Act* aboriginal rights were a matter of federal jurisdiction, and that therefore administrative tribunals established under British Columbia provincial statutes lacked jurisdiction to consider his aboriginal rights in their adjudications. The chambers judge sided with the Commission, but the Court of Appeals agreed with Paul. The Supreme Court of Canada reversed.

Michel Bastarache, J, writing for the Supreme Court of Canada, rejected Paul's arguments on the grounds that both the Court of Appeals and Thomas Paul were confusing adjudication with legislation (*Paul 2003*, para. 18). There was no question of the Commission's legislating in the field of aboriginal rights. Rather, the Commission was authorized to *consider* aboriginal rights claims—without changing them—in its adjudications. In fact, public officials routinely do this in their everyday routines in dealing with the public and it is hard to see why they should not also be able to consider rights connected to s. 35(1) which arise in the course of its work.

This would have been enough to decide the case. However Justice Bastarache continues on to discuss how the power of administrative tribunals to determine questions of constitutional law fits into an overarching understanding of the rule of law. Canadian administrative law, as already mentioned, has accepted the principle of a more 'pragmatic and flexible' approach. The new approach has necessitated a new canon of standards for review (*Pushpanathan v. Canada (Minister of Employment & Immigration)* [1998]). How does this new pragmatic approach articulate with 'the rule of law?'

Bastarache, J. places administrative tribunals within the "general constitutional and judicial architecture of Canada" (*Paul*, para. 21). Their role is analogous to the role played by provincial courts.

[The] constitutional protection of judicial review of administrative tribunals, derived from s. 96 of the *Constitution Act, 1867*, integrates administrative tribunals into the then, the system of justice encompasses the ordinary courts, federal courts, statutory provincial courts and unitary system of justice. By performing judicial review of the decisions of administrative tribunals, superior courts play an important role in assuring respect for the rule of law. While there are distinctions between administrative tribunals and courts, both are part of the system of justice.

The last case I want to deal with in this section concerns judicial review of tribunals. Specifically, what are the standards of review under the new pragmatic and flexible approach? Michel Bastarache, J spelled this out in *Pushpanathan v. Canada (Minister of Employment & Immigration)* [1998]. The *Pushpanathan* case involved a Sri Lankan man who had applied for refugee status, was later convicted of narcotics trafficking, and ordered expelled for being guilty of acts contrary to the purposes and principles of the United Nations. The rule seemed misapplied in this case. However, before considering the case M. Bastarache, J. decided he needed to clarify the issue of standards of review.

Bastarache J began by pointing out that courts adopting the pragmatic and functional approach to standards of review needed to take account of several contextual factors at once, none of which was

wholly determinative. The primary consideration is to find the intent of the legislature in establishing the Act and the tribunal in question. Within that general frame, courts establish: (a) whether the Act includes a privative clause—precluding judicial review—or a statutory right of appeal; (b) the expertise of the tribunal relative to that of the reviewing court on the issue raised; (c) the purpose of the Act and the specific provisions at issue; and (d) whether the question raised is one of law, facts, or mixed facts and law. Generally, on questions of law, the court leaves little room for administrative discretion and employs a standard of correctness. In fact-finding and especially in matters involving the expertise of the tribunal, the standard is reasonableness and greater deference is granted. Many tribunal decisions, of course, involve a mixture of law and fact and this, depending again on where on the continuum it falls, may result in greater deference to the tribunal.

Bastarache J. also included an important discussion on polycentricity. Polycentricity refers to “a delicate balancing act between different constituencies.” A legislature in establishing a tribunal might be more interested in the utilitarian, as opposed to the constitutional, aspects of the rule of law. Judicial procedure is premised on “bipolar opposition of parties, interests, and factual discovery” (*Pushpanathan*, para. 36). A “polycentric issue is one which involves a large number of interlocking and interacting interests and considerations” (para. 36, citing P. Cane, citation omitted). A tribunal’s function might be found to be *management* of rather than final resolution of disputes. This would be indicated perhaps by specialized knowledge represented on the board, but also by the statute’s leaving the tribunal a range of available remedies to deploy once a determination is reached. Bastarache J. noted other cases where the purposes of the act were more economic than legal—matters that are better decided by business people—or where the act included a commission’s protective role *vis-à-vis* the investing public. Even legal principles themselves “when they are vague, open-textured, or involve a multi-factored balancing test” (*Pushpanathan*, para. 36) may indicate a more relaxed standard of review. Even the term ‘legal’ gets a utilitarian definition, or at least a litmus test: a question of law will be “a finding which will be of great, even determinative import for future decisions of lawyers and judges” (*Pushpanathan*, para 37). In *Pushpanathan*, Bastarache J. found judicial room for broad legislative schemes that manage economic development in contexts involving multiple parties.

