

**DISCUSSION PAPER:  
“Proper Title and Rights Holder”**

**ISSUE**

Federal policy and legislation, primarily the *Indian Act*, has played a central role in the development of political decision-making power through “Indian Bands”. The legal status and capacity of “Indian Bands” continues to be determined by the courts. Paul Tennant notes that “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” (p. 45-46 of *Aboriginal Peoples and Politics*) (emphasis added)

The issue of “proper title and rights holder” is an important one for First Nations to consider and address. Court cases, in particular *Delgamuukw* and *Tsilhqot’in*, illustrate that this is a core issue when considering where Aboriginal title exists, and determining whether the Crown has met its legal obligations (e.g. to consult and accommodate for impacts to a First Nation’s Aboriginal title and rights).

First Nations recognize the importance, too, of the closely related issue of determining their proper political structures:

We have the inalienable sovereign right of 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 - “*All Our Relations*” A Declaration of the First Nations of British Columbia, November 29<sup>th</sup>, 2007 (emphasis added)

## **NEW RELATIONSHIP**

The New Relationship vision states an agreement:

“to a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights”, “respect for our respective laws and responsibilities”, and “processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing”.

“Recognition legislation” has been positioned by the First Nations as a primary mechanism for effecting systemic change towards this recognition-based vision. The joint BC-First Nations Leadership Council Recognition Working Group (RWG) has had extensive discussions about how to effectively move towards a recognition-based relationship, and shared decision-making and revenue and benefit sharing.

**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 the legitimate First Nations role in decision-making.** This is for legal and practical reasons. Legally, the courts have clarified that, at common law, Aboriginal title is held collectively by the members of a Nation, not by individual Aboriginal persons. They have also clarified that Indian Bands, as creatures of a federal statute, do not necessarily hold Aboriginal title (though, in actuality, there are situations where one Indian Band is the sole the governing body – i.e. political structure - representing an entire First Nation). On a practical level, the provincial Crown representatives have suggested that they are prepared to recognize, in principle, that they need to work with the proper title and rights holder, and indicated that this is impossible to do with 203 “Indian bands”.

## ABORIGINAL TITLE

Aboriginal title is an exclusive right to the land and includes the right to choose the uses to which the land is put, as well as a right to an inescapable economic component of that title. The right to self-government (or self-determination) finds its analogy, at least in part, from international law and the concept of “territorial sovereignty.” Broadly speaking, when a state, at international law, has territorial sovereignty over a given territory, it has an exclusive jurisdiction to make decisions that have effect over that territory.

Most importantly, both the Canadian common law on Aboriginal title, and international law, point to a configuration, or “aggregation”, of Aboriginal decision-making power at the Aboriginal “peoples” or “nation” level, rather than at the “Indian Band” level. **The determination of the proper title and rights holder will come from the history, culture, laws and practices of the Indigenous peoples of British Columbia.**

In legal terms, when speaking of ‘recognition’ we mean “recognition of the existence of Aboriginal title and rights and of the proper title and rights holders”. As set out above, the Courts have provided a significant amount of guidance on the question of the proper title and rights holder.

Indigenous law, the common law, constitutional law, and international law all have something to say about who properly holds title and rights. Aboriginal title and rights are grounded in all of these categories of law. In addition to these, the actions and behaviours of the Crown and Aboriginal groups in the past form an important history and background that affects current expectations and understandings.

- Aboriginal title derives “from the prior occupation of Canada by Aboriginal peoples.” (*Delgamuukw*, para. 114).

- “the communal nature of most indigenous occupation is a fact which cannot be denied... Determining today’s beneficiaries of a subsisting untransferred 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).
- 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).

Chief Justice Lamer stated of Aboriginal title in *Delgamuukw* that:

...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 (para. 112).

The Courts have provided clear guidance on the criteria or elements for identifying and defining the proper Aboriginal title and rights holder, including the following:

*Continuity:*

- First, continuity must be demonstrated between the claimant group and the pre-sovereignty group upon whose practices reliance is placed. Continuity in its most basic sense simply means that modern-day claimants must

establish that they are right holders, they must establish a connection with the pre-sovereignty group upon whose practices they rely in asserting title or a claim to a more restricted aboriginal right. To claim title, the group's connection with the land must be shown to have been "of a central significance to their distinctive culture". If the group has "maintained a substantial connection" with the land since sovereignty, this establishes the required "central significance" (*Marshall; Bernard*).

