

# Chapter 8

## INDIGENOUS INSTITUTIONS AND THE RULE OF INDIGENOUS LAW

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### I. INTRODUCTION

Who speaks for Indigenous nations? That question was asked with increasing urgency over the past year, as nation-wide protests effectively shut down sectors of the Canadian economy in solidarity with Wet’suwet’en hereditary chiefs.<sup>1</sup> Those hereditary chiefs opposed the construction of the Coastal GasLink pipeline, a project that would run through traditional Wet’suwet’en territory. However, the pipeline was supported by the elected *Indian Act*<sup>2</sup> band councils associated with the Wet’suwet’en, as well as some other hereditary chiefs. Many Wet’suwet’en members supported the pipeline and the economic benefits it promised to bring to their communities,<sup>3</sup> while

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<sup>1</sup> See *e.g.*, online: CTV News <<http://www.ctvnews.ca/business/as-economic-impact-of-rail-blockades-grows-protesters-say-fundamental-rights-are-at-stake-1.4812632>>; online: Edmonton Journal <<http://edmontonjournal.com/news/local-news/farmer-worry-about-rail-access-as-wetsuweten-protests-continue/wcm/d881649a-63b2-4a3d-85d6-b5794bb440fa>>; online: McGill Journal of Political Studies <<http://mjps.smu.ca/2020/02/19/railway-blockades-and-pipeline-protests-why-the-crisis-requires-immediate-action>>.

<sup>2</sup> R.S.C. 1985, c. I-5.

<sup>3</sup> See *e.g.*, *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at paras. 69, 70, 2019 BCSC 2264 (B.C.S.C.) [*“Coastal GasLink”*]; online: CBC News <<http://www.cbc.ca/news/business/wet-suwet-en-coastal-gas-link-pipeline-lng-1.5469401>>; online: CTV News <<http://www.ctvnews.ca/canada/wet-suwet-en-supporters-of-pipeline-don-t-think-their-message-is-being-heard-1.4833878>>. The economic benefits of the project include an estimated \$338 million for Indigenous communities along the route under project benefit agreements: *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at para. 13, 2019 BCSC 2264 (B.C.S.C.).

others were opposed on environmental and other grounds.<sup>4</sup>

The answer to the question of who speaks for the Wet'suwet'en nation turns out to be rather complicated.<sup>5</sup> It has been made so largely by the historical legacy of colonialism. Beginning particularly in the 19th century, government policy sought to displace Indigenous cultures, norms and institutions. With respect to local governance, the *Indian Act* established a one-size-fits-all political system for First Nations, which were categorized into relatively small "bands" that typically encompassed only parts of traditional nations.<sup>6</sup> Under the *Indian Act*, the federal government recognized authority as residing in an elected chief and band council, often without taking account of the traditions and norms of legitimacy within communities.<sup>7</sup>

In some cases, First Nations communities came to accept band councils as their legitimate leadership, sometimes taking advantage of a provisions in the *Indian Act* that allowed for departures from the standard governance model.<sup>8</sup> However, in other cases, Indigenous communities maintained separate traditional governance structures alongside *Indian Act* institutions, a remarkable feat of cultural resiliency. With respect to the Wet'suwet'en nation, a complex and nuanced system of governance based on clans and houses co-exists with the elected band councils, raising questions as to the jurisdiction of each set of institutions.<sup>9</sup> This brief article is about the challenges of Indigenous institution-building in the aftermath of colonialism, using

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<sup>4</sup> See e.g., online: The Guardian <<http://www.theguardian.com/world/2020/feb/14/wetsuweten-coastal-gaslink-pipeline-allies>>; online: Globe and Mail <<http://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc>>.