From the point of view of governmentality, then, the ‘rule of law’ in administrative law is a term that indicates a distinction between sovereign enactments of valid general measures and particular decisions of the public authorities purporting to implement those measures. Thus, the new ‘rule of law’ ideally integrates freedom with freedoms, law with laws, and right with rights through the idea of every citizen having “concrete institutionalized, and effective possibility of recourse against the public authorities. . . . a system of judicial arbitration between individuals and the public authorities” (Foucault, 2008, pp. 169-170). It is a great field of integration, a field of justice that grew up, in the first place, *vis-à-vis* a neoliberal economy but which also finds an application in the accommodation of aboriginal rights, though, as we shall see, it must operate there in a state of exception. The problem, in aboriginal settings, for which these arrangements are the solution is resources extraction. Isaac (2002), in his critical commentary on the Appeals Court decision in *Paul* makes this clear. The Appeals decision, he writes, “creates more ambiguity over the province's ability to govern in areas exclusively within its jurisdiction—in this case in relation to timber located on provincial Crown lands. Supreme Court direction is clearly required so that the province of British Columbia can get on with the task of governing and creating a suitable climate for economic investment and growth” (p. 77).

CONSULTATION

[Section on *River First Nation v. British Columbia (Ministry of Forests)* [1999] omitted to save space]

MACKENZIE VALLEY RESOURCE MANAGEMENT

In the Canadian North, consultation takes place in the framework of land-claims agreements and their implementation. Across the north of Canada over the past twenty years a number of functions that until recently were governed more or less by Ministerial fiat have been handed over to co-governance boards (Cameron & White, 1995; White, 2002; White 2006; White 2008; Bankes, 2003; Hunn, *et.al.* 2003; Nadasdy 2003; Ellis, 2005; also related, Timpson, 2006; Timpson 2008). Co-governance boards seek, among other things, to recruit and include aboriginal people into the policy making, planning, and governing of such areas as environmental regulation, natural resources exploitation and regulation, economic development, wildlife management, and social services. Aboriginal people have long sought to be included in all these areas. Graham White (2006) usefully summarizes them as follows:

In return for formally giving up title to the land and certain related rights, Aboriginal organizations receive a variety of benefits, including a cash payment, fee-simple ownership of specified parcels of land (usually 15-20 percent of the entire claim area) including some subsurface rights, hunting and trapping rights throughout the entire claim area, government commitment to negotiate self-government regimes, and representation on a series of land and resource boards. Once ratified by vote of the potential claim beneficiaries and by Parliament (and the provincial legislature if the claim is in a province), the settled claim enjoys constitutional status under section 35 of the Constitution Act, 1982. (White, 2006)

From both the aboriginal and Canadian government points of view, land claim agreements were necessary because economic development projects, many very large, were looming large on the horizon. In the MacKinzie Valley, for instance, a massive natural gas pipeline project in the 1970s was halted pending the outcome of the land claim agreements with the First Nations whose traditional territories it passed through (Berger, 1977). The Mackenzie Valley Resource Management Act (MVRMA) implements land claims agreements negotiated over roughly twenty years with the the Gwich'in and Sahtu First Nations, and later, the Tlicho government. To implement major parts of the agreements, the Act establishes the Mackenzie Valley Land and Water Board (MVLW) and the Mackenzie Valley Environmental Impact Review Board (MVEIRB). Section 9.1 of the Act states the Act's purpose in establishing boards:

9.1 The purpose of the establishment of boards by this Act is to enable residents of the MacKenzie Valley to participate in the management of its resources for the benefit of the residents and of other Canadians.

