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# Determining the Proper Rights Holder in a Dispute

Pacific Business Law Institute

Aboriginal Litigation and Negotiation

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# Early uncertainty as to collective / individual nature of Aboriginal rights

- Not entirely clear whether Aboriginal rights were considered collective or individual.
- James Bay and Northern Quebec Agreement (agreed to in 1975) is ambiguous:

  S. 2.1 states "Inuit of Quebec, the James Bay Crees and the Inuit of Quebec hereby cede, release, surrender and convey all their Native claims…"

  But s. 2.6 states, "The federal legislation approving, giving effect to and declaring valid the Agreement shall extinguish all native claims, rights, title and interests of all Indians and all Inuit in and to the Territory…"

- Yukon Umbrella Agreement (agreed to 1988) refers to both expressly:

  "2.5.1.1 subject to 5.14.0, that Yukon First Nation and all persons who are eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada, all their aboriginal claims, rights, titles, and interests…"

# Early uncertainty as to collective / individual nature of Aboriginal rights (cont.)

- Nisga'a Final Agreement (agreed to in 1998) focuses on collective rights but not exclusively:

> 23 states "This Agreement exhaustively sets out Nisga'a section 35 rights, the geographic extent of those rights, and the limitations to those rights, to which the Parties have agreed, and those rights are:
>
> > a. the aboriginal rights, including aboriginal title, as modified by this Agreement, in Canada of the Nisga'a Nation and its people in and to Nisga'a Lands and other lands and resources in Canada…"

- By the time of the Maa-nulth First Nations Final Agreement (2008/9), certainty provisions referred only to the rights of the nation:

> 1.11.2 This Agreement exhaustively sets out the Maa-nulth First Nation Section 35 Rights of each Maa-nulth First Nation…
>
> 1.11.3 Notwithstanding the common law, as a result of this Agreement and the Settlement Legislation, the aboriginal rights, including the aboriginal title, of each Maa-nulth First Nation, as they existed anywhere before the Effective Date, including their attributes and geographic extent, are modified, and continue as modified, as set out in this Agreement.

# Tracked developments in the case law

- *R. v. Sparrow*, [1990] 1 SCR 1075:

  > [68] Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group.

- *R. v. Van der Peet*, [1996] 2 SCR 507:

  > [41] … I would note the position of Professor Pentney who has described aboriginal rights as collective rights deriving "their existence from the common law's recognition of [the] prior social organization" of aboriginal peoples: William Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II -- Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev.* 207, at p. 258.

- *Behn v. Moulton Contracting Ltd*., 2013 SCC 26:

  > [30] The 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: *Beckman*, at para. 35; Woodward, at p. 5-55. But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights: see, e.g., *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517 (CanLII), 55 Admin. L.R. (4th) 236 (B.C.S.C).

# If Aboriginal rights are collective in nature then what "collective" holds them?

- Not a simple question.
- Was the very issue that required the SCC to order a new trial in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. In that case the First Nations sought to deal with overlapping claims among 51 Gitksan and Wet'suwet'en Houses by amalgamating the claims to the nation level on appeal. The SCC said this:

  > [76] …The appellants 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.

- Issue was addressed at some length by Vickers J. in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700:

  > [456] There is no legal entity that represents all Tsilhqot'in people. The Tsilhqot'in National Government, a federally incorporated legal entity, only represents five of the seven Tsilhqot'in communities…It seems to me that the search for a legal entity does not assist in the effort to define the proper rights holder….

# If Aboriginal rights are collective in nature then what "collective" holds them? (cont.)

- (From *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700):

> [469] 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.
>
> [470] I conclude that the 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.

