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## Aboriginal Rights and Indigenous Governance: Identifying the Holders of Rights and Authority

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## Aboriginal Rights and Indigenous Governance: Identifying the Holders of Rights and Authority

### Abstract

Aboriginal rights, including governance authority, are collective. In order to determine who can exercise these rights, it is therefore essential to be able to identify the collective that holds them. This article examines and analyzes Canadian cases relating to this matter that involve First Nation holders or claimants of rights in three contexts: (1) Aboriginal title cases; (2) cases involving Aboriginal rights apart from title; and (3) duty to consult cases. The jurisprudence reveals that the issue of the identity of rights holders is treated by the courts as a matter of fact. It depends on evidence of the cultural traditions and laws of Indigenous peoples themselves, which has to be presented to the court by testimony of persons who are knowledgeable and have the authority to speak about these matters. Because this issue of the identity of rights holders depends on Indigenous cultures and laws, each situation presents unique features.

# Aboriginal Rights and Indigenous Governance: Identifying the Holders of Rights and Authority

KENT MCNEIL\*

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**SECTION 35(1) OF THE *Constitution Act, 1982***, recognizes and affirms the “aboriginal and treaty rights of the aboriginal peoples of Canada.” The Aboriginal peoples are defined in section 35(2) as including “the Indian, Inuit, and Métis peoples of Canada.”<sup>1</sup> That is the extent to which the Canadian constitution identifies the potential holders of section 35 rights, leaving the matter to be resolved by judicial decisions or negotiated agreements. This article examines how Canadian courts have addressed the issue of identifying Aboriginal rights holders in specific instances, mainly in parts of Canada that are not subject to historical or modern-day treaties relating to land. As the focus is on the law of the Canadian state as interpreted and applied by the courts, especially the Supreme Court of Canada (SCC), the analysis is doctrinal. Of course, Indigenous peoples have their own legal orders,<sup>2</sup> and I am of the view that identification of Aboriginal rights holders should involve the application of Indigenous law, derived from Indigenous governance authority. Canadian courts can, and occasionally do, take account of Indigenous law in rendering decisions, but they inevitably do so within the framework of the Canadian legal system from which they derive

1. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 ss 35(1), 35(2).
2. See e.g. Ardith Walkem, “An Unfulfilled Promise: Still Fighting to Make Space for Indigenous Legal Traditions” in Maria Morellato, ed, *Aboriginal Law Since Delgamuukw* (Cartwright Group, 2009) 393; John Borrows, *Canada’s Indigenous Constitution* (University of Toronto Press, 2010); Val Napoleon, “Tsilhqot’in Law of Consent” (2015) 48 UBC L Rev 873 [Napoleon, “Tsilhqot’in Law”]; Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria Faculty of Law, 2009) [unpublished]; Val Napoleon, *Thinking About Indigenous Legal Orders* (National Centre for First Nations Governance, June 2007); Hadley Friedland, *Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada* (PhD Dissertation, University of Alberta Faculty of Law, 2016) [unpublished]; Aaron James Mills (Waabishki Ma’ingan), *Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism* (PhD Dissertation, University of Victoria Faculty of Law, 2019) [unpublished]. See also Brent Olthuis, “The Constitution’s Peoples: Approaching Community in the Context of Section 35 of the *Constitution Act, 1982*” (2009) 54 McGill LJ 1 (discussing the relevance of Indigenous norm generation to the issues discussed in this article and broader theoretical and practical considerations).

their authority, rather than within the context of Indigenous legal orders and governance authority. So when Indigenous people go to or end up in Canadian courts, either by choice or because they have been charged with an offence or sued in a civil action, they find themselves subject to the Canadian law that is applied by the courts. It is therefore essential for them to know how a Canadian court might address the matters at issue, which can include determining the identity of Aboriginal rights claimants.

In this article, I am going to discuss three categories of decisions: (1) Aboriginal title cases; (2) Aboriginal rights cases apart from title; and (3) duty to consult cases. My focus is mainly on SCC decisions involving First Nation Indigenous people arising in non-treaty areas. The issue of the identity of Aboriginal title and rights holders can also arise in cases involving the Inuit and the Métis, but there is a scarcity of case law on the issue where the Inuit are concerned, and the unique circumstances of the Métis have been dealt with by others, including some of the contributors to this Special Issue.<sup>3</sup>

## I. ABORIGINAL TITLE CASES

Five foundational Aboriginal title cases have reached the SCC:<sup>4</sup> *Calder v British Columbia (AG)*;<sup>5</sup> *Delgamuukw v British Columbia*;<sup>6</sup> *R v Marshall*; *R v Bernard*;<sup>7</sup>

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3. For a rare exception involving the Inuit, see *Hamlet of Clyde River v TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 179; *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 [*Clyde River*]. See Larry Chartrand, “The Constitutional Determination of a Métis Rights-Bearing Community: Reorienting the *Powley* Test” in Karen Drake & Brenda L Gunn, eds, *Renewing Relationships: Indigenous Peoples and Canada* (Wiyasiwewin Mikiwahp Native Law Centre, University of Saskatchewan, 2019) 169; Karen Drake, “Who are the Métis? The Role of Free, Prior and Informed Consent in Identifying a Métis Rights-Holder” in Dwight Newman & Ibrinke Odumosu-Ayanu, eds, *Indigenous-Industry Agreements, Natural Resources, and the Law* (Routledge) [forthcoming in 2020] (discussing the identification of Métis rights holders).

4. See also *St Catharines Milling & Lumber Co v R* (1887), 13 SCR 577, aff'd [1888] UKPC 70. Although Aboriginal title was discussed, the case involved a dispute between the federal government and the Province of Ontario over entitlement to lands and resources after the Aboriginal title had been supposedly surrendered by Treaty 3 (1873). No Indigenous nations or persons were party to the action or even called as witnesses. See Kent McNeil, *Flawed Precedent: The St. Catherine's Case and Aboriginal Title* (UBC Press, 2019) [McNeil, *Flawed Precedent*].

5. [1973] SCR 313 [*Calder* SCC].

6. [1997] 3 SCR 1010 [*Delgamuukw* SCC].

7. *R v Marshall* and *R v Bernard* were heard together in the Supreme Court, resulting in a single judgment (2005 SCC 43 [*Marshall/Bernard* SCC]).

and *Tsilhqot'in Nation v British Columbia*.<sup>8</sup> While the matter of the appropriate title holders was not a live issue in *Calder* and *Marshall/Bernard*, these decisions are nonetheless relevant and important because they reveal underlying assumptions of the parties and the judges.

*Calder* was a representative action, brought by Frank Calder and other members of the Nisga'a Nation (referred to as the Nishga Nation and the Nishga Indian Tribe in the case) on behalf of that nation, seeking a declaration "that the Aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory hereinbefore described, has never been lawfully extinguished."<sup>9</sup> The trial judge found that the plaintiffs, who were officers of the Nishga Tribal Council and councilors of the four *Indian Act* bands into which the

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8. 2014 SCC 44 [*Tsilhqot'in Nation* SCC]. A recent case, *Newfoundland and Labrador (Attorney General) v Uashannuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, involves an Aboriginal title claim, but the SCC's decision involves a jurisdictional issue rather than the substantive claim. See also *Oregon Jack Creek Indian Band v Canadian National Railway* (1989), 34 BCLR (2d) 344 (CA) [*Oregon Jack*], aff'd [1989] 2 SCR 1069. In addition to the five SCC decisions, this decision of the British Columbia Court of Appeal (BCCA) involved an application to amend a statement of claim, brought by thirty-six chiefs of Indian bands on behalf of themselves and all other members of their bands, alleging that double-tracking of a section of the Canadian National Railway along the Thompson River would negatively affect Aboriginal title and fishing rights in the Thompson and Fraser rivers. In allowing the amendment of the representative action to include all members of the three Indigenous nations whose ancestors had occupied lands along these rivers prior to European colonization, Justice MacFarlane, delivering the unanimous judgment, stated:

In my opinion, the date at which it must be shown that there was an organized society occupying the specific territory over which the plaintiffs, as descendants of the members of that society, now assert aboriginal title is the date at which sovereignty was asserted by the Europeans. The society need not have been what we now regard as a legal entity, and the descendants of that society need not, in order to have status to bring an action, prove that such a legal entity now exists. Whether the plaintiffs can establish the necessary criteria and show that they are descendants of the members of a society who in common held such Aboriginal rights is a matter to be determined on evidence (*ibid* at paras 33-34).

In a short judgment dismissing an application to rehear the appeal it had already rejected, the SCC observed that, in pronouncing "that the action was personal in nature rather than derivative and the plaintiffs need not establish either the continued existence of the Indian nations nor authority to bring the action ...", the Court of Appeal went beyond the narrow issue before them – whether the pleadings were clearly invalid," but the court decided that those *obiter* pronouncements did not affect the outcome on that narrow issue and so did not provide grounds for a rehearing (the SCC declined to comment on the correctness of the pronouncements). See [1990] 1 SCR 117 at 118-19. As far as I am aware, this case never went to trial. See Olthuis, *supra* note 2 at 16-17 (for discussion of the BCCA decision).

9. *Calder* SCC, *supra* note 5 at 345. This is a quotation from the statement of claim.

Nisga'a Nation had been divided, were "appropriate and adequate representatives to bring the action on the part of the Nishga Indian Tribe."<sup>10</sup> They were described by Justice Judson of the SCC as "descendants of the Indians who have inhabited since time immemorial the territory in question."<sup>11</sup> No one, including the plaintiffs who were members of the Nisga'a band councils, seems to have questioned that, if Aboriginal title existed, it was held by the Nisga'a Nation as a whole, not by the Indian bands or other subgroups within the nation. However, the consequences of the nation holding title were not addressed, as the Court refused the declaration because a majority of the judges decided that the action could not be brought against the Crown in right of British Columbia without a fiat (basically, permission) of the Lieutenant Governor of the province.<sup>12</sup>

*Marshall/Bernard* involved prosecutions under provincial statutes in Nova Scotia and New Brunswick for harvesting and possessing logs on lands the provinces claimed as Crown lands. The accused, who are members of the Mi'kmaq Nation in Nova Scotia and the Miramichi Mi'kmaq in New Brunswick, raised Aboriginal title, as well as treaty rights, as their defence. There seems to have been no question that they are Mi'kmaq who would be entitled to the benefits of Aboriginal title if they were able to establish that the Mi'kmaq had Aboriginal title to the sites where the cutting of timber took place. However, as the SCC agreed with the trial judges that the accused had not proven that the Mi'kmaq exclusively occupied the sites at the time of the British Crown's assertion of sovereignty, their claim to Aboriginal title failed. Since they were also unable to convince the judges that they had treaty rights to harvest timber commercially, they were convicted.

In his trial judgment in *R v Bernard*,<sup>13</sup> Justice Lordon seems to have taken for granted that the Miramichi Mi'kmaq, rather than the three Mi'kmaq bands with reserves in the area of New Brunswick where title was asserted, would be the Aboriginal title holders if title had been proven, which he decided it had not. On appeal, Justice Daigle of the New Brunswick Court of Appeal decided

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10. *Calder v British Columbia (AG)* (1969), 8 DLR (3d) 59 at 61 (BCSC).

11. *Calder* SCC, *supra* note 5 at 317.

12. See *ibid* at 345, 426-27. In his dissent, concurred in by Justice Spence and Justice Laskin, Justice Hall would have simply issued a declaration that "the appellants' right to possession ... and their right to enjoy the fruits of the soil, of the forest, and of the rivers and streams within the boundaries of said lands have not been extinguished": *ibid* at 422. See Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press, 2007).

13. [2000] 3 CNLR 184 (NB Prov Ct).

that the Miramichi Mi'kmaq do have collective Aboriginal title to the Northwest Miramichi watershed,<sup>14</sup> but this decision was overturned by the SCC.

In *R v Marshall*,<sup>15</sup> the accused asserted that the Mi'kmaq had Aboriginal title to all of Nova Scotia. Justice Curran at trial accepted that they had lived in individual communities that got together on occasions, concluding that, although “they did not have a fully-developed sense of being a nation, ... [t]hey were still a collection of communities.”<sup>16</sup> However, as he found that Aboriginal title had not been proven, the significance of this finding for the identity of the putative title holders was not discussed. The Nova Scotia Court of Appeal ordered a new trial because, among other reasons, it held that Justice Curran, and the Summary Conviction Appeal Court that upheld his decision,<sup>17</sup> had applied the wrong test for assessing the occupation required to establish Aboriginal title.<sup>18</sup> Justice Cromwell (later of the SCC) reviewed the trial judge’s findings of fact on the Mi'kmaq social and political organization, territoriality, and land tenure and use, and seems to have accepted that the divisions of their territory in Nova Scotia into seven districts and family hunting territories were developments that came after the British Crown’s assertion of sovereignty.<sup>19</sup> As the trial judge had found that there was “no persuasive evidence that they divided the entire territory among their communities” prior to sovereignty,<sup>20</sup> Justice Cromwell apparently thought that their Aboriginal title, if proven, would be held by the Mi'kmaq people of Nova Scotia as a whole.

On appeal of the *Marshall* and *Bernard* cases to the SCC, Chief Justice McLachlin stated the central issue to be whether “the Mi'kmaq people in Nova Scotia and New Brunswick ... have treaty rights or aboriginal title entitling them”

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14. *R v Bernard*, 2003 NBCA 55 at para 190.

15. 2001 NSPC 2 at para 3 [*Marshall* Prov Ct].

16. *Ibid* at para 55.

17. 2002 NSSC 57.

18. 2003 NSCA 105, especially at paras 249-53 [*Marshall* CA]. Justice Oland concurred with Justice Cromwell, and Justice Saunders also agreed with his reasons and disposition on the title issue.

19. *Ibid* at paras 141-52.

20. *Marshall* Prov Ct, *supra* note 15 at para 131 (quoted and emphasized by Justice Cromwell in *Marshall* CA, *supra* note 18 at para 152).

to “engage in commercial logging on Crown lands without authorization.”<sup>21</sup> Throughout her judgment, she referred to the “Mi’kmaq” and “Mi’kmaq people” as the Aboriginal title claimants, without separating them into individual communities or bands. This is consistent with how the constitutional questions were stated in each case, asking whether the provincial legislation under which the accused had been charged is “inconsistent with Mi’kmaq Aboriginal title.”<sup>22</sup>

The issue of the appropriate claimants in Aboriginal title cases was addressed more directly in *Delgamuukw v British Columbia*. Unlike *Marshall/Bernard*, where Aboriginal title was raised as a defence to prosecutions, *Delgamuukw* involved a direct claim by the Gitksan (now commonly spelled Gitksan) and Wet’suwet’en peoples for a declaration of their Aboriginal title. It was a representative action, brought by “39 hereditary Gitksan and 12 Wet’suwet’en (total 51) chiefs for all or most of the Houses of the Gitksan and Wet’suwet’en peoples, except ... the 12 Kitwancool chiefs.”<sup>23</sup> The position advanced by the plaintiffs at trial, as expressed by Chief Justice McEachern, was “that their chiefs are themselves, as well as on behalf of Houses or members, entitled to a judgment declaring their ownership, under Canadian, Gitksan and Wet’suwet’en law, of the individual territories they claim. There is no specific alternative claim pleaded by the plaintiffs collectively for the territory or any part of it on a communal, people-wide basis.”<sup>24</sup> As is well known, Chief Justice McEachern dismissed their claims, leading to appeals to the British Columbia Court of Appeal (BCCA) and then to the SCC.