<sup>5</sup> Online: Globe and Mail <<http://www.theglobeandmail.com/opinion/article-who-speaks-for-the-wetsuweten-people-making-sense-of-the-coastal/>>; online: First Nations Drum <<http://www.firstnationsdrum.com/2019/02/the-complicated-history-of-hereditary-chiefs-and-elected-councils/>>; online: Globe and Mail <<http://www.theglobeandmail.com/canada/article-its-the-people-who-decide-whos-leading-the-pro-wetsuweten>>.

<sup>6</sup> *Indian Act*, R.S.C. 1985, c. I-5, see e.g., ss. 2(1), 74; Jack Woodward, *Native Law* (Toronto: Carswell, 1989) (loose-leaf updated 2019), c. 7 at E-H.

<sup>7</sup> Jack Woodward, *Native Law* (Toronto: Carswell, 1989) (loose-leaf updated 2019), c. 7 at E-F.

<sup>8</sup> *Indian Act*, s. 74; online: Indigenous Services Canada <<http://www.sac-isc.gc.ca/eng/1433166668652/1565371688997>>.

<sup>9</sup> Online: National Post <<http://nationalpost.com/pmn/news-pmn/canada-news-pmn/a-primer-on-the-governance-system-of-the-wetsuweten-nation>>; online: Globe and Mail <<http://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc>>; John Borrows, "Wet'suwet'en and the Coastal Gaslink Pipeline" (University of Victoria, March 18, 2020), online: University of Victoria <<http://www.uvic.ca/law/home/news/current/video-john-borrows-on-the-wetsuweten-and-the-coastal-gaslink-pipeline.php>>.

the Wet'suwet'en dispute over the Coastal GasLink pipeline as a case study.

## II. WET'SUWET'EN GOVERNANCE AND THE COASTAL GASLINK PIPELINE

The hereditary system of the Wet'suwet'en is made up of five clans, under which there are 13 house groups.<sup>10</sup> Each house has a head hereditary chief — the highest hereditary title for the Wet'suwet'en — as well as a sub-chief or wing chief. Hereditary titles and land traditionally pass through the mother's clan.<sup>11</sup> Historically, a hereditary chieftainship was based not only on bloodlines, but also on the moral character of the individual in question.<sup>12</sup> The Office of the Wet'suwet'en was established in 1994 to represent the hereditary house chiefs in treaty negotiations and to deliver various services.<sup>13</sup> One of the 13 houses (Dark House, or Yex T'sa wil\_k'us) currently operates independently of the Office.<sup>14</sup> The Wet'suwet'en are also comprised of five *Indian Act* bands, each with an elected *Indian Act* chief and council.<sup>15</sup> There is often overlap between leaders who serve both as elected *Indian Act* councillors and as hereditary leaders.<sup>16</sup>

While elements of the present-day hereditary governance structure of the Wet'suwet'en have longstanding roots in traditional Wet'suwet'en law, it currently suffers from considerable instability, which has also compromised the authority of the elected *Indian Act* band councils.<sup>17</sup> These challenges were starkly evident in the controversy around the proposed Coastal GasLink pipeline project. The provincial

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<sup>10</sup> *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at para. 54, 2019 BCSC 2264 (B.C.S.C.).

<sup>11</sup> Online: Office of the Wet'suwet'en <<http://www.wetsuweten.com/culture/governance>>; see also *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 at 1031 (S.C.C.) ["*Delgamuukw*"].

<sup>12</sup> Online: Globe and Mail <<http://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc>>.

<sup>13</sup> Online: Office of the Wet'suwet'en <<http://www.wetsuweten.com/office/about-us>>; online: BC Treaty Commission <<http://www.bctreaty.ca/wetsuweten-hereditary-chiefs>>.

<sup>14</sup> *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at para. 55, 2019 BCSC 2264 (B.C.S.C.).

<sup>15</sup> *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at para. 56, 2019 BCSC 2264 (B.C.S.C.).

<sup>16</sup> Online: Globe and Mail <<http://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc>>.

