

Traditional Governance and Constitution Making
among the Gitanyow

Prepared for the First Nations Governance Centre
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This paper is a report on traditional governance and constitution making among the Gitanyow people prepared for the Gitanyow and for the First Nations Governance Centre. The Gitanyow are well along in the development of a national constitution based on traditional governance, and this paper will tell the story of that development. For the First Nations Governance Centre the focus will be on drawing out some of the critical issues for First Nations in constitutional development.

The idea behind this paper is to inform the First Nations Governance Centre of the nature of the work required to restore traditional governance to First Nations in Canada; including meetings held in communities, and key decisions in the context of a constitution which respects the oral histories and traditional governance in First Nations. It will also look at the problems posed specifically by the *Indian Act* and whether it is possible to move out of the *Indian Act* in the context of negotiations, specifically the British Columbia Treaty Commission process in this case. Major obstacles to this include government policies which favour dealing with *Indian Act* governments, lack of mandate to deal with traditional governments, and funding through *Indian Act* governments. If First Nations pursue traditional forms of governance, it becomes critical that they secure funding for that government. Given these hurdles, one of the issues needing particular attention in fact involves the question of whether or not it is at all possible for First Nations to choose their own forms of government. What is hoped is that this paper may begin to provide First Nations with a sense of vision and strategy to overcome these obstacles, and to inform the First Nations Governance Centre with a sense of the research and technical support requirements necessary in order that it may arm First Nations' leaders with the tools necessary so that they may go forward and make the case for whatever system of government their people feel is best suited to them.

The specific issues which require examining include:

- a. What community processes are needed in constitutional decision making?
- b. What impediments lie in the path of First Nations seeking to develop constitutions?
- c. What do First Nations require in terms of research and technical support?

¹ I am grateful for the assistance of members of the Gitanyow Nation in preparing this report.

- d. What are the policy and legislative issues surrounding constitutional development?

A lot of the problem in constitutional development arises in the context of negotiations with the federal and provincial governments which resist dealing with First Nations governments not based in the imposed *Indian Act* system, but in traditional or self defined forms. And for the First Nations Governance Centre, it should be noted, the focus is not on telling First Nations what they should do, but on enabling First Nations to follow their own agendas in choosing a model of governance best suited to their needs, in light of the considerable problems they face. The basic options are:

- a) a return to traditional models of governance;
- b) a modification of the *Indian Act* system; or
- c) A creation of something new.

The research for this project included interviews conducted in Gitanyow on August 3rd and 4th, 2004, as well as review of Gitanyow documents. These documents include:

- a) “Gitanyow Interim Governance Project—Proposal for Treaty Related Measures on Governance, Human Services and Lands, 2001-2002 (Submitted to: Federal and Provincial Chief Negotiators by Gitanyow Hereditary Chiefs, January 19, 2001, and Reprinted March 29, 2004);
- b) “The Ayookxw/Constitution of the Gitanyow Peoples—“Breathing Life into the Ayookxw (Working Draft 12, January 28, 2003);
- c) Gitanyow Government Chapter, (Draft 6, January 30, 2003);
- d) “Gitanyow Governance Paper—Back to Fundamentals (Gitanyow Hereditary Chiefs, January 30, 2003);
- e) “The Importance of s. 91 (24), Constitution Act, 1867—Protections and Positive Duties (approximately dated March 2003); and
- f) “Response to Canada’s proposed Wording for Certainty for the AIP, dated March 12, 2003 (approximately dated April, 2003);
- g) Gitanyow Assessment of MOF Decision to Approve BCTS 2002-2011 FDP Amendment # 1 for BCTS Development Plan Skeena Business Area for 2002-2011 (August 19, 2004).

Background

In assessing the development of the Gitanyow Constitution, the first question is what motivated the decision to develop a constitution in the first instance. This question also is somewhat misleading for the Gitanyow have in place a functioning traditional system, with a well established hierarchy within its clans and houses, a structure of precedence among its chiefs, and their ayookwx—traditional law—is strong within their territory, and is maintained by feasts (li'ligit). The Gitanyow people live by and maintain their ayookwx, so in a real sense their project is not so much one of constitutional development as constitutional documentation.

As set out in the Working Draft, there are eight Gitanyow Wilp or houses, four of which belong to the Lax Gibuu or wolf clan, and four of which belong to the Lax Ganada or frog clan. Each house has exclusive rights to Wilp names, adawaak (oral histories), ayuuk (wilp crests) git'mgan (poles) and lax yip (territories)

Each Gitanyow house has oral histories, laments and ancient songs, and traditional names for its high chief and senior chiefs, house names and crests. These are recorded on the git'mgan, which confirm the existence of the wilp and its authority (daxgyet) over the well defined territories. As well they continue to hold feasts of various types where laws and stories are publicly recited, witnessed, contested and corrected. The holding of these feasts is central to the maintenance of the authority of the wilp, and are very costly. The cost can range anywhere from \$20,000.00 to \$40,000.00 dollars for a death feast involving the death of a chief and the raising of a chief's marker. The wealth required for these feasts is supposed to come from the territories of the house holding the feast, and the feasts serve to ensure knowledge of Gitanyow laws and histories, communal decision making and provide every member of the Gitanyow with a place in the community. The Chiefs act as one in dealing with the governments, other nations and industry, but decisions are made transparently, and all house members are tied together, which provides a remarkable degree of social cohesion.