The SCC overturned Chief Justice McEachern’s judgment and ordered a new trial, partly because of his treatment of the oral histories, but also because the plaintiffs had reframed the nature of the claim before the Court. Chief Justice

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21. *Marshall/Bernard* SCC, *supra* note 7 at para 1. Note that, in my respectful opinion, the way Chief Justice McLachlin framed this issue begged the question of whether lands subject to Aboriginal title really are Crown lands. See Kent McNeil, “Aboriginal Title and the Supreme Court: What’s Happening?” (2006) 69 Sask L Rev 281 at 293-96. However, in *Tsilhqot’in Nation* SCC, *supra* note 8 at para 70, she returned to this issue and clarified that the Crown’s underlying title to Aboriginal title lands does not have any beneficial content. See Kent McNeil, “The Source, Nature, and Content of the Crown’s Underlying Title to Aboriginal Title Lands” (2018) 96 Can Bar Rev 273.

22. *Marshall/Bernard* SCC, *supra* note 7 at paras 107-08.

23. *Delgamuukw v British Columbia* (1991), 79 DLR (4th) 185 at 237 (BCSC) [*Delgamuukw* BCSC]. For a list of the plaintiffs, see the style of cause in *Delgamuukw* SCC, *supra* note 6. Note that there are Gitksan and Wet’suwet’en band councils as well under the *Indian Act*, RSC 1985, c I-5. The Gitksan-Wet’suwet’en Tribal Council was formed in 1978, but although it played a coordinating role in the court case, it was not a plaintiff claiming title. See *Delgamuukw* BCSC, *supra* at 235.

24. *Delgamuukw* BCSC, *supra* note 23 at 237.

Lamer explained that, on appeal, “the individual claims by each house have been amalgamated into two communal claims, one advanced on behalf of each nation. However, there were no formal amendments to the pleadings to this effect.”<sup>25</sup> He found this to be problematic:<sup>26</sup>

Given the absence of an amendment to the pleadings, I must reluctantly conclude that the respondents [British Columbia and Canada] suffered some prejudice. The appellants [the Gitksan and Wet’suwet’en] argue that the respondents did not experience prejudice since the collective and individual claims are related to the extent that the territory claimed by each nation is merely the sum of the individual claims of each house; the external boundaries of the collective claims therefore represent the outer boundaries of the outer territories. Although that argument carries considerable weight, it does not address the basic point that the collective claims were simply not in issue at trial. To frame the case in a different manner on appeal would retroactively deny the respondents the opportunity to know the appellants’ case.

Although the defect in the pleadings, combined with the mistreatment of the oral histories, prevented the Court from deciding the case on its merits, Chief Justice Lamer nonetheless proceeded to provide guidelines to trial courts on a number of vital issues, including proof, content, infringement, and extinguishment of Aboriginal title. For the purposes of this article, the most relevant aspect of his judgment is his apparent acceptance throughout that, if the case had been properly pleaded, Aboriginal title would be held by Aboriginal nations rather than by smaller collectives within nations, such as the Gitksan and Wet’suwet’en Houses. In a particularly relevant passage, he stated:<sup>27</sup>

A further dimension of aboriginal title is the fact that it is held *communally*. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.

This should not be interpreted to mean that the rights and interests of houses, clans, and other smaller groups are unimportant or lack legal validity. Instead, I understand it to mean that Aboriginal title is a territorial right vested in the whole nation that applies externally as against the Crown and other persons

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25. *Delgamuukw* SCC, *supra* note 6 at para 73. British Columbia and Canada argued that they were prejudiced as a result (*ibid*).

26. *Ibid* at para 76.

27. *Ibid* at para 115 [emphasis in original].

who are not members of that nation.<sup>28</sup> It is what my colleague Brian Slattery has referred to as a generic right because, apart perhaps from its inherent limit that does not allow the land to be used in ways that substantially diminish its value for future generations,<sup>29</sup> it does not vary from one Aboriginal nation to another.<sup>30</sup> It provides common law—and, since 1982, constitutional—protection to Indigenous territories within Canada.<sup>31</sup> Internally, houses, clans, families, individuals, and so on, continue to have rights under a nation's Indigenous laws,<sup>32</sup>

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28. For further discussion, see Kent McNeil, "Aboriginal Title in Canada: Site-Specific or Territorial?" (2012) 91 Can Bar Rev 745.
29. See *Delgamuukw* SCC, *supra* note 6 at paras 125-32; *Tsilhqot'in Nation* SCC, *supra* note 8 at paras 74, 88. Note that Chief Justice McLachlin in the latter case reformulated the inherent limit from a backward-looking limit determined by historical uses to a forward-looking approach emphasizing sustainability. See Brian Slattery, "The Constitutional Dimensions of Aboriginal Title" (2015) 71 SCLR (2d) 45 at 58-63 [Slattery, "Constitutional Dimensions"]; Kent McNeil, "Aboriginal Title and the Provinces after *Tsilhqot'in Nation*" (2015) 71 SCLR (2d) 67 at 68 [McNeil, "Aboriginal Title and the Provinces"]. Query whether this reformulation makes the inherent limit more uniform among Aboriginal title holders.
30. Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727 at 745 [Slattery, "Understanding Aboriginal Rights"]; Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can Bar Rev 255 at 269-71 [Slattery, "Metamorphosis"]. Both were quoted with approval by Justice Vickers in his trial judgment. See *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 471-72 [*Tsilhqot'in Nation* BCSC]. They were also cited with apparent approval by Justice Groberman in his judgment on appeal in the same case, (*sub nom William v British Columbia*). See *Tsilhqot'in Nation v British Columbia*, 2012 BCCA 285 at para 149 [*Tsilhqot'in Nation* BCCA].
31. See Kent McNeil, "Aboriginal Title as a Constitutionally Protected Property Right" in Owen Lippert, ed, *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (The Fraser Institute, 2000) 55, reprinted in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (University of Saskatchewan Native Law Centre, 2001) 292 [McNeil, *Emerging Justice*]; McNeil, "Aboriginal Title and the Provinces," *supra* note 29.
32. See *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paras 33, 35 [*Behn*] (quoted in discussion below).

which are subject to the territorial authority of the nation and so should be alterable through the exercise of its inherent right of self-government.<sup>33</sup>

The more recent case of *Tsilhqot'in Nation v British Columbia* is the strongest precedent so far on the identity of Aboriginal title holders, given that this was a contentious issue that was dealt with in some depth both at trial and at the BCCA. Like *Delgamuukw*, this was a representative action for a declaration of Aboriginal title and other Aboriginal rights, brought by Chief Roger William “on his own behalf and on behalf of all other members of the Xení Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation.”<sup>34</sup> The Xení Gwet'in is one of the six First Nations (*Indian Act* bands) that make up the Tsilhqot'in Nation. The plaintiff and Canada (a defendant in the case, but supporting the plaintiff's position on this issue) contended that the community of Tsilhqot'in people is the holder of the title and other Aboriginal rights, whereas British Columbia argued at trial, and again in the BCCA, that the title and rights holder is the Xení Gwet'in people.<sup>35</sup> The trial judge, Justice

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33. See Slattery, “Metamorphosis,” *supra* note 30 at 270; Slattery, “Constitutional Dimensions,” *supra* note 29 at 52-54; Jeremy Webber, “The Public-Law Dimension of Indigenous Property Rights” in Nigel Bankes & Timo Koivurova, eds, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Hart, 2013) 79; Kent McNeil, “Exclusive Occupation and Joint Aboriginal Title” (2015) 48 UBC L Rev 821 at 870-71 [McNeil, “Joint Aboriginal Title”]; McNeil, *Flawed Precedent*, *supra* note 4 at 166-67, 177-78, 188. For an acknowledgement of Indigenous nations' inherent right of self-government over their Aboriginal title lands by Justice Williamson, see *Campbell v British Columbia (Attorney General)*, [2000] 4 CNLR 1 (BCSC) [*Campbell v BC*]. See discussion in Kent McNeil, “Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence” in Foster, Raven & Webber, *supra* note 12, 129 at 139-43. But see *House of Sgá'nisim v Canada (Attorney General)*, 2011 BCSC 1394, where Justice Smith followed *Campbell v BC* out of comity, but also held that the governance provisions of the Nisga'a Final Agreement (ratified 2000), the validity of which was challenged in these cases, could be upheld as delegated governmental authority. Justice Smith's decision was affirmed on appeal on the latter basis, without deciding the inherent right issue. See 2013 BCCA 49, leave to appeal to SCC refused, 35301 (22 August 2013). For commentary, see Joshua Nichols, “A Reconciliation without Recollection? *Chief Mountain* and the Sources of Sovereignty” (2015) 48 UBC L Rev 515.
34. See style of cause in *Tsilhqot'in Nation* BCSC, *supra* note 30. For a representative Aboriginal title action in which the Crown, prior to trial, raised the issue of the membership of the claimant nation, see *Cowichan Tribes v Canada (Attorney General)*, 2016 BCSC 420.
35. *Tsilhqot'in Nation* BCSC, *supra* note 30 at para 437. One reason why British Columbia contended that title is held by the band rather than the nation as a whole was practical: To fulfil its duty to consult, the province argued that it needs to be able to engage with a definable legal entity, and the evidence revealed that the Tsilhqot'in Nation as a whole lacked a national political structure. See *Tsilhqot'in Nation* BCCA, *supra* note 30 at paras 138-43. See discussion below for a jurisprudential issue also raised by the province.

Vickers, reviewed the limited SCC jurisprudence on this issue (especially *Calder*, *Delgamuukw*, *Marshall/Bernard*, and the Métis Aboriginal rights case, *R v Powley*<sup>36</sup>), and observed:<sup>37</sup>

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.

This raises the issue of continuity between the Aboriginal nation in whom title vested at the time of Crown assertion of sovereignty<sup>38</sup> and the present title-holding collective. In *Marshall/Bernard*, Chief Justice McLachlin put it this way: “The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right.”<sup>39</sup> However, although there must be an ancestral connection by descent or succession between the Aboriginal people who were in exclusive occupation at the time of Crown

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36. 2003 SCC 43 [*Powley*].

37. *Tsilhqot'in Nation* BCSC, *supra* note 30 at para 445.

38. See *Delgamuukw* SCC, *supra* note 6 at para 145. Chief Justice Lamer stated that “aboriginal title crystallized at the time sovereignty was asserted.” For discussion in light of *Tsilhqot'in Nation* SCC, *supra* note 8, see McNeil, “Aboriginal Title and the Provinces,” *supra* note 29 at 71-78.

39. *Marshall/Bernard*, *supra* note 7 at para 67. See also the quotation from *Oregon Jack* in *supra* note 8. Note that this is not the only way in which the concept of continuity applies in the context of Aboriginal rights. As Chief Justice McLachlin went on to say in *Marshall/Bernard*, it can also mean that there must be a sufficient similarity or connection between the historical practice on which an Aboriginal right is based and the exercise of the right in the present (*ibid*). See also *R v Van der Peet*, [1996] 2 SCR 507 at paras 60-65 [*Van der Peet*]; *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 at paras 48-59 [*Lax Kw'alaams*]. When present occupation of land is relied upon to raise an inference of occupation at the time of Crown assertion of sovereignty for the purpose of establishing Aboriginal title, there must also be continuity between the present-day and historical occupation. See *Delgamuukw* SCC, *supra* note 6 at paras 152-54; *Tsilhqot'in Nation* SCC, *supra* note 8 at paras 45-46. For more detailed discussion, see Kent McNeil, “Continuity of Aboriginal Rights” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Purich, 2004) 127.

sovereignty and the current claimants,<sup>40</sup> this does not mean that they need be socially or politically organized in the same way.<sup>41</sup>

Returning to Justice Vickers' judgment, on this issue he concluded:<sup>42</sup>

[T]he proper rights holder, whether for Aboriginal title or Aboriginal rights, is the community of Tsilhqot'in people. 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.

Regarding British Columbia's argument that Tsilhqot'in bands are the proper holders of Aboriginal rights and title today, Justice Vickers observed:<sup>43</sup>

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. Their true identity lies in their Tsilhqot'in lineage, their shared language, customs, traditions and historical experiences. 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.

Although the Xeni Gwet'in people are regarded by the Tsilhqot'in as the caretakers of the lands in the Claim Area (which consists of only about five per cent of the Tsilhqot'in's claimed traditional territory),<sup>44</sup> Justice Vickers observed that "the caretakers have no more rights to the land or the resources than any

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40. See also Justice La Forest's concurring judgment in *Delgamuukw* SCC, *supra* note 6 at para 198. He suggested that:

the presence of two or more aboriginal groups in a territory may also have an impact on continuity of use. For instance, one aboriginal group may have ceded its possession to subsequent occupants or merged its territory with that of another aboriginal society. As well, the occupancy of one aboriginal society may be connected to the occupancy of another society by conquest or exchange. In these circumstances, continuity of use and occupation, extending back to the relevant time, may very well be established (*ibid*).

41. See *Tsilhqot'in Nation* BCSC, *supra* note 30 at para 457. Justice Vickers noted that:

[t]he political structures may change from time to time. Self identification may shift from band identification to cultural identification depending on the circumstances. What remains constant 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 (*ibid*).

42. *Ibid* at para 470.

43. *Ibid* at para 469.

44. See *Tsilhqot'in Nation* SCC, *supra* note 8 at para 6.

other Tsilhqot'in person."<sup>45</sup> So the subgroup responsible for the land is not necessarily the holder of title thereto and other Aboriginal rights.