<sup>17</sup> Community groups who oppose the Coastal GasLink Project claim that the *Indian Act* band councils only have jurisdiction over federal reserve lands, not the broader traditional territories that are implicated in the Project; the band councils dispute this: *Coastal GasLink* at paras. 67, 68. This has resulted "in considerable tension" within the community and between the various groups claiming to represent the interests of the Wet'suwet'en peoples (*Coastal GasLink* at para. 68) as described by various community members during the *Coastal GasLink* litigation: see paras. 69, 70.

Environmental Assessment Office directed Coastal GasLink to consult with the Office of the Wet'suwet'en, Dark House and the five *Indian Act* bands.<sup>18</sup> All five *Indian Act* bands ultimately signed impact-benefit agreements in support of the Project, as did each of the 20 other *Indian Act* bands along the Project route.<sup>19</sup> While the Office of the Wet'suwet'en initially participated in the consultation process, they have opposed the project since 2014, when Coastal GasLink rejected the Office's proposal to reroute the pipeline.<sup>20</sup> Dark House did not participate in formal consultations, despite being invited to do so, and through its spokespeople maintained its opposition to the Project throughout the process.<sup>21</sup>

Three of the hereditary chiefs who disagreed with the opposition of the Office of the Wet'suwet'en to the pipeline were subsequently stripped of their hereditary titles.<sup>22</sup> They went on to establish the Wet'suwet'en Matrilineal Coalition in 2015, with the intention of negotiating with Coastal GasLink on behalf of the hereditary clans.<sup>23</sup>

Meanwhile, several other groups claim varying degrees of legal authority over Wet'suwet'en territories. The Unist'ot'en were responsible for at least one of the

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<sup>18</sup> *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at para. 57, 2019 BCSC 2264 (B.C.S.C.).

<sup>19</sup> *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at para. 66, 2019 BCSC 2264 (B.C.S.C.).

<sup>20</sup> *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at paras. 58-60, 2019 BCSC 2264 (B.C.S.C.).

<sup>21</sup> *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at paras. 45-50, 61, 62, 2019 BCSC 2264 (B.C.S.C.).

<sup>22</sup> Online: Globe and Mail <<http://www.theglobeandmail.com/business/article-wetsuweten-chiefs-remove-hereditary-titles-of-three-women-who>>; online: APTN National News <<http://www.aptnnews.ca/national-news/hereditary-chiefs-of-the-wetsuweten-nation-in-b-c-say-1ng-pipeline-doesnt-have-unanimous-consent>>; online: Globe and Mail <<http://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc>>; Transcript from Theresa Tait-Day's March 10 appearance before the House Committee on Indigenous and Northern Affairs, online: Parliament of Canada <<http://www.ourcommons.ca/DocumentViewer/en/43-1/INAN/meeting-4/evidence#Int-1080090>>; online: Cision <<http://www.newswire.ca/news-releases/wet-suwet-en-hereditary-chief-theresa-tait-day-wi-haliy-te-tells-federal-government-women-s-voices-are-being-silenced-in-governance-and-resource-debates-828746342.html>>; online: APTN News <<http://www.aptnnews.ca/national-news/wetsuweten-sub-chief-who-supports-coastal-gaslink-says-supporters-elected-chiefs-arent-being-heard>>.

<sup>23</sup> *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at paras. 76, 78-82, 2019 BCSC 2264 (B.C.S.C.); see also online: Globe and Mail <<http://www.theglobeandmail.com/canada/article-wetsuweten-matriarch-calls-for-hereditary-governance-to-reflect>>; online: CBC News <<http://www.cbc.ca/news/canada/british-columbia/wetsuweten-whos-who-guide-1.5471898>>.

several blockades erected along the Coastal GasLink route.<sup>24</sup> While they claim clan-based hereditary authority in association with Dark House, this group's description has changed repeatedly over the course of the project's lifetime.<sup>25</sup> At least three other groups claiming clan-based authority have also emerged in opposition to the Project.<sup>26</sup>