Among the many ways the Act insures a prominent role for local voices is that Section 32 of the Act gives the Northwest Territories Supreme Court original jurisdiction to review actions by either the Land and Water Board or Environmental Impact Review Board. An exemplary case, and a good place to start a review of the Act's implications for governance, would be *DeBeers v. Mackenzie Valley Environmental Impact Review Board* [2007]. At issue in the case was whether the Mackenzie Valley Environmental Review Board (MVEIRB) must complete all five steps of its mandated environmental assessment before proceeding to an environmental impact review. The company, DeBeers, had applied for a land use permit and a water licence to develop a diamond mine. The MVRMA mandates that environmental review proceed in two phases: first, an environmental impact review (AI), and, if that review shows the need, second, an environmental impact review (EIR). The Act specifically mentions two types of relevant concerns, which we can characterize as technical and cultural. The Board, in keeping with the Act, holds hearings in both areas. In the AI process, a finding of evidence of either significant potential environmental impacts or of substantial public concerns triggers the EIR. The Board had developed a five step AI process, but in the DeBeers case, after completing the first two steps—the

work plan phase and scoping hearings—the Review Board concluded that the project already raised community concerns serious enough to warrant ordering an EIR. DeBeers appealed for judicial review, arguing that under the Act the Board had to complete all five steps of its AI before ordering an EIR. On review Madam Justice L.A. Charbonneau J. writing for the Northwest Territories Supreme Court, upheld the decision of the board.

In upholding board, J. Charbonneau highlighted two features: first, the unique character of the legislation, the MVRMA, and, second, the MVEIRB's report on its reasons for decision (MVEIRB [2006]). Deploying a '*Pushpanathan*' analysis to determine standards of review, she found that Parliament intended that both potential environmental impacts and public concern were to be important factors for the Review Board in making decisions. Parliament, she writes, "also intended that the preservation of social, cultural and economic well-being of the residents of the region and the importance of conservation to well-being and way of life of aboriginal people be taken into account" (*DeBeers* [2008], para. 25.) Looking at the composition, mandate, and experience of the Board she concluded that the Board "has expertise that calls for considerable deference being accorded to its decisions by a reviewing court" (para. 27).

DeBeers was arguing that the Board had not fulfilled its statutory obligations, that its procedure did not amount to an environmental assessment. But Charboneau, J. found that the Board had interpreted its statute correctly. The Act does not precisely define the term *environmental assessment*, but it does say that every environmental assessment shall provide "a consideration" of five factors, most of which involve the technical aspects of environmental review. However, the term 'consideration' is not a particularly technical word. She suggests that the word 'consideration' is more plausibly understood in the sense of requiring the Review Board to 'take into account' the factors in question, not that it be required to make determinations of each of them prior to ordering an EIR.

DeBeers further argued that the Board had engaged in procedural irregularities; that it took into account inappropriate factors, unlawfully delegated its duties, and prejudged the issue of whether the Project should be subject to an EIR. However, the Board's Report relied only on the finding that the Project was likely to generate significant public concern, something the Act specifically required the Board to take into account and which the Act placed on a par with technical environmental concerns. Other considerations that DeBeers complained of, such as discussions of opportunities for participant funding in EIR proceedings that were unavailable in EA proceedings or past experience with the DeBeers mining projects, were not impermissible subjects of discussion in the preliminary stages of a complex project assessment, nor inappropriate items of staff attention.

The last matter dealt with in this case was whether or not the Board had erred in finding that project was likely to be a cause of significant public concern. The standard of review here would be reasonableness. Here the court scrutinized the Board's procedures in its scoping hearings and workshops. The scoping hearings had run on two tracks: a technical track and a cultural community track. Before formal hearings in the latter track the Board notified communities of the existence of the project and scheduled two day workshops in three communities that it believed would be affected and also in a fourth community that requested one. Except in one case these workshops were well-attended. At the workshops DeBeers representatives made a presentation after which participants broke out into smaller groups at separate tables discussing different aspects of the project. People were encouraged to move from one group to another. On day two, facilitators attempted to aggregate issues and participants were sent home to further discuss and refine their concerns. About two weeks later community representatives presented their community's concerns at the formal community scoping hearing in Yellowknife. The record showed that all communities canvassed expressed concerns, that the concerns included such things as the protection of wildlife, protection of water quality and quantity, issues of contaminants, the impact on communities and the potential affect on two culturally and spiritually significant sites (*DeBeers* [2007], para. 65). The Board based its decision on this information, and the reviewing justice found that this was not an unreasonable conclusion.