In the Court of Appeal, Justice Vickers' decision on this issue was challenged by British Columbia. The province argued that the Xení Gwet'in band is the proper title and rights holder because the "historical and ethnographic evidence ... established that decision-making typically took place at the encampment or band level, and that while there were local chiefs, the Tsilhqot'in did not have a national chief or political organization."<sup>46</sup> Given these facts, the province contended that "the absence of any traditional pan-Tsilhqot'in governance structure is fatal to any claim on behalf of the Tsilhqot'in Nation."<sup>47</sup> Justice Groberman, writing the unanimous judgment of the Court of Appeal, responded to this argument as follows:<sup>48</sup>

If the law adopted such a position, it might well be devastating to claims by groups such as the Tsilhqot'in. The judge found that Tsilhqot'in decision-making and governance traditionally took place on a localized level, typically within family or encampment groupings, depending on the season. Because of the fluidity of the group structure and the limits of available evidence, however, it would be impossible to trace those localized collectives into modern counterparts. If Aboriginal rights devolve only upon collectives that can show that they are the modern successors of groups that had a clear decision-making structure, no one would be able to claim Aboriginal rights on behalf of the Tsilhqot'in.

Although Justice Vickers had concluded that the Tsilhqot'in did not have a national political structure, either historically or at the time of the trial,<sup>49</sup> Justice Groberman did not regard this as an impediment to finding that Aboriginal title and rights are held by the Tsilhqot'in people as a whole. While acknowledging the practical difficulties faced by the province in fulfilling its duty to consult if Aboriginal title and rights are held by a nation that lacks a national political structure with decision-making authority, he agreed with Justice Vickers that

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45. *Tsilhqot'in Nation* BCSC, *supra* note 30 at para 468 (see also *ibid* at para 459).

46. *Tsilhqot'in Nation* BCCA, *supra* note 30 at para 53.

47. *Ibid* at para 145. Interestingly, by making this argument British Columbia implicitly acknowledged that there is an intimate connection between Aboriginal title and governance. On this, see the sources in *supra* note 33 and further discussion below.

48. *Ibid* at para 146.

49. See *Tsilhqot'in Nation* BCSC, *supra* note 30 at para 456; *Tsilhqot'in Nation* BCCA, *supra* note 30 at paras 55, 140. According to Justice Vickers, the Tsilhqot'in National Government (TNG), which had been established in 1989, did not represent all the Tsilhqot'in people. Nonetheless, the federal government has consulted with the TNG regarding resource development in the Tsilhqot'in territory. See *e.g. Taseko Mines Limited v Canada (Environment)*, 2017 FC 1100.

“the evidence clearly established that the holders of Aboriginal rights within the Claim Area have traditionally defined themselves as being the collective of all Tsilhqot’in people. The Tsilhqot’in Nation, therefore, is the proper rights holder.”<sup>50</sup> Commenting further on British Columbia’s arguments on this issue, Justice Groberman observed:<sup>51</sup>

In my view, the position taken by British Columbia does not take adequate account of the Aboriginal perspective with respect to this matter. I agree with the trial judge’s conclusion that the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself.

Regarding the practical problem facing governments that have a legal obligation to consult with Indigenous peoples who have claimed or established Aboriginal title and rights, Justice Groberman found that, “[f]ortunately, the record in this case resolves the question of who speaks for the Tsilhqot’in Nation” in relation to particular lands within their traditional territory, specifically the Claim Area.<sup>52</sup> As the evidence showed that the Xení Gwet’in are the custodians or caretakers of that area, they have “a special role to play in asserting those rights and in engaging with governments in attempts to reconcile them with broader public interests.”<sup>53</sup>

The decision of the Court of Appeal in *Tsilhqot’in Nation* was appealed to the SCC, which overturned Justice Groberman’s ruling that Aboriginal title had not been proven and, for the first time in Canada, issued a declaration of Aboriginal title.<sup>54</sup> At the Supreme Court, British Columbia apparently abandoned its

50. *Tsilhqot’in Nation* BCCA, *supra* note 30 at para 150.

51. *Ibid* at para 149. For relevant interviews with Chief Commissioners Miles G Richardson, Steven Point, and Sophie Pierre, see also Canada, British Columbia Treaty Commission, *Annual Report* 2014, (BC Treaty Commission) at 5-15, online: <bctreaty.ca/sites/default/files/BCTC-Annual-Report-2014.pdf>.

52. *Tsilhqot’in Nation* BCCA, *supra* note 30 at para 152.

53. *Ibid* at para 156.

54. *Tsilhqot’in Nation* SCC, *supra* note 8. For a collection of articles discussing the decision see Special Issue, *Tsilhqot’in Nation v British Columbia* (2015) 48:3 UBC L Rev 693-970. See also André Boisselle, “To Dignity Through the Back Door: *Tsilhqot’in* and the Aboriginal Title Test” (2015) 71 SCLR (2d) 27; Slattery, “Constitutional Dimensions,” *supra* note 29; McNeil, “Aboriginal Title and the Provinces,” *supra* note 29; John Borrows, “Aboriginal Title and Private Property” (2015) 71 SCLR (2d) 91; Robert Hamilton, “After *Tsilhqot’in Nation*: The Aboriginal Title Question in Canada’s Maritime Provinces” (2016) 67 UNBLJ 58; Felix Hoehn, “Back to the Future: Reconciliation and Indigenous Sovereignty after *Tsilhqot’in*” (2016) 67 UNBLJ 109; Bruce McIvor & Kate Gunn, “Stepping into Canada’s Shoes: *Tsilhqot’in*, *Grassy Narrows* and the Division of Powers” (2016) 67 UNBLJ 146; Larry Chartrand, “Indigenous Peoples: Caught in a Perpetual Human Rights Prison” (2016) 67 UNBLJ 167; Michael Coyle, “From Consultation to Consent: Squaring the Circle?” (2016)

contention—or at least did not argue the point—that Aboriginal title and other rights are held by *Indian Act* bands rather than nations.<sup>55</sup> The decisions of Justice Vickers and Justice Groberman on this issue can therefore be taken as affirmed by the SCC’s declaration of title in favour of the Tsilhqot’in Nation as a whole.<sup>56</sup>

The SCC’s declaration of the Tsilhqot’in’s title raises an interesting legal personality issue.<sup>57</sup> The Court held in *Delgamuukw*,<sup>58</sup> and affirmed in *Tsilhqot’in Nation*,<sup>59</sup> that Aboriginal title is a proprietary right. In the common law, only natural persons (living human beings) and artificial persons (corporations) have the legal personality necessary to hold property rights.<sup>60</sup> For this reason, unless provided with this capacity expressly or implicitly by statute, collections of individuals, such as clubs and other unincorporated associations, generally cannot own property in their own right; instead, title is vested in all the members

67 UNBLJ 235; Matthew VW Moulton, “Framing Aboriginal Title as the (Mis)Recognition of Indigenous Law” (2016) 67 UNBLJ 336.

55. This issue was not raised in the Factum of the Province of British Columbia submitted to the Supreme Court. See *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 (Factum of the Respondents), online: SCC <scscc-csc.ca/WebDocuments-DocumentsWeb/34986/FM020\_Respondents\_Her-Majesty-the-Queen-et-al.pdf>. On the contrary, the province seems to have accepted Justice Groberman’s decision on this point, observing that, in his reasons, “[t]he Aboriginal perspective was at the forefront of the recognition of the Tsilhqot’in as the collective that is the proper holder of Aboriginal rights” (*ibid* at para 151).
56. See *Tsilhqot’in Nation* SCC, *supra* note 8 at para 94. Chief Justice McLachlin stated that “[w]ith the declaration of title, the Tsilhqot’in have now established Aboriginal title.” See also *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 BCCA 193, leave to appeal to SCC refused, [2012] SCCA No 336 [*Kwicksutaineuk/Ah-Kwa-Mish*]. The Court of Appeal decided that *Indian Act* bands are not necessarily the proper entities to be certified in a class action alleging infringement of Aboriginal fishing rights by fish farming in the Broughton Archipelago (*ibid* at para 77). In a concurring judgment, Justice Smith stated,
- [w]hile Aboriginal fishing rights adhere to the Aboriginal entity asserting them, they are not personal rights of the individual members of the Aboriginal entity; they do not exist independent of the entity. Rather they are collective rights that are for the use and benefit of all of the members of the Aboriginal entity asserting them (*ibid* at para 104).
57. For further discussion, see Kent McNeil, “The Post-*Delgamuukw* Nature and Content of Aboriginal Title” [McNeil, “Post-*Delgamuukw*”] in McNeil, *Emerging Justice*, *supra* note 31, 102 at 122.
58. *Delgamuukw* SCC, *supra* note 6 at para 113.
59. *Tsilhqot’in Nation* SCC, *supra* note 8 at paras 67-76. The Court found that “[a]nalogies to other forms of property ownership – for example, fee simple – may help us to understand aspects of Aboriginal title” (*ibid* at para 72), and that “Aboriginal title confers ownership rights similar to those associated with fee simple” (*ibid* at para 73).
60. Even the Crown is regarded as a corporation for this purpose. See FW Maitland, “The Crown as Corporation” (1901) 17 Law Q Rev 131.

for the time being.<sup>61</sup> It seems clear from the cases we have already examined that Aboriginal title is not vested in all the members of an Aboriginal nation as individuals; instead, it is a communal right vested in the whole nation as a single legal entity.<sup>62</sup> In other words, apart from those Aboriginal nations that have been accorded the capacity to hold property rights by statute and land claims agreements,<sup>63</sup> Aboriginal nations that have Aboriginal title must, at common law, have the legal personality necessary to hold property rights.<sup>64</sup> Moreover, as these nations have communal decision-making authority over their lands, Aboriginal title is not just proprietary—it is also governmental in nature.<sup>65</sup> As Brian Slattery has recently argued, this means that it is more akin to unencumbered provincial title to land than it is to private real property rights.<sup>66</sup>

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61. See generally Dennis Lloyd, *The Law Relating to Unincorporated Associations* (Sweet and Maxwell, 1938); Harold AJ Ford, *Unincorporated Non-Profit Associations: Their Property and Their Liability* (Clarendon Press, 1959); SJ Stoljar, *Groups and Entities: An Inquiry into Corporate Theory* (Australian National University Press, 1973). Note that another option is for the legal title to be held by a trustee for the benefit of the members, but in that situation the members still hold the equitable title as individuals, not as a collective with legal personality.

62. See *Delgamuukw* SCC, *supra* note 6 at para 115.

63. See *e.g.* Nisga'a Final Agreement (ratified 2000), online: <nnkn.ca/files/u28/nis-eng.pdf>.

64. “The Nisga'a Nation, and each Nisga'a Village, is a separate and distinct legal entity, with the capacity, rights, powers, and privileges of a natural person, including to ... acquire and hold property or an interest in property, and sell or otherwise dispose of that property or interest” (*ibid* at ch 11, s 5).

65. *Cf Kwickisutaineuk/Ah-Kwa-Mish*, *supra* note 56. Justice Garson stated:

Because the term “aboriginal collective” is not defined in the order or in the reasons for judgment, the question is whether such a group is a juridical person. As addressed above, the respondent argues that because the Aboriginal collectives hold constitutional rights, they ought to be able to sue through this class action. I decline to decide in a general way if any Aboriginal collective, for example a First Nation that may be organized and governed along traditional lines, could or could not be a juridical person. That question can be left for another day (*ibid* at para 79).

However, in this case the “aboriginal collective” having or asserting Aboriginal fishing rights was not sufficiently identified and defined, and that is why the Court of Appeal decided it did not comprise a sufficiently precise class for the purposes of certification (*ibid*).

66. See *supra* note 33 and accompanying text. See also Kent McNeil, “Indigenous Land Rights and Self-Government: Inseparable Entitlements” in Lisa Ford & Tim Rowse, eds, *Between Indigenous and Settler Governance* (Routledge, 2013) 135; Boisselle, *supra* note 54; Gordon Christie, “Who Makes Decisions over Aboriginal Title Lands?” (2015) 48 UBC L Rev 743.

66. Slattery, “Constitutional Dimensions,” *supra* note 29. See also McNeil, “Post-*Delgamuukw*,” *supra* note 57 at 124-25; Webber, *supra* note 33.

In summary, I think it is clear from the cases we have discussed that Aboriginal title is held by Aboriginal nations or polities that are the descendants or successors of the Aboriginal peoples that were in exclusive occupation of their traditional territories at the time of Crown assertion of sovereignty.<sup>67</sup> This is consistent with the jurisprudence on Aboriginal rights apart from title that we will now examine. In examining these cases, it is nonetheless important to keep in mind a fundamental distinction between Aboriginal title and other Aboriginal rights. Aboriginal title is exclusive, so except in situations where two or more Aboriginal nations share joint title,<sup>68</sup> only one nation can have title to any particular land.<sup>69</sup> As exclusivity does not appear to be a requirement for establishing other Aboriginal rights, proof that one Aboriginal nation or polity has an Aboriginal right—to hunt or fish in a particular place, for example—should not bar other Aboriginal groups from establishing that they have such a right as well.<sup>70</sup>

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67. The same basic conclusion was reached by the Royal Commission on Aboriginal Peoples regarding entitlement to the right of self-determination. See *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Supply and Services Canada, 1996) at 177-80. Compare *West Moberly First Nations v McLeod Lake Indian Band*, 2014 BCCA 283. Here, the Court of Appeal for British Columbia upheld an order granting intervener status to two *Indian Act* bands (the Takla Lake First Nation and Tsay Keh Dene First Nation) and the Tahltan Central Council, “a non-profit society representing the interests of the people of Tahltan ancestry” (*ibid* at para 4), because their claims to Aboriginal title and other rights in British Columbia gave them an interest in this litigation to determine the western boundary of Treaty 8. However, as the decision dealt only with their entitlement to intervener status, I do not interpret it as an acknowledgement that they are the proper holders of title or other rights. Although this case was decided just two weeks after the *Tsilhqot’in Nation* SCC, *supra* note 8, the SCC decision was not mentioned.

68. See McNeil, “Joint Aboriginal Title,” *supra* note 33, where American law on Aboriginal title is also discussed (*ibid* at 838-52). See especially the analysis of the following cases involving the identity of the title-holding group (*ibid* at 843-46): *Confederated Tribes of the Warm Springs Reservation of Oregon v United States*, 177 Ct Cl 184 (1966); *Iowa Tribe of the Iowa Reservation v United States*, 195 Ct Cl 365 (1971); *Turtle Mountain Band of Chippewa Indians v United States*, 490 F (2d) 935 (Ct Cl 1974).

69. See *Delgamuukw*, *supra* note 6 at para 155.

70. *Ibid* at para 159. This does not mean that Aboriginal resource use rights short of title can never be exclusive. If the evidence showed, for example, that one Aboriginal nation fished in a certain lake and excluded all other Aboriginal people from doing so, they could have an exclusive fishing right there, though I would think that exclusion of others should be evidence of sufficient control to establish Aboriginal title. See McNeil, “Joint Aboriginal Title,” *supra* note 33 at 825-34.