The conflict over the Coastal GasLink pipeline has been temporarily resolved by an agreement between the federal and provincial governments and the hereditary chiefs.<sup>27</sup> However, the elected band councils continue to contest the legitimacy of a negotiation process that has so far excluded them.<sup>28</sup> The question of how Wet'suwet'en institutions will operate going forward, including how the elected and hereditary governments will relate to each other, remains somewhat open. It is to be hoped that the recent dispute, which has led to negotiations over the recognition of Wet'suwet'en self-government powers, will lead to a period of institution-building that will bring clarity to these and other issues. As we will discuss in the next section, the stakes for Indigenous institution-building of this nature are high, and extend far beyond the fate of a single pipeline project.

### III. INDIGENOUS INSTITUTIONS AND CULTURAL MATCH

Indigenous institution-building must be led by Indigenous nations themselves. Indeed, there is no single answer to the question of which types of governance institutions are "best". Many Indigenous communities have sought to adapt their band council governance structures to their present circumstances, while others have

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<sup>24</sup> *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at paras. 14-23, 31-38, 2019 BCSC 2264 (B.C.S.C.); online: CBC News <<http://www.cbc.ca/news/canada/british-columbia/wetsuweten-whos-who-guide-1.5471898>>; online Global News <<http://globalnews.ca/news/6532407/7-arrested-northern-bc-pipeline-blockade>>; online: National Observer <<http://www.nationalobserver.com/2020/01/14/opinion/rcmp-let-journalists-witness-unistoten-camp>>.

<sup>25</sup> *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at paras. 71-74, 2019 BCSC 2264 (B.C.S.C.); online: Unist'ot'en <<http://unistoten.camp/about/governance-structure>>.

<sup>26</sup> *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at paras. 83-88, 2019 BCSC 2264 (B.C.S.C.). These groups are Gidum't'en, Sovereign Likhts'amisyu, and Tsaya Land Defenders.

<sup>27</sup> Government of Canada, Memorandum of Understanding between Canada, British Columbia and Wet'suwet'en as agreed on February 29, 2020, online: <<http://www.rcaanc-cirmac.gc.ca/eng/1589478905863/1589478945624>>.

<sup>28</sup> See *e.g.*, online: APTN National News <<http://www.aptnnews.ca/national-news/wetsuweten-hereditary-leaders-sign-rights-and-title-mou-with-feds-province>>; online: MacDonald-Laurier Institute <<http://www.macdonaldlaurier.ca/wetsuweten-revitalize-political-system>>; online: CBC News <<http://www.cbc.ca/news/politics/stefanovich-wetsuweten-elected-chiefs-mou-fallout-1.5565243>>; online: National Post <<http://nationalpost.com/news/they-created-a-problem-chiefs-say-trudeau-liberals-wetsuweten-deal-opens-up-fresh-conflicts>>.

opted instead to reinvigorate traditional institutions. A range of different factors can inform a community's assessment of what governance regime is best suited to members' current needs, including the values, traditions, priorities, and economic and political circumstances in the community.<sup>29</sup> However, one idea that has received particular attention in the Indigenous economic development literature is the importance of "cultural match": aligning a community's formal governance institutions with its underlying norms of political power and authority.<sup>30</sup>

One of the legacies of colonialism was the erosion of traditional governance structures. A core challenge faced by Indigenous communities today, therefore, is how to re-establish systems of law and governance aligned with norms of legitimacy among members. The importance of aligning governance institutions with norms of legitimacy cannot be understated. It has implications for the rule of law both within Indigenous communities and in Canadian society more broadly.