This system was in place, of course, long before contact with Europeans, so the process of constitution making is largely a matter of recording the process and adapting it for modern situations.

The Decision to Record the Gitanyow Constitution

The involvement of the Gitanyow in the British Columbia Treaty Process stimulated discussion toward the recording and adaptation of the Gitanyow Constitution, which, as stated, has roots in traditional practices which predate European contact with the Gitanyow. In about 1994, the federal and provincial governments wanted First Nations to evaluate their proposed constitutions against a checklist of criteria, including transparency and openness, and democratic processes in substantive law making. Against this backdrop, the Gitanyow Chiefs began to discuss the essential elements in a written constitution. It was a difficult process which lasted for two years, as there was a great deal of concern about the effect of reducing the Gitanyow Constitution to writing—it had functioned well for long, long years in an unwritten form, and the effect of using Western criteria in evaluating their constitution.

Eventually, however, the Gitanyow received funding from the government for a project on internal constitutional development tied to Chapter 11 in the Treaty Process (the Gitanyow Government Chapter) and the matter was pursued. The biggest problems involved the question of how could the traditional laws of the Gitanyow be written down, and the problem that the government checklist of governance criteria which were often in conflict with the traditional system. One striking illustration of this problem is that the criteria included elections. There were heated discussions over that.

Constitutional models as well began to be examined. Neil Sterrit came in as a facilitator and outlined the work being done across the country, and indicated some of the central elements in a constitution, including:

1. The balancing of individual rights against the rights of the community and government;
2. the importance of the legislative power and how law making is conducted;
3. the executive power;
4. implementation of laws; and
5. Internal dispute resolution (the Judicial Power).

As well, the Gitanyow discovered the work of Stephen Cornell at the Harvard Project, and his studies of successful governance among the indigenous peoples of the United States of America. That work identifies some basic elements found to be in place where there is successful governance in First Nations:

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

Two other important factors for the economic success of Aboriginal nations are: (1) strategic orientation as demonstrated by long term planning; and (2) creative leadership that can move beyond the status quo.³ Of course it is one thing to note the existence of these elements and quite another to create them where they do not exist. Cornell's work in particular emphasized the need to separate policy decisions from administrative decisions, and above all, the need for cultural match.

The Gitanyow also looked at other Constitutions, developed by other First Nations ranging from the Cree Naskapi to the Casca Dene, to the Nisga'a, and to various tribes in the United States. All of these models, however, seemed to them very westernized. The Gitanyow were always brought back to their traditional system. And at the same time in 1996 a Governance Chapter was tabled in the BC Treaty Process. This was done particularly under the impetus of the Nisga'a Treaty.

Drafting the Constitution

With the development of the Governance Chapter, the Gitanyow also began to draft their constitution. The constitution was to capture what the chiefs were saying. Some of the initial problems included the position of outsiders, their rights and responsibilities, and their participation at the feast, with permission. As is stated in the Preamble, the Gitanyow "have welcomed others in our traditional territory." There was also the issue

² Stephen Cornell, Miriam Jorgensen, & Joseph Kalt, "The First Nations Governance Act: Implications of Research Findings from the United States and Canada" (October 2002) paper prepared for the Assembly of First Nations, Office of the BC Regional Vice-Chief [unpublished, archived at the Office of the BC Regional Vice Chief-Assembly of First Nations] at 4-5 [Cornell].

³ *Ibid.* at 5.

of the relationship between the traditional system which was reflected in the Gitanyow Constitution, and the *Indian Act*. Internally, this conflict is more apparent than real. Although because membership in the traditional system is matrilineal and the *Indian Act* system is patrilineal, with the result that membership in the Gitanyow Wilps is not congruent with membership in the Gitanyow Band under the Indian Act, so long as the members participate in the traditional system, the Band Councils are not a problem. This is because the traditional system is strong throughout the territories where Gitanyow peoples live—in Gitwangak and Gitsegukla as well, and because the traditional system recognizes rights of spouses, children and grandchildren of wilp members to use the territories, as is reflected in Chapter 5.8 of the Constitution, which sets out the rights of Ent'im nak (spouse), Amna'gotwx (children), and Aye'e (grandchildren).

However, the Gitanyow know that under present government policies they will not be able to achieve an Agreement In Principle. The Constitution is in some sense a document for the future, rooted though it is in the past. It exists for the days when policies change, so that future generations in the territory, and in the wider world, can see how the traditional system works. We will look specifically at the government policies which prevent progress on this front, a little later in the paper.

Process

As indicated earlier, the Gitanyow territory is composed of eight house territories, and the houses consist of eight high chiefs, as well as sub chiefs and members. There is a functioning house system in place which contains within it a traditional system of planning by the chiefs, consultation within the houses, and implementation. The traditional system in fact is highly democratic and open through the mechanism of the feast. Ratification processes are also drawn from the traditional system. This openness can be seen by looking at examples from traditional types of feasts. If, for example, a chief or a sub chief dies, the House gathers for a planning meeting, chaired by the head chief. Tasks are assigned and certain tasks fall to the father clan. Anyone in attendance can speak and all have a say in determining what will happen. There is an open discussion of succession, for succession is based upon a number of criteria, including:

- a) understanding of the law;
- b) knowledge of territory
- c) attendance at feasts;

- d) personal wealth (because a chief has obligations); and
- e) Personal history including any instances of law breaking, for example intra clan marriage.