# If Aboriginal rights are collective in nature then what "collective" holds them? (cont.)

- On appeal to BCCA the Court noted some of the challenges associated with this question but affirmed the findings of Vickers J.:

> [149] … 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…
>
> [151] It will, undoubtedly, be necessary for First Nations, governments, and the courts to wrestle with the problem of who properly represents rights holders in particular cases, and how those representatives will engage with governments. I do not underestimate the challenges in resolving those issues, and recognize that the law in the area is in its infancy. I do not, however, see that these practical difficulties can be allowed to preclude recognition of Aboriginal rights that are otherwise proven.
>
> [152] Fortunately, the record in this case resolves the question of who speaks for the Tsilhqot'in Nation. Once again, I refer to what the trial judge described as the "modern political structure" of the Tsilhqot'in Nation:
>
> > [468] In the modern Tsilhqot'in political structure, Xeni Gwet'in people are viewed amongst Tsilhqot'in people as the caretakers of the lands in and about Xeni, 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.

# The bottom line on the law

- The proper rights holder must be determined with reference to how the Aboriginal community itself answers that question.
- Each Aboriginal group must be assessed in light of its own unique culture and history.
- Indian Act bands do not automatically possess the role of rights holder by virtue of being a governing band under the Indian Act. But the collective can assign the band that role if it chooses.

# How does this play out in litigation?

- Courts are usually reluctant to enter this fray in absence a full trial where the issue is squarely argued.
- Often addressed through litigation standing analysis – lines get blurred between question of who is a collective and who can represent it.
- Band councils *generally* fare well.  Is this correct or simply the easiest approach?
- Is it possible to reconcile the case law?

# *Komoyue Heritage Society v British Columbia (AG)*, 2006 BCSC 1517

- Case related to an EA certificate for a sand and gravel project situated on land subject to two Douglas Treaties (the Quaeckar-Douglas Treaty and the Quakeolth-Douglas Treaty). Consultation took place with the Kwakiutl First Nation (the Band).
- The petitioners, who purported to represent the Quaeckar-Komoyue First Nation (Q-KFN), challenged the certificate on the basis they were not consulted. The Band opposed the application.
- Preliminary question was whether the petitioners could properly bring a judicial review petition on behalf of the Q-KFN.

# *Komoyue Heritage Society v British Columbia (AG)*, 2006 BCSC 1517 (cont.)

- Davies J. stated:

> [35] After having considered the totality of the evidence and the submissions of all counsel, I have concluded that the decided case law does not support the petitioners' assertion that self-appointed aboriginal persons have, in the past, and should in this case, be allowed standing as individuals to assert collective treaty or other collective aboriginal rights on behalf of an aboriginal community. In my view, the weight of authority is to the contrary and underlies the reason why representative proceedings will only be sanctioned when the putative representative proceeding and representative plaintiff meet the four criteria established by the Supreme Court of Canada in *Western Canadian Shopping*.

- Considered *Western Canadian Shopping* four part test and held that it was not met:

(1) The class of plaintiffs must be capable of clear definition;

(2) There must be issues of fact or law common to all class members;

(3) Success for one class member on the common issues, must mean success for all; and

(4) The class representative must adequately represent the class … the court should be satisfied … that the proposed representative will vigorously and capably prosecute the interests of the class.

# *Komoyue Heritage Society v British Columbia (AG)*, 2006 BCSC 1517 (cont.)

- Standing analysis allowed court to avoid a very difficult issue:

> [11] The petitioners have filed contested evidence alleging that the signatories of the Queackar-Douglas Treaty were members of what is now identified by the petitioners as the Queackar-Komoyue tribe.
>
> [12] Although counsel for Orca submitted that the petition should be dismissed for lack of standing because the petitioners have failed to sufficiently establish that the self-identified Q-KFN is in fact comprised of descendants of the signatories of the Queackar-Douglas Treaty, I decline to do so. The resolution of that question is not necessary to my decision on standing and may have ramifications beyond the scope of this litigation that should not be determined summarily. …
>
> [13] I also need not decide, for the purposes of this judgment, whether the original signatories of the Queackar-Douglas Treaty were representatives of a clan, sub-tribe, "numayma", or "sept" along with three or more similar groups, which were all part of a larger "super-tribe" identified as the Kwakiutl tribe or were, in reality, part of a different and distinct tribe.