## II. ABORIGINAL RIGHTS CASES<sup>71</sup>

In many of the cases involving Aboriginal rights apart from title, at least those that have reached the SCC, the identity of the rights-holding entity does not appear to have been an issue. Most of these cases are prosecutions of First Nation individuals, in which it is sufficient for the accused, in order to claim the benefit of an Aboriginal right, to be a member of an *Indian Act* band or First Nation that has a connection to an Aboriginal people whose practices, customs, or traditions gave rise to the right at the time of contact with Europeans.<sup>72</sup> Since the issue for the courts in these cases is deciding whether the accused is entitled to the benefit of the claimed Aboriginal right, it is generally not necessary for the judges to specify precisely the collective entity that holds the right today.<sup>73</sup> Moreover, to the extent that judges have revealed their thinking on this matter, they have usually done so implicitly rather than explicitly. For these reasons, these cases generally shed less light on the identity of the present-day rights holders than do the Aboriginal title cases we have already examined.

In addition, the pre-contact social and political organization of the Aboriginal people in question usually does not seem to be a factor in the judges' view of the

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71. In this Part, I look primarily at cases that reached the Supreme Court of Canada that I think are most relevant to the issue of the title-holding collective. A more thorough discussion would examine more closely the numerous Aboriginal rights cases that did not reach the highest court, as well as Métis Aboriginal rights cases. See *e.g.* *Powley*, *supra* note 36. For discussion of this case, see *Tsilhqot'in Nation* BCSC, *supra* note 30 at paras 441-44; *Olthuis*, *supra* note 2 at 5, 21-25. *Cf.* *Tsilhqot'in Nation* BCCA, *supra* note 30 at para 157. See note 148 below.
72. See *e.g.* *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*]; *Van der Peet*, *supra* note 39; *R v NTC Smokehouse Ltd*, [1996] 2 SCR 672; *R v Adams*, [1996] 3 SCR 101 [*Adams*]; *R v Côté*, [1996] 3 SCR 139. See also *R v Nikal*, [1996] 1 SCR 1013 at para 95. Justice Cory, writing the majority judgment, observed that “the nature and scope of aboriginal rights will frequently be dependent upon membership in particular bands who have established particular rights in specific localities.” However, while membership in a band is generally the way in which individuals establish entitlement to Aboriginal rights, bands are not necessarily the holders of Aboriginal rights. Nonetheless, a band could be if it is the successor to the Aboriginal people whose pre-contact culture gave rise to the right, as seems to be the case of the Heiltsuk Band whose Aboriginal right to collect and sell herring spawn on kelp in commercial quantities was upheld in *R v Gladstone*, [1996] 2 SCR 723. See also *Abousaht Indian Band v Canada (Attorney General)*, 2009 BCSC 1494 [*Abousaht Indian Band* BCSC], discussed below. However, a First Nation individual seeking a declaration of a treaty or Aboriginal right as a plaintiff lacks standing in the absence of the support of the rights-holding community. See *Francis v Canada*, 2018 FC 49 at para 25 [*Francis* FC], *aff'd* 2018 FC 623, 2019 FCA 184 [*Francis* FCA]. See also *Canadian National Railway Co v Brant*, [2009] 4 CNLR 47 (ONSC).
73. *Abousaht Indian Band* BCSC, *supra* note 72 at para 288.

current rights-holding entity. In the leading case of *R v Van der Peet*, for example, the SCC apparently accepted that the Sto:lo people as a whole would today have the claimed Aboriginal right to exchange fish for money or other goods (if proven, which the Court decided it had not been), even though the Sto:lo had been “at a band level of social organization rather than at a tribal level” at the time of contact,<sup>74</sup> and are now organized at the community level into eleven *Indian Act* bands or First Nations.<sup>75</sup>

The lack of any real analysis of the issue of the precise identity of the current rights-holding entity is particularly evident in cases where the right was not established by the evidence. *R v Pamajewon*,<sup>76</sup> for example, involved appeals from convictions for unlawful gambling of members of two Ojibwa (Anishinaabe) *Indian Act* bands in Ontario, the Shawanaga and Eagle Lake First Nations. The accused argued that these First Nations have an inherent right of self-government that includes the authority to conduct and regulate gambling activities on their reserve lands. The SCC applied the test for Aboriginal rights laid down by the Court just the day before in *Van der Peet*,<sup>77</sup> and upheld the convictions on the ground that the evidence led by the accused failed to prove that high-stakes gambling and the regulation thereof had been integral to the distinctive culture of the Ojibwa at the time of contact with Europeans. Chief Justice Lamer observed that the accused relied “in support of their claim on the fact that the ‘Ojibwa people ... had a long tradition of public games and sporting events, which pre-dated the arrival of Europeans,’”<sup>78</sup> but he decided that the limited evidence of this did not establish that it included high-stakes gambling. He concluded that the “evidence presented at both the Pamajewon and Gardner trials does not demonstrate that gambling, or that the regulation of gambling, was an integral part of the distinctive cultures of the Shawanaga or Eagle Lake First Nations.”<sup>79</sup> But as those First Nations are actually bands that owe their legal existence to the *Indian Act*, it is questionable whether they could ever meet the *Van der Peet* test by proving that they had distinctive cultures at the time of contact with Europeans, which, by virtue of the fur trade, probably occurred for the Ojibwa from whom they are descended long before the Dominion of Canada was even created. Surely Chief Justice Lamer meant that the Ojibwa people would have

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74. *Van der Peet*, *supra* note 39 at paras 90-91.

75. See the Sto:lo Nation website: <stolonation.bc.ca/bands>.

76. [1996] 2 SCR 821 [*Pamajewon*].

77. *Supra* note 39.

78. *Pamajewon*, *supra* note 76 at para 26.

79. *Ibid* at para 28.

had to have a distinctive culture pre-contact that included the practice, custom, or tradition of high-stakes gambling. Whether the claimed Aboriginal right, had it been proven in that way, would now be held by the Shawanaga and Eagle Lake First Nations, or by some other present-day Ojibwa polity or polities, does not appear to have been seriously considered by the Court,<sup>80</sup> no doubt because it was not necessary to identify the holders of unestablished rights.

*Mitchell v MNR*<sup>81</sup> involved a claim by an individual member of a First Nation to the benefit of an Aboriginal right, namely, to bring goods for trade from the United States into Canada without paying customs duties. Chief Justice McLachlin described Grand Chief Mitchell as “a Mohawk of Akwesasne, a Mohawk community located just west of Montreal, and a descendant of the Mohawk nation, one of the polities comprising the Iroquois Confederacy prior to the arrival of Europeans.”<sup>82</sup> The SCC decided that the alleged right had not been proven, as the evidence of “pre-contact Mohawk trading north of the Canada-United States boundary” was “sparse and tenuous,” and trading to the north that did take place was “clearly incidental, and not integral, to the Mohawk culture.”<sup>83</sup> In assessing the evidence of trade, the Court’s focus was clearly on the Mohawk Nation as a whole, not just on the Akwesasne community that is only one of the Mohawk First Nations in Canada today.<sup>84</sup>

*R v Sappier; R v Gray*<sup>85</sup> involved prosecutions under provincial legislation for unlawfully harvesting wood on Crown lands in New Brunswick. The accused in *Sappier* are Maliseets and members of the Woodstock First Nation, whereas the accused in *Gray* is Mi’kmaq and a member of the Pabineau First Nation.

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80. See *ibid* at para 24. Chief Justice Lamer “assum[ed] without deciding that s. 35(1) includes self-government claims,” but did not address the issue of how to identify the present-day holders of the right.

81. 2001 SCC 33.

82. *Ibid* at para 2.

83. *Ibid* at para 3.

84. Compare the order of the Federal Court of Appeal (overturned by the SCC), *Mitchell v MNR*, [1999] 1 FC 375 at para 56. Justice Sexton stated:

the plaintiff as a Mohawk of Akwesasne resident in Canada has an existing aboriginal right which is constitutionally protected by sections 35 and 52 of the *Constitution Act, 1982*, when crossing the international border from New York to Ontario or Quebec, to bring with him to Canada, for personal use or consumption, or for collective use or consumption by the members of the community of Akwesasne, or for non-commercial scale trade with First Nation communities in Ontario or Quebec, goods bought in the State of New York without having to pay any duty or taxes to the government of Canada [emphasis added].

85. 2006 SCC 686 [*Sappier/Gray*].

In each case, the SCC decided that the accused had established that, as members of their respective First Nations, they had an Aboriginal right to harvest timber for domestic purposes because this practice had been integral to the Maliseet and Mi'kmaq cultures prior to contact with Europeans. Although the Court found that this right to harvest timber is site-specific, Justice Bastarache, in his majority judgment, observed:<sup>86</sup>

At the trial of Messrs. Sappier and Polchies, the Crown conceded that “the issue of territoriality does not arise in the trial of the Defendants on the charge set out herein” (Agreed Statement of Facts at para. 12, reproduced in the trial decision at p. 296). Moreover, in its reply to the defendants’ Notice of Contention, the Crown addressed the question of whether the harvesting of trees occurred within Crown lands traditionally used for this practice. The Crown responded: “This question would not appear to be an issue as wood was gathered at will within the traditional Maliseet territory” (reproduced in the reasons of the Court of Appeal at para. 71). Territoriality is therefore not at issue in the *Sappier and Polchies* prosecution.

Regarding the *Gray* case, Justice Bastarache noted that:<sup>87</sup>

[T]he trial judge accepted Mr. Sewell’s evidence that the Mi’kmaq had traditionally used the Crown lands in question for the purpose of tree harvesting. The Court of Appeal noted that the Crown did not dispute this finding (para. 15).

Yet after deciding that the Aboriginal right had been made out in each case, Justice Bastarache concluded:<sup>88</sup>

The respondent Mr. Gray possesses an aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for that purpose by members of the Pabineau First Nation. The respondents Messrs. Sappier and Polchies possess an aboriginal right to harvest wood for domestic uses. That right is also site-specific, such that its exercise is necessarily limited to Crown lands traditionally harvested by members of the Woodstock First Nation.

With all due respect, I find this conclusion difficult to reconcile with the Crown’s admission in *Sappier* that “wood was gathered at will within the traditional Maliseet territory” and the Court’s consequent conclusion that “[t]erritoriality is therefore not at issue in the *Sappier and Polchies* prosecution.”<sup>89</sup> Nor is it consistent with the undisputed “evidence that the Mi’kmaq had traditionally

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86. *Ibid* at para 52. Note that the meaning of the term “territoriality” in this context is unclear, as it is not defined in the Agreed Statement of Facts, reproduced at trial (in *R v Sappier*, [2003] 2 CNLR 294 (NB Prov Ct) at para 2), or in the judgments.

87. *Sappier/Gray*, *supra* note 85 at para 53.

88. *Ibid* at para 72.

89. See quotation at *supra* note 86.

used the Crown lands in question for the purpose of tree harvesting.<sup>90</sup> There does not appear to have been any evidence (at least not evidence referred to by the SCC) that a Mi'kmaw subgroup connected to the present-day Pabineau First Nation or a Maliseet subgroup connected to the current Woodstock First Nation even existed at the time of contact, let alone restricted their wood harvesting to defined portions of the Mi'kmaw and Maliseet territories.<sup>91</sup> Surely it would have been more consistent with the evidence referred to by the Supreme Court to conclude that Mr. Gray has an Aboriginal right to harvest wood wherever the Mi'kmaq harvested pre-contact, and Messrs Sappier and Polchies likewise where the Maliseet harvested.<sup>92</sup>

Unlike the other Aboriginal rights cases we have considered, *Lax Kw'alaams Indian Band v Canada (Attorney General)*<sup>93</sup> did not involve a prosecution. It was a representative action brought by “Chief Councillor Garry Reece on his own behalf and on behalf of the members of the Lax Kw'alaams Indian Band and others”<sup>94</sup> for a declaration of their right to fish commercially in designated waters along the coast of British Columbia. Delivering the unanimous decision of the SCC, Justice Binnie described the action as “the claim of the Lax Kw'alaams First Nation and other First Nations listed in the Appendix to these reasons (herein collectively referred to as ‘Lax Kw'alaams’), whose ancestral lands stretch along the northwest coast of British Columbia between the estuaries of the Nass and lower Skeena rivers, to the commercial harvesting and sale of ‘all species of fish’ within

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90. See quotation at *supra* note 87.

91. At trial, Provincial Court Justice Cain referred in general terms to “the distinctive culture of the ancestors of the Woodstock First Nation in pre-European times.” See *R v Sappier*, [2003] 2 CNLR 294 at para 12. The trial decision in *R v Gray* does not appear to have been reported, but the trial judge’s findings in relation to this issue were summarized by Justice Robertson in the Court of Appeal for New Brunswick: “Second, he held that the trees in question were harvested from lands traditionally occupied by Mr. Gray’s ancestors. Third, the trial judge concluded that the expert evidence of Mr. Sewell established that the Mi'kmaq traditionally used wood and that they continue to do so.” See *R v Gray*, [2004] 4 CNLR 201 (CA) at para 5. In his SCC judgment, Justice Bastarache described the main issue as “whether the practice of harvesting wood for domestic uses was integral to the distinctive culture of the Maliseet and Mi'kmaq, pre-contact.” See *Sappier/Gray*, *supra* note 85 at para 27.

92. The Court’s apparent concern to limit the geographical scope of the right would no doubt be met by the practical reality that members of these First Nations would be unlikely to travel far from their communities to harvest wood if the resource was available closer to home. The Court’s confinement of the right to domestic uses would reinforce this practical limitation.

93. *Lax Kw'alaams*, *supra* note 39.