These criteria are outlined by the elders, who also generally know who fits the criteria to succeed.

A smoke feast is then held at which the results of the planning meeting are announced formally. There is not much disagreement owing in part to the high level of openness and participation in decision making. Nor does the inheritance of a name imply dictatorship or caprice, because that inheritance implies adherence to a set of standards watched over by other chiefs:

- a) attendance at feasts;
- b) attendance at meetings;
- c) community participation; and
- d) Public behaviour.

There is the possibility of public removal if these standards are not adhered to. On the whole, in order to be a chief one must be accepted by the house and clan and by other chiefs and people within the Gitxsan Nation.

To take another example, decisions about land use can easily be made within the traditional model of Gitanyow governance. If a forestry company comes to the Office of the Gitanyow Chiefs, the Office contacts the relevant chiefs. If it is determined that the Gitanyow lack expertise in a certain area, they would retain experts for advice. Consultations ensue within the house whose territories are involved. The expert (a forester in this case) then goes out and looks at the plan and meets with the house, which decides what areas are operable, considering such things as riparian areas, and old growth management. **This process is only hampered by a lack of financial and technical resources.** But there is a high degree of house cooperation and everything that is done is witnessed and transparent. And the process can also accommodate decisions which affect the interests of more than one house.

Insofar as the process of ratification of the Gitanyow Constitution is concerned, the constitution is being prepared for final review and ratification by the Gitanyow Wilps.

That ratification will be a gathering of people for at least two days, at which a feast will be held and many people will be invited from within and without the Gitanyow territories. At the feast the constitution will be put into the language of the people, and be approved by the wilps. After ratification an interim pilot project of implementation will be drafted including: hiring a director to do administration, and drafting a policy handbook to guide the operation of the Chiefs; developing a lands and resources model with access to good data which will enable the Gitanyow to influence government policies more directly; and developing a human services model which will promote economic development and better deliver human services to people in the area. Against all this there are many impediments which stand in the way of the progress the Gitanyow want to make, impediments rooted above all in a lack of recognition of Gitanyow traditional organization, and in a lack of recognition of Gitanyow title to land.

Impediments

The Gitanyow system is workable and from their point of view highly desirable. They want it to be recognized through their treaty negotiations. But to achieve this is not easy, despite principles such as self determination which recognize the right of a people to decide how best to govern themselves. Particularly in recent years the West has reasserted its dubious claim to carry civilization to the rest of the world under the mantle of democracy and human rights, instead of Christianity and social Darwinism. It seems to be the same melody with different words. But in any case the writing down of the Gitanyow Constitution, so far as it is necessary, is aimed at promoting understanding of their system of government to the external world, to meet the complaints of the federal and provincial government that they have difficulty understanding the terms. The Constitution, however, needs no ratification internally. It is the inheritance of long years.

Another impediment is found in the relationship between the Constitution and the Indian Act. On the one hand the traditional system is very accommodating of members of the Gitanyow Band who are non Gitanyow traditionally. On the other hand these people may have fears about losing the Indian Act. However, non Gitanyow members, both aboriginal and non aboriginal can have a place within the traditional system through the institutions of adoption, as described in the Constitution:

5.7 WILP MEMBERS

A Gitanyow Wilp member means a person 'who is a member of a Gitanyow Wilp because of birth into the Wilp of his/her Mother or by adoption. In the latter case,

the membership must be validated at a Wilp Li'ligit. There are two types of adoptions, described as follows:

- a. Siidaxgyet — “strengthen”. A woman and her descendants who have been formally adopted at a Li'ligit have full rights, benefits and responsibilities.
- b. Tsi'limgodit — “taken in” adoption. An individual Wilp member may initiate the adoption of a non-Gitanyow or non-Aboriginal into a Wilp with the consent of a Simooyghet and other Wilp members and validated at the Liligit. This adoption provides for a seat at the Liligit along with a non-hereditary name and access rights with the consent of the Simooyghet and Wilp members. These rights are only for the lifetime of the individual and cannot be passed down.

As well, as previously noted, the traditional system provides for rights of non Gitanyow through recognizing rights of spouses, children and grandchildren:

5.8 SPOUSES, CHILDREN AND GRANDCHILDREN OF WILP MEMBERS

5.8.1. ENT'IM NAK' RIGHTS AND RESPONSIBILITIES

- a. Privileged rights to access and use the territories and resources of one's spouse 'with the consent of the Wilp Simooyghet,
- b. Must contribute at the Li'ligit hosted by spouse's Wilp or pdeek'.

5.8.2. AMNA'GOTWX RIGHTS AND RESPONSIBILITIES

- a. Privileged rights to access and use the territories and resources of the father's territories with the consent of the Wilp Simooyghet
- b. Must contribute at the Liligit hosted by father's Wilp.