- Court also relied on the fact that "[by] 1904 the Queackar peoples were amalgamated with other Kwakiutl people as one Indian Band under the provisions of the *Indian Act* (R.S.C. 1985, c. I-5) [R.S.C. 1886, c. 43 as it then was] and have, since that amalgamation, been known as the Kwakiutl Indian Band."

# *Te Kiapilanoq v British Columbia*, 2008 BCSC 54

- An application was brought by the Chief and Council of the Squamish Nation and Squamish Indian Band to have a representative action, brought by an individual member of the Squamish Nation on behalf of the Squamish Nation, struck.
- Related to a rights and title claim that paralleled a similar claim filed by the Council.
- The applicants argued that the plaintiff, who alleged to be a hereditary chief, had no authority to act on behalf of the Squamish Nation.
- Parrett J. discussed Squamish history regarding the membership code and shift to elected band leaders and stated:

> [25] In my respectful view, the elected Council representing the Squamish Nation is the proper party with the authority of this defined class of people to conduct a case which is aimed at determining the questions of Aboriginal rights and title. The collective nature of these rights requires an authority from the people who are, in this case, collectively represented by their elected Council.

- Went on to say that the plaintiff could not prove that he had the authority to proceed with the representative action given that:

> [27] the plaintiff has not asserted authority arising from the class of people themselves, other than his assertion that he is in fact a Hereditary Chief.

# *Campbell v British Columbia (Minister of Forests and Range)*, 2011 BCSC 448

- Directors of Sinixt Nation Society bought a petition on behalf of the Sinixt indigenous group for judicial review of a timber license awarded to a logging company on lands over which they asserted Aboriginal title.
- The Court held that while they claimed to have authority to speak on behalf of the Sinixt:

> [2] … there is a cloud hanging over both the underlying claim they seek to advance and to protect by injunction, and their claim to speak for the Sinixt. That is the fact that the indigenous group now known as the Sinixt is ancestrally related to a community once known as the Arrow Lakes Indians or the Lakes Indians, a community that is said to have assimilated with other aboriginal collectives and the non-indigenous population or to have left Canada and to have thereby become extinct. The petitioners seek through their community activity to revive the group's culture and traditions, and in this and other litigation to establish the status and claims of the Sinixt.

- The Court considered case law on the matters of aboriginal collective and community continuity and determined that:

# *Campbell v British Columbia (Minister of Forests and Range)*, 2011 BCSC 448 (cont.)

> [120] 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.

- The Court continues that:

> [144] The petitioners claim to be able themselves to recognize an adequate Sinixt ancestral connection. They say it is the prerogative of an aboriginal community to determine its own membership, and that the *Constitution Act, 1982* protects rights of unrecognized as well as recognized aboriginal communities. That is so, but the rules will only permit a representative proceeding to be brought on behalf of a group that is capable of objective definition. So a claim by an existing aboriginal collective to land rights will only be permitted if the ancestral connection of its members to the members of an aboriginal collective and occupation at the time of the exertion of sovereignty is pleaded with sufficient particularity.

# *Campbell v British Columbia (Minister of Forests and Range)*, 2011 BCSC 448 (cont.)

- Court discusses in some detail the lack of clarity as to membership and relationship to other Aboriginal groups.
- Court distinguishes representation of a collective from the existence of a collective

> [156] *Labrador Métis Nation…* case addresses the issue of who may speak for a group that is clearly a rights-bearing collective. The prior dealings in the case at bar do not assist in determining the composition of the collective on whose behalf the petitioners should have standing.

- Court dismissed the representative proceeding on the basis that "the proposed class or collective for whom the action is brought is not defined in a manner that permits its membership to be determined by objective criteria." (para. 166)

# *Kwicksutaineuk Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 FC 517

- An application for judicial review was brought by the KAFN, an Aboriginal group, challenging the decision of the Department of Fisheries and Oceans to grant aquaculture licenses to two corporate parties on the basis that it infringed on their Aboriginal rights.
- Canada sought to strike, arguing that the KAFN lacked proper standing to bring an application because it was an *Indian Act* band and that the application should have been brought by an individual member on behalf of the collective.
- The Court reviewed the history concerning Rule 114 particularly as it relates to Aboriginal groups and, in response to the case law provided by Canada in support of its position, it held that:

  > [86] Not only are these cases not binding on this Court, but they have been decided in the context of a differently worded rule and they do not explicitly state that a representative proceeding is the only way to bring a claim of Aboriginal right.