This seems like an almost perfect administrative law case. The Board had established procedures that accurately reflected the requirements of its authorizing statute, that it had followed its procedures in a

fair and reasonable way, that its staff had written a very good Report explaining its reasons for decision and tying its procedures and reasons to requirements of the Act, that their case was represented accurately in chambers, and, finally, that the chambers judge understood the uniqueness of the Act and the logic of its environmental scheme as a primary means of economic and cultural governance in the Mackenzie Valley.

In two cases decided together, *Chicot v. Canada (Attorney General)* [2007] and *Ka'a'Gee Tu First Nation v. Canada (Minister of Indian & Northern Affairs)* [2007], the Federal Appeals Court was also asked to interpret the MVRMA. In both cases concerned the same event. The responsible Ministers had, without consultation with the Ka'a'Gee Tu First Nation (KTFN), modified requirements specified by the MVEIRB. Paramount Resources Ltd. was seeking to move into the production phase of an extensive oil and gas exploration project in the Cameron Hills, an area in which the Ka'a'Gee Tu claimed both established treaty rights and more recently asserted aboriginal rights. The asserted claims were the subject of ongoing negotiations with the Government of Canada. The Environmental Review Board, after extensive consultation with KTFN, recommended that the project be approved subject to a number of requirements and suggestions designed to accommodate KTFN concerns. The most contentious requirements, at least for Paramount (White 2006), involved socio-economic and cultural concerns. It was these requirements that the Ministers modified. The Act establishes a 'consult to modify' process in which the Ministers, after consulting with the Board, may accept the Board's recommendation to approve a project but modify the Board's stipulations. This was the course the Responsible Ministers took. Having been given final approval by the Ministers, the boards had issued approvals and licences for the project. It was these approvals that KTFN asked the court to review on the grounds that it had not been consulted in the consult to modify process. E. P. Blanchard, J. agreed with KTFN.

In *Chicot* and *Ka'a'Gee Tu*, Paramount had claimed consistently in hearings that KTFN did not use the plateau section of the Cameron Hills and therefore no mitigation was necessary (White, 2006; *Chicot* [2008] at para. 110). This is clearly a case where indigenous conceptions of land-use clash with Euro-Canadian ones. KTFN had explained that aboriginal use was dependent on animal migration patterns and a variety of other factors that might mean that no actual harvesting would take place on a tract of land for extended periods, but such an area might still play an important role in an aboriginal people's cultural and economic life. Paramount, keeping with Euro-Canadian notions of tangible harm and suspecting that no actual harvesting occurred on the plateau, had taken the position that it was willing to compensate only actual loss of harvest in the area it was developing. KTFN wanted a compensation agreement that went beyond economic loss strictly understood and that addressed broader economic and cultural concerns. The Board, working to accommodate KTFN, had found that there was a substantial possibility of adverse impact to KTFN's cultural concerns and, to mitigate these concerns, had recommended requiring that the compensation plan and its enforcement be decided through binding arbitration. This requirement is referred to as R-15 in the report. Requirement R-16 required that a socio-economic agreement be developed with the affected communities. In the consult to modify process, the Responsible Ministers revised R-15 and R-16. As amended, R-15 required only that actual harvest losses be compensated and R-16 required only that Paramount file an annual assessment of the socio-economic benefits of its project with the Government of Northwest Territories (*Chicot* at para. 87). The Ministers had adopted Paramount's position.

E. M. Blanchard, J. avoided the adversarial and conceptual issues by first noting that legally the area was within the area of both treaty and unproven aboriginal claims, and thus subject to the requirements of the consultation process, and then agreeing with the Environmental Impact Review Board's factual finding that the Project had a real possibility for adverse impact on an asserted aboriginal right. The Court is silent, even if the Review Board is not, when it comes to cultural misunderstanding.