5.8.3. AYE'E RIGHTS AND RESPONSIBILITIES

- a. Privileged right to access and use the territories and resources of your maternal grandfather with the consent of the Wilp Simooyghet
- b. Must contribute at the Liligit hosted by grandfather's Wilp.

Similar flexibility is not found in the Indian Act, and particularly in the way in which the *Indian Act* is administered. Governments tend to view recognized Indian Bands as the sole legitimate expression of “Indianness” although it should be noted that the only criteria for a band to be a band is that it be a “body of Indians” for whom land or money has been reserved. Historically there was recognition of “irregular bands”, that is, bodies of Indians for whom no land or money had been reserved, and originally recognition as an Indian was based on reputation. There is no reason in principle why any Gitanyow structure—house or clan—cannot be recognized as a body of Indians, which of course those structures are. The difficulty lies precisely in the rules as to status, which does not reflect the way the Gitanyow self-identify. The government was compelled to revisit the issue of status in light of section 15 of the Charter of Rights and Freedoms, but it has been reluctant to do so in light of section 35 of the Constitution Act, 1982. Because, however, aboriginal rights are communal rights, as noted in *Delgamuukw*, there is surely something fundamental in the issues of membership and status, and I propose to examine these further.

I begin with the following statement from *Mabo v. Queensland* (1992), 175 C.L.R. 1 at page 70

Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.

This is a version of the test prescribed by Felix Cohen in *Handbook of Federal Indian Law* at page 2:

Recognizing the possible diversity of definitions of "Indianhood," we may nevertheless find some practical value in a definition of "Indian" as a person meeting two qualifications: (a) That some of his ancestors lived in America before its discovery by the white race, and (b) that the individual is considered an "Indian" by the community in which he lives.⁴

One of the changes which occurred as a result of the Bill C-35 revisions was to distinguish between Band Membership and Indian Status. Status is governed by the Indian Act, and emphasizes blood quantum. It is a restrictive version of the biology element in Indianness. The other element, communal or mutual recognition, has been hived off into membership, and with the revisions, Bands were allowed to determine their membership rules. I make the following observations:

1. The status of Indian Band may or may not have ever conformed to self determined bodies of Indians.
2. It is clear that over time the rules of membership and status have diverged from the original configuration of those bodies—
 - i. Membership rules were imposed without regard to the conventions of the people; and
 - ii. Status rules with their archaic concepts of blood quantum have caused the disenfranchisement of many.
3. Now that Bands can have control of their membership rules, it is possible perhaps to create rules which conform to tradition.
4. There is no reason in principle why traditional bodies of Indians may not be bands.

⁴ Felix S. Cohen, *Handbook of Federal Indian Law* (Reprint Edition) (Buffalo: W.S. Hein Co., 1988)

5. Recognition of Indian Bands as Bands has however always been discretionary, and that discretion may be one which Courts are reluctant to disturb. The status of Indian tribes in the United States was recognized as falling within the purview of the political questions doctrine in *Baker v. Carr* (1962), 369 U.S. 186 at 215, which gives it as an executive question some immunity from judicial review, and though the political questions doctrine was held not to apply in Canada in *Operation Dismantle v. the Queen*, [1985] 1 S.C.R. 441 at 472. Nevertheless in *Van der Peet* at para. 49, Chief Justice Lamer cautioned that “It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.” It may be that decisions as to the status of Indian Bands can be challenged, but care would have to be taken to describe the issue in legal terms which highlight “judicially discoverable and manageable standards for resolving it” (*Baker v. Carr* at 217), keeping in mind at all times that issues of justiciability raise two concerns for the courts, identified in *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 545:

- i. Whether answering the question would take the Court beyond its proper role within the constitutional framework of our democratic form of government; and
- ii. In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch

So it is not true ultimately that there is no political questions doctrine in Canada, but rather that constitutional questions are inherently legal, provided that they are properly framed.

6. Particularly vulnerable, it seems to me, are the Indian status rules which emphasize blood quantum which is inherently uncertain (*Noble and Wolf v. Alley*, [1951] S.C.R. 64, and leads no doubt to many cases where the rules may be challenged under s. 15 despite the amendments. And these rules are not unimportant, because their ultimate expression will be the disappearance of Indians.

7. The point I make in discussing this is that to the extent the Department of Indian Northern Affairs makes funding decisions dependent on Indian Band Status, and Indian Status, the rules themselves are not unimpeachable.

Another impediment is the loss of language among the Gitanyow. As stated in the Constitution:

1.0 We live by and are required to pass along to future generations, our inherited Ayookxw, Lax 'yip, the eight historic Wilp and their respective Ayuuk, Adawaak, and Git'mgan, the Gitxsanimxw language, and the practice of the Li'ligit.

3.0 (6) The first language of the Gitanyow peoples is Gitxsanimxw and is critical to the interpretation of the Gitanyow Ayookxw.

The Gitanyow see their Draft Constitution not as a replacement of their constitutional customs drawn from history and their laws. It is rather a communication those customs to the world and to the governments of the province and of Canada:

2.0 The primary objectives in adopting this Constitution are to:

1. Assist in informing the world of our inherent right to govern ourselves in accordance with our inherited Ayookxw, Adawaak, Lax 'yip, Gitxsanimxw language, Wilp, Hu'wilp and their respective territories, Ayuuk, Git'mgan and the practice of the Li'ligit;
2. Assist the Crown and the governments of Canada and British Columbia, with whom we co-exist, in understanding our system of governance...