Where formal governance institutions are aligned with the prevailing norms of a community, a culture of legality is able to flourish. Government officials and ordinary citizens are willing to abide by the requirements of the law not just out of a fear of sanction, but because they believe in the law's authority.<sup>31</sup> The law is also more readily ascertainable when it conforms with pre-existing customs and norms in a community. Individuals can adhere to widely known norms of conduct, safe in the assumption that the formal law is consistent with those norms.<sup>32</sup> If people can readily know what the law is, and believe they ought to follow it, the law is able to fulfil its function in guiding human conduct. This serves to render the exercise of government authority predictable, which in turn has a range of desirable consequences. Liberty is enhanced when arbitrary or unpredictable government action is limited.<sup>33</sup> There are also significant economic benefits associated with a stable and

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<sup>29</sup> See Malcolm Lavoie, "Models of Indigenous Territorial Control in Common Law Countries: A Functional Comparison" in Dwight Newman, ed., *Research Handbook on the International Law of Indigenous Rights* (Cheltenham, UK: Edward Elgar, 2020) [forthcoming].

<sup>30</sup> The Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions under US Policies of Self-Determination* (Oxford: Oxford University Press, 2008) at 125-26.

<sup>31</sup> The Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions under US Policies of Self-Determination* (Oxford: Oxford University Press, 2008) at 125-26.

<sup>32</sup> Compare the claim that the common law has traditionally been developed in a manner that aligns with pre-existing customs and norms. See F.A. Hayek, *Law, Legislation and Liberty*, vol. 1 (Chicago: University of Chicago Press, 1973) at 98-101, 106-110.

<sup>33</sup> John Rawls, *A Theory of Justice*, revised ed. (Cambridge, MA: Harvard University Press, 1999) at 206-13; F.A. Hayek, *The Constitution of Liberty* (New York: Routledge, 2006) at 180-92.

predictable legal regime.<sup>34</sup> Parties can make plans for their own businesses and families while knowing what the rules of the game are. In the case of Indigenous communities, the establishment of robust and effective governance aligned with local values is also an act of resiliency in the face of state action that has historically worked to undermine self-government.

While formal governance structures that are out of line with community norms are undesirable from the perspective of the rule of law, so too is a situation in which a community is governed by separate sets of institutions, with overlapping and competing claims to legitimacy. In these cases, the result is an undermining of the culture of legality and the predictability that it fosters, both within and outside of the Indigenous community. In principle, band councils and traditional governance institutions can co-exist, but they need a clear delineation of jurisdiction in order to avoid undermining each other's legitimacy and authority to represent the community.

The establishment of effective and legitimate governance institutions in Indigenous communities is not just an important issue for those communities. The rule of law in Canada is made up of an interconnected web of institutions, including federal, provincial and Indigenous governments. The rule of law depends on the efficacy and legitimacy of each of these institutions, and on clear and accepted principles for delineating their jurisdiction. Where institutions are misaligned in one setting, there are ripple effects in others.

The Wet'suwet'en dispute provides an excellent example of how Indigenous and non-Indigenous institutions are interconnected. Canadian law provides a mechanism for establishing Aboriginal rights and title, as well as consultation requirements that can apply prior to the definitive establishment of rights or title. The Wet'suwet'en nation has a strong Aboriginal title claim, though Aboriginal title has not yet been established.<sup>35</sup> The Office of the Wet'suwet'en has represented the Wet'suwet'en in treaty negotiations, which could eventually lead to the recognition of robust self-government with jurisdiction over an established territory, but those negotiations have so far been unsuccessful.<sup>36</sup>

In the case of the Coast GasLink project, the consent obtained from the elected

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<sup>34</sup> See Dani Rodrik, Arvind Subramanian & Francesco Trebbi, "Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development" (2004) 9 J. Economic Growth 131; Daron Acemoglu, Simon Johnson & James A. Robinson, "The Colonial Origins of Comparative Development: An Empirical Investigation" (2001) 91:5 American Economic Rev. 1369; Daron Acemoglu & James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (New York: Crown Business, 2012) at 429-430.

<sup>35</sup> *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.).