- The right is based on pre-sovereignty Aboriginal practices. Modern-day claimants must show that the right is the descendant of those practices. Continuity may also be raised in this sense. To claim title, the group's connection with the land must be shown to have been "of a central significance to their distinctive culture". If the group has "maintained a substantial connection" with the land since sovereignty, this establishes the required "central significance".

*Historic decision-makers:*

- 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.

## **IDENTIFYING THE PROPER TITLE & RIGHTS HOLDER**

Most recently, Justice Vickers of the BC Supreme Court handed down his decision in the *Tsilhqot'in* Aboriginal title and rights case. Although this case is largely fact specific, with an emphasis on the particular socio-political structure of *Tsilhqot'in*

people, the court confirms the importance of determining - and provides guidance on defining - the proper title and rights holder. Justice Vickers examined at some length whether a singular political entity can/should be the appropriate rights holder, or whether the larger nation is the more appropriate body.

In *Tsilhqot'in*, both the Plaintiff First Nation and Canada assert 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);
- British Columbia placed too much emphasis on the notion of a single decision-making body at the time reserves were established; (para 451)
- The use of a small decision-making body for one particular purpose is not necessarily the hallmark of a community; (para 451) and
- the search for a singular legal entity does not assist in the effort to define the proper rights holder. (para 456)

*Identification of historic rights-bearing community:*

- The tests for demonstrating the existence of an Aboriginal community that can support the claim to s. 35(1) rights [for a First Nation] can be no different than those required of a Métis community. I add to the analysis the

view that identification as a member of a community is not external. Membership is identified by the community. It should always be the particular Aboriginal community that determines its own membership (*Tsilhqot'in*, para 444).

- No matter how a contemporary community defines membership, a critical inquiry for the purposes of s. 35(1) rights is an ancestral connection to the relevant community extant at contact in the case of rights, or at sovereignty, in the case of title. In all of the Aboriginal rights and title decisions I have reviewed, the relevant historic community has been the larger First Nation that existed at the time of contact or sovereignty. (*Tsilhqot'in*, para 445).
- Such inquiries are “a matter of fact” to be determined on the whole of the evidence relating to the specific society or culture. One factor to consider is who made decisions about land use and occupation in the historic Aboriginal culture (*Tsilhqot'in*, para 439).
- The strength of the customary understanding of Aboriginal title lies in its emphasis on the origins of the right. Aboriginal title is nothing if not grounded ultimately in the actual use and occupation of lands by Indigenous peoples under their laws. It is the strong spiritual, legal and material bonds that First Nations hold with their lands that animate Aboriginal title and supply its underlying rationale.

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 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. That collective, then, has the right to determine its "political structures".

## **UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES**

The UN Declaration on the Rights of Indigenous Peoples sets out basic, human rights for Indigenous Peoples. Standards from the UN Declaration related to the right of First Nation to determine their political status 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.*

**NEW RELATIONSHIP: SHARED DECISION-MAKING & REVENUE AND BENEFIT SHARING**

When we speak of “shared decision-making” (which refers to a process in which decision-makers with respective jurisdictions, authorities and laws engage in a joint process of decision-making towards reaching a compatible or common decision) or about “revenue and benefit sharing” (which refers to the economic component of title), we are necessarily speaking about these concepts in relation to the proper title holder.

In practical terms, an argument can be made that aggregation will often, though not always, be required. This is because it may be unlikely that true Crown-First Nations shared decision-making can be accomplished within the current

architecture of First Nations governments – that is, multiple Indian Bands and/or other entities within one single Nation. This issue arises for the following reasons:

- First, the Province has made it clear that it cannot foresee accomplishing shared decision-making in the current organization of 203 First Nation (Band) governments and that it is functionally impractical to establish shared decision-making regimes with over 200 First Nation entities (e.g. Band governments). It is prohibitive due to cost, the organizational infrastructure involved, and the fact that most land and resource decisions would result in the participation of a multiplicity of First Nation entities; and
- Second, it could be strategically detrimental, politically and legally, to First Nations to establish shared decision-making regimes with the 203 Bands as the decision-making entities. Given that a vast majority of important land and resource decisions would necessarily involve the interests of large number of Bands, in order for a shared decision to be made, a multiplicity of those entities would have to be involved. If nation-building, or “aggregation”, has not already occurred, there is a greater likelihood that different Bands would be placed in conflict with each other. In such an approach, shared decision-making would simply become another potent tool the Crown could employ as it pursues its traditional strategy of “divide and conquer”. We note that we already see the Crown exploiting the constitutional duty of accommodation to divide First Nations. This is typically done by the Crown and proponents (at the direction of the Crown) pursuing agreements with one Band over other Bands.