The loss of language threatens the loss of the ability to transmit that part of the Gitanyow Constitution down to succeeding generations. In truth, the constitutional law of the Gitanyow is a product of learned status or placement within a social structure and learned obligations flowing from that status. Participation is a necessary part of the education of the young and is essential for the transmission of the entirety of the Gitanyow Constitution, including the oral traditions.

The constitutional law of Canada calls upon the governments of Canada, federal and provincial, to reconcile with aboriginal peoples, and to accommodate aboriginal peoples rights. Another problem faced by the Gitanyow stems from the fact that reconciliation and accommodation can become synonymous with extinguishment. The language of reconciliation is first used in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para 31:

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

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

This passage calls on the government to acknowledge the distinctive societies and cultures of aboriginal peoples and to reconcile with them. The Gitanyow constitution, accordingly defines the relationship the Gitanyow wish to have with the governments. But the governments tend to be intransigent. Instead of acknowledging the traditions of aboriginal people, including the way they organize themselves, they wish refuse to depart from the *Indian Act* which inherently redefines aboriginal peoples according to the government's needs and western ideas about inheritance.

The treaty making policies of both federal and provincial governments are similarly problematic. Although the Gitanyow have sent their constitution to Canada, there has been no response at all. British Columbia's response to the Gitanyow Constitution was mixed. They were keen to get the clarification of the Gitanyow internal structures which the document provided, but their approach remained inflexible and unaccommodating. There are preconceived mandates which that government has concerning outcomes for negotiations, which does not suit the Gitanyow. Law making power for example, is to be confined to treaty settlement lands and not run throughout the Gitanyow territories and there is a reluctance to deal with hereditary chiefs who, it is thought, have no democratic legitimacy, despite the fact that a chief must have the recognition of his or her house and clan, and the chiefs and people of the Gitksan nation as a whole in order to function. But they have been engaging the Gitanyow chiefs in any land or resource planning decisions and land use decisions generally, particularly as a result of the constitutional duty to consult which was given teeth in *Haida Nation v. B.C. and Weyerhaeuser* 2002 BCCA 147; *Haida Nation v. B.C. and Weyerhaeuser* [No. 2] 2002 BCCA 462; and *Taku River Tlingit First Nation v. Ringstad*, 2002 B.C.C.A. 59.

Funding is another major impediment. Canada funds programs primarily through the *Indian Act* Band, with allocations primarily governed by formulae based upon the *Indian Act* and the band list. The exception here is the Aboriginal Fishing Strategy Agreement which Canada has entered into with the Chiefs. The logic of the exception seems to be that Bands have no authority off reserve (*R. v. Lewis*, [1996] 1 S.C.R. 921). One area which needs further attention is the development of a strategy which can move the government away from the Band list and Band Councils as the basis for its recognition of

aboriginal people. On the other hand the Province has required the Gitanyow to incorporate the Gitanyow Huwilp Society as a vehicle for funding. These funding problems are particularly ironic in light of the recognition in *Delgamuukw* that there is an inescapable economic component to aboriginal title. Only in fishing does the government come near to that in funding. The Gitanyow have been able to improve their capacity in fisheries, and obtain good data which gives them credibility and influence in dealing with fisheries and the development of fishery management plans. But this success has not been mirrored in other land based areas. Anything that raises issues of ownership the government backs away from.

So there remains the lack of a true fiscal relationship based on recognition of Gitanyow title to the land. This necessitates an active litigation strategy on the part of the Gitanyow, including the attempt to attack the revenue sharing policies of the government based on the Band List, and the reaffirmation of Gitanyow's right to choose as said in *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 at para. 166:

The manner in which the fiduciary duty operates with respect to the second stage of the justification test -- both with respect to the standard of scrutiny and the particular form that the fiduciary duty will take -- will be a function of the nature of aboriginal title. Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.

Government policies in the view of the Gitanyow seem unlawful and unconstitutional, and they prevent any real accommodation from being achieved. But the pursuit of a litigation strategy demands a lot of financial resources which the Gitanyow struggle with.

Government policy remains focused on extinguishment, and both governments see treaty making as the vehicle by which aboriginal title will be extinguished. Their treaty models are based on giving some money and some land in exchange for extinguishment. The Gitanyow Constitution however is founded on the principle that the Gitanyow control their lands, and neither Canada nor the Province can accept that. In the end, government policies are very limiting and still designed to eliminate and contain aboriginal rights, not to recognize and affirm them in accordance with s. 35 of the Constitution Act, 1982. There has been very little shift in government policies after all.

The Future

In the near future, the Gitanyow constitution will be ratified and they will attempt to use it in securing resources for the community. The First Nations Governance Centre may be able to help in a number of ways, by:

8. Aiding the Gitanyow in the development of policies;
9. Promoting the Gitanyow traditional model as a workable model of governance, existing and capable of adapting to modern governance requirements in the territories; and
10. Developing a public information strategy to educate the people and inform civil servants, ministries and politicians.