94. *Ibid*, style of cause.

their traditional waters.”<sup>95</sup> Those First Nations are apparently descended from the Coast Tsimshian people who inhabited that region when the Europeans first arrived around 1793.<sup>96</sup> The evidence led to prove the Aboriginal right therefore related to the fishing practices, customs, and traditions of the Coast Tsimshian people as a whole prior to this European contact. Regarding the identity of the current rights holders, the statement of claim asked for “a declaration that the Lax Kw’alaams or, in the alternative, each of the Allied Tsimshian Tribes, have existing Aboriginal rights,” but the trial judge restated this as an application for declarations that “the plaintiffs have an existing Aboriginal right.”<sup>97</sup> Given the representative nature of the action, the term “plaintiffs” may be vaguer than “Lax Kw’alaams or, in the alternative, each of the Allied Tsimshian Tribes,” but the precise identity of the current rights holders was never clarified because the courts, all the way up to the SCC, decided that the right to a commercial fishery had not been proven. Justice Binnie agreed with the trial judge that the Coast Tsimshian’s pre-contact trade in eulachon grease did not provide a sufficient basis for “a modern right to fish commercially all species” in that people’s traditional territory.<sup>98</sup>

Although not a case decided by the SCC, *Abousaht Indian Band v Canada (Attorney General)*<sup>99</sup> deserves our attention because, like *Lax Kw’alaams*, it involved claims to commercial fisheries (as well as to Aboriginal title, which the court found unnecessary to address),<sup>100</sup> and because the identity of the rights holders was a significant issue at trial. The plaintiffs are five *Indian Act* bands, the Ehattesaht, Mowachaht/Muchalaht, Hesquiaht, Ahousaht, and Tla-o-qui-aht, on Vancouver Island. They claimed that,<sup>101</sup>

before and at the time of contact with Europeans, their predecessors (collectively, the “Nuu-chah-nulth Nations”) existed as organized and self-governing social and political entities. They claim that the Nuu-chah-nulth Nations are culturally related groups that share common distinctive features including language, customs, practices, traditions, laws, economies, spiritual beliefs and culture. After British Columbia’s entry into Confederation in 1871, each of the Nuu-chah-nulth Nations

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95. *Ibid* at para 1. The First Nations listed in the Appendix are the Ginaxangiik Tribe, Gitandoah Tribe, Gitwilgiots Tribe, Git’stsiis Tribe, Gitnadoiks Tribe, Gispaxloats Tribe, Gitlan Tribe, Gitzaxlaal Tribe, and Gitlutzau Tribe.

96. *Ibid* at paras 15-16. The SCC noted: “The Lax Kw’alaams First Nation consists of the descendants of an ancient ‘fishing people’ comprising the several tribes or houses of the Coast Tsimshian” (*ibid* at para 15).

97. *Ibid* at paras 25-26.

98. *Ibid* at para 30.

99. *Abousaht Indian Band BCSC*, *supra* note 72.

100. *Ibid* at paras 491-502.

101. *Ibid* at para 7.

was constituted as a band under the predecessor of the *Indian Act*, R.S.C. 1985, c.I-5, and, today, each band is the legal representative of its predecessor Nation and the lawful holder of the collective Aboriginal rights and title of that Nation.

Justice Garson stated that, in order to succeed in their Aboriginal rights claims, the plaintiffs had to<sup>102</sup>

establish that they are the successor collectives to the Aboriginal groups that possessed Aboriginal rights at the date of contact. ... The question to be resolved is whether these modern plaintiffs can prove that they are rights holders; that is, are they connected to the groups from whom they say they derive their Aboriginal rights to fish and to trade in fish.

Justice Garson examined the relevant evidence at length in her judgment, and concluded that each of the five bands had proven a sufficient connection with the pre-contact Nuu-chah-nulth Nation, from which they claimed to be descended, to be the present-day rights holders in that Nation's traditional territory.<sup>103</sup> She accordingly ordered, among other things, that<sup>104</sup>

[t]he plaintiffs have Aboriginal rights to fish for any species of fish in the environs of their territories and to sell fish. The approximate boundaries of each plaintiff's territory is [sic] delineated in Appendix A and further particularized for each plaintiff at Exhibit 26, with the exception of the seaward boundary. The seaward boundary is nine miles from a line drawn from headland to headland within each plaintiff's territory.

Justice Garson's decision was upheld by the BCCA, with one variation: geoduck clams were excluded from the plaintiffs' Aboriginal fishing rights because the Nuu-chah-nulth could not have engaged in this modern, high-tech fishery at the time of contact.<sup>105</sup>

One other SCC decision deserves to be mentioned, even though it involved a claim to treaty rights rather than Aboriginal rights, because the Court made

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102. *Ibid* at para 287. See also the quotation from *Marshall/Bernard* SCC, *supra* note 7 at para 67, accompanying note 39 above.

103. *Abousabt Indian Band* BCSC, *supra* note 72 at paras 287-365.

104. *Ibid* at para 909.

105. *Abousabt Indian Band v Canada (Attorney General)*, 2011 BCCA 237, *aff'd* in part 2013 BCCA 300. The rehearing took place because, on appeal of the BCCA's original judgment, the SCC ordered the case to be remanded to that court to be reconsidered in light of the Supreme Court's decision in *Lax Kw'alaams*, *supra* note 39. Litigation subsequent to these decisions involves the issue of whether infringement of the Aboriginal right to fish commercially can be justified. See *Abousabt Indian Band v Canada (Attorney General)*, 2018 BCSC 633; 2018 BCCA 413; 2018 BCCA 445 (the 2018 BCCA decisions involve intervener applications).

some general statements about rights holders that are applicable to both categories of rights. *Behn v Moulton Contracting Ltd*<sup>106</sup> was a tort action brought by a forestry company against members of the Behn family, who belong to the Fort Nelson First Nation (FNFN) in British Columbia, for blockading a logging road providing access to an area where the company had been granted timber harvesting licences by the province. The defendants argued that the licences were invalid because the province had not consulted with them prior to issuing the licences and because the licences infringed their treaty hunting and trapping rights. The company responded by arguing that the Behns lacked standing to raise the issues of consultation and treaty rights as defences because the rights are held by the FNFN, not by individual members or families.<sup>107</sup> The Behns' answer

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106. *Behn, supra* note 32.

107. For other cases involving the issue of standing in relation to Aboriginal and treaty rights, see *Komoyue Heritage Society v British Columbia (AG)*, 2006 BCSC 1517 [*Komoyue Heritage Society*]; *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2006 ABCA 392 at paras 113-34, rev'd *Canada (Attorney General) v Lameman*, 2008 SCC 14 (on the application of statutory limitation periods without deciding the standing issue); *Kelly v Canada (Attorney General)*, 2013 ONSC 1220 [*Kelly*]; *Watson v Canada*, 2017 FC 321 at paras 26-38; *Red Chris Development Co v Quock*, 2014 BCSC 2399 at paras 37-44; *North Slave Métis Alliance v Canada (Indian Affairs and Northern Development)*, 2017 FC 932. See *Kelly, ibid* at paras 56-57 (an action alleging that the government of Canada has not fulfilled its obligations in Treaty 3 in relation to education). Justice Perell stated:

Aboriginal rights are communal rights, but the rights holder; i.e., the aboriginal group that shares the right may be a family, a clan, a descent group, a hunting party, an encampment, a band, a tribe, a confederacy or a first nation ... . Aboriginal rights and treaty rights are collective rights, and the proper party with the standing to assert an aboriginal rights claim or a treaty rights claim is the collective that is the rights holder.

In this representative action, Justice Perell opined that if the matter were justiciable (which he decided it was not), Grand Chief Warren White could replace Grand Chief Diane Kelly as a plaintiff and would be

able to bring a representative action on behalf of the beneficiaries of Treaty 3 provided that: (1) he was authorized to do so by all of the 28 reserve bands (by band council resolutions); or (2) if he joins as party defendants those bands that do not authorize his representation action (*ibid* at para 121).

The Court of Appeal for Ontario reversed Justice Perell's decision that the action was not justiciable and agreed that the representative action could go ahead if the conditions he imposed were met. See *Kelly v Canada (Attorney General)*, 2014 ONCA 92 at para 21. See also *Kelly v Ontario (Minister of Energy)*, 2014 ONSC 5492, especially at para 19; *Hwilitsum First Nation v Canada (Attorney General)*, 2018 BCCA 276 (leave to appeal to SCC refused, 38325 (28 March 2019)) [*Hwilitsum First Nation*].

to this was summarized by Justice LeBel, who delivered the Court's unanimous judgment, as follows:<sup>108</sup>

They recognize that these rights have traditionally been held by the FNFN, which is a party to Treaty No. 8. But they also allege that specific tracts of land have traditionally been assigned to and associated with particular family groups. They assert in their pleadings that the Authorizations granted to Moulton are for logging in specific areas within the territory traditionally assigned to the Behns, where they have exercised their rights to hunt and trap.

The SCC decided that raising the consultation and treaty rights defences in this action was an abuse of process because the FNFN and the Behns had notice of the licences and should have challenged their validity in an action for judicial review before the company started work. The Court therefore declined to rule on the treaty rights issue, but Justice LeBel did make some general comments about the holders of Aboriginal and treaty rights that are relevant to our discussion:<sup>109</sup>

Aboriginal and treaty rights are collective in nature .... However, certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights.

After declining to try to categorize Aboriginal and treaty rights any more precisely along collective and individual lines, Justice LeBel concluded:<sup>110</sup>

on the occasion of this appeal and at this stage of the development of the law, ... [i]t will suffice to acknowledge that, despite the critical importance of the collective aspect of Aboriginal and treaty rights, rights may sometimes be assigned to or

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108. *Behn*, *supra* note 32 at para 36.

109. *Ibid* at para 33. As authority that Aboriginal and treaty rights are collective, Justice LeBel cited *Sparrow*, *supra* note 72 at 1112; *Delgamuukw*, *supra* note 6 at para 115; *R v Sundown*, [1999] 1 SCR 393 at para 36; *R v Marshall*, [1999] 3 SCR 533 at paras 17, 37; *Sappier/Gray*, *supra* note 85 at para 31; *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103 at para 35.

110. *Behn*, *supra* note 32 at para 35. For a case in which an individual's claim of a right to rely on Haudenosaunee law in relation to family matters was dismissed because the motion judge viewed the right as collective in nature, see *Beaver v Hill*, 2017 ONSC 7245 at paras 93-99. The Court of Appeal for Ontario reversed this decision on the ground that it was premature to make a determination of the issue, given the incomplete record at this preliminary stage of the proceedings. See *Beaver v Hill*, 2018 ONCA 816 [*Beaver* ONCA]. For further litigation relating to this case, see *Beaver v Hill*, 2019 ONCA 520, leave to appeal to the SCC refused, 38792 (16 January 2020). See also *Francis FC*, *supra* note 72 at paras 39-42. Here, the Federal Court dismissed a motion for advance costs brought by a First Nation man in a civil case, in part because he failed to show why he was entitled to claim a treaty or Aboriginal fishing right as an individual, as envisaged by Justice LeBel in *Behn*. The Federal Court of Appeal dismissed his appeal without dealing with this issue. See *Francis FCA*, *supra* note 72.

exercised by individual members of Aboriginal communities, and entitlements may sometimes be created in their favour. In a broad sense, it could be said that these rights might belong to them or that they have an individual aspect regardless of their collective nature. Nothing more need be said at this time.

It is clear from the cases we have already examined that individuals can successfully rely on Aboriginal rights as a defence to prosecutions. One would therefore think that they should be able to rely on those rights in civil cases as well. Be that as it may, our concern in this article is the identity of the current holders of collective rights. In *Behn*, it seems to have been assumed that the FNFN, an *Indian Act* band, is the holder of those rights in the area where the logging was taking place.<sup>111</sup> However, treaty rights are different from Aboriginal rights in this regard because the treaty records and documents provide direct evidence of the Aboriginal parties, whereas the identity of the Aboriginal peoples whose practices, customs, and traditions form the basis for Aboriginal rights depends more generally on historical, ethnographic, and other sources of evidence. As a result, and because the treaties are usually closer in time to the present, it is often easier to make a connection between parties who entered into the treaties and the present-day holders of collective treaty rights than it is to make a connection between Aboriginal peoples at the time of contact and the holders of Aboriginal rights today.<sup>112</sup>

111. See *Behn*, *supra* note 32 at paras 5-6. See also *Kiapilanoq v British Columbia*, 2008 BCSC 54, especially at para 25. In *Fort Nelson First Nation v British Columbia*, Justice Davies held that the province owes a duty to consult the Fort Nelson First Nation in relation to the development of a sand and gravel pit within their traditional territory. This decision was reversed on appeal, but not on the issue of the proper rights holder. See 2015 BCSC 1180, rev'd 2016 BCCA 500.

112. The SCC has refused to impose too high a standard for establishing such a connection in the case of treaty rights. See *R v Simon*, [1985] 2 SCR 387 at 407. Chief Justice Dickson, delivering the unanimous judgment, responded to the Crown's argument that the appellant had "not shown that he is a direct descendant of a member of the original Micmac Indian Band covered by the Treaty of 1752" (the treaty the appellant relied upon as a defence to the charge of unlawful hunting):

In my view, the appellant has established a sufficient connection with the Indian band, signatories to the Treaty of 1752. As noted earlier, this Treaty was signed by Major Jean Baptiste Cope, Chief of the Shubenacadie Micmac tribe, and three other members and delegates of the tribe. The Micmac signatories were described as inhabiting the eastern coast of Nova Scotia. The appellant admitted at trial that he was a registered Indian under the *Indian Act*, and was an "adult member of the Shubenacadie-Indian Brook Band of Micmac Indians and was a member of the Shubenacadie Band Number 02." The appellant is, therefore, a Shubenacadie-Micmac Indian, living in the same area as the original Micmac Indian tribe, party to the Treaty of 1752. This evidence alone, in my view, is sufficient to prove the appellant's connection to the tribe originally covered by the Treaty.

This brief survey of some of the SCC decisions involving claims by First Nations to Aboriginal rights apart from title reveals that the Court's approach has generally been to determine whether the individuals claiming the benefit of the right are members of a First Nation or Indian band today that has a connection with an Aboriginal people for whom the practice, custom, or tradition on which the alleged right is based was integral to their distinctive culture at the time of contact with Europeans. The Court does not appear to be too concerned with precise definition of the rights-holding entity, either at the time of contact or in the present day. As long as there is a sufficient connection between the relevant Aboriginal people at contact and the current Aboriginal community to which the individuals belong, that seems to meet the continuity requirement for the claimants of the Aboriginal right today. However, where the individuals are members of a subgroup within a larger entity such as an Aboriginal nation, it does not mean that the subgroup is the holder of the right.<sup>113</sup> For example, if Dorothy Van der Peet had been able to establish an Aboriginal right to exchange fish for money or other goods in *Van der Peet*, it seems that all members of the Sto:lo Nation, not just members of the Sto:lo band or First Nation to which she belongs, would have the benefit of that right today. Similarly, if Chief Mitchell had been able to prove the trading right in the *Mitchell* case, presumably all

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113. See text accompanying notes 85-92. Though *Sappier/Gray* may appear inconsistent with this conclusion, I think there are problems with this aspect of the decision. The Court's concern seems to have been to limit the territorial scope of the wood-harvesting right, but in so doing I think the judges did not take sufficient account of the admissions and evidence regarding the identity of the Aboriginal peoples—the Maliseet and Mi'kmaq peoples— whose pre-contact activities gave rise to the harvesting right. See *Sappier/Gray*, *supra* note 85 at para 53. With respect, I think Justice Bastarache's leap in logic in this regard is evident in the following passage of his judgment:

In the *Gray* trial, the trial judge accepted Mr. Sewell's evidence that the Mi'kmaq had traditionally used the Crown lands in question for the purpose of tree harvesting. The Court of Appeal noted that the Crown did not dispute this finding (para. 15). I would conclude on this basis that Mr. Gray has established an aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for this purpose by members of the Pabineau First Nation (*ibid* at para 53).