## **NATION BUILDING**

Given these legal and practical realities, three levels of First Nations organization are relevant for shared decision-making purposes: 1) internal within one Nation, 2) First Nation-to-First Nation, 3) Multi-Nation.

**Internal aggregation** refers to nation-building within a single Nation - as understood to be the “proper title and rights holder”. This form of nation-building would typically include clarifying internally the relationship between Nation-level and community or band-level initiatives for decision-making purposes. This is the focus of this Discussion Paper.

**First Nation-to-First Nation, or multi-First Nation, aggregation** refers to a government-to-government relationship between distinct Nations, where those nations may decide to form a joint shared decision-making entity on a particular issue or subject matter. An example might be a joint regional board to make decisions on wildlife matters. Another example might be a number of First Nations forming a committee to make a joint decision with respect to a particular major project (e.g. a transmission line that cuts through a number of First Nation’s territories). In these circumstances, the participating First Nations may address issues of “shared territories” and/or “overlaps.” (*See Discussion Paper on “Shared Territories/Overlaps”*)

## **MOVING TOWARDS NATION-BUILDING**

First Nations have long known the necessity of nation-building (or aggregation). Many believe there is a critical need to move out from under the *Indian Act* and to rebuild their traditional governing structures, within modern society, in order to more effectively negotiate with the Crown and to address serious socio-economic and cultural issues. As well, given the direction of the courts to date, there is a strategic need for nation-building, should a Nation wish to advance litigation with respect to their Aboriginal title and rights. A court will apply the common law

principles, set out above, to determine the proper title and rights holder. Where a Nation does not meet the common law criteria, they may fail in their legal action.

While First Nations know the importance of nation-building, there is no doubt that it is a challenging, time-consuming and resource intensive undertaking, making it difficult or impossible for some First Nations to address. Yet, at the same time, court decisions, make it clear that it is time to take significant steps in the direction of nation-building. Until internal nation unity is advanced and achieved, the Province will be able to marshal legal, political and practical arguments against shared decision-making and resource revenue sharing as being “unworkable” or because they “do not know who the proper title and rights holder is and, so, cannot fulfill Crown obligations.”

As such, a key component of discussions on “recognition”, “shared decision-making” and “revenue and benefit sharing” has been the question: “How do we facilitate nation-building in order to define proper title and rights holders and, therefore, identify or clarify our political structures?” Principles identified include:

- Nation-building (aggregation) is a First Nations-only undertaking. The Crown has no formal or informal roles to play within any given process of defining the proper title and rights holder.
- First Nations require capacity and, in many cases, expert assistance to achieve nation-building in a timely and unifying manner.
- Shared decision-making and resource revenue sharing cannot await completion of comprehensive First Nations nation-building.

In light of these, the First Nations representatives to the RWG have been advancing “recognition legislation” and a corresponding implementation agreement with the following elements, subject to direction of the Chiefs:

- Need for the Crown to engage with the proper title and rights holder;
- The dedication of funds by the Province – to be managed by a First Nations entity or institution – to be used by First Nations for purposes of nation-building;
- A commitment by the Province to interim shared decision-making and revenue and benefit sharing mechanisms in certain contexts (based on templates) as the process of nation-building is underway;
- A commitment by the Province to comprehensive shared decision-making and revenue sharing agreements (based on templates) as First Nations nation-building advances; and
- A commitment by the Province to respect and honour the outcomes of a First Nation’s nation-building efforts – that is, to recognize and respect the proper title and rights holder, and political structures, as defined by the particular Nation.

#### **DIRECTION REQUIRED FROM FIRST NATIONS LEADERSHIP**

**It is recognized that this issue will require ongoing analysis of the implications of case law and practicalities, as well as Chiefs’ discussions beyond the November 2008 All Chiefs Forum. To assist with the ongoing work:**

- **General input is sought from First Nations leadership on the need/desire to pursue nation-building (including potential aggregation) to support negotiations, litigation, shared decision-making and revenue and benefit sharing**
- **Specific experience is sought on nation-building efforts to help inform principles and processes (e.g. historical Nation-to-Nation treaties, modern Nation-to-Nation Protocols)**
- **The Chiefs may wish to consider establishing an Advisory Council (now or later) to assist with developing principles and/or frameworks, including consideration of new First Nation institutions or processes for assisting First Nations with nation-building efforts, where desired**