The Gitanyow believe that their governance model will enhance certainty and security for themselves as well as for the governments of Canada and British Columbia, third parties and industry in the territory. There is a real need to show how it works and how it can work, especially when people are so used to the *Indian Act* model. But it must be said that government policies are inconsistent with s. 35. Some of these inconsistencies include:

1. Despite the fact that under the *Constitution Act, 1867*, under head 91 (24) Canada has exclusive jurisdiction over “Indians and Lands reserved for the Indians”, and despite the fact that Canada has a positive fiduciary duty towards Indians (*Guerin v. the Queen*, [1984] 2 S.C.R. 335; *R. v. Sparrow*, [1990] 1 S.C.R. 1075) Canada is largely absent from many issues of critical importance in the negotiations. They seem to see treaty negotiations as a way for them to offload their constitutional responsibilities—and the Province on the other hand seems to view negotiations as a way to expand their jurisdiction into the exclusive federal jurisdiction identified by head 91 (24). A central strategic issue for the Gitanyow is “How does anyone compel the government to conform to their own Constitution?” Despite the frequent repetition of the phrase “Canada is governed by the principle of the rule of law,” the fact is it is very difficult to compel the governments to behave in accordance with s. 35.
2. The treaty negotiations policies of the federal and provincial governments are problematic. The process is painfully slow, and their policies demand a lot from the Gitanyow with little give in return. For instance, in terms of the Gitanyow

Constitution, it took the Gitanyow a terribly long time to get their Constitution on the table, and even now both governments refuse to accept the inclusion of a Gitanyow Governance structure as a treaty right. The government insist on the inclusion of ideas they take from their own culture, including democratic elections, and one man one vote. It is not that the Gitanyow disagree with these principles, but they cannot agree with the way the governments want to apply it in the context of the Gitanyow government. For example, although Canada and British Columbia insist on one man one vote for the Gitanyow, neither Canada nor British Columbia apply this principle inflexibly themselves. The ridings which determine the number of seats in the legislature are not of uniform size in either the Provincial legislature or the federal Parliament. Further, the interaction of federal principles with democratic principles weight the voting power in favour of provinces with smaller populations. There is nothing fundamentally undemocratic or unrepresentative about the house and clan system of government which the Gitanyow describe. In many ways it allows and encourages more participation by the citizens than the system of government in Canada.

3. Furthermore, owing to the small size of many First Nations, and the predominance of family voting, a simplistic notion of voting equality in First Nations may lead to substantive inequality. In *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 four symbiotic values were said to underlay political society in Canada: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. I have already noted that federalism is a value which undercuts the equality of the vote in Canada. Similarly, the protection of minority rights is a value which prevents democracy from degenerating into a tyranny of the majority. In order to prevent such degeneration in democratic First Nations, it is important to study their traditional mechanisms of social cohesion, which counterbalance the urge of dominant families to satisfy their own self interest, rather than the public good. It may be ultimately that the unthinking or untempered application of democratic principles in First Nations leads not to liberty and the promotion of the public good.
4. In a similar vein, an insistence on overly formulaic rules of natural justice, whether in its traditional formulation, or in its modern, free-market incarnation of openness, transparency and accountability can lead to simplistic caricatures of Gitanyow governance. “Every man calls barbarous anything he is not accustomed

to; it is indeed the case that we have no other criterion of truth or right-reason than the example and form of the opinions and customs of our own country.”⁵ Over insistence on the application models of market state governance in Gitanyow territory not only threatens to revive, in a modern form, the hydra-headed idea of the “white man’s burden.” “There is peril in assuming that only our rules are rational and justifiable.”⁶ The point is that one cannot make a facile judgment about the way Gitanyow governance works, based on a simple comparison, out of the context of the whole, between discreet elements of Gitanyow and Canadian Parliamentary political structures. Natural Justice is not merely procedural. It is the achievement through procedure of the protection of substantive values. This is what must be perceived. The mindless and formulaic approach to natural justice, and the insistence upon its simplistic application in Gitanyow structures, irrespective of context and cultural match, could subvert the Gitanyow system.

5. The Gitanyow have a profoundly different vision of the relationship between themselves and the governments of Canada and the province than what those governments are prepared to accept. The governments’ view is that since they are sovereign, any Gitanyow government would be under their authority. They would decide what that government would look like, who would be subject to it, over what territory, and what authority it would have. The Gitanyow view is that their existence as a people, their control over their territory, and their governmental institutions all pre-exist the assertion of British sovereignty. They insist that under the Canadian Constitution the province lacks authority over the them, and that the essence of federal power over them is its duty to recognize what has exist and still exists, and ensure that it is protected: This position is in accordance with the words of the Supreme Court in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at page 1109 and *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 31 and 43:

Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights

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⁵ Michel de Montaigne, “On the Cannibals” Book I, 31, *The Complete Essays*, trans. and ed M.A. Screech (Harmondsworth: Penguin Books, 1991) at pages 231

⁶ *Indyka v. Indyka*, [1969] 1 A.C. 33 at 76 per Lord Morris of Borth-y-Gest

What s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

* * *

The aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes.