<sup>36</sup> Online: BC Treaty Commission <<http://www.bctreaty.ca/wetsuweten-hereditary-chiefs>>.



band councils was not seen as legitimate by some Wet'suwet'en members. And that, in turn, called into question the legitimacy of the broader Canadian legal system. The widespread protests that ensued help to demonstrate that the effectiveness and legitimacy of Indigenous institutions has implications that extend well beyond these communities.

Indigenous institution-building is an important issue for the rule of law in Canada. We should all hope to see Indigenous nations (re-)establish effective governance structures that are consistent with community norms, whether these are based on adaptations of the band councils that have now been in place for generations or the reinvigoration of traditional governance structures. While this process must be Indigenous-led, there are important ways that outside governments can support it. Indigenous nations should be able to find ready partners at the negotiating table for self-government and comprehensive land claims agreements, which often provide opportunities for effective institution-building.<sup>37</sup>

Non-Indigenous Canadians clearly have an interest in effective and legitimate Indigenous institutions that uphold the rule of law. Yet as we discuss in the next section, it would be wrong to view the rule of law as a purely Western ideal at odds with Indigenous traditions, values and interests.

#### IV. THE RULE OF INDIGENOUS LAW

A growing body of Indigenous scholarship and public policy work identifies the rule of law as a fundamental element of traditional Indigenous governance.<sup>38</sup> Other sources enumerate principles that are typically associated with the rule of law, for instance accountability, transparency, and equality and fairness under the law.<sup>39</sup> This

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<sup>37</sup> See e.g., online (pdf): Nisga'a Lisims Government <<http://www.nisgaanation.ca/sites/default/files/Nisga%27a%20Final%20Agreement%20-%20Effective%20Date.PDF>> at 159; online: Nunavut Tunngavik <; online (pdf): Westbank First Nation <<http://www.wfn.ca/docs/self-government-agreement-english.pdf>" type="http"><http://nlca.tunngavik.com/?lang=en>>; online (pdf): Westbank First Nation <<http://www.wfn.ca/docs/self-government-agreement-english.pdf>>.

<sup>38</sup> Royal Commission on Aboriginal Peoples, vol. 2, *Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996) at 115 ("RCAP Report"). The full list of RCAP principles of Indigenous traditions of governance is as follows: (1) the centrality of the land; (2) individual autonomy and responsibility; (3) the rule of law; (4) the role of women; (5) the role of elders; (6) the role of the family and the clan; (7) leadership and accountability; and (8) consensus in decision-making; online (pdf): Centre for First Nation Governance <[http://www.fngovernance.org/publication\\_docs/Five\\_Pillars-CFNG.pdf](http://www.fngovernance.org/publication_docs/Five_Pillars-CFNG.pdf)> at 11.

<sup>39</sup> See e.g., Royal Commission on Aboriginal Peoples, vol. 2, *Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996); online (pdf): First Nations Financial Management Board <[http://fnfmb.com/sites/default/files/2018-09/2018\\_FN-Governance\\_Project\\_phase1-low-res\\_update.pdf](http://fnfmb.com/sites/default/files/2018-09/2018_FN-Governance_Project_phase1-low-res_update.pdf)> at 7; Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, 1st ed. (Don Mills, Ontario: Oxford University Press, 1999) at 82. The full list of Alfred's "characteristics of a strong Indigenous nation" is



is not surprising, given that the maintenance of community cohesion and consensus in decision-making are deeply ingrained in traditional governance systems.

The Centre for First Nations Governance<sup>40</sup> explains that the rule of law “provides clear instruction on acceptable behaviour — behaviour that benefits the community” and “exists to minimize conflict”.<sup>41</sup> The final report of the Royal Commission on Aboriginal Peoples notes that within traditional Indigenous governance systems, “the law is grounded in instructions from the Creator or, alternatively, a body of basic principles embedded in the natural order”.<sup>42</sup> As such, “any failure to live by the law is to turn one’s back on the Creator’s gifts, to abdicate responsibility and to deny a way of life”.<sup>43</sup>

In short, while the rule of law in Indigenous governance traditions “might be rooted in spiritual learning and oral traditions rather than written legislation”,<sup>44</sup> arbitrary or unaccountable governance structures are as much at odds with Indigenous governance principles as they are with Western governance ideals.