Turning to the main issue, the responsible Ministers argued that they were under no obligation to consult in general, that the primary vehicles for consultations with aboriginal groups was the Land and Water and Environmental Review boards. The Ministers seemed to believe that the Act did not require any further consultation once the Board had completed its assessment. The Act specified only that the Responsible Ministers consult with the Environmental Review Board. Blanchard, J. disagreed. "[The]

Crown's duty to consult cannot be boxed in by legislation" (*Chicot* para. 121). The result of the Ministers' position is that it "essentially allowed the Crown to unilaterally change the outcome of what was arguably, until that point, a meaningful process of consultation" (para. 120). Such an outcome would not be in keeping with the honor of the Crown as laid out in *Haida Nation* (2004). The Ministers argued that they should be deferred to in this case because it was polycentric and that, further, the consult to modify process was only a small part of a much larger process in which adequate consultation had occurred. However, J. Blanchard finds that by changing recommended mitigating measures R-15 and R-16 without consulting KTFN at all, the "Ministers essentially decided not to rely on the investigative and fact finding role of the Review Board" and had "commenced their own process of determining how to respond to the Applicants' concerns and that process made no provision for any input by the Applicants" (*Chicot* [2007], para 123). We might note in passing that the Ministers' positions would have been perfectly satisfactory in a non-aboriginal context, and perhaps even in a treaty case if it did not involve the duty to consult. The Ministers' took the position that "the onus is on a First Nation to prove that a right exists" (*Chicot* para 66), a conception compatible with a citizen-plus conceptions of Aboriginal-Crown relations, but consultation seems to imply something more, a state of exception to normal liberal governance.

In the companion case, *Ka'a'Gee Tu First Nation v. Canada (Minister of Indian & Northern Affairs)*, J. Blanchard relies on his finding in *Chicot* to conclude that, because the consultation requirements of Part 5 of the Act had not been met, the Land and Water Board had no authority to issue Paramount Industries an amended land use permit. The case is interesting because of the way it finds a duty to consult embedded in Part 5 of the MVRMA, and in its reflections on the purposes of the Act. It is also interesting in the way it, again as in *Chicot*, sidesteps thorny Constitutional issues and overrules negative liberty conceptions of administrative behavior towards citizens in aboriginal consultation cases. In both decisions Blanchard, J. emphasizes the unique nature of the MVRMA.

It is apparent that Parliament took great care in its enactment to ensure that aboriginals and residents of the Mackenzie Valley are well positioned to deal with matters to be treated by the Act and the Land and Water Board and to do so in their own region. *The Act repeatedly stresses the importance of providing a process which recognizes the role of the local residents and their way of life in the management of natural resources in the Mackenzie Valley (Ka'a'Gee Tu [2007]. Para. 47, emphasis added).*

The MVRMA is unusual in administrative law in that rather than assign authority to individuals, it mandates a *process* that recognizes the role of local residents in managing Mackenzie Valley natural resources. It is typical of both colonial and post-colonial aboriginal administration—though the specifics importantly change—that legal regimes establish an entitlement, a state of exception, and then allow the traffic habits of the processes involved in one's everyday relations with public government. The processes and procedures thus create governmentalities by which individuals and groups aspire and struggle (Anderson, 1991).

Again in *Ka'a'Gee Tu* [2007] both sides tried to lure Justice Blanchard into a Constitutional rights interpretation, and again, he finds statutory grounds for decision that avoid the issue. Constitutional interpretations, he writes, are necessary only when statutes were ambivalent. In this case, Part 5 of the Act is clear. It establishes a *process*.

Section 114 of the Act sets out the purpose of Part 5 which is "to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review in relation to proposals for development,..." to, among other objectives, "ensure that the concerns of the Aboriginal people and the general public are taken into account in that process." The requirements of Part 5 are not directed to a Board or to the Ministers. Rather, they are aimed at the process itself that must ensure the concerns of the Aboriginal people are taken into account. (*Ka'a'Gee Tu* [2007], para 66.)

According to Section 62 of the Act, if the requirements of Part 5 are not met, the board may not issue a permit. Section 114 mandates a Part 5 process, and one purpose of that process is to ensure that the concerns of aboriginal people are taken into account. It follows that if, as shown in *Chicot*, there was no consultation, then the concerns of the aboriginal group was not taken into account and thus, “the central requirement of Part 5 of the Act cannot be said to have been complied with” (*Ka’a’Gee Tu* [2007], para. 68). Since the procedural requirements of Section 62 had not been complied with, the Board could not issue a land use permit.