6. Instead of recognizing and affirming aboriginal rights, and instead of reconciling the sovereignty of the Crown with the Gitanyow and their pre-existing societies, the governments diminish, terminate, modify and extinguish aboriginal rights. Instead of allowing head 91 (24) to perform its function as a constitutional shield for Indians and Lands reserved for the Indians against the competing demands of provincial populations—and we must remember that head 91 (24) and its inclusion in the heads of federal power arose in the context of a long alliance between aboriginal peoples and the British, and in light of the American experience for example the conflict between the Cherokee and the State of Georgia, who wanted Cherokee land, led to the Cherokee cases in the United States Supreme Court and to the “Trail of Tears”—the federal government in its treaty policy insists on the extinction of “lands reserved for the Indians” as a class of subjects under federal jurisdiction. The Gitanyow however are of the view that 91 (24) is a shield against provincial authority, and intend that it continue to be such. They insist:
 - a. That Gitanyow lands must remain 91 (24) lands in accordance with the words of Lord Watson in *St Catherine’s Milling and Lumber Co. v. the Queen* (1888) 14 App. Cas. 46 at page 59:

the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority

It is in effect beyond the competence of either the federal or provincial government of B.C. jointly or separately, with the consent of and aboriginal people or not to impose on any lands, such as treaty lands must be, coming within this definition another status. No one would say that they could in the absence of a constitutional amendment redefine their trade and commerce power.

- b. That the provincial government lacks authority to interfere with Gitanyow governance and governments, or to set down standards for the Gitanyow to adhere to. The Gitanyow find themselves in a situation which simulates the position of the provinces vis-à-vis the federal government in terms of spending power. Federal control over money and greater financial power allows it to impose its will over the provinces in areas where its jurisdictional authority is dubious. Similarly the provinces, until First Nations can gain economic independence, can use financial power to control First Nations in areas where under the law, they have no business interfering. There has been much work done on the issue of the spending power,⁷
7. With respect to the Gitanyow Constitution, the governments, federal and provincial, continue to insist that they do not understand it, and that it is not defined. They have not yet articulated a response to it. This forces the Gitanyow to spend an inordinate amount of time educating and re-educating the governments in the Gitanyow mode of governance.
8. Government policy, particularly of the federal government, remains centred on *Indian Act* Bands, and in the Comprehensive Claims Policy. But the law has developed in ways far different than was imagined when the CCP was first articulated, and the policy needs to be brought up to date. Furthermore, the disappearance of the concept of irregular bands from the *Indian Act* in 1951, and the difficulty under the *Indian Act* in recognizing the complexity of political structures under which aboriginal people lived and live, are a stumbling block to progress.

Recommendations

⁷ Tremblay Report (Report of the Royal Commission on Constitutional Problems) (Quebec, 1956), vol. 2, 217-233; Trudeau, "Federal Grants to Universities" (1957) in *Federalism and the French Canadians* (1968) 79; Petter, "The Myth of the Federal Spending Power" (1989) 68 Can. Bar Rev. 448; Trudeau, *Federal-Provincial Grants and the Spending Power of Parliament* (1969) 30.

I turn now to a series of recommendations for the First Nations Governance Centre based upon the experience of the Gitanyow. These recommendations must be prefaced with the remark that each First Nation has its own history and its own future. The mandate of the First Nations Governance Centre is to enable First Nations to make their own choices in designing a government which meets their own needs in a manner which is culturally appropriate. This point was emphasized to me as I undertook this project by the First Nations Governance Centre itself, and my recommendations aim primarily to ensure that there is sufficient flexibility in governance policy to enable First Nations to make real choices.

Community Processes in Design of a Constitution.

The Gitanyow community processes involved in constitution making were traditional, and the Gitanyow traditional community divisions of house and clan were engaged in order to set down their traditional constitution. The traditional system affords a balanced way to approach the problem of family voting in small communities. That is to say, a simplistic application of democratic processes to design a constitution in circumstances where family bonds are strong and family interests compete against those of other families. If the aim of democracy and democratic processes is liberty,⁸ it follows that the pursuit of democracy must be tempered by a constitutionalism which is aware of specific local circumstances which if unchecked would undermine that end. Similarly, equality has both formal and substantive aspects. The pursuit of pure formal equality regardless of its effect on substantive equality would not be correct. It seems to me that the system of houses and clans which function as a means of corporate representation affords a good counterweight to the pressures of formal democracy, and it must be stressed that that system is not itself undemocratic. Mechanisms with similar effect suitable for First Nations with small populations and strong family ties need to be studied.

What impediments lie in the path of First Nations seeking to develop constitutions?

There are two sorts of impediments, internal and external. The internal impediments relate first of all to the uncertainty of moving beyond the *Indian Act*, which for all its faults has the one virtue of being in existence and recognized everywhere. First Nations

⁸ Aristotle, *The Politics*, Book VI, ch. 2.

communities may be reluctant to exchange the devil they know for the devil they do not know, and it is a lot easier to contemplate change in those communities where there are traditional systems of governance still in place, than in communities who are further away from traditional systems. There needs to be separate consideration of each situation, though it must be said that even in those situations where the traditional culture is strong, the reversion to traditional governance is not necessarily easy. The Gitanyow in particular have given a lot of hard thought to the way in which their system works in terms of legitimacy, power and resources. Their system can meet any concerns about legitimacy. But generally First Nations will be faced with a choice between:

- a) remaining with the Indian Act;
- b) modifying the Indian Act so that its failings are addressed
- c) reverting to a traditional form of governance
- d) modifying traditional forms of governance
- e) creating something new

The First Nations Governance Centre must be in a position to enable First Nations to assess their own needs in the context of their own cultures and in light of the desire for good governance.