A range of successful models exist for how Indigenous communities can (re)develop institutions that achieve a rule of law in keeping with their values and principles. Despite their diversity, effective Indigenous governance systems tend to share certain characteristics. For instance, they typically have robust, culturally-aligned processes for resolving disputes among members and leaders and, ideally,

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as follows: (1) wholeness with diversity; (2) shared culture; (3) communication; (4) respect and trust; (5) group maintenance; (6) participatory and consensus-based government; (7) youth empowerment; and (8) strong links to the outside world; John Borrows, *Canada’s Indigenous Constitution*, c. 3 at 59-106; John Borrows, “Wet’suwet’en and the Coastal Gaslink Pipeline” (University of Victoria, March 18, 2020), online: University of Victoria <<http://www.uvic.ca/law/home/news/current/video-john-borrows-on-the-wetsuweten-and-the-costal-gaslink-pipeline.php>> at 38:24-42:00; Jason Madden, John Graham & Jake Wilson, in their report “Exploring Options for Métis Governance in the 21st Century” (Institute on Governance, September 2005), identify the following “universal” principles of good governance: (1) legitimacy and voice; (2) fairness; (3) accountability; (4) performance; and (5) direction.

<sup>40</sup> The Centre notably includes a sitting board member who has held a hereditary Wet’suwet’en chieftainship, online: <[http://www.fngovernance.org/about/our\\_team](http://www.fngovernance.org/about/our_team)> (see Herb George).

<sup>41</sup> Online (pdf): Centre for First Nation Governance <[http://www.fngovernance.org/publication\\_docs/Five\\_Pillars-CFNG.pdf](http://www.fngovernance.org/publication_docs/Five_Pillars-CFNG.pdf)> at 11.

<sup>42</sup> Royal Commission on Aboriginal Peoples, vol. 2, *Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996) at 115.

<sup>43</sup> Royal Commission on Aboriginal Peoples, vol. 2, *Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996) at 116.

<sup>44</sup> Online (pdf): First Nations Financial Management Board <[http://fnfmb.com/sites/default/files/2018-09/2018\\_FN-Governance\\_Project\\_phase1-low-res\\_update.pdf](http://fnfmb.com/sites/default/files/2018-09/2018_FN-Governance_Project_phase1-low-res_update.pdf)> at 13.

the Crown and other external actors.<sup>45</sup> Many communities have focused on re-building traditional governance over discrete policy areas including management of reserve lands,<sup>46</sup> health,<sup>47</sup> education<sup>48</sup> and election processes.<sup>49</sup>

There is also a growing number of Indigenous-led institutions in Canada that focus on Indigenous institution-building outside of the confines of the *Indian Act*. Some are the product of federal legislation — for instance the First Nation Finance Authority,<sup>50</sup> the First Nations Financial Management Board,<sup>51</sup> the First Nation Lands Advisory Board,<sup>52</sup> and the First Nations Tax Commission<sup>53</sup> — while others are not — for instance the Centre for First Nations Governance (mentioned above),<sup>54</sup> the National Aboriginal Lands Managers Association,<sup>55</sup> the New Relationship Trust in British Columbia,<sup>56</sup> or the Aboriginal Financial Officers Association.<sup>57</sup>