- Montigny J. concluded that the application was not fatally flawed because it was not brought by a representative acting on behalf of the members of the KAFN, stating:

# *Kwicksutaineuk Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 FC 517 (cont.)

> [87] In…the language of Rule 114 leaves no doubt as to its intent. It is framed as permissive, not as mandatory… Had it been the intention to require all such proceedings be brought pursuant to that Rule, the wording would have been different. Of course, it is always open to the Court to ensure that the Band or the Aboriginal collective do not act in contravention to the will of its members or without lawful authorization. In the case at bar, no such concern has been raised by any of the Respondents.

- In allowing the band to proceed, the Court did expressly note that Indian Bands do not themselves hold s. 35 rights:

> [91] There is no dispute that the KAFN's claim rests ultimately on an assertion of Aboriginal rights [and] jurisprudence has defined the holders of Aboriginal rights as collectives of peoples with distinctive attributes, which may include a common language, culture and social organization… An *Indian Act* band is a creature of statute that post-dates contact with European settlers, and it cannot be assumed that the membership of a First Nation holding an Aboriginal right is coincidental with the membership of an *Indian Act* band. Indeed, a First Nation holding or asserting Aboriginal rights may have members who belong to several different *Indian Act* bands.

- However, in this case the Court was satisfied (based on prior court decisions) that the band and the historical collective were sufficiently connected.

# *Spookw v Gitxsan Treaty Society*, 2017 BCCA 16

- The appellants, a group of certain Gitxsan Hereditary Chiefs, Indian Bands and the Gitksan Local Services Society, appealed a decision dismissing their petition for the winding-up of the Gitxsan Treaty Society under the *Society Act*.
- The Gitxsan Treaty Society is a legal entity which obtains loans and undertakes in treaty negotiations.
- The Chambers Judge dismissed the petition on the basis that the appellants were not members of the Gitxsan Treaty Society and lacked standing as they were not considered "proper persons" under the applicable legislation.
- Harris J. for the Court of Appeal stated:

> [27] the courts should be cautious (at minimum) about interfering in the internal affairs of, or political conflicts within, First Nations….

# *Spookw v Gitxsan Treaty Society*, 2017 BCCA 16 (cont.)

- Went on to say:

> [47] …The judge concluded that the Hereditary Chiefs had available to them a means of direct engagement with the GTS, but that they had "forsworn the opportunity to work inside the [GTS] for the changes they would like to see" (at para. 128). In these circumstances, accepting the invitation to grant standing would involve the court in interfering in internal political disagreement within the Gitxsan nation, contrary to the principles embedded in the Treaty Process which call for recognition of the principle of self-government.

- Ultimately agreed with the decision of the Chambers Judge and added that:

> [64] … underlying the approach taken by the judge in handling this litigation is the recognition that the way in which the Gitxsan nation organizes itself to engage in treaty negotiation is a matter of internal self-government. What role, if any, the Bands and the Gitksan Local Services Society play in that process is to be decided by the community itself. Granting standing to these organizations as proper persons would be inconsistent with this approach. The judge's analysis of the Bands as being organizational manifestations of the relationship between government and the Gitxsan people is accurate, reflects the fact that the Bands do not form part of the traditional government of the Gitxsan nation, and in my view, was properly taken into account in denying them standing.

# *Hwlitsum First Nation v Canada (Attorney General)*, 2017 BCSC 475

- The Plaintiff, the Hwlitsum First Nation, brought a representative action on behalf of the members of the nation seeking compensation for infringements on their Aboriginal rights.
- Plaintiff claimed to be the modern day continuation of group for which some but not all descendants had joined other groups (bands), making a complex ethno-historical history.
- Abrioux J. stated:

> [58] The rights asserted by the plaintiffs are collective rights. As such, proceedings to assert or enforce those rights must be brought on behalf of a group that is capable of advancing such a claim under s. 35 of the *Constitution Act, 1982, which* recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada: *Campbell* at paragraph *9.*a.