How, one might ask, does the factual finding that “the Mi'kmaq had traditionally used the Crown lands in question for the purpose of tree harvesting” get transformed into a conclusion relating to “Crown lands traditionally used for this purpose by members of the Pabineau First Nation”?

Mohawk communities in Canada, not just the Mohawks of Akwesasne, would be the holders of the right.<sup>114</sup>

So far, we have examined cases where a claim to Aboriginal title or some other Aboriginal right was asserted, and an attempt was made to prove that title or right in court. In other cases, title and other rights are claimed, not in order to get a court declaration of their existence or as a defence against prosecution, but rather to force governments to consult with the Indigenous people concerned before resource development or another activity, such as the building of dams or infrastructure, goes ahead in their territory. These cases raise the issue of determining whom governments need to consult with in specific instances, which of course depends on the identity of the collectives claiming Aboriginal title or rights at the time when consultation must take place. We will now examine some of these cases.

### III. DUTY TO CONSULT CASES<sup>115</sup>

In the leading case of *Haida Nation v British Columbia*,<sup>116</sup> the SCC decided that the Crown (in this case the Crown in right of the province) has a constitutional duty to consult with Aboriginal peoples when it contemplates action that might have some adverse impact on their Aboriginal rights, even if those rights have only been claimed but not yet established in court or acknowledged by a historical treaty or modern land claims agreement. The Court found that British Columbia had not consulted with the Haida people when it modified a tree farm licence that permitted harvesting of timber on Haida Gwaii (formerly the Queen Charlotte Islands) and when it later transferred the licence to another forestry company. This decision, along with *Taku River Tlingit First Nation v British*

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114. See also *Adams*, *supra* note 72. In *Adams*, the accused, also an Akwesasne Mohawk, was found to have an Aboriginal right to fish for food in Lake St. Francis in Quebec because fishing there was integral to the distinctive culture of the Mohawks prior to contact with Europeans. Nothing in Chief Justice Lamer's decision suggests that only the Mohawks of Akwesasne have this right. He stated:

The appellant argues that the Mohawks have an aboriginal right to fish in Lake St. Francis. In order to succeed in this argument the appellant must demonstrate that, pursuant to the test laid out by this Court in *Van der Peet*, fishing in Lake St. Francis was “an element of a practice, custom or tradition integral to the distinctive culture” of the Mohawks. For the reasons given below, I am of the view that the appellant has satisfied this test (*ibid* at para 34).

115. The discussion in this Part is limited to selective Aboriginal title and rights cases, and so does not consider cases involving treaty rights.

116. 2004 SCC 73 [*Haida Nation* SCC].

*Columbia*,<sup>117</sup> a companion case decided the same day, set the stage for a stream of duty to consult cases in British Columbia and elsewhere in Canada. No attempt will be made in this article to provide anything like a comprehensive survey of these numerous cases. Instead, our focus will be on a few selected decisions that cast some light on the identity of the rights holders or claimants with whom consultation must take place. For, as Justice LeBel stated in the *Behn* decision,<sup>118</sup>

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117. 2004 SCC 74 [*Taku River*].

118. *Behn*, *supra* note 32 at para 30, citing *Komoyue Heritage Society*, *supra* note 107. See also *Behn* at para 31 (“given the absence of an allegation of an authorization from the FNFN, in the circumstances of this case, the Behns cannot assert a breach of the duty to consult on their own, as that duty is owed to the Aboriginal community, the FNFN”). See also *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 35; *John Voortman & Associates Ltd v Haudenosaunee Confederacy Chiefs Council*, [2009] 3 CNLR 117 at para 73 (ONSC) [*John Voortman*]. In *John Voortman*, Justice Henderson decided that no duty to consult was owed to Haudenosaunee Men’s Fire of Grand River (HMF) in relation to a land claim because “the HMF is not well defined and its authority to represent aboriginal people is not well established.” See also *Fond du Lac Denesuline First Nation v Canada (Attorney General)*, 2010 FC 948 at para 163), *aff’d* 2012 FCA 73 (without addressing this issue). Justice Russell decided:

Camsell Portage, Uranium City, Stony Rapids and Wollaston Lake [municipalities in northern Saskatchewan] may well have Aboriginal residents and connections to Aboriginal communities, but these entities themselves do not enjoy section 35 rights. Counsel for the Applicants has explained that these entities are being used in a convenient representative capacity for the Aboriginal members of their respective communities, but there is nothing before the Court to show how they acquired this representative capacity and whether they are truly authorized to make this application on behalf of the Aboriginal members of their communities. Consequently, in so far as this application depends upon section 35 rights and the duty of the Crown to consult with Aboriginal groups or persons, Camsell Portage, Uranium City, Stony Rapids and Wollaston Lake have not established that they have standing (*ibid* at para 163).

See also *Native Council of Nova Scotia v Canada (Attorney General)*, 2007 FC 45 at paras 42-44, *aff’d* 2008 FCA 113 (without addressing this issue). Justice Layden-Stevenson was willing to assume that the Native Council of Nova Scotia (NCNS) could represent Mi’kmaq and other Aboriginal persons living off-reserve in Nova Scotia in consultations in relation to their alleged Aboriginal right to fish. He stated:

Because the off-reserve aboriginal population of Nova Scotia chose the NCNS to represent them in their dealings with DFO [Department of Fisheries and Oceans], the NCNS (as an organization) holds the procedural right of consultation while its individual members hold the substantive right to fish (*ibid* at para 43).

However, because there was a paucity of evidence of the alleged right for members of the NCNS other than Mi’kmaq members, the NCNS could not claim it was owed a duty to consult on behalf of all its members.

[t]he duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature ... . But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights.

In the *Haida Nation* case itself, the style of cause described the plaintiffs as the “Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation.”<sup>119</sup> The portion of the declaration of the BCCA that was affirmed by the SCC declared that the Crown in right of the province has “a legally enforceable duty to the Haida people to consult with them in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Haida people, on the one hand, and the short term and long term objectives of the Crown.”<sup>120</sup> In the SCC judgment, the duty is said to be owed to the “Haida people,” or just the “Haida,” as they are the people with a strong claim to Aboriginal title and other Aboriginal rights. Writing the unanimous judgment, Chief Justice McLachlin observed: “The Haida have claimed title to all of Haida Gwaii for at least 100 years.”<sup>121</sup> The website of the Haida Nation states:<sup>122</sup>

The Haida Nation collectively holds Hereditary and Aboriginal Title and Rights to Haida Territories and the cultural and intellectual property rights of the Haida Nation. All people of Haida ancestry are citizens of the Haida Nation. Every Haida citizen has the right of access to all Haida Gwaii resources for cultural reasons, and for food or commerce consistent with the Laws of Nature as reflected in the laws of the Haida Nation.

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More recently, Justice Veale in *Kaska Dena Council v Yukon*, 2019 YKSC 13, held that the Kaska Dena Council did not have authority to bring an application for a declaration that the Yukon has a duty to consult with it before issuing hunting licences because the Council did not claim to have Aboriginal rights nor had it received authorization from the rights-bearing First Nations to bring such an action; on the contrary, one of those First Nations denied its authority to do so. See also *Wesley v Canada*, 2017 FC 725.

119. *Supra* note 116. Guujaaw was the President of the Council of the Haida Nation at the time. See “Innovative Haida leader Guujaaw steps aside,” *CBC News* (11 December 2012), online: <[www.cbc.ca/news/canada/british-columbia/innovative-haida-leader-gujaaw-steps-aside-1.1200975](http://www.cbc.ca/news/canada/british-columbia/innovative-haida-leader-gujaaw-steps-aside-1.1200975)>.
120. *Haida Nation v British Columbia*, 2002 BCCA 147 at para 60.
121. *Haida Nation* SCC, *supra* note 116 at para 65.
122. “History of the Haida Nation,” online: *Council of the Haida Nation* <[www.haidanation.ca/?page\\_id=26](http://www.haidanation.ca/?page_id=26)>. Legal expression of this is in the Constitution of the Haida Nation. See *Constitution of the Haida Nation*, (2018), art 3, online (pdf): <[www.haidanation.ca/wp-content/uploads/2018/10/Constitution-2018-10-signed.pdf](http://www.haidanation.ca/wp-content/uploads/2018/10/Constitution-2018-10-signed.pdf)>.

In affirming that the duty to consult is owed to the Haida people, the SCC's judgment is consistent with the Haida's own assertion that the whole Haida Nation has a collective right to their lands and resources that can be accessed by every Haida citizen. Distribution of governmental authority within the Haida Nation therefore does not affect, and is not relevant to, the identity of the title and rights holder, which is the Haida people collectively rather than a governing body.<sup>123</sup> However, according to Justice LeBel in the *Behn* decision, the Haida people can delegate authority to a governing body or individuals to represent them in consultations in relation to their Aboriginal title and other rights. In my opinion, such a delegation would be an exercise of the Haida Nation's governance authority over their title and other rights.<sup>124</sup>

In the *Taku River* case, the SCC held unanimously that the Taku River Tlingit First Nation (TRTFN), an *Indian Act* band, "have *prima facie* Aboriginal rights and title over at least some of the area that they claim,"<sup>125</sup> and consequently the province owed them a duty to consult in relation to construction of a road through their traditional territory. The Court noted that the province clearly had notice of the claims of the TRTFN, as they had been attempting to negotiate their land claim with Canada since 1983 and with British Columbia after the British Columbia Treaty Commission was established in 1993.<sup>126</sup> While it is not clear from the judgment that the TRTFN had received authority from the members of the TRTFN to negotiate the land claim and challenge the construction of the road, this was likely assumed, especially as the style of cause indicates that the action was brought by the "Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation."<sup>127</sup>

Comparing *Haida Nation* and *Taku River*, we see that in the former case the duty to consult was owed to the Haida people as a whole, not to their governing bodies, which include two *Indian Act* band councils, whereas in *Taku River* the duty was owed to the TRTFN, an *Indian Act* band. In neither case does the

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123. The Constitution of the Haida Nation provides for governmental authority to be distributed among the Council of the Haida Nation, the Hereditary Chiefs Council, and two village councils, Old Massett Village Council and Skidegate Band Council. See *Constitution of the Haida Nation*, *supra* note 122. The village councils are *Indian Act* band councils. See "First Nation Profiles Interactive Map," online: *Government of Canada* <geo.aadnc-aandc.gc.ca/cipn-fnpim/index-eng.html>.

124. On Indigenous governance, see the sources in *supra* note 33 and accompanying text.

125. *Taku River*, *supra* note 117 at para 30.

126. *Ibid* at para 26.

127. *Ibid*, style of cause.

identity of the claimants to Aboriginal rights and title seem to have been an issue. Instead, the SCC appears to have simply assumed that the claimants had the authority that they asserted by bringing the proceeding.<sup>128</sup> It would therefore seem that, unless someone challenges the authority of the Aboriginal people or polity claiming to be owed a duty to consult, judges usually will not raise the issue themselves by questioning that authority.<sup>129</sup>

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128. See *e.g. Carrier Sekani Tribal Council v British Columbia (Utilities Commission)*, 2009 BCCA 67, rev'd *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*]. In *Rio Tinto*, the Carrier Sekani Tribal Council (CSTC) alleged that its member tribes have Aboriginal rights and title in the Nechako River watershed in British Columbia, giving rise to a duty to consult in relation to sale of electricity from a hydroelectric facility built on the river in the 1950s. While the Supreme Court held that there was no duty to consult in relation to the sale of electricity because it would not have a new adverse impact on the claimed rights, it did not question the authority of the CSTC to bring the action. See also *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2015 FCA 222, aff'd 2017 SCC 41.
129. See *e.g. Pimicikamak v Manitoba*, 2016 MBQB 128 [*Pimicikamak*], aff'd 2018 MBCA 49, leave to appeal to SCC refused, 38221 (10 January 2019). In *Pimicikamak*, the applicants for judicial review in a duty to consult case were the Cross Lake Band (an *Indian Act* band) and Pimicikamak, the traditional government of the same First Nation community. As the community accepted their authority to engage in consultation and Manitoba consulted with both of them, the trial judge did not question their standing. Compare the cases cited in *supra* note 118. See also *Clyde River*, *supra* note 3. This challenge to standing of the Nammautaq Hunters & Trappers Organization–Clyde River to represent the collective rights-holding body under the Nunavut Land Claims Agreement in a duty to consult case was dealt with by the Federal Court of Appeal by granting that organization public interest standing (the SCC, while reversing the Federal Court of Appeal on whether the duty to consult had been met, must have accepted that court's ruling on the standing issue because it proceeded to decide the case without referring to the matter). See also *Halalt First Nation v British Columbia (Minister of Environment)*, 2012 BCCA 191 [*Halalt First Nation*]. Though not a case where such a challenge was made, *Halalt First Nation*, involving applications for intervener status in a duty to consult case, reveals another situation in which this issue could arise. The Cowichan Tribes, who are members of the Hul'qumi'num Treaty Group (HTG) to which the Halalt First Nation (the plaintiff in the case) also belongs, argued that

the strength-of-claim assessment required by the duty to consult must include consideration of which present-day aboriginal community is likely the proper rights holder. It says if that issue had been considered in this case, the Province would not have erred in concluding that the Halalt's aboriginal title claim to the well sites was weak. It submits that the Province should have recognised that the HTG member communities as a group are the likely proper rights holders of a strong claim to aboriginal title (*ibid* at para 25).

Justice Smith denied intervener status to the Cowichan Tribes without discussion of the issue of the proper rights holder, as “[t]his issue is being proposed for the first time on appeal and, in any event, could be advanced by Halalt if it so wishes” (*ibid* at para 30).

While not attempting a comprehensive survey, it is worth examining a couple of lower court decisions where the issue of the identity of the Aboriginal title or rights claimants did arise.<sup>130</sup> *Nlaka'pamux Nation Tribal Council v British Columbia (Project Assessment Officer, Environmental Assessment Office)*<sup>131</sup> involved the duty to consult in relation to a proposal to extend a landfill site that could have an adverse impact on Aboriginal rights and title. As the landfill site was on or close to the boundary between the traditional territories of two Aboriginal nations (the Secwepemc or Shuswap Nation and the Nlaka'pamux or Thompson River Nation), and the plaintiff Nlaka'pamux Nation Tribal Council (NNTC) represented some but not all of the *Indian Act* bands belonging to the Nlaka'pamux Nation, a question arose as to whether a duty to consult was owed to the NNTC. On this application for judicial review, Justice Sewell said this:<sup>132</sup>

What is the government to do when faced with a diversity of putative representation on behalf of a First Nation. In my view, the government must discharge its duty to consult by taking reasonable steps to ensure that all points of view within a First Nation are given appropriate consideration.