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<sup>45</sup> See John Borrows, “Wet’suwet’en and the Coastal Gaslink Pipeline” (University of Victoria, March 18, 2020), online: University of Victoria <<http://www.uvic.ca/law/home/news/current/video-john-borrows-on-the-wetsuweten-and-the-costal-gaslink-pipeline.php>> at 31:00; see discussion in *Intercultural Dispute Resolution in Aboriginal Contexts*, Catherine Bell & David Kahane, eds., Part 3 (Vancouver: UBC Press, 2004); see examples from the Centre for First Nations Governance’s Governance Pilot Project - Madawaska Maliseet First Nation, online: National Centre For First Nations Governance <[http://www.fngovernance.org/toolkit/best\\_practice/nisgaa\\_nation](http://www.fngovernance.org/toolkit/best_practice/nisgaa_nation)> type=“http”>[http://www.fngovernance.org/ncfng\\_research/patricia\\_mcguire.pdf](http://www.fngovernance.org/ncfng_research/patricia_mcguire.pdf)>; Nisga’a Nation, online: National Centre For First Nations Governance <[http://www.fngovernance.org/toolkit/best\\_practice/nisgaa\\_nation](http://www.fngovernance.org/toolkit/best_practice/nisgaa_nation)>; and the Anishinaabe, online: National Centre For First Nations Governance <[http://www.fngovernance.org/ncfng\\_research/patricia\\_mcguire.pdf](http://www.fngovernance.org/ncfng_research/patricia_mcguire.pdf)>.

<sup>46</sup> *First Nations Lands Management Act*, S.C. 1999, c. 24; see e.g., the Skowkale, Aitchelitz and Yakwekwioose First Nations (all part of the Stolo Nation in BC) who share land management governance under the *First Nations Lands Management Act*.

<sup>47</sup> See e.g., online: First Nations Health Authority <<https://www.fnha.ca>>.

<sup>48</sup> See e.g., Mi’kmaw Kina’matnewey in Atlantic Canada who have dramatically improved education outcomes for their communities while governing education consistent with Indigenous principles; online: Mi’kmaw Kina’matnewey <<http://kinu.ca>>.

<sup>49</sup> *First Nations Elections Act*, S.C. 2014, c. 5.

<sup>50</sup> Online: First Nations Financial Authority <<http://www.fnfa.ca/en>>.

<sup>51</sup> Online: First Nations Financial Management Board <<http://fnfmb.com/en>>.

<sup>52</sup> Online: Lands Advisory Board <<http://landsadvisoryboard.ca>>.

<sup>53</sup> Online: First Nations Tax Commission <<http://fntc.ca>>.

<sup>54</sup> Online: Centre for First Nations Governance <<http://www.fngovernance.org>>.

<sup>55</sup> Online: National Aboriginal Lands Managers Association <<http://nalma.ca/about/history>>.

<sup>56</sup> Online: New Relationship Trust <<http://www.newrelationshiptrust.ca>>.

<sup>57</sup> Online: AFOA Canada <<http://www.foa.ca>>.

These models and resources are likely to be useful to Indigenous communities, but models cannot be adopted reflexively. The task of institution-building is ultimately one for communities themselves. Local members and leaders can best determine which institutions are suited to a community, in light of local norms, traditional governance structures, and a range of other factors. To this end, Indigenous legal scholar John Borrows suggests that the recent Wet'suwet'en controversy may provide an opportunity for the Wet'suwet'en to rebuild their governance system, potentially "blend[ing] elements of hereditary and elected systems".<sup>58</sup> Borrows states that ideally, by "get[ting] past the stereotypes and generalizations and acrimony and think[ing] what are the issues in play, it is possible [for the Wet'suwet'en] to move . . . through a process of resolution".<sup>59</sup> The rule of Indigenous law will look different from one community to the next. But Indigenous-led institution-building aligned with Indigenous values will ultimately benefit all Canadians.

## V. CONCLUSION

Building up effective and legitimate Indigenous governance institutions will not eliminate disputes over resource development and other issues, but it can at least provide clear parameters for resolution. At the same time, robust governance institutions aligned with Indigenous values help to re-establish an Indigenous rule of law as part of Canada's legal heritage.

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<sup>58</sup> Online: Globe and Mail <article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc" type="http"><http://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc>>.

<sup>59</sup> Online: Globe and Mail <<http://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc>>.