# *Hwlitsum First Nation v Canada (Attorney General)*, 2017 BCSC 475 (cont.)

- Then applied the criteria from Western Shopping Canada and dismissed on the basis that the proposed class was not defined in a manner that would permit its membership to be determined by objective criteria. Abrioux J stated that:

> [104] … Ancestry alone is insufficient to establish that a modern collective has a claim to the rights of a historic group: *Campbell* at paragraph 103…
>
> [105] … The interrelationship of the [Hwlitsum First Nation] and other First Nations will make it virtually impossible to ascertain whether that descendant is one who supports the objectives of the plaintiffs or favours the positions advanced by the Band of which he or she is a member: *Campbell* at paragraphs 150-157; *Komoyue* at paragraph 41…

- This case raises many questions:
  - Is it not effectively using a standing test to decide who are Aboriginal rights holders?
  - How many other First Nations have interrelationships of a similar nature?
  - Why is their no discussion of *Tsilhqot'in*?

# *Wesley v Canada*, 2017 FC 725

- This case involved a challenge to the approval of the Pacific Northwest LNG Project under the Canadian Environmental Assessment Act, 2012.
- The Lax Kw'alaams people have both an Indian Act band government and a hereditary system of government comprised on nine tribes, each with its own Head Chief. (Presumably for this reason, the Chief under the Indian Act is referred to as Mayor.)
- Negotiations regarding a potential benefits agreement with the proponent were reportedly in excess of $1 billion.
- Although the band originally opposed the project, its position changed following an election.
- The Applicant, Don Wesley, brought the application as a hereditary chief of the Gitwilgyoots Tribe to challenge the federal approval based on inadequate consultation.
- His standing was challenged by the proponent and the Band which argued:

  (a) the Band was the appropriate representative for these matters, and

  (b) Don Wesley was not in fact the Head Chief of the Gwitilgyoots.

# *Wesley v Canada*, 2017 FC 725 (cont.)

- The Court referred to the proceedings as "an unfortunate consequence of an internal governance dispute" (para. 8).
- The Court also declined to get into this band vs. hereditary leader dispute on a motion:

> [9] As much as the views of the Court on these larger issues of governance might be of some value going forward, I will not attempt to resolve them. My primary reason for declining Lax Kw'Alaams' request is that the record before the Court is wholly inadequate for the suggested task. A reasoned analysis of these matters would require a detailed examination of the historical record and cultural practises of the Coast Tsimshian Nation and its constituent tribes given by knowledgeable witnesses, including First Nations members, historians and anthropologists. The paper record before me, although sturdy, is insufficient and, on a number of material points, contradictory.

- Also declined to get into an assessment of who was or was the not hereditary chief:

> [10] For the same reason, I am also in no position to resolve the Gitwilgyoots leadership dispute reflected in the respective affidavits of Yahaan and Carl Sampson Sr. Furthermore, up to this point it does not appear that any attempt has been made to resolve that matter internally. That, however, is exactly where it should be sorted out. The intervention of the Court at this stage would be premature because it would interfere with the rights of members of the Gitwilgyoots to make their own leadership choices according to their customs: see *Spookw v Gitxsan Treaty Society*, 2017 BCCA 16 (CanLII) at para 47, 94 BCLR (5th) 280. I would add that it is doubtful that this Court has jurisdiction over such a question.

# *Wesley v Canada*, 2017 FC 725 (cont.)

- Went on to reject Wesley's application based on the standing rules in Rule 114.
- In part this was based on the competing assertion that another person was the Head Chief of the Gitwilgyoots and suggested that this has to be sorted out by the Aboriginal group not the court:

> [14] That is not to say that Yahaan does not hold the position he asserts, but only that he has failed to prove it. As noted above, until this dispute is resolved by the Gitwilgyoots' members neither Yahaan nor Carl Sampson Sr. is an appropriate person to act in a representative capacity under Rule 114.