While making a preliminary assessment that the Nlaka'pamux Nation's Aboriginal title claim at the location of the proposed landfill extension was weak, Justice Sewell nonetheless decided that a duty to consult was owed to the NNTC, even though one of the bands within the NNTC opposed its position on the extension of the landfill site and challenged its authority to represent the Nlaka'pamux people in this matter.<sup>133</sup> Justice Sewell avoided the

130. For other case references and useful discussion, see Kerry Wilkins, *Essentials of Canadian Aboriginal Law* (Thomson Reuters, 2018), updated in CED (Ont 4th), vol 1, title 1 at § 183-89; Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Purich, 2014) at 65-71.

131. 2009 BCSC 1275 [*Nlaka'pamux Nation BCSC*].

132. *Ibid* at para 73.

133. This aspect of his decision was upheld on appeal. See *Nlaka'pamux Nation Tribal Council v British Columbia (Environmental Assessment Office)*, 2011 BCCA 78 [*Nlaka'pamux Nation BCCA*]. On the practical difficulties facing the Crown in this kind of situation, Justice Groberman, delivering the judgment, observed: "Like the chambers judge, I have some sympathy for the Project Assessment Director in this case. Faced with competing claims and obvious animosity among the First Nations groups that were demanding consultation, the task of creating an efficient and meaningful consultative process was a daunting one" (*ibid* at para 68). For a discussion of Justice Groberman's decision in *Tsilhqot'in Nation BCCA*, see also the text accompanying notes 48-53. For another example, see *Ktunaxa Nation v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568, aff'd 2015 BCCA 352, aff'd *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54. Here, the fact that the Shuswap Nation also claimed that the proposed ski resort was in their traditional territory and had accepted the

internal disagreement by deciding that a duty to consult was also owed to the dissenting band.<sup>134</sup>

In *Campbell v British Columbia (Minister of Forests and Range)*,<sup>135</sup> the petitioners sought an interim injunction to stop logging pending judicial review of a licence issued by the province to Sunshine Logging Ltd, permitting it to harvest timber from four cut blocks on Perry Ridge between the Slokan and Little Slokan rivers in southern British Columbia, in an area entirely within the territory over which the Sinixt people claim Aboriginal title. The petitioners, who are directors of the Sinixt Nation Society, a representative body of the Sinixt Nation, brought the action on their own behalf and on behalf of the Sinixt Nation and the Sinixt Nation Society.<sup>136</sup> The judgment relates to an application by the defendant Minister for an order dismissing the petition on the ground that “the petitioners are without authority to advance the claims or obtain the relief sought, and that they lack the requisite standing to bring the petition.”<sup>137</sup> Justice Willcock noted that “[t]his is as much a challenge to the claim of the collective on behalf of whom the petitioners purport to act as a challenge to the capacity or fitness of the individual petitioners to act for that collective.”<sup>138</sup> He observed that “[i]t is common ground that the rights asserted by the petitioners are collective rights and that legal action brought to determine or enforce those rights must be brought on behalf of a group that is capable of advancing a claim under s. 35 of the *Constitution Act, 1982*.”<sup>139</sup>

The Aboriginal title claim of the Sinixt people, upon which the alleged breach of the duty to consult depended in this case, is uncommon among claims by First Nations in Canada, in that these people do not currently have federally

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accommodation offered by the proponent did not prevent the courts from assessing whether a duty to consult the Ktunaxa Nation had been met. Compare *Fort Chipewyan Métis Nation of Alberta, Local 125 v Alberta (Minister of Aboriginal Relations)*, 2016 ABQB 713. This is a Métis case dealing with the issue of the authority of an applicant for judicial review to represent the community claiming Aboriginal rights.

134. Similarly, “where the Crown knows, or ought to know, that its conduct may adversely affect the Indigenous right or title of more than one First Nation, each First Nation is entitled to consultation based upon the unique facts and circumstances pertinent to it.” See *Tsileil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 506, citing *Gitsxaala Nation v Canada*, 2016 FCA 187 at para 236, leave to appeal to SCC refused, 37201 (9 February 2017).

135. 2011 BCSC 448 [*Campbell* BCSC].

136. *Ibid*, style of cause.

137. *Ibid* at para 7.

138. *Ibid*.

139. *Ibid* at para 9. See also *Hwilitum First Nation*, *supra* note 107 at para 6.

acknowledged status as an *Indian Act* band or bands. There was, however, no doubt about their existence as an Aboriginal people prior to the arrival of Europeans. Justice Willcock observed:<sup>140</sup>

The evidence before me is that a relatively distinct Aboriginal population made use of and occupied land between the Monashee and Selkirk Mountains, from the Kettle River north to the area of present-day Revelstoke, for a period of approximately 3,500 years, up to the time of contact with European explorers and settlers. The record also establishes that following contact, the Sinixt's numbers in Canada were reduced by disease and their gradual displacement south into the United States.

Tragically, the Sinixt never recovered from the decimation caused by a smallpox epidemic in the late 1700s. By the early twentieth century, most of their members had gone to live in the United States, particularly on the Colville Indian Reservation that had been created in 1872 in what became Washington State. Although a reserve at Oatscott in British Columbia was created for the Arrow Lakes Band of Sinixt by the Canadian government in 1915, by 1924 apparently only eight members of this band remained. After the last registered member, Annie Joseph, died on 1 October 1953, the federal government declared the Arrow Lakes Band to be extinct and transferred the reserve lands at Oatscott to British Columbia.<sup>141</sup> Justice Willcock noted:<sup>142</sup>

The Arrow Lakes Band appears to have been the only Indian band in British Columbia history to have been declared extinct by Canada and have its reserve land revert to the province. However, Sinixt individuals were and are living among and as members of the Osoyoos, Penticton, and Okanagan Bands of the Okanagan Nation Alliance, in Washington State as members of the Lakes Tribe of the Colville Confederacy, and off reservation in Canada and the United States.

The problem for the petitioners was proving the existence of a present-day identifiable claimant group that they represent. Unfortunately, the evidence regarding the continuing existence of a distinct Sinixt people was inconsistent. There were also “competing claims to speak for the contemporary manifestation of the historic rights-bearing group.”<sup>143</sup> The Sinixt Nation Society, to which the petitioners belong, was incorporated in 2006 to provide education about the history, culture, and traditions of the Sinixt people in British Columbia and to promote their interests. Counsel for the petitioners nonetheless “acknowledged that the Society cannot claim or enforce an Aboriginal right or title and is not

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140. *Campbell BCSC*, *supra* note 135 at para 15.

141. *Ibid* at para 34.

142. *Ibid* at para 42.

143. *Ibid* at para 56.

entitled to an injunction. Evidence of the existence of the Society and its role is put before the court solely as evidence of the composition of the Sinixt Nation and recognition of the individual named petitioners as representatives of that organization or collective.<sup>144</sup> But the evidence did not disclose clear criteria for membership in the Society or reveal how individuals become members, nor was its authority to represent the Sinixt as a whole accepted by all interested parties, matters that obviously bothered Justice Willcock. He decided that, in order to have standing to bring a representative action, the petitioners had to “clearly define a distinct Aboriginal collective by objective criteria, so that their claim that a collective with rights-bearing attributes exists and their claim to be the appropriate representatives of that collective can be adjudicated upon.”<sup>145</sup> He found that they had failed to do so, and as a result he dismissed their petition because it had not been properly brought as a representative action. This decision was plainly based on lack of adequate evidence, as Justice Willcock said he would have reserved judgment pending a hearing of an application to produce additional evidence, “if an application had been brought and if there was a prospect that further evidence could address the deficiencies in the representative case.”<sup>146</sup> An application to appeal this decision was dismissed by the BCCA as moot because the logging the petitioners were trying to prevent had already been completed by the time the appeal reached that court!<sup>147</sup>

The *Campbell* case reveals that, in situations where the present-day existence of an Aboriginal collective that holds or claims Aboriginal rights or title is in doubt, the onus is on the Aboriginal claimants to prove both its existence and its connection with the historical community from whom the rights or title are

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144. *Ibid* at para 61.

145. *Ibid* at para 163. See also *Hwlitsum First Nation*, *supra* note 107 at para 9.

146. *Campbell*, *supra* note 135 at para 165. Note that Justice Willcock’s judgment contains a lengthy, careful analysis of the law in relation to representative actions involving Aboriginal claims that could assist future litigants in avoiding some of the potential pitfalls in bringing these kinds of actions.

147. *Campbell v British Columbia (Minister of Forests and Range)*, 2012 BCCA 274.

derived.<sup>148</sup> If the representative capacity of the plaintiffs in an Aboriginal title, rights, or duty to consult case is challenged, as it was by the Minister in *Campbell*, the decision also suggests that the plaintiffs might have to prove that they have the authority to bring the action on behalf of the present-day collective that holds or claims the title or rights.<sup>149</sup> However, in our examination of *Nlaka'pamux Nation* we saw that Justice Sewell took a more generous approach where the duty to consult is concerned, ruling that “the government must discharge its duty to consult by taking reasonable steps to ensure that all points of view within a First Nation are given appropriate consideration,”<sup>150</sup> and this aspect of his decision was upheld by the BCCA.<sup>151</sup> Significantly, Justice Willcock cited the Court of Appeal’s decision in *Nlaka'pamux Nation*,<sup>152</sup> without remarking any discrepancy between the flexible approach to representative capacity in that case and his own approach.

More recently, the issue of whether the Sinixt people have an Aboriginal right to hunt in their traditional territory in the Kootenay region of British Columbia

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148. The evidentiary onus here appears to be similar to the onus where Métis Aboriginal rights are claimed. See *Powley*, *supra* note 36 at para 28. In *Powley*, the SCC accepted that the trial judge’s finding of a contemporary rights-bearing Métis community was “supported by the evidence and must be upheld.” See *Campbell* BCSC, *supra* note 135 at paras 114-20. In *Campbell* BCSC, Justice Willcock quoted *Powley* on the issue of membership in the contemporary community and concluded:

These passages suggest that it is not enough that a contemporary community acknowledge an individual’s membership in the community in order to establish that individual’s status. *The contemporary community itself must be able to establish its continuity with the historic rights-bearing community.* Recognition of an individual’s status by a newly-formed community is not sufficient to confer status upon that individual to claim s.35 rights [emphasis added] (*ibid* at para 120).

See also *Marshall/Bernard*, *supra* note 7 at para 67; *Labrador Métis Nation v Newfoundland and Labrador (Minister of Transportation and Works)*, 2007 NLCA 75 at paras 46-49; *Bernard v R*, 2017 NBCA 48.

149. See also *PF Résolu Canada inc c Wawatie*, 2014 QCCS 3972, leave to appeal to QCCA refused, 2014 QCCA 1840; *Manatch v Louisiana-Pacific Canada Ltd*, 2014 QCCS 4350 at paras 52-74. Compare *Beaver* ONCA, *supra* note 110, especially at para 60. In *Beaver*, the Court of Appeal for Ontario reversed the motion judge on the issue of standing, in part because the appellant was acting in his individual capacity and did not claim to represent the Haudenosaunee Confederacy.

150. *Nlaka'pamux Nation* BCSC, *supra* note 131 at para 73.

151. *Nlaka'pamux Nation* BCCA, *supra* note 133.

152. *Campbell* BCSC, *supra* note 135 at para 80.

was addressed in *R v DeSautel*.<sup>153</sup> Richard Desautel, an American citizen and a member of the Lakes Tribe of the Colville Confederated Tribes (CCT), resides in Washington State on the Colville Indian Reservation. He lawfully entered Canada and was hunting to obtain ceremonial meat on the instructions of the CCT's Fish and Wildlife Director. He shot an elk near Castlegar and was charged under the British Columbia *Wildlife Act*<sup>154</sup> with hunting without a licence and hunting big game without being a resident of the province. While not a duty-to-consult case, this decision is relevant to our current discussion because it revisited the issue of whether the Sinixt people can claim section 35(1) Aboriginal rights. At trial, Provincial Court Judge Mrozinski held that the Sinixt had hunted in the Kootenay region prior to contact (which occurred in 1811 when David Thomson visited the region), that hunting was integral to their distinctive culture and so supported the asserted Aboriginal right to hunt for food, social, and ceremonial purposes, and that this right had not been extinguished. The Crown argued nonetheless that the Sinixt could not have Aboriginal rights in Canada because by 1900 most of them had moved to the southern part of their territory in Washington State and no longer hunted north of the border after 1930, and they ceased to exist as a rights-holding collective in Canada at the time of the death in the 1950s of Annie Joseph, the last surviving member of the Arrow Lakes Band. Justice Mrozinski found that, while a modern-day Sinixt community (now called the Lakes Tribe) does exist in Washington State, the question to be answered was whether they could have Aboriginal rights in their traditional territory in British Columbia, given that they had ceased to reside or hunt there for many years. She decided that there was sufficient continuity between the practice of hunting in pre-contact times and the present and that the right to hunt in their traditional territory in Canada continued even though it probably had not been exercised from the 1930s until recent times. As she found that the provisions of the *Wildlife Act* infringed Mr. Desautel's right to hunt and the Crown was unable to justify the infringement, she decided he should be acquitted.<sup>155</sup>

On appeal to the British Columbia Supreme Court, the Crown argued that Mr. Desautel cannot be an Aboriginal person of Canada with section 35(1)

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153. 2017 BCPC 84 [*DeSautel* BCPC]. Note that apparently the defendant's name is "Desautel," though in some case reports it is spelled "DeSautel".

154. RSBC 1996, c 488.

155. Justice Mrozinski also dismissed the Crown's contention that it would be incompatible with Crown sovereignty for an American citizen resident in the United States to have an Aboriginal right to hunt in Canada. See *DeSautel* BCPC, *supra* note 153 at paras 136-67.

rights<sup>156</sup> because he is an American citizen and a member of an Indigenous group that is not resident in this country.<sup>157</sup> In rejecting this argument, Justice Sewell stated that “the Crown’s approach imposes non-aboriginal concepts such as citizenship and permanent residence on the proper interpretation of the degree of connection between an aboriginal group and Canada necessary for them to be considered aboriginal peoples of Canada.”<sup>158</sup> He concluded that the fact that the Sinixt community to which Mr. Desautel belongs is now resident in the United States does not preclude them from being an Aboriginal people of Canada, given their long-term connection with their traditional territory in this country. Adding support to this conclusion, he found that<sup>159</sup>

recognizing that the Sinixt are aboriginal people of Canada under s. 35 is entirely consistent with the objective of reconciliation established in the jurisprudence. In my view, it would be inconsistent with that objective to deny a right to a group that occupied the land in question in pre-contact times and continued to actively use the territory for some years after the imposition of the international boundary on them.

