

# Proper Title and Rights Holder

BC First Nations - All Chiefs' Forum  
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# “All Our Relations” A Declaration of the First Nations of British Columbia

“We have the inalienable sovereign right to self-determination. By virtue of this right, we are free to determine our **political status** and free to pursue our economic, social, health and well-being, and cultural development”

# DETERMINING THE PROPER TITLE AND RIGHTS HOLDER

- A new relationship based on co-existing titles and, in particular, recognition of Aboriginal title, requires the Crown to engage with the proper Title and Rights holders and recognize and respect First Nations role in decision-making. This is for legal or practical reasons

Principles agreed to by the Province at the RWG (MAY 2008) include:

- Shared decision-making is the process of governments coming together collaboratively to establish processes and mechanisms for making decisions on matters of mutual interest and concern relating to lands and resources
- First Nations should determine the appropriate First Nations' government bodies for shared decision-making discussions
- Government and First Nations recognize the benefits of broader regional approaches where appropriate

# THE EVOLVING LAW

- Legally, the courts have clarified that Aboriginal title is held collectively by the members of a Nation, and that the search is for the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion. That is distinct from what legal entity (political structure) represents them. Indian Bands, as creatures of a federal statute, are not necessarily the entity holding title. International law has clarified that the choice of political status is part of the inherent right of First Nations.

# COLLECTIVE NATURE OF ABORIGINAL TITLE

- “had tribal groups been recognized by the [Indian Act, the political and administrative environment of Indians would have been very different... the [Indian Act’s exclusive focus on bands served to inhibit... tribal strength and unity” (Paul Tennant, *Aboriginal Peoples and Politics*, pp. 45-46)
- “the communal nature of most indigenous occupation is a fact which cannot be denied... Determining today’s beneficiaries of a subsisting un-transferred aboriginal title would therefore involve ascertaining the present membership of the group that was in exclusive occupation when the Crown acquired sovereignty (1846 in British Columbia).” (*Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989)

# COLLECTIVE NATURE OF ABORIGINAL TITLE CONT...

- Aboriginal title derives “from the prior occupation of Canada by Aboriginal peoples.” (*Delgamuukw*, para. 114)
- Aboriginal title is held communally and cannot be held by individual Aboriginal persons. Rather, it is a collective right to land held by all members of an Aboriginal nation. Decisions with respect to that land are made by that community. This is a feature of Aboriginal title which is *sui generis* and distinguishes it from normal property interests. (*Delgamuukw*, para. 115)

# COLLECTIVE NATURE OF ABORIGINAL TITLE CONT...

- “...it is also sui generis in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives” (*Delgamuukw*, para. 112)
- An implication of *Delgamuukw* that “Aboriginal title is a collective right to land held by all members of an Aboriginal nation” and “decisions with respect to that land are also made by that community” illustrates that it is the internal law of the Aboriginal group that governs the manner in which group members share the land and make decisions about that land. This requires that there be some internal mechanism for decision-making

# THE TSILHQOT'IN DECISION

In *Tsilhqot'in* the court confirms the importance of determining - and provides guidance on defining - the proper title and rights holder. The Plaintiff First Nation and Canada asserted that the proper rights holder is the Tsilhqot'in Nation, while British Columbia argued that the proper rights holder is the community of Xeni Gwet'in, a member of the larger Tsilhqot'in Nation. The court held that:

- “Aboriginal people, like people in societies everywhere, typically belong to more than one group that helps to define their identities. In both historical and contemporary times, an individual can simultaneously be a member of a family, a clan or descent group, a hunting party, a band, and a nation”. (para 446);

# THE TSILHQOT'IN DECISION CONT...

- “British Columbia placed too much emphasis on the notion of a single decision-making body at the time reserves were established” ;
- “The use of a small decision-making body for one particular purpose is not necessarily the hallmark of a community” ;
- “the search for a singular legal entity does not assist in the effort to define the proper rights holder.”

# THE TSILHQOT'IN DECISION CONT...

The court acknowledged the reality that political structures may change from time to time and self-identification may shift from band identification to cultural identification, depending on the circumstances. What will remain constant, though, are the common threads of language, customs, traditions and a shared history that form the central “self” of a Tsilhqot'in person. The Tsilhqot'in Nation is the community with whom Tsilhqot'in people are connected by those four threads (para 457). The court notes:

- “Tsilhqot'in people make no distinction amongst themselves at the band level as to their individual right to harvest resources. The evidence is that, as between Tsilhqot'in people, any person in the group can hunt or fish anywhere inside Tsilhqot'in territory. The right to harvest resides in the collective Tsilhqot'in community. Individual community members identify as Tsilhqot'in people first, rather than as band members.” (para 459)

# THE TSILHQOT'IN DECISION CONT...

- “The setting aside of reserves, and the establishment of bands, was a convenience to government at both levels. The creation of bands did not alter the true identity of the people. While band level organization may have meaning to a Canadian federal bureaucracy, it is without any meaning in the resolution of Aboriginal title and rights for Tsilhqot'in people” (para 469)
- The court concludes by finding that the proper rights holder - whether for Aboriginal title or Aboriginal rights - is the Tsilhqot'in Nation. Tsilhqot'in people were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion. The Aboriginal rights of individual Tsilhqot'in people or any other sub-group within the Tsilhqot'in Nation are derived from the collective actions, shared language, traditions and shared historical experiences of the members of the Tsilhqot'in Nation

# INTERNATIONAL LAW

## *The United Nations Declaration on the Rights of Indigenous Peoples*

The UN Declaration on the Rights of Indigenous Peoples sets out basic, human rights for Indigenous Peoples. Principles from the UN Declaration that are relevant to this discussion paper include the following:

**Article 3:** Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development

**Article 4:** Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions

**Article 9:** Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right