An interesting thing to note in these cases is what happens to statutory interpretation—a standard feature of administrative law—when the statute in question implements a land claim agreement that itself fulfils the requirements of a Constitutional provision. In the context of aboriginal administrative law, since recent agreements are written much more favorably to indigenous people than were the numbered treaties, the MVRMA gives a first nation more cards to play. It also ensures that aboriginal interests get what I think of as heightened judicial consideration. The MVRMA is not an ordinary statute. It repeatedly states that its purpose is to give communities in the Northwest Territories a strong role in resources development. It’s treaty-like status may also mean that the aboriginal legal position is much less subject to being eroded by well healed business lobbying of legislatures than is usual with redistributive efforts. The three-way agreements that form the basis of these statutes took two decades to negotiate and it is unlikely that anyone would lightly take on the task of changing them. Finally, the problems that arise for First Nations because the duty to consult and accommodate does not require an agreement be reached (*Taku River*, 2004; *Tzeachten*, 2008) seem greatly eased in cases involving the MVRMA. There is one loophole, however; a grandfather clause which has been the focus of several recent cases (*North American Tungsten* [2002]; *North American Tungsten* [2003b]; *Canadian Zinc* [2005]).

However, again, it is only a certain form of behavior that is acceptable to courts, a behavior we can think of as recognizably administrative. The tools of this behavior are well-crafted reports detailing reasons for decisions, well-run and sensitive community workshops to educate the public about development proposals, and well publicized and organized public hearings. The process requires good lawyers and good public administrators and a conception of administrative justice recognizable to Euro-North American legal traditions as natural justice and procedural fairness.

TENTATIVE CONCLUSIONS

1) Through this series of cases we can note that administrative law remains unchanged outside aboriginal contexts, and that consultation procedures operate as states of exception that include aboriginal people into administrative law regimes that in their turn do their part to change the subjectivities of both majority and aboriginal administrators. By not faulting the District manager for procedural unfairness—by even affirmatively supporting him for his good behavior—Justice Finch in *Halfway Nation* [1999] makes sure that administrative law does not change its character in the wider settings of Canadian society and that aboriginal consultation would be the province of administration. Administration would take a pragmatic and functional approach to the issue and thus the debates would center on administrative procedures rather than in more contentious Constitutional law disputes.

2) Indigenous people are assumed to have consented. By not taking cognizance of the possibility that the entire British Columbia Forest Act might be repugnant to the Halfway River peoples—or that Treaty 8 or the Indian Act might be repugnant—and treating the problem as localizable at an administrative level as part of the general management of resources and interests that are formed from the traffic habits of citizens facing public officials and appealing to judges in chambers, then we presume that the forest practices regime itself is not in contention. People’s accepting the best possible deal under difficult circumstances is taken as consent rather than pragmatism. At the same time, however, the positive duty of governments to consult offsets any high handed dealings that might seem to follow from this assumption. In fact, the courts come close to mandating good will on the part of governments.

3) Zero-sum battles, such as take place in the typically adversarial atmosphere of court rooms, are diverted into managed polycentric forums. All is in line with neoliberal utilitarian conceptions of the rule of law. Citizen plus, or states of exception, brackets the extent to which “citizens” are a vis-à-vis of government. Common pool resources, etc., is enforced in the traffic habits of administrative law.

4) While these arrangements would not be satisfactory to the strongest critics of land-claim agreements, such as Taiaiake Alfred (2009), Val Napoleon (2001), Paul Nadasdy (2003), or to proponents of strong human rights agendas such as Michael Asch (1999), they should not be lightly dismissed as colonialist. Indeed, one thing the governmental approach seeks to do is to canvass the actual practices and procedures that structure people’s inclusion, to relay the tactics and alliances by which energies emerge and articulate against and with problems. The hope is to avoid having to revert to *ergons* and teleologies to explain political behavior. What this approach can acknowledge is the extent to which aboriginal people in the Canadian North are players in a dangerous game and not just victims.