Justice Sewell accordingly upheld the acquittal.

The Crown appealed to the BCCA. Justice Smith, in her unanimous decision, accepted the factual findings of the trial judge that the Sinixt people were the historical collective that had hunted in the geographical area in question, that hunting was a central and significant part of their distinctive culture prior to contact, that the Lakes Tribe of which Mr. Desautel is a member is a modern Indigenous collective (though possibly not the only one) with rights originating from the Sinixt people, and that there was sufficient continuity between the Sinixt’s pre-contact hunting and Lakes Tribe’s present-day hunting. In response to the Crown’s argument, Justice Smith said:<sup>160</sup>

Imposing a requirement that Indigenous peoples may only hold Aboriginal rights in Canada if they occupy the same geographical area in which their ancestors exercised

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156. The rights recognized and affirmed by section 35(1) of the *Constitution Act, 1982*, are the rights of the “aboriginal peoples of Canada.” See s 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

157. *R v Desautel*, 2017 BCSC 2389 at para 7 [*Desautel* BCSC].

158. *Ibid* at para 53. Justice Sewell also rejected the Crown’s argument that acknowledging that the Sinixt people residing in the United States have an Aboriginal right to hunt in British Columbia would be incompatible with Canadian sovereignty. See *ibid* at paras 92-123.

159. *Ibid* at para 88. Imposition of the boundary along the 49th parallel occurred in 1846 when Britain and the United States signed the Washington (Oregon Boundary) Treaty. See *ibid* at para 18.

160. *R v Desautel*, 2019 BCCA 151 at para 62, leave to appeal to SCC granted, 38734 (24 October 2019).

those rights, ignores the Aboriginal perspective, the realities of colonization and does little towards achieving the ultimate goal of reconciliation. In this case, such a requirement would extinguish Mr. Desautel's right to hunt in the traditional territory of his ancestors even though the rights of his community in that geographical area were never voluntarily surrendered, abandoned or extinguished.

She also dismissed the argument that it would be incompatible with Canadian sovereignty for an Indigenous person who is not a citizen or resident of Canada to have an Aboriginal right to hunt in this country because such a right can exist without an incidental right to enter Canada. Mr. Desautel had entered Canada legally and did not claim a right of entry. The Supreme Court of Canada has granted leave to appeal this decision.

On the issue of the rights-holding community, the petitioners in *Campbell* were unsuccessful mainly because they did not provide the court with sufficient evidence of the claimants' present-day existence as a collective having continuity with the pre-contact Sinixt people. The difference in *Desautel* is that the accused is a member of a defined Indigenous community, albeit resident in the United States, that has a clear connection with that pre-contact people. Both cases affirm that Aboriginal title and rights depend on proof of a present-day Indigenous collective that has a sufficient connection with an Indigenous people whose occupation of land or whose practices, customs, and traditions are the basis for the title or other rights.

Summarizing our discussion of the relevant duty-to-consult cases, we know from the Supreme Court's decision in *Behn* that the duty is owed to the collective that holds or asserts the rights or title.<sup>161</sup> It is therefore necessary to define the present-day collective, as was held in *Campbell*<sup>162</sup>—though how precisely remains to be seen—and show its connection with the pre-contact or pre-sovereignty collective from whom the claimed rights or title are derived.<sup>163</sup> Also, the organization or individuals who claim to represent the rights or title holding collective must have the authority to act in that capacity.<sup>164</sup> In instances where a subgroup within the collective is the custodian or caretaker of the rights or title in question, that subgroup may be able to engage in consultation on

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161. See *supra* note 118 and accompanying text.

162. See *supra* note 145 and accompanying text.

163. The SCC views this as a continuity requirement. See *Marshall/Bernard*, *supra* note 7 at para 67. The Court stated: "The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right" (*ibid* at para 67).

164. *Behn*, *supra* note 118 and accompanying text.

behalf of the collective, as Justice Groberman suggested in the Court of Appeal decision in *Tsilhqot'in Nation*.<sup>165</sup> The cases we have examined also reveal that, if unquestioned, the requisite authority is usually assumed from the circumstances, but when challenged, it has to be established by evidence.<sup>166</sup> But the *Nlaka'pamux Nation* decision suggests that, where there are divisions among the rights or title claimants, the duty to consult may be owed to more than one organization representing different interests within the collective.<sup>167</sup>

#### IV. CONCLUSIONS: FROM TITLE AND RIGHTS TO GOVERNANCE

Our examination of the relevant case law has revealed that Aboriginal rights and title are communal rights vested in present-day collectives that are connected by descent or succession to the Indigenous people whose practices, customs, and traditions are the source of specific Aboriginal rights, or who were in exclusive occupation of land giving rise to title at the time of Crown assertion of sovereignty. While the specific rights cases discussed in Part II do shed some light on the issue of the identity of rights holders, the fact that most of those cases involved prosecution of individuals has meant that precise identification of the rights-holding collective was usually unnecessary. The Aboriginal title cases discussed in Part I, while less numerous, are nonetheless more illuminating because, apart from *Marshall/Bernard*, they involved civil actions for declarations of title on behalf of Aboriginal collectives. The duty to consult cases discussed in Part III are also germane to this discussion, but we have seen that this duty, while owed to rights and title holders or claimants, can be fulfilled by consultation with organizations or individuals that have been authorized by rights or title holders or claimants to represent them. In cases where this authority is not questioned, the precise identity of the proper rights or title holders, or claimants, is not always apparent.

Our analysis of the trial and BCCA decisions in *Tsilhqot'in Nation* revealed that the judges engaged directly with the issue of the identity of rights and title

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165. See *Tsilhqot'in Nation* BCCA, *supra* note 30 at paras 152, 156.

166. For more discussion, see *Campbell* BCSC, *supra* note 135 at paras 56, 61, 134, 163; *Campbell* BCCA, *supra* note 70.

167. See text accompanying notes 132-34. *Nlaka'pamux Nation* also suggests that, in the case of overlapping claims, a duty to consult may be owed to more than one collective. In some instances, claims of this sort may involve joint Aboriginal title, where the duty to consult would be owed to each collective claiming joint title. On joint title, see McNeil, "Joint Aboriginal Title," *supra* note 33.

holders, and decided that the current holder of Aboriginal rights and title is the Tsilhqot'in Nation as a whole, not *Indian Act* bands. This conclusion, which does not appear to have been challenged by any of the parties on appeal to the SCC, was implicitly affirmed by that Court's declaration of the Tsilhqot'in Nation's Aboriginal title. However, I do not understand this to mean that rights and title will be vested in Aboriginal nations in every instance; instead, it depends on the evidence. At trial in *Tsilhqot'in Nation*, Justice Vickers stated that the inquiry into the identity of the rights and title holders "is primarily a matter of fact to be determined on the whole of the evidence relating to the specific society or culture."<sup>168</sup> He found that the "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."<sup>169</sup> Any rights of individuals or subgroups were derived from the collective actions, traditions, and experience of the Tsilhqot'in Nation.<sup>170</sup> As for the holders of present-day rights and title, Justice Vickers found as a fact that<sup>171</sup>

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.

So although one *Indian Act* band, the Xení Gwet'in, is currently the caretaker or custodian of the Claim Area where Aboriginal rights and title were declared, it is not the rights and title holder. Rights and title are vested in the Tsilhqot'in Nation as a whole.<sup>172</sup>

Although an Aboriginal rights rather than a title case (title was claimed but not dealt with), it is worth comparing the decision of Justice Garson in *Ahousabt Indian Band* with *Tsilhqot'in Nation*. In the former case, Justice Garson decided that the current holders of the Aboriginal right to fish commercially are the five *Indian Act* bands that are the successor collectives of the five

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168. *Tsilhqot'in Nation* BCSC, *supra* note 30 at para 439.

169. *Ibid* at para 470.

170. *Ibid*.

171. *Ibid* at para 459.

172. See also *ibid* at para 468. Justice Vickers stated:

In the modern Tsilhqot'in political structure, Xení Gwet'in people are viewed amongst Tsilhqot'in people as the caretakers of the lands in and about Xení, including Tachelach'ed. Other bands are considered to be the caretakers of the lands that surround their reserves. Still, the caretakers have no more rights to the land or the resources than any other Tsilhqot'in person.

Nuu-chah-nulth Nations whose practices, customs, and traditions gave rise to the right.<sup>173</sup> In reaching this conclusion, she accepted the plaintiffs' contention that, "[a]fter British Columbia's entry into Confederation in 1871, each of the Nuu-chah-nulth Nations was constituted as a band under the predecessor of the *Indian Act*, RSC 1985, c I-5, and, today, each band is the legal representative of its predecessor Nation and the lawful holder of the collective aboriginal rights and title of that Nation."<sup>174</sup> Her decision that *Indian Act* bands are the current holders of the fishing right was therefore based on the evidence, as was Justice Vickers' decision in *Tsilhqot'in Nation* that the Tsilhqot'in Nation as a whole is the holder of Aboriginal rights and title.

Evidence of the identity of the appropriate current holders or claimants of Aboriginal rights and title evidently must come from the Indigenous people concerned. As Justice Groberman stated in his Court of Appeal judgment in *Tsilhqot'in Nation*, expressing agreement with Justice Vickers, "the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself."<sup>175</sup> That viewpoint needs to be demonstrated by evidence. Given that determination of the question of who has rights is at least partly a matter of law,<sup>176</sup> this suggests that Indigenous law is relevant to answer this question. But because Canadian judges are generally unfamiliar with Indigenous law and cannot access it through conventional legal research, it has to be presented to them mainly through testimony by Indigenous people who are acknowledged in their communities as the authorities on that law.

Once the collective holder of Aboriginal rights or title has been identified, one needs to consider who can exercise those rights or enjoy the benefits of that title, and on what terms.<sup>177</sup> The kinds of rights involved, whether rights to hunt,

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173. See text accompanying notes 99-105.

174. *Abousabt Indian Band* BCSC, *supra* note 72 at para 7.

175. *Tsilhqot'in Nation* BCCA, *supra* note 30 at para 149.

176. See *R v DeSautel*, 2018 BCCA 131.

177. See Slattery, "Understanding Aboriginal Rights," *supra* note 30 at 745. Slattery stated:

the rights of individuals and other entities within the group are determined *inter se*, not by the doctrine of aboriginal title, but by internal rules founded on custom. These rules dictate the extent to which any individual, family, lineage, or other sub-group has rights to possess and use lands and resources vested in the entire group. The rules have a customary base, but they are not for that reason necessarily static. Except to the extent they may be otherwise regulated by statute, they are open to both formal and informal change, in accordance with shifting group attitudes, needs, and practices.

This passage was quoted with apparent approval by Justice Vickers at trial in *Tsilhqot'in Nation* BCSC and Justice Groberman in *Tsilhqot'in Nation* BCCA. See *Tsilhqot'in Nation* BCSC, *supra* note 30 at para 471; *Tsilhqot'in Nation* BCCA, *supra* note 30 at para 149.

fish, occupy and use land, and so on, generally cannot be enjoyed and exercised by a collective as such; instead, they are enjoyed and exercised by individuals, families, and other small groups. Given that the collective is necessarily made up of individual members, it is essential to be able to determine who the members are. As Justice Vickers observed in *Tsilhqot'in Nation*, this is an internal matter to be decided by the collective: "Membership is identified by the community. It should always be the particular Aboriginal community that determines its own membership."<sup>178</sup>

In my opinion, all this leads inevitably to the conclusion that the rights or title holding collective must have governmental authority.<sup>179</sup> Governmental structures and powers are obviously necessary for a community to make collective decisions about how its communal rights are to be allocated and managed.<sup>180</sup> Determinations about membership in the community also involve the exercise of governmental authority. This matter of governance was put before the SCC in *Delgamuukw*, but the Court declined to consider it, sending the matter back to trial along with the issue of the existence of Aboriginal title.<sup>181</sup> But now, with the declaration of collective Aboriginal title in *Tsilhqot'in Nation*, the matter can no longer be avoided. In the absence of guidance from Canadian courts, Indigenous peoples can take the initiative in exercising their governance authority. In the *Tsilhqot'in Nation* judgment, the SCC expanded the authority of the provinces over Aboriginal title lands by discarding the application of the doctrine on

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178. *Tsilhqot'in Nation* BCSC, *supra* note 30 at para 444.

179. While not deciding issues of Indigenous governance, Justice Vickers appears to have agreed with this assessment. See *ibid* at paras 471-72. Justice Vickers quoted with approval from two articles (which are cited in note 30) where Brian Slattery distinguished between the external and internal aspects of Aboriginal title. Internally, Slattery wrote in 1987, "the rights of group members among themselves ... are governed by rules peculiar to the group, as laid down by custom or *internal governmental organs*." See Slattery, "Understanding Aboriginal Rights," *supra* note 30 at 745 [emphasis added]. In the British Columbia Court of Appeal, Justice Groberman quoted the same passage, again with apparent approval. See *Tsilhqot'in Nation* BCCA, *supra* note 30 at para 149. See also John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*" (2015) 48 UBC L Rev 701 at 717-20 [Borrows, "*Terra Nullius*"].

180. See *Campbell v BC*, *supra* note 33 at para 137. Justice Williamson stated:

The right to Aboriginal title "in its full form", including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by Section 35 [of the *Constitution Act, 1982*] (*ibid* at para 137).

See also the other sources cited in *supra* note 33.

181. *Delgamuukw* SCC, *supra* note 6 at paras 170-71.

interjurisdictional immunity in this context.<sup>182</sup> One reason the Court gave for doing so was to avoid a legal vacuum.<sup>183</sup> But given that Indigenous peoples have their own laws in relation to their title lands and the exercise of other Aboriginal rights, there is no legal vacuum.<sup>184</sup> By exercising their governmental authority and ensuring that their laws are respected, Indigenous peoples can “pro-actively use and manage” their title lands, as the Supreme Court in *Tsilhqot’in Nation* said they have a right to do.<sup>185</sup>

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182. *Tsilhqot’in Nation* SCC, *supra* note 8 at paras 131-52. For critical commentary, see McNeil, “Aboriginal Title and the Provinces,” *supra* note 29; Kerry Wilkins, “Life among the Ruins: Section 91(24) after *Tsilhqot’in* and *Grassy Narrows*” (2017) 55 *Alta L Rev* 91.

183. *Tsilhqot’in Nation* SCC, *supra* note 8 at para 147.

184. See Napoleon, “*Tsilhqot’in* Law,” *supra* note 2, especially at 894-95; Christie, *supra* note 65; Borrows, “*Terra Nullius*,” *supra* note 179 at 738-40.

185. *Tsilhqot’in Nation* SCC, *supra* note 8 at para 73.