External Impediments—Legal and Policy Issues Surrounding First Nations Constitutional Development

External impediments to First Nations include primarily the strictures placed on them by the federal and provincial governments. These can be analyzed in terms of legitimacy, power and resources. First of all, despite the fact that the traditional governments or legitimate governments based on the right of self determination of First Nations ought to be recognized and affirmed by virtue of section 35 of the *Constitution Act, 1982*, in fact the position of the federal and provincial governments is far more conservative. Only those communities which have express statutory recognition get funding, and there remains a reluctance to deal with self constructed communities. The tendency is to rely on the *Indian Act*, and the Bands as they now exist.

Initially the Bands were communities identified and listed by officials of the Canadian government, for whom lands and monies were reserved. But in earlier *Indian Acts*, there was also express recognition of “irregular bands” that is bands for whom no money or land had yet been reserve. “Irregular bands” disappeared from the scheme of the Act in

1951, but the concept remains relevant, in that there are natural sub groupings and super groupings of First Nations people which the scheme of the Act does not allow for. Just as aboriginal title is not dependent upon “treaty, executive order or legislative enactment” (*Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313 at page 390 per Hall J.; affirmed by Dickson J in *Guerin v. the Queen*, [1984] 2 S.C.R. 335) so the existence of bodies of Indians predates the *Indian Act* and the setting aside of reserve lands or moneys for them. Assuming that the initial bodies of Indians which received recognition were the actual natural bodies of Indians which existed prior to contact, the enfranchisement, status and membership rules under the *Indian Act* have caused some great disparity between those natural bodies and the *Indian Act* bodies. The policy of the government of Canada should be to realign the *Indian Act* Bands with traditional bodies of Indians wherever that is possible, through the revitalization of the concept of irregular bands, and the modification of the status and membership rules under the *Indian Act*. It should also encourage customary councils which govern those bands in traditional ways. Given the difficulty of amending the Indian Act in any wholesale way, as illustrated recently by the proposed First Nations governance legislation, the focus should be on developing policies within the Canadian government which actively encourage self government and good governance. In general I am of the view that the *Indian Act* is remarkable for the range of discretion it allows to the Department of Indian Affairs. The legislation is not as problematic as the way it is applied by the Department—in a largely secret and unaccountable way. It is of primary importance that the Department itself comes to see that good governance must begin in the development of policies for itself which accord with the law and are driven by the needs of First Nations. It must be added in this context that the ordinary principles of representative democracy do not work well for a department which serves a small percentage of the overall population. The majority of Canadians have no contact with the Department and the interests of a Parliament driven by the concerns of the majority are often directed elsewhere.

There are of course other policy issues surrounding First Nations constitutional development. These include primarily:

- a) what constitutes good governance;
- b) how can universal principles of governance be applied in a culturally appropriate way in the context of First Nations?

I have already articulated the position that in small communities where family alliances are strong the simple application of formal democratic principles is not sufficient to guarantee liberty or formal equality. In my view much of the focus should go to developing in each case a suitable form of governance. I am struck particularly by the way in which Gitanyow governance traditionally has its own system of checks and balances, and there is much to be learned from this.

Research and Technical Support

Research on governance for First Nations falls naturally into two groupings:

1. Those things which can be applied generally to all First Nations; and
2. Those things which are of their nature specific to a particular First Nation or group of First Nations.

The First Nations Governance Centre is well suited to provide to First Nations information and research on matters of general application, including research into the essentials of good governance, and influencing the Canadian government in its policy choices. The Gitanyow particularly expressed the need for this second role. Their history however illustrates that there is a place for education of First Nations in governance generally—the structural questions such as the difference between legislative, executive and judicial functions—and the more substantive questions such as the means by which the legitimacy and effectiveness of governments are created, maintained and lost. In my view the Governance Centre can be of service in educating First Nations people in what might be called the technocratic language of governance so that they can see and evaluate their traditional systems and defend them when they need defending. But the fact that these systems are defensible is not enough unless the governments of Canada and the provinces see the wisdom in allowing the customary ways of First Nations great weight in the formation of constitutions best suited to them. For whether or not a constitution is rooted in tradition in the narrow sense, it must be rooted in common practice, if it is to be effective, and in the reality of political and social life in any given First Nations community. This marks the shift from the general to the particular situation of particular First Nation. In this area the primary role of the First Nations Governance Centre will be to enable First Nations to assess their particular community situations—involving:

1. An assessment of their particular practices of governance;
2. An assessment of the strengths and weaknesses of those practices;
3. An assessment of what one might call structural impediments to good governance including family ties and dominances which tend to exclude members from participation in decision making;
4. An assessment of how those structural impediments can be checked in designing a constitution suitable for the particular First Nation.

Again it is clear from my instructions from the First Nations Governance Centre that the Centres mandate is not to impose any particular form of government upon First Nations, but to enable First Nations to make informed choices about the type of government best suited to them. Only a particular First Nation has the information available to it to make that informed choice, supplemented by the expertise that the Centre can provide.