- Barnes J. further concluded Wesley had failed to produce evidence that he was authorized to act as per Rule 114(1)(b) and his "failure to ascertain the level of support he carries among members of the Gitwilgyoots also disqualifies him from purporting to act on their behalf" (para 18).
- Also concluded he could not meet Rule 114(1)(c) requirement.
- Decision is being appealed to the Federal Court of Appeal, though opposing parties have brought motion to strike that on mootness.

# *Enge v Canada (Indigenous and Northern Affairs)*, 2017 FC 932

- Application was brought by the President of the North Slave Métis Alliance (NSMA), on behalf of himself and the members of the NSMA, for judicial review challenging the adequacy of the consultation by the Minister of Indian Affairs and Northern Development with members of the NSMA.
- The Applicant asserted that the members of the NSMA had Aboriginal harvesting rights which were being adversely affected.
- Mactavish J. noted:

> [98] …self-appointed individuals will not be permitted to assert collective Aboriginal rights on behalf of an Aboriginal community: *Ross River Dena Council v. Canada (Attorney General)*, 2009 YKSC 38 (Y.T. S.C.) at para. 26, [2009] Y.J. No. 55 (Y.T. S.C.) citing *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517 (B.C. S.C.) at para. 35, (2006), [2007] 1 C.N.L.R. 286 (B.C. S.C.). An Aboriginal group can, however, authorize an individual or organization to represent it for the purpose of asserting its section 35 rights.

# *Enge v Canada (Indigenous and Northern Affairs)*, 2017 FC 932 (cont.)

- On the issue of Rule 114 and authorization, Mactavish J. found sufficient authority to bring the representative proceeding on behalf of the NSMA members given:
  - the structure of the NSMA,
  - the fact that during the application process to join the NSMA applicants had to confirm that they had voluntarily chosen the NSMA to represent and pursue their aboriginals rights, and
  - the fact that the Applicant was the President of the organization.
- Court also made a point to note that the opposing parties had not identified anyone who objected to the representative proceeding (para. 113).

# *Enge v Canada (Indigenous and Northern Affairs)*, 2017 FC 932 (cont.)

- In particular, Mactavish J. emphasized the objectives of the NSMA and found that:

> [101] According to its Constitution, the NSMA is an organization whose purpose is "to advance the interests of its members by whatever means as are appropriate", and to promote and support the recognition and advancement of the Aboriginal rights of the Métis community of the North Slave area of the Northwest Territories.
>
> [103] Thus the assertion of Aboriginal harvesting rights in the area north of Great Slave Lake is part of the very *raison d'être* of the NSMA, and Mr. Enge's actions in bringing this application for judicial review are entirely consistent with the objects of the organization.

# How does this play out in negotiations?

- Issue is often not tackled directly.  Is *any* agreement a good agreement?
- Comfort often sought through use of Band Council Resolutions. But are these Indian Act instruments meaningful to non-Indian Act matters?
- Agreements may contain representations and warranties regarding authority to enter agreement and covenants to take reasonable steps to stop members from taking contrary actions. But are they enforceable in a practical sense?
- Issue is further complicated when government is a party to negotiations (in addition to its regulatory role).  How can government duly consider the question of representation, if it is disputed, when it is negotiating or has an agreement with one of the disputants?

# Some practical suggestions

- Do not be reluctant to broach this question.  An issue does not go away by ignoring it.
- Hold government accountable for giving proper consideration to these issues.  It is not enough just to "consult everyone".
- Review BCTC Statement of Intent filings – standard terms request confirmation of authorization to file and ask:

  *How did you receive the authorization? (Please provide documentation)*

- Recognize the limits of the court's willingness and ability to resolve these issues (at least in the absence of very lengthy and expensive litigation).
- Understand the importance of internal First Nation reconciliation to larger societal reconciliation - they are not unrelated.

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